

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

**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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REPLY BRIEF OF APPELLANTS

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ARGUMENT

I. THE PASSAGE OF SECTION 1002.335, *FLORIDA STATUTES*, DEFEATS THE PURPOSE OF ARTICLE IX, SECTION 4(B), WHICH IS TO VEST LOCAL CONTROL TO DISTRICT SCHOOL BOARDS OVER SCHOOLS WITHIN THEIR RESPECTIVE JURISDICTIONS.

The Appellee offers policy arguments in a futile attempt to rebut the irrefutable conclusion underlying this appeal: that the *Florida Constitution*, in Article IX, Section 4, expressly requires a system of local control by elected schools boards. Therefore, it is beyond the power of the Legislature to enact a statute, such as section 1002.335, which defeats the purpose of this constitutional provision and removes local control over public schools within a school district.

As was pointed out in the Appellants' Initial Brief, alleged policy motivations for the creation of the Commission or the wisdom of the Legislature in enacting section 1002.335 are both irrelevant to the issue in this case. Rather, here, as in *Bush v. Holmes*, 919 So. 2d 392, 398 (Fla. 2006):

[T]he issue is what limits the Constitution imposes on the Legislature. We make no distinction between a small violation of the Constitution and a large one. Both are equally invalid. Indeed, in the system of government envisioned by the Founding Fathers, we abhor the small violation precisely because it is precedent for the larger one.

Thus, this Court is limited to measuring section 1002.335 against the dictates of the constitution and determining whether the Legislature, in enacting this statute, exceeded the constitutional limits imposed by Article IX, Section 4.

Appellants acknowledge that the Legislature has general legislative power over such issues as public education; however, those powers are specifically limited by the constitution. *See generally State ex rel. Green v. Pearson*, 14 So. 2d 565, 567 (1943) (“The legislative branch looks to the Constitution not for sources of power but for limitations upon power.”). Beyond such limitations, the constitution must prevail over any legislative enactment contrary to it. *Holmes*, 919 So. 2d at 398 (“[T]he usual deference given to the Legislature’s resolution of public policy issues is at all times circumscribed by the Constitution.”). The Legislature is precluded from delegating by statute any authority that the constitution reposes in local school boards rather than the Legislature. *See United Teachers of Dade FEA/United, AFT, Local 1974, AFL-CIO v. Dade*, 472 So. 2d 1269 (Fla. 1st DCA 1985) (“[L]ocal control over Florida’s public schools is constitutionally reposed into several district school boards.”).

Article IX, Section 4 defines a system of local control by elected school boards with legal authority to operate and control all public schools within their respective counties. This provision acts as a limitation on legislative power because it provides both a mandate to provide for children’s education in the public

school system and a restriction on the manner of execution of that mandate. Contrary to the Appellee's contention, section 1002.335, creating an unelected Commission to operate some schools within school districts, stands in direct conflict with the plain and unambiguous language of Article IX, Section 4, and should be stricken as unconstitutional.

While the Appellee and Amicus Curiae try to read the phrase "as provided by law" into Article IX, Section 4(b), noting that the Legislature explicitly adopted this limitation in section 1001.32(2), *Florida Statutes*, Article IX, Section 4 contains no such limitation and is a self-executing provision. As this Court noted in *NAACP, Inc. v. Florida Board of Regents*, 876 So. 2d 636, 639 (Fla. 1st DCA 2004), "[t]here is a presumption that constitutional provisions are intended to be self-executing 'because in the absence of such presumption the legislature would have the power to nullify the will of the people expressed in their constitution, the most sacrosanct of all expressions of the people.'" (citation omitted). The language used in Article IX, Section 4 is nearly identical to the language that this Court found to be self-executing in *NAACP* and falls squarely within the examples of self-executing language provided by the Supreme Court of Florida in *Florida Department of Education v. Glasser*, 622 So. 2d 944 (Fla. 1993). Thus, the attorney general opinions and cases cited by the Appellee and Amicus Curiae, which are based on faulty reasoning, are of little value to this Court in examining

the issues presented herein. If anything, these opinions as well as the Appellee's arguments stand as a clear attempt "to nullify the will of the people expressed in their constitution." *NAACP*, 876 So. 2d at 639.

The Appellee's efforts to characterize this appeal as premature should also be ignored. While the Appellee notes that no Commission-authorized schools yet operate in Florida, it fails to mention that the Commission has approved at least eleven charter school applications to date, and it is still directly accepting charter applications for review.¹ Although Appellee concedes it "does not expect a Commission-authorized school to open in one of Appellants' districts until at least the 2009-10 school year," (Answer Brief at 3, fn 2), Appellants contend that the damage has already occurred. As Appellants argued in their Initial Brief, section 1002.335 is unconstitutional *on its face* because it (1) requires local school boards to seek permission to exercise exclusive authority to authorize charter schools within their districts despite an explicit constitutional grant of power to do so;² (2)

¹ See <http://www.fldoe.org/fsecommission/>, last visited June 8, 2008.

² We note that not only were school districts forced by statute to petition the State Board to retain exclusivity to authorize charter schools within their jurisdictions, but charter operators were encouraged by representatives of the State Board to challenge the school districts' requests. In fact, Chairman T. Willard Fair was quoted saying: "It's going to be hard, very hard, to think about granting any authorization to any local school district. I don't trust them. That's why I need a law to protect me from them." McClure, Vicki and Mary Shanklin (March 28, 2007). Losing local say: State panel can supersede districts on charters. *Orlando Sentinel*,

grants control over some public schools to a non-elected Commission that is not accountable to the local electorate; and (3) requires local school districts to expend a portion of their locally-raised funds to some public schools over which they have no control.

Assuming *arguendo* that the Appellee has not yet promulgated rules to “define the school boards’ precise role with Commission-authorized schools yet,” (Answer Brief at 13), the adoption of rules cannot correct the constitutional infirmity which is present. Indeed, it is equally likely that the Commission will adopt rules that *further* defy the specific mandates of the constitution. What the Appellee, in effect, is asking this Court to do is overlook each of the previously-described constitutional violations and allow the Commission to attempt to rectify the violations by defining a relationship between the Commission and the school boards that will accommodate the statute’s constitutional incursion. The fallacy in this argument is that it is virtually impossible to correct, through rulemaking, a statute that *on its face and in application* runs afoul of constitutional requirements. Furthermore, the Appellee, an administrative agency, lacks the legislative power to amend the statute in such a way that it resolves the obvious constitutional infirmities that exist here. Therefore, this Court should find that because of the many conflicting provisions plaguing section 1002.335, the Act is unconstitutional.

A-1, found online at <http://www.orlandosentinel.com/news/orl-charterschools-part4-story,0,7504865.blurb>.

Throughout the Answer Brief, the Appellee assigns great significance to cases in which courts have upheld the State Board's authority to review local school board decisions to approve or deny a charter school application, pursuant to section 1002.33, *Florida Statutes* (2006). However, attempting to justify the constitutionality of section 1002.335 with the analysis used in such cases is inappropriate, not only because the statute involved there is procedurally different than the statute at issue in the instant case, but also because those cases do not rest solely on an interpretation of the provisions of Article IX, Section 4, as this case does.

Prior to the enactment of section 1002.335, local school districts were the entities which considered the approval or denial of charter applications. Once a charter application was granted, the school board still retained control over the process because the applicant and the school board had to agree on the provisions of the charter. *See* § 1002.33(6)(i), *Fla. Stat.* (2005). Local school boards had the ability to prevent certain charter schools from opening or close them down for good cause; however, their decisions were subject to review by the State Board pursuant to an extensive review process. *See* § 1002.33(6), *Fla. Stat.* (2005). It was this statutory review process that was the subject of the appeals in the cases relied upon by the Appellee. *See School Bd. of Volusia County v. Academies of Excellence, Inc.*, 974 So. 2d 1186, 1193 (5th DCA 2008) (holding that the school

board lacked good cause to deny the charter school application on the basis of alleged deficiencies); *see also School Bd. of Osceola County v. UCP of Cent. Florida*, 905 So. 2d 909 (Fla. 5th DCA 2005) (upholding the State Board's determination that there was no good cause to reject the charter application).

Upon a reversal being directed by the State Board, the decision was remanded to the local school board for implementation, in recognition of the school district's local control over public schools within the district. We submit this is the type of supervision which is contemplated by Article IX, Section 2 granting to the State Board general supervisory powers as provided by law. Art. IX, § 2, *Fla. Const.* ("The state board of education shall ... have such supervision of the system of free public education as is provided by law."). On the other hand, section 1002.335 establishes a structurally different process whereby the local school boards are absolutely written out of the equation with regards to the approval of certain charter schools and the conversion of other school-sponsored charter schools to "Florida Schools of Excellence" charter schools. Never before has this statute been challenged under Article IX, Section 4.

Moreover, Appellee's argument that section 1002.335 will bolster uniform and efficient charter school policies in districts that have an alleged history of treating charter schools unfairly should be rejected, as well. First, to suggest that school districts have historically treated charter schools inequitably, without any

empirical data supporting that assertion, is disingenuous, particularly in light of the fact that there are more than 350 charter schools currently operating throughout Florida with more than 100,000 students participating.³ Secondly, to the extent charters have been rejected or revoked in the past, the justifications by far have involved serious abuses, deficient internal controls, and/or significant financial issues jeopardizing the public welfare. *See, e.g., Survivors Charter Schools, Inc. v. School Bd. of Palm Beach County*, 968 So. 2d 39 (Fla. 4th DCA 2007) (involving the revocation of charters for failing, *inter alia*, fraudulent activity, and misappropriation of public funds); *Imhotep-Nguzo Saba Charter School v. Department of Educ.*, 947 So. 2d 1279 (4th DCA 2007) (upholding the State Board's conclusion that there was competent, substantial evidence to support the school board's denial of the charter school applications after finding that the existing charter school of the applicant was fiscally and academically non-compliant).

Additionally, the asserted "fair and equitable standard," which section 1002.335(5)(e) purports to impose on local school districts seeking exclusivity, is not only offensive to Article IX, Section 4(b), but also has been arbitrarily invoked by the State Board. For example, during the 2007 review of applications from local school districts seeking exclusivity, the State Board summarily denied eight

³ *See* http://www.floridaschoolchoice.org/Information/Charter_Schools/, last visited June 8, 2008.

applications stating that the school boards had no discernible history of authorizing charter schools. (R. V6; 1066). In fact, some, if not all, of the school boards had *no history whatsoever* of treatment toward charter schools because no applications for new charters had been presented to them within the four years prior to the submission.⁴ (R. V6; 1063-1066). Thus, for the State Board to maintain that the purpose of the Commission is to “afford relief to qualified applicants in certain districts with a history of unfair treatment,” (Answer Brief at 15), is misleading and untrue.

Arguably, the previous single-track authorization process under section 1002.33 allowed the State Board to achieve the goals of uniformity and efficiency, which it now proffers, because the State Board provided the final review of decisions rendered by local school districts regarding charter applications. However, rather than constituting a vehicle to bolster uniformity and efficiency, the Commission is more akin to a school district without borders, further disturbing the constitutional scheme of local control. Thus, the Appellee’s asserted policy reason does not stand to support the validity of section 1002.335.

⁴ We note that just recently, the State Board voted not to recommend that any new school board retain exclusive authority. Districts without a history of charter schools were not recommended as well. See <http://www.floridaschoolchoice.org/CSStandardReview/PublicDistrictOption.aspx>, last visited June 8, 2008.

This Court should also reject the suggestion by the Appellee that because other specific types of public schools historically have not been directly controlled by the local school boards, the Commission should also be allowed to circumvent the local control mandate of Article IX, Section 4(b). *See Answer Brief at 16.* Frankly, the validity of those governing structures is not at issue in this case. Only the constitutionality of section 1002.335 is before the Court. *See generally, Holmes, 919 So. 2d at 412* (rejecting the suggestion by the State and amici that other programs would be affected by the Court's decision and noting that "[t]he effect of our decision on those programs would be mere speculation").

II. ARGUMENT 1.B OF THE AMICUS BRIEF IS ENTIRELY INAPPROPRIATE AND SHOULD BE IGNORED BY THE COURT.

An Amicus Curiae brief is "generally for the purpose of assisting the court in cases which are of general public interest, or aiding in the presentation of difficult issues." *Ciba-Geigy Ltd. V. Fish Peddler, Inc.*, 683 So. 2d 522, 523 (Fla. 4th DCA 1996). Argument 1.B of the amicus brief does not aid or assist this Court on the constitutional issue raised by the Appellants. Instead, the argument is an unwarranted attack on the Osceola County School Board. Although this improper argument should not be considered,⁵ the Appellants address the major inaccuracies

⁵ Indeed, this section of the Amicus Brief would properly be the subject of a motion to strike. However, in the interest of judicial economy, the Appellants have

presented in the Amicus Curiae's summary of the facts and holding in *School Board of Osceola County v. UCP of Central Florida*, 905 So. 2d 909 (Fla. 5th DCA 2005) and *School Board of Osceola County v. Academies of Excellence*, 914 So. 2d 981 (Fla. 5th DCA 2005).

These cases in no way demonstrate that the Appellants have treated charter schools unfairly or inequitably. What the cases show is that the Appellants are concerned with ensuring the fiscal soundness of charter schools and ensuring a quality education for the students attending all public schools in the district, including charter schools. The Amicus Curiae's statement that Osceola County School Board denied the charters "without a shred of good cause" is not only incorrect, but a gross oversimplification of the issues involved in those cases. See Amicus Brief at 16.

At the time, the Osceola County School District received the lowest operational funding of any school district in the state, and charter schools did not receive any capital funding. See *UCP*, 905 So. 2d at 913. When the charters presented financial plans showing that they would use operational funds for capital expenditures, the Osceola County School Board denied the charters because of the concern that the dilution of operational funds through capital expenditures would be detrimental to the quality of education received by the charters' students. The

instead decided simply to point out here that it is inapposite to the issues presented in this case.

Fifth District found that the School Board's concerns did not constitute statutory good cause. *Id.* at 915-916.

Although the Court found that statutory good cause did not exist, this does not mean that the Osceola County School Board did not have good cause for denying the charters. Fiscal mismanagement by charters is often a reason for their demise, and elected school boards are legitimately concerned when they find that funds are being funneled from the classroom for use in other areas. *See Survivors Charter Schools, Inc. v. School Bd. of Palm Beach County*, 968 So. 2d 39 (Fla. 4th DCA 2007); *Imhotep-Nguzo Saba Charter School v. Department of Educ.*, 947 So. 2d 1279 (4th DCA 2007). Indeed, Osceola County's concerns were realized when the Academies opened and closed its charter school within the same school year.⁶

III. SECTION 1002.335 UNCONSTITUTIONALLY ESTABLISHES A SYSTEM OF EDUCATION CONCURRENT AND ALTERNATIVE TO THE CONSTITUTIONALLY-MANDATED UNIFORM SYSTEM OF PUBLIC EDUCATION.

Because the Appellee has no valid legal argument to support its position, it resorts to scare tactics to respond to the cogent arguments presented by the Appellants in the Initial Brief. The Appellee waves the uniformity flag while warning that what the Appellants are truly arguing for is the creation of 67 autonomous school systems. Yet, it is the Appellee, not the Appellants, that seeks

⁶ *See* http://www.floridaschoolchoice.org/Information/Charter_Schools/files/closed_charter_schools.pdf.

to violate the uniform system of public education by establishing a concurrent, alternative, and competitive system of public education.

Unlike the Appellee, the Appellants are well aware that all provisions of Article IX must be read together. Where the Appellee would read Article IX, Section 4(b) out of existence, the Appellants contend that the provisions of Article IX should be read together to give meaning to each and every provision. *See Caribbean Conservation Corp., Inc. v. Florida Fish and Wildlife Conservation Comm'n*, 838 So. 2d 492 (Fla. 2003). In so doing, it is clear that Article IX, Section 4(b) provides the school boards with the authority to exercise local control within the uniform and efficient public education system established by the Legislature.

Thus, while the Appellee provides the framework, it is the school boards that decide how to apply the framework within their local districts. The Legislature, either through the Department of Education or the Appellee, sets the parameters for opening new schools and the building requirements for such schools, but it is the school board that decides where and when the school will be opened. *See Jones v. Braxton*, 379 So. 2d 115 (Fla. 1st DCA 1979). Similarly, the Legislature sets the standards for teacher certification, but the school boards decide which teachers to hire.

This interplay between the Legislature's role under Article IX, Section 1 and the school board's role under Article IX, Section 4(b) was explored in *Citrus Oaks Homeowners Association, Inc. v. Orange County School Board*, Case No. 05-0160RU, 2005 WL 3733837 (DOAH Aug. 1, 2005). In *Citrus Oaks*, a group of parents and a homeowner's association challenged the Orange County School Board's establishment of attendance zones for four high schools in western Orange County. In invalidating a portion of the rule adopted by the Orange County School Board, the administrative law judge examined the role of the school board and the Legislature with regards to school attendance zones. The judge found that "the establishment of school attendance zones within the District involves the exercise of local authority that is constitutionally reposed in [the Orange County School Board]." *Id.* at *12.

However, the judge noted that the school board was required to exercise this local authority in a fair and procedurally correct manner as established by the Legislature. Because the school board failed to follow the proper procedures for adopting the rule, the judge held that a portion of the rule was invalid. In so doing, the judge specifically acknowledged that "[t]he Legislature cannot delegate by statute authority that the constitution reposes in the [school board] rather than the Legislature." *Id.*

Section 1002.335, *Florida Statutes*, does not establish mere procedural requirements for school boards to follow in reviewing charter applications. Instead, it establishes a non-elected commission to exercise the local authority that the constitution reposes in the school boards. Essentially, the statute creates a statewide school district with absolute authority over a segment of public schools in contravention of Article IX, Sections 1 and 4(b). Contrary to Appellee's assertions, this dual school system does not ensure a fair and equitable uniform system of public education. It fractures the uniform system adopted by the electors in the *Florida Constitution*. See *Holmes; Crist v. Florida Association of Criminal Defense Lawyers, Inc.*, 978 So. 2d 134 (Fla. 2008).

While the Appellee apparently believes that the Legislature can legislate a constitutional body out of existence, the law holds otherwise. By giving meaning to all provisions of Article IX, a uniform system of public education, composed of elected school boards exercising local authority, can exist harmoniously.

CONCLUSION

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

DATED this ____ day of June, 2008.

Respectfully submitted,



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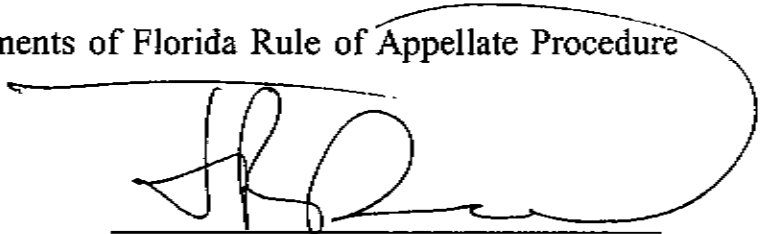
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and exact copy of the foregoing has been furnished by U.S. Mail on this 9 day of June, 2008, to: Timothy D. Osterhaus, Esquire, Deputy Solicitor General, Office of the Attorney General, PL-01, The Capitol, Tallahassee, Florida 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).

A handwritten signature in black ink, consisting of stylized initials and a surname, written over a horizontal line.

ATTORNEY