

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

RENAISSANCE CHARTER SCHOOL,
INC., AND RENAISSANCE CHARTER
SCHOOL AT TRADITION,

Petitioners,

vs.

Case Nos. 14-3267
14-4045RU

ST. LUCIE COUNTY SCHOOL BOARD,

Respondent.

_____ /

FINAL ORDER

These cases came before Administrative Law Judge Darren A. Schwartz for final hearing on February 2 and 3, 2015, in Fort Pierce, Florida.

APPEARANCES

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STATEMENT OF THE ISSUES

1) Whether Petitioners, Renaissance Charter School, Inc., and Renaissance Charter School at Tradition, can be required by the St. Lucie County School Board ("School Board") to offer regular school busing to all eligible charter school students residing more than two miles from the charter school.

2) Whether Petitioner, Renaissance Charter School at Tradition, breached its contract with the School Board by not providing transportation to students in accord with the parties' charter school contract and Florida Statutes.

3) Whether School Board Policies 3.90 and 8.31 constitute an invalid exercise of delegated legislative authority.

4) Whether the School Board has charter busing policies which amount to illegal, unadopted rules under chapter 120, Florida Statutes (2014).

PRELIMINARY STATEMENT

On July 14, 2014, Petitioners, Renaissance Charter School, Inc., and Renaissance Charter School at Tradition (referred to collectively as Petitioners or by their individual names), pursuant to section 1002.33(6)(h), Florida Statutes (2014), filed with the Division of Administrative Hearings ("DOAH"), a

Notice/Request of Initiation of Proceedings. This matter (DOAH Case No. 14-3267) was assigned to the undersigned to conduct the final hearing. In Case No. 14-3267, Petitioners contest the authority of the School Board to require that Petitioners offer regular school busing to all eligible students residing more than two miles walking distance from the charter school.

On August 6, 2014, the School Board filed an answer and counter-petition with DOAH. In its counter-petition filed pursuant to section 1002.33(6)(h), the School Board asserts that Renaissance Charter School at Tradition breached its charter contract with the School Board and violated Florida Statutes by refusing to offer regular school busing to all students residing more than two miles from the charter school.

On August 26, 2014, Petitioners filed a petition with DOAH pursuant to sections 120.54 and 120.56. This matter (DOAH Case No. 14-4045RU) was also assigned to the undersigned to conduct the final hearing. In Case No. 14-4045RU, Petitioners assert that the School Board has an unadopted rule which requires regular school busing of all charter school students in St. Lucie County residing more than two miles from their school. Petitioners further assert the School Board's adopted transportation rules (School Board Policies 3.90 and 8.31) constitute an invalid exercise of delegated legislative authority.

On September 11, 2014, the undersigned entered an order consolidating Case Nos. 14-3267 and 14-4045RU. On December 29, 2014, Petitioners filed an amended petition in Case No. 14-4045RU.

The final hearing commenced as scheduled on February 2 and 3, 2015, following two continuances and the undersigned's orders denying the parties' cross-motions for summary final order. Prior to the final hearing, the undersigned granted Petitioners' first and second requests for judicial recognition of section 1002.33 and School Board Policy 3.90. The undersigned denied Petitioners' third, fourth, fifth, sixth, and seventh requests for judicial recognition.

At the hearing, Petitioners presented the in-person testimony of Derek Kelmanson, Richard Page, Stacy Schmit, and Kathleen McGinn. Petitioners' Exhibits 1 through 5, 8 through 12, 15 through 18, and 20 through 23 were received into evidence. The School Board presented the in-person testimony of Kathleen McGinn, K.W., L.H.H., and Marvin Sanders. The School Board's Exhibits 1, 6 through 9, 11 through 16, 18, 21 through 24, 26 through 37, and 39 through 41 were received into evidence. In addition, the parties agreed that the deposition of Kenneth Haiko would be received into evidence in lieu of his live testimony because he was unavailable for the final hearing. The deposition of Adam Miller (along with Exhibits 1 through 7 attached to the

deposition) was also received into evidence in lieu of his live testimony because he was unavailable for the final hearing.

At the hearing, the undersigned granted the parties' request that proposed final orders be filed within 20 days after the filing of the final hearing transcript. The two-volume final hearing Transcript was filed on March 2, 2015.

Following the hearing, the undersigned granted the parties' multiple requests to extend the deadline for the filing of their proposed final orders. On May 26, 2015, the parties timely filed their proposed final orders, which were given consideration in the preparation of this Final Order.

Unless otherwise indicated, citations to the Florida Statutes refer to the 2014 Florida Statutes.

The Parties' Joint Prehearing Stipulation has been incorporated into this Final Order to the extent relevant.

FINDINGS OF FACT

The Parties

1. Renaissance Charter School, Inc., is a not-for-profit Florida corporation.

2. Renaissance Charter School, Inc., currently owns and operates two charter schools in St. Lucie County: Renaissance Charter School at Tradition and Renaissance Charter School at St. Lucie.

3. The School Board is the "sponsor" of Renaissance Charter School at Tradition within the meaning of the charter school statute, section 1002.33.

The School Board's Approval of Renaissance Charter School at Tradition's Charter Application and Charter Contract

4. On August 1, 2012, a charter school application was submitted to the School Board by Renaissance Charter School, Inc., on behalf of Renaissance Charter School at Tradition.

5. During the charter application and approval process, the School Board consistently contended that charter schools in St. Lucie County are required by law to offer regular school busing to all eligible students residing more than two miles from their charter school.^{1/}

6. On September 17, 2012, the School Board's Charter School Evaluation Team recommended approval of the Renaissance Charter School at Tradition charter school application, subject to the charter school providing "a viable transportation plan that meets statutory requirements once a school site has been finalized."

7. On May 14, 2013, the School Board, at a regular board meeting, unanimously approved its charter contract with Renaissance Charter School, Inc., for Renaissance Charter School at Tradition.

8. The Renaissance Charter School at Tradition charter contract became effective upon approval by the School Board at

its May 14, 2013, meeting. The term of the charter contract is five years, commencing on the first day of the 2013-2014 school year, and ending on June 30, 2018.

9. The School Board and Renaissance Charter School at Tradition have a valid and binding charter school contract that is still in full force and effect.

Applicable Transportation Provisions of Renaissance Charter School at Tradition's Charter Contract

10. Section 6 of the charter contract between the School Board and Renaissance Charter School at Tradition, which governs student transportation, provides as follows:

SECTION 6: TRANSPORTATION

A) Cooperation Between Sponsor and School:

The School shall provide transportation to the School's students consistent with the requirements of Part I.E. of Chapter 1006, and Section 1012.45, F.S. The School may contract with the Sponsor to provide transportation service.

B) Reasonable Distance: Transportation will not be a barrier to equal access for all students residing within the District, and the School shall provide transportation to all students residing in the District subject to the limitations in this Section 6.B. Students residing within two miles of the school will be expected to furnish their own transportation, except that certain students, as specified in Section 1006.21, F.S., for example students with disabilities and elementary grade students who are subject to specified hazardous walking conditions, must be provided transportation, regardless of the distance from the school. For students who are geographically isolated, or who are

unable to be transported on a school bus due to disabilities, the School will offer reimbursement to eligible parents residing within the District. This parental reimbursement shall be equivalent to the monies provided by the Sponsor to the School for transportation of the student. At the time of student application for enrollment, the School shall be responsible for informing parents of the transportation options available, including the reimbursement amount available in lieu of provided transportation to qualifying students.

C) Compliance with Safety Requirements: The School shall demonstrate compliance with all applicable transportation safety requirements. Unless it contracts with the Sponsor for the provision of student transportation, the School is required to ensure that each school bus transporting the School's students meets applicable federal motor vehicle safety standards and other specifications. The School agrees to monitor the status of the commercial drivers' licenses of each school bus driver employed or hired by the School (hereafter "School Bus Drivers") unless it contracts with Sponsor to provide such services. The School will provide the Sponsor, via the Charter Schools Support Department, an updated list each quarter of all School Bus Drivers providing commercial driver's license numbers, current license status and license expiration dates.

D) Fees: The School may not charge a fee for transportation to which the student is entitled pursuant to state law. The School shall reimburse parents for parent-provided transportation costs if the student is legally entitled to transportation.

E) Private Transportation Agreement: In the event the School will be contracting with a third party to provide transportation to its students, the School shall provide a copy of the transportation contract to the Sponsor at

least sixty (60) days prior to the initial day of classes.

F) Reimbursement for School Funded

Transportation: The rate of reimbursement to the School by the Sponsor for transportation will be equivalent to the reimbursement rate provided by the State of Florida for all eligible transported students.

11. Section 1 B) 4) of the charter contract further provides:

4) Statutory Requirements: The Parties will comply with Section 1002.33, F.S., and any regulations adopted by the State Board of Education or other state agency, or amendments thereto, pertaining to charter schools, and all applicable federal, state and local laws pertaining to civil rights and student health, safety and welfare. If any conflict exists between the provisions of the approved application or this Charter and any specific provision of law, then the provisions of the law shall prevail. The School shall be bound by amendments to applicable statutes, rules, and regulation, as any such amendments take effect. Unless specifically incorporated herein, the policies of the Sponsor do not apply to the School. However, if the School is statutorily required to have a policy and does not, the Sponsor's policy shall be deemed to apply.

Students of Renaissance Charter School at Tradition and the School's Transportation Policy

12. For a student to attend Renaissance Charter School at Tradition, their parents must apply during an open enrollment period, and a lottery system is used to determine who may attend.

13. Parents whose child is selected through the lottery to attend Renaissance Charter School at Tradition are given a certain number of days to accept or decline the seat. Then the process starts over again until all seats are filled or there are no other students on the list.

14. Renaissance Charter School at Tradition opened for the 2013-2014 school year as a K-6 school with 695 enrolled students. Projected enrollment for the 2013-2014 school year was 661 students. However, before the 2013-2014 school year began, projected enrollment had increased to 745 students.

15. Renaissance Charter School at Tradition opened for the 2014-2015 school year as a K-7 school with 890 enrolled students and an enrollment cap of 945 students.

16. For the 2015-2016 school year, Renaissance Charter School at Tradition plans to open as a K-8 school with projected enrollment of 1,075 students.

17. For the 2016-2017 school year, Renaissance Charter School at Tradition plans to open as a K-8 school at maximum capacity of 1,145 enrolled students.

18. The only "A" graded schools in St. Lucie County, Florida, for the 2013-2014 school year were Renaissance Charter School at Tradition and Renaissance Charter School at St. Lucie.

19. There is a waiting list for grades K-3 at Renaissance Charter School at Tradition.

20. Parents of students enrolled at Renaissance Charter School at Tradition recognize that Renaissance Charter School at Tradition provides their children with a unique educational opportunity.

21. Parents of students enrolled at Renaissance Charter School at Tradition recognize that the decision to enroll their children at Renaissance Charter School at Tradition is a personal choice and not a privilege.

22. Parents of students enrolled at Renaissance Charter School at Tradition are active partners in the education of their children.

23. Renaissance Charter School at Tradition does not provide regular school busing to its students who reside more than two miles from the charter school.

24. Renaissance Charter School at Tradition re-evaluates its transportation policies on a yearly basis.

25. Parents of students are informed that Renaissance Charter School at Tradition does not offer regular school busing in informational meetings before they apply for their child to attend the school.

26. Parents of students enrolled at Renaissance Charter School at Tradition sign a "Parent Obligation Form," contractually obligating themselves "[t]o provide transportation to and from the school for my child."

27. Parents are required to sign the "Parent Obligation Form" every year as part of the enrollment process.

28. The transportation policy of Renaissance Charter School at Tradition, which is given to all parents upon enrollment, appraises parents that the school does not offer regular school busing to students, but that the school agrees to provide "transportation or an equivalent reimbursement" to students in certain legally-defined circumstances.

29. The transportation policy of Renaissance Charter School at Tradition provides as follows:

Student Transportation Policy

Renaissance Charter School at Tradition's [sic], is and always has been, fully committed to ensuring that transportation will not be a barrier to equal access for all students residing within the District. To date, there are more students attending our newly-opened charter school than was projected for our first year.

Although our school does not presently offer busing as a means of school transportation, we are in the process of helping put together parent carpools for those parents who want their children to share rides to and from school.

Moreover, transportation, or an equivalent reimbursement, will be provided to any student who falls under any of the following categories [taken from Florida State Statute 1006.21]:

1. Any student in grades K-8 who does not otherwise have access to an adequate educational facility or opportunity.

2. Any student in grades K-6 who are subjected to a hazardous walking condition as defined in s. 1006.23 while en route to or from school.

3. Any student in grades K-8 who have a documented transportation need in their IEP.

4. Any student in grades K-8 who are pregnant, student parents, and/or the children of these students if a teenage parent program is presented at the school.

If you feel your child falls within one of the categories listed above, please notify the front office and we will work with you on a case-by-case basis.

30. The School Board rejected the transportation policy of Renaissance Charter School at Tradition because it does not provide for the regular school busing of all students residing more than two miles from the charter school.

31. Renaissance Charter School at Tradition's failure to provide regular bus transportation to all students residing more than two miles from the charter school does not constitute a barrier to equal access to all students.

32. At the hearing, no credible and persuasive evidence was presented that any students lack equal access to an adequate educational facility or opportunity. No evidence was presented that any students are subject to hazardous walking conditions while en route to or from the charter school.

33. There is one student who enrolled on January 20, 2015, who has a transportation need documented in their individual

education plan, but the child's parent has chosen to provide transportation. No evidence was presented of any students who are pregnant or who have given birth to any children.

34. Renaissance Charter School at Tradition opens at 6:00 a.m. and closes at 6:00 p.m. There are before-and-after-care private buses that take students off-site to other organizations, such as to karate and the Boys and Girls Clubs.

35. Renaissance Charter School at Tradition also encourages parents' use of carpooling their children to and from school. The School Board's position is that carpooling is not a viable transportation option for the charter school.

36. At Renaissance Charter School at Tradition, one parent has decided to run a private busing service, but no other parents have chosen to use the services of that private bus.^{2/}

The Charter Contract and Transportation Policy Do Not Require Petitioners to Transport by Regular School Bus All Students Residing More Than Two Miles From the Charter School

37. The parties' dispute centers on whether the School Board can require Renaissance Charter School at Tradition to offer regular school bus transportation, to and from the school, for all students residing more than two miles from the school. The interests of Petitioners are directly and substantially affected by the School Board's attempt to require that

Petitioners transport by regular school bus all students residing more than two miles from the charter school.

38. The parties unsuccessfully mediated their dispute before the Florida Department of Education.

39. The persuasive and credible evidence adduced at hearing demonstrates that Renaissance Charter School at Tradition has not breached its charter contract with the School Board by not providing regular school busing to all students residing more than two miles from the charter school.

40. The charter school contract between the School Board and Renaissance Charter School at Tradition does not require Renaissance Charter School at Tradition to provide regular school busing to all students residing more than two miles from the charter school.^{3/}

41. Renaissance Charter School at Tradition's transportation policy is consistent with its charter contract with the School Board.

The School Board's Inequitable Treatment of Charter Schools

42. The persuasive and credible evidence adduced at hearing demonstrates that the School Board's treatment of Petitioners is inequitable.

43. The School Board has a "no transportation zone," which geographically encompasses approximately one-third of the county. Students of traditional public schools residing in the "no

transportation zone" are not provided regular school bus transportation to and from school.

44. The School Board also has a "limited transportation zone." Students of traditional public schools residing in the "limited transportation zone" are provided regular school bus transportation, but only if they attend a school located within the "limited transportation zone."

45. The "no transportation zone" and "limited transportation zone" encompass approximately one-half of St. Lucie County.

46. At the hearing, the School Board conceded that it has different policies for the transportation of traditional public school students and students at magnet schools and attractor schools.

47. The School Board encourages the use of carpools for students of traditional public schools.

The School Board's Alleged Unadopted Policy

48. The School Board, in paragraph 20 of its counter-petition filed in Case No. 14-3267, specifically states: "The School District's adopted policy is that students who live more than two miles from their assigned school shall be provided school bus transportation." (emphasis added).

49. The persuasive and credible evidence adduced at hearing demonstrates that the School Board interprets Florida law and its

adopted School Board Policies 3.90 and 8.31 to require that all existing and future charter schools within the county provide regular school bus transportation for all students residing more than two miles from the charter school. The persuasive and credible evidence adduced at hearing demonstrates that the School Board does not have an unadopted policy that all charter schools within the county must provide regular school busing to all students residing more than two miles from their charter school.

The School Board's Adopted Policies

50. The School Board has two adopted policies, School Board Policy 3.90 (dealing with charter schools) and School Board Policy 8.31 (dealing with student transportation). The interests of Petitioner are directly and substantially affected by these policies.^{4/}

51. Both School Board Policies 3.90 and 8.31 were properly noticed pursuant to chapter 120, Florida Statutes.

52. Neither School Board Policy 3.90 nor 8.31 is specifically incorporated into the charter agreement between the School Board and Renaissance Charter School at Tradition.

53. Moreover, according to the School Board, School Board Policy 8.31 applies only in the absence of a viable charter school transportation policy.

54. The persuasive and credible evidence adduced at hearing fails to demonstrate that the School Board and Renaissance

Charter School at Tradition mutually agreed that School Board Policy 3.90, or 8.31, apply to the charter school.

CONCLUSIONS OF LAW

Jurisdiction and General Legal Principles Governing Charter Schools

55. DOAH has jurisdiction to hear these consolidated cases pursuant to sections 120.54(1)(a), 120.56(3) and (4), 120.569, 120.57(1), and 1002.33(6)(h), Florida Statutes.

56. In Florida, charter schools are nonsectarian public schools that operate pursuant to a charter contract with a public sponsor, in this case a school board. See § 1002.33(1), Fla. Stat.; Sch. Bd. v. Survivors Charter Sch., Inc., 3 So. 3d 1220, 1227 (Fla. 2009). All charter schools in Florida are public schools. Id.

57. Flexibility and parental choice are at the heart of the charter school statute. The Florida statute governing charter schools (chapter 1002) is titled: "STUDENT AND PARENTAL RIGHTS AND EDUCATIONAL CHOICES." One of the statutorily recognized guiding principles for charter schools is that they "provide[] parents with the flexibility to choose among diverse educational opportunities within the state's public schools system." § 1002.33(2), Fla. Stat.; Sch. Bd. v. Survivors Charter Sch., Inc., 3 So. 3d at 1227. (emphasis added). A charter school is open to any student residing in the school district in

which the charter school is located. § 1002.33(10)(a), Fla. Stat.

The School Board Cannot Require Petitioners to Transport by Regular School Bus All Charter School Students Residing More Than Two Miles From the Charter School, and the Charter School Did Not Breach Its Contract with the School Board by Not Providing Transportation to Its Students in Accord with the Parties' Charter School Contract and Florida Statutes

58. The parties agree that the undersigned has final order authority to resolve their dispute in Case No. 14-3267 pursuant to section 1002.33(6)(h), which provides, in pertinent part, as follows:

The Department of Education shall provide mediation services for any dispute regarding this section subsequent to the approval of a charter application and for any dispute relating to the approved charter, except disputes regarding charter school application denials. If the Commissioner of Education determines that the dispute cannot be settled through mediation, the dispute may be appealed to an administrative law judge appointed by the Division of Administrative Hearings. The administrative law judge has final authority to rule on issues of equitable treatment of the charter school as a public school, whether proposed provisions of the charter violate the intended flexibility granted charter schools by statute, or on any other matter regarding this section except a charter school application denial, a charter termination, or a charter nonrenewal and shall award the prevailing party reasonable attorney's fees and costs incurred to be paid by the losing party. The costs of the administrative hearing shall be paid by the party whom the administrative law judge rules against.

59. Because this "appeal" comes to the Administrative Law Judge without a record, it was proper to conduct an evidentiary hearing concerning the issues raised in Case No. 14-3267, to wit: 1) whether Petitioners can be required by the School Board to offer regular busing to all charter school students residing more than two miles from the charter school; and 2) whether Renaissance Charter School at Tradition breached its contract with the School Board by not providing transportation to students in accord with the parties' Charter School Contract and Florida Statutes.

60. As to the first issue, Petitioners bear the burden to demonstrate by a preponderance of the evidence that they are entitled to the relief requested. As to the second issue, the School Board bears the burden to demonstrate by a preponderance of the evidence that it is entitled to the relief requested. § 120.57(1)(j), Fla. Stat.; Fla. Dep't of Transp. v. J.W.C., Inc., 396 So. 2d 778, 781 (Fla. 1st DCA 1981). Section 1002.33(6)(h) does not contain an express appellate standard of review or finding, or defer to a decision made by the sponsor. As such, the scope of issues set out by the Legislature in section 1002.33(6)(h) provides for a de novo review by the Administrative Law Judge. See Tampa Sch. Dev. Corp. v. Hillsborough Cnty. Sch. Bd., Case No. 11-2183 (Fla. DOAH Oct. 25, 2011) (Corrected Final Order).

61. In the instant case, the resolution of the parties' dispute centers on statutory interpretation. Section 1002.33(20)(c) specifically addresses a charter school's obligation with regard to the transportation of its students:

Transportation of charter school students shall be provided by the charter school consistent with the requirements of subpart I.E. of chapter 1006 and s. 1012.45. The governing body of the charter school may provide transportation through an agreement or contract with the district school board, a private provider, or parents. The charter school and the sponsor shall cooperate in making arrangements that ensure that transportation is not a barrier to equal access for all students residing within a reasonable distance of the charter school as determined in its charter.

62. The undersigned's analysis must begin with the question of whether this statute is clear and unambiguous. As recognized by the First District Court of Appeal in Levey v. Detzner, 146 So. 3d 1224, 1225 (Fla. 1st DCA 2014):

Legislative intent is the polestar that guides a court's interpretation of a statute. A court must endeavor to construe a statute to effectuate the Legislature's intent. In discerning legislative intent, a court must look to the actual language used in the statute. When a statute is clear and unambiguous, a court will not look behind the statute's plain language for legislative intent or resort to rules of statutory construction to ascertain intent. It is not the prerogative of a court to construe an unambiguous statute differently from the plain language of the words employed, nor is

the wisdom of the statute within the ambit of the court's authority.

Levey, 146 So. 3d at 1225 (citations omitted).

63. The disjunctive effect of the word "or" may be helpful in determining the plain meaning of a statute. Zuckerman v. Alter, 615 So. 2d 661, 663 (Fla. 1993).

64. Section 1002.33(20)(c) is clear and unambiguous. This subsection provides the mode of how transportation may be provided by a charter school for its students. "The governing body of the charter school may provide transportation through an agreement or contract with the district school board, a private provider, or parents." The express terms and plain language of the statute, especially the use of the word "through," and the disjunctive effect of the phrase "or parents," unequivocally establishes that a charter school may provide transportation through various means, including an agreement or contract with the parents of students. In other words, the phrase "or parents" in the charter transportation section can only mean that parents are one of the legal options by which Florida charter schools can transport their students to and from the charter school.

65. In the present case, the evidence adduced at hearing demonstrates that Renaissance Charter School at Tradition has entered into a written agreement with parents of enrolled students, whereby the parents have expressly agreed to be

responsible for the transportation of their children to and from school. These agreements are consistent with, and contemplated by, the plain and unambiguous language of section 1002.33(20)(c). Renaissance Charter School at Tradition met its statutory obligation with regard to the provision of transportation because parent transportation is one of the specific legal options available to the school under the statutes, and this option was made available to the parents.

66. Notwithstanding the plain and unambiguous language of section 1002.33(20)(c), the School Board argues that section 1006.21(3), Florida Statutes, requires that Renaissance Charter School at Tradition provide regular school busing for all students residing more than two miles from the charter school.

67. Section 1006.21(3) is contained within Subpart I.E., of chapter 1006. Section 1006.21 is titled: Duties of district school superintendent and district school board regarding transportation.

68. Section 1006.21(3) provides, in part, as follows:

(3) District school boards, after considering recommendations of the district school superintendent:

(a) Shall provide transportation for each student in prekindergarten disability programs and in kindergarten through grade 12 membership in a public school when, and only when, transportation is necessary to provide adequate educational facilities and opportunities which otherwise would not be

available and to transport students whose homes are more than a reasonable walking distance as defined by rules of the State Board of Education, from the nearest appropriate school.

(b) Shall provide transportation for public elementary school students in membership whose grade level does not exceed grade 6, and may provide transportation for public school students in membership in grades 7 through 12, if such students are subjected to hazardous walking conditions as provided in s. 1006.23 while en route to or from school.

* * *

(e) Shall provide necessary transportation to pregnant students or student parents, and the children of those students, when the district school board operates a teenage parent program pursuant to s. 1003.54.

69. The School Board further relies on Florida Administrative Code Rule 6A-3.001(3), which provides:

(3) A reasonable walking distance for any student who is not otherwise eligible for transportation pursuant to Section 1011.68, F.S., is any distance not more than two (2) miles between the home and school or one and one-half (1 1/2) miles between the home and the assigned bus stop. Such distance shall be measured from the closest pedestrian entry point of the property where the student resides to the closest pedestrian entry point of the assigned school building or to the assigned bus stop. The pedestrian entry point of the residence shall be where private property meets the public right-of-way. The district shall determine the shortest pedestrian route whether or not it is accessible to motor vehicle traffic.

70. The School Board further relies on section 1006.22(1)(a), which provides:

District school boards shall use school buses . . . for all regular transportation. Regular transportation or regular use means transportation of students to and from school or school-related activities that are part of a scheduled series or sequence of events to the same location.

71. Had the Legislature not specifically stated in section 1002.33(20)(c) that "[t]he governing body of the charter school may provide transportation through an agreement or contract with the district school board, a private provider, or parents," then the School Board's position might be well-taken.

72. However, the Legislature chose to include a specific sentence in section 1002.33(20)(c), which clearly and unambiguously provides that transportation of charter school students may be provided through various mechanisms, including through an agreement between the parents and the charter school.

73. Even if the undersigned were to resort to rules of statutory construction, the outcome would be the same. The specific sentence in section 1002.33(20)(c), which provides that transportation of charter school students may be provided "through" an agreement between the "parents" and charter school, would control over sections 1006.21(3) and 1006.22(1)(a).

74. There are several basic statutory construction principles which guide this analysis. First, a specific

statutory provision controls over another general statutory provision. Sch. Bd. v. Survivors Charter Sch., Inc., 3 So. 3d 1220, 1232 (Fla. 2009); Fla. Virtual Sch. v. K12, Inc., 148 So. 3d 97, 101-104 (Fla. 2014). In the instant case, section 1002.33(20)(c) contains a specific statutory provision dealing with charter school transportation, and a specific sentence which allows a charter school to provide transportation to its students through various means, including through an agreement with parents. Sections 1006.21(3) and 1006.22(1)(a), on the other hand, deal with the more general subject of transportation.

75. Second, a statutory provision will not be construed in such a way that it renders meaningless any other statutory provision. Fla. Virtual Sch. v. K12, Inc., 148 So. 3d at 101-104. In the instant case, to conclude that Renaissance Charter School at Tradition is required to transport by regular school bus all students residing more than two miles from the charter school, would render meaningless the sentence in section 1002.33(20)(c), which specifically allows a charter school to provide transportation to its students "through" various means, including through an agreement with "parents."

76. Third, significant effect must be given to every word, phrase, sentence, and part of the statute if possible, and words in a statute should not be construed as mere surplusage. Sch. Bd. v. Survivors Charter Sch., Inc., 3 So. 3d 1220, 1232-33 (Fla.

2009). In the instant case, to conclude that Renaissance Charter School at Tradition is required to transport by regular school bus all students residing more than two miles from the charter school would ignore the specific sentence in the charter school transportation statute, section 1002.33(20)(c), which contains the word "through," and the phrase "or parents." Such a conclusion would reduce the sentence to mere surplusage.

77. Furthermore, to conclude that Renaissance Charter School at Tradition is required by the charter school statute to provide regular school bus transportation to all students residing more than two miles from the charter school would violate one of the fundamental principles of the charter school statute, which is to provide charter schools greater flexibility.

78. The Legislature specifically recognized that charter schools should have greater flexibility than traditional public schools. Parents choose to send their children to charter schools, knowing full-well that they may reside more than two miles from the charter school, and that their traditional public school may be located much closer to their residence than the charter school.

79. Accordingly, the undersigned concludes, as a matter of law, that Renaissance Charter School at Tradition is not required by the charter school statute to transport by regular school bus

all children residing more than two miles from the charter school.

80. As detailed above, the charter contract and Renaissance Charter School at Tradition's Transportation Policy also do not require Renaissance Charter School at Tradition to transport by regular school bus all children who reside more than two miles from the charter school.^{5/}

81. As detailed above, the School Board's insistence that Renaissance Charter School at Tradition transport by regular school bus all students residing more than two miles from the charter school is inequitable and violates the provision in section 1002.33(6)(h) with respect to the "equitable treatment of the charter school as a public school."

School Board Policies 3.90(11) and (14) and 8.31 Cannot be Applied to Petitioners

82. Petitioners contend that School Board Policy 3.90 constitutes an invalid exercise of delegated legislative authority. Section 120.56(3), Florida Statutes, provides, in pertinent part:

CHALLENGING EXISTING RULES; SPECIAL PROVISIONS.--

(a) A substantially affected person may seek an administrative determination of the invalidity of an existing rule at any time during the existence of the rule. The petitioner has a burden of proving by a preponderance of the evidence that the existing rule is an invalid exercise of

delegated legislative authority as to the objections raised.

(b) The administrative law judge may declare all or part of a rule invalid. The rule or part thereof declared invalid shall become void when the time for filing an appeal expires. The agency whose rule has been declared invalid in whole or part shall give notice of the decision in the Florida Administrative Register in the first available issue after the rule has become void.

83. Under section 120.52(8), a 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."

84. Among the factors in determining whether a rule is an invalid exercise of delegated legislative authority are:
1) whether "[t]he agency has exceeded its grant of rulemaking authority, citation to which is required by s. 120.54(3)(a)1.;"
and 2) whether "[t]he rule enlarges, modifies, or contravenes the specific provisions of law implemented, citation to which is required by s. 120.54(3)(a)1." § 120.52(8)(b) & (c), Fla. Stat.;
see also Lamar Outdoor Adver. v. Fla. DOT, 17 So. 3d 799, 801 (Fla. 1st DCA 2009).

85. In the instant case, Policy 3.90(11) provides as follows:

(11) Transportation and Food Services

(a) Transportation and food services are the responsibility of charter schools and must be provided according to District, state, and federal rules and regulations.

(b) A charter school may contract with the District for transportation and/or food service or may contract with a private provider.

86. The undersigned concludes, as matter of law, that School Board Policy 3.90(11) is an invalid exercise of delegated legislative authority because it modifies and contravenes the charter school statute, specifically sections 1002.33(20)(c), 1002.33(6)(h), and 1002.33(5)(b)1.d.

87. Notably absent from School Board Policy 3.90 is any language authorizing the charter school to agree or contract with "parents." As detailed above, section 1002.33(20)(c) specifically allows for charter schools to agree or contract with parents to provide transportation for their own children to and from the charter school. Moreover, section 1002.33(5)(b)1.d. provides that "the sponsor shall not apply its policies to a charter school unless mutually agreed upon to by both parties and the charter school." School Board Policy 3.90 is unreasonable and violates the intent of giving charter schools greater flexibility because it fails to expressly provide that charter schools may agree or contract with parents for transportation, and the policy was not mutually agreed upon by the parties.

88. Petitioners further assert that School Board Policy 3.90(14) does not provide for the pass through of federal funds, as required by section 1002.33(17)(c). School Board Policy 3.90(14) provides, in pertinent part, as follows:

(14) Funding

(a) Funding for student enrollment in a charter school shall be the sum of District operating funds from the Florida Education Finance Program, including gross state and local funds, discretionary lottery funds, and discretionary mileage funds divided by totally District funded weighted full-time-equivalent students times the weighted full-time-equivalent students of the particular charter school. Charter Schools, if eligible, shall also receive their proportionate share of categorical program funds included in the Florida Education Finance Program.

(b) Federal funds received by the District for the provision of services shall be used to provide charter school students the level of services provided to other student enrolled in schools operated by the School Board as appropriate in consideration of the provisions of the funding sources.

(c) Total funding shall be recalculated during the school year to reflect actual weighted FTE students reported by the charter school during the FTE student survey periods.

89. Section 1002.33(17) provides, in pertinent part:

(17) FUNDING.--Students enrolled in a charter school, regardless of the sponsorship, shall be funded as if they are in a basic program or a special program, the same as students enrolled in other public schools in the school district. . . .

(a) Each charter school shall report its student enrollment to the sponsor as required in s. 1002.62, and in accordance with the definitions in s. 1011.61. The sponsor shall include each charter school's enrollment in the district's report of student enrollment. All charter schools submitting student record information required by the Department of Education shall comply with the Department of Education's guideline for electronic data formats for such data, and all districts shall accept electronic data that complies with the Department of Education's electronic format.

(b) The basis for the agreement for funding students enrolled in a charter school shall be the sum of the school district's operating funds from the Florida Education Finance Program as provided in s. 1011.62 and the General Appropriations Act, including gross state and local funds, discretionary lottery funds, and funds from the school district's current operating discretionary millage levy; divided by total funded weighted full-time equivalent students in the school district; multiplied by the weighted full-time equivalent students for the charter school. Charter schools whose students or programs meet the eligibility criteria in law are entitled to their proportionate share of categorical program funds included in the total funds available in the Florida Education Finance Program by the Legislature, including transportation and the Florida digital classrooms allocation. Total funding for each charter school shall be recalculated during the year to reflect the revised calculations under the Florida Education Finance Program by the state and the actual weighted full-time equivalent students reported by the charter school during the full-time equivalent student survey periods designated by the Commissioner of Education.

(c) If the district school board is providing programs or services to students

funded by federal funds, any eligible students enrolled in charter schools in the school district shall be provided federal funds for the same level of service provided students in the schools operated by the district school board. Pursuant to provisions of 20 U.S.C. 8061 s. 10306, all charter schools shall receive all federal funding for which the school is otherwise eligible, including Title I funding, not later than 5 months after the charter school first opens and within 5 months after any subsequent expansion of enrollment. Unless otherwise mutually agreed to by the charter school and its sponsor, and consistent with state and federal rules and regulations governing the use and disbursement of federal funds, the sponsor shall reimburse the charter school on a monthly basis for all invoices submitted by the charter school for federal funds available to the sponsor for the benefit of the charter school, the charter school's students, and the charter school's students as public school students in the school district. Such federal funds include, but are not limited to, Title I, Title II, and Individuals with Disabilities Education Act (IDEA) funds. To receive timely reimbursement for an invoice, the charter school must submit the invoice to the sponsor at least 30 days before the monthly date of reimbursement set by the sponsor. In order to be reimbursed, any expenditures made by the charter school must comply with all applicable state rules and federal regulations, including, but not limited to, the applicable federal Office of Management and Budget Circulars; the federal Education Department General Administrative Regulations; and program-specific statutes, rules, and regulations. Such funds may not be made available to the charter school until a plan is submitted to the sponsor for approval of the use of the funds in accordance with applicable federal requirements. The sponsor has 30 days to

review and approve any plan submitted pursuant to this paragraph.

90. In the instant case, School Board Policy 3.90(14) contravenes and modifies sections 1002.33(17)(c) and 1002.33(5)(b)1.d. School Board Policy 3.90(14) limits a charter school's receipt of federal funds received by the School Board for the provision of services "as appropriate in consideration of the provisions of the funding sources." This provision, particularly the use of the term "appropriate," gives the School Board unbridled discretion to determine the circumstances under which a charter school may receive federal funds. Section 1002.33(17)(c), on the other hand, is more specific and less discretionary with regard to a charter school's right to receipt of federal funding. Moreover, the policy was not mutually agreed upon by the parties. Finally, School Board Policy 3.90(11)(b) is unreasonable and violates the intent of the charter school statute to give charter schools greater flexibility. Accordingly, School Board Policy 3.90(14) is an invalid exercise of delegated legislative authority.

91. As to School Board Policy 8.31, the unrefuted testimony at hearing establishes that the School Board would not apply the policy in a situation where a charter school's transportation plan is viable.

92. Based on the undersigned's conclusion that Renaissance Charter School at Tradition's transportation plan is valid, it is unnecessary to reach the issue of whether School Board Policy 8.31 constitutes an invalid exercise of delegated legislative authority. Nevertheless, the undersigned concludes, as a matter of law, that School Board Policy 8.31 is an invalid exercise of delegated legislative authority for the same reasons as School Board Policy 3.90(11).

93. Finally, based on the Findings of Fact and Conclusions of Law detailed above, it is unnecessary to reach the issue of whether the School Board has the legal authority to adopt School Board Policies 3.90 and 8.31.^{6/}

The School Board Does not Have an Unadopted Policy

94. Section 120.56(4)(a) authorizes any person who is substantially affected by an agency statement to seek an administrative determination that the statement is actually a rule whose existence violates section 120.54(1)(a) because the agency has not formally adopted the statement. Section 120.54(1)(a) declares that "[r]ulemaking is not a matter of agency discretion" and directs that "[e]ach agency statement defined as a rule by s. 120.52 shall be adopted by the rulemaking procedure provided by this section as soon as feasible and practicable."

95. Section 120.52(16) defines the term "rule" 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 by an existing rule. The term also includes the amendment or repeal of a rule.

96. To be a rule, a statement of general applicability must operate in the manner of a law. Thus, a statement is a rule if its effect is to create stability and predictability within its field of operation; if it treats all those with like cases equally; if it requires affected persons to conform their behavior to a common standard; or if it creates or extinguishes rights, privileges, or entitlements. State Dep't of Admin. v. Harvey, 356 So. 2d 323, 325 (Fla. 1st DCA 1977); see also Jenkins v. State, 855 So. 2d 1219, 1225 (Fla. 1st DCA 2003); Amos v. Dep't of HRS, 444 So. 2d 43, 46 (Fla. 1st DCA 1983).

97. Because the definition of the term "rule" expressly includes statements of general applicability that implement or interpret law, an agency's interpretation of a statute that gives the statute a meaning not readily apparent from its literal reading and purports to create rights, require compliance, or otherwise have the direct and consistent effect of law, is a rule, but one which simply reiterates a statutory mandate is not. State Bd. of Admin. v. Huberty, 46 So. 3d 1144, 1147 (Fla. 1st DCA

2010); Beverly Enters.-Fla., Inc. v. Dep't of HRS, 573 So. 2d 19, 22 (Fla. 1st DCA 1990); St. Francis Hosp., Inc. v. Dep't of HRS, 553 So. 2d 1351, 1354 (Fla. 1st DCA 1989).

98. On the other hand, an agency statement applying an existing adopted rule is not itself an unpromulgated rule. Envtl. Trust v. Dep't of Env'tl. Prot., 714 So. 2d 493, 498 (Fla. 1st DCA 1998); Bisz v. Fla. Dep't of Agric. & Consumer Servs., 802 So. 2d 385 (Fla. 3d DCA 2001).

99. Section 120.56(4)(c) authorizes the administrative law judge ("ALJ") to enter a final order determining that all or part of a challenged statement violates section 120.54(1)(a). The ALJ is not authorized to decide, however, whether the statement is an invalid exercise of delegated legislative authority as defined in section 120.52(8)(b) through (f). Thus, in a section 120.56(4) proceeding, it is not necessary or even appropriate for the ALJ to decide whether an unadopted rule exceeds the agency's grant of rulemaking authority, for example, or whether it enlarges, modifies, or contravenes the specific provisions of law implemented, or is otherwise "substantively" an invalid exercise of delegated legislative authority.

100. Section 120.56(4) is forward-looking in its approach. It is designed to prevent future or recurring agency action based on an unadopted rule, not to provide relief from final agency action that has already occurred. Thus, if a violation is found,

the agency must, pursuant to section 120.56(4)(d), "immediately discontinue all reliance upon the statement or any substantially-similar statement as a basis for agency action." See, e.g., Ag. for Health Care Admin. v. HHCI Ltd., 865 So. 2d 593, 596 (Fla. 1st DCA 2004).

101. Turning to the instant case, Petitioners failed to establish by a preponderance of the evidence that the School Board has an unadopted busing policy of requiring all charter schools within the county to transport by school bus all students residing more than two miles from the charter school. Instead, the School Board's position rests on its erroneous application of the charter school statute and existing adopted School Board Policies 3.90(11) and 8.31.

ORDER

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

1. The School Board cannot require Petitioners to offer regular school busing to all charter school students residing more than two miles from Renaissance Charter School at Tradition.

2. Renaissance Charter School at Tradition did not breach its contract with the School Board by not providing transportation to students in accord with the parties' charter school contract and Florida Statutes.

3. Renaissance Charter School at Tradition's charter school contract and its transportation policy do not require Petitioners to transport by regular school bus, all students of Renaissance Charter School at Tradition residing more than two miles from the charter school.

4. The School Board does not have an unadopted illegal policy that all charter schools within the county are required to transport by regular school bus all students residing more than two miles from their charter school.

5. School Board Policies 3.90(11) and (14) are an invalid exercise of delegated legislative authority, and the School Board shall immediately cease any and all reliance upon these policies.

6. The undersigned retains jurisdiction to consider issues pertaining to attorneys' fees and costs.

DONE AND ORDERED this 30th day of June, 2015, in Tallahassee, Leon County, Florida.



DARREN A. SCHWARTZ
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 30th day of June, 2015.

ENDNOTES

^{1/} All students residing within the school district are eligible to attend any charter schools within the district, without regard to how many miles away from the charter school the student resides.

^{2/} K.W. lives more than four miles from Renaissance Charter School at Tradition. K.W. testified that she did not enroll her child at the charter school for the 2013-2014 school year because the school does not offer regular bus transportation to students, and she had no other way to transport her child to the school.

L.H.H. lives almost seven miles away from the charter school and about four miles away from Renaissance Charter School at St. Lucie. L.H.H.'s two children attended Renaissance Charter School at Tradition during the entire 2013-2014 school year, during which time L.H.H. provided her own transportation for her children. In addition, L.H.H. signed the "Parent Obligation form" for the 2013-2014 school year. However, L.H.H. decided not to enroll her children at Renaissance Charter School at Tradition for the 2014-2015 school year because no regular school busing was going to be provided. At the final hearing, L.H.H. acknowledged that Renaissance Charter School at St. Lucie offers regular school busing. Nevertheless, L.H.H. chose to enroll her children at Kidzone Academy, where they are on scholarship and happy. Kidzone Academy is located less than three miles from L.H.H.'s residence.

^{3/} Notably, the charter agreement between the School Board and Renaissance Charter School at St. Lucie specifically provides that Renaissance Charter School at St. Lucie "shall use school buses" for the transportation of students to and from the charter school. This language is absent from the charter agreement between the School Board and Renaissance Charter School at Tradition. Had the School Board intended to contract with Renaissance Charter School at Tradition to require the regular busing of all students residing more than two miles from the charter school, it certainly could have defined transportation in the parties' charter contract to require "school buses" for the regular transportation of all students residing more than two miles from the charter school.

4/ School Board Policy 3.90(11) provides as follows:

(11) Transportation and Food Services

(a) Transportation and food services are the responsibility of **charter** schools and must be provided according to District, state, and federal rules and regulations.

(b) A **charter** school may contract with the District for transportation and/or food service or may contract with a private provider.

School Board Policy 8.31 provides as follows:

(1) Any student who resides more than a reasonable walking distance, as defined by the Florida Department of Education, from the nearest appropriate school is eligible to ride a district school bus to and from school. The student shall board the bus at the stop designated which is nearest his home and may not enter or leave at any other stop except in case of an emergency; provided, that any exception shall be approved in writing by the school principal on request of the parent or guardian.

(2) Students with special transportation needs as defined in Florida Statutes, may ride a school bus regardless of distance.

(3) Bus routes will be designated which will provide safe and economical transportation. All bus routes and stop locations shall be designated so as to ensure safety and efficiency and shall be available for inspection. To the extent practicable, as determined by the Superintendent or designee, when consistent with other provisions of this policy, and when permitted under the requirements of state and federal law governing education and related services to individual students with special needs, bus stops should not be located on arterial or collector roadways that lack sidewalks.

(4) A deviation in a school bus route may be made by the transportation department when necessary. Each bus driver shall have on his or her bus a schedule of stops and approximate times.

(5) The Board will transport children attending the public schools of the district within the limits of the law. A student who is subject to hazardous walking conditions, as determined by the Board, whose grade level does not exceed grade 5 may be transported to school by bus.

(6) For students who have chosen an assignment to a magnet school, routes and bus stop locations may be designated using an express run system of community bus stops. The express run system substitutes traditional neighborhood stops with fewer community stops located at public places in order to promote efficiency and economy. Community stops may be located more than a reasonable walking distance from the student's home. For more information on magnet school transportation options available for specific residential areas, parents may refer to the Transportation Department website at <http://www.stlucie.k12.fl.us/includes/Transportation/Trans.aspx> or contact the Transportation Department at (772) 785-6602.

^{5/} According to Petitioners, the Florida State Board of Education recently adopted the Florida Standard Contract (which took effect on December 23, 2014). This new form contract, according to Petitioners, is incorporated by reference into amended Florida Administrative Code Rule 6A-6.0982 and is accessible through the following electronic hyperlink: <https://www.flrules.org/gateway/reference.asp?No=Ref-04769>. Petitioners seek to rely on this purported rule in support of their argument.

Notably, section 120.54(1)(i)3. and 4., Florida Statutes, provides, in pertinent part:

3. In rules adopted after December 31, 2010, material may not be incorporated by reference unless:

a. The material has been submitted in the prescribed electronic format to the Department of State and the full text of the material can be made available for free public access through an electronic hyperlink from the rule making the reference in the Florida Administrative Code; or

b. The agency has determined that posting the material on the Internet for purposes of public examination and inspection would constitute a violation of federal copyright law, in which case a statement to that effect, along with the address of locations at the Department of State and the agency at which the material is available for public inspection and examination, must be included in the notice required by subparagraph (3) (a)1.

4. A rule may not be amended by reference only. Amendments must set out the amended rule in full in the same manner as required by the State Constitution for laws.

Contrary to Petitioners' position, the purported amended rule is not accessible through an electronic hyperlink from the rule making the reference in the Florida Administrative Code. Although rule 6A-6.0982 on the Department of State website (which contains the Florida Administrative Code rules) references the electronic hyperlink, the new form is not accessible via the electronic hyperlink. Accordingly, Petitioners' reliance on the purported new State Board of Education form contract is rejected.

^{6/} Notably, Petitioners acknowledge in their amended petition that their primary argument in Case No. 14-4045RU is their "unpromulgated" rule challenge. Although Petitioners generally alleged that the School Board lacks the legal authority to adopt School Board Policy 3.90, they failed to meet their burden of alleging and identifying specific provisions of the policies they contend the School Board lacks the legal authority to adopt.

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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.