

**STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS**

Center for Education Advocacy, Inc.,  
Rosemary N. Palmer, and  
Donna Lorman,

Petitioners,

v.

DOAH CASE NO.: 08-\_\_\_\_\_RP

STATE BOARD OF EDUCATION and  
DEPARTMENT OF EDUCATION,

Respondents.

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**PETITION TO CHALLENGE PROPOSED RULES  
6A-6.03028, 6A-6.0331, 6A-6.03311, 6A-6.03312, and 6A-03411**

COME NOW, the Petitioners, the Center for Education Advocacy, Inc., and Rosemary N. Palmer, by and through their undersigned counsel, and hereby file this Petition pursuant to § 120.56, Florida Statutes, and seek an administrative determination as to whether Rules 6A-6.03028 Provision of Free Appropriate Public Education ("FAPE") and Development of Individual Educational Plans for Students with Disabilities; 6A-6.0331 General Education Intervention Procedures, Identification, Evaluation, Reevaluation and the Initial Provision of Exceptional Education Services; 6A-6.03311 Procedural Safeguards and Due Process Procedures for Parents and Students with Disabilities; 6A-6.03312 Discipline Procedures for Students with Disabilities; and 6A-6.03411 Definitions, ESE Policies and Procedures, and ESE Administrators, Florida Administrative Code ("F.A.C."), (the "Proposed Rules"), as published by the State Board of Education and the Florida Department of Education (collectively "FDOE") in

the Florida Administrative Weekly on May 23, 2008, Volume 34, Number 21 (a copy of which is attached hereto as Exhibit "A"), as corrected May 30, 2008 Volume 34, Number 22 are an invalid exercise of delegated legislative authority.

### **Background**

The chronological history of the rule promulgation of the amendments to Rules 6A-6.03028, 6A-6.033, 6A-6.03311, 6A-6.03312, and 6A-6.03411 , F.A.C., is as follows:

1. September 21, 2007, publication of a Notice of Rule Development, Volume 33, Number 38, Florida Administrative Weekly.
2. May 23, 2008, publication of a Notice of Proposed Rulemaking Publication Vol. 34 No. 21, Florida Administrative Weekly.
3. May 30, 2008 a correction to the May 23, 2008 publication of Notice of Proposed Rulemaking was published in Volume 34, No. 22 issue of the Florida Administrative Weekly announcing a public hearing of the Proposed Rules before the State Board of Education on June 17, 2008.
4. June 17, 2008 public hearing before the State Board of Education, and approval.

The Proposed Rules all relate to students with disabilities and, according to the published Notice of Proposed Rulemaking, are supposed to have as their purpose and effect "...to align Florida's administrative rules related to the provision of services to students with disabilities with the 2004 reauthorization of the Individuals with Disabilities Education Act (the "IDEA") and its implementing Regulations. The affect of these amendments will minimize the number of rules to which local education agencies (LEAs) and schools in Florida are subjected."

The Summaries published for the Proposed Rules describe the changes:

Rule 6A-6.03028, F.A.C., is proposed for amendment to combine into a single rule all of the federal requirements related to the provision of a free appropriate public education (FAPE) and the development of individual educational plans (IEPs) for students with disabilities.

Rule 6A-6.0331, F.A.C., is proposed for amendment to incorporate the procedures related to activities required prior to referral, referral and identification are collectively referred to as “general education intervention procedures” to conform with changes in the field related to ensuring highest student achievement for all students. These amendments **align Florida’s rules with the federal regulations relative to early intervening services, identification of students who may be eligible students with disabilities, evaluation and reevaluation procedures, and the initial provision of ESE services.** When appropriate, corresponding procedures relative to giftedness are included. **(Emphasis added.)**

Rule 6A-6.03311, F.A.C., is proposed for amendment to align the requirements related to procedural safeguards and due process procedures for parents and students with disabilities with the requirements under IDEA and its implementing regulations. **Specific details regarding pre-hearing and hearing procedures are proposed for deletion as they are not federal requirements** and in order to provide more discretion to administrative law judges (ALJs) regarding how hearings are conducted while maintaining the minimum federal requirements. **(Emphasis added.)**

Rule 6A-6.03312, F.A.C., is proposed for amendment to mirror the federal requirements at 34 CFR 300.530 – 300.536. This includes definitions that are contained in the federal regulations that supersede, for purposes of discipline of students with disabilities, definitions under state law. **(Notice the absence of announcement of repealing existing protections for such students.)**

Rule 6A-6.03411, F.A.C., is proposed for amendment to incorporate a new “definitions” section to define all terms related to exceptional student education, and to align Florida’s definitions with those in IDEA and its implementing regulations. Old and out-dated provisions have been deleted.

Congress found when it amended IDEA in 2004 that implementation of the act had been impeded by low expectations and insufficient focus on applying replicable research on proven teaching and learning methods. It noted that almost 30 years of research and experience had demonstrated that the education of children with disabilities can be made more effective by:

- Having high expectations for such children and ensuring their access and progress in the general curriculum to the maximum extent possible, in order to meet the challenging expectations that have been established for all children and be prepared to lead productive and independent adult lives to the maximum extent possible;
- Providing special education and related services and aids and supports in the regular classroom to children who need them, whenever appropriate;
- Strengthening the role of parents and ensuring that families of such children have meaningful opportunities to participate in the education of their children at school and at home;
- Coordinating IDEA with other federal, state and local improving efforts, including No Child Left Behind in order to assure that students with disabilities benefit from those improvement efforts;
- Ensuring that special education is a beneficial service for such children rather than a place where they are sent;
- Providing appropriate special education, related services, aids and supports in the regular classroom to such children, whenever appropriate; and
- Supporting high-quality, intensive professional development for all personnel who work with such children to ensure the such personal have the skills and knowledge necessary to improve the academic achievement and functional performance of children with disabilities, including the use of scientifically based instructional practices, to the maximum extent possible.

Section 120.54(3)(a), Florida Statutes, requires that prior to the adoption, amendment, or repeal of any rule other than an emergency rule, an agency must give notice of the intended action, "setting forth a short, plain explanation of the purpose and effect of the proposed action" and a "summary thereof. Throughout the history of the promulgation of the Proposed Rules and their predecessors, the stated purpose and effect of the Proposed Rules according to FDOE was to incorporate revisions required for programs for students with disabilities by the "amendments to the federal law, the Individuals with Disabilities Education Act (the "IDEA"), 20 U.S.C., Chapter 33, and its implementing regulations" and consistency with the federal requirements".

However, in several instances, the Proposed Rules conflict with the IDEA or its implementing regulations. Equally, in certain instances the Proposed Rules take away from the parents of students with disabilities rights which they had under the existing Rule without the proper exercise of procedural and substantive Due Process. In addition, in at least two instances, the proposed regulations contradict existing state law. The FDOE has not been given any authority to adopt a Rule, which contradicts existing state law in these specific instances. Accordingly, FDOE as "materially failed to follow the applicable rulemaking procedures or requirements set forth in this chapter" and, because of this failure, the Proposed Rules are an invalid exercise of the delegated legislative authority.

Because the Proposed Rules are contrary to or inconsistent with the IDEA 2004, and to the extent that the Proposed Rules are contrary to state law, they violate the authority cited by FDOE for the adoption of the Proposed Rules. FDOE has not cited any specific authority in its Notice of Proposed Rulemaking that authorizes it to adopt rules that are inconsistent with IDEA 2004 or in violation of existing state law. Indeed, the authority the FDOE has cited indicates that FDOE's rules should be consistent with IDEA. The Notice of Proposed Rulemaking cites §§ 1001.02(1) and(2)(n); 1003.01(3)(a) and (b); 1003.57, Florida Statutes, and 1006.09, Florida Statutes, as authority for the adoption of the challenged Proposed Rules. Sections 1001.02(1) and (2)(n), Florida Statutes, require that FDOE's rules implement the provisions of law for the improvement of the state K-20 system in a manner that cooperates with the federal government and other public entities in the enforcement of laws for which the state and local school districts are jointly responsible. The other citations of authority supplement, but do not change, the

obligation of FDOE to comply with the provisions of law concerning public education, such as IDEA.

Section 1002.02(1), expressly requires the State Board of Education "to adopt rules pursuant to §§ 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." (**Emphasis added.**) The implementation of those provisions of law includes the requirements of IDEA and the federal regulations implementing IDEA, as well as, implementing Florida's constitutional requirement that education is a paramount importance and duty of the State. In addition, § 1002.02(2)(n), Florida Statutes, provides the State Board of Education with duty "to adopt cohesive rules pursuant to §§ 120.536(1) and 120.54, **within statutory authority**, for education systemwide issues." (**Emphasis added.**) Neither of those statutes provides FDOE with specific statutory authority as required by § 120.536(1), Florida Statutes, for the Proposed Rules. However, the State Board of Education is provided with the authority and has a duty "to approve plans for cooperating with the Federal Government" and "to approve plans for cooperating with other public agencies in the development of rules and in the enforcement of laws for which the state board and such agencies are jointly responsible." See, § 1002(2)(g) and (h).

34 C.F.R. 300.2(a) provides that 34 C.F.R. Part 300 applies to each state that receives funds under IDEA. Also, 34 C.F.R. §300.2(b)(1) provides that 3.4 C.F.R. Part 300 applies to all political subdivisions of a state that are involved with the education of children with disabilities, like school districts. As a result, both the State Board and district school boards are responsible for implementation of IDEA and IDEA implementation is a education systemwide issue. By proposing rules that do not cooperate with the federal government with respect to the

implementation of IDEA, FDOE has contravened the mandate of s.1001.02(2)(g)and (h), FLORIDA STATUTES, and has failed to adopt cohesive rules for education systemwide issues that are within FDOE's statutory authority to implement IDEA. Accordingly, to the extent that the Proposed Rules are inconsistent with the requirements of IDEA and the federal regulations implementing IDEA, the Proposed Rules are beyond FDOE's statutory authority to adopt the Proposed Rules.

1. Agency Name and Address:

State Board of Education  
Department of Education  
325 West Gaines Street  
Tallahassee, Florida 32399-04002

2. Petitioners' Names and Addresses:

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5973 S.W. 42nd Terrace  
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Rosemary N. Palmer  
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Tallahassee FL 32309

Donna Lorman  
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For purposes of this Petition, all correspondence, pleadings, and papers should be sent to undersigned counsel.

3. Notice of Agency Action. Petitioners received notice of agency promulgation of the Proposed Rules, pursuant to publication in the Florida Administrative Weekly (FAW) dated May 23, 2008, and corrected May 30, 2008, Volume 34, Number 22, even though Petitioner Palmer

had requested specific notification. FDOE held a public hearing on June 17, 2008, during which the Florida Board of Education approved the rules. To Petitioner's knowledge the Proposed Rules have not yet been adopted as a Final Rule.

### **Standing**

4. The Center for Education Advocacy, Inc. is a Florida advocacy practice for students with disabilities, representing parents of children with disabilities, training parents and teachers, and assisting private schools who are educating students with disabilities.

5. Rosemary N. Palmer, Esquire, is a nationally known special education attorney who represents clients in the panhandle of Florida and Utah, and has given seminars about special education around the state and in other states. She is also grandmother to children who are or may be subject to these rules. And she is a taxpayer from whom taxes will be extracted to cover the services needed by students with disabilities when they are not appropriately educated to the maximum extent possible so that they can live independent lives, and when they cannot also contribute to public services because they cannot obtain and keep employment.

6. Donna Lorman is the parent of a 16 year old son with Autism who attends public school in Orange County, Florida and who is subject to the Proposed Rules.

7. The Petitioners' Substantial Interests. The Petitioners substantial material interests are affected in the following ways, including but not limited to:

A. The time frames school districts will have to conduct initial evaluations and make eligibility determinations will deprive students of free appropriate public education,



some of which are petitioner's clients and others of which will be unable to live independently, creating a burden on taxpayers.

B. Transferring all authority to exercise educational rights from parents to students who are demonstrably unable to exercise sound judgment in their decision making guarantees that those students will be unable to assure themselves of FAPE which will affect petitioner's clients, and petitioners directly as tax payers.

C. The application of the Uniform Rules of Administrative Proceedings will discourage parents from vindicating the rights of their children with the result that many of Florida's students will not become the independent people they could be, wasting substantial human potential, and costing taxpayers significant resources, which will affect Petitioner's clients and families.

D. Changing the federal definitions of free appropriate public education to suggest that state standards can be lowered for students with disabilities by ESE rules will affect petitioners' clients and them as taxpayers who have to pick up the cost for the damages caused by failure to appropriately educate students.

E. Repealing the disciplinary provisions that protected students with disabilities without providing any notice of the action and without any evaluation of its impact on the ability of students with disabilities to obtain free appropriate public education.

F. Attempting to set a statute of limitations by rule, that is different from existing Florida law. § 95.11(3)(f), Florida Statutes.

G. Attempting to exclude students in prisons from general assessments when Florida law requires it. § 1003.49, Florida Statutes.

H. FDOE's failure to materially follow the applicable rulemaking requirements under Chapter 120, Florida Statutes, for the Proposed Rules.

8. Invalid Exercise of the Delegated Legislative Authority. Petitioners submit that the Proposed Rules are an "invalid exercise of the delegated authority" and makes the following statements of: (1) all material facts indispute; (2) specific facts which warrant reversal of the agency's proposed action; and (3) a statement of the specific rule or statutes that require reversal or modification of the Agency's proposed action, with an explanation of how the alleged facts relate to the specific statutes and rules. Among others, these include:

A. All Proposed Rules. Petitioner Palmer who requested notification of rulemaking did not receive any such notices, in violation of 120.54 (3)(a)(3).

B. Proposed Rule 6.A-6.03028. F.A.C.

1. Proposed Rule 6.A-6.03028 (3) (a) describes parent role in a way that appears to undermines the parents equal status on the IEP team, failing to make it clear that parents' ideas and concerns are entitled to equal weight with those put forward by the school district, and in violation of the IDEA's purpose in strengthening parental roles and language making parents equal partners. The proposed rule is contrary to the authority cited by FDOE for the proposed rule, IDEA, P.L. 105-17 (20 U.S.C. 1401, 1412, 1413, 1414, 1415), and, therefore, contravenes the specific provisions of the law implemented. The proposed rule summary for Rule 6A-6.03028, F.A.C., says that it is "to combine into a single rule all of the federal requirements related to the provision of a free appropriate public education (FAPE) and the development of individual educational plans (IEPs) for students

with disabilities.” Therefore, the proposed rule also violates the rulemaking requirements of § 120.54, Florida Statutes, that requires a summary of what is proposed be provided.

2. Proposed Rule 6.A-6.03028 (b) (3)(l) exempts students who are in prison from the general assessments in violation of § 1003.49, Florida Statutes. Because there is no authority for FDOE to contravene Florida statute, the proposed rule is without authority, and an invalid exercise of legislative authority.

C. Proposed Rule 6A-6.0331, F.A.C

1. Proposed Rule 6A-6.0331(1), F.A.C., requires general education intervention be completed by school personnel before a student is evaluated to determine if the student has a disability. The proposed rule fails to establish a time frame within which these activities must be completed in all situations or when a parent’s consent needs to be sought. As a result of the failure to prescribe when the activities ;and determinations must be made, the proposed rule fails to establish adequate standards for agency decisions and, thereby, vests unbridled discretion in the agency.

2. Proposed Rule 6A.6.0331(3)(d), F.A.C., requires that school board ensure that students suspected of having a disability be evaluated within sixty (60) school days "that the student is in attendance". This time period does not begin to run until after the completion of the intervention activities listed in Rule 6.4-6.0331(1), F.A.C., and after the receipt of a parental consent for the evaluation. The proposed rule is inconsistent with the IDEA which requires that an initial evaluation be conducted

within 60 calendar days (34 C.F.R. 300.301( c)). While that regulation, and the statute do allow a state to establish a different time frame, nothing in current legal doctrines allows the state to expand deadlines designed to effect the purposes of the IDEA and those designed to give students with disabilities equal access to high quality education. Indeed, the United States Department of Education wrote in the commentary on its proposed regulations :

The child find requirements in § 300.111 and section 612(a)(3)(A) of the Act require that all children with disabilities in the State who are in need of special education and related services be identified, located, and evaluated. Therefore, it would generally not be acceptable for an LEA to wait several months to conduct an evaluation or to seek parental consent for an initial evaluation if the public agency suspects the child to be a child with a disability. If it is determined through the monitoring efforts of the Department or a State that there is a pattern or practice within a particular State or LEA of not conducting evaluations and making eligibility determinations in a timely manner, this could raise questions as to whether the State or LEA is in compliance with the Act. Vol. 71, No. 156 Federal Register, p. 46637

The sixty school days allowed in the Proposed Rules would completely exclude evaluation of a child whose disability prevented him from attending school. It would delay provision of free appropriate public education to students with disabilities 1/3 of a school year, an eternity in a common scenario of a child whom the school retains because of failure to meet promotion criteria but without the data an evaluation gives about how to again set the child on the path to closing the achievement gap.

Such a lengthy time period is not only unreasonable, it is intentional discrimination against the system's most vulnerable. In addition, the proposed rule leaves school districts with the opportunity to avoid evaluating entirely by creating situations where a student is not "in attendance" (most commonly suspensions, but also creating a hostile environment in which a parent fears to send a child to school). Consequently, the proposed rule fails to establish adequate standards for agency decisions and, thereby, vests unbridled discretion in the agency to determine when an evaluation of a student suspected of having a disability must be completed.

Additionally, the proposed rule conflicts with the requirement of the regulations implementing IDEA that evaluation and eligibility determinations be made within a reasonable time period. The only reasonable interpretation of the IDEA is that the time for evaluation cannot exceed sixty school days, though a state could make the time shorter. Since, the summary of this proposed rule says it is proposed "to incorporate the procedures related to activities required prior to referral, referral and identification are collectively referred to as "general education intervention procedures" to conform with changes in the field related to ensuring highest student achievement for all students. These amendments **align Florida's rules with the federal regulations relative to early intervening services, identification of students who may be eligible**

**students with disabilities, evaluation and reevaluation procedures, and the initial provision of ESE services...” (emphasis added),** but it neither aligns the rule nor assures highest student achievement, it violates the rulemaking requirements of s120.54, F..S. and is therefore an invalid exercise of legislative authority.

D. Proposed Rule 6A-6.03311, F.A.C.

1. Proposed rule 6A-6.03311 (5)(d)(1)(f) establishes a statute of limitations for state complaints, which the IDEA itself does not. The United States Department of Education gave no reasons for establishing one year as the limit in regulations and overstepped its own authority in doing so. But even if the US Department of Education had such authority, FDOE does not have authority under state law to make a rule that absolves itself from resolving parent claims that are not brought within a one year time frame. There is nothing in the statutes FDOE said gave it authority to promulgate rules that authorizes them to cut off access to their oversight responsibilities. And it would be completely arbitrary and capricious to do so, since there is no reason consistent with FDOE’s obligations under IDEA to ensure that the statute is followed and that all eligible students receive FAPE thereunder.

2. Proposed Rule 6A-6.03311(8)(d) provides that:

(d) For a student with a disability who has attained age eighteen (18) and is incarcerated in a juvenile justice facility or local correctional facility, all rights accorded to parents under this rule transfer to the student, including the right to notice as described in this rule. For students incarcerated in state correctional facilities,

all rights accorded to parents under this rule transfer to the student, including notice, regardless of the age of the student.

What this means is that the most vulnerable of all students, those who have conclusively demonstrated their inability to make good choices, and who are often illiterate and who are statistically unlikely to be able to even read the documents that they would be required to understand, much less to know their rights to a free appropriate public education (if they had this understanding it is unlikely they would be incarcerated at all) and have the ability to stand up for them alone in the correctional environment are deprived of the protections that every other student with a disability in Florida receives. Yet this is the population that most desperately needs appropriate educational services and protections of IDEA, because FAPE is what has the capacity to return them to the right track.

While the IDEA statutory language does allow states to have the proposed rule, it does not require that Florida make this choice. Florida has a constitution that makes education a paramount duty of the state. FDOE is charged with making rules that are cohesive and that ensure high quality educational services, under the statutes FDOE cited as authority for the Proposed Rules. Section 1003.49, Florida Statutes, requires Florida Department of Corrections and others to be subject to the same graduation and promotion standards and provide the same remedial assistance as any other "district school boards". These Florida laws mean that FDOE's

decision to exclude students with disabilities who are incarcerated is arbitrary and capricious because this rule will prevent incarcerated student from accessing the high quality education that FDOE is supposed to ensure they receive; and in violation of Florida law.

3. Proposed rule 6A-6.03311(9)(b) establishes a statute of limitation for due process requests for claims under the IDEA. But FDOE states no authority at all for doing so and s. 95.11(3)(f), F. S. says that the statute of limitations for claims based on statute is four years. It is true that IDEA itself established a two year limitation, but it also explicitly allows states to establish a different one, which means that the two year limit is not an obligatory part of the IDEA. It is well established that statutes of limitations are just that — statutes, not rules. And FDOE certainly has no power to overturn an existing statute by Rule.

4. Proposed rule 6A-6.03311(9)(v) states:

(v) An ALJ shall use the provisions of Rules 6A-6.03011 through 6A-6.0361, F.A.C., for conducting due process hearings and shall conduct such hearings in accordance with the Uniform Rules for Administrative Proceedings, Chapter 28-106, F.A.C.

The IDEA due process procedure was designed to allow a parent to quickly obtain an independent review of an educational agency's decisions when the parent disagreed with them. Indeed the IDEA requires that the hearings be held and decisions rendered 45 days after the 30 day resolution period is finished. And the IDEA carefully lays out that the parties have to disclose documents five days before a hearing if they plan to use them



as evidence. In Florida, there are almost 400,000 students with disabilities, fewer than 30 percent of whom are meeting Florida's challenging standards and prepared to successfully transition to the post secondary outcome of their choice, even though eighty percent or better are cognitively capable of doing so when the students receive free appropriate public education that the law requires and that citizens everywhere understand to be a basic civil right. Yet, in Florida, there are still only approximately 15 private attorneys regularly practicing special education law and perhaps another 30 who practice in non-profits. That means that if IDEA's procedural safeguards are not to be completely illusory, then parents must be able to access simple systems that assure they can bring their claims fully and fairly. The laws of Florida recognize the differences in administrative hearings under the IDEA in s. 1003.57(5), FLORIDA STATUTES, by exempting such hearings from the normal administrative procedures. Therefore, FDOE does not have authority to authorize the administrative law judges to impose the more onerous requirements of the Uniform Rules of Administrative Proceedings, Chapter 28-106 which by title relates to the decisions determining substantial interests which Florida legislature said did not apply to IDEA due process cases.

Such hearings shall be exempt from the provisions of ss. 120.569, 120.57, and 286.011, except to the extent that the State Board of Education adopts rules establishing other procedures and any

records created as a result of such hearings shall be confidential and exempt from the provisions of s. 119.07(1)... 1003.57(5)

The language of the statute allows FDOE to establish other procedures, but not to invoke the administrative procedure provisions.

Petitioners understand that it makes things simpler for administrative law judges when they do not have to learn special procedures for specific cases. But the civil rights that are exonerated in due process cases are fundamental rights which deserve careful preservation. What happened in Florida before ST v. Seminole County School Board, 783 So.2d 1231 (Fla. 5th DCA 2001) when Florida's Fifth District Court of Appeals reminded school districts that discovery was not available in Florida under § 1003.57(5) is that when a parent filed a due process request, they received (often within a day or two) a box of Interrogatories, Requests for Production, and Subpoenas. Not even understanding what the documents were, and unable to find legal counsel and/or unable to pay for them, and with the heavy burdens that accompany parenting children with disabilities (particularly those who are not learning and succeeding at school), parents withdrew their due process requests and abandoned their claims in frustration. Most every parent attorney in Florida can tell about due process hearings that were prolonged because of abusive discovery and parents who gave up in the face of such tactics. This author posits that parents inability to easily access IDEA's procedural safeguards is largely

responsible for the continuing abysmal results that school districts in Florida produce for students with disabilities, when research tells us what we need to do to be successful in many areas. Therefore, even if state law authorized FDOE to require conformity with the Uniform Rules, which it does not, it would be arbitrary and capricious and inconsistent with the IDEA.

E. Proposed Rule 6A-6.03312

Proposed Rule 6A-6.03312 changes the protections provided students with disabilities to a manifestation determination. The existing rule 6A-6.03312(3) provides:

(3) **Manifestation Determination.** A manifestation determination, consistent with the following requirements, must be made any time disciplinary procedures result in a change of placement.

(a) In conducting the review, the IEP team and other qualified personnel shall:

1. Consider all relevant evaluation and diagnostic information including information supplied by the parents of the student, observations of the student, the student's current IEP and placement, and any other relevant information, then

2. Determine that, in relationship to the behavior subject to disciplinary action:

a. The student's IEP and placement were appropriate and whether the special education services, supplementary aids and services, accommodations and modifications as defined in paragraphs (2)(e) and (f) of Rule 6A-6.03028, F.A.C., and positive behavior intervention strategies were provided consistent with the student's IEP and placement;

b. The student's disability impaired the ability of the student to understand the impact and consequences of the behavior subject to disciplinary action; and

c. The student's disability impaired the student's ability to control the behavior subject to disciplinary action.

(b) If the IEP team and other qualified personnel determine that the student's behavior was not related to the disability, the relevant disciplinary procedures applicable to students without disabilities may be applied to the student in the same manner in which they would be applied to students without disabilities. However, services consistent with subsection (5) of this rule must be provided.

(c) With the exception of placement in an interim alternative educational setting, as described in paragraphs (1)(j) and (6)(b) of this rule, if the IEP team determines that the student's behavior was a manifestation of the disability, the student's placement cannot be changed by school personnel as a disciplinary intervention. However, the IEP team may determine that a change of placement is necessary to provide the student a free, appropriate public education in the least restrictive environment.

(d) If the IEP team and other qualified personnel determine that any of the requirements of subparagraph (3)(a)2. of this rule were not met, the behavior subject to disciplinary action must be considered a manifestation of the student's disability. (e) The review described in paragraph (3)(a) of this rule may be conducted at the same IEP meeting that is required by paragraph (4)(b) of this rule. (f) Immediate steps must be taken to remedy any deficiencies in the student's IEP or placement or in their implementation that were identified during the manifestation determination.

These are substantial protections that FDOE is proposing to eliminate without having given any specific notice of doing so, as required under § 120.54, Florida Statutes. While it is true that the IDEA has been changed in disciplinary matters, the State of Florida has higher expectations for its students as providing in statute and in its constitution. The authority FDOE cites for this rule do not say that FDOE is authorized to make rules that make it easier to exclude children from school for conduct related to their disabilities. While everyone understands that children must be taught appropriate social and behavioral skills and held accountable for volitional behavior that violates student codes of conduct, how can society hold a person with disabilities (who in Florida is very likely NOT to

be receiving FAPE), fully accountable when he cannot behave, any more than society could expect a person without legs to remain standing without his crutches? Florida laws support a high quality education. FDOE does not have authority to set rules that deprive students with disabilities from education services when their disabilities prevent them from behaving appropriately. The IDEA, other federal anti discrimination laws, and Florida laws call for effective services to address those misbehaviors. In any case, FDOE's exclusion of these protections is arbitrary and capricious, and was done without the notice required under § 120.54, Florida Statutes.

F. Proposed Rule 6A-6.03411(1)(p)

Proposed Rule 6A-6.03411(1)(p) modifies the IDEA definition of free appropriate public education, by adding in paragraph 2, "including the requirements of Rules 6A-6.03011 through 6A-6.0361, F.A.C.", and in doing so is inconsistent with the IDEA and an invalid rule. FDOE is authorized to make rules consistent with federal law and in furtherance of its duties. But it is not authorized to change the expectations for students with disabilities by rule. The standards of the Florida Department of Education, also known as the State Sunshine Standards must be available to all. Modifying that by suggesting that Rules that pertain to provision of services to students with disabilities can somehow trump such student's access to the same standards that apply to all is absolutely what the IDEA is intended to prevent. The Summary in the Proposed Rule Making says that the proposed rule is "to align Florida's definitions with those in IDEA and its implementing regulations." Instead, FDOE has changed the federal definition. It is

arbitrary and capricious to suggest that students with disabilities are not entitled to access the same standards that apply to all. And that, and the failure to notice the change, makes the proposed rule an invalid exercise of legislative authority.

As a result, FDOE has materially failed to follow applicable rulemaking requirements pursuant to Chapter 120, FLORIDA STATUTES, for this proposed rule because FDOE's Notice of Proposed Rulemaking states that the purpose and effect of the proposed rule is to "... to align Florida's administrative rules related to the provision of services to students with disabilities with the 2004 reauthorization of the Individuals with Disabilities Education Act (IDEA) and its implementing regulations. ..." The above comparison of the proposed rule to the applicable federal regulations implementing IDEA, indicate the proposed rule is contrary to the requirements of the federal regulations implementing IDEA. Consequently, the Proposed Rules are an invalid exercise of the delegated legislative authority because FDOE's stated purpose and effect of the proposed rule is clearly wrong and is misleading. Accordingly, the proposed rule contravenes the cited authority for the rule.

9. Statement of Disputed Facts.

- A. Whether DOE failed to materially follow the applicable rulemaking procedures for Proposed Rules.
- B. Whether the Proposed Rules are consistent with the requirements of the federal regulations implementing IDEA.
- C. Whether the Proposed Rules conflict with the requirements of the federal regulations implementing IDEA

D. Whether the Proposed Rules must not conflict with the federal regulations that implemented ID EA for the Proposed Rules for FDOE to be found to have complied with the requirement in s. 120.54(3)(a) that it include a short, plain , explanation of the purpose and effect of the Proposed Rules in the Notice of Proposed Rulemaking when the statement included by FDOE in the Notice of Proposed Rulemaking indicates that the purpose and effect of the Proposed Rules is "... to align Florida's administrative rules related to the provision of services to students with disabilities with the 2004 reauthorization of the Individuals with Disabilities Education Act (IDEA) and its implementing regulations. The affect of these amendments will minimize the number of rules to which local education agencies (LEAs) and schools in Florida are subjected."

E. Whether the Proposed Rules must not conflict with the federal regulations that implement IDEA for the Proposed Rules for FDOE to be found to have complied with the requirement in s. 120.54(3)(a) that it include a summary of the Proposed Rules in the Notice of Proposed Rulemaking when the summary included by FDOE in the Notice of Proposed Rulemaking indicates that the Proposed Rules "are to meet Federal requirements for programs with disabilities and state requirements for programs for students who are gifted, including procedures for identification, evaluation, determination of eligibility, development of individual plans, and reevaluation, discipline, and the accompanying procedural safeguards. Rules address policies and procedures for the provision of specially designed instruction and related services for exceptional students."

F. Whether the failure by FDOE to include a short, plain explanation of the Proposed Rules and a summary of the Proposed Rules that accurately reflects the actual purpose and effect of the Proposed Rules and a summary that accurately summarizes the Proposed Rules in the Notice of Proposed Rulemaking for the Proposed Rules is a material failure by FDOE to follow the applicable rulemaking procedures or requirements set forth in Chapter 120, Florida Statutes.

G. The appropriate time frame for completion of the activities by school personnel that lead to an evaluation of whether a student has a disability.

H. The appropriate time frame for completion of the determinations required prior to a referral of a student suspected of having disability for evaluation by school personnel.

I. The time period that school boards have to complete an evaluation of a student suspected of having a disability.

J. Whether due process hearings can be subjected to the Uniform Rules of Administrative Proceedings Chapter 28-106.

The above list is not exhaustive of the issues in this proceeding, but are only those factual issues which may be disputed. In determining whether the Proposed Rules are an invalid exercise of the delegated legislative authority, several determinations do not require fact-finding, but require legal analysis of the Proposed Rules vis-a-vis the applicable laws. To the extent such issues are not listed in this portion of the Petition does not mean that Petitioners will not be presenting a case as to such issues; and Petitioners will request a ruling from the Administrative Law Judge on such issues.



10. Statement of Ultimate Facts. Petitioners state that the following sections of the Proposed Rules are an invalid exercise of the delegated legislative authority, and are vague, arbitrary and capricious, among other legal infirmities:

A. The Proposed Rules enlarge, contravene and modify the provisions of the laws to be implemented, including, but not limited to the following:

- 1.The Individuals with Disabilities Education Improvement Act
- 2.Chapter 120, FLORIDA STATUTES
- 3.Chapter 1000 et seq. (Florida's Education Code.
- 4.Section 95.11

B. As described in s. 120.52(8)(d), FLORIDA STATUTES, the Proposed Rules are vague and fail to establish adequate standards for agency decisions or vests unbridled discretion in the agency in the following ways, among others:

- 1.Proposed Rule 6A-6.03028, F.A.C.
- 2.Proposed Rule 6A-6.03028, F.A.C.
- 3.No time frames have been specified for school district personnel to make a determination as to whether a student has a disability.
- 4.The sixty school days rule contravenes federal and state law.
- 5.Proposed Rule 6A-6.0331, F.A.C.

C. FDOE has failed materially to follow the applicable rulemaking requirements under chapter 120 because:

- 1.The Proposed Rules in the instances cited above in this Petition are contrary to the federal regulations implementing IDEA and FDOE's stated purpose and effect

and summary of the Proposed Rules in the Notice of Proposed Rulemaking is to implement and be consistent with IDEA and the implementing federal regulations.

11. Rules and Statutes Applicable to this Proceeding. The rule and statutes which are at issue in this petition include all of the laws cited as specific authority or as law implemented for the Proposed Rules, chapter 120, FLORIDA STATUTES, and IDEA and the Federal regulations adopted to implement IDEA.

12. Demand for Relief: Petitioners hereby requests that the following relief be granted, that:

A. The Director of the Division of Administrative Hearings determine that this Petition satisfies the requirements of §120.56 and §120.569, FLORIDA STATUTES

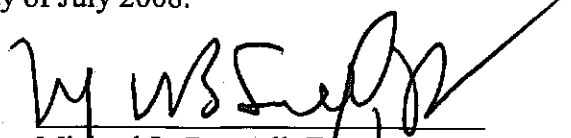
B. The Director of the Division of Administrative Hearings assign this matter to an Administrative Law Judge to conduct a final hearing in the manner provided in §120.569 and §120.57(1), FLORIDA STATUTES

C. A Final Order be entered determining that the Proposed Rules, concerning the education of students with disabilities and a variety of related issues, be declared an invalid exercise of the delegated legislative authority, pursuant to §120.56(2), FLORIDA STATUTES, and are, therefore, invalid.

D. To the extent permissible by applicable statutes, Petitioners be allowed to recover their attorney's fees for pursuing this action pursuant to §120.595(2), FLORIDA STATUTES

E. Such other relief as the Administrative Law Judge deems necessary and appropriate.

Respectfully submitted this <sup>17<sup>th</sup></sup>~~17~~ day of July 2008.



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