

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

DUVAL COUNTY SCHOOL

BOARD, et. al.,

Appellants,

vs.

STATE BOARD OF EDUCATION,

Appellee

) Cases Nos.: 1D07-6041/1D0-
) 76105/1D07-6562/1D07-6584/1D08-
) 84/1D08-168/1D08-169/1D08-
) 170/1D08-171/1D08-172/1D08-
) 173/1D08-216/1D08-363/1D08-369

) L.T. DOE 2007-1438-FOI

**AMICUS CURIAE BRIEF OF THE FLORIDA CONSORTIUM OF PUBLIC
CHARTER SCHOOLS IN SUPPORT OF APPELLEE
ON APPEAL FROM THE STATE BOARD OF EDUCATION**

Daniel J. Woodring
Florida. Bar No 086850
Woodring Law Firm
3030 Stillwood Court
Tallahassee, FL 32308
Office Location:
203 N. Gadsden St.
Suite. 1-C
(850)567-8445
(850) 254-2939 Fax
Daniel@woodringlawfirm.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS 1

SUMMARY OF ARGUMENT 2

STANDARD OF REVIEW 3

ARGUMENT 3

I. THE LEGISLATURE ACTED CONSTITUTIONALLY, PURSUANT TO ARTICLE IX SECTION 1(A), SECTION 2, AND SECTION 4(B) OF THE FLORIDA CONSTITUTION, BY REQUIRING THAT THE STATE BOARD OF EDUCATION WAS TO PROVIDE OPPORTUNITY FOR CHARTER SCHOOL AUTHORIZATION BY BOTH THE DISTRICT AND THE FLORIDA SCHOOLS OF EXCELLENCE COMMISSION IN DISTRICTS WITH A FOUR-YEAR HISTORY OF UNFAIR AND INEQUITABLE BEHAVIOR TOWARD CHARTER SCHOOLS. 3

A. THE LEGISLATURE ACTED IN ACCORD WITH THE HISTORICAL AND CONTEMPORANEOUSLY UNDERSTOOD INTERPLAY OF THE AUTHORITY OF THE LEGISLATURE, STATE BOARD OF EDUCATION AND SCHOOL BOARDS IN ENACTING SECTION 1002.335 FLORIDA STATUTES. THE LEGISLATURE HAS BROAD AUTHORITY TO ESTABLISH THE SUPERVISORY AUTHORITY OF THE STATE BOARD OF EDUCATION AND TO CONTROL ALL ACTIONS OF LOCAL SCHOOL BOARDS. 4

B. PROVIDING AN ADDITIONAL PROCESS FOR ESTABLISHING A CHARTER SCHOOL, WHEN THE DISTRICT HAS A HISTORY OF UNFAIR AND INEQUITABLE TREATMENT OF CHARTER SCHOOLS, IS IN ACCORD WITH ARTICLE IX, SECTIONS (1) AND (2), AND NOT INCONSISTENT WITH ARTICLE IX, SECTION 4 (B) OF THE FLORIDA CONSTITUTION. 15

II. THE ESTABLISHMENT OF THE FLORIDA SCHOOLS OF EXCELLENCE COMMISSION FURTHERS, NOT UNDERCUTS,

THE LEGISLATURE'S COMPLIANCE WITH THE
CONSTITUTIONAL REQUIREMENT THAT "[A]DEQUATE
PROVISION SHALL BE MADE BY LAW FOR A UNIFORM,
EFFICIENT, SAFE, SECURE, AND HIGH-QUALITY SYSTEM OF
FREE PUBLIC SCHOOLS.....18

CONCLUSION.....20

CERTIFICATES OF SERVICE & COMPLIANCE.....21,22

TABLE OF AUTHORITIES

FLORIDA CASES

<u>Beverly v. Div. of Beverage of Dept. of Bus. Reg.,</u> 282 So. 2d 657 (Fla. 1st DCA 1973)	6
<u>Bush v. Holmes,</u> 912 So. 2d 392 (Fla. 2006)	19
<u>Chiles v. Phelps,</u> 714 So. 2d 453 (Fla. 1998)	6
<u>Dist. Sch. Bd. of Lee County v. Askew,</u> 278 So. 2d 272 (Fla. 1973)	18
<u>Fla. Dep't of Educ. v. Glasser,</u> 622 So. 2d 944 (Fla. 1993)	13, 18
<u>Fla. Soc'y of Ophthalmology v. Florida Optometric Ass'n.,</u> 489 So.2d 1118 (Fla. 1986)	6
<u>Jones v. Braxton,</u> 379 So. 2d 115 (1st DCA 1979)	11
<u>NAACP, Inc. v. Fla. Bd. of Regents,</u> 876 So. 2d 636 (Fla. 1st DCA 2004)	11, 13
<u>PW. Ventures, Inc. v. Nichols,</u> 533 So. 2d 281 (Fla. 1998)	5
<u>St Johns County v. Northeast Florida Builders Association,</u> 583 So. 2d 685(Fla. 1991)	19
<u>Sch. Bd. of Collier County v. Fla. Teaching Profession N.E.A</u> 559 So. 2d 1197 (Fla. 2 nd DCA 1990)	9
<u>Sch. Bd. of Escambia County v. State,</u> 353 So. 2d 834(Fla. 1977)	18, 19

<u>School Bd. of Miami-Dade County v. King,</u> 940 So. 2d 593, (Fla. 1 st DCA 2006).....	9
<u>Sch. Bd. of Osceola County v. Acad. of Excellence,</u> 914 So. 2d 981 (Fla. 5th DCA 2005), <u>cert. denied,</u> 918 So. 2d 292 (Fla. 2005).	16
<u>Sch. Bd. of Osceola County v. State Bd. of Educ.,</u> 903 So. 2d 963 (Fla. 5th DCA 2005).....	16
<u>Sch. Bd. of Osceola County v. UCP of Central Fla.,</u> 905 So. 2d 909 (Fla. 5th DCA 2005), <u>cert. denied,</u> 914 So. 2d 954 (Fla. 2005)	16
<u>Sch. Bd. Of Volusia County v. Acad. Of Excellence, Inc.,</u> 974 So. 2d 1186 (Fla. 5th DCA 2008).....	11,12
<u>State v. Bd. of Pub. Instr. of Pasco County,</u> 176 So. 2d 337(Fla. 1965)	18
<u>State v. Holbrook,</u> 176 So. 99 (Fla. 1937)	18
<u>Simon v. Celebration Co.,</u> 883 So. 2d 826 (Fla. 5th DCA 2004).....	9
<u>Sulcer v. Mcfatter,</u> 479 So. 2d 1349(Fla. 4 th DCA 1986).....	9
<u>Taylor v. Dorsey,</u> 19 So. 2d 876 (Fla. 1944)	3
<u>Winicki v. Mallard,</u> 417 So. 2d 742 (Fla. 1 st DCA 1982).	15
<u>W.E.R. v. Sch. Bd. of Polk County,</u> 749 So. 2d 540 (Fla. 2d DCA 2000).....	9

FEDERAL CASES

Stuart v. Laird
5 U.S. (1 Cranch) 299 (1803)5

FLORIDA CONSTITUTION

Article VII, § 9, Fla. Const.13
Article IX, § 1, Fla. Const..... *passim*
Article IX, § 2, Fla. Const..... *passim*
Article IX, § 4, Fla. Const..... *passim*

FLORIDA STATUTES

Section 230.03(2) Florida Statutes (1985)..... *passim*
Section 1001.32(2), Fla. Stat..... *passim*
Section 1002.335, Fla. Stat.4, 5, 15
Section 1002.36, Fla. Stat.14
Ch. 78-86, § 7 Laws of Fla.7

Opinions of the Florida Attorney General

Op. Atty. Gen. Fla. 2007-45(Nov. 2007).....6
Op. Atty. Gen. Fla. 83-72 (Oct.1983).....6,10
Op. Atty. Gen. Fla. 82-59 (Aug. 1982).....8
Op. Atty. Gen. Fla. 76-61 (Mar. 1976).....7
Op. Atty. Gen. Fla. 75-148 (May 1975)6, 8

Interest of Amicus Curiae

The Florida Consortium of Public Charter Schools is a not-for-profit membership organization of charter schools, charter planning groups, and other entities in the process of applying for and opening charter schools. The Consortium was started in 1999 by five charter school operators. Today it is Florida's only active charter school organization. It has over 200 member schools operating in 33 districts. These schools provide educational services to approximately 60,000 students - more than half the students served by Florida charter schools. Within the Consortium's membership are charter school operators who have applied, or anticipate applying, to the Florida Schools of Excellence Commission for a charter.

The Consortium has a continuing interest in expanding quality charter school options for Florida students. Thanks to its broad membership, it is uniquely qualified to represent the interests Florida's charter schools and the students they serve. The parties to this appeal are the State Board of Education and numerous school boards, but the consequences of this case are most felt by charter schools and their students. The Consortium therefore brings to the case a focus and perspective on behalf of those most impacted by any decision.

The statewide membership of the Consortium has a strong interest in ensuring that they are fairly and equitably treated. The Consortium believes that the Legislature has acted appropriately, constitutionally, and in furtherance of fair and equitable treatment by creating the Florida Schools of Excellence Commission. In fact, the Legislature may have had no better option to ensure fair and equitable treatment for all charter schools.

Summary of the Argument

School boards have consistently, both before and after the adoption of the 1968 constitutional education provisions, been considered to have very limited authority absent specific legislation. Appellants argue for a broad interpretation, but their interpretation is contradicted by history, unsupported by case law, and contrary to historical practice. As such, there is no basis for this Court to strike the Florida Schools of Excellence as unconstitutional beyond a reasonable doubt.

In addition to broad constitutional authority to create the educational system, the Legislature has explicit authority to specify the supervisory role of the State Board of Education. It is well within the Legislature's constitutional authority, when it concludes that the prior appeals system was not ensuring fair and equitable treatment of charters, to establish an additional method of authorizing charters.

Finally, having a more consistent state-level process for approval of charters, when there has been a determination that the district process is not fair and equitable, does not violated the constitutional requirement for a uniform educational system. If anything, increasing the state-level consistency furthers, not undercuts, the constitutional requirement for uniformity.

This Court should therefore decline Appellants invitation to strike the Florida Schools of Excellence Commission as unconstitutional.

Standard of Review for All Issues

This appeal challenges the constitutionality of a Florida Statute. The constitutionality was not addressed below. This Court applies the legal standard that

[w]hen a legislative enactment is challenged the court should be liberal in its interpretation; every doubt should be resolved in favor of the constitutionality of the law, and the law should not be held invalid unless clearly unconstitutional beyond a reasonable doubt.

Taylor v. Dorsey, 19 So. 2d 876, 882 (Fla. 1944) (citations omitted).

Argument

1

THE LEGISLATURE ACTED CONSTITUTIONALLY, PURSUANT TO ARTICLE IX SECTION 1(A), SECTION 2, AND SECTION 4(B) OF THE FLORIDA CONSTITUTION, BY REQUIRING THAT THE STATE BOARD OF EDUCATION WAS TO PROVIDE OPPORTUNITY FOR CHARTER SCHOOL AUTHORIZATION BY BOTH THE DISTRICT AND THE FLORIDA SCHOOLS OF EXCELLENCE COMMISSION IN DISTRICTS WITH A FOUR-YEAR HISTORY OF UNFAIR AND INEQUITABLE BEHAVIOR TOWARD CHARTER SCHOOLS.

Appellants ask this Court for extreme relief, the striking of a statute as facially unconstitutional, based on a radical interpretation of school board powers. Their proffered interpretation appears to misapprehend the Legislature and State Board of Education's constitutional authority. It is unsupported by the statutory and constitutional history and historical understanding of school board powers. Appellants' interpretation is also unsupported by any appellate or trial court holding of which the Consortium is aware. Given this, Appellants' argument is far

from meeting the clear beyond a reasonable doubt standard required to strike a statute as unconstitutional. The Consortium therefore asks this Court to deny the facial constitutional challenge to section 1002.335 Florida Statutes (2006), which created the Florida Schools of Excellence Commission.

1. A

THE LEGISLATURE ACTED IN ACCORD WITH THE HISTORICAL AND CONTEMPORANEOUSLY UNDERSTOOD INTERPLAY OF THE AUTHORITY OF THE LEGISLATURE, STATE BOARD OF EDUCATION AND SCHOOL BOARDS IN ENACTING SECTION 1002.335 FLORIDA STATUTES. THE LEGISLATURE HAS BROAD AUTHORITY TO ESTABLISH THE SUPERVISORY AUTHORITY OF THE STATE BOARD OF EDUCATION AND TO CONTROL ALL ACTIONS OF LOCAL SCHOOL BOARDS.

The Constitution instructs that:

[a]dequate 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 and for the establishment, maintenance, and operation of institutions of higher learning and other public education programs that the needs of the people may require.

Art. IX, §1 Fla. Const. The Constitution also directs that “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.” Art. IX, §2 Fla. Const. Finally, the Constitution provides that “[t]he 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.

Article IX has been amended since its 1968 adoption, but the above quoted portions - the language concerning the authority of the Legislature, State Board of Education, and schools boards - is materially unaltered.

Foundational for the question on appeal, the constitutionality of section 1002.335 Florida Statutes (2006), is comprehending the constitutional interplay between the Legislature, State Board, and school boards. The starting point for this analysis is the language and context of the education article of the 1968 Constitution.

Almost forty years have passed since Floridians adopted these constitutional provisions. To the extent one can, understanding these provisions as interpreted not long after initial adoption would be of benefit in determining the matter currently on appeal. See, e.g. PW. Ventures , Inc. v. Nichols, 533 So. 2d 281, 283 (Fla. 1998) (noting it is well established that contemporaneous construction by an agency charged with interpretation and enforcement is entitled to great weight). See also Stuart v. Laird, 5 U.S. (1 Cranch) 299, 309 (1803) (noting that historical meaning and practice regarding constitutional provisions can be of great weight).

While we do not quite have the Florida equivalent of the Federalist Papers, Stuart at 309, we do have several attorney general opinions that are most enlightening on the historical understanding of the education provisions, and the

authority of school boards before and after their adoption. The Attorney General's construction of this provision "is entitled to considerable weight." Chiles v. Phelps, 714 So. 2d 453, 459 (Fla. 1998) (quoting Florida Soc'y of Ophthalmology v. Florida Optometric Ass'n, 489 So.2d 1118, 1120-21 (Fla. 1986) ("[E]stablished constructions of constitutional provisions are 'presumptively correct unless manifestly erroneous.' "). See also Beverly v. Division of Beverage of Dept. of Business Regulation, 282 So. 2d 657, 660 (Fla. 1st DCA 1973)(noting the same opinion by different Attorneys General bolsters the opinion's weight).

In this instance, the Attorney General has consistently opined that article IX, section 4(b) is not self-executing, and school board authority is statutorily limited. See, e.g. Op. Atty. Gen. Fla. 75-148(May 1975); Op. Atty. Gen. Fla. 2007-45(Nov. 2007). While the opinion holdings are persuasive, Beverly at 660, in the context of this appeal, their value is as much for the historical understanding of the interplay of these constitutional provisions and related statutes.

Attorney General Opinion 83-72, was issued October 18, 1983 and entitled "Duties of School Boards." 83-72(Oct. 1983). The Auditor General had requested the opinion for the purpose of understanding what impact the new language in section 230.03(2) Florida Statutes had on school board authority. Id. To understand why this was an important question in 1983, some background is required.

In relevant part, section 230.03(2) Florida Statutes, as amended in 1983, and today found unchanged and renumbered in section 1001.32(2) Florida Statutes (2007) provides:

DISTRICT SCHOOL BOARD.--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.

Before 1983 the last clause provided that school boards “may exercise any power *for educational purposes* except as expressly prohibited by the State Constitution or general law.” (emphasis added). Ch.78-86 § 7, Laws of Fla. There was also language that narrowly defined educational purpose in that same section. Id. Prior to 1978 the statute did not have the last clause. Id.

When asked about school board powers prior to 1978, the Attorney General opined that “[a] school board has no inherent or common law powers. It has only those powers which have been expressly or by necessary implication conferred by statute.” Op. Atty. Gen. Fla. 76-61(Mar. 1976). In 1975, the Attorney General had explained the reasoning behind his opinion, when faced with the question of school board power over truant pupils:

The school board derives its authority to regulate in the disciplinary area and in connection with compulsory pupil attendance from the Legislature. See Art. IX, s. 1, State Const., requiring the Legislature to make adequate provision by law for a uniform system of free public schools and Art. IX, s. 2, giving the State Board of Education such supervision of the system of public

education as may be provided by law. See also Chs. 228 and 229, F. S. *Article IX, s. 4, does not in terms empower school boards to require attendance at public schools or to regulate or enforce the compulsory school attendance laws, and in this regard it does not appear to be self-executing* or to vest any of the police power of the state in the school officials.

Op. Atty. Gen. Fla. 75-148 (May 1975)(emphasis added). The Attorney General opined that the only school board control over truant pupils was that which was statutorily provided. Id. The 1978 statutory revision provided school boards with some general power, but that power was still considered to be very narrow. “Any power” was still modified by “educational purposes” as narrowly defined. §230.03(2) Fla. Stat (1980). No attorney general opinion prior to the 1983 statutory change considered the school boards to have broad authority without specific legislative authority. See, e.g. Op. Atty. Gen. Fla. 82-59 (Aug. 1982).

This state of affairs was significantly altered in 1983. Answering the power of school boards question posed in Op. 83-72, the Attorney General opined that the 1983 revision of section 230.03(2) Florida Statutes to “may exercise any power except as expressly prohibited by the State Constitution or general law,” was considered to greatly expand the authority of school boards, and he was so “constrained” to hold. Op. Atty. Gen. Fla. 83-72(Oct. 1983). This statutory change was considered to be the genesis of school board “home rule authority.” Id. Even so, after this broad expansion, the Attorney General was careful to still point out that

[w]here the state statute distinctly specifies the method, manner, or procedure in which a district school board is required to act in the exercise of a legislative power or administrative policy, such

legislative direction would prevail over a conflicting method or procedure adopted by a district school board.

Id. Explicit statutes still trumped general school board authority, article IX, section 4(b) notwithstanding.

This understanding that the 1983 revision was a significant expansion of school board authority is also noted in several cases. See W.E.R. v. Sch. Bd. of Polk County, 749 So. 2d 540, 542 (Fla. 2nd DCA 2000) (citing to Section 230.03, and noting that school board has significant authority in matters not addressed specifically by the legislature, but cannot enact rules contrary to legislation); Sch. Bd. of Collier County v. Fla. Teaching Profession N.E.A., 559 So. 2d 1197, 1198 (Fla. 2nd DCA 1990) (noting that since no statute expressly prohibited an act, general statutes “cannot be construed to limit a school board’s power under section 230.03(2) after 1983”); Sulcer v. Mcfatter, 479 So. 2d 1349, 1350 (Fla. 4th DCA 1986) (noting that since 1983 no specific statutory authority was needed for a school board to act).

This historical concept that article IX, section 4(b) was not self-executing, and that any local school board authority came from the 1983 change to the section 230.03 Florida Statutes was the consistent interpretation. Given the other educational provisions contemporaneously adopted it was a very reasonable interpretation. “By law” means legislation is needed to establish the education system and determine what supervisory role the State Board has over the school boards. See School Bd. of Miami-Dade County v. King 940 So. 2d 593, 603 (Fla. 1st DCA 2006) (noting the holding of Simon v. Celebration Co., 883 So. 2d 826, 831 (Fla. 5th DCA 2004) “to be that no private cause of action exists for the enforcement of Article IX, section 1, against *individual school boards* because the clause, in the words of the district court, “specifically states that the provision of an

adequate education must be made by the Legislature since the provision states that ‘adequate provision shall be made by law.’ ”).

In summation then, school board authority as historically understood was:

1. Both before and after 1968, and until 1978, school boards had no authority to do any act without explicit statutory authorization, for article IX, section 4(b) was not considered to be self- executing.
2. After 1978, school boards could act for educational purposes as narrowly statutorily defined based on section 230.03 Florida Statutes breathing life into article IX, section 4(b), but were still not considered to have “home rule powers.”
3. From 1983 to the present, school boards were considered to have “home rule powers” in that they could act without specific statutory authorization except as expressly prohibited by specific constitutional provision or general law, based on the statutory language in section 1001.32 Florida Statutes (2007).

What a contrast this history provides to Appellants' radical interpretation of school board authority. Appellants stated that that they considered the last phrase of section 1001.32(2) Florida Statutes to be a “questionable law,” because of limiting school boards to actions that do not conflict with general law. *IB.* at 18. Appellants’ position is that the statutory language limited school board authority as constitutionally provided for. *Id.* The contemporaneous and historical understanding was exactly the opposite. For the first time, this statutory language gave broad authority to school boards. The Attorney General was even “constrained” to opine that this language gave the districts great authority. *Op.* 83-72.

Given this historical understanding of school board powers, it casts one of Appellants' arguments in a very interesting light. Appellants argue that the only way to justify the constitutionality of the challenged statute is to interpret the Constitution

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.

IB. at 17. Since this alleged "mischaracterization" of local school board powers under the Constitution so accurately reflects the actual historical understanding of school board powers for the last forty years, Appellants' argument supports this Court upholding the Florida Schools of Excellence Commission as constitutional.

Not only is Appellants' novel interpretation of local school board powers contradicted by history, it is unsupported by the holdings of any cited cases. The cases cited for the proposition of broad school board authority under the constitution are Jones v. Braxton, 379 So. 2d 115 (Fla. 1st DCA 1979); School Board of Volusia County v. Academies of Excellence, 974 So. 2d 186.(Fla. 5th DCA 2008), and, possibly by analogy, NAACP, Inc. v. Fla. Bd. of Regents, 876 So. 2d 636 (Fla. 1st DCA 2004). First, it is worth noting that in neither Jones nor Volusia were there any state-level actors charged with defending the constitutionality of the statute; the parties were boards and private individual in both cases.

Jones was decided strictly as a matter of statutory interpretation, and only as dictum contains the comment that if decisions to build or not to build a school were to be state-level decisions, this would violate the Constitution. 379 So. 2d. at 118.

It is entirely unclear that state-level decisions requiring a school to be built, for example to comply with class size or growth management requirements, would violate the historically understood authority of school boards, but in any case this statement was only dictum in a case between private parties and a school board.

In Volusia, a challenge was brought to the constitutionality of the State Board's requiring a school board to allow a charter school to open in the district when the State Board reversed the board's denial of the charter school application. 974 So. 2d at 1191. The argument the school board made was that the statute was unconstitutional because it allowed the State Board to open a charter school in violation of article IX, section 4(b). Id. The court denied that claim on the ground that the statute did not authorize the State Board to open a school. Id. at 1192. It therefore did not reach the issue of whether a statute that allowed a school to be opened by the State Board was unconstitutional. Id.

Neither of the above cases provides authority for a result contrary to the historical understanding of article IX, section 4(b). Analysis of NAACP provides no broader support. NAACP technically dealt with the question of whether a challenge that a rule exceeded statutory authority could still be maintained when the status of the Board of Governors (BOG) had changed from a statutory to a constitutional entity, and the Court held that since the BOG could enact rules without explicit statutory authority, the case was moot. 876 So. 2d 636, 641. Unlike the history and language of the constitutional provisions relating to school boards, the Court in NAACP determined that not only was the BOG given the authority to operate, manage and control the state university system, that authority was subject only to legislative appropriation. Id. The language therefore at issue

in NAACP is distinct by terms and context from that applicable to school board powers.

While the holdings of the above cases do not support a broad interpretation of article IX, section 4(b), the holding and concurrence in a case interpreting another clause in article IX, section 4(b) supports the interpretation of school board powers subject to general law. In Florida Department of Education v. Glasser, 622 So. 2d 944 (Fla. 1993), a school board challenged a law that limited the level of non-voted discretionary millage that could be charged to .510 mills. Id. at 946. The district argued that this law violated article IX, section 4(b)'s provision that "the school board shall . . . determine the rate of school district taxes within the limits prescribed herein." The argument was that since the Constitution provided a limit of ten mills, that was the only limit on the authority of the school boards. Id. at 947.

The Court , in a plurality opinion, reversed the trial court and the district court, and held that the language in article VII, section 9 that provided "Counties, school districts and municipalities shall, and special districts may, be authorized by law to levy ad valorem taxes meant that the grant of authority in section 4(b) was still subject to legislative limits beyond the 10 mill limit. Id. at 947. Justice Kogan concurred, but found the provision in Article VII to be at best ambiguous as to whether the "by law" applied to school districts. Id. at 949. However, he thought that the provision in article IX requiring the provision "by law" of a uniform system of education provided all the authority the Legislature needed to limit the tax rate. Id. at 950. Glasser again undercuts the school boards' interpretation of article IX, section 4(b), but continues to be consistent with the concept that article IX, section 4(b) is not self-executing, and that school board

powers may therefore not be considered in isolation from enabling statutes and the rest of the Constitution.

The case law is not contrary to the historical understanding of the interplay of constitutional provisions and statutes, and historical practice is instructive when looking at the narrower question of the constitutionality of the Florida Schools of Excellence. Appellants' main argument is that this statute is unconstitutional because it allows a school to be established in a district but not controlled by the district. IB at. 7. The State Board has pointed out numerous examples of schools that are public schools over which the school boards have no authority. AB at. 16-17. While those examples need not be recited here, one classic example bears mention: The Florida School for the Deaf and Blind, which has been in existence since the 1800s. See § 1002.36. Fla. Stat. (2007)

There is no question that this school is a public school. Id. There is also no question that this school has never been under the control of a school board. Id. It is also beyond logical dispute that Appellants' proffered interpretation of article IX, section 4(b) would have found this school unconstitutional. From a historical perspective, it seems a stretch to conclude that by adopting the 1968 Constitution, voters intended to outlaw the Florida School for the Deaf and Blind. Yet, if Appellants' novel interpretation applied in 1968, it would have outlawed the Florida School for the Deaf and Blind. This Court, consistent with constitutional history and historic practice, should decline Appellants' invitation to interpret the Constitution in such a fashion that the Florida School for the Deaf and Blind would be unconstitutional.

Argument 1.B

PROVIDING AN ADDITIONAL PROCESS FOR ESTABLISHING A CHARTER SCHOOL, WHEN THE DISTRICT HAS A HISTORY OF UNFAIR AND INEQUITABLE TREATMENT OF CHARTER SCHOOLS, IS IN ACCORD WITH ARTICLE IX, SECTIONS (1) AND (2), AND NOT INCONSISTENT WITH ARTICLE IX, SECTION 4 (B) OF THE FLORIDA CONSTITUTION.

As Sir William Gladstone famously uttered, "Justice delayed is justice denied." This Court has recognized the truth of the statement. See Winicki v. Mallard, 417 So. 2d 742, 743 (Fla. 1st DCA 1982). This axiom is especially pertinent when understood in the context of applying for and starting a new charter school. The challenged statute requires that an alternative means of applying for a charter school be provided only when a district is determined to have failed to fairly and equitably treat charter schools. §1002.335 (5) (e) Fla. Stat. (2006). Appellants contend that prior to the creation of the Florida Schools of Excellence Commission, "fair treatment of charter schools was promoted by the ability of charter schools to appeal. . . to the state board . . ." IB, at 11. Since the State Board determined that only three districts had a history of fair and equitable treatment, (R. V6: 1187-1194), a factual determination not contested in this appeal, the Consortium demurs from such a conclusion.

While the Legislature has responsibility for creating the whole educational system, it also has the specific authority to provide for the State Board's supervisory authority. Art IX, §§1&2. In the instant case, the Legislature has acted within its constitutional authority to specify how the State Board of Education supervises school boards regarding charter schools. The Legislature may have created the Florida Schools of Excellence Commission after concluding

that the charter appeals process alone was inadequate to ensure fair and equitable treatment for all charter schools. A short history of two charter school appeals from Osceola County demonstrates why it would have been extremely reasonable to conclude that more supervision was required than the existing appeals process.

In October of 2003, the Osceola School Board denied two applications for new charter schools simply because the applications were for new charter schools. See generally, Sch. Bd. of Osceola County v. UCP of Central Fla., 905 So. 2d 909 (Fla. 5th DCA 2005), cert. denied, 914 So. 2d 954 (Fla. 2005); Sch. Bd. of Osceola County v. Acad. of Excellence, 914 So. 2d 981 (Fla. 5th DCA 2005)(following the UCP holding). Osceola denied the charter school applications because new charter schools would not be eligible for any construction funds. However, since the Legislature had determined that no new charter schools were eligible for construction funds, by definition, charter schools would never qualify to open under this standard. The court noted that these denials seemed to be based on policy, not law. UCP at 916.

Osceola denied these charters without a shred of good cause, and probably as a result, never won a legal proceeding at any level: The Board lost appeals to the State Board, Fifth DCA, and petitions for review at the Supreme Court were denied or withdrawn, but not until Fall of 2005. Sch. Bd. of Osceola County v. UCP of Central Fla., cert. denied, 914 So. 2d 954 (Fla. 2005).

Osceola was unsatisfied with the direct appeal process, so the board filed a related action bringing a constitutional challenge to the appeals process. See Sch. Bd. of Osceola County, Fla. v. State Bd. of Educ., 903 So. 2d 963 (Fla. 5th DCA 2005). Once again, the Board lost at every level. The Board lost at the circuit court and at the 5th DCA on venue. Id. The Board filed in the Second Circuit, lost

a motion for summary judgment, and then appealed to this Court. Sch. Bd. of Osceola County, Fla. v. State Bd. of Educ., 2nd Cir. Ct., Case No. 05-CA-1906 (Aug. 18, 2006) (Lewis, J.) (order granting summary judgment, aff'd per curiam, 955 So. 2d 571 (Fla. 1st DCA 2007) (see AB, Appendix C for trial court order)

The consequence of Osceola's conduct was to delay the opening of the proposed charter schools for a minimum of two years or longer. The real world consequences of delay are significant. By way of example, in addition to the expense of litigating for over two years (potentially a substantial expense for a school that has no students and thus no income) such a delay is a huge loss of time when trying to start a school. A charter operator could be forced to either pay rent or carry financing for a facility when they have no students and no income, or to lose the location and have to start over. It is hard to recruit teachers if there is no certainty on when if ever the school may open. Many other attendant hardships can be imagined that are not in anyway cured by the existing appeals process. And in Osceola, these consequences would have been experienced by blameless charter applicants. Such unreasonable delay could prove fatal to any new charter.

Given this example of unfair and inequitable treatment, it should not be assumed that providing an alternative method of authorizing charter schools is beyond the Constitutional purview of the Legislature. The State Board cited many examples of its supervisory authority, which do not need repetition. See AB at 22-23. Appellants somehow suggest that the State Board's supervisory authority is applicable only at a system level, and does not extend to impact schools. IB. at 33. That view is mystifying in light of the detailed legislative requirements for all aspects of the educational system at the district, school, classroom and individual level. See, e.g. AB at 22-23. It is far from clear beyond a reasonable doubt that

creating an additional method of charter school authorization, when charters have not been fairly and equitably treated, exceeds the Legislature's broad constitutional authority.

Argument 2

THE ESTABLISHMENT OF THE FLORIDA SCHOOLS OF EXCELLENCE COMMISSION FURTHERS, NOT UNDERCUTS, THE LEGISLATURE'S COMPLIANCE WITH THE CONSTITUTIONAL REQUIREMENT THAT "[A]DEQUATE PROVISION SHALL BE MADE BY LAW FOR A UNIFORM, EFFICIENT, SAFE, SECURE, AND HIGH-QUALITY SYSTEM OF FREE PUBLIC SCHOOLS."

Contrary to Appellants' suggestion, IB. at 31, the Legislature, not the 67 school districts, is charged with creating a uniform, high quality system of public education. Art. IX, §1 Fla. Const.. The question of what exactly violates the constitutional requirement for a uniform system is an open question, but whatever the requirement may be, Florida Schools of Excellence Commission furthers a high quality uniform educational system. In Glasser, Justice Kogan suggested that it was "allow[ing] students in one district to be deprived of basic educational opportunities while students in other districts do not suffer the same." Glasser at 950-51 (Kogan, J. concurring). He further suggested that it did not mean that every district had to have "Latin or painting classes." Id. at 950. In School Board of Escambia County v. State, 353 So. 2d 834, 836 (Fla. 1977), the court collected a number of instances that did not violate a uniform system. See State v. Holbrook, 176 So. 99 (Fla. 1937) (limiting employment authority and tenure decisions in only one district in the state); State v. Bd. of Pub. Instr. of Pasco County, 176 So. 2d 337 (Fla. 1965) (creating a special school taxing district within a school district); Dist. Sch. Bd. of Lee County v. Askew, 278 So. 2d 272 (Fla. 1973) (providing for

uniform expenditure per student without regard to tax base.). Escambia then held that uniformity did not require the same number of school board members or same pay for members on a statewide basis. 353 So. 2d at 838. Escambia also suggested that uniformity would not require a “uniform plant or curriculum,” but that “coordinated effort and direction provided by the state board are essential.” Id. In St Johns County v. Northeast Florida Builders Association, 583 So. 2d 685(Fla. 1991), the court noted nothing in the uniformity provision that required “uniform sources of school funding among the several counties.” Id. at 641. The Bush v Holmes decision really did not add to the understanding of uniformity, since it applied the concept to non-public schools. 919 So. 2d 392, 409 (Fla. 2006).


There is nothing in this patchwork of interpretations, mostly interpretations of what does not violate the uniformity clause, to suggest beyond any reasonable doubt that the Legislature’s attempt to ensure fair, equitable and uniform treatment for all charter schools at a statewide level violates the requirement for a uniform system. In fact, it would seem that the more equality there was for greater access to educational opportunities within and among the districts, the more this supports the concept of a high quality and uniform system of education. Likewise, the more statewide consistency there is in the charter school approval process, the more uniform over time will be the availability of charter options in every district.

Having school boards such as Osceola, which denied charter schools because they were charter schools, when other boards that have fairly and equitably treated charter schools, can only decrease the uniformity of the system of education. Even the school board motivation engendered by the Florida Schools of Excellence Commission, characterized by a lack of enthusiasm for charter schools authorized without board approval, may help to increase the fair and equitable

treatment of charter schools as boards annually strive to regain exclusivity, and a reputation for fair and equitable treatment of charter schools.

CONCLUSION

The Consortium respectfully requests that this Court decline Appellants' request to strike the Florida Schools of Excellence as unconstitutional.


DANIEL J. WOODRING
FLORIDA BAR No. 86850
WOODRING LAW FIRM
3030 Stillwood Court
Tallahassee, FL 32308
Office Location:
203 North Gadsden St.
Suite 1-C
(850) 567-8445
(850) 254-2939 Fax
Email: Daniel@WoodringLaw
Firm.com

CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing has been furnished by U. S. Mail or hand delivered this 27th day of May 2008, to:

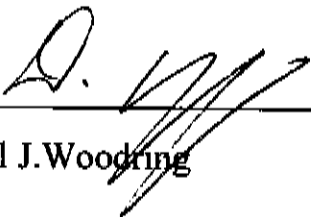
Jennifer S. Blohm, Esq

Meyer & Brooks, P.A.
2544 Blair Stone Pines Dr.
P.O. Box 1547
Tallahassee, FL 32302

Counsel for Appellant

Timothy D. Osterhaus
Deputy Solicitor General
Office of the Attorney General
PL-01 the Capitol
Tallahassee, FL 32399

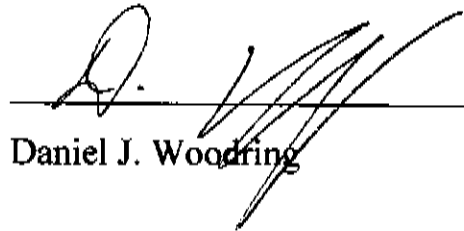
Counsel for Appellee



Daniel J. Woodring

CERTIFICATE OF COMPLIANCE

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


Daniel J. Woodring