STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SHARI BURKE, TARA BURKE, MARK BURKE, SHARON BURKE, SOPHIA OSORIO, SARAH OSORIO, CAROLINA CORDONA-LILLY, HUNTER NODINE, KATRINA NODINE, JULIE ANN NODINE, NIAH J. STONE, LARONDAR A. STONE, CAMERON DARBY, LUCAS DARBY, JAMES DARBY, WENDY DARBY, ZOE ALYSSA WOOD, AND DOUG WOOD,

Petitioners,

vs. Case No. 17-0629RP

SCHOOL BOARD OF PASCO COUNTY,

Respondent.
_____/

FINAL ORDER

D. R. Alexander, an Administrative Law Judge of the Division of Administrative Hearings, conducted a final hearing in this case on March 15, 2017, 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 four middle schools and four high schools (East Side Schools) located in eastern 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 East Side Schools for school year 2017-2018. On January 26, 2017, Petitioners, 22 students and/or their parents, filed a Petition Challenging Validity of Proposed Rule (Petition), as later amended, contending the new boundary for the East Side Schools is an invalid exercise of delegated legislative authority. As a basis for relief, it relies primarily on procedural errors allegedly committed by the district during the rezoning process. Two Petitioners were later authorized to withdraw as parties. Because Francessca Huber was unavailable for deposition, the parties stipulated that she and her daughter were no longer parties.

At the hearing, the parties agreed that one parent, either the mother or father, could testify on behalf of the entire family. Thereafter, Petitioners presented the testimony of six parents. Petitioners' Exhibits 1 through 16 were accepted in

evidence. The School Board presented the testimony of four witnesses. School Board Exhibits 1 through 30 were accepted in evidence. Exhibit 28 is the deposition testimony of Superintendent Kurt S. Browning. The four-volume Transcript in Case No. 17-0495RU, which involved the rezoning of the district's West Side Schools, was made a part of this record.

A two-volume Transcript of the proceeding was filed. Proposed final orders (PFOs) were filed by Petitioners and 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 school attendance boundaries. At issue here is an area that encompasses the East Side Schools, comprised of around 40 designated areas, all east of the Sunshine Parkway or Interstate 75, in which four middle schools and four high schools are located.

3. Petitioners are students or parents who reside in the Country Walk community in area 16. Students in area 16 are

currently assigned to Wiregrass Ranch High School (Wiregrass) and Dr. John Long Middle School (John Long). With the exceptions cited below, under the new attendance plan, area 16 students will be reassigned to Thomas E. Weightman Middle School (Weightman) and Wesley Chapel High School (Wesley Chapel) beginning in school year 2017-2018. Only the rezoning for area 16 is being challenged in this case.

4. Sarah Osorio is a student in the fourth grade and is unaffected by the boundary change. Lucas Darby is a student in the first grade and is unaffected by the boundary change. Lyric Hunter is a student in the second grade and is unaffected by the boundary change. Zoe Alyssa Wood is a student in the 11th grade; as a rising senior, she will be allowed to remain in Wiregrass. Katrina Nodine is currently in the fifth grade and is already scheduled to change schools at the end of the school year as a result of her graduation from elementary school. Cameron Darby is currently in the eighth grade and is already scheduled to change schools at the end of the year as a result of his graduation from middle school. The parents of these students are also unaffected by the new plan.

5. The County is experiencing an increase in population caused by "intense" new residential development in the eastern part of the County. As a result, enrollment in most East Side Schools has exceeded capacity. In school year 2016-2017,

Wiregrass exceeds capacity by 50.4 percent, while John Long exceeds capacity by 40.6 percent. If no changes are made, the two schools are projected to be operating at approximately 154.2 and 147 percent capacity, respectively, in school year 2017-2018. In contrast, Wesley Chapel and Weightman, while exceeding their permanent capacity, are operating at less capacity than Wiregrass and John Long. The district is expected to open a new combined middle-high school (Cypress Creek) in August 2017, but the student population must still be redistributed to address the capacity issue in Wiregrass and John Long.

6. 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 East Side Schools. 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.

7. 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, School Board action, and notices. Id. at 2-3. The policy also describes how a substantially affected person may challenge a proposed policy. Id. at 4.

8. Reference to a "rule" and chapter 120 was made in various announcements, notices, and statements throughout 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 began the rezoning process.

9. The Superintendent opted to use the same rezoning process used since at least 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 committee meetings or direct any member to draw a plan in a particular way. He 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.

10. A boundary committee is comprised of two parents from each affected school, 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 East Side Schools consisted of 21 members.

11. 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.

12. 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. 11. The committee was also given extensive data 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.

13. 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 by 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.

14. 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, listen to the recorded message, or 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.

15. Signs and notices regarding the rezoning were not posted in the Country Walk neighborhood before any meeting. However, multiple notices were posted on social media and websites, and text messages, emails, and telephone messages were sent to the 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.

16. Besides telephone calls, text messages, emails, and social media, on November 8, 2016, the Superintendent sent a letter to affected parents informing them of the parent meeting on November 29, 2016. See Resp. Ex. 3. The letter noted that attendance boundary lines for East Side Schools would be redrawn to "relieve crowding" at those schools, and it included the new proposed boundary lines being considered, along with reference to a website where more details could be found. Through School

Connect, the School Board then sent parents reminder notifications via telephone and email.

17. All Petitioners acknowledged receiving some form of notice of the process during the fall of 2016, and all had actual notice well in advance of the last committee meeting. Some parents attended committee meetings, the parent meeting, or spoke at both School Board meetings. During this same period of time, parents sent emails to the School Board or Superintendent expressing their views on rezoning.

18. 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 13, 2016. The press release announced the appointment of the boundary committee and provided the day, time, and location of each committee meeting. The press release was also published on the School Board's Twitter account. On October 3, 2016, an informational video regarding the rezoning process and featuring the Superintendent and district Planning Director was published on the School Board website and Twitter and Facebook accounts.

19. Committee meetings were conducted on September 16, September 29, October 20, and December 2, 2016. These meetings were open to the public, and all were live-streamed on YouTube.com. Except for the last meeting, very few parents attended the meetings.

20. 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. Committee members were encouraged to speak to the parents to keep them updated on what was occurring. All documents considered by the committee were posted on the School Board and special zoning websites. 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.

21. On November 29, 2016, hundreds of parents, including four of the six who testified at hearing, attended a parent meeting. So that parent input would be considered, the Superintendent scheduled a fourth committee meeting on December 2, 2016.

22. Four rezoning plans were considered by the committee, all addressing the overcrowding problem in different ways. On December 2, 2016, by a 16-to-5 vote, the committee recommended approval of Option 20, which did not affect area 16. The plan with the second most votes, Option 13, supported by district staff, reassigned students in area 16 to Wesley Chapel and Weightman. The new schools lie north of Country Walk, but are

approximately the same distance from Country Walk as are Wiregrass and John Long, which lie directly south of area 16.

23. The Superintendent chose not to accept the committee's recommended option. Instead, he chose to recommend Option 13 to the School Board for adoption. This decision was reached after consultations with the district Planning Director. The only difference between the two Options is that Option 20 reassigns areas 8, 9, 11, and 12 to Wesley Chapel and Weightman, leaving areas 16, 17, 20, and 21 unchanged, while Option 13 reassigns areas 16, 17, 20, and 21 to the new schools, leaving areas 8, 9, 11, and 12 unchanged.

24. In developing Option 13, the committee and Superintendent followed the guidelines established at the outset of the process. Option 13 takes into account future growth and capacity of the schools. Consideration is also given to providing socioeconomic balance. Subdivision integrity is maintained, in that the entire Country Walk community is assigned to the same schools. During the development of this option, the committee had available the long-term school construction plans of the district. The transportation director was a member of the committee and provided assurance that the new plan provides safe and efficient transportation. Finally, because of overcrowding and anticipated growth in the area, the school feeder pattern structure, which now directs area 16

students to Wiregrass and John Long, was necessarily impacted. On balance, however, the guidelines were observed.

25. Pursuant to other district policies, certain exceptions apply to the new attendance boundary. Students who are rising seniors at Wiregrass are grandfathered and remain at Wiregrass. Students who are approved under the School Choice program to remain in Wiregrass or John Long may do so. To take advantage of this program, a student must give a valid reason, such as hardship, separation of siblings, or participation in certain extracurricular activities. There is, however, no guarantee that a request for School Choice will be approved.

26. Notice of the Superintendent's recommended plan, the School Board agenda, memorandum to the School Board, and map were published on the School Board's website seven days before the first School Board meeting. In addition, the same information was published on the district's Twitter and Facebook accounts, and emails were sent to parents who provided an email address. Finally, the Superintendent published a letter/email on December 12, 2016, explaining his reasons for recommending Option 13. It is fair to say that all parents had actual notice well before the first School Board meeting that area 16 was being reassigned to different schools.

27. 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. See Pet'r Ex. 2. 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:
>
> * * *
>
> New Middle/High School GGG (Cypress Creek Middle/High), Charles S. Rushe Middle, Dr. John Long Middle, Thomas E. Weightman Middle, Sunlake High, Wesley Chapel High, Wiregrass Ranch High
>
> * * *
>
> First reading on this matter is scheduled for the regular meeting of the District School Board of Pasco County on December 20, 2016 at 6:00 p.m. in the W. David Mobley Media Center, School Board Room, 7205 Land O' Lakes Blvd., Land O' Lakes, Florida.
>
> School Board action on this matter is scheduled for the regular meeting of the District School Board of Pasco County on January 17, 2017 [at the same time and location].

28. Although all Petitioners stated they did not read the Notice, they nonetheless complain the Notice 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 meetings, all other parents who were not working or were not out of town had actual notice and attended the meetings.

29. 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 number of parents wishing to speak (33), 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, 14 speakers who were not allowed to speak at the first meeting were scheduled to speak first at the second meeting on January 17, 2017. All Petitioners attended at least one of the two School Board meetings.

30. Committee members were not required to attend either School Board meeting to explain Option 13 (or why it was not their first choice) 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, the School Board considered and approved Option 13.

31. 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.

32. At the beginning of the meeting on January 17, 2017, the Superintendent commented on his recommendation to adopt Option 13. After public comment, by a 4-to-1 vote the School Board adopted Option 13 for the East Side Schools. Unlike typical agency rulemaking, the adopted plan is in the form of a map, rather than a numbered rule.

33. 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.

34. The cost for parents to transport their children to the new schools is highly speculative, but it should be similar to the current costs, as the new schools are the same distance from Country Walk. There was no evidence to show that the new plan would increase regulatory costs, directly or indirectly, more than $200,000.00 within one year after implementation. See § 120.541(1)(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.

35. The parties agreed that had the students who are named as parties testified at the final hearing, they would have reiterated the allegations set forth in the First Amended Petition. These include allegations that the students will be emotionally affected by the transfer; they will be separated from friends, teachers, counselors, and certain academic and extracurricular programs; and they will be limited in their ability to walk or bike to school.

36. The parents expressed a wide range of concerns with the new attendance boundaries. All wondered why Option 20, which was recommended by the committee, was not accepted by the Superintendent, rather than Option 13. However, in an email dated December 12, 2016, the Superintendent explained that Option 13 provided the least disruption for all students. He

pointed out that if Option 20 were adopted, "some students could attend four different schools in their secondary years. They could conceivably start 6th grade at John Long Middle School, move to Weightman Middle School by the 8th grade, start 9th grade at Wesley Chapel High School, and be moved to Cypress Creek High School [a new high school] before graduation." Pet'r Ex. 8. He added that under Option 13, "the projected average daily membership for Wiregrass Ranch High School will decrease after the seniors graduate in 2017. Projected enrollment goes down to 2,124 in 2018 and 1,956 in 2019." Id. The Superintendent further testified that by choosing Option 13, "it kept [him] from having to move portables from Wiregrass Ranch High School to Wesley Chapel High School," and it "accomplished our goal of reducing student enrollment at Wiregrass High School to get us off the 10-period day." Resp. Ex. 28, p. 141. These reasons are sufficient to validate the change in the boundary. Therefore, the undersigned will not engage in an exercise to determine if another Option, or variation thereof, might be better for, or more advantageous to, a particular neighborhood.

37. Although the new schools are the same distance from Country Walk as the current schools, the parents are concerned with traffic conditions on State Road 54 and Meadow Pointe Boulevard, roads they say must be used in order to travel to the

new schools. They point out that these roads are far more dangerous than the roads they now use to travel to their current schools, and both roads have had a sharp increase in serious accidents during the last two years. However, the district Transportation Director stated that regardless of the route taken, he had no concerns regarding the district's ability to develop bus routes that result in safe transportation of students to and from their schools. Notably, all major roads in the Country Walk area are currently used by the district for bus transportation and there are no safety concerns regarding their continued use.

38. Several parents expressed a concern that the value of their homes would decline since buyers would not choose to purchase a home in Country Walk if their children were forced to attend Wesley Chapel or Weightman. 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.

39. Parents are concerned that the new schools do not have the same clubs, extracurricular activities, or educational opportunities that are found at Wiregrass and John Long. There is no credible evidence that substantially-similar educational opportunities will not be available to students at Wesley Chapel and Weightman. And there is no credible evidence that any

student currently involved in a course of study unavailable at the new school will be negatively impacted by curriculum differences.

CONCLUSIONS OF LAW

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

41. 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.

42. 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."

43. 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.

44. 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).

45. 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 East Side Schools and reside within that geographic area, and it implements the general power to assign students to schools. The map is a rule, as defined by section 120.52(16).

46. 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").

47. 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.

48. 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).

49. 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 schools" 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.

50. In its PFO, the School Board asserts 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.

51. 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. One statutory time period for challenging a proposed rule is "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 shortly 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.

52. Petitioners 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 valid, notwithstanding the Petitioners' objections. Id.

53. 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 students (and their parents) named in Finding of Fact 4, each parent 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).

54. 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.

55. 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.").

56. 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

57. The Petition raises multiple procedural grounds upon which Petitioners argue that the proposed rule is invalid under section 120.52(8)(a). They essentially boil down to alleged

publication and notice errors and other procedural errors committed during the rulemaking process.

58. 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 Procedures 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. Also, 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.

59. 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.

60. Petitioners contend notice of rule development was not given, as required by section 120.81(1)(d), which governs notice procedures for educational units. 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.

61. Rule development must have occurred between September and early December 2016 when four committee meetings and one parent meeting were conducted. 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, School Connect, press releases, and letters to parents. These are "appropriate places" for posting notices and constitute substantial compliance with the statute. Petitioners contend otherwise and assert that signs and notices must be posted in the affected neighborhoods in order to satisfy the statute. But this would be impractical, as it would require the School Board to post a sign or notice in every street and neighborhood of the County where an affected person might reside.

62. Petitioners contend the School Board erred by failing to mail a notice of rulemaking to the Country Walk Homeowners Association. While this type of notice was not provided, each Petitioner received actual notice of the boundary process well before the boundary committee, Superintendent, or School Board took action to recommend or adopt the new attendance boundaries. Moreover, advance written notice of rule development meetings was not requested by any individual or organization. If there

was an error, it was harmless, as Petitioners had actual notice of the zoning 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).

63. Even though Petitioners did not read the Notice for the adoption hearings, they contend it was flawed because it failed to include all information required by the statute. The legal advertisement published 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 the Notice lacked the detail normally provided in agency rulemaking, 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, social media, and the map itself, Petitioners 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).

64. 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, which was not shown here, the rule is not invalid under section 120.52(8)(a).

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

65. 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 or School Choice. The purpose of the rule was only to establish new school attendance boundaries, and not to address other standards. Those 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

66. 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).

67. 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

68. 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).

69. 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 Option 13 is not an invalid exercise of delegated legislative authority as to the objections raised. The First Amended Petition is denied.

DONE AND ORDERED this 27th day of April, 2017, in Tallahassee, Leon County, Florida.

D. R. ALEXANDER
Administrative Law Judge
Division of Administrative Hearings
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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.