

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SPORTS CAMP, INC., d/b/a SPORTS
CLUB, A FLORIDA NOT-FOR-PROFIT
CORPORATION,

Petitioner,

and

PARENTS' RIGHTS OF CHOICE FOR
KIDS, INC., d/b/a PARENTS ROCK,

Intervenor,

vs.

Case No. 14-0285RX

COLLIER COUNTY SCHOOL BOARD,

Respondent.

_____ /

FINAL ORDER

On May 6 through 8, and June 5 through 6, 2014,
Thomas Porter Crapps, a duly-designated Administrative Law Judge
of the Division of Administrative Hearings (DOAH), conducted the
final hearing in this case in Naples, Florida.

APPEARANCES

For Petitioner: Kevin Pendley, Esquire
Grant Fridkin Pearson, P.A.
5551 Ridgewood Drive, Suite 501
Naples, Florida 34103

For Respondent: Jon Fishbane, Esquire
School Board of Collier County
5775 Osceola Trail
Naples, Florida 34109

James D. Fox, Esquire
Roetzel and Andress, LPA
850 Park Shore Drive
Trianon Centre, Third Floor
Naples, Florida 34103

For Intervenor: Steven J. Bracci, Esquire
Steven J. Bracci, P.A.
9015 Strada Stell Court, Suite 102
Naples, Florida 34109

STATEMENT OF THE ISSUE

Whether Amended School Board Policy 2262 is an invalid exercise of delegated legislative authority under section 120.52(8), Florida Statutes (2013)^{1/}.

PRELIMINARY STATEMENT

On January 17, 2014, Petitioner, Sports Club, Inc., a Florida non-profit corporation, doing business as Sports Club (Sports Club), filed with DOAH a Petition to Determine Invalidity of a Rule (Petition), adopted by the School Board of Collier County (School Board). The challenged rule is the School Board's Before and After School Child Care Services Policy, Amended School Board Policy 2262 (Amended School Board Policy 2262), adopted on December 10, 2013.

The School Board adopted Amended School Board Policy 2262 in response to an unadopted rule challenge. See Bracci v. Sch. Bd. of Collier Cnty., Case No. 13-2394RU (Fla. DOAH Jan. 17, 2014) (dismissing unadopted rule challenge as moot where School Board initiated rulemaking and adopted rule). This unadopted rule challenge had argued that the School Board's Request for

Qualifications #115-4/13 (RFQ) constituted an unpromulgated rule. The RFQ sought to qualify child care providers to operate before and after school child care programs located at the District's elementary schools. During the unadopted rule challenge, the School Board, on September 13, 2013, elected to initiate rulemaking, and ultimately adopted Amended School Board Policy 2262, and wholly incorporated the RFQ into its policy.

On February 21, 2014, Parents' Rights of Choice for Kids, Inc., doing business as Parents Rock, a Florida non-profit corporation (Parents Rock), filed a Petition to Intervene in the rule challenge case, which was granted.

Sports Club's Petition alleged that Amended School Board Policy 2262 improperly allows the Collier County School District (District) to act as a private business and operate its own child care programs. Sports Club contends that absent a specific constitutional or delegated statutory authority, the School Board's adopted rule is invalid. Further, Sports Club alleges that Amended School Board Policy 2262 "is the product of an invalid procedure, vests unbridled discretion in the School Board, and imposes regulatory costs on Sports Club and the public over and above less costly alternatives[.]" Thus, Sports Club concludes that Amended School Board Policy 2262 is an "invalid exercise of delegated legislative authority."

The parties filed a stipulated agreement to hold the final hearing beyond the 30-day time limit found in section 120.56(1)(c), Florida Statutes. The final hearing began the first week in May 2014, but the parties were unable to finish the case. As a result, the final hearing was continued until June 5, 2014, and was completed the next day.

Sports Club presented the testimony of: two of its corporate officers, Lane Beatty and William Carufe; Pat Mitchell, an internal funds accountant for the School Board; Roy Terry, a School Board member; Dr. Kamela Patton, superintendent for the School Board (Superintendent Patton); Jodie Moorhead, principal of Lake Trafford Elementary School; and Marilou Andrews, principal of Laurel Oaks Elementary. Sports Club admitted into evidence Petitioner's Exhibits 1 through 3 and 5 through 9.

Parents Rock presented the testimony of Erika Donalds, its president, and Nancy Sirko, the School District's director of purchasing. Parents Rock introduced into evidence Intervenor's Exhibits 1 through 3, 6, 8 through 13, 16 through 20, 24 through 30, 34, 36, 38, 40 through 44, 47 through 50, 56 and 59.

The School Board presented the testimony of: Superintendent Patton; Nancy Sirko; Sandy Eaton, the School Board's administrative director of operations; and Steve Brettholtz, an expert witness. The School Board admitted into evidence

Respondent's Exhibits 1 through 4, 6 through 9, 11 and 17 through 19.

A six-volume Trial Transcript was filed with DOAH. The undersigned granted the parties' request for an extension of time in order to file proposed recommended orders. Sports Club and Parents Rock filed a joint Proposed Recommended Order, and the School Board filed its own separate Proposed Recommended Order.

FINDINGS OF FACT

1. The School Board has the constitutional duty to operate, control and supervise the public schools within Collier County, Florida. Art. IX, § 4(b), Fla. Const. (2014); see also § 1001.32, Fla. Stat.

2. Sports Club is a private, non-profit Florida corporation, whose principal business activity is providing before and after school child care. Sports Club is located in Collier County, and offers its child care services at its own private facilities, as well as at certain District elementary schools.

3. Parents Rock is a private, non-profit Florida corporation formed on June 24, 2013, for the purpose of representing parents' interests in education, and advocating for legislation, regulations, and government programs that improve parents' rights and choices in local education. Parents Rock's membership consists of approximately 700 individuals, mostly

parents of children attending schools in the District. A substantial number of these parents use the child care programs located at the District facilities. Moreover, a substantial number of Parents Rock's members routinely attend School Board meetings and advocate for parental involvement in their children's education and issues of importance, like the District's child care program.

4. Amended School Board Policy 2262, which is part of the School Board's Bylaws and Policies, is titled: Before and After School Child Care. The challenged policy contains paragraphs lettered "A through L" which provides for the following issues:

A. Parents and the community being given an opportunity to make recommendations concerning the operation and funding of child care programs prior to the approval by the School District;

B. Child care programs and services being available to students both prior to and after the school day;

C. Child care programs having an emphasis on providing educational opportunities and "variety of activities that promote the social, intellectual, and physical development of children in the program[;]"

D. Adequate attention being given to the child care programs having an environment that meets the needs and well-being of the children, ensuring the children's safety, security, that the children are clothed, fed, and "hav[ing] an opportunity for a variety of social, intellectual, and physical activities[;]"

E. Vendors or other organization contracted to provide the child care programs having adequate liability insurance, and "maintaining appropriate adult-child ratios, provide quality child care, and in general, complying with the procedures established by the State and the District[;]"

F. Notifying parents and families about the child care programs and procedures for enrollment;

G. Continuing program assessments by staff, participating parents, and other stakeholders during the course of the child care program;

H. Fees for the child care services being applied only to those schools involved in vendor run or school based programs;

I. Recognizing that a parent may notify the child care providers of the parent's preference that a child receiving either additional physical or academic activities, and "every reasonable effort shall be made to accommodate the request[;]"

J. Parents, whose children participate in the child care programs, giving "feedback concerning the program" and requiring that the District's manager of after school child care consider the information;

K. A procedure for surveying and collecting information from parents evaluating the child care programs; and

L. Providing that "[a]ny terms, conditions, or issues enumerated in the District's RFQ 115-4113 [sic], whether express or implied, related to this policy, are hereby adopted and incorporated by reference in the policy during the duration of RFQ 115-4113 including any renewal period provided for in said RFQ."

Amended School Board Policy 2262 then states that to "implement this policy, the Superintendent will develop and/or revise

administrative procedures consistent with the RFP/RFQ process relative to child care service.”

5. The School Board wholly adopted School Age Child Care Services, RFQ #115-4/13 (RFQ), into its Policy. Consequently, a short explanation of the RFQ is required here.

6. In the RFQ, the District sought to qualify child care providers to operate child care programs at the District’s elementary schools. The RFQ that was released by the District, on May 2, 2013, provided for:

- 1) uniform fees for all program services;^{2/}
- 2) no credit for fees paid, if a child was unable to use the child care program due to an absence;^{3/}
- 3) a \$10.00 surcharge on each registered student that a private vendor provided financial assistance to attend the after school program;^{4/} and
- 4) standards and criteria for the child care programs that required the programs to be staffed by certified teachers.^{5/}

Finally, and importantly, the RFQ allowed elementary school principals to decide whether or not to offer child care through private providers or for the school to operate its own “in-house” child care program.^{6/}

7. Sports Club participated in the RFQ process, and was identified as a qualified provider. Based on its approval as a qualified provider, Sports Club was given an opportunity to present its services to the District’s elementary school

principals in a webinar. Following the presentation, on May 29, 2013, five elementary school principals chose Sports Club as child care provider for their schools. However, Sports Club was not chosen as a provider for six other elementary schools that it had previously served under a contract with the District. In some instances, like Veterans Memorial Elementary School, the principal had decided to operate an "in-house" program, rather than selecting Sports Club.

8. After the selection process, Sports Club informed parents about the impending changes, and asked the parents to contact the School Board if they wanted to keep Sports Club as a child care provider. The School Board was to ratify the elementary school principals' decisions at a June 11, 2013, School Board meeting.

9. Many parents, on learning about the RFQ's terms and that Sports Club would no longer be providing child care at their child's elementary school, became extremely upset. A particular concern was the District's decision not to seek any parental involvement in the formulation of the RFQ and provisions setting the uniform fees, which increased the child care costs for the parents.

10. On June 3, 2013, the RFQ became the subject of an unadopted rule challenge brought by a parent. Rather than proceeding to a final hearing, the School Board elected to

initiate rulemaking concerning the unadopted rule challenge on September 13, 2013.

11. In the initial Notice of rulemaking, the School Board specifically stated that although a proposed text of the rule was not available, the RFQ's provisions regarding fees and program content would serve as a reference point.

12. During the rulemaking workshops on October 16, 2013, and November 13, 2013, the District's rule proposals amended certain provisions within the RFQ. Specifically, the proposals amended the RFQ's terms concerning the amount of the uniform fees to be charged;^{7/} the granting of credits in the limited instance when a child has a medical excuse for not attending the after school child care;^{8/} setting out a parental survey for assessing the child care programs;^{9/} and reducing the fee paid by private providers for using the District's facilities during the summer months.^{10/}

13. The School Board at its December 10, 2013, meeting, enacted Amended School Board Policy 2262, which incorporated the RFQ completely into the policy in paragraph "L." On its face, the School Board's language in paragraph "L" is not clear as to which version of the RFQ was incorporated. However, the testimony and attachments to the Amended School Board Policy show that the School Board's reference is referring to the RFQ, as the School Board had amended it during the rulemaking process.

14. Amended School Board Policy 2262, with the RFQ's terms setting out the uniform fees and program criteria, only applies to child care programs located at the District's elementary schools. Amended School Board Policy 2262 has no application for child care services off-site. The facts here show that Sports Club owns its own facility, and provides transportation to the Sports Club's private facility for students from some of the elementary schools that elected to provide "in-house" services. Parents sign a permission form, and Sports Club's bus transports the child from the elementary school to Sports Club's facility. At its private facility, Sports Club is free to offer child care programs at rates that it decides are appropriate, without any regard to the challenged rule.

15. Sports Club's claimed economic losses are the result of its decision to participate in the RFQ process, not the challenged rule. Sports Club was selected as a child care provider under the RFQ at the June 11, 2013, School Board meeting, and Sports Club subsequently entered into a contract with the District to provide child care services under the RFQ, on August 16, 2013. These events occurred months before the School Board adopted the challenged rule here at its December 10, 2013, meeting. Moreover, the undersigned found that Mr. Brettholtz credibly testified that the financial records provided by Sports Club did not follow accepted accounting

practices, and could not be used to support Sports Club's claimed economic losses.

CONCLUSIONS OF LAW

16. DOAH has subject matter jurisdiction pursuant to section 120.56(1), Florida Statutes, concerning whether the challenged rule is an invalid exercise of delegated legislative authority.

17. The School Board raised several defenses in response to Sports Club's rule challenge. One dispositive defense is that Amended School Board Policy 2262 is pursuant to the School Board's constitutional authority, and is not a delegated legislative authority under section 120.52(8), Florida Statutes.

18. The School Board derives its power to operate, control and supervise the local schools from the Florida Constitution. Art. IX, § 4(b), Fla. Const. The Legislature may not reallocate or delegate those powers. Chiles v. Children A, B, C, D, E and F, 589 So. 2d 260, 268-269 (Fla. 1991). The broad scope of the School Board's powers are recognized by the Legislature in section 1001.32(2), Florida Statutes, which provides:

District School Board. -In accordance with the provisions of s. 4(b) of Art. IX of the State Constitution, district school boards shall operate, control, and supervise all free public schools in their respective districts and may exercise any power except as expressly prohibited by the State Constitution or general law.

19. The School Board's ability to exercise its constitutional powers is also acknowledged in section 120.81, Florida Statutes. Section 120.81(1)(a), Florida Statutes, recognizes that "[n]otwithstanding s. 120.536(1) and the flush left provisions of s. 120.52(8), district school boards may adopt rules to implement their general powers under s. 1001.41." The flush left provisions under section 120.52(8), which recognizes that "[a]n agency may adopt only rules that implement or interpret the specific powers and duties granted by the enabling statute[,]'" is not applicable to a school board acting to implement their general powers, which are constitutionally derived.

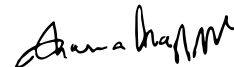
20. While the School Board has constitutional authority over local control of the public schools, the Legislature has the constitutional authority to maintain a statewide system of uniform system of education. Art. IX, § 1(a), Fla. Const. An area where the Legislature has asserted its constitutional authority to maintain a uniform system of statewide education is the Florida Education Code's statutes concerning the employment and discipline of school district instructional staff. See § 1012.33, Fla. Stat. Thus, in reviewing the School Board's action here, one must determine whether the challenged rule is one of local concern, and whether the Legislature has asserted its constitutional authority over the issue.

21. Applying the law to the School Board's challenged rule here, the undersigned finds that its Amended School Board Policy 2262 is an action pursuant to the School Board's constitutional powers, and is not a delegated legislative authority. The School Board's decision for the District to operate its own child care programs, to set uniform fees, and determine the criteria for child care programs located at District facilities is purely a local issue. The decision is a local issue because the challenged policy and the RFQ have no effect outside of the District's elementary schools that participate in the before and after school child care programs. Moreover, there is no express provision, either constitutional or statutory, prohibiting the School Board from: 1) deciding to offer "in-house" child care programs at its own facilities; 2) determining the rates to be charged by providers or vendors providing services at District's facilities; or 3) determining the program criteria and personnel for child care programs offered at the District's facilities. Consequently, as recognized in section 1001.32, Florida Statutes, the School Board here is free to adopt Amended School Board Policy 2262 in the exercise of its constitutional powers. It is not an invalid delegation of legislative authority.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, the Petitioner's and Intervenor's rule challenge is dismissed.

DONE AND ORDERED this 17th day of September, 2014, in Tallahassee, Leon County, Florida.



THOMAS P. CRAPPS
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 17th day of September, 2014.

ENDNOTES

^{1/} All references to Florida Statutes shall be to the 2013 edition, unless otherwise specified.

^{2/} Section 3.4 of the RFQ stated that after school child care for a full week, consisting of 4 to 5 days, cost \$50 per child, with a \$40 per child charge for Collier County Public School employees. The cost for a partial week, which consisted of 2 to 3 days per week, was \$40 per child, with no discount for District employees. The RFQ set the cost for one day drop off at \$20. The RFQ expressly stated that the "uniform fees" were "NOT negotiable." RFQ, § 3.4 (emphasis in original).

^{3/} Section 3.4 of the RFQ provided that "Students must be enrolled and tuition is expected to be paid weekly whether the enrolled child is in attendance or not (i.e. absence due to illness, appointments or other reasons)." Consequently, under the RFQ, a parent who had paid for child care would not be given

a credit if his or her child was unable to use the child care service.

^{4/} Section 3.7 of the RFQ.

^{5/} The RFQ envisioned that qualified providers would operate child care programs at the school facilities that included academic programs staffed by certified teachers, and incorporated standards set out by the National Association for Elementary School Principals. RFQ §§ 3.9 and 4.0.

^{6/} There was no evidence that the District personnel made any economic study to determine the potential costs of running the after school child care programs, and correlate the uniform fees set by the District in its RFQ with the costs of the program.

^{7/} Revised section 3.4 of the RFQ, table found in School Board's Exhibit 1 at page 78.

^{8/} Revised section 3.6 of the RFQ, Credit for Prepayment for Health Reasons found in School Board's Exhibit 1 at page 79.

^{9/} Revised RFQ, Exhibit D found in School Board's Exhibit 1 at page 83, and paragraph K of Amended School Board Policy 2262.

^{10/} Revised section 3.7, RFQ, School Board's Exhibit 1 at page 80. Under the original terms of the RFQ, private child care providers were required to pay the School District 30 percent of total monthly tuition charged for all students in the program during the summer months. Under the proposed revision, the private child care provider's payment was reduced to 20 percent of total monthly tuition charged for all students in the program.

COPIES FURNISHED:

Kevin William Pendley, Esquire
Grant Fridkin Pearson, P.A.
5551 Ridgewood Drive, Suite 501
Naples, Florida 34103
(eServed)

Steven J. Bracci, Esquire
Steven J. Bracci, P.A.
9015 Strada Stell Court, Suite 102
Naples, Florida 34109
(eServed)

Jon D. Fishbane, Esquire
Collier County School Board
5775 Osceola Trail
Naples, Florida 34109
(eServed)

James D. Fox, Esquire
Roetzel and Andress
850 Park Shore Drive, Suite 300
Naples, Florida 34103-3587
(eServed)

Kamela Patton, Superintendant
Collier County School Board
5775 Osceola Trail
Naples, Florida 34109-0919

Pam Stewart, Commissioner
Department of Education
Turlington Building, Suite 1514
325 West Gaines Street
Tallahassee, Florida 32399-0400
(eServed)

Lois Tepper, Interim General Counsel
Department of Education
Turlington Building, Suite 1244
325 West Gaines Street
Tallahassee, Florida 32399-0400
(eServed)

Kenneth Plante, Esquire
Joint Administrative Procedures Committee
Room 680, Pepper Building
111 West Madison Street
Tallahassee, Florida 32399-1900
(eServed)

Liz Cloud, Program Director
Administrative Code
Department of State
R.A. Gray Building, Room 101
Tallahassee, Florida 32399
(eServed)

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 administrative appeal with the agency clerk of the Division of Administrative Hearings within 30 days of rendition of the order to be reviewed, and a copy of the notice, accompanied by any filing fees prescribed by law, with the clerk of the District Court of Appeal in the appellate district where the agency maintains its headquarters or where a party resides or as otherwise provided by law.