

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JACK W. CARSWELL, MINOR CHILD,
JULIE CARSWELL AND SCOTT
CARSWELL, PARENTS,

Petitioners,

vs.

Case No. 13-3388RU

FLORIDA STATE UNIVERSITY
SCHOOLS, INC.; FLORIDA STATE
UNIVERSITY SCHOOLS, INC. BOARD
OF DIRECTORS; AND FLORIDA STATE
UNIVERSITY BOARD OF TRUSTEES,

Respondents.

ORDER GRANTING MOTIONS TO DISMISS AND FINAL ORDER OF DISMISSAL

This cause has come before the undersigned on Motions to Dismiss for Lack of Jurisdiction (Motions) filed by each of the Respondents in this matter. Petitioners have filed responses thereto. The motions and responses suggested that the taking of limited evidence regarding the nature of the parties and the Code of Conduct at issue would be appropriate.

Pursuant to notice, a bifurcated evidentiary hearing was held on November 14, 2013, in Tallahassee, Florida, before E. Gary Early, the Administrative Law Judge assigned by the Division of Administrative Hearings to determine the threshold question of whether Respondents, Florida State University Schools, Inc. and Florida State University Schools, Inc. Board

Of Directors (collectively "FSUS") constitute an "agency" as defined in section 120.52, Florida Statutes, either on their own or as a result of their affiliation with the FSUS sponsor, Florida State University ("FSU").

APPEARANCES

For Petitioners: Mary Linville Atkins, Esquire
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For Respondents Florida State University Schools, Inc. and
Florida State University Schools, Inc. Board of Directors:

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For Respondent Florida State University Board of Trustees:

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PRELIMINARY STATEMENT

This case originated with the filing of a Petition Challenging Agency Policy as Unpromulgated Rule filed on September 9, 2013. The Petition challenged provisions of the FSUS Student Code of Conduct as an unadopted rule. On September 12, 2013, the matter was assigned to the undersigned. The Motions were filed on September 24, 2013, by FSUS, and September 25, 2013, by the Florida State University Board of Trustees ("FSU"). Responses were filed on September 27, 2013,

to the FSUS Motion, and September 30, 2013, to the FSU Motion. On October 10, 2013, a Notice of Motion Hearing was entered scheduling a hearing for October 29, 2013. Due to an illness, the undersigned was compelled to cancel the hearing, and it was rescheduled for November 14, 2013.

At hearing, the parties filed 21 stipulations of fact, which have been accepted. The developmental research laboratory school operated by FSUS and sponsored by FSU is generally known as "Florida High," the name used throughout the stipulated facts. The stipulated facts, to the extent that they are relevant and pertinent to the issues in this proceeding, are set forth herein.

The parties stipulated to the following exhibits:
Verification of Election Results and Certification of Exclusive Bargaining Representative which verified the results of a December 18, 2003, election and certified United Faculty of Florida as the exclusive collective bargaining representative of university school professors, associate professors, assistant professors and instructors; the FSUS 2012-2013 Student Code of Conduct; the August 22, 2000, Charter between FSU and FSUS; and a July 9, 2013, letter from FSUS to Petitioners by which the FSUS Director "agree[s] with Dr. Epps' decision to enforce school policy," and withdraw Jack Carswell's "invitation to attend FSUS."

Respondent, FSUS, presented the testimony of Alan Hanstein, acting chairperson of the FSUS Board of Directors, who was recalled to the stand by Petitioners.

All references to Florida Statutes are to the 2013 edition unless otherwise indicated.

FINDINGS OF FACT

Stipulated Facts

1. Florida High is a charter school created pursuant to section 1002.33(5)(a)2.

2. Florida High is a public school.

3. Pursuant to section 1002.33(5), FSU is the sponsor of Florida High, has executed a charter agreement with FSUS, and performs the duties listed in the charter agreement.

4. Florida High was originally created as a developmental research school and receives public funding for its operations as set forth in section 1002.32(9).

5. Florida High's student admissions are governed in part by sections 1002.21 and 1002.33(10)(a).

6. FSUS employees are public employees and are part of the Florida Retirement System.

7. The Public Employees Relations Commission has certified a unit of FSUS' instructional personnel for purposes of engaging in collective bargaining.

8. FSUS teachers are subject to the same instructional certification requirements as those for all of Florida's public school teachers.

9. In establishing Florida High as a lab charter school, FSU and FSUS drafted a charter agreement. The charter agreement was executed by both parties after holding a public hearing.

10. FSUS adopted the Student Code of Conduct after holding a public hearing.

11. FSUS is subject to Florida's public records laws as set out in chapter 119.

12. All meetings of FSUS' Board of Directors, unless otherwise exempt, are subject to the requirements of Florida's Sunshine Act and must be noticed and open to the public.

13. FSUS is subject to the class size requirements of Florida's public school system.

14. FSUS is required to administer the Florida Comprehensive Assessment Test to all students, and the school is included in the state grading system for public schools and subject to specific repercussions by the Department of Education in the event of a failing grade.

15. FSUS is required to report student assessment data to every parent of a student at the school, the school district, and its Board of Directors, and must maintain a website and post

this data as well as follow the State Board of Education's rules pertaining to public notice of school performance.

16. Florida High's Director files an annual financial disclosure of financial interest with the Florida Commission on Ethics.

17. FSUS has the status of a "Local Education Agency" allowing it to receive federal funds.

18. Jack Carswell was withdrawn from Florida High in part due to paragraph "k" of the Student Code of Conduct entitled "Withdrawal of Invitation".

Additional Facts

19. Petitioner, Jack W. Carswell, was, until the 2013-2014 school year, a student at FSUS, having attended since 2002. Petitioners, Julie and Scott Carswell are Jack W. Carswell's parents.

20. Charter schools are public schools, and are part of the state's program of public education. Charter schools may be sponsored by district school boards in the county over which the district school board has jurisdiction, or by a state university.

21. Charter schools sponsored by a state university are in a separate category known as developmental research (laboratory) schools, or "lab schools." With certain exceptions not

applicable here, there is a limit of one charter lab school per state university.

22. Respondent, FSUS, is a lab school created under the authority of sections 1002.32 and 1002.33.

23. Respondent, FSU, is a state university, and is the sponsor of FSUS.

24. The alleged unadopted rule at issue in this proceeding is found at section VI.K. of the Student Code of Conduct, which provides that:

K. Withdrawal of Invitation/Expulsion

When a student's behavior is repeatedly inappropriate to others or continues to exhibit absolute disregard for the conditions of behavior set by the school, a meeting will be held and the Principal may recommend to the Director expulsion or permanent withdrawal of invitation of the student.

The Principal/designee may recommend to the Director expulsion or withdrawal of invitation any student enrolled when his or her presence has or tends to substantially disrupt or interfere with the orderly educational process, destroys school property, endangers the health or safety of the student or others or infringes on the rights of others.

(1) Withdrawal of Invitation

FSUS is a school of choice that extends invitations on an annual or longer basis. The administration will decide the viability of a particular student's invitation to attend FSUS at the end of each school year. Attendance and disciplinary issues will be

considered when making these determinations. If it is decided that a particular student's invitation should be withdrawn, then the Principal will make a written recommendation to the Director. Parents will be formally notified by the administration of a withdrawal of invitation for the next school year during the summer. Every attempt will be made to notify parents of the withdrawal of an invitation as early as possible in the summer so that arrangements for enrolling the student in their home school can be made.

The Director may withdraw an invitation as prescribed in this Code or a parent or guardian may voluntarily withdraw the student. Documentation for withdrawal of invitation is a confidential record between the parents/guardian(s) and the school. Such documentation shall not be included in the student's permanent record. A student cannot avoid expulsion by withdrawing from school.

25. The only rulemaking authority granted by the Legislature in sections 1002.32 or 1002.33 is that conferred on the State Board of Education to adopt rules on how to form and operate a charter school and how to enroll in a charter school once it is created, which rules are to include a model application form, standard charter contract, standard evaluation instrument, and standard charter renewal contract.

§§ 1002.33(21)(b)3.b. and 1002.33(27), Fla. Stat.^{1/}

26. Charter school systems (see section 1002.33(20)(a)4., section 1002.33(20)(a)6., and section 1002.33(2)) have been designated as "local educational agenc[ies]" for the limited

purpose of receiving federal funds. § 1002.33(25), Fla. Stat. As further established in that section, however, "[s]uch designation does not apply to other provisions unless specifically provided in law."

CONCLUSIONS OF LAW

27. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties to this action in accordance with section 120.56(4), Florida Statutes. FSUS is not an "Agency"

28. 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. . . ." The preliminary issue to be decided is whether FSUS is an agency as defined by chapter 120, Florida Statutes.

29. Section 120.52(1), Florida Statutes, defines an "agency" as:

. . . the following officers or governmental entities if acting pursuant to powers other than those derived from the constitution:

(a) The Governor; each state officer and state department, and each departmental unit described in section 20.04; the Board of Governors of the State University System; the Commission on Ethics; the Fish and Wildlife Conservation Commission; a regional water supply authority; a regional planning agency; a multicounty special district, but only if a majority of its governing board is

comprised of nonelected persons; educational units; and each entity described in chapters 163, 373, 380, and 582 and section 186.504.

(b) Each officer and governmental entity in the state having statewide jurisdiction or jurisdiction in more than one county.

(c) Each officer and governmental entity in the state having jurisdiction in one county or less than one county, to the extent they are expressly made subject to this chapter by general or special law or existing judicial decisions.

This definition does not include a municipality or legal entity created solely by a municipality; a legal entity or agency created in whole or in part pursuant to part II of chapter 361; a metropolitan planning organization created pursuant to section 339.175; a separate legal or administrative entity created pursuant to section 339.175 of which a metropolitan planning organization is a member; an expressway authority pursuant to chapter 348 or any transportation authority or commission under chapter 343 or chapter 349; or a legal or administrative entity created by an interlocal agreement pursuant to section 163.01(7), unless any party to such agreement is otherwise an agency as defined in this subsection.

30. Section 120.52(6), Florida Statutes, defines an "educational unit" as "a local school district, a community college district, the Florida School for the Deaf and the Blind, or a state university when the university is acting pursuant to statutory authority derived from the Legislature."

31. Charter schools are not included in the list of entities that listed as an "agency," either generally or as an "educational unit."

32. It is the view of the undersigned that had the legislature intended the APA to apply to charter schools, having enacted a "statute [] comprehensive in its treatment of all aspects of the creation, operation, and termination of charter schools," (Sch. Bd. of Palm Beach Co. v. Survivors Charter Schools, Inc., 3 So. 3d 1220, 1229 (Fla. 2009)), it would have expressly so provided. It did not.

33. There appears to be a split amongst Florida appellate courts regarding when an entity that is not specifically defined as an "agency" may nonetheless fall within the requirements of chapter 120.

34. In Mae Volen Senior Center, Inc. v. Area Agency on Aging, 978 So. 2d 191, 194 (Fla. 4th DCA 2008), the Fourth District Court of Appeal found that area agencies on aging (AAA), which were referred to as "boards" in section 20.41(7), Florida Statutes (2007), were agencies for the purposes of determining whether the Division of Administrative Hearings had jurisdiction to hear a bid protest involving an AAA and a lead agency with whom it contracted. As set forth in the opinion:

Area agencies on aging are organizations designated by the Department of Elder Affairs ("DOEA") to coordinate and

administer DOEA programs and to provide, through contracting agencies, services for the elderly within a planning and service area. . . . Area agencies may be either public or private nonprofit entities. Florida has eleven area agencies on aging. The area agencies are all subject to the public records act and the sunshine laws of the state when considering any contracts requiring the expenditure of public funds.

Mae Volen at 192.

35. In making its determination that AAAs were "agencies" under chapter 120, the court held:

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.

* * *

The area agencies determine the need for elderly services in their areas, plan for the provision of those services, and receive funds from the government which they then distribute to service providers. In all respects they act as an arm of the state agency. They are required to comply with the public records act and the sunshine laws with respect to the contracts requiring the expenditure of public funds, which would include lead agency contracts. They are required to follow state contracting guidelines and requests for proposals. Under these circumstances, where the nonprofit corporation functions under the direction and as a public agency for the purpose of contracting with lead agencies,

we do not deem its "private" label as dispositive of whether it is an agency for purposes of the APA.

Mae Volen at 194.

36. Subsequent to the Fourth District Court of Appeal's opinion in Mae Volen, the same issue of the identity of an AAA as an "agency" was placed squarely before the Third District Court of Appeal in First Quality Home Care, Inc. v. Alliance for Aging, Inc., 14 So. 3d 1149 (Fla. 3rd DCA 2009). In that case, the court declined to follow Mae Volen, and concluded that AAAs are not "agencies" governed by the APA. In so concluding, the court held that:

The APA's definition of "agency" is set forth in section 120.52(1), which is divided into several subsections. [The AAA] does not fall within the definition of "agency" as provided in subsections (a), (b) or (c). First, section 120.52(1)(a), which applies to the Governor's exercise of executive powers other than those derived from the constitution is clearly inapplicable to Alliance. Second, [the AAA], a private, non-profit corporation, is not one of the entities listed in subsection (b), i.e., a state department/departmental unit described in section 20.04, Florida Statutes; an authority; a board; a commission; a regional planning agency; a multicounty special district; an educational unit; or an entity described in several listed statutes other than chapter 430, which concerns the DOEA. . . . Finally, [the AAA] is not a unit of state government that has been made subject to the APA by general or special law or existing judicial decisions as required under subsection (c). . . . We, therefore,

conclude that [the AAA] is not an "agency" as defined by section 120.52(1).

First Quality Home Care at 1152.

37. The Third District Court of Appeal discussed in detail the elements of Mae Volen with which it disagreed. Notably, the Third District found that the legislature's identification of the governing body of an AAA as "the board" in section 20.41(7), Florida Statutes (2007), was not to be construed as meaning a "board" as defined in section 120.52(1)(b)3., Florida Statutes (2007).

38. First Quality Health Care followed the reasoning of the First District Court of Appeal in Vey v. Bradford Union Guidance Clinic, Inc., 399 So. 2d 1137, 1139 (Fla. 1st DCA 1981), and held that:

As recognized in Vey, "a private entity which contracted to provide services for a state agency does not thereby become a state agency itself." Id. (citing State Rd. Dep't v. Cone Bros. Contracting Co., 207 So. 2d 489 (Fla. 1st DCA 1968)). . . . We discern no legislative intent to include private, non-profit corporations such as [the AAA] within the purview of the APA. As stated in Florida Association of Insurance Agents, 813 So. 2d at 984:

To conclude that the legislature intended that the Association be subject to the Act would, necessarily, also require the conclusion that many other similar entities are subject to the Act. Had the legislature intended such a result, given the apparently comprehensive nature of the list set

out in section 120.52(1), we believe it would have said so.

First Quality Health Care at 1153.

39. As applied to the issue of whether a charter lab school is an "agency" as defined in chapter 120, the undersigned agrees with the reasoning expressed in First Quality Health Care that had the Legislature intended to subject charter school student admission procedures to the APA, it would have included charter schools in the pertinent statutes defining "agency" or "educational unit." See First Quality Health Care at 1153-1154.

40. The fact that the governing body and employees of a charter school are governed by section 768.28 for purposes of tort liability (see section 1002.33(12)(h)), is not dispositive. See Rubenstein v. Sarasota Cnty. Pub. Hosp., 498 So. 2d 1012, 1013 (Fla. 2d DCA 1986) (section 768.28 envisions "a much broader definition of 'agency' than does the APA.>").

41. Petitioners argue that general concepts of due process require that there be some means of challenging the decision of FSUS to withdraw the invitation of a current student. Petitioner's argument has appeal. However, in that regard, section 1002.33(7)(d)1. provides, in pertinent part, that "[e]ach charter school's governing board must appoint a representative to facilitate parental involvement, provide access to information, assist parents and others with questions

and concerns, and resolve disputes.” That dispute resolution process having been established by the Legislature for internal charter school disputes, it is not within the purview of the undersigned to create additional or alternative remedies.

The FSUS Student Code of Conduct is not a Statement of FSU

42. Even though FSUS is not an “agency,” Petitioners argue that the Student Code of Conduct is an “agency statement” due to its attribution to FSU through the entry of the charter contract.

43. The FSUS Student Code of Conduct is not a statement of FSU’s policies or procedures.

44. A sponsor is prohibited from applying its own policies to a charter school without mutual consent. § 1002.33(5)(b) 1.d., Fla. Stat.

45. The duties of FSU as the sponsor of the FSUS charter lab school are set forth in section 1002.33(5)(b) as follows:

(b) Sponsor duties. –

1.a. The sponsor shall monitor and review the charter school in its progress toward the goals established in the charter.

b. The sponsor shall monitor the revenues and expenditures of the charter school and perform the duties provided in section 1002.345.

c. The sponsor may approve a charter for a charter school before the applicant has identified space, equipment, or personnel,

if the applicant indicates approval is necessary for it to raise working funds.

d. The sponsor shall not apply its policies to a charter school unless mutually agreed to by both the sponsor and the charter school. If the sponsor subsequently amends any agreed-upon sponsor policy, the version of the policy in effect at the time of the execution of the charter, or any subsequent modification thereof, shall remain in effect and the sponsor may not hold the charter school responsible for any provision of a newly revised policy until the revised policy is mutually agreed upon.

e. The sponsor shall ensure that the charter is innovative and consistent with the state education goals established by section 1000.03(5).

f. The sponsor shall ensure that the charter school participates in the state's education accountability system. If a charter school falls short of performance measures included in the approved charter, the sponsor shall report such shortcomings to the Department of Education.

g. The sponsor shall not be liable for civil damages under state law for personal injury, property damage, or death resulting from an act or omission of an officer, employee, agent, or governing body of the charter school.

h. The sponsor shall not be liable for civil damages under state law for any employment actions taken by an officer, employee, agent, or governing body of the charter school.

i. The sponsor's duties to monitor the charter school shall not constitute the basis for a private cause of action.

j. The sponsor shall not impose additional reporting requirements on a charter school without providing reasonable and specific justification in writing to the charter school.

k. The sponsor shall submit an annual report to the Department of Education in a web-based format to be determined by the department.

The sponsor duties do not establish a degree of control to ascribe the FSUS adopted Student Code of Conduct to FSU.

46. While the charter between FSUS and FSU is to address a student code of conduct (see section 1002.33(7)(a)7.), the actual plan is not included therein. The only reference to the Student Code of Conduct in the charter agreement is that related to the dismissal of students, and provides that such dismissals "shall occur in accordance with the policies and procedures described in the [FSUS] Code of Student Conduct." Given its limited involvement in the FSUS Student Code of Conduct, FSU cannot be said to have adopted the Code as its own.

47. Petitioner argues that a charter school code of conduct, which is applicable only to the charter school's students, becomes a "rule" as a result of the fact that the charter sponsor is an "educational unit." All charter school sponsors, i.e. district school boards and state universities (see section 1002.33(5)(a)), are "educational units" as defined in section 120.52. The practical effect of Petitioner's

argument would be to subject all policies and decisions of charter schools vis-à-vis their students to chapter 120 remedies. This position is simply not supported by sections 1002.32 and 1002.33, or by chapter 120.

CONCLUSION

Based upon the foregoing it is hereby:

ORDERED:

That the Petition Challenging Agency Policy as Unpromulgated Rule be dismissed on the basis that FSUS is not an agency for the purposes of chapter 120, Florida Statutes, and that agency status is not attributed to FSUS as a result of its sponsorship by FSU.

DONE AND ENTERED this 26th day of November, 2013, in Tallahassee, Leon County, Florida.



E. GARY EARLY
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 26th day of November, 2013.

ENDNOTE

^{1/} In a somewhat curious provision, an "advisory board to provide general oversight and guidance" to a charter lab school is required to "adopt internal organizational procedures or bylaws necessary for efficient operation as provided in chapter 120." Aside from the fact that the provision does not apply to the lab school itself, the internal organizational procedures or bylaws described appear to be outside of the scope of a "rule" as defined in section 120.52(16) in that, as described, they constitute "[i]nternal management memoranda which do not affect either the private interests of any person or any plan or procedure important to the public and which have no application outside the agency issuing the memorandum."

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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.