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Bill Sublette, Chairman  
Orange County Blue Ribbon  
Panel On Education  
Sublette, Sanders & Sanders  
250 N. Orange Ave., Ste. 1220  
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**via fax (407) 426-7789  
& hand delivery**

**Re: Opinion Regarding the Creation of a Countywide Elected Chairman of  
the School Board of Orange County**

Dear Mr. Sublette:

This correspondence responds to your questions regarding the possible recommendation of a countywide elected chair of the School Board of Orange County. In summary, I have concluded that the creation of a countywide elected chair is possible so long as the legislature enacts general law providing for such. This position may not be created internally, despite the Board's home rule power. An internal delegation of authority will not allow for a countywide elected chair, and there would be redundancy and conflicting authority, given the duties and responsibilities of the superintendent in s. 1001.51, Florida Statutes. The remainder of this correspondence will address the constitutional and statutory issues presented, and suggests a concept that may be recognized by the Panel as a meaningful basis for reform.

## **I. CONSTITUTIONAL ISSUES**

The extent to which the legislature by law may allow for the establishment of a countywide elected chair and for the transfer of powers traditionally reserved to the superintendent is limited by the Florida Constitution. *State v. Miller*, 313 So. 2d 656 (Fla. 1975); *Peter v. Meeks*, 163 So. 2d 753 (Fla. 1964); *Bd. Of Pub. Instr. For Sumter Co. v. Wright*, 76 So. 2d 863 (Fla. 1955). Under these authorities, the legislature may not by law expand the power of a government official beyond that expressly provided in the Florida Constitution. The Florida Constitution, Article IX, section 5, requires that in each school district there shall be a superintendent of schools who shall be elected or may be appointed. Article IX and s. 1001.461, Florida Statutes, provide the procedure by which the position may be made appointive. Article IX also provides: “[T]he district school superintendent in any school district shall be employed by the district school board as provided by general law.”

Notably, Article IX does not repose in the superintendent of schools any specific job duties or responsibilities. Thus, the duties of the superintendent are for the legislature to define “as provided by general law.” In contrast, Article IX, section 4, does confer specific powers to the school boards, and grants to them the powers to “operate, control and supervise all free public schools within the school district.”<sup>1</sup>

There is no federal right to a public education, and the decision to offer a free public education is left to the individual states. See, e.g., *Plyler v. Doe*, 457 U.S. 202, 221, 102 S.Ct. 2382, 2396-7 (1982) (no federal right to a public education, but once the state offers a public education, the program must be administered in accordance with the civil rights laws of the United States, including the constitutional right to equal protection of the laws). Although all 50 states provide for public education in their constitutions, there is a significant variation among the states in the constitutional language establishing the educational systems. Dayton, “Serrano And Its Progeny: An Analysis of 30 Years of School Funding Litigation”, 157 West Ed. Law Rptr. 447, 452 (Dec. 6, 2001) (Recognizing “considerable divergence” in the provisions for education among the state constitutions.) For example, in Wisconsin the state constitution provides that the “supervision of public instruction is vested in the state superintendent and such other officers as the legislature

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<sup>1</sup> The other component of Florida’s system of K-12 public education, the State Board of Education, has no authority conferred by the Constitution, other than “such supervision of the system of free public education as is provided by law.” Art. IX, § 2, Fla. Const. The constitutional framework for public education in Florida consists, therefore, of a program in which the elected school boards “operate, control and supervise” the public schools, and the State Board of Education and the superintendents of schools have only those specific powers as may be provided by the legislature in law.

shall direct and their . . . powers shall be prescribed by law". *Thompson v. Craney*, 546 N.W. 2d 123, 127 (Wis. 1996). Under the Louisiana constitution, the State Board of Elementary and Secondary Education is given the power to determine educational policy for the public schools, and the superintendent's responsibility is to implement the policies adopted by the State Board. *Board of Elementary and Secondary Education v. Nix*, 347 So. 2d 147 (La. 1977).

The Florida Constitution must be interpreted in accordance with its plain language, merely provides for the existence of the superintendent, and leaves for establishment in general law the powers and responsibilities of the position. See, *Coastal Florida Police Benevolent Assoc. V. Williams*, 838 So. 2d 543 548-9 (Fla. 2003) (The Florida Constitution must be construed by the plain meaning of its language). I conclude, therefore, the legislature may establish the countywide elected chair position without disturbing the requirement that the school boards "operate, control and supervise" the districts. Moreover, the legislature by general law may alter and transfer the powers, responsibilities and duties of the superintendent for those school districts operating with a countywide elected chair.<sup>2</sup>

## **II. FLORIDA STATUTES**

Several statutes should be considered and amended to allow for the countywide election of a strong chair of schools. And, of course, a new law would be required to authorize a referendum election for the local option of a countywide chair.

A. *Section 1001.32, Florida Statutes.* This statute incorporates the home rule authority of the district school boards from Article IX, section 4, of the Florida Constitution. The statute provides that the superintendent is responsible for the administration and management of the schools and serves as the secretary and executive officer of the district

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<sup>2</sup> The appellate decisions that defer to the authority of the superintendent, despite his conflict with the school board, turn on the interpretation of statutes, and no decision confers to a superintendent authority over a school board found in the Constitution. See, e.g., *Cox v. School Board of Osceola County*, 669 So. 2d 353 (Fla. 5<sup>th</sup> DCA 1996) (Under the relevant statutes, the superintendent has the sole authority to nominate persons for positions of employment, and even under the unique circumstances of this case, the school board had no authority to require the superintendent to employ a specific individual); *Spurlin v. School Board of Sarasota County*, 520 So. 2d 294 (Fla. 2d DCA 1988) (A person nominated for employment by the superintendent has a property interest in his nomination, and the school board may not reject the person nominated unless it can demonstrate good cause for the rejection).

school board, "as provided by law." The statute would be amended under this program to allow for the transference of responsibilities to the chair.

B. *Section 1001.33, Florida Statutes.* Subsections 1 and 2 of the statute should include the countywide chair of schools as one of the listed school officials, for each district that has enacted this form of governance. The chair will be the district executive officer if the local option is enacted.

C. *Sections 1001.36, .361 and .362, Florida Statutes.* These sections provide generally for five (5) school board members, each residing in a residence area but elected by the voters throughout the district. However, under s. 1001.36, school districts may have seven members, divided into either five residence areas with two district school board members elected at-large, or in seven member residence areas. There is a local option procedure for the election of district school board members by single member residence area vote. This option for single member area election is referred to as the "School District Local-Option Member Representation Law of 1984." Under the county chair program, these sections should be amended to provide that local option for a strong form of countywide chair is limited to those school districts with seven members in which the district is divided into five residence areas, with two members elected at-large. The position of countywide chair will, in such instance, be one of the two at-large seats.

D. *Section 1001.362.* This statute should be amended to clarify that the seven single member district option in subsection (2)(b)2 is unavailable if the district also wants the countywide strong form of elected chair.

E. *Section 1001.371.* This statute will be amended to accommodate the possibility of the countywide chair. If a school board enacts the local option it shall not elect a chair at the organizational meeting as provided in this section. The school board may elect a vice-chair who, in the absence of the countywide chair, shall only have the authority to chair the meetings and other proceedings of the school board, and sign official documents that would ordinarily be signed by the chair, until such time as the chair is again available.

F. *Section 1001.395.* This section should be amended to reflect the procedure for adopting the amount of compensation for the countywide elected chair.

G. *Section 1001.41.* This section should be amended in the first paragraph to provide that the countywide chair of schools shall make recommendations for action to the school board in those districts with the countywide chair form of governance.

H. *Section 1001.48.* This section should be amended to provide that the district school superintendent shall be the secretary and executive officer of the district school board, except in the event the district has established the position of a countywide chair of schools, in which case the countywide chair shall be the chief executive officer of the school board, and the superintendent shall be ex-officio secretary to the school board.

I. *Sections 1001.49, .50 and .51.* These statutes should be amended to redirect the authority and powers of the superintendent in any district that has enacted the countywide chair of schools form of governance. If the district adopts this local option, the chair shall exercise the powers that the legislature transfers in general law.

These statutes confer by general law a comprehensive array of administrative and management powers which must be considered for reassignment to the countywide chair of schools. A paramount objective should be the elimination of redundant or conflicting areas of responsibility.

You may consider that an ideal outcome is a system by which the chair of schools will provide leadership in the business and proprietary departments, such as finance, food service, transportation, technology, IT/MIS, risk management, HR and maintenance. Under this program, the powers in subsections 1001.49(1) and (3)-(6) would generally be transferred to the chair. Subsection 2 of s. 1001.49 should remain with the superintendent under the proposed framework for the division of responsibilities. This provides that the superintendent shall advise and counsel the school board "on all educational matters and recommend to the district school board for action such matters (involving education) as should be acted upon." If the local option program is advanced, the Panel should consider that the superintendent shall remain the educational leader, charged with developing programs of educational excellence, whereas leadership of the business and governance functions will be reposed in the chair.

Section 1001.50 should be amended to provide for the countywide chair of schools to be the executive officer of the district in districts that enact that form of governance. The statute should provide that even if the local option is enacted the superintendent remains outside the provisions of laws relating to tenure of employment and contracts with other school personnel. The statute may also provide that if the district enacts the local option, the superintendent shall be the chief education official of the district, responsible to advise the chair and the district school board on all educational matters, and make recommendations within that area of assigned responsibility. Lastly, s. 1001.51 will be amended to reassign responsibilities between the countywide chair of schools and the superintendent, acting as chief educational officer.

J. *Miscellaneous.* It will be necessary to consider other statutes and administrative rules for amendment to accommodate the possibility of a countywide chair of schools. For example, consideration should be given to whether the chair will take over responsibility for enforcement of attendance, as provided in s. 1001.53, or, whether the chair assumes responsibility for the program of records retention, including educational records, under s. 1001.52. Lastly, the district and SBOE will be required to amend their policies to accommodate the chair in areas of operations such as purchasing and facilities.

### **III. RESPONSES TO THE SPECIFIC QUESTIONS RAISED IN YOUR MEMORANDUM OF DECEMBER 14, 2004**

By memorandum dated December 14, 2004, you presented four questions, which are answered in the order presented:

A. What are the state constitutional, or statutory, impediments, if any, to the creation of a countywide elected chairman of the Orange County School Board?

The school board is a constitutional unit of government in Florida, with home rule. Therefore, it may exercise any power for school purposes, unless that action is expressly prohibited by the state Constitution or general law. General law currently provides for the elected school board members to elect the chair at the organizational meeting. Therefore, under general law, the election countywide of the chair is expressly prohibited by the existing statute that specifies the procedure for an annual organization of the school board. Moreover, there are currently statutes that require the superintendent of schools to be the chief executive officer, responsible for management and administration of the school district. Accordingly, it will be necessary to amend general law to allow for the local option of a countywide elected chair of schools. The statutes must also be amended to provide for a transfer of powers if the district adopts the local option for that form of governance.

There is no constitutional provision that expressly prohibits the creation of the local option for a countywide elected chair. As discussed above, the only constitutional provision regarding the superintendent of schools is found in Article IX, section 5, and that provision merely requires that in each school district there "shall be a superintendent of schools." The Constitution of Florida allows for the appointment of the superintendent by the school board, and when appointed, the "district school superintendent . . . shall be employed by the district school board, as provided by general law." However, it is constitutionally required that the school board continue to operate and control the district, and the position of superintendent must remain. It is also my opinion that in a district with a countywide elected chair of schools, the superintendent must retain a meaningful role

and authority and the position of chief educational officer, responsible for leadership in the area of curriculum and instruction, will satisfy that requirement.

B. If there are no state constitutional impediments to the creation of such a position, what methods are available or required for the creation of such a position?

The school board may, under current law, elect a chair at the organizational meeting and, by bylaw or policy amendment, delegate substantially more duties to that person than is the norm. The extent of the delegation would be subject to the restrictions of the state Constitution and general law, and such delegation could not transfer authority and powers required to be exercised by the superintendent. A mere internal action of the school board, such as a vote of the school board members to create a strong form of chair will be insufficient to accomplish the objective under consideration. The position would not be elected countywide by the voters, and the powers to be exercised would be severely limited by the existing statutes that call for the superintendent to exercise comprehensive and specific powers in the management and administration of the school district. Additionally, whatever internal action might be taken by the school board is subject to rescission by majority action at any future meeting.

A special law establishing the local option procedure for the countywide elected chair of schools may violate article III, section 11(a)(1), which prohibits special laws pertaining to election, jurisdiction, or duties of officers. See, e.g., *Kane v. Robbins*, 556 So. 2d 1381, 1383-84 (Fla. 1989) (holding that a school board member is an "officer" for purposes of the constitutional provision which prohibits special laws pertaining to election, jurisdiction, or duties of officers).<sup>3</sup> Therefore, the adoption by the legislature of a general law is preferable, especially in light of the language in article IX, section 5. That provision states that if the superintendent is appointed in any school district, that superintendent "shall be employed by the district school board as provided by general law." This reference to "general law" in the Constitution contrasts with the legislature's reference to provision "by law" in s. 1001.32(3) when it describes the superintendent's authority as a matter of

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<sup>3</sup> There is a distinct difference between a general law and a special law. A general law operates uniformly upon subjects as they may exist in the state, applies uniformly within permissible classifications, and operates universally throughout the state, or relates to a state function or instrumentality. A general law operates uniformly, not because it operates upon every person in the state, but because every person brought under the law is affected by it in a uniform fashion. Conversely, a special or local law is one relating to, or designed to operate upon, particular persons or things, or in a specifically indicated part of the state, or one that purports to operate upon classified persons or things. Thus, special laws differ from general laws in that they can operate in a limited geographic area within the state or can regulate the conduct of a limited class of persons within the state.

constitutional interpretation. There is at least a significant possibility a court will place significance on the distinction. Therefore, the procedure with the greatest chance of passing constitutional muster is a local option for the election of a countywide chairman of schools, provided in general law, available only to school districts with an appointed superintendent and a seven-person school board, constituted under s. 1001.36(1)(a), with five-member residence areas and two members elected at-large. The countywide elected chair would be one of the two at-large seats.

The general law should require a referendum election for the local option of a countywide chair. Even though a referendum election may not be constitutionally required, the Legislature has set a clear precedent of requiring a referendum election for other school district local options, such as the single-member representation option in s. 1001.362 and the option for making the superintendent an appointed position, as provided in s. 1001.461. In summary, it will be necessary for various general statutes to be amended to allow for meaningful authority and responsibility in the countywide elected chair and to avoid a redundancy between the position of superintendent and that of the countywide chair of schools. Without an amendment to the general laws, the position will be either largely ceremonial or redundant.

C. What powers may be granted to the chair of schools, and what powers are specifically reserved to the school board and superintendent by the state constitution or statute?

The discussion above identifies the statutes that currently repose specific powers in the superintendent. The authority currently reposed in the superintendent may be granted to the countywide chair of schools because the state Constitution merely provides for the position of superintendent, and relegates to the legislature the policy decision regarding the specific powers to be conferred. A court may conclude that a statutory scheme rendering the superintendent of schools completely impotent or ceremonial violates Article IX. It may be implicit in the Constitution that the superintendent must have meaningful authority in the system of public education because the position is mandated in the Constitution. Notwithstanding, a system in which the countywide elected chair has the power under general law to manage the business and proprietary functions of the school district and to be its chief executive officer should be viewed as constitutional if the superintendent retains meaningful authority over vital areas of the public education program. A designation as chief educational officer of the district should be consistent with Article IX. The superintendent will have real authority in the areas of the development of curriculum, the acquisition and improvement of instructional materials, including textbooks, the development of programs related to academic improvement and the management of other components of the school system related to the educational "product" of this

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enterprise. Support for this innovation may be found in No Child Left Behind, which encourages alternative forms of school district governance when the motivation behind the restructuring is the improvement of education and academic achievement in the district.<sup>4</sup>

In no event may the strong chair supplant the current constitutional requirement for the school board to operate and control the district. Even with the option under consideration, the school board shall receive proposals from the chair and must take action by vote.

D. Are there other jurisdictions in Florida which have delegated similar powers to a single countywide elected chairman or other similar position?

No other school district in Florida has a strong form of governance reposed in a countywide elected chair. That system is prohibited unless the statute calling for the school board members to elect the chair at the organizational meeting is amended.

### **CONCLUSION**

It has been a pleasure to work with you with regard to this concept for a unique innovation in public school district governance. Please advise if there are further research assignments related to this or any other topic of interest to the Blue Ribbon Panel.

Very truly yours,

Usher L. Brown

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<sup>4</sup> Consideration must be given to the structure for dealing with the potential for conflict between the two positions. When the educational leader determines that he or she wants certain curricula or instructional personnel, for example, we stray into the chair's areas of purchasing, hiring and the authority to determine the recommendations to the board for action. A possible resolution of this conflict is a requirement that, subject to the chair's authority to recommend the superintendent's employment, the chair is required to recommend to the board for action the superintendent's proposals made in the area of the educational responsibility, unless the chair has "good cause" to reject the proposal. This system of balances is analogous to the current law in the area of personnel recommendations, and may be sufficient to resolve this potential conflict.