IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

CASE NO. 1D13-3583

BRANDT ROBINSON, BETH WEATHERSTONE, VICKI HALL, CAROLYN LOFTON, CORY WILLIAMS, and CHRISTINE MAYER,

Appellants,

v.

PAM STEWART, as Florida Commissioner of Education, STATE BOARD OF EDUCATION, and STATE OF FLORIDA, DEPARTMENT OF EDUCATION,

Appellees.
_____/

Opinion filed January 23, 2015.

An appeal from the Circuit Court for Leon County.
John C. Cooper, Judge.

Ronald G. Meyer, Thomas W. Brooks, Jennifer S. Blohm, and Lynn C. Hearn of Meyer, Brooks, Demma and Blohm, P.A., Tallahassee; Pamela L. Cooper, General Counsel of Florida Education Association, Tallahassee, for Appellants.

Michael Mattimore, Jason E. Vail, and Matthew D. Stefany of Allen, Norton & Blue, P.A., Tallahassee, for Appellees.

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THOMAS, J.

This case involves the appeal of an unsuccessful constitutional challenge

brought by Appellants seeking a declaration that the "Student Success Act" passed by the 2011 Legislature[1] violates Article II, section 3, of the Florida Constitution by invalidly delegating legislative powers to the Executive Branch. Appellants carry a heavy burden of persuasion:

> Although the Court's review [of a claim that a statute is unconstitutional] is de novo, statutes come clothed with a presumption of constitutionality and must be construed **whenever possible** to effect a constitutional outcome. As this Court has stated, '[s]hould any doubt exist that an act is in violation . . . of any constitutional provision, the presumption is in favor of constitutionality. To overcome the presumption, the invalidity must appear **beyond reasonable doubt**, for it must be assumed the legislature intended to enact a valid law.'

Crist v. Fla. Ass'n of Criminal Defense Lawyers, Inc., 978 So. 2d 134, 139 (Fla. 2008) (quoting Franklin v. State, 887 So. 2d 1063, 1073 (Fla. 2004) (emphasis added; citations omitted)).

Appellants have not established that the legislature delegated core legislative authority to the Board of Education and intended to violate the separation of powers requirement of Article II, section 3 of the Florida Constitution. Thus, we hold that Appellants have failed to show beyond a reasonable doubt that the legislature violated the constitution by enacting the Student Success Act, and we

[1] Chap. 2011-1, Laws of Fla.; § 1012.34, Fla. Stat. (2011). In addition to their claim that the statute violated the separation of powers provision of Article II, section 3 of the Florida Constitution, Appellants also challenged the statute's constitutionality under Article I, section 6 of the Florida Constitution, as a violation of their right to engage in collective bargaining; this was also rejected by the trial court, and that ruling is not challenged on appeal.

affirm the trial court's decision finding the Act constitutional.

Under our precedent in Florida Teaching Profession-National Education Association v. Turlington, 490 So. 2d 142 (Fla. 1st DCA 1986), this statute confers permissible discretion to allow the Board of Education to implement a highly technical matter regarding the evaluation of teachers, not a fundamental policy decision. In Turlington, this court rejected a nondelegation challenge to a statute that was similar to the statute here in terms of the subject matter and discretion allowed to the administrative agency. In Turlington, the statute granted a range of decisions to the education agency for determining teacher evaluations for pay incentives and incentive funding for schools. Id. at 142-45. The statute in Turlington, like here, did not dictate to the Board of Education every conceivable variable to apply, but instead allowed school officials and the Board of Education to apply improvements in student test scores to determine whether a school merited the incentive status. Furthermore, this court rejected the arguments that because the statute allowed principals to "confer extra evaluation points," it violated Article II, section 3 of the Florida Constitution. Id. at 146.

Under the Student Success Act, the legislature revised certain requirements for evaluating classroom teachers and other personnel, which in part required that at least fifty percent of a teacher's evaluation must be based on "student learning growth." This factor of measuring student improvement is assessed statewide

based on a formula adopted by the Commissioner of Education, unless the subject matter is better evaluated by an "equally appropriate formula" adopted by the local school district. §§ 1012.34(3)(a) & 1012.34(7), Fla. Stat. (2011).[2]

The Student Success Act requires that teacher evaluations must be based on four levels of performance: highly effective; effective; needs improvement or developing; and unsatisfactory. § 1012.34(2)(e), Fla. Stat. (2011). In addition, the Board of Education is directed to adopt rules which establish "sufficient [consistent] differentiation" in performance levels, including the student learning growth standard, which "if not met" will render a teacher's performance level unsatisfactory. This legislation further requires that the student learning growth standard must be met before a teacher can be classified as attaining a "highly effective" or "effective" rating. § 1012.34(8), Fla. Stat. (2011). These classifications affect teachers' eligibility for salary increases, promotions, placements, transfers and layoffs. §§ 1012.22(1)(c) & (e); 1012.28(6); 1012.33(5), Fla. Stat. (2011).

The Commissioner of Education must "consult with experts, instructional personnel, school administrators, and education stakeholders in developing the criteria for the performance levels." § 1012.34(2)(e), Fla. Stat. (2011). The critical

[2] The Commissioner of Education approved a formula for measuring student learning growth, and the State Board of Education initiated rulemaking to implement the formula, but no rule has yet been adopted.

component, student learning growth, must be developed by the Commissioner of Education, based on standardized test scores and other factors, including a student's past academic performance. The Commissioner is prohibited from establishing different formulae based on gender, race, ethnicity, or socioeconomic status.

When creating the student learning growth criterion, the Board of Education is not free to invent factors out of whole cloth; instead, it must utilize the described components. The statute provides that this criterion will be based on standardized test scores, where possible, and other factors, such as a student's past performance and related measures for areas not subject to standardized test scores. We are not determining whether the statute is perfect or comprehensive in its direction to the Board of Education, but rather whether the statute grants the Board of Education "unbridled discretion" to enact fundamental policy choices. This it does not do.

The statute provides the Board of Education with sufficient direction to implement the technical aspects of the law in accordance with the legislature's express policy goals to "promote enhanced academic success and funding efficiency of educational delivery systems by **aligning responsibility with accountability** . . . [and to ensure that the] guiding principles for Florida's K-20 education system are . . . student-centered in every facet [and] provide[] for local operational flexibility while promoting accountability for student achievement and

improvement." §§ 1000.02(1) & (2), Fla. Stat. (2011) (emphasis added). In addition to these overarching principles, in section 1012.34(1)(a), the legislature states that its purpose in evaluating teachers and other personnel is to "increase[] student learning growth by improving the quality of instructional . . . services in the public schools of the state . . . ."

In the seminal case defining the parameters of the nondelegation doctrine, Askew v. Cross Key Waterways, the statute allowed the Administrative Commission to select certain areas of the state for more stringent environmental, economic and growth regulations, and by doing so, gave the Commission unbridled discretion to choose large areas of the state for these more stringent regulations. 372 So. 2d 913 (Fla. 1978). The court emphasized that the statute was deficient, because it would not be subject to meaningful judicial review. Id. at 918-19. The court further emphasized that while a law can allow an agency to "flesh out" a legislative policy under Article II, section 3, that law cannot allow the agency to "flesh out" what it has "first conceived"; that is, the statute will not pass constitutional muster if it allows the agency the unfettered discretion to enact policy and then implement that policy. Id. at 920.

Here, the statute does not confer on the Board of Education the power to "conceive" or enact the policy. Quite the opposite. Rather, the Board is directed to implement a detailed teacher evaluation plan that includes standardized test

scores.

In addition to our own precedent in Turlington and the test established under Cross Key Waterways, under the authority of Avatar Development Corporation v. State, 723 So. 2d 199 (Fla. 1998), Brown v. Apalachee Regional Planning Council, 560 So. 2d 782 (Fla. 1990), and Microtel, Inc. v. Florida Public Service Commission, 464 So. 2d 1189 (Fla. 1985), this statute passes constitutional muster.

In Brown, the supreme court recognized that under the nondelegation doctrine, the legislature may delegate certain decisions to administrative agencies, where "given the highly technical nature of the [Development of Regional Impact] review process, details relating to the imposition of a cost-based review fee can be viewed as a **technical matter of implementation** rather than a fundamental policy decision." 560 So. 2d at 785 (emphasis added). This is a pragmatic view which properly shows respect to the legislative branch, which cannot be expected to include every technical aspect in a complex act. The statute here certainly qualifies for this deference. Furthermore, section 1012.34, Florida Statutes, provides the Board of Education with detailed parameters to implement the student learning growth criterion for teacher evaluations. The legislature, not the Board of Education, directed that this criterion include standardized test results, annual student improvement, and non-standardized data utilized by local school boards.

Whether the statute could assign **more** instructions to the Board is not the

test for this court to apply. Rather, the well-established test is whether the statute confers "unfettered discretion" and fundamental policy decisions on an agency of the executive branch. See Avatar, 723 So. 2d at 202. This statute does not.

The supreme court's decision in Avatar is particularly instructive, as that decision rejected a nondelegation argument, where the statute at issue imposed **criminal liability** based on a violation of a permit issued by the Department of Environmental Protection. 723 So. 2d at 199. There, the appellant argued that the statute violated the separation of powers, because it conferred the power to define the crime on DEP, which defines and imposes permit conditions. Id. at 202-03. In rejecting the appellant's arguments, the supreme court reiterated what it held in Cross Key Waterways and Brown, that "the sufficiency of adequate standards depends on the complexity of the subject matter and the 'degree of difficulty involved in articulating finite standards.'" Avatar, 723 So. 2d at 207. Here, the legislature did not confer unbridled discretion on the Board of Education to define student learning growth, but specified factors or tools the Board of Education must and may utilize to define this critical component of the statutory plan. Thus, the legislature made the fundamental policy decision and properly allowed the Board of Education to implement the technical aspects of that policy decision.

In Microtel, the supreme court upheld a statute that directed the Public Service Commission to authorize intrastate long distance telephone service against

a nondelegation claim. 464 So. 2d at 1191. As the court noted, "the legislature made the 'fundamental and primary policy decision' that there be competition in long distance telephone service." Id. The statute at issue delegated to the Public Service Commission the duty to determine the qualifications of the applicant, "which may include a detailed inquiry into the ability of the applicant to provide service, a detailed inquiry into the territory and facilities involved, and a detailed inquiry into the existence of service from other sources . . . ." Id. at n.1. The statute did not limit the Public Service Commission from requiring other information from the applicant; in fact, the statute did not even mandate that the Public Service Commission require the above information, stating that the Commission "may" require such information from the applicant. There, the legislature conferred broad discretion on the Public Service Commission, just as the statute here confers broad discretion on the Board of Education. But in neither case did the legislature violate Article II, section 3 of the Florida Constitution by delegating fundamental policy decisions.

The decisions finding a violation of the nondelegation doctrine are readily distinguishable from the statute here. In Florida Department of State, Division of Elections v. Martin, 916 So. 2d 763 (Fla. 2005), for example, the statute at issue gave the Department of State no direction or guidance in deciding whether to allow a candidate's withdrawal from consideration. In fact, that statute provided, "*The*

Department of State may ***in its discretion*** *allow such a candidate to withdraw after the 42nd day before an election upon receipt of a written notice, sworn to under oath, that the candidate will not accept the nomination or office for which he or she qualified*." Id. at 767 (italicized emphasis supplied; bolded emphasis added). As the supreme court recognized, this statute "does not articulate any factors to be considered in determining whether withdrawal should be granted or denied, nor does it indicate the legislative purpose to be served . . . ." Id. at 771.

Here, the discretion granted to the Board of Education is guided by a detailed direction from the legislature, in addition to stated policies designed to improve teacher and student performance. The legislature does not attempt to delegate its core policy functions.

The trial court's opinion upholding the constitutionality of the Student Success Act is AFFIRMED.

LEWIS, C.J., ROBERTS, WETHERELL, ROWE, MARSTILLER, RAY, SWANSON, MAKAR and BILBREY, JJ., concur.

MAKAR, J., concurs in an opinion in which THOMAS, J., joins.

BENTON, J., dissents in an opinion in which WOLF and CLARK, JJ., join.

PADOVANO and OSTERHAUS, JJ., recused.

MAKAR, J, concurring with opinion.

I fully concur in Judge Thomas's opinion, which finds no constitutional violation under the theory that the complex teacher performance statute at issue, section 1012.34, Florida Statutes, on its face violates separation of powers principles. Art. II, § 3, Fla. Const. I write to supplement his opinion with the entire statutory text and to point out that the complexity of the legislative policy at issue makes the need for flexibility even more important.

The teachers' claim is that the State Board of Education has "unbridled discretion" in implementing the statute due to its abject lack of guidance. In its written order, the trial court rejected this claim, finding that Florida Teaching Profession-National Education Association v. Turlington, 490 So. 2d 142, 146 (Fla. 1st DCA 1986), had already "addressed this issue" of whether proper delegation existed. The trial court noted that minimum standards and guidelines are required when the Legislature gives administrative discretion to another branch, the "specificity of which is dependent upon the subject's complexity." The court then discussed the applicable constitutional test, closely reviewed the complex statute and its subsections (in the appendix below), and held that the "Legislature provided sufficient guidelines" to avoid an unconstitutional delegation of legislative authority to the executive branch.

Almost thirty years ago in Turlington, a similar teacher performance statute was alleged to be an unlawful, standardless delegation of legislative authority. This Court, however, affirmed the constitutionality of that statute. The teacher performance statute in Turlington created the "Merit Schools Program," which included a "State Master Teacher Program" that authorized payment of incentive awards "to superior teachers who voluntarily document their fulfillment of statutory eligibility criteria." The Board was "directed to adopt rules for this program" and did so by setting forth "extensive criteria governing the performance evaluations and subject area examinations required by the program" as well as "subject area examinations" to be approved by the Board. Turlington, 490 So. 2d at 144-45.

The constitutional question was whether the statute permitted the "unrestricted exercise of discretion by officials of the Department of Education." Id. at 146. Concluding the statute did not, this Court noted that the statute "confers permissible administrative discretion . . . to administer new and innovative programs, but they do not enable officials to 'say what the law is.'" Id. Notably, the "failure" of the Department to initially approve a plan under the statute was deemed unimportant, this Court noting that the statute permitted a range of potential plans and a "balance" had to be struck between the interests of the

teachers and the Department. No specific plan was constitutionally required; time and flexibility were necessary to get input from affected persons and entities.

Turlington has exceptionally close parallels to this case. And the statute at issue, section 1012.34, has at least as much detail and parameters as was upheld in Turlington, as Judge Thomas explains, and as the trial court concluded in its order. Section 1012.34(2) provides detailed requirements for evaluation systems. The statute has sufficient detail and guidance to reflect the Legislature's policy decision that the evaluation of student learning growth be based on the factors in subsection (7), and that the evaluation system provide for differentiated performance levels under the factors in subsection (3)(a) to be implemented by rule via subsection (8).

Reading subsection (8) in isolation and independent from the remainder of the statute is a no-no under the principle that statutes must be read as a whole. See Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 167 (2012) ("Perhaps no interpretative fault is more common than the failure to follow the whole-text canon, which calls on the judicial interpreter to consider the entire text, in view of its structure and of the physical and logical relation of its many parts."); see also Stephen Breyer, Active Liberty 101 (Vintage Books 2006) ("An overly literal reading of a text can too often stand in the way" of "translat[ing] the popular will into sound policy."). Rather than "unbridled discretion," or an ability to operate in a wholly unrestricted way that sets a new and

untethered legislative policy, section 1012.34 *overall* provides sufficient guidance and constraints to channel the Board of Education's actions and prevent it from operating in a wholly unchecked manner. Subsection (8)'s delineation of categories for rulemaking purposes is part and parcel of the overall legislative policy, reflected in section 1012.34, to evaluate the performance of duties and responsibilities of educational personnel in a structured, detailed, and comprehensive way. This is a wonkish and gruelingly detailed undertaking that involves technical, methodological, and scientific expertise that legislators (and courts) lack, but which is assisted by public input.[3]

Given the complexity of the legislative policy goals, which have only increased since the time of Turlington (as Judge Benton's opinion makes evident), the statute provides constitutionally adequate guidance and constraints to prevent the Board from wandering too far afield. Of course, the statute could be written in even greater detail and complexity, as Judge Thomas notes. But Turlington and related cases from our supreme court allow for a degree of leeway in the

[3] That the Board, or indeed any agency, seeks input from the public on a complex topic during the rulemaking process is neither a failing nor a concession that statutory guidance is lacking; instead, it is a requisite—and oftentimes helpful—step that can help fine-tune a proposed rule and give affected persons an inclusive point of entry. That one bullet point on one power-point slide presented at one rule-making workshop asks for public input on the standard to be adopted in utilizing highly complex Value-Added Models (VAM) for evaluating and classifying teachers does not move the chains up-field on the teachers' constitutional challenge, particularly given the hefty burden of proof that applies.

implementation of "innovative" and complex programs (such as the one at issue) if the Legislature provides "reasonable guidance," which it has.[4] Until the VAM formulary, in all its complexity, becomes better formed, how the data distribution will look in real-life applications is indeterminate—but not thereby unconstitutional. The Legislature could have specified a precise statistical standard (two deviations above the norm = effective; two standard deviations below the norm = ineffective) or the like, but no legal principle says it must do so. After all, this is supposed to be a merit system, not a raw quota. Indeed, it would be problematic if the constitution required the Legislature to define with mathematical precision the demarcation points of a statistical distribution that is as yet unknown, which is why the Legislature deferred to the Board's unquestioned expertise on the highly complicated, multivariate task at hand.

History is replete with legal battles over the murkiness of standards, a good example being litigation in which competitors fought for a decade about what

[4] Section 120.52(8), which in a 1996 statutory rewrite narrowed the administrative power of agencies in their *rule-making* functions, has no relevance in this constitutional challenge. The statute was not mentioned by the parties and the plaintiff-teachers do not claim that the Board has adopted a *rule* that is invalid under section 120.52(8). Instead, the only issue presented is the facial *constitutionality* of the challenged *statute* under separation of powers principles. The outcome of this *constitutional* case is controlled by Turlington and similar non-delegation cases, not by a 1996 statutory change to administrative rule-making. Stated differently, the judicially-established test for the constitutionality of a statute is unaffected by the legislatively-adopted change to section 120.52(8).

percentage of peanuts was necessary to call their products "peanut butter."[5] In this case, given the complexity of the topic at hand, and the controversy it continues to spawn from Turlington to the present day, litigation over the standards for evaluating teacher effectiveness likely face a similar fate. Unless our supreme court alters course, and compels legislators to pass laws on highly complex subjects with more precision than has previously been deemed permissible, we must follow its existing jurisprudence and our decision in Turlington by

[5] See Food Standard Innovations: Peanut Butter's Sticky Standard, U.S. Food & Drug Administration, at http://www.fda.gov/AboutFDA/WhatWeDo/History/ProductRegulation/ucm132911.htm. In describing the FDA's experience in proposing a standard in 1961 that peanut butter be recognized as at least 90 percent peanuts and allowing for additional sweeteners, the agency stated:

> Three competitive brands of peanut butter then entered the standards battle: Skippy, Jif, and Peter Pan. The public evidentiary hearing alone, a small fragment in the decade long process, took twenty weeks and produced a transcript of nearly 8,000 pages. A prominent attorney on the case wryly observed that the peanut butter standards 'put many lawyers' children through college'. Participants began to feel that they were close to arguing about the number of angels dancing on the head of a pin when it became clear that the disagreement between the industrial protagonists was over a mere 3 per cent difference in proposed peanut content. In the end, the government did prevail as the US Appeals Court affirmed the FDA order setting standards for peanut butter at no less than 90 percent for peanuts and no more than 55 percent fat. The court found the Commissioner's findings to be based upon substantial evidence and the promulgation of such standards within his authority.

affirming—thereby recognizing legislative deference to the agency's expertise on this complex topic.

BENTON, J., dissenting.

The school teachers who sought declaratory and injunctive relief below, and now bring this appeal, contend that the Legislature, in enacting Chapter 2011-1, Laws of Florida, now codified at section 1012.34(8), Florida Statutes (2014), has conferred on the State Board of Education power to designate some of them—perhaps nearly all of them—professionally "unsatisfactory," and therefore, among other things, subject to being laid off, for reasons that are so unclear and indefinite that the Legislature has abandoned its responsibility to set public policy in this important area, and delegated legislative authority it should have exercised itself to the State Board of Education, an executive branch agency. I agree with this contention, and respectfully dissent from today's decision on that basis.

Quite apart from the troubling implications for numerous public employee collective bargaining agreements,[6] the appellants contend and I agree that subsection 8, the provision the teachers challenge as essentially standardless, offers no meaningful guidance on how the State Board of Education is to determine "uniform cut scores," section 1012.34(8), Fla. Stat. (2014), and in particular on how "student learning growth" (as defined elsewhere in section 1012.34) or other

[6] Counts I through V of the amended complaint alleged various provisions in Chapter 2011-1, Laws of Florida, violated the appellants' right to collectively bargain pursuant to article I, section 6 of the Florida Constitution. The trial court's rejection of these claims, on the authority of Scott v. Williams, 107 So. 3d 379 (Fla. 2013), and Florida Public Employees Council 79, AFSCME v. Bush, 860 So. 2d 992 (Fla. 1st DCA 2003), is not challenged on appeal.

student performance measurements are to be taken into account in arriving at an individual educator's score.[7] While the statute does say that half[8] of each educator's evaluation is to be based on "student learning growth" under some unspecified, brave new scheme, § 1012.34(3)(a)1, Fla. Stat. (2014), it is anybody's guess what the Legislature intended in this regard, or what the State Board of Education could or must do to comply with the pertinent statutory language. Not every provision of section 1012.34 is under challenge here: At issue is only subsection 8, which lacks any standard for setting "uniform cut scores."

The teachers challenge the Legislature's delegation to state educational administrators of purported authority to adopt rules that "establish student performance levels that if not met will result in the [instructional] employee receiving an unsatisfactory performance evaluation rating," § 1012.34(8), and so become subject to discharge and be referred for possible license (teacher's certificate) revocation. The teachers do not base the present challenge on the

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[7] Under the statute, student learning growth is assessed by statewide assessments based on a formula adopted by the Commissioner of Education or, for subjects and grade levels not measured by statewide assessments, by "an equally appropriate formula" adopted by the school district. §§ 1012.34(3)(a); 1012.34(7), Fla. Stat. (2014).

[8] The "student learning growth" or student performance component can drop from 50 to "not less than 40 percent" for classroom teachers in certain circumstances. §§ 1012.34(3)(a)1; 1012.34(3)(a)2; 1012.341, Fla. Stat. (2014). Where a teacher receives an "unsatisfactory" rating based on students' test performance, however, the "student learning growth" component becomes all-important, i.e., 100 percent de facto. See §§ 1012.33(1)(a), (3); 1012.335(2)(c), Fla. Stat. (2014).

questionable fairness of firing teachers because some or all of their students fail to do well on tests. Their challenge is based instead on the Legislature's handing off to the state educational bureaucracy power to adopt rules, wholly as it sees fit, that might lead to ninety percent of Florida's public school teachers' losing their jobs. Of course, it might be only ten percent. But the gist of the challenge is that nothing in the law determines whether it will be ninety percent or ten percent, or how the bureaucracy should settle that question. Subsection 8 leaves the decision to the uncabined discretion of the State Board of Education, and a reviewing court can have no better idea than the State Board will have whether subsection 8 calls for ten percent or for ninety percent, or some other percentage entirely.

Subsection 8 requires that the State Board of Education adopt rules, in conformity with the Administrative Procedure Act, establishing uniform procedures for teacher evaluation systems that differentiate among four levels of performance (identified elsewhere[9] in section 1012.34), to wit: "Highly effective,"

[9] Section 1012.34(2)(e), Florida Statutes (2014), provides, in its entirety:

> The evaluation systems for instructional personnel and school administrators must:
>
> . . .
>
> (e) Differentiate among four levels of performance as follows:
>
> 1. Highly effective.
>
> 2. Effective.
>
> 3. Needs improvement or, for instructional personnel in the first 3 years of employment who need improvement, developing.

"Effective," "Needs improvement" (or in the first three years of employment, "developing"), and "Unsatisfactory." § 1012.34(2)(e), Fla. Stat. (2014). For each performance level, the State Board of Education must establish "uniform cut scores":

> The State Board of Education shall adopt rules . . . which establish . . . specific, discrete standards for each performance level required under subsection (2) to ensure clear and sufficient differentiation in the performance levels and to provide consistency in meaning across school districts . . . . Specifically, the rules shall establish student performance levels that if not met will result in the employee receiving an unsatisfactory performance evaluation rating. In like manner, the rules shall establish a student performance level that must be met in order for an employee to receive a highly effective rating and a student learning growth standard that must be met in order for an employee to receive an effective rating.

§ 1012.34(8), Fla. Stat. (2014). Virtually automatic, but highly important, consequences would flow from these performance level rating scores: Performance evaluation ratings would determine, for example, an individual educator's eligibility for salary increases, promotions, placements and transfers, not to

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> 4. Unsatisfactory.
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> The Commissioner of Education shall consult with experts, instructional personnel, school administrators, and education stakeholders in developing the criteria for the performance levels.

mention the likelihood of an individual educator's being dismissed.[10,11] See §§ 1012.22(1)(c); 1012.22(1)(e); 1012.28(6); 1012.33(5), Fla. Stat. (2014).

[10] A teacher with a professional services contract who is rated "unsatisfactory" is immediately placed on probation for 90 days. § 1012.34(4)(b)1, Fla. Stat. (2014). Thereafter, if the teacher's "deficiencies" have not been corrected, the superintendent is authorized to recommend termination, § 1012.34(4)(b)2, Fla. Stat. (2014), and refer the matter to the Department of Education for possible action against the teacher's certificate. § 1012.34(5), Fla. Stat. (2014). A teacher receiving "unsatisfactory" ratings in two consecutive years (or twice in three consecutive years) or a combination of three "unsatisfactory" and "needs improvement" ratings in three consecutive years is subject to dismissal during the teacher's contract term, see § 1012.33(1)(a), Fla. Stat. (2014), and is ineligible for renewal of his or her employment contract. See §§ 1012.33(3)(b); 1012.335(2)(c)3, Fla. Stat. (2014).

[11] Some of the virtually automatic consequences prescribed by statute do not apply to teachers who had continuing contract status thirty years ago (prior to July 1, 1984). See § 1012.33(1)(a), Fla. Stat. (2014) ("All such contracts, except continuing contracts as specified in subsection (4), shall contain provisions for dismissal during the term of the contract only for just cause," which includes "two consecutive annual performance evaluation ratings of unsatisfactory under s. 1012.34, two annual performance evaluation ratings of unsatisfactory within a 3-year period under s. 1012.34, three consecutive annual performance evaluation ratings of needs improvement or a combination of needs improvement and unsatisfactory under s. 1012.34[.]"); § 1012.33(4)(a)-(c), Fla. Stat. (2014) (providing that an employee who had continuing contract status prior to July 1, 1984, is entitled to retain such contract and all rights arising therefrom, unless the employee voluntarily relinquishes the continuing contract; setting forth grounds for dismissal of such employees; and providing that "[a]ny decision adverse to the employee shall be made by a majority vote of the full membership of the district school board." But see § 1012.33(5), Fla. Stat. (2014) ("If workforce reduction is needed, a district school board must retain employees at a school or in the school district based upon educational program needs and the performance evaluations of employees within the affected program areas. Within the program areas requiring reduction, the employee with the lowest performance evaluations must be the first to be released; the employee with the next lowest performance evaluations must be the second to be released; and reductions shall continue in like manner until the needed number of reductions has occurred. A district school board may not

Clearly germane here is a key rationale underlying the constitutional separation of powers in state and federal government alike, which now Judge Boyd explained, as follows:

> The United States and Florida constitutions require at least a majority vote of both houses of a representative legislative body and the approval of the chief executive as a prerequisite to adoption of public policy. This significant hurdle is not simply a matter of parliamentary procedure. The procedure reflects a profound understanding that, in the long run, a government that acts to implement policies unsupported by general consensus ceases to be a democracy and will eventually become unstable. The process was not designed to be efficient, but to achieve other goals, one of which was to prevent the adoption of controversial policies not enjoying broad public support. Delegation of the power to make policy decisions from a democratically elected legislative branch to any entity able to act in the absence of consensus reduces the power of democratic institutions and divorces the government from the people.

F. Scott Boyd, Legislative Checks on Rulemaking Under Florida's New APA, 24 Fla. St. U. L. Rev. 309, 316 (1997) (footnotes omitted).

In contrast to the Federal Constitution, moreover, Article II, section 3 of the Constitution of Florida has been construed to require what is universally acknowledged to be a strict separation of powers. Art. II, § 3, Fla. Const.; Bush v. Schiavo, 885 So. 2d 321, 329 (Fla. 2004); see also Chiles v. Children A, B, C, D,

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prioritize retention of employees based upon seniority.").

E, & F, 589 So. 2d 260, 264 (Fla. 1991).[12] Where the Florida Constitution allocates power to a specific branch of government, any statute purporting to give the same power to another branch violates the separation of powers doctrine.

> [U]nlike the apparent federal approach, Florida has not relied on implied powers, arguments of expedience or necessity, or any penumbral theory in gauging the contours of the separation of powers . . . What the Constitution's plain language says on this subject is what the courts of Florida enforce. If a statute purports to give one branch powers textually assigned to another by the Constitution, then that statute is unconstitutional.

B.H. v. State, 645 So. 2d 987, 992 (Fla. 1994); cf. Harden v. Garrett, 483 So. 2d 409, 410 (Fla. 1985) (concluding constitutional delegation of power to the Legislature prevents the judiciary, under the separation of powers doctrine, from deciding a legislative election contest). The Florida Supreme Court has applied this strict separation of powers doctrine rigorously and recently. See, e.g., Fla.

[12] The Florida Supreme Court has described the doctrine of separation of powers as providing the foundation of our tripartite form of government, Bush v. Schiavo, 885 So. 2d 321, 329 (Fla. 2004), and quoted James Madison, as follows: "'The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.'" State ex rel. Albritton v. Lee, 183 So. 782, 787 (Fla. 1938) (quoting The Federalist No. 47, at 270 (James Madison)). To similar effect, "Montesquieu's Spirit of the Laws argues that genuine liberty is dependent on the rule of law, which in turn is dependent on a true separation of powers enforced by a system of checks and balances. [Harlan S. Abrahams, et al., Separation of Powers & Administrative Crimes: A Study of Irreconcilables, 1976 So. Ill. L.J. 1, 19, 19 n.60] (citing Montesquieu, Spirit of the Laws (Newmann ed. 1949))." B.H. v. State, 645 So. 2d 987, 991 (Fla. 1994).

Dep't of State, Div. of Elections v. Martin, 916 So. 2d 763, 769 (Fla. 2005); Schiavo, 885 So. 2d at 329 (describing the separation of powers as the "cornerstone of American democracy").[13]

Whether the Legislature "intended to violate the separation of powers

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[13] "[U]nder the doctrine of separation of powers, the legislature may not delegate the power to enact laws or to declare what the law shall be to any other branch." Chiles v. Children A, B, C, D, E, & F, 589 So. 2d 260, 264 (Fla. 1991).

> The Legislature is permitted to transfer subordinate functions "to permit administration of legislative policy by an agency with the expertise and flexibility to deal with complex and fluid conditions." Microtel, Inc. v. Fla. Public Serv. Comm'n, 464 So. 2d 1189, 1191 (Fla. 1985). However, under article II, section 3 of the constitution the Legislature "may not delegate the power to enact a law or the right to exercise unrestricted discretion in applying the law." Sims v. State, 754 So. 2d 657, 668 (Fla. 2000). This prohibition, known as the nondelegation doctrine, requires that "fundamental and primary policy decisions . . . be made by members of the legislature who are elected to perform those tasks, and [that the] administration of legislative programs must be pursuant to some minimal standards and guidelines ascertainable by reference to the enactment establishing the program." Askew v. Cross Key Waterways, 372 So. 2d 913, 925 (Fla. 1978) . . . . The statute must so clearly define the power delegated that the [executive] is precluded from acting through whim, showing favoritism, or exercising unbridled discretion." Lewis v. Bank of Pasco County, 346 So. 2d 53, 55-56 (Fla. 1976).

Schiavo, 885 So. 2d at 332. See also Sloban v. Fla. Bd. of Pharmacy, 982 So. 2d 26, 29-30 (Fla. 1st DCA 2008) (recognizing that, despite the Legislature's ability to transfer subordinate functions to "'permit administration of legislative policy by an agency with the expertise and flexibility to deal with complex and fluid conditions,'" the Legislature may not delegate the right "'to exercise unrestricted discretion in applying the law'" and is precluded "from delegating its powers 'absent ascertainable minimal standards and guidelines.'" (citations omitted)).

requirement of Article II, section 3 of the Florida Constitution," ante at 2, is not the issue. The Legislature has in fact violated Article II, section 3, by omitting sufficient guidelines from subsection 8. "The requirement that the Legislature provide sufficient guidelines also ensures the availability of meaningful judicial review." Schiavo, 885 So. 2d at 332.

> "In the final analysis it is the courts, upon a challenge to the exercise or nonexercise of administrative action, which must determine whether the administrative agency has performed consistently with the mandate of the legislature. When legislation is so lacking in guidelines that neither the agency nor the courts can determine whether the agency is carrying out the intent of the legislature in its conduct, then, in fact, the agency becomes the lawgiver rather than the administrator of the law."

Id. (quoting Askew v. Cross Key Waterways, 372 So. 2d 913, 918-19 (Fla. 1978)); see also Sloban v. Fla. Bd. of Pharmacy, 982 So. 2d 26, 30 (Fla. 1st DCA 2008) (same). Florida courts "have recognized that the 'specificity of the guidelines [set forth in the legislation] will depend on the complexity of the subject and the "degree of difficulty involved in articulating finite standards,"' [but] have also made clear that '[e]ven where a general approach would be more practical than a detailed scheme of legislation, enactments may not be drafted in terms so general and unrestrictive that administrators are left without standards for the guidance of their official acts.'" Schiavo, 885 So. 2d at 332-33 (citations omitted).

Despite some statutory detail concerning methods for measuring "student

learning growth" and considerable detail about the high stakes consequences of overall performance ratings for individual educators (including school administrators), subsection 8 is altogether silent on how the State Board of Education is to make use of "student learning growth" or other student assessments to "establish student performance levels that if not met will result in the [instructional] employee receiving an unsatisfactory performance evaluation rating." § 1012.34(8), Fla. Stat. (2014). The Legislature has delegated significant policy decisions to the State Board of Education with no guidance on how they are to be made, and no standard for the Board or a reviewing court to ascertain whether legislative intent is being fulfilled. See generally Orr v. Trask, 464 So. 2d 131, 134-35 (Fla. 1985) (holding that, although "it was not necessary for the legislature to make the actual selection of the deputy positions to be abolished; it was . . . necessary that the legislature furnish ascertainable minimal criteria and guidelines on how the selection was to be made").

Fitting hand and glove with Florida's strict separation of powers doctrine, amendments to the Administrative Procedure Act (APA) in recent years make clear that the rulemaking authority subsection 8 confers on the State Board of Education cannot remedy the constitutional defects in the statutory language challenged here. It is by no means clear that the State Board of Education itself is persuaded that subsection 8 provides the Board adequate legislative guidance for promulgating

rules. The challenged language has been in place since 2011,[14] yet no rule

[14] At the time this court heard oral argument in this case, section 1012.34(8), Florida Statutes (2011), (as initially enacted) provided:

> The State Board of Education shall adopt rules pursuant to ss. 120.536(1) and 120.54 which establish uniform procedures for the submission, review, and approval of district evaluation systems and reporting requirements for the annual evaluation of instructional personnel and school administrators; specific, discrete standards for each performance level required under subsection (2) to ensure clear and sufficient differentiation in the performance levels and to provide consistency in meaning across school districts; the measurement of student learning growth and associated implementation procedures required under subsection (7); a process to permit instructional personnel to review the class roster for accuracy and to correct any mistakes relating to the identity of students for whom the individual is responsible [this phrase was moved to 1012.34(1) in 2014]; and a process for monitoring school district implementation of evaluation systems in accordance with this section. Specifically, the rules shall establish a student learning growth standard that if not met will result in the employee receiving an unsatisfactory performance evaluation rating. In like manner, the rules shall establish a student learning growth standard that must be met in order for an employee to receive a highly effective rating and a student learning growth standard that must be met in order for an employee to receive an effective rating.

Subsection 8 was subsequently amended during the 2014 legislative session, effective July 1, 2014. See Ch. 2014-23, § 13, at 649-50, Laws of Fla.

As amended, subsection 8 now provides that the "rules shall establish student performance levels that if not met will result in the employee receiving an unsatisfactory performance evaluation rating" and "a student performance level that must be met in order for an employee to receive a highly effective rating." § 1012.34(8), Fla. Stat. (2014) (emphasis supplied). Subsection 8 continues, however, to provide that the rules must establish "a student learning growth

implementing subsection 8 has ever been adopted.

In the stalled rule adoption process, the Board of Education seemed to be searching for answers to key questions the Legislature neglected to address. As part of the rule development workshops undertaken in a thus far unsuccessful attempt to implement subsection 8, the Department of Education poses to workshop participants the precise, critical, policy question that should have been answered by the legislation, to wit: "What standard should be used to evaluate and classify teachers and administrators based on VAM data?" Fla. Dep't of Ed., Rule Development Workshop Proposed Rule 6A-5.0411: Calculations of Student Learning Growth Using Statewide Assessment Data for Use in School Personnel Evaluations, p.16, available at http://www.fldoe.org/core/fileparse.php/7566/urlt/0075066-vam-ruleworkshop.pdf (last visited Jan. 6, 2015). Albeit arcanely articulated[15] by those charged with

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standard that must be met in order for an employee to receive an effective rating." Id. (emphasis supplied). The focus of the staff analysis for Senate Bill 1642 is the rating of schools, not teachers, and it does not address the amendment to subsection 8. Subsection 1012.34(2)(e) was unchanged, and no party has asserted that the 2014 amendment to subsection 8 should affect this court's analysis.

[15] The Commissioner of Education approved a formula for measuring student learning growth on the Florida Comprehensive Assessment Test in reading and math, pursuant to section 1012.34(7), Florida Statutes (2011), and the State Board of Education initiated rulemaking to implement the formula, involving so-called "VAM data." The formula is $y_i = \mu + \sum_{g=1}^{M} \delta_g x_g + \sum_{j=1}^{K} \beta_j x_j + \theta_{(k)i} + \omega_{(mk)i} + \varepsilon_i$; where y_i denotes the test score for student *i*, δ_g is the coefficient associated with g^{th} prior test score, β_j is the coefficient associated with variable *j*, θ is the common school component of school *k* assumed $\theta \sim N(0, \sigma_\theta^2)$, ω is the effect of teacher *m* in

drafting a rule to implement subsection 8, this is the basic issue the Legislature left to the executive branch without any basis for deciding it. If the statute itself had provided adequate guidance for answering this question, as required by the Florida Constitution, the Department would not have needed to ask agency staff and members of the public to supply the answer.

Beginning in 1996,[16] "amendments to the APA have tightened and clarified

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school *k* assumed $\omega \sim N(0, \sigma_\omega^2)$, and ε is the random error term assumed $\varepsilon \sim N(0, \sigma_\varepsilon^2)$.

Rule development workshops regarding the implementation of this formula in teacher evaluations were conducted in early 2013. But no rule establishing a formula for measuring student learning growth pursuant to subsection 1012.34(3), much less establishing "specific, discrete standards for each performance level" pursuant to subsection 1012.34(8) for measuring teachers' and administrators' performance, has yet been adopted. See 39 Fla. Admin. R. 20 (Jan. 30, 2013) (Notice of Development of Rulemaking for Proposed Rule 6A-5.0411, available at http://www.flrules.org/gateway/ruleNo.asp?id=6A-5.0411).

[16] In 1996, the Legislature amended section 120.52(8), defining "invalid exercise of delegated legislative authority," by adding the following general standards in a closing paragraph (often referred to as the "flush left" paragraph):

> A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may adopt only rules that implement, interpret, or make specific the particular powers and duties granted by the enabling statute. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than the particular powers and duties conferred by the same statute.

rulemaking restrictions." State, Bd. of Trs. of the Internal Improvement Trust Fund v. Day Cruise Ass'n, Inc., 794 So. 2d 696, 698 (Fla. 1st DCA 2001).[17] As revised

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Ch. 96-159, § 3, at 152, Laws of Fla. (emphasis supplied) (codified at § 120.52(8), Fla. Stat. (Supp. 1996)). The identical language was included in section 120.536(1), Florida Statutes (Supp. 1996). See Ch. 96-159, § 9, at 159, Laws of Fla. "The precise effect of this then new statutory language was at least originally a matter of some debate." State, Bd. of Trs. of the Internal Improvement Trust Fund v. Day Cruise Ass'n, Inc., 794 So. 2d 696, 698 (Fla. 1st DCA 2001).

[17] See Day Cruise Ass'n, Inc., 794 So. 2d at 698 n.2 ("Compare Stephen T. Maher, How the Glitch Stole Christmas: The 1997 Amendments to the Florida Administrative Procedure Act, 25 Fla. St. U. L. Rev. 235, 242 n.33 (1998) (predicting that 'the adoption of the so-called map tack provision, which requires that agencies be able to show specific statutory rulemaking authority for the rules they adopt, promises to make rule challenges easier to win') with Patrick L. "Booter" Imhof & James Parker Rhea, Legislative Oversight, Fla. B.J., Mar. 1997, at 28, 30 ('While the bases for agency rulemaking authority have been restricted by the act, it remains to be seen how the enunciated standard will be applied by the courts . . . .'")). As observed by Professor Rossi:

> Opinions issued by the Florida Supreme Court [prior to the 1996 APA amendments] articulate[d] a range of standards, requiring legislative delegation of policymaking authority to contain an "intelligible principle," have "adequate standards" to guide the agency, have "objective guidelines and standards," be "accompanied by adequate guidelines," or contain "reasonably definite standards." Despite harsh rhetoric in the Florida Supreme Court's treatment of the nondelegation issue, it has been observed that courts in the state seldom [found] statutes unconstitutional.
>
> Thus, notwithstanding the courts' continued rhetorical adherence to strict separation of powers, many Florida regulatory programs operate[d] under fairly general legislative grants of power. For example, the Board of Medicine (Board), which regulates the licensing of physicians, [wa]s authorized to promulgate rules "as may be necessary to carry out the duties and authority" conferred specifically by statute and "as may be necessary to protect the health, safety, and welfare of the public."
>
> The 1996 revisions to the Florida APA, however, seriously limit[ed] agency rulemaking authority in future rulemaking

in 1999, the closing paragraph of section 120.52(8) provides:

> A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may adopt only rules that implement or interpret the specific powers and duties granted by the enabling statute. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious or is within the agency's class of powers and duties, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than implementing or interpreting the specific powers and duties conferred by the same statute.

§ 120.52(8), Fla. Stat. (1999) (emphasis supplied); see also Ch. 99-379, § 2, at 3790-91, Laws of Fla.[18] "Under the 1996 and 1999 amendments to the APA, it is

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proceedings. . . .

Jim Rossi, The 1996 Revised Florida Administrative Procedure Act: A Rulemaking Revolution or Counter-Revolution?, 49 Admin. L. Rev. 345, 359 (1997) (footnotes omitted).

[18] Thereafter, as recounted in Day Cruise Association,

> In apparent response to the decision in Consolidated-Tomoka, the Legislature again amended sections 120.52(8) and 120.536(1) in 1999, stating its intent "to clarify the limited authority of agencies to adopt rules in accordance with chapter 96-159, Laws of Florida, and . . . to reject the class of powers and duties analysis." Ch. 99[-]379, § 1, at 3789, Laws of Fla. The legislative history of the 1999 amendments reflects a legislative intent that the standard for agency rulemaking be more restrictive than the standard explicated in what the Legislature deemed inappropriately broad judicial

now clear, agencies have rulemaking authority only where the Legislature has enacted a specific statute, and authorized the agency to implement it, and then only if the (proposed) rule implements or interprets specific powers or duties, as opposed to improvising in an area that can be said to fall only generally within some class of powers or duties the Legislature has conferred on the agency." Day

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> interpretations of the 1996 amendments to the APA, expressly including Consolidated-Tomoka:
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> > [The bill] rejects a judicial interpretation of this standard which created a functional test to determine whether a challenged agency rule is directly within the class of powers and duties identified in the statute to be implemented. [specifically citing Consolidated-Tomoka]
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> Fla. H.R. Comm. on Govtl. Rules & Regs., CS/HB 107 (1999) (ch. 99-379, Laws of Fla.) Final Staff Analysis 5 (June 30, 1999); see also Kent Wetherell, Sour Grapes Make Sweet Wine, Fla. Bar. Environ. and Land Use Law Section, Section Reporter (Dec. 1999) <http://www.eluls.org/dec1999-wetherell.html> ("Consolidated-Tomoka . . . did not survive the legislative session following its rendition as it was effectively overruled by legislation adopted in the 1999 Session. . . . The 1999 legislation explicitly rejects the 'class of powers and duties' test created by the court in Consolidated-Tomoka. . . ."). . . .
>
> Implementing this legislative intent to cabin agency rulemaking authority, the 1999 Legislature amended the "flush left" paragraph of section 120.52(8) and parallel language in section 120.536(1), by replacing the phrase "particular powers and duties" with the phrase "specific powers and duties," and by expressly rejecting the judicial "class of powers and duties" gloss. . . .

Day Cruise Ass'n, 794 So. 2d at 699 (footnote omitted).

Cruise Ass'n, 794 So. 2d at 700 (footnote omitted).

Particularly in light of these changes to the Administrative Procedure Act,[19] the majority and concurring opinions' reliance on Florida Teaching Profession-National Education Association v. Turlington, 490 So. 2d 142 (Fla. 1st DCA 1986), is wholly unjustified.[20] Concluding that there was no unlawful delegation

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> [19] In the new APA, Florida has expressed its intent to delegate less authority for agencies to formulate policy by rule. The Legislature has created a stricter test to be applied in determining the validity of agency rules by requiring more specific statutory authority than that minimally required by the Florida Constitution.
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> The new statutory test is applied to rules, not to statutes. But the intended effect of the statutory rulemaking provision differs from the constitutional nondelegation doctrine only in degree, not in direction. The nondelegation doctrine compels the Legislature to enact more detailed laws in response to judicial invalidation of extremely broad delegations of legislative authority. The new rulemaking provision is intended to compel the agency to return to the Legislature for more detailed laws as a response to an invalidation of rules by the Division of Administrative Hearings (DOAH) based upon very broad delegations of legislative authority.
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> . . . .
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> . . . The concept of less delegation is linked to the requirement that the Legislature give more policy direction in enabling legislation.

F. Scott Boyd, Legislative Checks on Rulemaking Under Florida's New APA, 24 Fla. St. U. L. Rev. 309, 317-18 (1997) (footnotes omitted).

[20] In Florida Teaching Profession-National Education Association v. Turlington, 490 So. 2d 142 (Fla. 1st DCA 1986), the plaintiffs (two classroom teachers and employee organizations that collectively bargained with school boards on behalf of instructional employees) sought a judicial declaration that sections 231.532 and 231.533, Florida Statutes (Supp. 1984) (referred to as the "Merit

Schools Program" and the "Master Teacher Program" provisions), were unconstitutional. The Merit Schools Program authorized state funding for voluntary, locally-negotiated plans designed to increase the performance of students and provide economic incentives for teachers and other school personnel who met specified statutory criteria. The Master Teacher Program authorized incentive awards to teachers who voluntarily documented their fulfillment of statutory eligibility criteria. The Turlington plaintiffs challenged the statutory provisions in part as "'unlawful, standardless delegation[s] of legislative authority to the Department of Education in violation of the principle of separation of powers.'" Id. at 145. This court, in rejecting the plaintiffs' arguments, adopted verbatim the order of the trial court. Id. at 143.

A Westlaw search indicates the decision in Turlington has been cited in an appellate decision only once—by this court in a citation per curiam affirmance without opinion. See Petersen v. Dep't of Educ., 508 So. 2d 540 (Fla. 1st DCA 1987).

Appellees argue that subsection 8, like the statutory provisions at issue in Turlington, "'confers permissible administrative discretion'" on the State Board of Education "'to administer new and innovative programs,'" without violating the prohibition against enabling executive officials to "'say what the law is.'" They contend that subsection 8 calls for the Board to "flesh out rules within certain defined parameters," like the statutes upheld as constitutional in Turlington. Subsection 8 does not, however, contain the guidance the statutory provisions at issue in Turlington provided.

The basis for the Turlington plaintiffs' argument that the Merit Schools Plan "'represent[ed] an unlawful, standardless delegation of legislative authority to the Department of Education in violation of the principle of separation of powers'" is not entirely clear from the decision. Turlington, 490 So. 2d at 145. Nor is the basis for the trial court's (and hence this court's) rejection of the argument. The Turlington trial court addressed the argument as follows:

> The initial Merit Schools Plan sanctioned by Plaintiff Pinellas Classroom Teacher Association is presented as a primary example of what Plaintiffs believe to be unlawfully exercised discretion. The Court is not persuaded that the initial failure by the Department of Education to approve this plan was in any way unlawful. Indeed, the plan as originally submitted did not require student test score improvement as a mandatory criterion for selection. This was required by statute. Too, it must be noted that the Merit Schools statute necessarily

of legislative authority to the Department of Education, the Turlington court relied (at least with regard to the Master Teacher Program) in large part on rules promulgated by the Board to "'adequately protect candidates . . . from the arbitrary exercise of discretion,'" saying that Department of Education officials were "'responsible for fleshing out these programs'" by rulemaking and predicting that even "'[m]ore fine tuning [would] be required.'" Id. at 146-47. It is now crystal clear, if there were ever any doubt,[21] that executive branch rulemaking cannot save a statute that impermissibly delegates legislative authority. See F. Scott Boyd, Legislative Checks on Rulemaking Under Florida's New APA, 24 Fla. St. U. L.

> permitted a range of plan options to be negotiated at the local level. It seems somewhat ironic that the range of options specified in the statute is argued to confer unconstitutional discretion on the Department of Education but at the same time it is argued that the Merit Schools Program 'chokes' the bargaining process. Quite obviously, a balance must be struck and the Court finds that the balance so struck is appropriate.

Id. at 146. The court in Turlington determined that the challenged statutes did not "'permit the unrestricted exercise of discretion by officials of the Department of Education.'" Id. at 146. The court concluded the statutes "'confer[red] permissible administrative discretion on the Department of Education officials to administer new and innovative programs, but they do not enable those officials to "say what the law is."'" Id. (citation omitted). In reaching its decision, the court observed that the "'programs may not to date have proven all that one might have hoped,'" but "'expresse[d] the view that Department of Education officials responsible for fleshing out these programs have achieved rather remarkable success in carrying out expressed legislative intent in a short period of time. . . . [The statutes] are imperfect to be sure. More fine tuning will be required before results can be evaluated.'" Id. at 147.

[21] Any misdirection the Turlington opinion can be said to offer in this regard is not binding on the en banc court.

Rev. 309, 317 n.59 ("While the nondelegation doctrine and the APA share certain policy goals, . . . [the] constitutionality of a statute [does not depend on] anything that takes place [post enactment]: the way the statute may be implemented by an agency; the enactment, amendment, or repeal of an APA; or the extent to which the statute was 'refined' through rulemaking."). In any event, it appears that the Turlington plaintiffs' argument[22] that the Master Teacher Program at issue there represented an "'unlawful, standardless delegation of legislative authority'" was based solely on the claim that "'the ability of principals to confer extra evaluation points on teachers represent[ed] unlawful discretion.'" Turlington, 490 So. 2d at 145-46. The possibility of missing out on special recognition under the scheme at

[22] In rejecting this argument, the Turlington trial judge opined:

> This argument, however, seems to overlook that the "extra points" available under the statute may only be recommended by the principal. Also overlooked is the fact that candidates who are denied associate master teacher designation may also obtain review of such decision under Sec. 120.57, F.S. The safeguards contained in the statute and in the aforestated Rule, in the Court's view, adequately protect candidates for associate master teacher designation from the arbitrary exercise of discretion.

Id. at 146. The trial court described the rules as setting "'forth extensive criteria governing the performance evaluations and subject area examinations required by the program,'" "'prescrib[ing] that acceptable subject area examinations for certification as associate master teachers can be either a Specialty Area Test of a National Teacher Examination or a subject area examination constructed by the Institute for Instructional Research and Practice and Student Education Evaluation and Performance,'" and providing that "'[a]ll subject area examinations . . . be approved by the State Board of Education.'" Id. at 144-45.

issue in Turlington because of the lack of a principal's recommendation is a world apart from the draconian consequences of falling on the wrong side of the "uniform cut scores" required by subsection 8.

To return to the specifics of the present case, subsection 1012.34(2) sets forth some general requirements for evaluation systems: that such systems be designed to support "effective instruction" and student learning growth; that the systems provide "appropriate" instruments, procedures and criteria for "continuous quality improvement" of professional skills; that systems include a mechanism to examine performance data from multiple sources, including "opportunities for parents to provide input" into employee performance evaluations "when appropriate;" and that [school] systems identify those teaching fields for which special evaluation procedures and criteria are necessary. § 1012.34(2), Fla. Stat. (2014). In addition,[23] subsection 1012.34(2) provides that evaluation systems must differentiate among four levels of performance (highly effective, effective, needs improvement, or unsatisfactory).

[23] Subsections 1012.34(7) and 1012.34(2), Florida Statutes (2014), do not provide sufficient standards or guidelines for application of subsection 8. Subsection 1012.34(7) does list factors that must be, factors that may be, and factors that may not be taken into consideration by the Commissioner of Education in developing a formula to measure individual "student learning growth." But it gives no guidance on where or how to set "uniform cut scores." It does not illuminate what the relationship between individual "student learning growth" and "uniform cut scores" should be or what purpose the relationship should serve.

But neither subsection 2 nor any other subsection directs, guides, or informs the State Board of Education how it is to decide on "student performance levels" or a "student learning growth standard" "that if not met will result in the employee receiving an unsatisfactory performance evaluation rating" (or that must be met for an employee to receive a "highly effective" or "effective" rating) as mandated by subsection 8. § 1012.34(8), Fla. Stat. (2014). See D'Alemberte v. Anderson, 349 So. 2d 164, 167-68 (Fla. 1977) (holding that the statute did "not employ technical words which have acquired a pellucid connotation to those specific individuals governed by the statute," that it was not "'suggested what standards, either by common usage or by reference to the purposes of the Act, c[ould] be implied in limiting the Commissioner's authority in this respect,'" and that vesting a Commission with the "'unbridled discretion to define such terms without any rule or standard whatever to guide them [was] a clear delegation . . . of straight legislative power which will not be permitted'" (quoting Conner v. Joe Hatton, Inc., 216 So. 2d 209, 213 (Fla. 1968))).

Subsection 8 "includes no criteria which provide standards to guide the [State Board of Education] in the exercise of the power delegated." See Martin, 885 So. 2d at 458. Subsection 8 leaves it to the Board to determine what it should consider in establishing a "student performance level" that will trigger a mandatory evaluation of "unsatisfactory," with the dire consequences statutorily attendant.

The Board is free to choose "trigger points" in a way that labels a majority of teachers "highly effective," "unsatisfactory," or anything in between. This lack of legislative guidance and restraint renders subsection 8 unconstitutional. See B.H., 645 So. 2d at 993-94 ("The legislature may not delegate open-ended authority such that 'no one can say with certainty, from the terms of the law itself, what would be deemed an infringement of the law.'"); Sloban, 982 So. 2d at 31 (holding section 456.072(6), Florida Statutes, granted "unbridled discretion" to the Florida Board of Pharmacy "to determine the professional fate of a group of persons"); see also Cross Key Waterways, 372 So. 2d at 918-19 ("When legislation is so lacking in guidelines that neither the agency nor the courts can determine whether the agency is carrying out the intent of the legislature in its conduct, then, in fact, the agency becomes the lawgiver rather than the administrator of the law.").

Subsection 1012.34(8) is an unconstitutional delegation of legislative authority, a violation of the separation of powers required by article II, section 3 of the Florida Constitution. The judgment as to Count VI of the amended complaint should be reversed, and the case should be remanded for further proceedings.

Appendix

1012.34. Personnel evaluation procedures and criteria[24]

(1) Evaluation system approval and reporting.--

(a) For the purpose of increasing student learning growth by improving the quality of instructional, administrative, and supervisory services in the public schools of the state, the district school superintendent shall establish procedures for evaluating the performance of duties and responsibilities of all instructional, administrative, and supervisory personnel employed by the school district. The district school superintendent shall annually report the evaluation results of instructional personnel and school administrators to the Department of Education in addition to the information required under subsection (5).

(b) The department must approve each school district's instructional personnel and school administrator evaluation systems. The department shall monitor each district's implementation of its instructional personnel and school administrator evaluation systems for compliance with the requirements of this section.

(c) By December 1, 2012, the Commissioner of Education shall report to the Governor, the President of the Senate, and the Speaker of the House of Representatives the approval and implementation status of each school district's instructional personnel and school administrator evaluation systems. The report shall include performance evaluation results for the prior school year for instructional personnel and school administrators using the four levels of performance specified in paragraph (2)(e). The performance evaluation results for instructional personnel shall be disaggregated by classroom teachers, as defined in s. 1012.01(2)(a), excluding substitute teachers, and all other instructional personnel, as defined in s. 1012.01(2)(b)-(d). The commissioner shall continue to report, by December 1 each year thereafter, each school district's performance evaluation results and the status of any evaluation system revisions requested by a school district pursuant to subsection (6).

[24] Effective March 24, 2011, through May 11, 2015.

(2) Evaluation system requirements.--The evaluation systems for instructional personnel and school administrators must:

(a) Be designed to support effective instruction and student learning growth, and performance evaluation results must be used when developing district and school level improvement plans.

(b) Provide appropriate instruments, procedures, and criteria for continuous quality improvement of the professional skills of instructional personnel and school administrators, and performance evaluation results must be used when identifying professional development.

(c) Include a mechanism to examine performance data from multiple sources, including opportunities for parents to provide input into employee performance evaluations when appropriate.

(d) Identify those teaching fields for which special evaluation procedures and criteria are necessary.

(e) Differentiate among four levels of performance as follows:

1. Highly effective.

2. Effective.

3. Needs improvement or, for instructional personnel in the first 3 years of employment who need improvement, developing.

4. Unsatisfactory.

The Commissioner of Education shall consult with experts, instructional personnel, school administrators, and education stakeholders in developing the criteria for the performance levels.

(f) Provide for training programs that are based upon guidelines provided by the department to ensure that all individuals with evaluation responsibilities understand the proper use of the evaluation criteria and procedures.

(g) Include a process for monitoring and evaluating the effective and consistent use of the evaluation criteria by employees with evaluation responsibilities.

(h) Include a process for monitoring and evaluating the effectiveness of the system itself in improving instruction and student learning.

In addition, each district school board may establish a peer assistance process. This process may be a part of the regular evaluation system or used to

assist employees placed on performance probation, newly hired classroom teachers, or employees who request assistance.

(3) Evaluation procedures and criteria.--Instructional personnel and school administrator performance evaluations must be based upon the performance of students assigned to their classrooms or schools, as provided in this section. Pursuant to this section, a school district's performance evaluation is not limited to basing unsatisfactory performance of instructional personnel and school administrators solely upon student performance, but may include other criteria approved to evaluate instructional personnel and school administrators' performance, or any combination of student performance and other approved criteria. Evaluation procedures and criteria must comply with, but are not limited to, the following:

(a) A performance evaluation must be conducted for each employee at least once a year, except that a classroom teacher, as defined in s. 1012.01(2)(a), excluding substitute teachers, who is newly hired by the district school board must be observed and evaluated at least twice in the first year of teaching in the school district. The performance evaluation must be based upon sound educational principles and contemporary research in effective educational practices. The evaluation criteria must include:

1. Performance of students.--At least 50 percent of a performance evaluation must be based upon data and indicators of student learning growth assessed annually by statewide assessments or, for subjects and grade levels not measured by statewide assessments, by school district assessments as provided in s. 1008.22(8). Each school district must use the formula adopted pursuant to paragraph (7)(a) for measuring student learning growth in all courses associated with statewide assessments and must select an equally appropriate formula for measuring student learning growth for all other grades and subjects, except as otherwise provided in subsection (7).

a. For classroom teachers, as defined in s. 1012.01(2)(a), excluding substitute teachers, the student learning growth portion of the evaluation must include growth data for students assigned to the teacher over the course of at least 3 years. If less than 3 years of data are available, the years for which data are available must be used and the percentage of the evaluation based upon student learning growth may be reduced to not less than 40 percent.

b. For instructional personnel who are not classroom teachers, the student learning growth portion of the evaluation must include growth data on statewide assessments for students assigned to the instructional personnel over the course of at least 3 years, or may include a combination of student learning growth data and other measurable student outcomes that are specific to the assigned position, provided that the student learning growth data accounts for not less than 30 percent of the evaluation. If less than 3 years of student growth data are available, the years for which data are available must be used and the percentage of the evaluation based upon student learning growth may be reduced to not less than 20 percent.

c. For school administrators, the student learning growth portion of the evaluation must include growth data for students assigned to the school over the course of at least 3 years. If less than 3 years of data are available, the years for which data are available must be used and the percentage of the evaluation based upon student learning growth may be reduced to not less than 40 percent.

2. Instructional practice.--Evaluation criteria used when annually observing classroom teachers, as defined in s. 1012.01(2)(a), excluding substitute teachers, must include indicators based upon each of the Florida Educator Accomplished Practices adopted by the State Board of Education. For instructional personnel who are not classroom teachers, evaluation criteria must be based upon indicators of the Florida Educator Accomplished Practices and may include specific job expectations related to student support.

3. Instructional leadership.--For school administrators, evaluation criteria must include indicators based upon each of the leadership standards adopted by the State Board of Education under s. 1012.986, including performance measures related to the effectiveness of classroom teachers in the school, the administrator's appropriate use of evaluation criteria and procedures, recruitment and retention of effective and highly effective classroom teachers, improvement in the percentage of instructional personnel evaluated at the highly effective or effective level, and other leadership practices that result in student learning growth. The system may include a means to give parents and instructional personnel an opportunity to provide input into the administrator's performance evaluation.

4. Professional and job responsibilities.--For instructional personnel and school administrators, other professional and job responsibilities must be included

as adopted by the State Board of Education. The district school board may identify additional professional and job responsibilities.

(b) All personnel must be fully informed of the criteria and procedures associated with the evaluation process before the evaluation takes place.

(c) The individual responsible for supervising the employee must evaluate the employee's performance. The evaluation system may provide for the evaluator to consider input from other personnel trained under paragraph (2)(f). The evaluator must submit a written report of the evaluation to the district school superintendent for the purpose of reviewing the employee's contract. The evaluator must submit the written report to the employee no later than 10 days after the evaluation takes place. The evaluator must discuss the written evaluation report with the employee. The employee shall have the right to initiate a written response to the evaluation, and the response shall become a permanent attachment to his or her personnel file.

(d) The evaluator may amend an evaluation based upon assessment data from the current school year if the data becomes available within 90 days after the close of the school year. The evaluator must then comply with the procedures set forth in paragraph (c).

. . .

(7) Measurement of student learning growth.--

(a) By June 1, 2011, the Commissioner of Education shall approve a formula to measure individual student learning growth on the Florida Comprehensive Assessment Test (FCAT) administered under s. 1008.22(3)(c) 1. The formula must take into consideration each student's prior academic performance. The formula must not set different expectations for student learning growth based upon a student's gender, race, ethnicity, or socioeconomic status. In the development of the formula, the commissioner shall consider other factors such as a student's attendance record, disability status, or status as an English language learner. The commissioner shall select additional formulas as appropriate for the remainder of the statewide assessments included under s. 1008.22 and continue to select formulas as new assessments are implemented in the state system. After the commissioner approves the formula to measure individual student learning growth on the FCAT and as additional formulas are selected by the commissioner for new

assessments implemented in the state system, the State Board of Education shall adopt these formulas by rule.

(b) Beginning in the 2011-2012 school year, each school district shall measure student learning growth using the formula approved by the commissioner under paragraph (a) for courses associated with the FCAT. Each school district shall implement the additional student learning growth measures selected by the commissioner under paragraph (a) for the remainder of the statewide assessments included under s. 1008.22 as they become available. Beginning in the 2014-2015 school year, for grades and subjects not assessed by statewide assessments but otherwise assessed as required under s. 1008.22(8), each school district shall measure student learning growth using an equally appropriate formula. The department shall provide models for measuring student learning growth which school districts may adopt.

(c) For a course that is not measured by a statewide assessment, a school district may request, through the evaluation system approval process, to use a student achievement measure rather than a student learning growth measure if achievement is demonstrated to be a more appropriate measure of classroom teacher performance. A school district may also request to use a combination of student learning growth and achievement, if appropriate.

(d) If the student learning growth in a course is not measured by a statewide assessment but is measured by a school district assessment, a school district may request, through the evaluation system approval process, that the performance evaluation for the classroom teacher assigned to that course include the learning growth of his or her students on FCAT Reading or FCAT Mathematics. The request must clearly explain the rationale supporting the request. However, the classroom teacher's performance evaluation must give greater weight to student learning growth on the district assessment.

(e) For classroom teachers of courses for which the district has not implemented appropriate assessments under s. 1008.22(8) or for which the school district has not adopted an equally appropriate measure of student learning growth under paragraphs (b)-(d), student learning growth must be measured by the growth in learning of the classroom teacher's students on statewide assessments, or, for courses in which enrolled students do not take the statewide assessments, measurable learning targets must be established based upon the goals of the school

improvement plan and approved by the school principal. A district school superintendent may assign to instructional personnel in an instructional team the student learning growth of the instructional team's students on statewide assessments. This paragraph expires July 1, 2015.

(8) Rulemaking.--The State Board of Education shall adopt rules pursuant to ss. 120.536(1) and 120.54 which establish uniform procedures for the submission, review, and approval of district evaluation systems and reporting requirements for the annual evaluation of instructional personnel and school administrators; specific, discrete standards for each performance level required under subsection (2) to ensure clear and sufficient differentiation in the performance levels and to provide consistency in meaning across school districts; the measurement of student learning growth and associated implementation procedures required under subsection (7); a process to permit instructional personnel to review the class roster for accuracy and to correct any mistakes relating to the identity of students for whom the individual is responsible; and a process for monitoring school district implementation of evaluation systems in accordance with this section. Specifically, the rules shall establish a student learning growth standard that if not met will result in the employee receiving an unsatisfactory performance evaluation rating. In like manner, the rules shall establish a student learning growth standard that must be met in order for an employee to receive a highly effective rating and a student learning growth standard that must be met in order for an employee to receive an effective rating.