

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

FLORIDA ASSOCIATION FOR)
CHILD CARE MANAGEMENT, INC.,)
)
Petitioner,)
)
vs.) Case No. 08-1717RU
)
EARLY LEARNING COALITION)
OF DUVAL AND AGENCY FOR)
WORKFORCE INNOVATION,)
)
Respondents.)
_____)

FINAL ORDER

On July 9, 2008, a hearing was held in Tallahassee, Florida, pursuant to the authority granted in Sections 120.56, 120.569 and 120.57(1), Florida Statutes. The case was considered by Lisa Shearer Nelson, Administrative Law Judge.

APPEARANCES

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STATEMENT OF THE ISSUE

Whether the Early Learning Coalition of Duval (ELC of Duval) is a state agency as defined in Section 120.52, Florida Statutes, and whether the quality improvement rating system identified in Petitioner's Amended Petition is an agency statement that constitutes an unadopted rule in violation of Section 120.54(1)(a), Florida Statutes.

PRELIMINARY STATEMENT

This case originated with a Petition for Administrative Determination of the Invalidity of Agency Statements Defined as a Rule filed April 8, 2008. On April 10, 2008, the matter was assigned to the undersigned and on April 11, 2008, a Notice of Hearing issued scheduling a hearing for May 9, 2008. On April 29, 2008, the parties filed an Agreed Motion for Continuance and on April 30, 2008, the case was rescheduled for June 27, 2008.

Motions for Summary Final Order were filed by the Respondents ELC of Duval and the Agency for Workforce Innovation (AWI or the Agency) on June 6, 2008, and June 11, 2008, respectively. The Agency also filed a Motion to Continue Final

Hearing and Stay Further Proceedings on June 11, 2008, based on notice of rule development workshops. However, the text of rules scheduled for rule development were not published with the notice, and at the motion hearing convened to hear argument on all three motions, counsel for the Agency could not represent that the rule development would address the statement alleged in these proceedings to be an unadopted rule. By Order dated June 24, 2008, all three motions were denied.

On June 26, 2008, ELC of Duval filed an Agreed Motion for Continuance based upon the illness of counsel, and the matter was rescheduled for July 9, 2008. On June 27, 2008, Petitioner filed a Motion for Leave to File Amended Petition, which was granted. The case proceeded to hearing on the Amended Petition for Administrative Determination of the Invalidity of Agency Statements Defined as Rules.

At hearing, the parties presented Joint Exhibits numbered 1-9, which were the depositions of Gayle Grimes, Carol Moore, Edward Bell, Brittany Birken, Angel Carro, Michele DeMonaco, Matt Moore, Padma Rajan and Susan Main, and the exhibits to these depositions. Petitioner presented the testimony of Gayle Grimes, and Petitioner's Exhibits numbered 1-11 were admitted. Respondent ELC of Duval presented the testimony of Susan Main, and Respondent's Exhibits numbered 1-8, 10-12 and 15-17 were admitted into evidence. Respondent AWI presented the testimony of Brittany Birken. At the close of the Petitioner's case, AWI

moved for dismissal of the proceedings based upon the failure to prove standing. Ruling was reserved and the issue of standing will be addressed in the Findings of Fact and Conclusions of Law below.

The proceedings were recorded and the transcript was filed with the Division on July 23, 2008. All parties timely filed Proposed Final Orders on August 4, 2008. These submissions have been carefully considered in the preparation of this Final Order. All references to Florida Statutes are to the 2007 edition unless otherwise indicated.

FINDINGS OF FACT

1. Petitioner, Florida Association for Child Care Management, Inc. (FACCM) is a Florida not-for-profit corporation which serves as a trade organization of private child care facilities.

2. Respondent, AWI, is the state agency that has the authority and obligations relating to school readiness programs as set forth in Section 411.01, Florida Statutes, and applicable federal law.

3. Respondent, ELC of Duval, is an early learning coalition as that term is applied in Section 411.01, Florida Statutes.

The School Readiness Act

4. The Florida Legislature passed the School Readiness Act in 1999. The Act, codified at Section 411.01, Florida Statutes, required the creation of local school readiness coalitions with

the goal of ensuring that children are eager to learn and ready to succeed when they enter kindergarten. The Act is directed toward at-risk children in the State.

5. The following portions of Section 411.01, Florida Statutes, provide part of the framework for the school readiness programs in Florida:

(2)(a) . . . Each school readiness program shall provide the elements necessary to prepare at-risk children for school, including health screening and referral and an appropriate educational program.

* * *

(d) It is the intent of the Legislature that the administrative staff at the state level for school readiness programs be kept to the minimum necessary to administer the duties of the Agency for Workforce Innovation, as the school readiness programs are to be regionally designed, operated, and managed, with the Agency for Workforce Innovation developing school readiness program performance standards and outcome measures and approving and reviewing early learning coalitions and school readiness plans.

* * *

(g) It is the intent of the Legislature that the federal child care income tax credit be preserved for school readiness programs.

6. The administration of the school readiness programs was moved to AWI in 2001. The Agency now oversees the coalitions operating school readiness programs throughout the state, and is considered, for purposes of the administration of the federal Child Care and Development Fund, 45 C.F.R. parts 98 and 99, the lead agency for the State of Florida.

7. The Agency's responsibilities with respect to school readiness programs include coordinating birth-to-kindergarten services for eligible children, as well as the programmatic, administrative and fiscal standards for all public providers of school readiness programs; providing leadership for school readiness through early learning coalitions; responsibility for prudent use of all public and private funds in accordance with all legal and contractual requirements; providing final approval and periodic review of early learning coalitions and school readiness plans; providing technical assistance to early learning coalitions; and developing and adopting performance standards and outcome measures for school readiness programs, which must address age-appropriate progress of children regarding school readiness skills and must be integrated with performance standards adopted by the Department of Education in the Voluntary Prekindergarten Education Program. See generally § 411.01(4), Fla. Stat.

8. The Legislature has granted authority to the Agency to adopt rules with respect to the preparation and implementation of the school readiness system, the collection of data, the approval of early learning coalitions and school readiness plans, the provision of a method by which more than one county may be served by an early learning coalition, the award of incentives to early learning coalitions and the issuance of waivers.

9. As of the date of hearing in this case, there are no rules adopted by the Agency regarding the approval of school readiness plans or performance standards and outcome measures for school readiness programs.

Early Learning Coalitions and School Readiness Plans

10. Services for at-risk children are furnished through child-care providers such as pre-schools. School readiness programs provide, through early learning coalitions, tuition vouchers to the parents of eligible children, and the parents use the vouchers to enroll their children with a provider. Priority for participation is afforded to children served by the Family Safety Program Office of the Department of Children and Family Services or a community-based lead agency under Chapter 39, Florida Statutes, and for whom child care is needed to minimize the risk of further abuse, neglect or abandonment.

11. Section 411.01, Florida Statutes, authorizes a series of early learning coalitions throughout Florida to administer school readiness programs at the local level. The law contemplates 30 or fewer coalitions to be established, and requires that each one serve at least 2,000 children based upon the average of all children served per month through the program during the previous 12 months. Multi-county coalitions generally are established when a learning coalition would serve fewer than 2,000 children as described above.

12. At present, there are 31 early learning coalitions in the State of Florida.^{1/} There are 12 coalitions that serve more than one county. Respondent ELC of Duval operates only in Duval County. It does not have the authority to act outside the bounds of Duval County, and has no rulemaking authority.

13. Whether an early learning coalition serves one county or multiple counties, it is composed of 18-35 members, with the chair and two other members being appointed by the governor. In addition, each early learning coalition must include a Department of Children and Family Services district administrator or designee; a district superintendent of schools or designee; a regional workforce board executive director or designee; a county health department director or designee; a children's services council or juvenile welfare board chair or executive director, if applicable; an agency head of a local licensing agency as defined in Section 401.302, Florida Statutes, if applicable; a president of a community college or designee; a member appointed by a board of county commissioners; a central agency administrator, where applicable; a Head Start director; a representative of private child-care providers, including family day care homes; a representative of faith-based child-care providers; and a representative of programs for children with disabilities under the federal Individuals with Disabilities Act. The last five categories of members are non-voting members.

14. ELC of Duval was incorporated as a not-for-profit corporation in 2000. It provides school readiness services pursuant to a grant agreement entered into with the AWI and is considered an independent contractor.

15. Under the grant agreement and in accordance with the provisions of Section 411.01, ELC of Duval must submit a school readiness plan detailing how the coalition will meet state and federal requirements for school readiness programs, including the implementation of quality initiatives. The AWI may suspend or terminate its agreement with the ELC of Duval, as it can with any early learning coalition, if it fails to comply with the terms and conditions of the grant agreement. The grant agreement provides in pertinent part:

In the Coalition's performance of its duties and responsibilities under the Agreement, it is mutually understood and agreed that the Coalition is at all times acting and performing as an independent contractor and not a division or subpart of the [Agency]. The [Agency] shall neither have nor exercise any control or direction over the methods by which the Coalition shall perform its functions other than as provided herein and in law. Nothing in the Agreement is intended to or shall be deemed to constitute a partnership or joint venture between the parties.

16. Early learning centers operating in Duval County are not required to participate in any program or receive any funding from ELC of Duval to legally operate as an early learning center in Duval County. In fact, Section 411.01(4)(g), Florida Statutes, prohibits the Agency from imposing requirements on a

child care or early childhood education provider that does not deliver services under a school readiness program or receive state or federal funds pursuant to Section 411.01.

17. Participation in school readiness programs is voluntary.

18. Payments for school readiness services are made by a transfer of funds from the ELC of Duval to legally operating school readiness providers that have entered into a negotiated service agreement with the coalition. In other words, while participation is voluntary, early learning centers wishing to participate must sign a contract saying that they will abide by certain minimal quality standards. There is, however, no requirement that any early learning center accept children requiring subsidies to pay for attendance as a condition of operating an early learning center in Duval County.

19. There are between 500 and 600 preschools in Duval County, including family childcare homes. Of those, approximately 315 have contracts with the ELC of Duval to accept school readiness children.

20. Approximately 7,500 children in Duval County receive school readiness subsidies. There are approximately 2,000 additional children on a waiting list for school readiness subsidies.

21. One of ELC of Duval's obligations, under both its grant agreement and the terms of Section 411.01, is to submit a plan for implementing its school readiness program to the AWI for approval. The plan must demonstrate how the program will ensure that each 3 and 4-year-old in a publicly funded school readiness program receives scheduled activities and instruction designed to enhance the age-related appropriate progress of the children in performing the performance standards adopted by the Agency.

22. The plan must also include a single point of entry and unified waiting list, which is part of a statewide information system established by the Agency. The plan must include developmentally appropriate curriculum designed to enhance the progress of the child; a character development program to develop basic values; an age-appropriate assessment of each child's development; a pretest administered when children enter the program and a posttest when they leave; an appropriate staff-to-children ratio; a healthy and safe environment; and a resource and referral network to assist parents in making an informed choice of a learning center for their children.

23. An early learning coalition may not implement its school readiness plan until the Agency has approved it. Plans must also be reviewed by the Agency at least annually. The early learning coalition must review and revise the plans as necessary, at least biennially.^{2/} Revisions to the plan cannot be

implemented until approved by the Agency. § 411.01(5)(d), Fla. Stat.

24. The Agency has been given the authority to adopt rules related to the approval of early learning coalitions and school readiness plans. It has been directed to adopt criteria for the adoption of school readiness plans consistent with the performance standards and outcome measures adopted by the Agency and must require each approved plan to include certain minimum standards related to a sliding fee scale based upon ability to pay; a choice of settings and locations to be provided to parents; instructional staff with certain delineated training; specific eligibility priorities; performance standards and outcome measures; payment rates adopted by the early learning coalition and approved by AWI; certain delineated system support services and direct enhancement services to families and children; the early learning coalition's business organization; and strategies to meet the needs of unique populations, such as migrant workers.

25. In the absence of a rule, AWI has provided to the early learning coalitions a "guidance document" for submitting their school readiness plans, entitled the Early Learning Coalition Guidance and Instruction Workbook (Workbook). This Workbook was developed at least by 2006. The Workbook was used by ELC of Duval in preparing its plan for approval by AWI.

26. The ELC of Duval submitted its school readiness plan on July 22, 2006. This plan was approved by the Agency. ELC of Duval submitted amendments to the 2006 plan in early 2008. These amendments were approved by the Agency via letter dated March 6, 2008.

Funding for Early Learning Programs

27. In addition to the program components outlined above, both AWI and early learning coalitions must be mindful of the spending allocations outlined in federal regulations. School readiness programs administered by the early learning coalitions are funded by a combination of state and local funds. The federal portion of the school readiness funding comes from the Child Care and Development Fund (CCDF) administered by the Department of Health and Human Services (HHS). 45 C.F.R. § 98.50 describes the required funding allocations for child care services related to school readiness programs:

§ 98.50 Child Care Services.

(a) Of the funds remaining after applying the provisions of paragraphs (c), (d) and (e) of this section the Lead Agency shall spend a substantial portion to provide child care services to low-income working families.

* * *

(c) Of the aggregate amount of funds expended (i.e., Discretionary, Mandatory, and Federal and State Share of Matching Funds), no less than four percent shall be used for activities to improve the quality of child care as described at §98.51.

(d) Of the aggregate amount of funds expended (i.e., Discretionary, Mandatory, and Federal and State share of Matching Funds), no more than five percent may be used for administrative activities as described in § 98.52.

(e) Not less than 70 percent of the Mandatory and Matching Funds shall be used to meet the child care needs of families who:

(1) Are receiving assistance under a State program under Part A of title IV of the Social Security Act,

(2) Are attempting through work activities to transition off such assistance program, and

(3) Are at risk of becoming dependent on such assistance program.

28. 45 C.F.R. § 98.51 further describes quality activities:

(a) No less than four percent of the aggregate funds expended by the Lead Agency for a fiscal year, including the amounts expended in the State pursuant to §98.53(b), shall be expended for quality activities.

(1) These activities may include but are not limited to:

(i) Activities designed to provide comprehensive consumer education to parents and the public;

(ii) Activities that increase parental choice; and

(iii) Activities designed to improve the quality and availability of child care, including, but not limited to those described in paragraph (2) of this section.

(2) Activities to improve the quality of child care services may include, but are not limited to:

(i) Operating directly or providing financial assistance to organizations (including private non-profit organizations, public organizations, and units of general purpose local government) for the development, establishment, expansion, operation and coordination of resource and referral programs specifically related to child care;

(ii) Making grants or providing loans to child care providers to assist such providers in meeting applicable State, local, and tribal child care standards, including applicable health and safety requirements, pursuant to §§ 98.40 and 98.41;

(iii) Improving the monitoring of compliance with, and enforcement of, applicable State, local and tribal requirements, pursuant to §§98.40 and 98.41;

(iv) Providing training and technical assistance in areas appropriate to the provision of child care services, such as training in health and safety, nutrition, first aid, the recognition of communicable diseases, child abuse detection and prevention, and care of children with special needs;

(v) Improving salaries and other compensation (such as fringe benefits) for full-and part-time staff who provide child care services for which assistance is provided under this part; and

(vi) Any other activities that are consistent with the intent of this section.

Development of the Quality Rating Improvement System

29. In 2002, the ELC of Duval began discussions on how to best improve its school readiness program through the expenditure of "quality activity" funds contemplated by 45 C.F.R. §98.51. In September 2002, it began work on a quality rating system for

school readiness programs operating in Duval County. The purpose of the quality rating system was to assist early learning centers providing school readiness services through contracts with ELC of Duval in improving their programs and to assist parents in selecting quality care for their children.

30. The quality rating system was developed through two pilot programs. The initial pilot program involved 14 volunteer early learning centers. The second year pilot program, which began in 2005 and lasted until 2007, involved 100 centers. Participants for this portion of the pilot were taken from sites located in the boundaries of elementary schools where 75 percent or more of the children were on free or reduced lunch programs, and the site indicated a willingness to participate. The quality rating system was fully implemented in November 2007 and currently has 96 early learning centers participating in Guiding Stars. Seventy-two of the 100 centers in the second year pilot have graduated or exited the program. As will be discussed more fully below, the name of the program was changed in early 2008 to the Quality Rating Improvement System (QRIS).

31. Phase I of the current program is called "Quality Connections." This phase involves an environmental assessment of the early learning center based upon rating scales referred to as ITERS (Infant/Toddler Environmental Rating Scale) and ECERS (Early Childhood Environmental Rating Scale). The purpose of this phase is to determine the environmental needs of the

provider and to determine whether the provider is ready for Phase II, which is known as the "Guiding Stars." Notably, assessment using ITERS and ECERS is required of all providers accepting school readiness children, and is not a requirement unique to the QRIS.

32. There are presently 110 school readiness providers in Phase I. These providers receive grants from the ELC of Duval for books, materials, and equipment as indicated in the ITERS and ECERS assessments.

33. If a participant receives a score of three (out of five) on the environmental assessments, then they are eligible to participate in Guiding Stars. Phase II is the portion of the QRIS that has 96 participants. However, Phase II envisions a two-year window of participation, and not all participants start on the same schedule. There was no testimony presented that any early learning center had completed Phase I and was denied entrance in Phase II for want of a slot.

34. Based on the assessment in Phase I, the ELC of Duval assists the provider by supplying technical assistance support for up to two years. Technical assistance can include classroom assessments by trained evaluators, development of an action plan to address areas identified as needing improvement, training for staff members, educational stipends and scholarships, and wage incentives.

35. Once the provider has had an opportunity to improve any shortcomings identified in the initial assessment, it is evaluated by a team of early learning professionals based on factors such as: a) the quality of a provider's facility; b) the quality of the educational environment at the provider's facility; c) the ratio of staff to children; d) the qualifications of the provider's staff members; e) the quality of the curriculum; and f) parental/family involvement with the children's learning and development.

36. After the evaluation team has completed its assessment, a provider receives one to five stars, and each star represents an increasing level of quality.

37. Once a child-care provider has received a star rating, it is considered to be an "exited" provider and receives a maintenance support plan which may include, but is not limited to quarterly contacts by the Guiding Stars program manager; on-site training opportunities and technical assistance for directors and teachers; educational scholarships for the professional development and continuing education of staff members; recognition through the Child Care Resource and Referral Network and the Northeast Florida Early Care and Education Guide; curriculum support; staff training; mini-grants to enhance program development; and wage incentives for staff.

38. A significant amount of evidence was presented regarding the funding of the Guiding Stars program. In compliance with the federal requirements in 45 C.F.R. § 98.50, ELC of Duval allocates approximately 80 percent of its funds for child care slots (as opposed to the 70 percent required for this purpose). ELC of Duval devotes approximately 9 percent to quality enhancement activities, including the Guiding Stars program. The funding for services provided to exited centers comes from a combination of state, federal and private sources.

39. While "quality dollars" from CCDF are used to finance the program, the majority of the funding (approximately \$3.5 million) comes from the Mayor of Jacksonville's Early Literacy Initiative. The Guiding Stars program also receives significant funding from private sources, including the Rice Foundation and Blue Cross-Blue Shield.

40. Early learning centers that participate in ELC of Duval's school readiness program are qualified to participate in the Guiding Stars program, but are not required to do so. There is no cost to early learning centers that accept children attending school readiness programs under tuition subsidies to participate in the Guiding Stars programs. Every early learning center who has a signed provider agreement with ELC of Duval receives the same amount of subsidy per eligible child whether or not they participate in the Guiding Stars program.

41. Information regarding the rating received by participants in the program is available to parents seeking placement for their children. Reference to the Guiding Stars ratings is a way for parents to assess the provider's commitment to quality, and the program is featured in some of ELC of Duval's promotional materials.

42. Description of quality activities and services is required in an early learning coalition's school readiness plan submitted to and approved by AWI. Reference to ELC of Duval's QRIS is included in "Section 5: Quality Activities and Services. The ELC of Duval could not have implemented the QRIS program unless some description of the program was included in the school readiness plan.

43. The school readiness plan submitted by the Early Learning Coalition of Duval in 2006 did not contain documentation on the Guiding Stars Program itself. It did reference the program under the following categories in the School Readiness Plan (consistent with the format required by the Early Learning Coalition Guidance and Instruction Workbook): 1.92 (Evaluation Plan); 2.5 (Collaboration and Coordination of Services with Other Entities); and 3.4 (Parent Involvement and Skill Building). More substantial information is provided in Section 5 (Quality Activities and Services). When ELC of Duval decided to change the description of the program from a quality rating system to a quality rating improvement system, it submitted amendments to its

school readiness plan to reflect the change. These amendments are included in the submission referred to in paragraph 26, above.

44. The ELC of Duval's plan amendment likewise did not incorporate the actual workings or substance of the QRIS. It did not submit the material identified as an agency statement attached to the Amended Petition in this case.

45. Brittany Birken, Director of the Office of Early Learning for the AWI, did not review the QRIS or Guiding Stars program as a part of the review of ELC of Duval's early learning readiness plan. On behalf of the Agency, she reviewed ELC of Duval's school readiness plan to make sure that it complied with federal and state law requirements that at least four percent of identified funding was being spent on appropriate quality activities. AWI determined that the wage incentives, technical assistance and professional development proposed through the QRIS were consistent with federal requirements for quality activities.

46. AWI approved the ELC of Duval's school readiness plan. It did not approve the QRIS or endorse it.

Standing

47. The Florida Association for Child Care Management is a not-for-profit corporation that functions as a trade association for approximately 2,500 private child-care providers in Florida. It monitors legislation and provides lobbying services on behalf its members before both the executive and legislative branch.

Ninety-three of its members are in the Duval county area. There was no indication of how many members receive children using vouchers via the school readiness program. However, thirty-three members participate in the Guiding Stars program. Two of the board members for FACCM own preschools in Duval County. In the one meeting called to discuss the challenge to the Guiding Stars program, approximately 20 to 25 members attended. There was no evidence presented to indicate how many of those in attendance supported the challenge in this case.

48. With regard to its standing to initiate the challenge in this proceeding, FACCM alleged that a substantial number of FACCM members are substantially affected by the QRIS, which they claim is an unadopted rule, because only providers who participate in the Guiding Stars program are entitled to the benefits of the program; the star ratings are publicized as an indication of the quality of a program, and providers face increased costs to achieve higher star ratings.

49. The Executive Director for FACCM testified that FACCM members are substantially affected by Guiding Stars because a) the funding of the Guiding Stars program reduces the funding that would otherwise be available for school readiness programs operated by FACCM members; b) providers who do not participate in the program are denied positive public promotion by ELC of Duval, mini-grants, educational scholarships and wage incentives for staff; c) the Guiding Stars program imposes additional regulatory

costs on FACCM members; d) some providers are not eligible to participate in the Guiding Stars program even though they operate school readiness programs in Duval County; and e) the Guiding Stars program determines the level of benefits a participating member may receive.

50. Only one child care program owner testified regarding participation (or lack thereof) in the program. Carol Moore is the owner/director of the Learning Tree Schools of Jacksonville. There are two locations: Fort Caroline and Hidden Hills. Both schools are in the Arlington area of Jacksonville. The Fort Caroline School has 160 preschool children, with 22 of them receiving subsidies. Hidden Hills has 80 preschool children, with 4 children receiving subsidies.

51. At the time of hearing, both schools were at full enrollment with a wait list of about a year.

52. Ms. Moore testified that she was visited by representatives from ELC of Duval in November or December 2007 regarding possible participation in the Guiding Stars program. She testified that sometime soon after the visit she was informed that only one of two schools could be accepted into the program. However, she could not identify who made this statement, when it was made or any reason provided for such a statement. Ms. Moore admitted that she never formally applied to participate in the program and never received any type of rejection in writing. She

also indicated that things have changed since the time ELC of Duval representatives visited her program.

53. Ms. Moore was only interested in being in the program if she could obtain a five-star rating. To do so, she claimed that she might be required to purchase an additional piece of playground equipment, although the type and price was not identified. Once again, she did not identify who told her such equipment would be required, and no documentation was produced. Indeed, Ms. Moore admitted that there was no regulatory cost to participate in the program, but "if you wanted to be a five-star school, yes, it's going to cost you some money."

54. Ms. Moore has not suffered a decrease in enrollment or any other financial harm resulting from the existence of the program. As a program receiving subsidies for care, her schools are already assessed in terms of ITERS and ECERS, and her program is accredited as a Gold Seal Program through the Department of Children and Families.

55. No other FACCM member was identified whose program had been denied participation in the Guiding Stars or who had suffered additional costs as a result of the program. The more credible evidence indicates that no provider accepting school readiness children has been denied access to participate in the Guiding Stars program. The program has sufficient capacity to serve current provider requests and ELC of Duval is attempting to recruit additional programs to participate. The ELC of Duval

advertises the existence of the program encouraging additional child-care providers to enroll.

56. Susan Main, the Executive Director for ELC of Duval, testified that she was unsure whether the program could accommodate all 315 child care programs accepting early readiness children if all of the programs wanted to participate in the program, and to do so would dilute the resources each program would receive. However, she believed that ELC of Duval would, in that instance, seek additional funding for the program.

57. The more credible evidence indicates that the Guiding Stars program does not necessarily reduce the funding available for subsidies to school readiness children. ELC of Duval already exceeds the required level of funding for this component by ten percent. Much of the funding for Guiding Stars does not come from the funds received through AWI. There is no credible evidence from any witness in a decision to participate in decision-making that, absent the Guiding Stars program, funding would divert to providing additional subsidies.

58. The more credible evidence indicates that providers who do not participate in the program choose not to participate. It cannot be said that they are denied promotion by ELC of Duval when they have declined participation in the program.

59. Participation in the Guiding Stars program does not result in additional regulatory costs. The more credible evidence indicates that participation in the program results in

additional funding being available to a child-care provider for improvements in the quality of its program.

60. No credible evidence was presented indicating that there are programs that are not eligible for participation in the program. As noted above, the more credible evidence is that no program has been denied participation.

61. Finally, Guiding Stars benefits are determined on a case by case basis, depending on the needs of the individual providers and the level of funding available.

62. Petitioner has not established that it is substantially affected by the implementation of the Guiding Stars program by the ELC of Duval.

CONCLUSIONS OF LAW

63. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties to this action in accordance with Sections 120.56, 120.569 and 120.57(1), Florida Statutes.

64. In this case, there are three preliminary issues that must be resolved in order for Petitioner to prevail. First, Petitioner must demonstrate that it has standing to bring this challenge to the Guiding Stars program. Second, Petitioner must demonstrate that the statements identified in the Amended Petition are agency statements. To do so, Petitioner must demonstrate that, as to ELC of Duval, that ELC of Duval is a state agency as that term is contemplated in Section 120.52,

Florida Statutes. Finally, as to AWI, Petitioner must demonstrate that the statements identified in the Amended Petition were approved by AWI.

65. Should Petitioner overcome these initial hurdles, Petitioner has the burden of demonstrating by a preponderance of the evidence that the agency statement is a rule as defined by Section 120.52(15), Florida Statutes. § 120.56(4)(b), Fla. Stat. The burden then shifts to the agency (or agencies) to prove that rulemaking is not practicable or feasible. Id.

Standing

66. Petitioner is a professional or trade association seeking relief on behalf of its members.

To meet the requirements of section 120.56(1), an association must demonstrate that a substantial number of its members, although not necessarily a majority, are 'substantially affected' by the challenged rule. Further, the subject matter of the rule must be within the association's general scope of interest and activity, and the relief requested must be of the type appropriate for a trade association to receive on behalf of its members.

NAACP v. Florida Board of Regents, 863 So. 2d 294, 298 (Fla. 2003). To demonstrate that its members are "substantially affected," Petitioner must establish: a) a real and sufficiently immediate injury in fact; and that b) the alleged interest is arguably within the zone of interest to be protected or regulated. Jacoby v. Florida Board of Medicine, 917 So. 2d 358 (Fla. 1st DCA 2005); Florida Board of Medicine v. Florida Academy

of Cosmetic Surgery, 808 So. 2d 243 (Fla. 1st DCA 2002),
superseded on other grounds, Department of Health v. Merritt, 919
So. 2d 561 (Fla. 1st DCA 2006).

67. The injury contemplated by this standard must be sufficiently real and immediate, as opposed to perceived injury based upon pure speculation or conjecture. Ward v. Board of Trustees of the Internal Improvement Fund, 651 So. 2d 1236, 1237 (Fla. 4th DCA 1995). Examples of a real and sufficient injury in fact are where a challenged rule has a direct and immediate effect on one's right to earn a living or where it has the effect of directly regulating professional conduct of persons within a particular occupation. Id.

68. Petitioner has not met this burden. The evidence presented indicates that 93 of Petitioner's members are in the Duval County area. However, the parties have not identified how many of those 93 members accept at-risk children and receive the subsidies provided pursuant to Section 411.01. However many of those members there may be, 33 of FACCM's members have elected to participate in the Guiding Stars program. There is no evidence that any of those members who have elected to participate believe that they are injured by their participation.

69. Of the FACCM's 2,500 members, only 20-25 expressed an interest in the instant challenge sufficient to attend a meeting about it. Of those, there is no indication how many were in favor of the challenge to the Guiding Star's program. Even

assuming that all of those who attended the meeting were in favor of the challenge, one percent of Petitioner's membership does not amount to a "substantial number" of its members.

70. Nor has Petitioner demonstrated a substantial injury. The program is voluntary. No provider's authorization to provide child care services or to accept school readiness children is affected by their election to participate or not participate in the program. No credible evidence was presented to demonstrate that additional costs are imposed to participate in the program, or that FACCM members would be ineligible to participate.

71. Moreover, the evidence suggesting that dollars now spent on the Guiding Stars program would be spent on subsidies for additional children to enter the school readiness program is, at this point, speculative. The ELC of Duval already spends ten percent over and above the federal requirements for school readiness subsidies. At least five of the nine percent currently spent on quality activities, such as Guiding Stars, is reserved by federal regulation for that purpose. In other words, if Guiding Stars were not in existence, at least five percent would have to be spent on some other quality activity. There was no evidence presented that funds were diverted from providing subsidies in order to implement the Guiding Stars program. It is just as likely that funds now used for quality activities would continue to be used for quality activities in another form.

72. Based on the totality of evidence presented, Petitioner has not demonstrated standing in this proceeding because it has not demonstrated that a substantial number of its members have been substantially affected by the statements at issue in this case.

ELC of Duval is Not a State Agency

73. Even assuming that Petitioner has standing to bring the challenge in this case, it must show that the statement at issue is an agency statement. Section 120.52(15), Florida Statutes, defines a "rule" as "each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency. . . ." (Emphasis supplied.) With respect to ELC of Duval, the preliminary issue to be decided is whether ELC of Duval is a state agency as contemplated by Chapter 120, Florida Statutes.

74. An "agency," for the purposes of Chapter 120, Florida Statutes, is defined in Section 120.52(1), Florida Statutes:

- (a) The Governor in the exercise of all executive powers other than those derived from the constitution.
- (b) Each:
 1. State officer and state department, and each departmental unit described in s.20.04.
 2. Authority, including a regional water supply authority.
 3. Board, including the Board of Governors of the State University System and a state

university board of trustees when acting pursuant to statutory authority derived from the Legislature.

4. Commission, including the Commission on Ethics and the Fish and Wildlife Conservation Commission when acting pursuant to statutory authority derived from the Legislature.

5. Regional planning agency.

6. Multi-county special district with a majority of its governing board comprised of nonelected persons.

7. Educational units.

8. Entity described in chapters 163, 373, 380, and 582 and s. 186.504.

(c) Each other unit of government in the state, including counties and municipalities, to the extent they are expressly made subject to this act by general or special law or existing judicial decisions.

This definition does not include any legal entity or agency created in whole or in part pursuant to chapter 361, part II, any metropolitan planning organization created pursuant to s. 339.175, any separate legal or administrative entity created pursuant to s.339.175 of which a metropolitan planning organization is a member, an expressway authority pursuant to chapter 348 or transportation authority under chapter 349, any legal or administrative entity created by an interlocal agreement pursuant to s. 163.01(7), unless any party to such agreement is otherwise an agency as defined in this subsection, or any multicounty special district with a majority of its governing board comprised of elected persons; however, this definition shall include a regional water supply authority.

75. Early learning coalitions are not contained in this list. Petitioner asserts that ELC of Duval is a state agency

because it is a board. However, an examination of Section 411.01 does not reveal any use of the term "board" in discussing early learning coalitions.^{3/} Not a single reference to the coalitions as a board is found.

76. The ELC of Duval also does not meet the definition of an agency under the tests developed pursuant to case-law. There are two accepted tests for determining whether an entity meets the definition of "agency" under Chapter 120, Florida Statutes, where it has not otherwise been specifically so designated. One test is whether the entity performs traditional governmental functions. Florida Department of Insurance v. Florida Association of Insurance Agents, 813 So. 2d 981, 983 (Fla. 1st DCA 2002). The second is whether the entity exercises its authority in more than one county. Orlando-Orange County Expressway Authority v. Hubbard Construction Co., 682 So. 2d 566, 567-568 (Fla. 5th DCA 1996). ELC of Duval asserts that an entity must meet both tests while Petitioner asserts that an entity can qualify under either one.

77. Most cases speak in terms of one or the other, presumably because only one of the two is at issue in a particular case. In this case, neither test supports Petitioner's position. Mae Volen Senior Center, Inc. v. Area Agency on Aging, 978 So. 2d 191, 194 (Fla. 4th DCA 2008), speaks in terms of both tests. The Fourth District found that area agencies on aging, which are referred to as "boards" in Section

20.41(7), Florida Statutes, were agencies for the purposes of determining whether the Division of Administrative Hearings had jurisdiction to hear a bid protest involving a AAA and a lead agency with whom it contracted. In making this determination, the Court stated:

Because the legislature designated the area agencies on aging as "boards" performing the programmatic and funding requirements of the DOEA, as well as the fact that they exercise multi-county authority and perform essentially government functions in authorizing the spending of public funds and contracting with lead agencies, we conclude that the DOAH has authority to hear this bid protest.

78. Here, not only are the early learning coalitions not referred to as boards in Section 411.01, but the functions performed are not traditional government functions. Early learning coalitions are expressly excluded from the public school system. § 411.01(2)(f), Fla. Stat. They act only after given permission to do so, and act at the direction of AWI. Like the Bradford Union Guidance Clinic, Inc., in Vey v. Bradford Union Guidance Clinic, Inc., 399 So. 2d 1137 (Fla. 1st DCA 1981), the ELC of Duval is a private entity that acts pursuant to an independent contractor agreement. In that agreement, AWI and ELC of Duval have agreed, long before this challenge was instituted, that "the Coalition is at all times acting and performing as an independent contractor and not a division or subpart of the [Agency]. The [Agency] shall neither have nor exercise any control or direction over the methods by which the Coalition

shall perform its functions other than as provided herein and in law." As the Court stated in Vey, "a private entity which contracted to provide services for a state agency does not thereby become a state agency itself." 399 So. 2d at 1139. Moreover, the fact that coalition members and employees are governed by Section 768.28 for purposes of tort liability (see Section 411.01(5)(a)11., Florida Statutes), is likewise not dispositive. Rubenstein v. Sarasota County Public Hospital, 498 So. 2d 1012 (Fla. 2d DCA 1986), notes that Section 768.28 envisions a much broader definition of "agency" than does Chapter 120.

79. Likewise, the ELC does not meet the multi-county factor for determining whether an entity is an agency because it does not operate outside the confines of Duval County. It is clear that Section 411.01 authorizes early learning coalitions to operate in more than one county where necessary to serve a minimum of 2,000 children. The fact is, however, that ELC of Duval, the respondent in this case, does not.

80. Petitioner has argued that it would be irrational for some early learning coalitions to escape agency status while some others who serve more than one county could be accorded agency status. The more sensible approach, however, is to recognize that the Legislature did not express any intent for any of the early learning coalitions to be considered state agencies. As stated earlier, the coalitions are consistently referred to in

Section 411.01 as coalitions, and not as boards. Moreover, the Legislature expressly stated that "it is the intent of the Legislature that the administrative staff at the state level for school readiness programs be kept to the minimum . . . as the school readiness programs are to be regionally designed, operated, and managed" § 411.01(1)(d), Fla. Stat. To consider the coalitions to be state agencies runs contrary to the Legislature's stated intent that administrative staff at the state level be minimized. It would serve to increase, rather than minimize, the state-level administration of the program, and detract from the purpose of designing locally-oriented programs. The Legislature's allowance for single or multi-county existence is consistent with its intent that these coalitions are not state agencies. Because the ELC of Duval is not an "agency" as contemplated by Chapter 120, Florida Statutes, the Guiding Stars program is not an agency statement of ELC of Duval.

The Statement is Not a Statement of AWI

81. Finally, even though ELC of Duval does not meet the definition of an "agency," Petitioner may still prevail if it can demonstrate that the statement at issue in this proceeding, i.e., the QRIS or Guiding Stars program, is a statement of AWI by virtue of its approval of the statement.

82. Petitioner states, "it is undisputed that AWI approved the ELC of Duval's Plan and plan amendment that identifies the implementation of the QRIS program." (Emphasis supplied).

However, while the QRIS is clearly mentioned in the ELC of Duval's school readiness plan, the actual QRIS is not included in the plan. If the AWI did not review the plan itself, it cannot be said to have approved it, and has not adopted the plan as its own. Moreover, Petitioner's argument would mean that the school readiness plans themselves become rules by virtue of AWI's approval of them. This position is simply not supported by the requirements of either Section 411.01 or Chapter 120, Florida Statutes.

83. Finally, the QRIS simply does not meet the definition of a rule. As stated above, Section 120.52(15), Florida Statutes, defines a rule to be:

Each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency

An agency statement or policy is a rule if its effect requires compliance, creates certain rights while adversely affecting others, or otherwise has the direct and consistent effect of law. Jenkins v. State, 855 So. 2d 1219, 1225 (Fla. 1st DCA 2003); Department of Revenue v. Novoa, 745 So. 2d 378, 380 (Fla. 1st DCA 1999); Department of Transportation v. Blackhawk Quarry Company of Florida, Inc., 528 So. 2d 447, 449 (Fla. 5th DCA 1988). An agency statement is not a statement of general applicability, and thus not a rule, where it is only applicable in "certain

circumstances." Department of Highway Safety & Motor Vehicles v. Schluter, 705 So. 2d 81, 82 (Fla. 1st DCA 1997).

84. The Petitioner has not demonstrated that the QRIS is a statement of general applicability. It applies only in Duval County, as opposed to statewide.^{4/}

85. Moreover, the QRIS does not require compliance, but rather gives early learning centers the option of participating. It creates no rights, as the right to operate as an early learning provider is separate from participation in the program. Likewise, no right has been adversely affected. The benefits accorded to participants is determined on a case-by-case basis, based on the needs of the participant and the funding availability at the time of participation. In short, the QRIS simply does not meet the definition of a rule.

CONCLUSION

In view of the foregoing findings of fact and conclusions of law, it is hereby:

ORDERED:

That the petition by the Florida Association for Child Care Management, Inc., be dismissed for lack of standing; that Early Learning Coalition of Duval County is not a state agency for the purposes of Chapter 120, Florida Statutes; and that the QRIS, otherwise known as the Guiding Stars program, is not a rule as defined by Section 120.52(15), Florida Statutes.

DONE AND ORDERED this 26th day of August, 2008, in
Tallahassee, Leon County, Florida.



LISA SHEARER NELSON
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 26th day of August, 2008.

ENDNOTES

^{1/} Section 411.01(5)(a)3., Florida Statutes, provides that the early learning coalitions in Sarasota, Osceola, and Santa Rosa Counties that were in operation on January 1, 2005, are not counted within the 30-coalition limit established in Section 411.01(5)(a)1.

^{2/} Testimony at hearing indicated that a new plan must be submitted every three years and upon each amendment to the previously approved plan. However, Subsections 411.01(5)(d)2. and 6. refer to annual and biennial review.

^{3/} See, e.g., § 411.01(5)(a)1. ("The Agency . . . shall adopt procedures for merging early learning coalitions, . . . and for the early termination of the terms of coalition members. . . ."); § 411.01(5)(a)4. ("Each early learning coalition shall be composed of at least 18 members but not more than 35 members."); and §411.01(5)(a)6. ("Each learning coalition must include the following members"). (Emphasis supplied.)

^{4/} Petitioner places great reliance on the fact that on at least one occasion, a bill to establish a statewide quality rating system has been introduced and has failed to pass. This reliance is misplaced. The fact that the Legislature has not chosen to implement such a rating system statewide does not mean that it is not appropriate for an individual county. Once again, Section 411.01(1)(d) envisions school readiness plans being "regionally designed, operated and managed." This legislative intent endorses

the use of methods that might work well in one area but not in another. ELC of Duval's actions seem consistent with this directive.

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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 the original notice of appeal with the Clerk of the Division of Administrative Hearings and a 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.