

IN THE DISTRICT COURT OF APPEALS
FOR THE FIRST DISTRICT
STATE OF FLORIDA

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Clerk District Court Of Appeals
1st District

**DUVAL COUNTY SCHOOL
BOARD, et. al.,**

Appellants,

vs.

STATE BOARD OF EDUCATION,

Appellee.

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

L.T. No.: 2007-1438-FOI

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PREFACE

This is the initial brief for the following consolidated cases: (1) 1D07-6041 - Duval County Sch. Bd. v. State Bd of Educ.; (2) 1D07-6105 - School Bd. of Escambia County v. Florida State Bd. of Educ.; (3) 1D07-6562 - School Bd. of St. Lucie County v. State Bd. of Educ.; (4) 1D07-6584 - School Bd. of Broward County v. State Bd. of Educ.; (5) 1D08-84 - School Bd. of Palm Beach County v. State Bd. of Educ.; (6) 1D08-168 - School Bd. of Lake County v. State Bd. of Educ.; (7) 1D08-169 - Sumter County Sch. Bd. v. State Bd. of Educ.; (8) 1D08-170 - School Bd. of St. Johns County v. State Bd. of Educ.; (9) 1D08-171 - School Bd. of Osceola County v. State Bd. of Educ.; (10) 1D08-172 - School Bd. of Volusia County v. State Bd. of Educ.; (11) 1D08-173 - Hernando County Sch. Bd. v. State Bd. of Educ.; (12) 1D08-216 - School Bd. of Martin County v. State Bd. of Educ.; (13) 1D08-363 - District Sch. Bd. of Pasco County v. State Bd. of Educ.; (14) 1D08-369 - School Bd. of Pinellas County v. State Bd. of Educ.

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)).

STATEMENT OF THE CASE AND FACTS

In 2006, the Florida Legislature enacted section 1002.335, *Florida Statutes*. The statute established the “Florida Schools of Excellence Commission” as an independent, state-level entity with the power to authorize charter schools throughout the State of Florida. All charter schools in Florida are public schools. See §1002.33(1), *Fla. Stat.* (2006).

Prior to the enactment of section 1002.335, only district school boards could authorize charter schools. However, under the new statutory scheme, the district school boards may exercise that exclusive authority only if the State Board of Education grants them such power within their district. See § 1002.335(5)(c), *Fla. Stat.* (2006). The State Board effects this decision after reviewing resolutions by the school boards demonstrating that they have fairly and equitably treated the charter schools in their districts over the prior four years. See § 1002.335(5)(c), *Fla. Stat.* (2006). This provision of the statute became effective for the 2007-2008 fiscal year.

In accordance with the statute and in order to preserve their rights to later challenge the constitutionality of the statute, multiple school boards throughout the state, including the Appellants, filed resolutions with the State Board of Education seeking to retain exclusive authority to authorize charter schools in their respective

districts. (R. V1-3; 1-599).¹ Within their resolutions, the Appellant school boards specifically reserved the right to challenge the constitutionality of section 1002.335, Florida Statutes. (R. V1; 3).² Informal and cursory hearings were held on September 18, 2007, and October 16, 2007. (R. V6; 1006-1197). Thereafter, the State Board of Education denied the Appellants' application to retain exclusive power to authorize charter schools in their districts. (R. V6; 1198-1199).³ The State Board of Education allowed only three school boards, out of the 31 that applied, to retain their exclusive authority.⁴ (R. V6; 1187-1194).

¹ (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).

² (Duval R. V1; 15); (Escambia R. V1; 8-9); (Broward R. V1; 2); (Palm Beach R. V5; 859); (Lake R. V1; 2); (Sumter R. V1; 2-3); (St. Johns R. V1; 6-7); (Osceola R. V1; 13); (Volusia R. V1; 31); (Hernando R. V1; 10); (Martin R. V1; 7); (Pasco R. V1; 9); (Pinellas R. V1; 13).

³ (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; 993-994); (Martin R. V5; 900-901); (Pasco R. V20; 3903-3904); (Pinellas R. V7; 1384-1385).

⁴ The School Board of Orange County, the Polk County School Board, and the Sarasota County School Board retained their exclusive authorizing authority over charter schools. (R. V6; 1187).

The Appellants timely appealed to the appropriate District Court of Appeal as authorized in section 1002.335(5)(f), *Florida Statutes*. After the Appellee filed motions to transfer venue to this Court, the Second, Third, Fourth and Fifth District Courts of Appeal transferred the Appellants' cases filed in those courts to this Court. On February 28, 2008, this Court consolidated the Appellants' cases for travel and briefing.

SUMMARY OF THE ARGUMENT

Section 1002.335, *Florida Statutes*, violates article IX, section 4(b) of the Florida Constitution. The statute unconstitutionally vests supervision, operation, and control of charter schools in an appointed commission in direct contravention of article IX, section 4(b), which expressly grants elected school boards the power to supervise, operate, and control all public schools. Charter schools are public schools and as such, they are subject to the authority of the local school boards under the Constitution. Allowing the Florida Schools of Excellence Commission to sponsor and operate charter schools within a school district violates article IX, section 4(b). This violation is compounded by the school boards having to remain responsible for a portion of the charter schools' funding while at the same time, their constitutional authority over charter schools has been unlawfully removed and placed in the hands of a statutorily-created, non-elected commission.

Section 1002.335, *Florida Statutes*, also violates article IX, section 1(a) of the Florida Constitution. The creation of the Florida Schools of Excellence Commission to operate, control, and supervise charter schools establishes a competing state-level school system in violation of the constitutional mandate of a uniform system of high quality public education. For these reasons, the Appellants request that this Court hold that section 1002.335 be stricken in its entirety as unconstitutional.

ARGUMENT

I. SECTION 1002.335, *FLORIDA STATUTES*, VIOLATES ARTICLE IX, SECTION 4(B) OF THE FLORIDA CONSTITUTION BY USURPING THE AUTHORITY OF DULY-ELECTED LOCAL SCHOOL BOARDS TO OPERATE, CONTROL, AND SUPERVISE ALL FREE PUBLIC SCHOOLS WITHIN THEIR RESPECTIVE SCHOOL DISTRICTS.

Standard of Review

The determination of a statute's constitutionality and the interpretation of a constitutional provision are both questions of law reviewed *de novo* by this Court. See *Zingale v. Powell*, 885 So. 2d 277, 280 (Fla. 2004); *Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006); *State v. Coney*, 845 So. 2d 120, 137 (Fla. 2003); *Williams v. State*, 946 So. 2d 1163, 1164 (Fla. 1st DCA 2006).⁵

⁵ The Appellants assert that section 1002.335, *Florida Statutes*, is facially unconstitutional because by requiring school boards to apply to the State Board of Education to retain their constitutionally-provided authority, on its face, violates article IX, section (4)(b). There are absolutely no reasonable circumstances under which the statute can be constitutionally applied. However, even if this issue is viewed as an as applied challenge, the analysis is the same. All of the Appellants' resolutions seeking to retain exclusive authority were denied, and therefore, the application of the statute resulted in a violation of article IX, section 4(b).

Although unnecessary in an administrative proceeding, the Appellants did present their constitutional arguments below. See Footnote n. 2; (R. V6; 1147-1148, 1177); *Florida Hosp. v. Agency for Health Care Admin.*, 823 So. 2d 844 (Fla. 1st DCA 2002)(holding that constitutional challenges, whether as applied or facial, in administrative proceedings may be raised for the first time on appeal); *Rice v. Department of Health and Rehabilitative Servs.*, 386 So. 2d 844 (Fla. 1st DCA 1980). The arguments were not ruled upon by the State Board of Education which recognized that it did not have the authority to decide the constitutionality of a statute. (R. V6; 1148); See *Key Haven Associated Enters., Inc. v. Board of Trs. of the Internal Improvement Trust Fund*, 427 So. 2d 153 (Fla. 1982).

Argument on the Merits

The creation of the Florida Schools of Excellence Commission, and the purported grant of powers thereto, pursuant to section 1002.335, *Florida Statutes*, is an attempt by the Legislature to bypass, displace, and usurp the power of elected local school boards to establish, sponsor, and oversee charter schools within their districts. Because charter schools are free public schools, by definition, section 1002.335 violates article IX, section 4(b) of the Florida Constitution, which mandates that local school boards “shall operate, control and supervise all free public schools within the school district.”

a. Local school board authority

The Florida Constitution mandates that the Legislature shall provide for a uniform system of public education, and article IX, section 2 grants the State Board of Education (“State Board”) overall “supervision of the system of free public education” to ensure that such an educational system exists. The State Constitution further prescribes that “[e]ach county shall constitute a school district...and [i]n each school district there shall be a school board composed of five or more members chosen by vote of the electors in a nonpartisan election...” Art. IX, § 4(a), *Fla. Const.*

As a constitutionally-created entity, a local school board is imbued with one primary source of authority: article IX, section 4 of the Florida Constitution, which provides in pertinent part:

- (a) The school board shall operate, control and supervise all free public schools within the school district and determine the rate of school district taxes within the limits prescribed herein.

Art. IX, § 4(b), *Fla. Const.* Thus, the highest law of the state bestows upon local school boards the explicit and sole constitutional responsibility to locally operate, control and supervise all public schools within their geographical jurisdictions, including charter schools. The fact that local school boards derive their primary source of authority from the Constitution underscores the importance of the concept of local control to our state. In the event of a conflict between article IX, section 4 and a state statute, the Constitution will prevail. *See Henderson v. State*, 155 Fla. 487, 491, 20 So. 2d 649, 651 (Fla. 1945) (noting that “when the provisions of a statute collide with provisions of the Constitution the statute must give way.”).

The statutory powers and duties of district school boards are primarily set forth in sections 1001.41, 1001.42, and 1001.43, *Florida Statutes* (2006). These include the exclusive powers to determine policies and programs for the efficient operation and general improvement of the district school system; to adopt rules; to prescribe standards and policies to provide each student the opportunity to receive a complete

education program; to assign students to particular schools; to develop and execute plans for the operation of schools; and to provide for the transportation of students, as well as other duties generally relating to the operation of the school district.

Further, section 1001.42 delineates certain exclusive duties of school boards relating to school personnel, including the power to “[d]esignate positions to be filled, prescribe qualifications for those positions, and provide for the appointment, compensation, promotion, suspension, and dismissal of employees....” § 1001.42(5)(a), *Fla. Stat.* (2006). As the school board is empowered to contract, sue, and be sued, it is the exclusive contracting agent for the district school system. § 1001.41(4), *Fla. Stat.* (2006); *School Bd. of Leon County v. Goodson*, 335 So. 2d 308, 310 (Fla. 1st DCA 1976). Thus, in addition to the constitutional authority to operate, control, and supervise all public schools in their districts, school boards possess sole statutory authority to contract for their districts, which includes the execution of charters⁶ under section 1002.33(7), *Florida Statutes*.

⁶ A “charter” is an agreement signed by the governing body of the proposed school and the sponsor (school board) that addresses all major issues involving the operation of the charter school including, but not limited to, the school’s mission, students served, curriculum, methods of student academic assessment, method for conflict resolution, financial and administrative management, and the term of the charter. *See* §1002.33(7), *Fla. Stat.* (2006).

b. Local school boards' prior exclusive charter school authority

In 1996, the Florida Legislature authorized the existence of charter schools as part of the state's program of public education. See ch. 96-186, *Laws of Florida*. Pursuant to section 1002.33(1), *Florida Statutes*, all charter schools in Florida are public schools. The Legislature provided two methods by which a charter school may be formed: (1) various parties, including individuals, teachers, parents, and municipalities, may apply for a new charter school through the local school board; or (2) an existing public school may be converted to a charter school, by request of the principal, teachers, parents, and/or the school advisory council at an existing public school or at the behest of its local school board. § 1002.33(1)-(2), *Fla. Stat.* (2006)(the relevant language in the previous versions of the statute remains the same in the 2006 version). Under either method, the local school board issued the charter and supervised the school, consistent with article IX, section 4.

The charter school statute reiterated the constitutional grant of exclusive authority to local school boards to "sponsor" a charter school in the county over which the district had jurisdiction.⁷ § 1002.33(5)(a)1., *Fla. Stat.* (2006). As a sponsoring

⁷ Pursuant to the charter school statute, four state universities-Florida A&M University, Florida Atlantic University, Florida State University, and the University of Florida-were also authorized to grant charters to sponsor development research (laboratory) schools. § 1002.32(2), *Fla. Stat.* (2006).

entity, the district school board was charged with the approval and financial oversight of the charter school, as with all public schools operated within the district. §§ 1001.33 and 1001.32(2), *Fla. Stat.* (2006).

Fair treatment of charter schools was promoted by the ability of charter schools and charter applicants to appeal local school board decisions revoking or non-renewing a charter or denying a charter application to the State Board, which received recommendations from the Charter School Appeal Commission. § 1002.33(6)(c), *Fla. Stat.* (2006); §1002.33(6)(f)1., *Fla. Stat.* (2006) (“A Charter School Appeal Commission is established to assist the commissioner and the State Board of Education with a fair and impartial review of appeals by applicants whose charter applications have been denied, whose charter contracts have not been renewed, or whose charter contracts have been terminated by their sponsors.”). The provision of such state-level appellate remedies appropriately recognized the restrictions on the State Board to enter charter contracts or sponsor charter schools.

c. Florida Schools of Excellence Commission

In 2006, ten years after enactment of the charter school statute, the Legislature abruptly changed the authority to approve and sponsor charter schools for K-12 public school students by creating the Florida Schools of Excellence Commission (“Commission”) as an independent, appointed, state-level authorizer and sponsor of

charter schools statewide. § 1002.335(3)(a), *Fla. Stat.* (2006); *see also* ch. 06-302, § 1, *Laws of Florida*. The Commission operates as a separate entity under the supervision of the State Board and in collaboration with the Department of Education. § 1002.335(3)(a), *Fla. Stat.* (2006). It is managed by an executive director and comprised of seven members appointed by the State Board of Education, based upon recommendations from the Governor, President of the Senate, and Speaker of the House of Representatives. § 1002.335(3)(b) and (d), *Fla. Stat.* (2006).

With respect to the establishment of charter schools within public school districts, and in contravention of the Florida Constitution, the Commission was statutorily granted the following powers, among others: (1) to directly authorize, sponsor, and oversee⁸ charter schools, including the approval or denial of charter school applications and the nonrenewal or termination of charter schools; (2) to approve or deny Florida Schools of Excellence (“FSE”) charter school applications and renew or terminate charters of FSE charter schools; and (3) to authorize any municipality, state university, community college, and regional educational consortia

⁸ As if it were an elected local school board which it is not, the Florida Schools of Excellence Commission is required to perform all duties of a charter school sponsor under section 1002.33(5)(b) and (20), including direct oversight of charter schools and direct provision of services. *See* §1002.335(4)(b)18., *Fla. Stat.* (2006); *see also* §1002.335(11), *Fla. Stat.* (2006)(applying most of the charter school statute’s subsections to the Commission).

to cosponsor charter schools in the state. § 1002.33(8)-(9), *Fla. Stat.* (2006); § 1002.335(4)(a), *Fla. Stat.* (2006). Notably, each of the foregoing powers was previously reserved to elected district school boards, pursuant to the charter school statute and the State Constitution.

Moreover, with the creation of the Commission, the Legislature established a means by which to completely exclude local school boards' involvement with the creation of certain charter schools in their respective districts by adopting sections 1002.335(5)(a) and (b), *Florida Statutes*. Under those paragraphs, the Commission can exclusively monitor and oversee all FSE charter schools sponsored by the Commission. § 1002.335(5)(a) and (b), *Fla. Stat.* (2006). As a direct result of this unconstitutional delegation of power, the Commission may approve contracts for the creation and operation of charter schools anywhere in the state, without obtaining approval, or even input, from the local school board. *See* §1002.335(4)(a), *Fla. Stat.* (2006). Essentially, the statute strips local school boards of exclusive, indeed, any authority over FSE charter schools in their districts.

Section 1002.335 further turns the Constitution on its head by forcing local school boards to apply for permission to retain exclusive possession of the very powers already given them *exclusively* by the Constitution. Yet, in order to retain and utilize their exclusive charter-authorizing powers within their geographic boundaries,

local school boards must now seek permission from the State Board, pursuant to section 1002.335(5)(e), *Florida Statutes*. Then if, and only if, the school board is able to convince the State Board that the school board “has provided fair and equitable treatment to its charter schools during the 4 years prior to the district school board’s” request for exclusivity will the school board be granted *permission* to retain exclusive control over charter schools in its own district. *Id.* If the school board’s application for exclusivity is denied, the school board can only exercise such authority concurrently with the Commission. § 1002.335(5)(a), *Fla. Stat.* (2006).

Even if the State Board at some point approves the local school board’s application for exclusivity, the school board would purportedly have no power to oversee any charter school that has been converted to an FSE charter school. § 1002.335(5)(a)-(b), *Fla. Stat.* (2006) (“The commission shall monitor and oversee all FSE charter schools sponsored by the commission....”) Ironically, since the Commission’s inception, the State Board has granted exclusivity to only three of the 67 school boards in Florida. (R. V6; 1187).

- d. **Section 1002.335 defies the mandates of article IX, section 4 by requiring local school boards to seek permission to exercise exclusive authority within their districts.**

It is beyond dispute that local governments assume a central role in administering public education. The United States Supreme Court has consistently

emphasized principles of local control in the context of public schools. *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 42 (1973) (noting that local control permits tailoring of educational programs to local needs); *Wright v. Council of the City of Emporia*, 407 U.S. 451, 469 (1972) (recognizing that “[d]irect control over decisions vitally affecting the education of one’s children is a need that is strongly felt in our society”).

Florida is one of only six states with an express constitutional provision for local school governance, underscoring the importance of the concept to our state.⁹ Article IX, section 4 represents a plain and clear substantive constraint on legislative authority over local educational decisions. *See generally Savage v. Board of Pub. Instruction*, 101 Fla. 1362, 133 So. 341, 344 (1931) (“The Constitution of this state is not a grant of power to the Legislature, but a limitation only upon legislative power....”). It is well-established that:

[W]here the Constitution expressly provides the manner of doing a thing, it impliedly forbids its being done in a substantially different manner. Even though the Constitution does not in terms prohibit the doing of a thing

⁹ *See, e.g.*, Ga. Const., Art. VIII, § 5 (vesting local boards with authority to “establish and maintain” district schools); Kan. Const., Art. VI, § 5 (providing that local public schools “shall be maintained, developed and operated by locally elected boards”); Mont. Const. art. X, § 8 (vesting “supervision and control of schools” in local boards); Va. Const., Art. VIII, § 7 (vesting “supervision of schools” in local boards); Col. Const., Art. IX, § 15 (providing that an elected school board “shall have control of instruction in the public schools of their respective districts”).

in another manner, the fact that it has prescribed the manner in which the thing shall be done is itself a prohibition against a different manner of doing it. Therefore, when the Constitution prescribes the manner of doing an act, the manner prescribed is exclusive, and it is beyond the power of the Legislature to enact a statute that would defeat the purpose of the constitutional provision.

Weinberger v. Board of Pub. Instruction, 93 Fla. 470, 112 So. 253, 256 (Fla. 1927) (citations omitted); *see also Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006); *S & J Transp., Inc. v. Gordon*, 176 So. 2d 69, 71 (Fla. 1965) (providing that “where one method or means of exercising a power is prescribed in a constitution it excludes its exercise in other ways”).

“State constitutions are limitations upon the power of state legislatures. Consequently, a statute enacted by the Legislature may not restrict a right granted under the Constitution.” *Notami Hosp. of Fla., Inc. v. Bowen*, 927 So. 2d 139, 142 (Fla. 1st DCA 2006) (citations omitted). Therefore, it is the duty of the Legislature to comply with constitutional restrictions, not to “define” them out of existence. Yet, by enacting a statute that removes exclusive authority from the local school boards and places it with an independent, non-elected body, the Legislature has redefined the mandates of the local control requirement found in our state’s most powerful document, the Constitution. *See Holley v. Adams*, 238 So. 2d 401, 405 (Fla. 1970)

(stating that if a statute conflicts with express or clearly implied mandates of the Constitution, the statute must fall).

To justify the legality of section 1001.335, this Court would have to read the constitutional directive that locally-elected school boards “shall operate, control and supervise all free public schools within the school district” to mean that local boards are responsible only for running the day-to-day affairs of public education as agents for the implementation of state statutes and that they may exercise independence in educational programming only to the extent they are allowed to do so by leave of state officials. However, such a reading would fly in the face of the provision’s plain language.

Although the Legislature can enact statutes directing school boards to do, or not do, certain activities, such laws must be consistent with the powers approved by the will of the people in the Constitution. In this case, any power that the Legislature is attempting to wield over the school boards is a result of questionable laws *it itself* has previously enacted in contradiction to the Florida Constitution. For example, sections 1001.32(2) and 1001.33, both provisions enacted by the Legislature, incorporate language limiting express constitutional powers to other laws passed by the Legislature. § 1001.32(2), *Fla. Stat.* (2006) (“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.*”) (emphasis added); § 1001.32(2), *Fla. Stat.* (2006) (“*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 with the district school superintendent as executive officer.*”) (emphasis added). It cannot be credibly argued that the any power arising from section 1002.335 derives authority from article IX, section 4, nor can the statute be justified by the limiting language seen in the above-described general laws. As previously stated, “when the Constitution prescribes the manner of doing an act ... it is beyond the power of the Legislature to enact a statute that would defeat the purpose of the constitutional provision.” *See Weinberger*, 112 So. at 256; *Bowen*, 927 So. 2d at 142 (holding that “a statute enacted by the Legislature may not restrict a right granted under the Constitution”).

Where the Florida Constitution grants local elected school boards the power “to operate, control and supervise all free public schools within the school district,” it is unnecessary for them to apply to the State Board for authorization to retain such exclusive power. Under the instant circumstances, the dictates of article IX, section 4(b) place distinct limits on the Legislature’s ability to authorize an entity *other than the local school boards* to operate, control, and supervise public schools within

Florida. This constitutional provision prohibits the Legislature from enacting a statute that takes away from the local school boards any of their powers of supervision and control over charter schools only to lodge such powers in the Commission, since these powers are vested in the local school boards absolutely, without any constitutional limitations or restrictions. *See, e.g., NAACP, Inc. v. Florida Board of Regents*, 876 So. 2d 636 (Fla. 1st DCA 2004) (finding that the legislature's authority over the constitutionally created Board of Governor's was limited to appropriating funds, confirming appointed Board members, and setting members' staggered terms); *Cf. Academies of Excellence, Inc.*, 974 So. 2d at 1193 (holding that the State Board of Education cannot open charter schools).

Article IX, section 4, *not the Legislature*, authorizes locally-elected school boards to exercise exclusive authority to sponsor and approve charter schools within their districts. While the Legislature is free to change the charter school law and policy, it must do so in a manner that does not violate constitutional mandates, not however it sees fit. Furthermore, until article IX, section 4(b) of the Florida Constitution is repealed, the Legislature is not free to ignore this principle of local control. There is simply no interpretation of section 1002.335 that does not run afoul of the principle of local control embodied in article IX, section 4(b). The only interpretation that can be given to the statute to make it constitutional would require

reading section 4(b) as being of so little import that the State, vis-à-vis the Commission, can exert total control over a certain segment of public schools in local school districts. Such an approach would require the Court to rewrite the Constitution, which is not the prerogative of the Court to do.

- e. **Section 1002.335 violates article IX, section 4(a) requiring local control over public education to reside with an elected school board.**

It is apparent that the constitutional framers made the choice to place control as near the people as possible by creating a representative local government to govern public education in Florida's 67 counties. The language empowering local school boards with authority over *all* of the public schools within their locales is plain and unambiguous. So, too, is the language that describes how such school boards must be selected.

Article IX, section 4 clearly mandates that "a school board composed of five or more members chosen by vote of the electors ... shall operate, control and supervise all free public schools within the school district." Art. IX, § 4(a)-(b), *Fla. Const.* Thus, the Florida Constitution requires all public schools in a school district to be operated, controlled and supervised by a school board elected by local voters who may be impacted by the establishment and operation of schools in their geographical areas.

Contrary to the constitutional mandate that the governing body over public schools must consist of duly-elected school board members, the Commission is a non-elected entity appointed by the State Board, and whose appointees serve at the pleasure of the Governor. *See Art. IX, § 2, Fla. Const.* In other words, section 1003.335 purports to allow an appointed state commission exclusive control and supervision over some of Florida's free public schools, which is in direct contradiction to the Constitution. The appointment of the Commission, by the Governor-appointed State Board, and simultaneous grant of powers otherwise reserved constitutionally to the duly-elected local school boards, is unconstitutional and incompatible with article IX, section (4)(a), which requires that elected school board members retain the authority to govern all public schools in their respective districts. Because the Commission members would be appointed by yet another appointed body, elected school board members would effectively be displaced by appointees with regard to the administration of education within their districts.

In addition, the Florida Constitution creates and requires a structure of public school governance, and the Commission does not comport with this constitutional structure. Through article IX, section 4(b), the framers created a representative body, the local school board, to govern a the public schools within the respective school district. The powers given to the Commission wholly usurp the power of these elected

school boards to approve the establishment of, and regulate, charter schools within a school district – even though the school district’s tax base must provide the funding for such schools. Thus, section 1002.335, as enacted by the Legislature, conflicts clearly and irreconcilably with the Florida Constitution in this regard as it effectively removes from elected school boards their unencumbered constitutional authority to have a meaningful role in the establishment, operation, control, and supervision of charter schools within the school district.

While this Court may find the underlying goals of charter schools laudable—to provide innovative learning opportunities and offer parents additional educational options that best fit the needs of their children—even great ideas must be implemented within the framework of the Florida Constitution. Appellants do not seek here a review of the political motivations of the Legislature in enacting section 1002.335, since such is not a proper matter of inquiry for this Court, as it is limited to measuring the Act against the dictates of the Constitution. *See School Bd. of Escambia County v. State*, 353 So. 2d 834, 839 (Fla. 1977). Nevertheless, Appellants do contend strongly that by stripping all discretion from the local school boards over some public schools in their geographic boundaries, section 1002.335 is in clear violation of article IX, section 4. The Act poses a present total and fatal conflict with article XI, section 4(b) as it allows an independent, non-elected Commission to supplant an elected local

school board's constitutional authority. *See Cashatt v. State*, 873 So. 2d 430, 434 (Fla. 1st DCA 2004); *see also Bush v. Holmes*, 886 So. 2d 340, 346 n.3 (Fla. 1st DCA 2004). Because locally-elected school board members—not the State Board or a commission appointed by the State Board—must operate, control and supervise the public schools within their districts, section 1002.335 cannot withstand constitutional scrutiny.

- f. **Section 1002.335 violates article IX, section 4 because it requires local school districts to expend a portion of their locally-raised funds to public schools over which they have no control.**

The practical consequences of section 1002.335 are even more egregious when viewed against the fact that a local school board is constitutionally and statutorily charged with funding the operation of all public schools within a school district. The challenged statutory language interdicts the right of the duly-elected school boards to approve or disapprove establishment of a charter schools, while at the same time requiring the school district's tax base to fund the operation of such schools whether or not the elected school board has determined that it would be fiscally prudent to do so. Even though section 1002.335(11)(a) may appear to make the Commission responsible for funding its schools by making section 1002.33(17) (the charter funding provisions) applicable to the Commission, the practical effect of the statute

is to require district school boards to expend tax funds levied by the school board to fund a school that the board has not approved and does not control.

Under section 1002.335, when the Commission approves a charter school application, it retains the power to negotiate the specific contract with the charter school. So, in effect, the Commission not only imposes the specific contract but also requires the local board to accept the opening of a school that effectively usurps the local board's decision-making authority and its ability to govern a school for which it is ultimately responsible. Such an effect raises serious constitutional infirmities.

Whether a local school board is allowed to retain exclusive charter-school authority or not, it is nonetheless stripped of the ability to oversee or reauthorize certain charter schools, such as those approved as FSE charter schools, because such power is strictly conferred upon the Commission. *See* § 1002.335(4)(a)3., *Fla. Stat.* (2006) (“The commission shall have the power to ... [a]pprove or deny Florida Schools of Excellence (FSE) charter school applications and renew or terminate charters of FSE charter schools.”); § 1002.335(5)(a), *Fla. Stat.* (2006) (“The commission shall monitor and oversee all FSE charter schools sponsored by the commission... .”); § 1002.335(5)(b), *Fla. Stat.* (2006) (“A district school board shall retain the authority to reauthorize and to oversee any charter school that it has

authorized, *except with respect to any charter school that is converted to an FSE charter school... .*") (emphasis added).

The statutes further require that the creation of a public school be made in light of a district's comprehensive growth management plan. *See* §§ 163.31777 and 163.3180, *Fla. Stat.* (2006). Such a plan requires school districts to work with local governments to include a public school facility element, which adopts sweeping growth management policies that will require all public schools and related infrastructure requirements to be included in a "financially feasible" plan for all new developments. The purpose of the plan is to ensure that as growth occurs in a given county, adequate public school infrastructure is planned and funded well in advance so that the design and construction of schools can occur in a timely fashion.

Once concurrency is in place, the local government and the school district must determine whether there will be school capacity available for any increase in the number of students prior to approving new residential growth. In addition to concurrency considerations, local school boards must also comply with desegregation orders; participate in local property tax adjustment boards; plan renovations to existing schools; and evaluate potential school closures, as well as consider new site selection prior to land acquisition. To allow the Commission to bypass the local school district and unilaterally approve and control charter schools also disrupts the

defined and unified system of data gathering, as well as coordination and monitoring of the required comprehensive growth management plan, because the local school districts will no longer have control over, and ability to predict, classroom and school capacities.

Although the decision to open a school within a particular school district is one constitutionally committed to the exclusive discretion of the local school board, it would be without authority to prevent the establishment of an FSE charter school within its district, although the school board is nonetheless ultimately responsible for funding any Commission-established charter school in the district and also ensuring full compliance with concurrency requirements. Section 1002.335(5) makes it clear that FSE charter schools need answer only to the Commission. There is simply no avoiding the fact that any Commission order to approve a charter is an order to open a school for which a local board has not planned, thus allocating resources to a program over the board's objection and assigning control of those resources to a governing body other than the local school board. This result conflicts with a local school board's constitutional control over the public schools within its boundaries as well as its statutory duty to determine which schools shall be operated and maintained in the district.

This usurpation of power from the school boards affects yet another funding mechanism within the school district – federal funding for the education of exceptional students. The Individuals with Disabilities Education Act (“IDEA”) provides federal funding to states that comply with its provisions. *See* 34 CFR §300.1-300.818. The State of Florida implements the provisions of the IDEA through programs established and enforced by the local school boards, which are the designated local educational authority under the IDEA. In section 1001.42(4)(l), *Florida Statutes*, the local school boards are directed to “[p]rovide for an appropriate program of special instruction, facilities, and services for exceptional students. . . .” Section 1003.57, *Florida Statutes*, lists the specific duties that the school boards must undertake in educating exceptional students in compliance with the IDEA. The school boards must comply with these provisions and the rules of the State Board of Education in order to receive federal funding through the State under the IDEA. *See* 34 CFR §300.200; 34 CFR §300.705.

The charter school statute, through section 1002.33(17)(c), *Florida Statutes*, requires the local school boards to provide federal funds to charter schools at the same level that the funds are provided for services at other schools within the school district. However, federal funds under the IDEA are dependent upon the school board ensuring that all the public schools in the school district are complying with the IDEA.

With the implementation of section 1002.335 and the creation of the Commission, the local school boards no longer supervise the exceptional education programs at FSE charter schools. Although section 1002.33(16)(3) requires charter schools to follow the laws pertaining to exceptional student education, the local school boards have no method of enforcing the provisions of the IDEA without the ability to operate, control and supervise the charter schools through sponsorship contracts. Thus, school boards face a loss of federal funding due to noncompliance of an FSE charter school with the IDEA. Ironically, the school boards are ultimately responsible for funding FSE charter schools even though such schools may be the cause of a reduction in funding available to the school board.

Without questioning the wisdom of the state's policy choices with respect to the administration of charter schools in the state, it is quite apparent that those policy choices fail to comport with constitutional requirements. Article IX, section 4(b) is unambiguous, and where the language of the Constitution is plain and its meaning clear, this Court should enforce it as written. *See Crist v. Florida Ass'n of Criminal Defense Lawyers, Inc.*, 33 Fla. L. Weekly S172, 2008 at *3 (Fla. Mar. 13, 2008) (stating that constitutional provisions that are clear, unambiguous, and address the matter at issue must be enforced as written). An analysis of article IX, section 4(b) reveals that the framers sought to empower the electors in each school district with

control over education through the creation of local school boards that would represent the will of their electorate. If the Legislature wishes to change this fundamental structure, it must either seek to amend the Constitution or enact legislation that satisfies the mandates of the Florida Constitution.

As it stands, section 1002.335 transgresses the Constitution by depriving local school boards of control over the public schools in their respective districts. The creation of the Commission and the legislative grant of powers thereto amount to an abdication of local control over essential educational functions, including the operation of charter schools within the district. Moreover, the requirement imposed upon school districts to be the ultimate source of operating funding for FSE charter schools, of which the elected school board has had no voice in the establishment, operation or control, violates the requirements of article IX, section 4(b). Such an act is incompatible with the constitutional provisions granting the exclusive right to elected school boards to operate, control and supervise all free public schools within the school district and to determine the funding to be accorded to such schools.

II. SECTION 1002.335, *FLORIDA STATUTES*, VIOLATES ARTICLE IX, SECTION 1(A) OF THE FLORIDA CONSTITUTION BY ESTABLISHING A SYSTEM OF EDUCATION CONCURRENT AND ALTERNATIVE TO THE CONSTITUTIONALLY-MANDATED UNIFORM SYSTEM OF PUBLIC EDUCATION.

Standard of Review

The constitutionality of section 1002.335, *Florida Statutes* is a question of law and is reviewed *de novo*. See *Zingale v. Powell*, 885 So. 2d 277, 280 (Fla. 2004); *Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006); *State v. Coney*, 845 So. 2d 120, 137 (Fla. 2003); *Williams v. State*, 946 So. 2d 1163, 1164 (Fla. 1st DCA 2006).

Argument on the Merits

In interpreting the Constitution, the Supreme Court of Florida holds that:

[E]ach provision must be given effect, according to its plain and ordinary meaning. The court must give provisions a reasonable meaning, tending to fulfill, not frustrate, the intent of the framers and adopters. Constructions which are strained, lead to absurd results, or render another provision nugatory must be avoided. Unless a different intent is clearly manifested, each section of the constitution should be read in conjunction, with all other provisions to determine its proper meaning, and the entire document should receive a consistent and uniform interpretation. Where particular words or phrases are ambiguous, resort may be had to the history of the particular provision.

In re Advisory Opinion to the Governor, 374 So. 2d 959, 964 (Fla. 1979)(citations omitted); see also *Coastal Florida Police Benevolent Ass'n, Inc. v. Williams*, 838 So. 2d 543 (Fla. 2003). Thus, in determining whether section 1002.335, *Florida Statutes* violates article IX, section 1(a), all provisions of article IX must be read in *pari materia*. While section (1)(a) requires the Legislature to make adequate provision by law “for a uniform, efficient, safe, secure, and high quality system of free public schools that allows students to obtain a high quality education . . .,” sections 2-7

establish the bodies responsible for implementing the mandate, including the State Board of Education and the district school boards.¹⁰ This court noted the interplay between these sections of article IX in *School Board of Collier County v. Steele*, 348 So. 2d 1166, 1167 (Fla. 1st DCA 1977), stating “[o]ur constitution provides for ‘a uniform system of free public schools’ in which the school boards of single-county districts ‘operate, control and supervise’ all free public schools within the school district,’ subject to ‘such supervision (by the State Board) as provided by law.’” (citations omitted). Accordingly, when the sections of article IX are considered in pari materia, it is clear that while public education is the responsibility of the state, the elected school boards are the governing bodies providing for the uniform system of

¹⁰ Article IX provides:

Section 2. State board of education

The state board of education shall be a body corporate and have such supervision of the system of free public education as is provided by law....

Section 4. School districts; school boards

(a) Each county shall constitute a school district In each school district there shall be a school board composed of five or more members chosen by vote of the electors in a nonpartisan election

(b) The school board shall operate, control and supervise all free public schools within the school district

public schools. See *School Bd. of Escambia County v. State*, 353 So. 2d 834 (Fla. 1977).

In adopting section 1002.335, *Florida Statutes*, the Legislature has ignored this constitutionally-mandated uniform system of district schools and unilaterally created a concurrent state-level system of public schools controlled by a statutorily-created Commission with appointed members. In *Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006), the Florida Supreme Court provided an in-depth analysis of article IX. In doing so, the Supreme Court explained that the Constitution is a limitation on the Legislature's power. *Id.* at 406, 410-411. As previously stated, the Court applied the principle of *expressio unius est exclusio alterius*, noting:

[W]here the Constitution expressly provides the manner of doing a thing, it impliedly forbids its being done in a substantially different manner. Even though the Constitution does not in terms prohibit the doing of a thing in another manner, the fact that it has prescribed the manner in which the thing shall be done is itself a prohibition against a different manner of doing it. Therefore, when the Constitution prescribes the manner of doing an act, the manner prescribed is exclusive, and it is beyond the power of the Legislature to enact a statute that would defeat the purpose of the constitutional provision.

Id. at 407, quoting, *Weinberger v. Board of Pub. Instruction*, 93 Fla. 470, 112 So. 253, 256 (1927)(citations omitted).

In *Holmes*, the supreme court reviewed the constitutionality of section 1002.38, *Florida Statutes*, which established the opportunity scholarship program. The

opportunity scholarship program provided vouchers to students attending failing public schools, which could be used by the students for tuition at private schools. After an in-depth analysis of article IX, section 1(a), the supreme court held that the statute was unconstitutional because it created an alternative system of education, and therefore, violated the constitutional requirement for a uniform system of public education.

As in *Holmes*, in this case, the Legislature through the enactment of section 1002.335 has created an alternative system of public education. By its express terms, the Constitution requires the free public schools to be a part of single county districts that are operated, controlled and supervised by the district school boards. While the State Board of Education has supervision over the system of free public schools, pursuant to article IX, section 2, the actual schools, including charter schools, in each district are the responsibility of the district school board, an elected governing body. See Art. IX, § 4(a) and (b), *Fla. Const.*; see also *Jones v. Braxton*, 379 So. 2d 115 (Fla. 1st DCA 1979)(finding that the state cannot force a school board to build a school); *School Bd. of Volusia County v. Academies of Excellence, Inc.*, 974 So. 2d 1186, 1193 (Fla. 5th DCA 2008)(noting that as an appellate remedy, the State Board of Education can direct a school board to accept a charter application, because approving an application is only one step in the long process of opening a charter

school, such as having to reach agreement as to the terms of the charter contract, and the school board itself will be the authorizer, sponsor, and overseer of the charter school if it is opened).

Jones and Volusia show the delineation of constitutional powers between the school boards and the State Board of Education. The State Board provides the framework within which the school boards make their decisions. Thus, the State Board provides the building standards for schools or the application requirements for charter schools, but the local school boards decide if a school should be built or a charter school opened. Similarly, the State Board provides teacher certification requirements, but the local school boards determine which teachers to hire. *See School Bd. of Collier County v. Steele*, 348 So. 2d 1166 (Fla. 1st DCA 1977). This system is the uniform system of education prescribed by the Constitution.

By contrast, section 1002.335, *Florida Statutes*, removes charter schools from the district school board system and places them in the hands of a state-level, non-elected Commission. Thus, the Legislature has violated article IX, section 1(a) by creating a competing, nonuniform system of education.

Guidance regarding this constitutional violation is provided by another recent Florida Supreme Court case. In *Crist v. Florida Association of Criminal Defense Lawyers, Inc.*, 33 Fla. L. Weekly S172 (Fla. Mar. 13, 2008), the Court upheld the

constitutionality of the statute creating the Offices of Criminal Conflict and Civil Regional Counsel (“OCCCRC”) which handle representation in criminal cases where a public defender has a conflict. In upholding the constitutionality of the OCCCRC, the Court found:

What is critical to our decision is that the OCCCRC are appointed in criminal cases *only* where the public defender must withdraw due to a conflict of interest. Therefore, the OCCCRC do not compete or otherwise act concurrently with the public defender – it is only when the public defender steps aside that a regional counsel steps in. In fact, section 27.51 was *not* revised by chapter 2007-62. This is significant because, despite the creation of the OCCCRC, the public defender maintains primary responsibility for representation in all criminal cases, as it has since the public defender system was created in 1963. Moreover, by creating the OCCCRC, the Legislature did not transfer all of the typical responsibilities of the public defender and a bulk of its funding to an appointed office, leaving the elected public defender with only nominal duties. To the contrary, the OCCCRC are an essential safety net that are only utilized when the public defender has a conflict.

Id.

Unlike in *Crist*, in this case, the Florida Schools of Excellence Commission acts concurrently with the district school boards, and the primary responsibility for the charter schools in the various school districts is transferred to the Commission. *See* § 1002.335(4) and (5), *Fla. Stat.* (2006). Specifically, section 1002.335(5)(a), *Florida Statutes*, states:

If a district school board has not retained exclusive authority to authorize charter schools as provided in paragraph (e), the district school board and the **commission shall have concurrent authority** to authorize charter

schools and FSE charter schools, respectively, to be located within the geographic boundaries of the school district. The district school board shall monitor and oversee all charter schools authorized by the district school board pursuant to s. 1002.33. The commission shall monitor and oversee all FSE charter schools sponsored by the commission pursuant to subsection (4).

(emphasis added).

Through its enactment of section 1002.335, *Florida Statutes*, the Legislature has created a concurrent and competitive state-level system of public schools which supplants the role of the constitutionally-mandated school boards. It is not simply about approving or denying charter school applications; it is about an extra-constitutional entity opening and supervising public schools. Thus, the case of *School Board of Volusia County v. Academies of Excellence, Inc.*, 974 So. 2d 1186 (Fla. 5th DCA 2008), provides no support to the Commission.

In *Volusia*, the court upheld the constitutionality of section 1002.33, *Florida Statutes* because “[g]ranting a charter application is not equivalent to opening a public school.” *Id.* at 1193. The court noted that once the charter application has been approved, the school board still has control over the process because the applicant and the school board must still agree on the provisions of the charter. *See* § 1002.33(6)(h), Fla. Stat. (2006). A school board also can cause a charter to be revoked or not renewed. *See* § 1002.33(8), Fla. Stat. (2006). The court, therefore, found that section 1002.33(6)(c) does not permit the State Board to open a charter school. Instead, as

required by the Constitution, the elected school board retains local control while the State Board of Education sits in a review capacity.

In contrast, under section 1002.335, the Florida Schools of Excellence Commission completely displaces the local school boards as to FSE charter schools. Thus, this extra-constitutional Commission that is not responsible to the electorate may open charter schools. This arrangement is exactly the type considered unconstitutional by the Florida Supreme Court in *Crist* and *Holmes*.

Further, such a violation of the uniformity clause concerns the structure of the system of public education in Florida—a structure that requires single-county school districts governed by a district school board. There are 67 counties in the State of Florida, 67 school districts, and 67 elected district school boards. This is the uniform system created by the Constitution. The Constitution does not provide for or authorize an alternative, statewide school system governed by a non-elected Commission. Regardless of any argument regarding the extent of the Legislature's or State Board's powers, the system created by the Legislature in section 1002.335, *Florida Statutes*, is unconstitutional.

CONCLUSION

Based on the foregoing, the Appellants respectfully request that this Court hold that section 1002.335, *Florida Statutes*, is unconstitutional.

DATED this 18th day of April, 2008.

Respectfully submitted,


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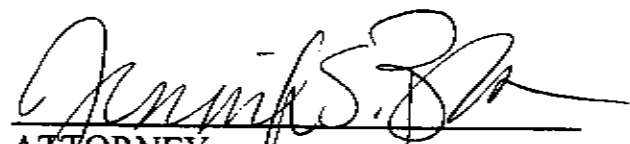
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and exact copy of the foregoing has been furnished on this 18th day of April, 2008, by U.S. Mail to: Timothy D. Osterhaus, Esq., Deputy Solicitor General, Office of the Attorney General, PL-01, The Capitol, Tallahassee, FL 32399-0400.


ATTORNEY

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief uses font size Times New Roman 14 in compliance with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).


ATTORNEY