STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

FLORIDA ASSOCIATION OF
INDEPENDENT CHARTER SCHOOLS AND
ASPIRA RAUL ARNALDO MARTINEZ
CHARTER SCHOOL AND MIAMI
COMMUNITY CHARTER MIDDLE SCHOOL,

Petitioners,

vs. Case No. 17-1986RP

FLORIDA DEPARTMENT OF EDUCATION
AND STATE OF FLORIDA BOARD OF
EDUCATION,

Respondents.
_____/

FINAL ORDER

This case came before Administrative Law Judge Darren A. Schwartz of the Florida Division of Administrative Hearings ("DOAH") for final hearing by video teleconference on May 12, 2017, at sites in Tallahassee and Miami, Florida.

APPEARANCES

For Petitioners: Christopher Norwood, J.D.,
Qualified Representative
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For Respondents: David L. Jordan, Esquire
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STATEMENT OF THE ISSUE

Whether the proposed amendment to Florida Administrative Code Rule 6A-2.0020(4) is an invalid exercise of delegated legislative authority because of conflict with section 1008.34(1)(a), Florida Statutes (2016), or because the rule will be arbitrary and capricious in its application and administration.

PRELIMINARY STATEMENT

On October 3, 2016, Petitioners, Florida Association of Independent Charter Schools, Aspira Raul Arnaldo Martinez Charter School, and Miami Community Charter Middle School ("Petitioners"), filed a petition challenging a proposed amendment to rule 6A-2.0020(4). The case was assigned to the undersigned under DOAH Case No. 16-5765RP. The case proceeded to final hearing on October 28, 2016. At the hearing, the parties presented exhibits and witnesses.

Following the final hearing in DOAH Case No. 16-5765RP, Respondents, Florida Department of Education and State of Florida Board of Education ("Respondents"), filed a Notice of Withdrawal of Rule and Motion to Dismiss on December 7, 2016. A telephonic hearing on the motion was held on December 9, 2016. Because of Respondents' withdrawal of the proposed rule amendment, the controversy became moot. Accordingly, on

December 14, 2016, the undersigned entered a Final Order of Dismissal.

Subsequently, Respondents published a Notice of Proposed Rule which proposed to amend rule 6A-2.0020(4). Petitioners timely filed another petition at DOAH on March 31, 2017, challenging the proposed amendment to the rule. Subsequently, the case was assigned to the undersigned under DOAH Case No. 17-1986RP.

On April 5, 2017, a status conference was held between the undersigned, counsel for Respondents, and Petitioners' representative, Christopher Norwood, J.D. During the conference, the parties agreed to waive the 30-day deadline for conducting the final hearing. On April 7, 2017, Mr. Norwood filed a request to be designated as Petitioners' qualified representative. On April 9, 2017, the undersigned entered an Order granting the request. On April 10, 2017, the undersigned entered an Order setting the case for final hearing on May 12, 2017.

On May 11, 2017, the parties' Joint Pre-hearing Stipulation was filed. The stipulated facts in the joint stipulation are incorporated in this Final Order.

The final hearing was held on May 12, 2017, as scheduled. At the hearing, Petitioners presented the testimony of Milagros Fornell. Respondents presented the testimony of Adam Miller.

As stipulated by the parties, the two-volume Transcript from the final hearing held on October 28, 2016, was received in evidence as Joint Exhibits 1 and 2. Petitioners' Exhibits 1 through 9 and Respondents' Exhibits 1 through 10 were also received in evidence.

On June 2, 2017, the one-volume Transcript from the May 12, 2017, final hearing was filed at DOAH. On June 8, 2017, Petitioners filed a request to extend the deadline until June 21, 2017, for the parties to file their proposed final orders. On June 9, 2017, the undersigned entered an Order granting the motion. On June 21, 2017, the parties timely filed their proposed final orders, which have been considered in the preparation of this Final Order.

Unless otherwise indicated, all references to the Florida Statutes are to the 2016 version.

FINDINGS OF FACT

1. Petitioner Florida Association of Independent Charter Schools is a Florida non-profit corporation. The association is substantially affected by the proposed amended rule.

2. Petitioner Aspira Raul Arnaldo Martinez Charter School is a charter school in Miami-Dade County and is currently serving 573 students. Its school grades over the past two consecutive years are: "D" for 2014-2015 and "D" for 2015-2016. If the proposed amended rule becomes effective and the school

receives a school grade lower than "C" for 2016-2017, the school will not be eligible for the 2017-2018 Capital Outlay Appropriation. The school is substantially affected by the proposed amended rule.

3. Petitioner Miami Community Charter Middle School is a charter middle school in Miami-Dade County currently serving 283 students. It is a Title I school serving 99 percent Free and Reduced Lunch. Its school grades over the past two consecutive years are: "D" for 2014-2015 and "D" for 2015-2016. If the proposed amended rule becomes effective and the school receives a school grade lower than "C" for 2016-2017, the school will not be eligible for the 2017-2018 Capital Outlay Appropriation. The school is substantially affected by the proposed amended rule.

4. Respondent State of Florida Board of Education is "the chief implementing and coordinating body of public education in Florida . . . [with] the authority to adopt rules pursuant to ss. 120.536(1) and 120.54 to implement the provisions of law conferring duties upon it for the improvement of the state system of K-20 public education . . . ." § 1001.02(1), Fla. Stat.

5. Respondent Florida Department of Education "act[s] as an administrative and supervisory agency under the

implementation direction of the State Board of Education." § 1001.20(1), Fla. Stat.

6. "The Commissioner of Education is the chief educational officer of the state . . . , and is responsible for giving full assistance to the State Board of Education in enforcing compliance with the mission and goals of the K-20 education system except for the State University System." § 1001.10(1), Fla. Stat.

7. Charter school capital outlay funding is the state's contribution to capital funding for charter schools. A charter school's governing body may use such funds for the following purposes: purchase of real property, construction of school facilities, purchase or lease of permanent or relocatable school facilities, purchase of vehicles, renovation, repair, maintenance of school facilities, and insurance for school facilities. § 1013.62(3), Fla. Stat.

8. The charter school statute, section 1002.33, Florida Statutes, specifically authorizes the State Board of Education to adopt rules which address charter school eligibility for capital outlay funds. "The Department of Education, after consultation with school districts and charter school directors, shall recommend that the State Board of Education adopt rules to implement specific subsections of this section." § 1002.33(28), Fla. Stat. One of the specific subsections of section 1002.33

is subsection (19), entitled "CAPITAL OULAY FUNDING." Subsection (19) provides, in pertinent part: "Charter schools are eligible for capital outlay funds pursuant to s. 1013.62."

9. Each year, the Commissioner of Education is required to allocate charter school capital outlay funds, if any are appropriated by the Legislature, to eligible charter schools.[1/]

10. One of the eligibility criteria, which is at the center of the parties' dispute, is set forth in section 1013.62(1)(a)3., Florida Statutes: "Have satisfactory student achievement based on state accountability standards applicable to the charter school."

11. The 2016 Florida Legislature amended section 1013.62, but it did not amend the statute regarding satisfactory student achievement.

12. With regard to satisfactory student achievement, presently effective rule 6A-2.0020 provides:

> (2) The eligibility requirement for satisfactory student achievement under Section 1013.62, F.S., shall be determined in accordance with the language in the charter contract and the charter school's current school improvement plan if the school has a current school improvement plan. A charter school receiving an "F" grade designation through the state accountability system, as defined in Section 1008.34, F.S., shall not be eligible for capital outlay funding for the school year immediately following the designation.

13. On February 28, 2017, Respondents published a Notice of Proposed Rule, which proposed to amend rule 6A-2.0020.

14. On March 22, 2017, the State Board of Education approved the proposed amendments to rule 6A-2.0020. As approved, the portion of the proposed rule which addresses satisfactory student achievement provides:

> (4) Satisfactory student achievement under Section 1013.62(1)(a)3., F.S., shall be determined by the school's most recent grade designation or school improvement rating from the state accountability system as defined in Sections 1008.34 and 1008.341, F.S. Satisfactory student achievement for a school that does not receive a school grade or a school improvement rating, including a school that has not been in operation for at least one school year, shall be based on the student performance metrics in the charter school's charter agreement. Allocations shall not be distributed until such time as school grade designations are known.
>
> (a) For the 2016-2017 school year, a charter school that receives a grade designation of "F" shall not be eligible for capital outlay funding.
>
> (b) Beginning in the 2017-2018 school year, a charter school that receives a grade designation of "F" or two (2) consecutive grades lower than a "C" shall not be eligible for capital outlay funding.
>
> (c) Beginning in the 2017-2018 school year, a charter school that receives a school improvement rating of "Unsatisfactory" shall not be eligible for capital outlay funding.

15. Proposed amended rule 6A-2.0020(4), if adopted, will provide the standard for what constitutes failure to meet

satisfactory student achievement for purposes of receiving capital outlay funding. A school with a grade of "F" or two (2) consecutive grades lower than a "C" will be ineligible for funding.

16. Proposed amended rule 6A-2.0020(4), if adopted, will allow a charter school with a single "D" grade to continue receiving capital outlay funds for the next fiscal year.

17. On April 5, 2017, Respondents published a Notice of Change for a technical change for rule 6A-2.0020, referencing the following rulemaking authority for the rule: sections 1001.02(1), (2)(n); 1002.33(19), (28); 1013.02(2)(a); and 1013.62(5).

CONCLUSIONS OF LAW

18. DOAH has jurisdiction over the subject matter and the parties to this proceeding pursuant to section 120.56, Florida Statutes.

19. Any person who is substantially affected by a proposed rule can petition DOAH for a final order that the proposed rule is an invalid exercise of delegated legislative authority. § 120.56(1)(a), Fla. Stat. As stipulated by the parties, Petitioners are substantially affected and have standing to challenge the proposed rule.

20. Under section 120.52(8), a proposed rule by an administrative agency may be challenged as an "invalid exercise

of delegated legislative authority," which is defined to mean "action which goes beyond the powers, functions, and duties delegated by the Legislature."

21. Respondents have 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. § 120.56(2)(a), Fla. Stat. The proposed rule is not presumed to be valid or invalid. § 120.56(2)(c), Fla. Stat.

22. Among the factors in determining whether a proposed rule is an invalid exercise of delegated legislative authority are: (1) whether the agency has exceeded its grant of rulemaking authority; (2) whether the proposed rule enlarges, modifies, or contravenes the specific provisions of law implemented; and (3) whether the proposed rule is arbitrary or capricious (a rule is arbitrary if it is not supported by logic or the necessary facts and is capricious if it is adopted without thought or reason or is irrational). § 120.52(8)(b), (c), and (e), Fla. Stat. In the instant case, Petitioners contend the proposed rule is an invalid exercise of delegated legislative authority for these reasons.

23. As to the first ground for alleged invalidity under section 120.52(8)(b), Judge Wetherell's recent analysis in United Faculty of Florida v. Florida State Board of Education,

157 So. 3d 514, 516-517 (Fla. 1st DCA 2015), is instructive. In that case, Judge Wetherell stated:

> A rule is invalid under section 120.52(8)(b) if the agency "exceed[s] its grant of rulemaking authority." A grant of rulemaking authority is the "statutory language that explicitly authorizes or requires an agency to adopt [a rule]." § 120.52(17), Fla. Stat. The scope of an agency's rulemaking authority is constrained by section 120.536(1) and the so-called "flush-left" paragraph" in section 120.52(8), which provide that an agency may only adopt rules to "implement or interpret the specific powers and duties granted by the [agency's] enabling statute"; that an agency may not adopt rules to "implement statutory provisions setting forth general legislative intent or policy" or simply because the rule "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"; and that "[s]tatutory 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."
>
> Section 120.536(1) and the flush-left paragraph in section 120.52(8) require a close examination of the statutes cited by the agency as authority for the rule at issue to determine whether those statutes explicitly grant the agency authority to adopt the rule. As this court famously stated in *Save the Manatee Club*, the question is "whether the statute contains a specific grant of legislative authority for the rule, not whether the grant of authority is specific *enough*. Either the enabling statute authorizes the rule at issue or it does not."

24. In the instant case, the proposed rule does not exceed the grant of rulemaking authority. The statutes cited as rulemaking authority for the challenged rule contain the necessary "specific grant of legislative authority" for the Respondents to adopt a rule establishing standards for eligibility for capital outlay funding.

25. As detailed above, the State Board of Education has both the authority and duty pursuant to section 1001.02(1) to adopt rules to implement the provisions of law conferring duties upon it for the improvement of the state system of K-20 education. The charter school statute, section 1002.33, specifically authorizes the State Board of Education to adopt rules which address charter school eligibility for capital outlay funds. Section 1002.33(28) specifically provides: "The Department of Education, after consultation with school districts and charter school directors, shall recommend that the State Board of Education adopt rules to implement specific subsections of this section." One of the specific subsections of section 1002.33 is subsection (19), entitled "CAPITAL OUTLAY FUNDING." Subsection (19) provides, in pertinent part: "Charter schools are eligible for capital outlay funds pursuant to s. 1013.62."

26. As to the second ground for alleged invalidity, section 120.52(8)(c) provides that a rule is an invalid exercise

of delegated legislative authority if it "enlarges, modifies, or contravenes the specific provisions of the law should be implemented . . . ." The "law implemented is the language of the enabling statute being carried out or interpreted by an agency through rulemaking." § 120.52(9), Fla. Stat.; See also Fla. Elec. Comm'n v. Blair, 52 So. 3d 9, 13 (Fla. 1st DCA 2010)(concluding that adopting rule defining legal standard of "willful" did not contravene law implemented).

27. In the instant case, Petitioners contend that the proposed rule's application of the phrase "satisfactory student achievement" to school grades or school improvement ratings conflicts with, modifies, or contravenes the definition of "satisfactory student achievement" in section 1008.34(1)(a).

28. Section 1008.34(1)(a) defines the phrase "student achievement" as a description of "the level of content mastery a student has acquired in a particular subject as measured by a statewide, standardized assessment administered pursuant to section 1008.22(3)(a) and (b)." According to Petitioners, the determination of whether a charter school is eligible for capital outlay funding can be made only on the basis of how an individual student performs on a statewide, standardized test (i.e., a score of three or better as defined in section 1008.34(1)(a)).

29. The resolution of the parties' dispute centers on statutory interpretation. Section 1013.62 specifically addresses a charter school's eligibility for capital outlay funding and states, in pertinent part:

> **1013.62 Charter School capital outlay funding.--**
>
> (1) In each year in which funds are appropriated for charter school capital outlay purposes, the Commissioner of Education shall allocate the funds among eligible charter schools as specified in this section.
>
> (a) To be eligible for a funding allocation, a charter school must:
>
> * * *
>
> 3. Have satisfactory student achievement based on state accountability standards applicable to the charter school.

30. Section 1013.62(1)(a)3. is clear and unambiguous. Levey v. Detzner, 146 So. 3d 1224, 1225 (Fla. 1st DCA 2014). To be eligible for capital outlay funding, a charter school must have "satisfactory student achievement based on state accountability standards applicable to the charter school." § 1013.62(1)(a)3., Fla. Stat.

31. The "state accountability standards applicable to charter schools" described in section 1013.62(1)(a)3. are largely driven by the school grading system described in section 1008.34.[2/]

32. Chapter 1008 is entitled "Assessment and Accountability." Section 1008.34 is located within Part II of chapter 1008, entitled "Accountability, K-20." The opening section of Part II creates the framework for the "Florida K-20 education performance accountability system." § 1008.31, Fla. Stat.

33. One of the goals of the accountability system is to answer the question of "How are individual schools and postsecondary education institutions performing their responsibility to educate their students as measured by how students are performing and how much they are learning?" § 1008.31(1)(a)4., Fla. Stat. Section 1008.31(1)(b) states the Legislature's intent that: "The K-20 education performance accountability system be established as a single, unified accountability system with multiple components, including, but not limited to, student performance in public schools and school and district grades." § 1008.31(1)(b), Fla. Stat. (emphasis added).

34. The individual student achievement levels described in section 1008.34(1)(a) are only a step in the process that results in the state accountability standards applicable to the charter schools. The remainder of section 1008.34(2) and (3) creates a school grading system applicable to most public and charter schools.[3/]

35. In sum, the proposed rule does not enlarge, modify, or contravene the specific provisions of the law implemented in violation of section 120.52(8)(c). Petitioners' claim that the proposed rule conflicts with section 1008.34(1)(a) is also rejected.

36. Petitioners' contention that capital outlay funds should, as a policy matter, be distributed in the same manner as federal Title I, Title III, and special education grant funds (i.e., follow the individual student based on the individual student's performance on a test) is rejected. The federal statutes and regulatory scheme for distributing such funds are different from the Florida scheme for distributing charter school capital outlay funds. The distribution of capital outlay funds, as set forth by the Florida Legislature, is based on the charter school's eligibility, not an individual student's eligibility based on that student's performance on an individual test.[4/]

37. Petitioners' contention that the proposed rule is arbitrary or capricious is without merit. A proposed rule is arbitrary if it is not supported by logic or the necessary facts and is capricious if it is adopted without thought or reason or is irrational. § 120.52(8)(e), Fla. Stat.

38. In the instant case, the proposed rule is supported by logic, the necessary facts, it was adopted with thought and reason, and it is rational. § 120.52(8)(e), Fla. Stat.

39. The undersigned has carefully considered each of Petitioners' arguments, and they are all rejected. Respondents proved, by a preponderance of the evidence, that the proposed rule is not an invalid exercise of delegated legislative authority.[5/]

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that the Petition for Administrative Determination of Invalidity of Proposed Rule Revision is DISMISSED.

DONE AND ORDERED this 21st day of July, 2017, in Tallahassee, Leon County, Florida.

DARREN A. SCHWARTZ
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 21st day of July, 2017.

ENDNOTES

[1/] For the 2016-2017 school year, the Legislature appropriated 75 million dollars for charter school capital outlay funds.

[2/] The school improvement ratings described in section 1008.34 apply to alternative schools that provide dropout prevention and academic prevention services. Section 1008.341 sets forth a system for assessing school improvement ratings for such schools.

[3/] Section 1008.34(3)(b) provides that school grades are based on 11 components: four achievement components (English language arts, mathematics, science, and social studies), four learning gains components (English language arts and mathematics for all eligible students, and for the eligible student in the lowest 25 percent for each subject), a middle school acceleration component, as well as components for graduation rate and high school acceleration. Each component is worth up to 100 points in the overall calculation, based on the percentage of students passing the standardized assessments or making learning gains. The points earned for each component are then used to determine a school grade for each school using a method adopted by school board rule. For 2014-2015, the data for the four learning gains components was not available, so the 2014-2015 school grades were based upon the remaining seven components.

[4/] The proposed rule will allow a charter school with a single "D" grade to continue receiving capital outlay funds for the next fiscal year. The school grade statute, section 1008.34(2), provides that a "C" means that the school is making satisfactory progress, and that a "D" means the school is making less than satisfactory progress. These school grade descriptions are not directly aligned with the capital funds eligibility requirement that a charter school "have satisfactory achievement based on state accountability standards applicable to the charter school." However, section 1008.34(2) does not prevent Respondents from adopting a standard which allows a school with a single "D" to be eligible for capital outlay funds.

[5/] In concluding that the proposed rule is not an invalid exercise of delegated legislative as detailed above, the

undersigned was unpersuaded by the testimony of Ms. Fornell and more persuaded by the testimony of Mr. Miller.

COPIES FURNISHED:

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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.