

FIRST DISTRICT COURT OF APPEAL  
STATE OF FLORIDA

Case Nos. 1D07-6041 / 1D07-6105 / 1D07-6562 /  
1D07-6584 / 1D08-84 / 1D08-168 / 1D08-169 / 1D08-170 /  
1D08-171 / 1D08-172 / 1D08-173 / 1D08-216 / 1D08-363 / 1D08-369  
Lower Tribunal: DOE-2007-1438-FOI

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DUVAL COUNTY SCHOOL BOARD, et al.,

*Appellants,*

vs.

FLORIDA STATE BOARD OF EDUCATION,

*Appellee.*

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**ANSWER BRIEF OF FLORIDA STATE BOARD OF EDUCATION**

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ON APPEAL FROM A FINAL ORDER OF THE  
STATE BOARD OF EDUCATION

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## **STATEMENT OF THE CASE AND FACTS**

The Initial Brief filed by district school boards from fourteen different counties – Broward, Duval, Escambia, Hernando, Lake, Martin, Osceola, Palm Beach, Pasco, Pinellas, St. Lucie, St. Johns, Sumter, and Volusia (School Boards or Appellants) – raises a facial constitutional challenge to section 1002.335, Florida Statutes (2006) (*see Appendix A*), which establishes the Florida School of Excellence Commission (Commission) to authorize and oversee some charter schools within the state education system.<sup>1</sup> The core issue in this appeal is whether article IX, sections 1 and 2 of the Florida Constitution, which direct the Legislature to provide for a uniform and efficient public education system “by law,” empowers the Legislature to establish the Commission. *See* art. IX, Fla. Const. (**Appendix B**).

### **Factual Background**

Because Appellants raise only a facial challenge to section 1002.335, there are few relevant facts. In 2006 the Florida Legislature created the Florida Schools of Excellence Commission (Commission), as “an independent, state-level charter

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<sup>1</sup> For clarity sake, record citations will follow the practice of the Initial Brief: Citations to the record within the body of the brief will be **solely** to the record in case number 1D07-6562 (St. Lucie) and will be cited as “R.” followed by the volume (“V”) number and page number. Footnotes will be used to indicate the record citations in the remaining cases and will be designated by county name followed by “R.”, volume (“V”) number and page number (i.e., (Pasco V3; 345)).

school authorizing entity” chosen and supervised by the State Board of Education.

§ 1002.335(3), Fla. Stat. It established the Commission to promote:

the development and support of charter schools in order to better meet the growing and diverse needs of ... charter schools in the state and to further ensure that charter schools of the highest academic quality are approved and supported throughout the state in an efficient manner.

§ 1002.335(2)(a), Fla. Stat. Consistent with this mission, the Commission was empowered to authorize and oversee charter schools throughout the state, except in certain districts that retain “exclusive authority” – a process more fully described below. *See* § 1002.335(5), Fla. Stat.

Significantly, the new law did not diminish the district school boards’ authority to oversee charter schools under the pre-existing charter school law (§ 1002.33, Fla. Stat.); school boards retain the same authority to receive applications and to authorize charter schools. The Commission only has “*concurrent*” authority to authorize charter schools. § 1002.335(5)(a), Fla. Stat. Thus, schools boards and the Commission both have authority to sponsor charter schools, and applicants in most districts may apply to either body for authorization of a new charter school.

While the Commission will have oversight of the schools it authorizes, section 1002.335 also contemplates an ongoing role for school boards in Commission-authorized schools. The school boards’ role may include duties

related to tracking student enrollments, addressing administrative burdens and services, with facilities and transportation issues, and, most likely, in other areas as well. § 1002.335 (4)(b), Fla. Stat. However, the extent of the school boards' role and collaboration is not yet defined because Commission-authorized schools do not yet operate in Florida.<sup>2</sup>

Finally, school boards may exclude the Commission from authorizing schools in their districts if the State Board determines that they have treated charter schools fairly and equitably over the past four years. § 1002.335(5)(e), Fla. Stat. The statute and a State Board administrative rule outline the annual process whereby school boards may apply to retain exclusive authorizing authority. *Id.*; Fla. Admin. Code R. 6A-6.0783. In fiscal year 2007-08, the State Board reviewed 38 such applications from district school boards to retain exclusive authorizing authority, including applications from the Appellants. (R. V1-3; 1-599).<sup>3</sup> Three school boards were granted exclusive authority; and, 14 school boards whose

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<sup>2</sup> For instance, the State Board does not expect a Commission-authorized school to open in one of Appellants' districts until at least the 2009-10 school year. Thus far, the only administrative rule relating to section 1002.335 sets forth the exclusive authority application process and does not address the respective responsibilities of the Commission and school boards. *See* Fla. Admin. Code R. 6A-6.0783.

<sup>3</sup> (Duval R. V1-9; 1-1741); (Escambia R. V1-4; 1-773); (Broward R. V1-14; 1-2779); (Palm Beach R. V1-34; 1-6630); (Lake R. V1-4; 1-651); (Sumter R. V1-7; 1-1215); (St. Johns R. 1-3; 1-513); (Osceola R. V1-4; 1-623); (Volusia R. V1-5; 1-926); (Hernando R. V1-2; 1-395); (Martin R. V1-2; 1-303); (Pasco R. V1-16; 1-3266); (Pinellas R. V1-4; 1-781).

applications were denied initiated the instant appeals in which briefing has been consolidated. (R. V6; 1187-94) (*see Appendix D*).<sup>4</sup>

The School Boards only challenge section 1002.335 on its face, and do not raise particular issues related to the State Board's consideration of their respective applications for exclusive authority.

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<sup>4</sup> (Duval R. V14; 2614-2615); (Escambia R. V7; 1393-1394); (Broward R. V17; 3396-3398); (Palm Beach R. V39; 7800-7803); (Lake R. V7; 1249-1250); (Sumter R. V10; 1813-1814); (St. Johns R. V6; 1112-1113); (Osceola R. V7; 1222-1223); (Volusia R. V8; 1525-1526); (Hernando R. V5; 993-993); (Martin R. V5; 900-901); (Pasco R. V20; 3903-3904); (Pinellas R. V7; 1384-1385).

## SUMMARY OF ARGUMENT

Section 1002.335, Florida Statutes (2006), lawfully establishes the Florida School of Excellence Commission (Commission), with power to authorize and oversee some public charter schools in Florida. The law comports with the Legislature's mandate to provide "by law" for a uniform and efficient public education system and does not unlawfully strip the authority of district school boards. *See* art. IX, §§ 1, 2, & 4, Fla. Const.

Appellants claim that section 1002.335 impinges Florida's 67 district school boards' unlimited and absolute constitutional authority over charter schools. But, they overstate the school boards' authority. While the school boards have a role in the constitutional system – they supervise the overwhelming majority of public schools, including all currently operating charter schools – their role is subject to statutory parameters. Courts have repeatedly concluded that article IX, section 4(b) must be read in light of sections 1 and 2 which give the *Legislature* authority to establish a uniform and efficient system of free public schools and the State Board supervision of the system as provided "by law." Thus, the Legislature has power both to provide "by law" for schools within the system and to define how they will be run; powers that should not be nullified or effectively subordinated to the discretion of individual school board policies.

Moreover, the Legislature enacted section 1002.335 to further the explicit constitutional goals of systemic uniformity and efficiency. Too often, uneven district-level policies have forced qualified charter schools and applicants to endure both years of litigation before being permitted to open a school and other inequities once a school is opened. Even Appellants concede that state-level involvement promotes the fair treatment of charter schools. IB at 11. Section 1002.335 improves the system by giving charter school applicants the option to apply to a state-level Commission in those districts that have not been authorized by the State Board to remain the single authorizing entity due to their history of treating charter schools. If approved, the Commission will also support these charter schools with uniform policies – again helping to avoid unevenness in the system. Thus, section 1002.335 promotes uniformity and efficiency in Florida’s charter school regime consistent with constitutional requirements.

Section 1002.335-like schools have long existed in Florida. Over the past 100 years, a number of public schools have been established *outside* the oversight of school boards; these schools are run by appointed boards or other sponsors in accordance with law. The structure of article IX and Florida’s historical practice compel the conclusion that article IX, section 4(b) should be interpreted the same as in sections 1001.32(2) and 1001.33, Florida Statutes, respectively:

In accordance with the provisions of s. 4(b) of Art. IX of the State Constitution, district school boards shall operate, control, and

supervise all free public schools in their respective districts and may exercise any power except as expressly prohibited by the State Constitution or general law. ...

Except as otherwise provided by law, all public schools conducted within the district shall be under the direction and control of the district school board. (emphasis added)

In addition, the School Boards' argument, if successful, would upset the framework of Florida's education system. The education code is replete with provisions requiring close state-level involvement with public schools. If the Legislature's prerogative were narrowed, much of the code would be impacted and litigation would multiply.

Finally, section 1002.335 does not create an alternate school system, or advance a private system as in Bush v. Holmes; it merely enhances the existing system's uniformity and efficiency. The court's principal concern in Bush v. Holmes was the funding of *private* schools. In contrast, Commission-authorized schools will be one component of the larger system of free *public* schools by the Constitution. *See* § 1002.335(4)(b), Fla. Stat. The public Commission will authorize and oversee these schools; and the schools will abide by the same curriculum, faculty, facilities, financial accountability, student eligibility, and other standards as school board-supervised charter schools.

For these reasons, the Court should affirm the facial constitutionality of section 1002.335, Florida Statutes, and the State Board's final orders.

## ARGUMENT<sup>5</sup>

### **I. THE LEGISLATURE HAS LAWFULLY ESTABLISHED THE FLORIDA SCHOOLS OF EXCELLENCE COMMISSION IN SECTION 1002.335 TO AUTHORIZE AND OVERSEE SOME PUBLIC CHARTER SCHOOLS.**

The Appellant School Boards facially challenge the establishment of the Florida Schools of Excellence Commission (Commission) in section 1002.335, Florida Statutes (2006) (**Appendix A**), declaring themselves to have unlimited and absolute authority over Florida's charter schools. Initial Brief (IB) at 19. But, the School Boards' argument would actually flip the longstanding educational hierarchy on its head in favor of the policies of 67 individual school boards in Florida, contrary to the Constitution's explicit requirement that *the Legislature* provide for a *uniform and efficient* system of free public schools. Art. IX, § 1, Fla.

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<sup>5</sup> **Standard of Review:** The standard of review applicable to Appellant's facial constitutional challenge to section 1002.335 is *de novo*. See Execu-Tech Bus. Sys. v. New Oji Paper, 752 So. 2d 582 (Fla. 2000); Agency for Health Care Admin. v. Wilson, 782 So. 2d 977 (Fla. 1st DCA 2001). To succeed in a facial challenge, "the challenger must demonstrate that the statute's provisions pose a present total and fatal conflict with applicable constitutional standards. [A facial] challenge must fail unless *no* set of circumstances exists in which the statute can be constitutionally applied." Cashatt v. State, 873 So. 2d 430, 434 (Fla. 1st DCA 2004) (emphasis added). The challenging party, who has the burden of proof, has to prove "beyond all reasonable doubt" that the challenged act is in conflict with some designated provision of the Constitution. Metro. Dade County v. Bridges, 402 So. 2d 411, 413-14 (Fla. 1981). Uncertainty should be resolved in the favor of finding the statute valid. Falco v. State, 407 So. 2d 203, 206 (Fla. 1981). Finally, if possible, courts must construe a statute so as to uphold it. Miami Dolphins, Ltd. v. Metro. Dade County, 394 So. 2d 981, 988 (Fla. 1981).

Const. (Appendix B). As such, the Court should reject the School Boards' facial challenge to the statute.

**A. Appellants Restate a Previously Rejected Argument Against the Legislature's Article IX, Section 1 Authority Over the Public School System.**

The School Boards' argument is not new, but rather another attempt by district school boards to exclusively control charter school policy at the expense of the Legislature's constitutional prerogative.

Similar to previous arguments rejected by courts, the School Boards claim absolute and unlimited authority over charter schools pursuant to article IX, section 4(b) of the Florida Constitution. IB at 19; *see also* Sch. Bd. of Volusia County v. Acad. of Excellence, Inc., 974 So. 2d 1186 (Fla. 5th DCA 2008); Sch. Bd. of Osceola County v. UCP of Central Fla., 905 So. 2d 909 (Fla. 5th DCA 2005), *cert. denied*, 914 So. 2d 954 (Fla. 2005); Sch. Bd. of Osceola County v. Acad. of Excellence, 914 So. 2d 981 (Fla. 5th DCA 2005); Sch. Bd. of Osceola County, Fla. v. State Bd. of Educ., 2nd Cir. Ct., Case No. 05-CA-1906 (Aug. 18, 2006) (Lewis, J.) (order granting summary judgment, *aff'd per curiam*, 955 So. 2d 571 (Fla. 1st DCA 2007) (*see* Appendix C). In these cases, other school boards, citing article IX, section 4(b), of the Florida Constitution, challenged a law that allowed the State Board to reverse a school board's decision to reject a charter school applicant. *See* § 1002.33(6)(c) & (e), Fla. Stat. But, courts repeatedly rejected the

school boards' article IX, section 4(b)-based arguments finding that this section must be harmonized with the Legislature's section 1 authority to craft "by law [] a uniform, ... high-quality system of free public schools," the controlling parameter in Article IX.<sup>6</sup> For instance, in School Board of Volusia County, 974 So.2d at 1193, the Fifth District Court concluded that "while the school board shall operate, control and supervise ..., the State Board of Education has supervision over the system of free public education *as provided by law*." (emphasis added); *see also* **Appendix C** (Sch. Bd. of Osceola County, Fla., at 4 (Lewis, J.) (stating "it is certainly reasonable to construe [article IX sections 2 and 4] together ... and conclude that the legislature is free to decide the extent to which the State Board is to 'supervise' the actions of individual school districts")). The School Boards' current attempt to subordinate charter school legislation to their policies also should be rejected on the same grounds – because the Legislature is charged to establish "by law" a system of free public schools and one that is both "uniform" and "efficient." Art. IX, § 1, Fla. Const.

While school boards are constitutional entities, the Constitution does not define the extent of their authority or duties with respect to charter schools. As the Initial Brief implicitly concedes, these particulars are left to the Legislature. IB at

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<sup>6</sup> "[C]onstitutional provisions must be read in *pari materia* 'to form [a] congruous whole so as to not render any language superfluous.'" Physicians Healthcare Plans v. Pfeifler, 846 So. 2d 1129, 1134 (Fla. 2003) (citation omitted).

8-11 (describing the school boards' particular duties by reference to statutes and *not* the Constitution); *see also* Bryan v. State, 753 So. 2d 1244, 1254 (Fla. 2000) (noting the Legislature's discretion both to enact a law and to designate officials to operate and enforce it). The Legislature first established and has always defined the school boards' role since Governor Chiles signed charter schools into law. *See* § 228.056 (4)(a), Fla. Stat. (1997). And, what the Legislature first created, it may now freely amend to give the Commission concurrent authority to authorize and oversee some charter schools. City of Jacksonville v. Bowden, 64 So. 769, 773 (Fla. 1914) (noting that the Legislature may alter or amend the law at any time).

The Second District Court's decision in W.E.R. v. School Board of Polk County, 749 So. 2d 540 (Fla. 2d DCA 2000), is instructive. There, the court addressed a similar argument in the context of a school board's student conduct policy that contradicted a state statute. Because school discipline issues would appear to be at the heart of a school board's article IX, section 4(b) discretion to operate and control its schools, the school board claimed the law to serve only as guidance for its policies. The Court disagreed, concluding that school boards are "prohibited from promulgating rules at variance with legislation." *Id.* at 542.

Furthermore, even if the Legislature could shift away too much power from school boards in violation of the Constitution, it has not done so here. Contrary to the School Boards' claim that section 1002.335 takes away their absolute and

unlimited constitutional powers (IB at 19),<sup>7</sup> it neither reduces district school boards' authority over the charter schools that they supervise, nor precludes them from authorizing new charter schools. § 1002.335(5)(a) & (b), Fla. Stat. Also, district school boards will continue to operate and control the overwhelming majority of Florida's public schools, excluding just a small percentage of schools (as further discussed in part C. below). Thus, section 1002.335 will have a modest impact limited to the narrow charter school sphere,<sup>8</sup> whereby it will bolster uniform and efficient charter school policies in *some* districts that have a history of not treating charter schools fairly and equitably. *See* §1002.335(5)(e), Fla. Stat.

Additionally, Appellants too broadly assume that they will be prevented from dealing with Commission-authorized schools, when in fact they retain some important duties. *See* § 1002.335 (4)(b), Fla. Stat. (acknowledging the role of school boards with respect to student enrollment, addressing administrative

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<sup>7</sup> Appellants claim that section 1002.335:

- “interdicts the right” to disapprove a charter school (IB at 23);
- usurps school boards' decision-making authority (IB at 24); and
- removes school boards' authority to prevent the establishment of a charter school (IB at 26).

<sup>8</sup> Even now, more than a decade after charter schools were first established in Florida, only 3.5% of Florida's public school students attend a charter school (2005-06 school year data) and many districts have no charter schools. *See* “Florida's Charter Schools,” Fla. Dept. Educ. (Nov. 2006), < [www.floridaschoolchoice.org/information/charter\\_schools/files/charter\\_10year\\_book.pdf](http://www.floridaschoolchoice.org/information/charter_schools/files/charter_10year_book.pdf) >; “Profiles of Florida School Districts, 2005-06,” Fla. Dept. of Educ. (May 2007) < <http://www.fldoe.org/eias/eiaspubs/pdf/ssdata06.pdf> >.

burdens and services, and facilities and transportation issues). However, the school boards' precise role with Commission-authorized schools is still unknown because no Commission-authorized schools yet operate in Florida. Thus, Section 1002.335 does not strip school boards of authority; and, for purposes of this *facial* challenge, the Court should assume that the Commission and school boards will define their relationship in a constitutional manner as accommodated by the statute. If not, a claim will ripen and permit a future challenge.

Finally, Appellants cite Jones v. Braxton, 379 So. 2d 115 (Fla. 1st DCA 1979) and School Board of Volusia County, which do not support invalidation of section 1002.335. In Jones, the court's decision turned on a *statutory* division of duties related to the construction of a high school. The court concluded that while the state may establish reasonable construction regulations, no statute allows it to require the physical construction of a district controlled school: "nothing in Chapter 235 ... removes from the [district school] boards the discretion to build an educational facility." Id. at 118. Thus, the court decided Jones not on constitutional grounds, but on statutory grounds.

Appellants also cite the dicta in School Board of Volusia County, in which the Fifth District Court recognized the authority of the State Board to authorize charter schools, but distinguished it from their power to "open" a charter school. 974 So. 2d at 1193; *but see* § 1002.33(6)(c) & (e), Fla. Stat. (requiring that school

boards “shall implement” the decisions of the State Board within 30 days). But even in that case, the court deferred to the statutory scheme and did *not* elevate the school board’s claimed constitutional rights over the charter school statute. Id.<sup>9</sup>

Because section 1002.335 comports with the Legislature’s article IX authority to establish a uniform and efficient system of free public schools and does not compromise the constitutional role of school boards, it should be upheld.

**B. Section 1002.335 Adds Efficiency and Uniformity to Florida’s System of Charter Schools as the Constitution Requires.**

The Legislature enacted section 1002.335 to address two constitutional goals – uniformity and efficiency – that have caused charter school applicants and schools to be treated unfairly and inequitably under the pre-existing charter school regime. *See* § 1002.335(2)(a), Fla. Stat. (stating that the Legislature’s intended “to further ensure that charter schools of the highest academic quality are approved and supported throughout the state in an efficient manner”).

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<sup>9</sup> These decisions comport with the consistent and long-standing opinion of Florida’s Attorney General’s office. While lacking precedential value, these opinions demonstrate the State’s consistent recognition that the Constitution *and general laws* limit district-level authority. Op. Atty. Gen. Fla. 2004-10 (Mar. 24, 2004); Op. Atty. Gen. Fla. 2004-56 (Nov. 23, 2004); Op. Atty. Gen. Fla. 2002-13 (Feb. 5, 2002); Op. Atty. Gen. Fla. 2001-52 (July 18, 2001); Op. Atty. Gen. Fla. 2003-55 (Nov. 3, 2003); Op. Atty. Gen. Fla. 2003-40 (Sep. 3, 2003); Op. Atty. Gen. Fla. 97-21 (March 31, 1997); Op. Atty. Gen. Fla. 87-48, May 26, 1987 (“See, e.g. AGO’s 86-45 and 83-72 (where a statute or rule of the State Board of Education does not distinctly specify the required manner in which a school board may properly exercise a power, the school board may use its reasonable discretion to determine the manner in which the power will be exercised).”)

Even Appellants concede that state-level involvement with applicants and existing charter schools promotes their fair treatment (IB at 11), and for good reason; in the past, qualified applicants and existing charter schools have not consistently been approved and supported throughout the state in an efficient manner. In UCP of Central Florida, for instance, a school board denied United Cerebral Palsy of Central Florida's charter school application (as well as another application addressed in a different case) for purely political reasons:

It cannot be disputed that UCP's application met all the statutory requirements. The School Board ... failed to demonstrate that it had good cause to deny UCP's application. The comments contained in the record suggest that the School Board denied the application in an effort to prompt the Florida Legislature to commence reform of the current charter school funding scheme. A court is not the proper forum to consider such policy issues.

UCP, 905 So. 2d at 915-16; *see also* Acad. of Excellence, 914 So. 2d at 981 (adopting the rationale of the UCP case). In both cases, the previous single-track authorization process under section 1002.33 allowed a school board to block qualified applicants from opening charter schools for years. *See also* School Board of Volusia County, 974 So. 2d at 1193 (wherein the district court's opinion and March 2008 mandate came almost three years after the school board's initial consideration of the charter application).

By establishing the Commission, the Legislature affords relief to qualified applicants in certain districts with a history of unfair treatment. *Cf.*

§1002.335(5)(a), Fla. Stat. (school boards with a history of fair and equitable treatment of charter schools may retain *exclusive* authorizing authority).<sup>10</sup>

Qualified applicants need no longer to endure extended litigation in order to receive state-level consideration of their application, but can apply directly to the Commission. Also, if approved, these schools will be supported by the Commission and its uniform policies implemented statewide.

Thus, the addition of section 1002.335 enhances efficiency and uniformity in the charter regime in accordance with constitutional goals. *See* art. IX, § 1, Fla. Const.; § 1002.335(2)(a), Fla. Stat.

**C. The Legislature Has a Well-Developed History of Authorizing Public Schools Overseen by State-Appointed Entities.**

The Legislature's provision in section 1002.335, for schools supervised by a state-level entity is far from unprecedented. In fact, Florida has a long history of establishing public schools outside of the control of district school boards, such as:

- laboratory schools affiliated with Florida's universities (§ 1002.32, Fla. Stat.);
- the New World School for the Arts (§ 1002.35, Fla. Stat.);
- the Florida School for the Deaf and the Blind (§ 1002.36, Fla. Stat.);

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<sup>10</sup> In the underlying administrative process leading to this appeal, each appellant School Board had the opportunity to demonstrate a recent history of fair and equitable treatment of its charter schools. While each has a different experience with charter schools and the strength of their applications varied, the State Board found that none met the fair and equitable standard. *See* footnotes 3 & 4, *supra*.

- the Florida Virtual School (§ 1002.37, Fla. Stat.);
- the K-8 Virtual School Program (§ 1002.415, Fla. Stat.);
- Department of Juvenile Justice programs and schools (§ 1003.52, Fla. Stat.); and
- the Florida School of the Arts (§ 1004.74, Fla. Stat).

In other instances, such as with charter schools (§ 1002.33, Fla. Stat.) and private schools affiliated with John M. McKay Scholarships for students with disabilities (§ 1002.39, Fla. Stat.), district school boards also have a diminished oversight role as compared to their oversight of traditional public schools. *See* § 1000.04, Fla. Stat. (defining the components for the delivery of public education to include the above schools and programs).

Such public schools have a long pedigree in Florida, notwithstanding the 1885 Constitution that first provided for district-specific supervision of “all” schools within a district (*see* art. XII, § 10, Fla. Const. (1885)) and the current language in article IX, section 4(b). Florida established the School for the Deaf and the Blind more than 120 years ago in St. Augustine. *See* <  
<http://www.fsdb.k12.fl.us/about/history.php>>; § 1002.36, Fla. Stat. Appellant St. John’s County School Board does not oversee and has never overseen this school. § 1002.36(4), Fla. Stat. Also, the Arthur G. Dozier School for Boys (originally the “Florida State Reform School”) in Jackson County was established by the Legislature and opened in 1900. § 1003.52, Fla. Stat.;

<[http://www.djj.state.fl.us/Residential/Facilities/north\\_facilities/Dozier\\_School\\_for\\_Boys.html](http://www.djj.state.fl.us/Residential/Facilities/north_facilities/Dozier_School_for_Boys.html)>. The Florida School of the Arts was established in Palatka in 1974, and the New World School for the Arts in Miami-Dade was established a decade later, as state-supported professional arts schools for high school and college students. *See* § 1004.74, Fla. Stat.; <<http://floarts.org/aboutus.html#BODYC>>; ch. 84-192, § 1, Laws of Fla. (establishing the New World School); <<http://nwsa.mdc.edu/high-school-home/high-school-home/welcome.html>> Again, none of these schools is controlled by a district school board.

That Florida has consistently provided for schools outside of the district school boards' control – and to which the boards may not limit student access (*see, e.g.,* §§ 1002.33(10)(a), 1002.37(3)(c) & 1002.415(5)(a), Fla. Stat.) – demonstrates that article IX, section 4(b) of the Florida Constitution is most accurately construed as follows:

In accordance with the provisions of s. 4(b) of Art. IX of the State Constitution, district school boards shall operate, control, and supervise all free public schools in their respective districts and may exercise any power except as expressly prohibited by the State Constitution or general law.

§ 1001.32(2) (emphasis added); *see also* § 1001.33, Fla. Stat. (“Except as otherwise provided by law, all public schools conducted within the district shall be under the direction and control of the district school board”) (emphasis added).

Thus, Florida's history supports the conclusion that the Legislature may establish schools like in section 1002.335 that are outside of school boards' control.<sup>11</sup>

**D. Appellants' Funding and Accountability Arguments Should Not Determine the Constitutionality of Section 1002.335.**

Appellants also find fault with section 1002.335 because it allegedly removes school boards' discretion to open and fund a new charter school. IB at 23-29. But, school boards have never possessed such broad discretion over charter schools. Even under section 1002.33, the State Board has final say over whether a charter school application is rejected; school boards have no effective discretion to block or refuse to open a charter school that has been authorized by the State Board and commits to lawfully operating the school.<sup>12</sup> See § 1002.33(6)(c) & (e)

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<sup>11</sup> Furthermore, there is little merit to Appellants' argument that the Commission must be elected in order to oversee a charter school. IB at 20. The Constitution only requires that *district-level* school board members be elected; not *state-level* education authorities. In fact, no state-level education officials are popularly elected – not the State Board, the Commissioner of Education, the Board of Governors, or any of the trustees/boards that control the above-discussed schools. See Bryan v. State, 753 So.2d 1244, 1254 (Fla. 2000) (noting that the Legislature may enact a law and designate officials to operate and enforce it); see also Crist v. Fla. Assoc. of Criminal Defense Lawyers, Inc., 33 Fla. L. Weekly S172 (Fla., Mar. 13, 2008) (ruling that the Legislature could establish five *appointed* regional counsel to perform public defender-like responsibilities in conflict cases, even though the Constitution requires public defenders to be elected in each county).

<sup>12</sup> As noted above, school boards have unsuccessfully disputed the State Board's authority to authorize charter schools in a number of cases. See, e.g., Sch. Bd. of Volusia County v. Acad. of Excellence, Inc., 974 So.2d 1186; UCP of Central Fla., 905 So. 2d 909; Sch. Bd. of Osceola County v. Acad. of Excellence, 914 So. 2d

(requiring that school boards “shall implement” the decisions of the State Board within 30 days). Thus, that a state-level entity has charter school authorization powers – identical powers that have already been upheld in the section 1002.33-related cases cited earlier – is an insufficient basis for invalidating section 1002.335.

In addition, the Constitution does not link the oversight of Florida’s public schools to whether the state or district provides the most funds. Instead, the state and district both contribute to educate Florida’s school children subject to legislative parameters. Art. IX, § 4(b), Fla. Const.; Fla. Dep’t of Educ. v. Glasser, 622 So. 2d 944 (Fla. 1993) (ruling that school boards may not levy taxes pursuant to article VII, section 9 and article IX, section 4(b) in the absence of *statutory* authorization). The same enrollment-based, per pupil funding formula and IDEA obligations are expected to govern under 1002.335 that districts routinely administer with existing charter schools. See §§ 1002.335(11)(a) & 1002.33(17), Fla. Stat. And, the alleged funding burdens are no different than in other instances where funds flow through school boards to schools and programs that the school boards do not directly control. See, e.g., § 1002.33, Fla. Stat. (district supervised charter schools may be operated by private entities).

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981; Sch. Bd. of Osceola County, Fla. v. State Bd. of Educ., 2nd Cir. Ct., Case No. 05-CA-1906 (Aug. 18, 2006) (granting summary judgment).

Moreover, for reasons earlier discussed, it is premature for Appellants to argue that they lack sufficient involvement to hold Commission-authorized schools accountable for certain funding. Appellants allege concerns about their “comprehensive management plan” and other obligations that section 1002.335 will supposedly hinder such as funding forecasts, enrollments, compliance with court orders, tax boards, data gathering, renovations, future spending, and IDEA compliance. IB at 25-29. Undoubtedly, school boards will have to collaborate with Commission-authorized schools on these issues; but section 1002.335 contemplates as much. § 1002.335 (4)(b), Fla. Stat. (acknowledging school boards’ role with respect to student enrollment, addressing administrative burdens and services, and facilities and transportation issues). Appellants simply cannot assume that the Commission (or the State Board in its supervisory role) will prevent school boards from meeting any relevant oversight obligations.

Because the roles and working relationship of the Commission and school boards is not yet defined, however, and no Commission-authorized school yet operates, it is premature to decide Appellants’ constitutional challenge on the basis of funding/accountability issues.<sup>13</sup>

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<sup>13</sup> Uncertainty should be resolved in the favor of finding the statute valid. Falco v. State, 407 So. 2d 203, 206 (Fla. 1981). If possible, courts must construe a statute so as to uphold it. Miami Dolphins, Ltd. v. Metro. Dade County, 394 So. 2d 981, 988 (Fla. 1981).

**E. Invalidation of Section 1002.335 Could Unsettle the Education Code and Multiply Litigation.**

Finally, a decision that rejects the Legislature's authority to enact section 1002.335 could substantially undermine the structure of Florida's education system and increase litigation.

The education code is replete with provisions for close state-level involvement with public schools. Many of these requirements strike at the heart of Appellants' claim to absolute and unlimited supervision and control over all public schools. IB at 19. Chapter 1008, Florida Statutes, alone provides for the State Board's oversight and accountability over all K-12 educational programs down to level of assessing the data of individual students and schools. Sections 1001.03 and 1001.10 address state enforcement power over standards of district compliance. Sections 1001.371-1001.54 – especially section 1001.42 – direct school districts on all matters of local governance subject to state oversight. Sections 1002.20-1002.34 compel compliance with student and parental rights, with the State Board exercising oversight enforcement authority under sections 1002.23(9) and 1008.32. Chapter 1003 addresses the K-12 system in its entirety specifying all manner of classroom level requirements and authorizing the State Board to adopt rules and assure compliance under chapter 1008. *See, e.g.*, §§1003.01(9)(e) & 1003.02(9), Fla. Stat. Chapter 1006, Part I, deals with support for learning with State Board oversight prescribed throughout. *See, e.g.*,

§§1006.11(1) & 1006.13(2)(b), Fla. Stat. Chapter 1011, Part II, provides for funding subject to state review and audit. See §§ 1011.62(1)(d)1 & 1011.62(9)(b), Fla. Stat. Chapter 1012 addresses district personnel and chapter 1013 pertains to educational facilities, both of which allow for close state-level involvement.

Thus, if section 1002.335 is invalidated, much of the education code would be threatened for the very same reasons. This Court should uphold section 1002.335, and refuse to breathe life into an article IX-based jurisprudence that pits school boards against the Legislature and State Board for control of Florida's schools.

## **II. SECTION 1002.335 DOES NOT ESTABLISH A SECOND PUBLIC SCHOOL SYSTEM.**

Citing Bush v. Holmes, the School Boards erroneously claim that section 1002.335 creates an alternative education system in Florida in violation of the uniformity requirement of article IX, section 1. 919 So. 2d 392 (Fla. 2006).

However, section 1002.335 bears no resemblance to the Opportunity Scholarship Program struck down in Bush v. Holmes. There, the Court's principal concern was the program's funding of *private* schools. The Court cited two controlling factors that do not exist here. First, it concluded that "[t]he Constitution prohibits the state from using public monies to fund a private alternative to the public school system." Id. at 408. Second, it found the lack of state standards and oversight of private schools presents fatal constitutional

uniformity problems. *Id.* at 409-10 (noting that “the private school’s curriculum and teachers are not subject to the same standards as those in force in public schools”).

Here, in contrast, Commission-authorized schools are *public* schools; they will be authorized, extinguished, and supervised exclusively by an appointed commission accountable to the State Board. § 1002.335, Fla. Stat. Furthermore, Commission-authorized schools must abide by the same standards related to curriculum, faculty, facilities, financial accountability, student eligibility, etc., as other charter schools. §§ 1002.335(11) & 1002.33(9), Fla. Stat. As such, these schools function as simply one component within the larger system of public schools provided by law.

Appellants’ misconstrue section 1002.335 to establish an independent “system” of free public schools, instead of as a component of the State’s larger public system. Much like a big city transportation “system” might incorporate various components to move people efficiently – airports, trains, subways, buses, interstates, taxicabs, bicycle lanes/paths, etc. – the Legislature here has only established a modest component of the public education system. *See* § 1002.335(4)(b), Fla. Stat. (describing Commission-authorized public charter schools to be “a *component* of the delivery of public education within [the system]”) (emphasis added); § 1000.04, Fla. Stat. (describing various component

schools within the system, including charter schools and “other educational institutions” authorized by law).

Because students are different and have various educational needs, Florida offers schooling options for them to meet state goals. Art. IX, § 1(a), Fla. Const. (requiring “adequate provision shall be made for the education of *all* children”). In the real world, one size rarely fits all; and, the Constitution should not be construed to forbid the Legislature from establishing schools and programs necessary to meet the systems’ goals. *See, supra*, p. 16-17 (listing a number of public schools and programs in Florida that are not controlled by district school boards). This particular component will serve to further uniformity and efficiency as to charter schools in the system in furtherance of article IX’s goals.

Finally, much of the rest of Appellants’ uniformity argument folds back into its previous arguments as to whether the Constitution allows the Legislature to involve a state-level commission to enhance the system’s uniformity and efficiency, or whether it saddles the Legislature to the piecemeal policies of individual district school boards found to have treated charter schools without fairness and equity. *See, e.g.*, IB at 37 (arguing “[t]here are ... 67 elected district school boards. This is the uniform system created by the Constitution.”).<sup>14</sup> Clearly

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<sup>14</sup> Appellants cite Crist v. Fla. Assoc. of Criminal Defense Lawyers, Inc., 33 Fla. L. Weekly S172 (Fla., Mar. 13, 2008), which actually cuts against their case. There, the Court affirmed the Legislature’s prerogative to establish five *appointed*

article IX, section 1 expects the Legislature to pursue strategies that promote increased uniformity and efficiency, such as it did by enacting section 1002.335.

Thus, the Legislature did not create an alternate school system, or advance a private system as in Bush v. Holmes, but established for the Commission to enhance the existing system's uniformity and efficiency pursuant to its constitutional authority.

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regional counsel to handle public defender-like responsibilities in conflict cases. Much like in this case, the Legislature in Crist had express constitutional authority to enact the disputed statute. *Compare* art. IX, §§ 1 & 2, Fla. Const. (providing the Legislature's responsibility to provide for Florida's educational system "by law") *with* art. V, § 18, Fla. Const. (giving the legislative responsibility to prescribe the duties of public defenders "by general law").

**CONCLUSION**

Wherefore, the State Board respectfully requests that this Court affirm its final orders in all respects and uphold the facial constitutionality of section 1002.335, Florida Statutes.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that a true copy of the foregoing has been furnished by U. S. Mail  
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**CERTIFICATE OF COMPLIANCE**

I certify that the font used in this brief is Times New Roman 14-point, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

  
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Timothy D. Osterhaus