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TO: Honorable School Board Members
FROM: Karen M. Chastain / *Kmc*
CC: Dr. Patricia S. Willis, Superintendent
Jason R. Gabriel, General Counsel
RE: HB 7069
DATE: August 23, 2017

I. Introduction and Background.

The School Board requested a memorandum from the Office of General Counsel to discuss possible legal action concerning certain provisions of HB 7069. It is argued that HB 7069 provisions will negatively impact the ability of the School Board to carry out its constitutional responsibilities. This memorandum is not intended to be exhaustive but highlights key legal issues.

To date, at least ten (10) Florida school boards have committed to initiating litigation and joining together to challenge certain provisions of HB 7069 as noted below:

Bay	\$10,000	Broward	\$25,000	Hamilton	\$ 5,000
Lee	\$25,000	Miami-Dade	\$30,000	Orange	\$25,000
Palm Beach	\$25,000	Polk	\$25,000	St. Lucie	\$10,000
Volusia	\$25,000				

For those school boards that have authorized litigation, the understanding is that each district will financially participate on a prorated basis per student enrollment; accordingly, the financial participation noted above may change. It is my understanding that the firm of Husch Blackwell has been selected (lead attorney is John Borkowski). The complaint may set forth an "as applied" approach as opposed to a facial challenge, and the preliminary budget through trial is estimated to be \$400,000.00.¹

¹ For those school boards that have approved initiating the legal challenge, most of the discussions center on challenging HB 7069 in a circuit court proceeding. There has been little discussion regarding challenges pursuant to Chapter 120, Florida Statutes, such as challenges to rulemaking or challenges to final orders issued by the State Board of Education to implement HB 7069. For example, if the Schools of Hope provision is implemented and the State Board of Education issues a final order, then pursuant to section 120.68, F.S., the adversely affected school board can file its appeal to the First District Court of Appeal. The 2008 charter school case discussed in section III.A. below (*Duval County School Board v. State Board of Education*, 998 So.2d 641 (Fla. 1st DCA 2008)) went to the First District

II. Relevant Constitutional Provisions.

- Article IX, §1(a), Florida Constitution

Florida has strong language for public education as compared to other states, and describes the education of children being a “fundamental value,” and the state having a “paramount duty” to “make adequate provision for the education of all children....” Section 1(a) also states: “Adequate provision shall be made 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....”

- Article IX, §2, Florida Constitution

Section 2 provides for the powers of the State Board of Education, such as its duty to “have such supervision of the *system of free public education* as is provided by law.” (Emphasis added).

- Art. IX, §4(b), Florida Constitution

Section 4(b) provides for the powers of a school board, such as its duty to “*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.” (Emphasis added). Compared to the duties of the State Board of Education to “supervise the system of free public education,” a school board must “operate, control, and supervise all free public schools.”

- Article VII, §9(a), Florida Constitution

This section provides the ability to authorize school districts to levy ad valorem taxes. Proponents of HB 7069 may argue that the Florida Constitution provides for the potential authorization of school districts to levy taxes, and the Legislature may prescribe the limits of that authorization. See, however, Article VII, §10, Florida Constitution, below.

- Article VII, §10, Florida Constitution

This section prohibits the state, special districts, or local governments from giving, lending or using its taxing power to aid any corporation, with a few exceptions.

- Article III, §6, Florida Constitution

This section is commonly referred to as the “single-subject” rule for legislation.

- Constitutional Revision Commission.

It may be important to monitor the pending Constitutional Revision Commission (“CRC”) proposals related to public education. The website for the Commission is: <http://flcrc.gov/>. The CRC Education Committee schedule is as follows, and all meetings of the committee are in Room 110, Senate Office Building, Tallahassee, Florida:

- September 18 at 8:00 a.m.
- September 26 at 1:00 p.m.
- September 28 at 8:00 a.m.

Court of Appeal based on final agency action of the State Board of Education denying some 28 school boards’ respective applications to be authorized to sponsor charter schools under the then-statutory provisions.

- October 3 at 1:00 p.m.

III. Five Primary Areas Under Review for a Legal Challenge

The following matters are under review for a legal challenge; depending on the result of that litigation review and preparation of the complaint to be filed, the complaint may include all or a few of the following matters:

- Whether the “schools of hope” established by HB 7069 are constitutional;
- Whether local school boards may constitutionally be required to execute “standard charter contracts” with charter school operators;
- Whether local school boards can be mandated to share their levied discretionary capital millage with charter schools;
- Whether HB 7069 constitutionally authorizes charter schools to become Local Educational Agencies (“LEAs”), and whether HB 7069 creates permissible changes to federal requirements for Title I funding; and
- Whether HB 7069 violates the “single subject” requirement of the Florida Constitution.

A. “Schools of Hope”

HB 7069 provides a new statutory section 1002.333, Florida Statutes, creating “schools of hope.” The schools of hope concept is proposed to set forth a new method regarding perennially underperforming schools.

The schools of hope provisions of HB 7069 appear to be contrary to Article IX, Sections 1(a), 4(b), and 6 of the Florida Constitution. These provisions forbid the provision of funds to schools that are not public schools under the control of the local school board. Although schools of hope are obliged to file specified student and financial reports with the school board, they operate almost independently, and the school board has little ability to control or supervise them. In HB 7069, it is possible for the State Board of Education to directly enter into a contract with a school of hope operator and bypass the school board. HB 7069 also permits a school of hope to become a local education agency (LEA) for purposes of directly receiving federal funds (see discussion regarding LEAs in subsection D below). HB 7069 also requires a district to turn over an “underused, vacant, or surplus facility” (whether the entire facility or a portion) to a school of hope operator if so requested and the operator is required to pay a fee not to exceed \$600 per student to the district.

B. Standard Charter School Contracts

HB 7069 requires school boards to use the State Board’s adopted model contract, and any modification to the State Board’s standard contract would be “presumed to be a limitation on charter school flexibility.” If a school board continues to use its form of charter contract, then the charter school applicant can file an appeal at the Division of Administrative Hearings. To prevail at the administrative proceeding, the school board must overcome the statutory presumption that the modification to the State Board’s standard contract prevents the charter school’s statutory

flexibility. It is possible to construe this part of the statute to mean that a school board might not be able to enforce rules and regulations required by statutes if the trier of fact determined the rules and regulations to be unreasonable or a violation of a charter school's statutory flexibility. This apparently means that the school board is free to propose terms and conditions that differ from the standard contract but, if the charter school objects to any of the different terms, they may be presumed invalid on appeal. Thus, these provisions of HB 7069 may relegate "local boards to essentially ministerial functions" in violation of Article IX, Section 4(b), Florida Constitution. *See, Duval County School Board v. State Board of Education*, 998 So.2d 641, at 644 (Fla. 1st DCA 2008). Another case to review is *School Board of Volusia County v. Academies of Excellence, Inc.*, 974 So.2d 1186 (Fla. 5th DCA 2008).

C. Sharing Local Tax Revenue with Private Enterprise in the Form of Capital Funding.

HB 7069 amends Florida Statutes Section 1011.71(2) and 1013.62 to mandate that a school district share a portion of its discretionary levied capital outlay millage revenues with charter schools. The capital outlay provisions in HB 7069 may be found invalid under Article VII, Sections 1(a) and 9(a) and Article IX, Section 4(b) of the Florida Constitution because they are effectively a state *ad valorem* tax and the revenues distributed to charter schools do not further a school district purpose. The amount given to charter schools is based on the number of students regardless of the charter school's need; compared to school district capital plans that must be based on need. The provisions of HB 7069 may conflict with the constitutional prohibition concerning school districts' taxing power to aid any corporations, association, partnership or person pursuant to Article VII, Section 10.

D. Charter School "Systems" and Schools of Hope as "Local Educational Agencies" and Title I Funding

The issue of authorizing private entities to be "local educational agencies" ("LEAs") may violate Article IX, Section 4(b) of the Florida Constitution. LEAs, such as school boards, directly receive federal funds from the State of Florida (which is the recipient from the federal government). The United States Department of Education definition of an LEA does not appear to include public nonprofit charter schools, as established under state law. HB 7069, however, permits charter school systems and schools of hope to become a LEA upon its request to the school board, thereby creating a second competitive private education system. By allowing charter school systems and schools of hope to become LEAs, HB 7069 permits and encourages the creation of a separate system of free public schools operated by private entities, which are not supervised or controlled by the local school board. This system appears to violate *Bush v. Holmes*, 919 So.2d 392 (Fla. 2006) in that all free public schools must be under the control, operation, and supervision of the local school board.

A related federal issue is the creation of "Equity in School-Level Funding Act," where HB 7069 amends Section 1011.69, F.S., to add a new provision controlling districts' distribution of federal Title I funds. The Title I amendments may violate the school board's constitutional authority to "operate, control, and supervise" free public schools by restricting the school boards' authority to determine the most efficient use of Title I funds within federal parameters. The effect

of these new Title I provisions is to improperly relegate local boards to ministerial function with respect to the use of Title I funds.

The state provisions of HB 7069 may not be consistent with federal law; thus it is possible that the above-issues could be removed to federal court.

E. Single Subject Requirement

Florida's Constitution sets forth the "single-subject requirement" which provides that: "Every law shall embrace but one subject and matter properly connected therewith, and the subject shall be briefly expressed in the title." (see Art. III, §6, Florida Constitution). HB 7069 may violate the Constitution's single-subject clause. Although the bill ostensibly falls under the "single-subject" of K-12 education policy, it amends at least sixty-nine (69) statutes and covers numerous subjects such as sunscreen use, recess policies, charter schools, and teacher pay. However, because single-subject defects are cured by the Legislature's proper re-enactment of the Florida Statutes at issue, this theory has been identified, but not recommended, as a basis to challenge HB 7069.

IV. Conclusion

The School Board has several options: (1) decline to initiate litigation; (2) defer its decision to a later time or event; or (3) initiate litigation (whether on its own or join the other Florida school boards in their consolidated efforts). If the School Board defers its decision to a later time or event, then it may not be feasible to join the other school boards (depending on the timing and/or issue(s) presented). If the litigation is a circuit court trial proceeding on an "as applied" basis rather than a facial challenge, then the proceedings may exceed one year through trial and expenses are estimated to be \$400,000.00. Please note that the issues to be set forth in the complaint are yet to be finally determined, and the outcome of any litigation is uncertain. If the School Board decides to initiate litigation and join the other Florida school boards, then it is recommended that the School Board approve an agenda item that authorizes the following:

- A. The School Board initiate litigation with other Florida school boards to challenge those specific provisions of HB 7069 that raise constitutional and legal issues as soon as practicable;
- B. Funding for the litigation to be paid from non-public funds to the extent feasible in an amount not to exceed \$25,000, without additional School Board approval;
- C. With regard to the potential or active litigation, the Office of General Counsel will provide the School Board with monthly updates to ensure that the Board is fully informed and engaged;
- D. Notwithstanding the power of the School Board to initiate litigation, that the School Board explore and exhaust all elements of negotiation (such as requesting the Legislature to modify and/or repeal certain aspects of HB 7069);
- E. If appropriate, that the Office of General Counsel request approval from the School Board the authority to initiate any individual litigation on behalf of the School Board; and
- F. If appropriate, that the Office of General Counsel request approval to withdraw from the litigation.