STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

THE RENAISSANCE CHARTER SCHOOL, INC., AND THE LEE CHARTER FOUNDATION, INC.,	)	
Petitioners,	)	
vs.	)	Case No. 08-1309RU
DEPARTMENT OF EDUCATION,	)	
Respondent.	)	

FINAL ORDER

This case came on for final hearing on October 13, 2008, in Tallahassee, Florida, before Suzanne F. Hood, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

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STATEMENT OF THE ISSUE

The issue is whether Respondent's policy relative to the applicability of the maximum class-size statute to charter schools is a rule as defined in Section 120.52(16), Florida Statutes, which has not been adopted as required by Section 120.54, Florida Statutes.[1/]

PRELIMINARY STATEMENT

On March 14, 2008, Petitioners The Renaissance Charter School, Inc. and The Lee Charter Foundation, Inc. (Petitioners) filed a Petition Seeking an Administrative Determination of the Invalidity of an Agency Statement Defined as a Rule. The petition challenges certain agency statements as un-promulgated rules that apply Section 1003.03, Florida Statutes, the maximum class-size statute, to charter schools.

Specifically, Petitioners challenge Respondent Department of Education's (Respondent) policy that supports the following two documents:

a. Technical Assistance Paper No:FU2005-04 (TAP 2005-04) entitled "Implementation of the Class Size Reduction Amendment in Charter Schools," which was issued in December 2005.

b. Technical Assistance Paper No: FY2006-01 (TAP 2006-01) entitled "Class Size Reduction Data Collection," which was updated in July 2006.

On March 19, 2008, the undersigned issued a Notice of Hearing. The notice scheduled the hearing for April 9, 2008, and set forth the following issue: whether TAP Nos: FY2005-04 and FY2006-01 are rules as defined in Section 120.52(15), Florida Statutes, that have not been adopted as required by Section 120.54, Florida Statutes.[2/]

On April 4, 2008, Respondent filed an unopposed Motion to Stay Proceedings and to Continue Final Hearing. The motion asserted that Respondent had transmitted a Notice of Development of Rulemaking to the Florida Administrative Weekly. The motion also stated that the Notice of Development of Rulemaking addressed the challenged statements in this case. The undersigned granted the motion on April 7, 2008.

On April 18, 2008, Respondent published a Notice of Development of Rulemaking in the Florida Administrative Weekly, Volume 34, page 16. The notice states that the purpose of the rule development was to "amend the Data Base Manuals to reflect the collection and calculation of class-size data, and, if necessary, promulgate a new rule to implement the requirements of law related to class size." Among other provisions of law, the notice cited Sections 1002.33(16) and 1002.33(24), Florida Statutes, related to charter schools and Section 1003.03, Florida Statutes, related to maximum class size.

On May 7, 2008, Respondent filed a Status Report and Request for Extension of Abeyance. The Status Report provided the following information: (a) Respondent published the Notice of Development of Rulemaking in the April 18, 2008, issue of the Florida Administrative Weekly; (b) Respondent had monitored several bills during the 2008 Florida Legislature that might have impacted this case; (c) Respondent was ready to schedule a rulemaking workshop in the last week of June; (d) Respondent had agreed to withdraw or rescind TAP Nos: FY2005-04 and FY2006-01; and (e) Respondent needed a 60-day continuance to conduct rulemaking proceedings. Petitioners did not object to the request for a continuance, provided that Respondent actually withdrew or rescinded the TAPs.

On May 8, 2008, the undersigned issued an Order Continuing Case in Abeyance. The order required the parties to file a status report no later than July 8, 2008.

On May 28, 2008, Petitioners filed a Motion to Confirm Rescission of Technical Assistance Papers. The motion requested the undersigned to issue an order finding that the voluntarily withdrawn TAPs had no force and effect and that Respondent could not rely on them to take action affecting charter schools.

On June 3, 2008, Respondent filed a Response to Motion to Confirm Rescission of Technical Assistance Papers. The response indicated that Respondent had agreed to engage in rulemaking but

had not agreed that its challenged policy was incorrect. On June 5, 2008, the undersigned issued an Order Denying Motion to Confirm Rescission of Technical Assistance Papers.

On June 13, 2008, Respondent published a second Notice of Development of Rulemaking in the Florida Administrative Weekly, Volume 43, page 24. The notice stated that the purpose of the rule development workshop was to "provide an opportunity for the public to provide input on the amendment of Data Base Manuals to reflect the collection and calculation of class-size data, and address the need, if any, to promulgate a new rule to address class size. Among other provisions of law, the notice cited Sections 1002.33(16) and 1002.33(24), Florida Statutes, related to charter schools and Section 1003.03, Florida Statutes, related to maximum class size.

On July 8, 2008, Respondent filed a Status Report. The report indicated that Respondent held a rule workshop on June 30, 2008, and intended to file a Notice of Proposed Rulemaking in the next few days, with the matter to be included on the agenda of the State Board of Education at its August 19, 2008, meeting. Respondent requested another 60-day continuance to continue the rulemaking proceedings.

On July 9, 2008, Petitioners filed a Motion to Sever Issue, Partially Terminate Abatement and to Set Matter for Hearing. The motion alleged that the sole purpose of Respondent's rule

development was to amend Florida Administrative Code Rule 6A-1.0014 to include the computational algorithm for class-size determinations without reference to charter schools. According to the motion, Respondent was not acting in good faith because it did not intend to adopt a rule addressing the applicability of the maximum class-size statute to charter schools.

On July 16, 2008, Respondent filed a Response to Motion to Sever Issue, Partially Terminate Abatement and to Set Matter for Hearing. The response asserted that: (a) the motion exceeds the scope of a rule challenge proceeding; and (b) Petitioner had raised the same legal issue in a pending petition for declaratory statement.

On July 23, 2008, the undersigned issued an order denying Petitioner's Motion to Sever. The order granted Respondent's request for continued abatement.

On August 20, 2008, Petitioners filed a Renewed Motion to Terminate Abatement and to Set Matter for Hearing. The motion alleged that Respondent had not continued with rule development in good faith. Specifically, the motion stated that Respondent had not put its proposed rule on the State Board of Education's August 19, 2008, agenda for adoption and had not filed a Notice of Proposed Rulemaking.

On August 27, 2008, Respondent filed a unilateral Interim Status Report. Without addressing Petitioners' allegations of

bad faith or providing any other explanations, the report confirmed that Respondent had not filed a Notice of Proposed Rule. The report also stated that, due to internal deadlines, Respondent had failed to add the proposed rule to the State Board of Education's August 19, 2008, agenda. The report indicated that the proposed rule would be placed on the State Board of Education's October 21, 2008, agenda and noticed in the Florida Administrative Weekly at some unspecified date.

On September 5, 2008, the undersigned conducted a telephone conference with the parties. During the conference, Respondent's counsel admitted that Respondent was not developing, and did not intend to develop, a rule relating to the implementation of the maximum class-size statute to charter schools.

After the September 5, 2008, telephone conference, the undersigned issued a Notice of Hearing dated September 8, 2008. The notice scheduled a final hearing on October 13, 2008, to address the issue set forth above in the Statement of the Issue.

On September 12, 2008, Respondent published a Notice of Proposed Rule in the Florida Administrative Weekly, Volume 34, page 37. The notice states that the purpose of the amendment is to "revise existing requirements of the statewide comprehensive management information system which are necessary in order to implement changes recommended by school districts and to make

changes in state reporting and local recordkeeping procedures for state and/or federal programs. The effect is to maintain compatibility among state and local information system components."

Neither the notice nor the text of the proposed rule on its face refers to charter schools or maximum class size. The proposed rule does not cite to Sections 1002.33(16) and 1002.33(24), Florida Statutes, related to charter schools or Section 1003.03, Florida Statutes, related to maximum class size.

The proposed amendment to the rule incorporates by reference and changes the date of Respondent's publication entitled DOE Information Data Base Requirements: Volume I--Automated Student Information System from 2007 to 2008.

During the hearing on October 13, 2008, Petitioners did not present the testimony of live witnesses. Petitioners offered 15 exhibits. However, upon review of the record, a copy of Petitioners' Exhibit No. 10 was not included in Petitioners' composite of exhibits.

According to the index to Petitioners' composite of exhibits, Petitioners' Exhibit No. 10 is Respondent's 2009 Agency Proposal to the Legislature, suggesting revision to Section 1002.33(16) and related documents. Respondent's counsel admitted during the hearing that Respondent requested the 2008

Legislature to clarify whether class-size requirements apply to charter schools and intended to do so again in 2009. Upon consideration, the past and future actions taken by either party to secure legislative clarification of question at issue here is not relevant. Accordingly, only Petitioners' Exhibits Nos. 1-9 and 11-15 are accepted as evidence.

Petitioners' Exhibit No. 14 is the deposition in lieu of live testimony by Linda Champion. Petitioners' Exhibit No. 15 is the deposition in lieu of live testimony by Lavan Dukes, Jr. The latter deposition was filed on October 17, 2008, and again on November 3, 2008.

Respondent did not present the testimony of any live witnesses. Respondent offered 11 exhibits that were accepted as evidence. Petitioners' objection to the relevance of Respondent's Exhibit No. 5, a collection of e-mails and other documents showing the appeals process involving a particular charter school, is hereby overruled.

The hearing Transcript was filed on October 27, 2008. Respondent filed a Proposed Final Order on November 6, 2008. Petitioners filed a Proposed Final Order on November 7, 2008.

On November 6, 2008, Respondent published the final adopted version of Florida Administrative Code Rule 6A-1.0014, Comprehensive Management Information System, as amended. The rule had an effective date of November 26, 2008. As of the date

that this Final Order was issued, Florida Administrative Code Rule 6A-1.0014 has not been challenged.

On November 12, 2008, Petitioners filed Notice of Filing Supplemental Exhibit/Motion for Tribunal to Take Official Notice. Respondent has not filed a response in opposition to the notice/motion, which is hereby granted.

Respondent's publication entitled DOE Information Data Base Requirements: Volume I--Automated Student Information System, 2008 includes "Appendix AA, Class Size Average Algorithm." Appendix AA does not contain a reference to charter schools.

Petitioners' July 9, 2008, Motion to Sever Issue, Partially Terminate Abatement and to Set Matter for Hearing August 20, 2008, Renewed Motion to Terminate Abatement and to Set Matter for Hearing are moot for reasons set forth below in the Conclusions of Law.

FINDINGS OF FACT

1. Petitioners own and/or operate eight charter schools in Florida. They have been "substantially affected" by Respondent's maximum class-size policies at every level of implementation.

2. Respondent's regulatory scheme requires charter schools to submit information and to comply with statutory class-size levels. Respondent's determination of non-compliance triggers penalties and adverse consequences for charter schools.

3. Respondent has a comprehensive data management system for public school reporting and accountability. The system includes detailed definitions and reporting requirements on many facets of public education, including information on students, teachers, and public school facilities. This information has been incorporated by reference into Florida Administrative Code Rule 6A-1.0014, as database manuals.

4. For example, the manuals contain a detailed student element using the Florida Inventory of School Houses (FISH) and a Classroom Identification Number, which creates an identifier for every classroom in every building and facility in the school district. Charter schools that do not have a "FISH" number may have one generated.

5. Respondent uses a computational algorithm to calculate class size. The algorithm uses data elements and correlations to create classroom ratios. Many of the data elements are required by statute and/or existing rules for all public schools, including charter schools.

6. For each school that does not meet class-size compliance requirements, a portion of funds attributed to that school will be transferred from operational funding to capital outlay funds. The amount transferred is equal to the full-time equivalent funds for the number of students over the cap. Respondent makes the initial transfer calculation, which is then

replicated and approved by the State Board of Education, the Florida Education Finance Allocation Committee, and the Legislative Budget Committee.

7. In November of 2007, Respondent calculated class size on the individual classroom level for all public schools, including charter schools. Respondent utilized data from the October student membership survey, which consists of data collected by the Respondent from public schools.

8. The algorithm used by Respondent to calculate class size, including the data collected in November 2007, was not adopted as a rule until after the commencement of this proceeding.

9. Class-size compliance forms, mandated by Respondent for use by charter schools that are determined by Respondent not to be in compliance with the maximum class-size act, have also not been adopted by any formal rulemaking process.

10. Respondent's policies include an informal process for "appealing" adverse determinations. The informal appeal process has not been adopted as a rule.

11. Respondent has published several Technical Assistance Papers, including TAP Nos: FY2005-04 and FY2006-01, applying the maximum class-size act and a computational class-size algorithm to charter schools. These papers were not adopted through the formal rulemaking process.

12. Respondent withdrew TAP Nos: FY2005-04 and FY2006-01 by memorandum dated May 22, 2008. However, Respondent still maintains its policy that the maximum class-size act applies to Florida charter schools.

13. In 2007, charter schools reported data and received data from Respondent regarding initial class-size figures. Some charter schools appealed the class-size calculations and the resulting transfer of operational funds to the State Board of Education.

14. Cape Coral Charter School submitted information to Respondent, leading to a downward adjustment in the funds to be transferred to capital outlay. However, Cape Coral Charter School lost funds in part because of Respondent's initial determination that Cape Coral Charter School had failed to comply with the maximum class-size act.

15. Respondent also formally determined in February 2008, that Cape Coral Charter School was ineligible to offer a voluntary pre-kindergarten program because of its 2007 determination that Cape Coral Charter School was not in compliance with the class-size strictures.

16. The Florida Education Finance Program Appropriation Allocation Conference verified the transfer of capital outlay categorical funds as recommended by the Commissioner of Education on January 17, 2008.

17. The Commissioner of Education recommended transfers in funds based upon class-size compliance to the State Board of Education, which approved the transfers on February 4, 2008.

18. On February 21, 2008, the Legislative Budget Committee approved the transfer calculations.

19. Florida Administrative Code Rule 6A-1.0014 incorporates by reference the database manual that Respondent uses to collect data from public schools on teachers, students and classroom space. The amendment to the rule, which became effective November 26, 2008, consists of an additional page in the database manual (Appendix AA).

20. Appendix AA sets forth Respondent's class-size algorithm, which has been in use for several years. Appendix AA does not address the applicability of the maximum class-size act to Florida charter schools.

CONCLUSIONS OF LAW

21. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this case pursuant to Section 120.56(4), Florida Statutes.

22. Petitioners have the burden of proving by a preponderance of the evidence that the challenged agency statement meets the definition of a rule that has not been adopted as required by Section 120.54(1)(a), Florida Statutes.

See Agrico Chemical Co. v. Department of Environmental Regulation, 365 So. 2d 759, 763 (Fla. 1st DCA 1978).

23. Respondent is an "agency" within the meaning of 120.52(1), Florida Statutes. Thus, Respondent is subject to the rulemaking requirements of Section 120.54, Florida Statutes, which provides as follows in pertinent part:

> (1) General Provision Applicable to All Rules Other than Emergency Rules.--
> (a) Rulemaking is not a matter of agency discretion. Each agency statement defined as a rule by s. 120.52 shall be adopted by the rulemaking procedure provided by this section as soon as feasible and practicable.

24. A rule is defined in Section 120.52(16), Florida Statutes, in relevant part as follows:

> (16) "Rule" means each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency and includes any form which imposes any requirement or solicits any information not specifically required by statute or by an existing rule. The term also includes the amendment or repeal of a rule.

25. Rulemaking is necessary for "those statements which are intended by their own effect to create rights, or to require compliance, or otherwise to have the direct and consistent effect of law." See McDonald v. Department of Banking and Finance, 346 So. 2d 569, 581 (Fla. 1st DCA 1977).

26. This proceeding concerns the Education Article of the Florida Constitution and several provisions of Florida law and administrative rules as they relate to the collection and calculation of public school data, the implementation of class-size requirements and charter schools.

27. Pursuant to Section 1008.385, Florida Statutes, Respondent has developed a comprehensive and integrated data management and accountability system for all public schools. According to Section 1008.385(2), Florida Statutes, "[t]he system must be designed to collect . . . student and performance data required to ascertain the degree to which schools and school districts are meeting state performance standards . . . ."

28. Section 1, Article IX of Florida's Constitution was amended in 2002 to include what is known as the Class Size Amendment, which imposes a mandatory ratio of students assigned to teachers in public school classrooms. The full test of Section 1 Article IX, Florida Constitution, reads as follows:

> SECTION 1. Public education.--
> (a) The education of children is a fundamental value of the people of the State of Florida. It is therefore, a paramount duty of the state to make adequate provision for the education of all children residing within its borders. Adequate provision shall be made by law for a uniform, efficient, safe, secure, and high quality system of free public schools that allows students to obtain a high quality education

> and for the establishment, maintenance, and operation of institutions of higher learning and other public education programs that the needs of the people may require. To assure that children attending public school obtain a high quality education, the legislature shall make adequate provision to ensure that, by the beginning of the 2010 school year, there are a sufficient number of classrooms so that:
>
> (1) The maximum number of students who are assigned to each teacher who is teaching in public school classrooms for pre-kindergarten through grade 3 does not exceed 18 students;
>
> (2) The maximum number of students who are assigned to each teacher who is teaching in public school classrooms for grades 4 through 8 does not exceed 22 students; and
>
> (3) The maximum number of students who are assigned to each teacher who is teaching in public school classrooms for grades 9 through 12 does not exceed 25 students.
>
> The class size requirements of this subsection do not apply to extracurricular classes. Payment of the costs associated with reducing class size to meet these requirements is the responsibility of the state and not of local school districts. Beginning with the 2003-2004 fiscal year, the legislature shall provide sufficient funds to reduce the average number of students in each classroom by at least two students per year until the maximum number of students per classroom does not exceed the requirements of this subsection.

29. The Legislature's implementation of the Class Size Amendment is found in Section 1003.03, Florida Statutes, which provides as follows in relevant part:

> (1) Constitutional Class Size Maximums.--Pursuant to s. 1, Art. IX of the State Constitution, beginning in the 2010-2011 school year:

> (a) The maximum number of students assigned to each teacher who is teaching core-curricula courses in public school classrooms for pre-kindergarten through grade 3 may not exceed 18 students.
>
> (b) The maximum number of students assigned to each teacher who is teaching core-curricula courses in public school classrooms for grades 4 through 8 may not exceed 22 students.
>
> (c) The maximum number of students assigned to each teacher who is teaching core-curricula courses in public school classrooms for grades 9 through 12 may not exceed 25 students.

Subsequent sections of the statute outline the implementation, implementation options, accountability, and team teaching strategies for carrying out the class-size mandate.

30. Charter schools are public schools and are part of the state's program of public education. See §§ 1001.04(1) and 1002.33(1), Fla. Stat. They are operated by individuals or other legal entities, who apply to and contract with local school districts to establish and run charter schools in those districts. See § 1002.33, Fla. Stat.

31. The charter school statute exempts charter schools from all provisions of the Florida Education Code with certain exceptions set forth in Section 1002.33(16), Florida Statutes, which states as follows:

> 1002.33(16) EXEMPTION FROM STATUTES.--
>
> (a) A charter school shall operate in accordance with its charter and shall be exempt from all statutes in chapters 1000-1013. However, a charter school shall be in

> compliance with the following statutes in chapters 1000-1013:
>
> 1. Those statutes specifically applying to charter schools, including this section.
>
> 2. Those statutes pertaining to the student assessment program and school grading system.
>
> 3. Those statutes pertaining to the provision of services to students with disabilities.
>
> 4. Those statutes pertaining to civil rights, including s. 1000.05, relating to discrimination.
>
> 5. Those statutes pertaining to student health, safety, and welfare.
>
> (b) Additionally, a charter school shall be in compliance with the following statutes:
>
> 1. Section 286.011, relating to public meetings and records, public inspection, and criminal and civil penalties.
>
> 2. Chapter 119, relating to public records.

The exceptions to the statutory exemption in Section 1002.33(16), Florida Statutes, do not require charter schools to comply with Section 1003.03, Florida Statutes.

32. Respondent has statutory authority to carry out the collection of data and the oversight of accountability for public schools. Charter schools are specifically directed to submit certain information required for the educational accountability system governed by Sections 1008.31 and 1008.345, Florida Statutes. Under Section 1002.33(9)(l)1., Florida Statutes, "[c]harter schools are subject to the same accountability requirements as other public schools, including

reports of student achievement information that links baseline student data to the schools performance projections identified in the charter."

33. Additionally, charter schools must report student enrollment for funding in compliance with Respondent's guidelines for electronic data formats for such data. See § 1002.33(17)(a), Fla. Stat. Section 1002.33(17)(b), Florida Statutes, concludes with the following statement:

> Total funding for each charter school shall be recalculated during the year to reflect the revised calculations under the Florida Education Finance Program by state and the actual weighted full-time equivalent students reported by the charter school during the full-time equivalent student survey periods designated by the Commissioner of Education.

34. Respondent argues that adoption of its policy is not necessary in this case because facial application of the maximum class statute, read in pari materia with other statutes, simply carries out the directive of law and administers the requirements of already-promulgated rules. This argument is without merit because Section 1002.33(16), Florida Statutes, exempts charter schools from most of the Education Code, except as specifically required by statute.

35. There is no specific statutory requirement for charter schools to comply with the maximum class-size statute. Likewise, Florida Administrative Code Rule 6A-1.0014, as

amended, which contains the algorithm used to calculate class size, does not even refer to charter schools.

36. Respondent's regulatory framework begins with the initial and fundamental statutory interpretation that the maximum class-size statute applies to charter schools notwithstanding the exemption set forth in Section 1002.33(16), Florida Statutes. Respondent's statutory interpretation, amounting to an "exception to the exemption," means the challenged statement is a rule as defined by Section 120.52(16), Florida Statutes, that has not been adopted as required by 120.54(1)(a), Florida Statutes.

37. Moreover, Respondent's comprehensive regulatory framework implements a policy that is generally applicable to all charter schools. By its own terms, Respondent's un-adopted rule creates rights and duties that have become the substantive requirements of law.

38. Petitioner's have met their burden of proving that Respondent's policy is an un-adopted rule. Respondent presented no evidence that adoption of the policy as a rule was not feasible and practicable. See § 120.56(4)(b), Fla. Stat.

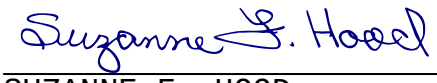
39. Instead, Respondent argues that it does not have statutory authority to adopt a rule exempting or requiring compliance by charter schools with the maximum class-size statute. This argument only reinforces the proposition that

Respondent does not have authority to implement a regulatory framework requiring charter schools to comply with the class-size statute.

40. Until the legislature determines otherwise or a rule has been adopted, Respondent cannot apply the maximum class-size statute to charter schools. It follows that Respondent cannot use the class-size algorithm (Appendix AA), which is now an adopted rule, to determine whether charter schools have met the class-size requirements. Therefore, Petitioners' Renewed Motion to Terminate Abatement and to Set Matter for Hearing is moot.

41. The undersigned retains jurisdiction to determine attorney's fees. See § 120.596(4)(a), Fla. Stat.

DONE AND ORDERED this 17th day of December, 2008, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 17th day of December, 2008.

[1/] All references to Florida Statutes are to the 2008 version unless otherwise indicated.

[2/] Subsection 120.52(15) was renumbered as Subsection 120.52(16) as a result of s.2, Chapter 2008-104, Laws of Florida, but the text of the subsection did not change. The 2008 amendments were not yet effective at the time the original Notice of Hearing was issued.

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing one copy of a Notice of Appeal with the agency clerk of the Division of Administrative Hearings and a second copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the appellate district where the party resides. The Notice of Appeal must be filed within 30 days of rendition of the order to be reviewed.