THE SCHOOL BOARD OF BROWARD COUNTY, FLORIDA

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MEMORANDUM

TO: Abby Freedman, Chair
All School Board Members

FROM: Barbara J. Myrick, General Counsel

DATE: July 3, 2017

SUBJECT: **CONSTITUTIONAL ISSUES RELATED TO HB 7069**

The following is an analysis of HB 7069 (Legislation). Although I believe this is a full and accurate review of the legislation, I am sure there are additional details and nuances that would further support the position that a Constitutional challenge is an appropriate action to take at this time.

The following are the Florida Constitution Articles that the legislation is in violation of:

> ARTICLE IX of the Florida Constitution:
>
> Section 1 (a): The education of children is a fundamental value of the people of the State of Florida. It is, therefore, a paramount duty of the state to make adequate provision for the education of all children residing within its borders. 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 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.
>
> Section 4 (b): 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. Two or more school districts may operate and finance joint educational programs.

Section 6: The income derived from the state school fund shall, and the principal of the fund may, be appropriated, but only to the support and maintenance of free public schools.

ARTICLE II Section 6 of the Florida Constitution:

Every law shall embrace but one subject and matter properly connected therewith, and the subject shall be briefly expressed in the title…

ARTICLE VII Section 9 (a) of the Florida Constitution:

(a) Counties, school districts, and municipalities shall, and special districts may, be authorized by law to levy ad valorem taxes and may be authorized by general law to levy other taxes, for their respective purposes, except ad valorem taxes on intangible personal property and taxes prohibited by this constitution.

This memorandum addresses the five (5) primary areas ripe for challenge:

1. SINGLE SUBJECT REQUIREMENT

ARTICLE II Section 6 of the Florida Constitution:

"An act relating to Education" is the title with an introduction consuming 19 pages and the bill makes changes in 69 different statutes relating to education.

Challenge: It neither embraces one subject nor is it brief.

Likely outcome: Special session to divide the bill up into numerous smaller bills and vote separately. All smaller bills might not pass and delays the implementation.

2. STANDARD CHARTER CONTRACTS

ARTICLE IX Section 4 (b) of the Florida Constitution:

Challenge: Restriction of The School Board's authority "operate, control and supervise" all schools within the District.

Modification of 1002.33, Florida Statutes to make charter applications and contracts "standard" rather than "model." Additionally, any modification to the standard contract would be "presumed to be a limitation on charter school flexibility." Therefore, to prevail at any administrative proceeding, The School Board would have to overcome the presumption that the modification was invalid. Further, the statute states that The School Board cannot impose unreasonable rules or regulations that might prevent flexibility. It is possible to construe this part of the statute to mean

that The School Board might not be able to enforce rules and regulations required by statute if the trier of fact determined the rules and regulations to be unreasonable. If true, the statute "relegates local school boards to essentially ministerial functions," which violates Article IX. Duval County School Board (2008)

3. SCHOOLS OF HOPE

ARTICLE IX Sections 1 (a); 4 (b); and 6 of the Florida Constitution:

Challenge: Circumvents the direct involvement of The School Board in charter school contracting and approval process thus preventing The School Board from "operating, controlling and/or supervising all public schools in the District" and establishes a duplicative competitive private system.

a. Exempts Schools of Hope from the application process currently in the charter school statute. Operator simply submits a notice of intent.

b. Having only to submit a notice of intent compared to an application indicates this process is not intended to be a negotiation.

c. There would be no "voting" approval by The School Board, but simply the district entering into a performance-based agreement. The statute outlines the elements of the performance-based agreement.

d. Since The School Board has no ability to deny a notice of intent as it does a charter application, the decision to open a School of Hope is totally in the hands of the operator. Violation of Article IX Section 4 (b).

e. FDOE is required to create a form performance-based agreement for use in authorizing Schools of Hope. The bill gives the ability to dictate terms of the agreements to FDOE and/or the operator, thus again in violation Article IX Section 4 (b).

f. Also allows FDOE to enter into a performance-based agreement directly with an operator in certain circumstances, which appears to create a state authorizer of charter schools in violation of the First District Court of Appeals' holding in Duval.

g. Under Duval and other cases, school boards must retain the authority to both authorize and terminate a charter contract. If The School Board is not a party to the

performance-based agreement, it is not clear whetherThe School Board would have the authority to revoke or terminate an agreement.

h. The independence of Schools of Hope may also violate Article IX under Bush v. Holmes in which the Supreme Court held that Article IX commanded the legislature to adequately fund public schools but precluded it from funding "a duplicate competitive private system."

i. Currently charter schools are subject to district policies that are mutually agreed upon. Schools of Hope are exempt from all polices and there is no mechanism and/or agreement (charter) to allow the district and Schools of Hope to agree on policies.

j. Allowing Schools of Hope to become their own local educational authority for purposes of receiving federal funds would make these schools parallel to, and in competition with, district schools.

k. Schools of Hope would have statutory authority to *take* underused property from school districts. The District would be required on an annual basis to provide FDOE with a list of underutilized, vacant or surplus property and all a School of Hope would be required to do is offer $600 per student as part of its notice of intent and take possession of the underused property.

l. These provisions for Schools of Hope together may create a second competitive private system.

4. CHARTER SCHOOLS AS LOCAL EDUCATIONAL AGENCIES (LEA)

ARTICLE IX Section 4 (b) of the Florida Constitution (See Above):

Challenge: Modifies statutes regarding how a charter school can become its own LEA and therefore compete against a school district for federal funds, which would create a second competitive private education system.

Currently, statute allows for charter school systems [provides no definition of a "charter school system"] to apply to be designated an LEA if the charter school system includes both conversion and non-conversion charter schools and the non-profit board cannot contract with a for-profit school management organization. The bill takes way these two requirements.

The U.S. Department of Education defines a LEA as "a public board of education or other public authority legally constituted with a State for either administrative control or direction

of, or to perform a service function for, public elementary schools or secondary schools." (This *does* include public nonprofit charter schools, as established under state law.) However, this appears to violate Bush v. Holmes in that all free public schools must be under the control, operation, and supervision of the local school board and even though charter schools are public schools, they must remain under the control of the local school board. If charter schools are able to compete with school districts for federal funds, it would create a system in competition with local districts that the constitution prohibits.

5. SHARING DISCRETIONARY CAPITAL MILLAGE WITH CHARTER SCHOOLS

ARTICLE VII Section 9 (a) of the Florida Constitution:

Challenge: Violates the Constitution, as stated above, by requiring the funding of non-district capital projects that are not the "purpose" of the school district.

a. School districts currently *may* include capital outlay funding to charter schools, however the legislation would now *require* it.

b. School Districts have several statutory requirements to maintain and report their own educational facilities; to develop and report a five-year plan for capital improvements of district facilities; and developing budgets or estimated costs. These requirements serve to justify the decision to levy local *ad valorem taxes*.

c. Legislation would nullify how school districts control its schools and the discretion of how to use its locally-levied *ad valorem taxes*.

d. Amount given to charter schools based on number of students, regardless of need; even though district capital plans are based on need, as required by statute.

e. The Constitution currently prohibits the use of school districts' taxing power to aid any corporation, association, partnership or person. Article 7 Section 10.

f. The Florida legislature has the ability and discretion to continue to fund capital improvements for charter schools.

g. Capital funds would be provided to charter schools on a monthly basis starting in February 2018 and if the districts' *ad valorem tax* receipts are unavailable or insufficient, school districts would be required to use any other funds available to make the required payments to charter schools.

h. Requiring the sharing of *ad valorem taxes* could affect current contractual obligations and future financing. (See Sector Comment from Moody's)

References:

I would like to express appreciation to colleagues from other districts that have contributed to this analysis.

Florida Constitution:	Articles II, VII, and IX
Florida Statutes:	1002.33; 1011.71; 1013.35; 1013.62; 1031.31
Federal Regulations:	34 C.F.R. § 303.23
Case Law:	Duval County School Board v State Board of Education, 998 So. 2d 641 (Fla 1st DCA 2008)
	School Board of Volusia County v. Academies of Excellence, Inc., 974 So. 2d 1186 (Fla 5th DCA 2008)
	Bush v. Holmes, 919 So. 2d 392 (Fla. 2006)

REQUEST: **School Board approval for the Superintendent and the General Counsel to enter into an agreement with other school districts to challenge the constitutionality of HB 7069 and to spend up to $25,000 from the General Counsel's Department budget.**

Enclosure

C: Robert W. Runcie, Superintendent of Schools

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SECTOR COMMENT
21 June 2017

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Local government - Florida

Florida budget mandates school districts share capital revenues with charter schools, a credit negative

On June 15, Florida (Aa1 stable) Governor Rick Scott and the state legislature finalized the state's budget for fiscal 2018 (ending June 30, 2018), and along with it, a mandate requiring K-12 public school districts to share revenues generated by their respective 1.5 mill capital levy on a per-pupil basis between traditional schools and district-sponsored charter schools. Previously, school districts had the option, but not the obligation, to share revenues generated by the levy with district-sponsored charters. However, only three of the 46 school districts with charters chose to do so.

The mandate is credit negative for school districts with significant charter enrollment because they will have to transfer revenues that were previously earmarked for capital projects at traditional schools to charters within their district. The revenue-sharing formula stipulates that school districts allocate the funds remaining after debt service paid by the 1.5 mill levy on a full-time enrollment basis, less capital outlay funds received by charters from the state.

The new formula allows for a more equitable distribution of capital outlay funding for all students within a school district because charters will become eligible for the local and state funding sources that traditional schools have historically received. However, the mandate marks the third effective reduction in the capital millage rate since 2008 and continued charter growth under the new formula will increasingly pressure traditional schools' capital budgets. As capital revenues follow students to charters, traditional schools' ability to cut capital expenditures will be tempered by aging infrastructure and the need to attract and retain students.

As shown in Exhibit 1, the majority of Florida's largest school districts have a sizeable proportion of students enrolled in charters and will be negatively affected by the new reform. If the revenue-sharing formula under the new legislation were applied to schools districts in fiscal 2017, eight of the 10 largest districts would have had to transfer between 1.9% and 6.3% of their after-debt-service available capital revenues to charters within their district.

Exhibit 1

Largest Florida school districts by enrollment, percent chartered school enrollment and pro forma capital revenues transfers to chartered schools

School District	School District Enrollment Ranking	Percent of Students Enrolled in Charters	Pro Forma Capital Revenues Transfers to Charters*	Issuer Rating and Outlook
Miami-Dade	1	17.60%	5.70%	Aa3 stable
Broward	2	16.90%	4.30%	Aa2 stable
Hillsborough	3	8.50%	0.00%	Aa1 stable
Orange	4	6.80%	1.90%	Aa1 stable
Palm Beach	5	10.90%	4.10%	Aa2 stable
Duval	6	10.40%	2.50%	Aa3 negative**
Pinellas	7	5.70%	3.40%	Unrated
Polk	8	13.40%	5.70%	Aa3 no outlook**
Lee	9	13.40%	6.30%	Aa2 no outlook
Brevard	10	7.30%	0.00%	Aa2 no outlook

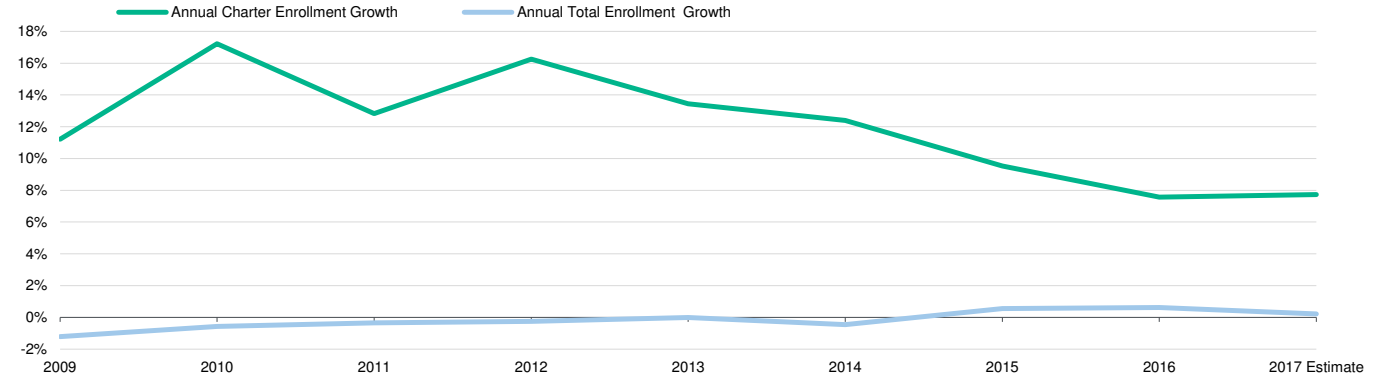
*These are our estimates of the transfers that would have occurred if the legislation were applied in fiscal 2017. Percentages are of after-debt-service available capital revenues. Our estimate assumes that only 84% of charter enrollment is eligible for shared capital millage revenues, in line with the statewide average.
** Rating on certificates of participation.
Sources: Florida Department of Education, Moody's Investors Service

Notably, Hillsborough County School District (Aa1 stable) and Brevard County School District (Aa2) would have been unaffected in fiscal 2017 by the new revenue-sharing formula after allowances for debt service and capital outlay funds for charters received from the state. However, in the event that the state decided not to appropriate capital outlay funds to charters, school districts would have to fill the funding gap. As a result, the funding formula leaves school districts exposed to the risk that state capital appropriation to charter schools will decline or cease. The Florida legislature appropriated $50 million for charter capital outlay in its fiscal 2018 budget, down from $75 million in fiscal 2017. Consequently, school districts will have to share roughly $25 million more from after-debt-service available revenues with eligible charters in fiscal 2018.

The legislation stipulates that only charters eligible for state capital outlay revenue receive their portion of the capital millage. In fiscal 2017, 84% of the state's 652 charter schools qualified for state funding. Rapid growth in charter enrollment across the state will further compress funds available for traditional school capital outlay in the next one to two years. As Exhibit 2 shows, enrollment in Florida charters grew roughly 8% in fiscal 2017, and Exhibit 3 shows charter enrollment grew to 10.4% of total enrollment, up from 4.0% in 2008. Although charter enrollment growth has slowed from double-digit rates earlier in the decade, it far outpaces the stagnant enrollment trends across traditional districts, as Exhibit 2 shows.

Exhibit 2

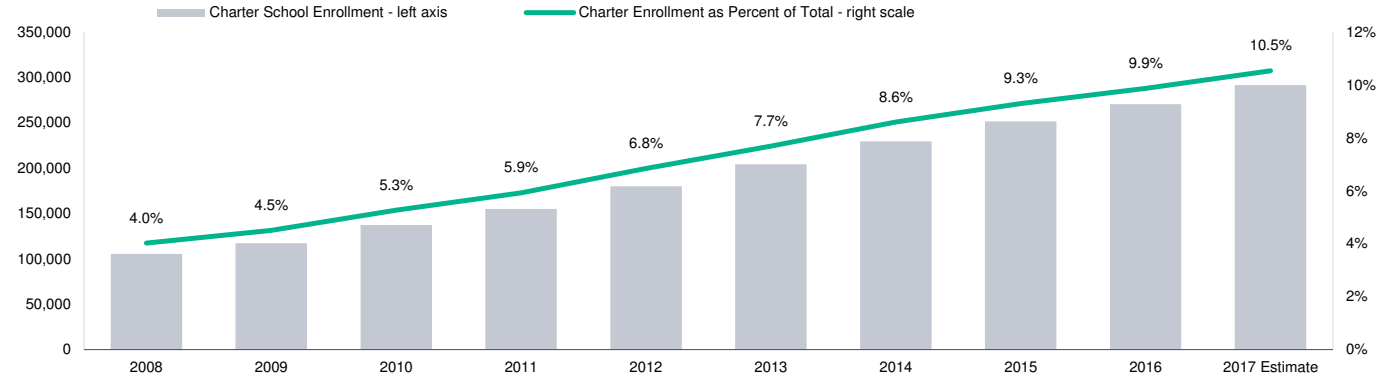
Florida charter school enrollment growth slows, but remains robust



Sources: Florida Department of Education, 2017 charter estimate derived from National Alliance for Public Charter Schools

Exhibit 3

Florida charter school enrollment grew steadily over the last decade



Sources: Florida Department of Education, 2017 charter estimate derived from National Alliance for Public Charter Schools

Capital millage revenues will follow the student as traditional public schools lose enrollment to their district-sponsored charters. Less revenues available for capital planning at traditional schools will likely lead to decreased investment in facility and technology upgrades. As a result, continued charter enrollment growth and the associated loss in capital funding for traditional schools may lead to a self-reinforcing cycle of decreased traditional public school enrollment and decreased revenues available for capital planning under the new legislation.

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