STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LAUREN LINARES, CECILIA LOYOLA, JAMES STANLEY, SAMUEL UNGER, JACOB UNGER, AND CATHERINE UNGER,

Petitioners,

and

JESSICA MAJER, KARL MAGER, MARSHA MAJER, AMBER DINICOLA, ALEXIS DINICOLA, JOSEPH DINICOLA, ALEXA MCPHERON, MICHELE MCPHERON, NICHOLAS CARVALHO, MICHELLE CARVALHO, NOAH RADLE, BENJAMIN RADLE, STEPHEN RADLE, BRADY NESSLER, AJ NESSLER, EVELYN NESSLER, ANTHONY NESSLER, DOMINIC FAIELLA, AND ALISON FAIELLA,

Intervenors,

vs. Case No. 17-00495RP

SCHOOL BOARD OF PASCO COUNTY,

Respondent.
_____/

FINAL ORDER

On February 27 and 28, 2017, D.R. Alexander, an Administrative Law Judge of the Division of Administrative Hearings (DOAH), conducted a final hearing in this case in Land O' Lakes, Florida.

APPEARANCES

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STATEMENT OF THE ISSUES

The issues are whether the proposed change of school attendance boundaries for five middle schools and five high schools (West Side Schools) located in southwest Pasco County (County) is a rule, and, if so, whether the proposed rule is an invalid exercise of delegated legislative authority.

PRELIMINARY STATEMENT

On January 17, 2017, the School Board of Pasco County (School Board or district) approved a change of school attendance boundaries for West Side Schools for school year 2017-2018. On January 20, 2017, Petitioners, three students and/or their parents, filed a Petition Challenging Validity of Proposed Rule (Petition) contending the new boundary for the West Side Schools is an invalid exercise of delegated legislative authority. The Petition was later twice amended. As a basis for relief, it relies primarily on procedural errors

committed by the district during the rezoning process. On February 20, 2017, a Motion for Leave to Intervene filed on behalf of 24 students and/or their parents was granted.[1/]

Because a dispute of material facts existed, Petitioners' Motion for Summary Final Order to Remand Proceedings to District was denied.

At the hearing, Petitioners and Intervenors presented the testimony of 12 witnesses. Also, Petitioners' Exhibits 1-3, 5-17, and 19-25 were accepted in evidence. One exhibit was accepted on a proffer only basis.[2/] The School Board presented the testimony of five witnesses. School Board Exhibits 1-6, 8, 10, 11, 13-28, 33, and 35-41 were accepted in evidence.

A four-volume Transcript of the proceeding was filed. Proposed final orders (PFOs) were filed by Petitioners/ Intervenors and by the School Board, and they have been considered in the preparation of this Final Order.

FINDINGS OF FACT

1. The School Board is an educational unit and an agency defined in sections 120.52(1)(a) and (6), Florida Statutes. One of its duties is to assign students to schools after consultation with the Superintendent. See § 1001.41(6), Fla. Stat.

2. The School Board has divided the County into geographic areas for purposes of drawing attendance boundaries. At issue

here is an area that encompasses the West Side Schools, comprised of 35 designated areas, all west of the Sunshine Parkway, in which five middle schools and five high schools are located.

3. Petitioners and Intervenors are students or parents who reside in area 12. Students in area 12 are currently assigned to J.W. Mitchell High School (Mitchell) or Seven Springs Middle School (Seven Springs). With a few exceptions cited below, under the new attendance plan, area 12 students will be reassigned to the River Ridge Middle School or River Ridge High School (River Ridge) beginning in school year 2017-2018. Only the rezoning for area 12 is being challenged in this case. Around 140 students will be moved from Mitchell and Seven Springs to other schools during the first year.

4. Intervenors Evelyn Nessler and Dominic Faiella, who are in the third and second grades, respectively, will not change schools this fall and are unaffected by the new rezoning. Petitioner Nicholas Carvalho is currently in the eighth grade at Seven Springs and, as a result of his graduation, will be assigned to River Ridge this fall. Intervenor Brady Nessler is in the terminal grade for elementary school and, upon graduation, will be assigned to River Ridge this fall. Thus, the reason for reassignment of Carvalho and Nessler is unconnected to the new rezoning.

5. The County is experiencing an increase in population caused by new residential development in the western part of the County. As a result, enrollment in some West Side Schools has exceeded capacity. For the spring term of school year 2016-2017, Mitchell exceeds capacity by 18 percent, while Seven Springs exceeds capacity by 22 percent. Without a change in boundaries, in school year 2017-2018, Mitchell is projected to exceed capacity by 27 percent, while Seven Springs is projected to exceed capacity by 31 percent. In contrast, both River Ridge High School and River Ridge Middle School are currently below capacity, operating at 86 and 93 percent capacity, respectively. The over-capacity at the two schools is expected to continue, as more residential development is being planned in the State Road 54 corridor near area 12, Mitchell, and Seven Springs.

6. To counter this condition, attendance zones are periodically redrawn in an effort to balance school enrollment. A School Board planner recalled there have been 27 boundary changes during his tenure as an employee. This case, and one other, Case No. 17-0629RP, which challenges the East Side Schools rezoning plan, are the first instances when attendance zones have been formally challenged. As the Superintendent observed, school rezoning "can be an incredibly painful process" because parents often move into neighborhoods with the belief that schools come with the homes. A fair assumption is that as

long as rezoning does not affect their children, parents are content with a new rezoning plan.

7. Because of anticipated growth in the County and existing disparities in school enrollment, in August 2016, the Superintendent instructed his planning staff to begin the process of developing a plan for amending school attendance boundaries, including the West Side Schools. The stated goal was to "review and alter the southwest secondary school boundaries in order to redistribute the school populations between overcrowded and under crowded schools and to provide for future growth as much as possible." Resp. Ex. 17, p. 00285. He further directed that a recommendation be formulated in time for the School Board to approve a new plan before February 1, 2017. This deadline was necessary because by April of each year, the School Board must prepare a proposed budget for the following year; adequate lead time is required to develop a new transportation routing plan; and once new boundary lines are drawn, an open enrollment plan, known as the School Choice program, allows students, between February 1 and March 1 of each year, to apply for enrollment in another school, i.e., in this case their former school.

8. The School Board has adopted a set of Bylaws and Policies, which apply to "Legislative/Policymaking," or rulemaking, and follow the requirements found in chapter 120.

See Pet'r Ex. 1. Policy 0131 provides that "the term 'rule' and 'policy' shall have the same definition." Id. at 1. The policy spells out in detail the procedural requirements for adopting policies (rules), which include notice of the proposed policy, a hearing, preparation of a rulemaking record, Board action, and appropriate notices. Id. at 2-3. The policy also describes how a substantially affected person may challenge a proposed policy (rule). Id. at 4.

9. Reference to a "rule" and chapter 120 was made in various announcements, notices, and statements throughout the rezoning process. Also, the School Board acknowledges in a discovery response that section 120.54 is one of the statutes that apply to the rezoning process. Even so, the School Board takes the position that its policies and chapter 120 do not govern the redrawing of attendance boundaries. As a consequence, the Superintendent did not review the Bylaws and Policies or chapter 120 before he established the rezoning process. As explained by one witness, the School Board has not used formal rulemaking in prior rezoning plans, and it was its intention to follow usual past practice.

10. The Superintendent opted to follow the same rezoning process used since at least 2004 or 2005. Under this process, a boundary committee, advisory in nature, is appointed for the purpose of developing multiple boundary maps and then

recommending one of them to the Superintendent. The Superintendent does not attend the meetings or direct any member to draw a plan in a particular way. The Superintendent considers, but is not required to accept, the committee recommendation. A parent meeting is also conducted to allow parents to provide input into the process. After the committee and parent meetings are concluded, the committee submits a recommendation to the Superintendent, who then submits a final recommendation to the School Board. By law, two adoption hearings must be conducted by the School Board, which makes the final decision.

11. A boundary committee is comprised of parents, district staff, and principals of affected schools. The committee is intended to represent the interests of students, parents, communities, schools, and the district. The committee for the West Side Schools consisted of 27 members, three of whom reside in Longleaf, a residential community in area 12 where most Petitioners and Intervenors reside.

12. During the rezoning process, a committee will typically conduct three meetings before making its recommendation. In this case, the Superintendent scheduled a fourth meeting to be held after the parent meeting so that parent input could be considered.

13. In developing new school attendance boundaries, the committee was instructed to follow certain guidelines. Under these guidelines, a new boundary should provide socioeconomic balance, maintain to the extent possible an in-line feeder pattern, provide for future growth and capacity, provide safe and efficient transportation, maintain subdivision integrity, and consider long-term school construction plans. See Pet'r Ex. 23. The committee was also given "lots of information" at the first meeting including, among other things, existing and projected enrollments for each school for school years 2016-2017 and 2017-2018; five and ten-year projected enrollments for each school; long-term school construction plans; future growth potential in the area; minority, low income, and special education population by area; and total population history for each school.

14. The School Board employs a full-time public information officer who directs and coordinates the dissemination of information to the public. This is accomplished through social media (Twitter, Instagram, and Facebook) and a School Board website accessible to the public. In addition, a special zoning website was established during the rezoning process. The website and social media profiles are identified on the inside front cover of the student planner issued to every student at the beginning of the school year.

15. The district also operates a program known as School Connect, which is capable of sending telephone messages, emails, and text messages to the parents. School Connect was used to make automated telephone calls to the contact telephone number listed on a student's information card informing the parents of the time and date of the parent meeting. See Resp. Ex. 6. All parents with a valid telephone number received a call, although some parents either did not personally answer the call or did not remember its substance. School Connect also sent emails and texts to parents, including notification of the plan the Superintendent was going to recommend to the School Board.

16. Signs and notices regarding the rezoning were not posted in the neighborhoods before any meeting. However, multiple notices were posted on social media and websites, and text messages, emails, and telephone messages were sent to parents. This constituted substantial compliance with the requirement that notice of rulemaking be "post[ed] in appropriate places so that those particular classes of persons to whom the action is directed may be duly noticed." § 120.81(1)(d)3., Fla. Stat.

17. Besides telephone calls, text messages, emails, and social media, on November 7, 2016, letters were sent to affected parents informing them of the parent meeting on November 14, 2016. See Resp. Ex. 3. Although the final plan was not known

at that time, the letter put parents on notice that Mitchell and Seven Springs were overcrowded due to the influx of new homes being built in that area.

18. Many parents knew as early as August 2016 that a new rezoning plan was going to be adopted that fall, but none believed area 12 would be affected due to its proximity to Mitchell and Seven Springs. This mistaken belief probably explains why some parents did not diligently follow the process until the parent meeting or even the School Board meetings when a final plan was adopted. However, one Intervenor formed a group known as "Delay West Pasco Rezoning" in August 2016 in an effort to prevent area 12 from being moved. There is no evidence that any parent or homeowner association requested that they be provided advance written notice of any meeting during the entire process.

19. On September 6, 2016, the procedures for school rezoning were announced on Facebook and other social media. A press release for various media was issued on September 14, 2016. The press release provided the day, time, and location of each boundary committee meeting. The press release was also published on the School Board's Twitter account.

20. The boundary committee for the West Side Schools was appointed on September 16, 2016.

21. Committee meetings were conducted on October 5, October 26, and November 7, 2016. These meetings were open to the public, and all were live-streamed on YouTube.com., although some parents say portions of the broadcast were inaudible. The meetings were also broadcast live on the School Board's Facebook account, and a link to the broadcast was published on its Twitter account. Only around 30 parents attended each meeting.

22. Members of the public who attend the committee meetings are observers only, they do not have input into the meeting process, and they are not allowed to participate in committee discussions. However, there is nothing to prevent an observer from asking a member a question before or after the meeting, or in another setting. As noted above, three committee members lived in Longleaf where most Petitioners and Intervenors reside, and members were encouraged to speak with neighbors and homeowner associations to keep them updated on what was occurring. All documents considered by the committee were posted on the School Board and special zoning websites. Finally, minutes for each meeting, which summarized decisions of the committee and gave notice to parents as to which path the committee was taking, were published before the following meeting.

23. On November 14, 2016, "hundreds" of parents attended a parent meeting, which lasted more than three hours. Before the

meeting began, parents were told which options were still being considered by the committee. Although committee members were present, Petitioners stated that questions were not answered by the members, and the entire meeting consisted of comments by the parents. So that their input would be considered, the Superintendent scheduled a fourth committee meeting on November 17, 2016.

24. Five plans were considered by the committee at its fourth meeting, but there was no consensus on which plan to adopt. By a 13-to-12 vote, with two members absent, the committee recommended approval of a new plan known as Plan 4A2, which was posted on the website and social media the same day. Under the plan, effective school year 2017-2018, area 12 students (and others) would be reassigned to River Ridge. Notably, Plan 5A2, the option with the second most votes, garnered 12 votes and is "very similar" to Plan 4A2. It also reassigned area 12 students to River Ridge. The River Ridge joint campus is approximately eight or nine miles north of area 12, while Mitchell and Seven Springs, also a joint campus, are only two or three miles south of area 12. The Superintendent concurred in the recommendation to approve Plan 4A2 with one modification which did not affect area 12: students in areas 1 through 4, previously unaffected, would be reassigned to Gulf Middle School and Gulf High School.

25. In developing the new plan, the committee followed the guidelines given to it at the outset of the process. The new plan took into account future growth and capacity of the schools. Consideration was also given to providing socioeconomic balance. Subdivision integrity was maintained, in that the entire Longleaf community was reassigned to the same schools. During the development of the plan, the committee had available the long-term school construction plans of the district. The district transportation coordinator was a member of the committee and ensured that the new plan provided safe and efficient transportation. Finally, because of overcrowding and anticipated growth in the area, the school feeder pattern structure, which now directs area 12 students to Mitchell and Seven Springs, was necessarily impacted. On balance, however, the guidelines were observed.

26. A few alternative plans were submitted by parents during the committee process, including at least one plan prepared by an unidentified observer that was left on the committee's table before a meeting. The alternative plans are not of record.

27. Pursuant to other district policies, certain exceptions apply to the new area 12 attendance boundary. Students who are rising seniors at Mitchell are grandfathered and remain at Mitchell. Students approved under the School

Choice program to remain in Mitchell or Seven Springs may also do so. To take advantage of this program, a student must give a valid reason, such as hardship, separation of siblings, participation in certain extracurricular activities, or acceptance into the Mitchell Academy for Medical Arts Program, which is not offered at River Ridge. Many Petitioners and Intervenors have applied for School Choice to remain at Mitchell or Seven Springs, but there is no guarantee their requests will be approved.

28. Notice of the Superintendent's recommended plan, including the map, was posted on the Board's website seven days before the first School Board meeting. In addition, the same information was posted on the district's Twitter and Facebook accounts, and emails were sent to those parents who provided an email address. Finally, the Superintendent published a letter on December 12, 2016, explaining his reasons for recommending Plan 4A2. It is fair to say that all parents had actual notice well before the first School Board meeting that area 12 was being reassigned to different schools.

29. On November 20, 2016, a Public Notice (Notice) was published in the Tampa Times advising that a first reading on the new school attendance boundaries would be conducted by the School Board on December 20, 2016, and that final action would

be taken at a second meeting on January 17, 2017. The Notice read in relevant part as follows:

> PUBLIC NOTICE
> INTENT TO ADOPT A RULE TO ESTABLISH SCHOOL BOUNDARIES FOR THE 2017-2018 SCHOOL YEAR
>
> The District School Board of Pasco County intends to change attendance boundaries for the 2017-2018 school year for the schools listed below:
>
> * * *
>
> West Pasco County Schools
>
> Chasco Middle, Gulf Middle, Paul R. Smith Middle, River Ridge Middle, Seven Springs Middle, Anclote High, Gulf High, J.W. Mitchell High, Ridgewood High, River Ridge High
>
> First reading on this matter is scheduled for the regular meeting of the District School Board of Pasco County on December 20, 2016.
>
> School Board action on this matter is scheduled for the regular meeting of the District School Board of Pasco County on January 17, 2017.

30. Even though none of Petitioners or Intervenors read the Notice, they now complain that it does not contain a detailed summary of the new boundary lines, a reference to the grant of rulemaking authority, a reference to the statute being implemented, a summary of the estimated regulatory costs, or the other details normally included in agency rulemaking pursuant to section 120.54. There is, however, no evidence that the parents

were prejudiced by a lack of more information in the Notice. With the exception of those parents who voluntarily chose not to attend, virtually all other parents who were not working or were not out of town had actual notice and attended the two School Board meetings.

31. Sensing that Plan 4A2 was going to be selected, on December 17, 2016, with the assistance of a committee member who happened to be an attorney, Petitioners James Stanley and Cecilia Loyola, husband and wife, drafted a letter to the Superintendent and School Board Chairman. See Pet'r Ex. 2. The letter stated the proposed rule (new attendance boundaries) was arbitrary and capricious. It requested (a) a workshop pursuant to section 120.54(2)(c) mediated by a neutral party, and (b) the attendance of committee members at the workshop to answer questions. The letter also asked that if a workshop was not conducted, the rulemaking process be suspended and a separate draw-out proceeding be conducted pursuant to sections 120.569 and 120.57. Finally, the letter asserted that by limiting each speaker to only "one or three minutes," the School Board was violating section 120.54(3)(c). This was the first and only time that a parent invoked a chapter 120 rulemaking requirement in an effort to slow or derail the rezoning process.

32. The letter was delivered to the Superintendent and Board Chairman on the day of the meeting. By that late date,

the request was untimely, and the Superintendent had insufficient time to prepare a written response stating why a workshop was unnecessary, as required by section 120.54(2)(c). See § 120.54(3)(c)2., Fla. Stat. (a person must "timely" assert and affirmatively demonstrate to the agency that the rulemaking proceeding does not protect his substantial interests). No draw-out or workshop was conducted, and except for the Superintendent's reply letter, discussed below, no formal ruling was made by the School Board at the meeting on the untimely draw-out and workshop requests.

33. On February 17, 2017, the Superintendent replied to the Stanley/Loyola letter. See Pet'r Ex. 3. The three-page letter outlined the multi-step rezoning process that was followed by the School Board, the efforts to solicit and facilitate parent participation, and the numerous types of notice given to the parents. Thus, he concluded that a workshop was unnecessary.

34. At both School Board meetings, members of the public were allowed to speak. Normally, one hour of public testimony is permitted for an agenda item, with a three-minute time limitation for each speaker. Because three sets of attendance boundary plans were being considered as a single item, this time was expanded, and each plan was allotted one hour, for a total of three hours. To accommodate the large turnout of parents

wishing to speak (58), only 90 seconds was allotted to each speaker, including those representing groups. Given the time constraints, not every parent was given the opportunity to speak. However, 16 speakers who were not allowed to speak at the first meeting were scheduled to speak first at the second meeting on January 17, 2017.

35. Committee members were not required to attend either School Board meeting to explain Plan 4A2 or to answer questions posed by the audience. At this point in the process, the Superintendent, and not the committee, bore the responsibility of making a final recommendation to the School Board and to answer any questions members had. At the close of public comment on December 20, 2016, the School Board considered and approved Plan 4A2. However, one Board member suggested a modification to Plan 4A2, which would delay by one year the reassignment of students in areas 1 through 4 from Mitchell and Seven Springs to Gulf High School and Gulf Middle School. In all other respects, Plan 4A2 remained the same. This suggestion was to be reviewed by the Superintendent prior to the second meeting the following month.

36. On January 17, 2017, the day of the second School Board meeting, the Superintendent sent a memorandum to School Board members regarding the rezoning issue. Among other things, he stated that "[t]he establishment of school attendance

boundaries is authorized by Section 1001.42, Florida Statutes. In addition, the Administrative Procedures [sic] Act requires that the District publish a Notice of Intent to Adopt a Rule twenty-one days prior to the public hearing. The first reading was held on December 20, 2016." Pet'r Ex. 19.

37. On January 17, 2017, the day of the second School Board meeting, the Superintendent tweeted on his Twitter account that he intended to recommend the adoption of Plan 4A2, as modified. See Pet'r Ex. 9. After public comment, final action was taken by the School Board and Plan 4A2 was adopted as the new school attendance boundaries for the West Side Schools. Unlike typical agency rulemaking, the adopted plan is in the form of a map, rather than a numbered rule. See Resp. Ex. 16.

38. The additional cost for parents to transport their children to a new school is highly speculative, and no evidence was adduced to show that the new plan would increase regulatory costs, directly or indirectly, more than $200,000.00 within one year after implementation. See § 120.54(3)(a)b., Fla. Stat. Therefore, a statement of estimated regulatory costs for implementing the new boundary lines was not prepared by the School Board, and none was requested nor submitted by a third party.

39. As required by section 120.54(3)(e)6., a copy of the new boundaries was filed with the "office of the agency head" after it was adopted at the second meeting.

40. The parties stipulated that had the students who are named as parties testified at the final hearing, they would have reiterated the allegations set forth in the Second Amended Petition and Motion for Leave to Intervene. These include allegations that the students will be emotionally affected by the transfer; they will be separated from friends, teachers, counselors, and certain extracurricular programs in which they now participate; the change will limit their ability to walk or bike to school; and they will have increased travel time to attend the new schools.

41. The parents expressed a wide range of concerns with the new attendance boundaries. Many wondered why area 13, which lies just west of area 12, was not reassigned to River Ridge. However, the committee decided early on to use State Road 54 as a demarcation line, sending students who reside north of State Road 54 to River Ridge. Area 12 lies north of the roadway, while area 13 is just south of the line. The reassignment of area 12 students was based on this consideration and is not illogical or unreasonable.

42. Most parents purchased their homes with the understanding that their children would always be attending the

schools located closest to their homes. The new school assignments will result in longer bus rides, inconvenience for parents who drive their children to school in the morning, or pick them up after regular school hours if they participate in extracurricular activities. The parents also noted that driving on Starkey Boulevard (Starkey) is the shortest route to the new schools. They described the route as unsafe and one that requires them to make a difficult left turn onto Starkey when leaving Longleaf. There are, however, other routes to the new school, and the district transportation coordinator established that student safety is a top priority.

43. Several parents, including one who is a realtor, expressed a concern that the value of their homes would decline since buyers would not choose to purchase a home if their children could not attend the schools closest to their homes. However, the record gives no indication that any homes have been offered for sale, any homes have been sold at a distressed price, or any homeowners have not been able to sell their homes due to the proposed rezoning.

44. Parents are concerned that River Ridge does not have the same clubs, extracurricular activities, or educational opportunities that are found in Mitchell and Seven Hills. The record shows, however, that both schools are ranked as "B" schools; they have the same core academic and educational

programmatic offerings; they both have advanced offerings for students who excel; they both have magnet programs; and both are accredited by AdvancED/Southern Association of Colleges and Schools. There is no evidence that classes currently available at Mitchell and Seven Hills will not be available at River Ridge this fall, or even that such classes will remain available to the students at Seven Springs and Mitchell. In summary, there is no evidence that the students will not have the same educational opportunities at the River Ridge schools as they now receive at Mitchell and Seven Springs.

45. Some students visit doctors and dentists who have offices near Mitchell and Seven Springs. Having to travel from River Ridge to those offices will be more time-consuming and inconvenient. This is not, however, a ground to invalidate a rule.

46. It was contended that some parents provide a false address to the School Board in order to have their children enrolled in Mitchell and Seven Springs, rather than their assigned schools under the current school attendance plan. Petitioners assert that if all addresses are verified, those students can be removed, and the overcrowding at Mitchell and Seven Springs alleviated. However, no evidence to support this assertion was produced.

47. Some parents complained that emails requesting answers to questions that were sent to the Superintendent or planning staff during the process were never answered. Although the Superintendent instructed staff to reply to all emails, if hundreds or thousands of emails were received by staff during the process, it is likely that some were not answered.

CONCLUSIONS OF LAW

48. A threshold issue in this proceeding is whether the redrawing of attendance boundaries is a rule. Despite conceding that section 120.54 applies to school rezoning, and having made numerous references to rulemaking throughout the process, the School Board contends assigning students to schools constitutes legislative action taken pursuant to section 1001.41(6), and not rulemaking. It asserts that Petitioners' only remedy is to file an action in circuit court.

49. The power to adopt new boundary lines is found in section 1001.41(6), which provides as follows:

> The district school board, after considering recommendations submitted by the district school superintendent, shall exercise the following general powers:
>
> * * *
>
> (6) Assign students to schools.
>
> * * *

50. To implement this duty, section 120.81(1)(a) provides in part that "district school boards may adopt rules to implement their general powers under s. 1001.41." Also, section 1001.41(2) authorizes district school boards to "[a]dopt rules pursuant to ss. 120.536(1) and 120.54 to implement the provisions of law conferring duties upon it to supplement those prescribed by the State Board of Education and the Commissioner of Education."

51. The term "rule" is defined in section 120.52(16) to mean:

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

52. As the First District Court of Appeal explained many years ago, "[t]he breadth of the definition in section 120.52(1[6]) indicates that the legislature intended the term to cover a great variety of agency statements regardless of how the agency designates them." State Dep't of Admin. v. Harvey, 356 So. 2d 323, 325 (Fla. 1st DCA 1977).

53. An agency statement can be a declaration, expression, communication, or even a map. The map reflects the School Board's position with regard to school attendance boundaries,

and there is little or no room for discretionary application. It has general applicability in that it applies uniformly to students who attend West Side Schools and reside within areas 1 through 35, and it implements the general power to assign students to schools. The map is a rule, as defined by section 120.52(16).

54. This conclusion is consistent with a long string of administrative decisions, which hold that the drawing of school attendance boundaries is a rule. See Fischer v. Orange Cnty. Sch. Bd., Case No. 07-2760RP (Fla. DOAH Apr. 11, 2008); Citrus Oaks Homeowners Ass'n, Inc. v. Orange Cnty. Sch. Bd., Case No. 05-0160RP (Fla. DOAH Aug. 1, 2005), aff'd 942 So. 2d 897 (Fla. 4th DCA 2006); SC Read, Inc. v. Seminole Cnty. Sch. Bd., Case No. 04-4304RP (Fla. DOAH Mar. 17, 2005), aff'd 951 So. 3d 3 (Fla. 5th DCA 2007); Plantation Residents' Ass'n, Inc. v. Sch. Bd. of Broward Cnty., Case No. 82-0951RP (Fla. DOAH July 14, 1982), aff'd 424 So. 2d 879 (Fla. 1st DCA 1982), pet. for rev. denied, 436 So. 2d 100 (Fla. 1983); White v. Sch. Bd. of Leon Cnty., Case No. 81-1608RP (Fla. DOAH Aug. 10, 1981); McGill v. Sch. Bd. of Leon Cnty., Case No. 80-0775RP (Fla. DOAH July 11, 1980). See also Polk v. Sch. Bd. of Polk Cnty., 373 So. 2d 960, 961 (Fla. 2d DCA 1979)("[b]y definition, the action of the school board in adopting the attendance plan constituted the making of a rule").

55. The School Board contends, however, that chapter 1001, which replaced former chapter 230 in 2002, implicitly abrogates the requirement that school boards assign students to schools through rulemaking.

56. Administrative controversies concerning school attendance zones began in the late 1970s. Under the statutory scheme in place at that time, schools boards were granted the general power to adopt student "attendance areas" pursuant to section 230.23(4)(a), Florida Statutes (1979). To implement this duty, school boards were authorized to "adopt rules and regulations." See § 230.22(2), Fla. Stat. (1979).

57. This statutory scheme continued, with minor modifications and renumbering, until 2002, when the Legislature repealed chapter 230 and replaced it with new chapter 1001. Except for renumbering and minor changes in the text, the rezoning process is essentially the same. Under existing law, school boards still have the general power to "assign students to school" pursuant to section 1001.41(6), and to implement that power by adopting rules pursuant to sections 120.81(1)(a) and 1001.41(2). Nothing in the current statutory scheme or legislative history suggests that the Legislature intended to "implicitly abrogate" the process of changing boundary lines by rulemaking in favor of legislative action. The contention is rejected.

58. In its PFO, the School Board contends that if the new boundary is a rule, any challenge would be against an existing rule, rather than a proposed rule, as the School Board adopted the boundaries at its January 17 meeting, and it became effective on that date.

59. Resolution of this issue is significant because it determines which party has the burden of proof and whether the challenged rule is entitled to a presumption of validity in this proceeding. The School Board's argument is based on language in section 120.54(3)(e)6., which provides that if an agency does not have to file its rule with the Department of State, the rule becomes effective "when adopted by the agency head." However, section 120.54(3)(e)6. cannot be squared with the periods established in section 120.56(2)(a) for challenging a proposed rule. Under the latter statute, a proposed rule can be challenged "within 10 days after the final public hearing is held on the proposed rule as provided in s. 120.54(3)(e)2." The Petition in this case was filed three days after the second School Board meeting. If the proposed rule became effective upon adoption, as the School Board contends, Petitioners and other substantially affected persons would have been denied their right to challenge the rule within the period provided by section 120.56(2)(a). The construction of the statute in this manner would produce an absurd result and be inconsistent with

the intent underlying chapter 120 to allow wide citizen participation. The Petition is properly framed as a challenge to a proposed rule.

60. Petitioners and Intervenors have the burden of proving by a preponderance of the evidence that they are substantially affected by the proposed rule. See § 120.56(2)(a), Fla. Stat. The School Board then has the burden to prove by a preponderance of the evidence that the proposed rule is not an invalid exercise of delegated legislative authority as to the objections raised. Id.

61. To have standing to challenge a proposed rule, the challenger must be "substantially affected" by the proposed rule. § 120.56(2)(a), Fla. Stat. A person is substantially affected if the proposed rule is or will be applied to that person as a basis for the agency action. Standing is not predicated on showing that the challenger would prevail on the merits of the proceeding. It is sufficient to show that the challenger was subjected to the rule as a basis for the School Board's action. Except for the four students named in Finding of Fact 4, each parent/student presented evidence to show they have substantial interests that could be affected by the proposed rule. Therefore, they have standing to challenge the new boundaries. See, e.g., Abbott Labs. v. Mylan Pharms., 15 So. 3d 642, 651 n.2 (Fla. 1st DCA 2009); Cole Vision Corp. v.

Dep't of Bus. & Prof'l Reg., 688 So. 2d 404, 407 (Fla. 1st DCA 1997)(recognizing "a less demanding standard applies in a rule challenge proceeding than an action at law, and that the standard differs from the 'substantial interest' standard of a licensure proceeding"). See also Cortese v. Sch. Bd. of Palm Bch. Cnty., 425 So. 2d 554, 555 (Fla. 4th DCA 1982)(changing of school boundaries affects the substantial interests of parents of children).

62. Section 120.52(8) defines "invalid exercise of delegated legislative authority" to mean:

> [A]ction that goes beyond the powers, functions, and duties delegated by the Legislature. A proposed or existing rule is an invalid exercise of delegated legislative authority if any one of the following applies:
>
> (a) The agency has materially failed to follow the applicable rulemaking procedures or requirements set forth in this chapter;
>
> (b) The agency has exceeded its grant of rulemaking authority, citation to which is required by s. 120.54(3)(a)1; [or]
>
> (c) The rule enlarges, modifies, or contravenes the specific provisions of law implemented, citation to which is required by s. 120.54(3)(a)1.
>
> (d) The rule is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency;
>
> (e) The rule is arbitrary or capricious. A rule is arbitrary if it is not supported by logic or the necessary facts; a rule is

> capricious if it is adopted without thought or reason or is irrational; or
>
> (f) The rule imposes regulatory costs on the regulated person, county, or city which could be reduced by the adoption of less costly alternatives that substantially accomplish the statutory objectives.
>
> A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may adopt only rules that implement or interpret the specific powers and duties granted by the enabling statute. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious or is within the agency's class of powers and duties, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than implementing or interpreting the specific powers and duties conferred by the enabling statute.

63. The unlettered, "flush left" paragraph at the end of section 120.52(8) is not implicated in this proceeding. See § 120.81(1)(a), Fla. Stat. ("Notwithstanding 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.").

64. Of the lettered paragraphs in section 120.52(8), Petitioners' challenge to the proposed rule is based upon paragraphs (a), (d), (e), and (f).

Compliance with Rulemaking Procedures

65. Although the Petition raises 19 procedural grounds, upon which Petitioners argue that the proposed rule is invalid under section 120.52(8)(a), in the main, these grounds boil down to alleged procedural errors during the rule development and rule adoption phases of rulemaking.

66. The School Board is an agency for purposes of chapter 120. See § 120.52(1)(a), Fla. Stat. Educational units are exempted from filing documents with the Joint Administrative Procedure Committee and may publish their notices in a local newspaper rather than the Florida Administrative Register. See § 120.81(1)(d) and (e), Fla. Stat. And they are not required to include the full text of the rule in notices. Id. However, they are not exempt from any other steps in the rulemaking process.

67. The rulemaking process requires notice and opportunity for public input during the rule development phase and rule adoption phase. See § 120.54(2) and (3), Fla. Stat.

68. Petitioners contend that proper notice of rule development was not made, as required by section 120.54(2)(a). However, notice procedures for educational units are governed by

section 120.81(1)(d), and not section 120.54. To comply with the statute, the School Board must provide notice:

> 1. By publication in a newspaper of general circulation in the affected area;
>
> 2. By mail to all persons who have made requests of the educational unit for advance notice of its proceedings and to organizations representing persons affected by the proposed rule; and
>
> 3. By posting in appropriate places so that those particular classes of persons to whom the intended action is directed may be duly notified.

69. Rule development must have occurred during October and November 2016 when four committee meetings and one parent meeting were conducted. Although not labeled as such, these meetings could also constitute a workshop. A legal advertisement for this phase of the process was not published, but notice was provided through the School Board's website, special rezoning website, social media, and School Connect. There is no evidence that any person requested advance written notice of rule development meetings. It is fair to conclude from the evidence that Petitioners and Intervenors had actual notice of the committee and parent meetings, as most attended or watched the committee meetings by live streaming, they provided comments at the parent meeting, or they voluntarily chose not to attend. Thus, a failure to properly notice rule development was harmless error where Petitioners had actual notice of the

process. See Ag. for Health Care Admin. v. Fla. Coal. of Prof'l Lab. Orgs., Inc., 718 So. 2d 869, 873 (Fla. 1st DCA 1994).

70. An agency "may" hold a workshop on rule development. § 120.54(2)(c), Fla. Stat. It "must" hold one "if requested in writing by any affected person, unless the agency head explains in writing why a workshop is unnecessary." Id. In this case, a written request was filed after the rule development phase was completed, and on the day of the first adoption hearing. Under these circumstances, it was impossible for the Superintendent to prepare a reasoned response in a timely fashion. Under any reasonable interpretation of the statute, the request was untimely, as the statute contemplates that the written request be filed and considered during the rule development phase, and not during the adoption phase. Even if the committee and parent meetings did not constitute a workshop under section 120.54(2)(c), there was no error in failing to conduct one.

71. No requests for advance written notice of the adoption hearings were submitted by any person. However, Petitioners contend the newspaper notice for the adoption hearings was flawed. The legal advertisement published by the School Board on November 20, 2016, satisfied the requirement that "publication [be made] in a newspaper of general circulation in the affected area." § 120.81(1)(d)1., Fla. Stat. While it did not contain a great deal of detail, it was sufficient to put

members of the public on notice that new school boundaries would be adopted by the School Board at meetings on December 20, 2016, and January 17, 2017. Moreover, through other types of notice, such as letters, emails, telephone calls, and social media, Petitioners and Intervenors had actual notice of the meetings and the Superintendent's recommended plan. All parents either participated in the process to the extent they were able, or chose not to participate. Any failure to provide constructive notice was harmless error and was cured by the parents' receipt of actual notice. See, e.g., Stuart Yacht Club & Marina, Inc. v. Dep't of Nat'l Res., 625 So. 2d 1263, 1269 (Fla. 4th DCA 1993)(petitioner was not prejudiced by lack of direct notice of agency's proposed rules because it received indirect notice and it filed a petition challenging the proposed rules).

72. Petitioners also contend the School Board erred by not conducting a draw-out proceeding after a written request was filed on December 20, 2016. But section 120.54(3)(c)2. requires that such a request be "timely" filed with the School Board, and not hours before the adoption hearing. Assuming arguendo that Petitioners satisfied the first part of the statute by demonstrating that "the proceeding [did] not provide adequate opportunity to protect [their] interests," the request was still untimely. There was no error in not conducting a draw-out proceeding.

73. As to any other procedural errors not directly addressed herein, a failure to follow all procedural steps does not necessarily render the rule invalid. Only when the agency materially fails to follow the applicable rulemaking procedures or requirements will the rule be declared invalid under section 120.52(8)(a). See, e.g., Dep't of Health & Rehab. Servs. v. Wright, 439 So. 2d 937, 940-41 (Fla. 1st DCA 1983)(compliance with procedural aspects of rulemaking process is subject to "statutory harmless error" rule); Stuart Yacht Club, supra. The steps taken by the School Board during the rezoning process substantially comply with all procedural requirements. Absent a showing of prejudice by Petitioners, the rule is not invalid under section 120.52(8)(a).

Vagueness, Inadequate Standards, or Vesting Unbridled Discretion in School Board

74. Petitioners contend the proposed rule is vague. However, the map is not so vague that persons of common intelligence must guess at its meaning or application. Petitioners further contend the rule fails to establish adequate standards for district decisions and vests unbridled discretion in the district. Specifically, they assert the rule fails to contain any district standards governing grandfathering of students, school choice, or address verification. The purpose of the rule was only to establish new school attendance

boundaries, and not to address standards for grandfathering, school choice, and address verification. These standards are found in other policies and were not the subject of the district's rulemaking. The proposed rule provides sufficient standards and details to guide the rezoning process. The preponderance of the evidence demonstrates that the proposed rule establishes adequate standards for agency decisions and does not vest unbridled discretion in the School Board. It is not invalid under section 120.52(8)(d).

Arbitrary and Capricious

75. Petitioners contend the proposed rule is arbitrary and capricious. "An arbitrary decision is one not supported by facts or logic, or despotic." Bd. of Trs. of Int. Imp. Trust Fund v. Levy, 656 So. 2d 1359, 1362 (Fla. 1st DCA 1995). "A capricious action is one taken without thought or reason or irrationally." Id. A determination is not arbitrary or capricious if it is justifiable "under any analysis that a reasonable person would use to reach a decision of similar importance." Dravo Basic Materials Co., Inc. v. State of Fla., Dep't of Transp., 602 So. 2d 632, 634 n.3 (Fla. 2d DCA 1992).

76. The School Board's proposed rule was the product of thoughtful consideration by the committee and Superintendent during an extensive rulemaking development process. There is no credible evidence that the proposed rule is capricious or that

it was taken without thought or reason or irrationally. The rule is not invalid under section 120.52(8)(e).

Statement of Estimated Regulatory Costs

77. Section 120.541(1) governs the preparation and consideration of statements of estimated regulatory costs. In this case, Petitioners did not request or submit a lower cost regulatory alternative to the proposed rule. Likewise, there is no evidence that the rule is likely to directly or indirectly increase regulatory costs in excess of $200,000.00 in the aggregate within one year after implementation. Therefore, preparation of a statement of estimated regulatory costs was not necessary. The rule is not invalid under section 120.52(8)(f).

78. In summary, the map is a rule and is a valid exercise of delegated legislative authority.

DISPOSITION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

ORDERED that Plan 4A2, as modified, is a valid exercise of delegated legislative authority, as to the objections raised in the Second Amended Petition, which is denied.

DONE AND ORDERED this 13th day of April, 2017, in Tallahassee, Leon County, Florida.

D. R. ALEXANDER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 13th day of April, 2017.

ENDNOTES

[1/] In their PFO, Petitioners and Intervenors state that four Intervenors, Lorenzo Santalasci, Christina Santalasci, Eric Santalasci, and Thomas Pirozzi and Minor Children, have withdrawn as parties to this action at some point in the proceeding. However, a notice of voluntary dismissal was never filed, and no order was entered to confirm their withdrawal. For the sake of efficiency, however, the undersigned has treated this representation in the PFO as a notice of voluntary dismissal and amended the style of the case to reflect this action.

[2/] The exhibit, a 47-page document labeled as an expert report, was not provided to opposing counsel until Petitioners' rebuttal case on the second day of hearing. The name of the expert witness sponsoring the exhibit was not disclosed until after the discovery cutoff date, one working day before the hearing, and then only as a fact witness. Her testimony and exhibit were excluded as being untimely.

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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 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.