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MEMORANDUM

TO: Commissioner Richard Corcoran

FROM: Matthew Mears, General Counsel

RE: Hillsborough County School Board; Nonrenewal of Charter Schools

DATE: July 12, 2021

Background: You have requested an analysis of whether there is probable cause to find that the Hillsborough County School Board violated the law for the purpose of implementing the enforcement authority of the State Board of Education under section 1008.32, Florida Statutes. My conclusion is that there is probable cause to find that the School Board violated section 1002.33(8), Florida Statutes. Whether the actions of school board members constitutes neglect of duty, misfeasance, or malfeasance is not addressed in this memorandum.

Summary of Facts: On June 15, 2021, four charter school contracts whose contract terms all expired on June 30, 2021, came before the Hillsborough County School Board (Hillsborough or School Board) with a recommendation from Superintendent Addison Davis and District staff to renew the contracts. Two of these charter schools had been in operation for 10 years, and two were just concluding initial five-year terms of operation. The most recent grades at the two largest schools were B's, and grades at the remaining two schools were C's. District staff conducted a comprehensive review of these charter schools covering over 130 performance criteria. No grounds for nonrenewal were identified. Although the 90-day deadline to provide written notice of nonrenewal had passed, and neither staff nor the Superintendent had found grounds to deny renewal of the charters, the School Board voted to deny the renewal of four existing charter school contracts. Written notice of the nonrenewal was not provided to the charters until June 29, 2021, one day before the expiration of the contracts.

Issue 1: Whether there is probable cause to find that the Hillsborough County School Board violated the law when it provided written notice of nonrenewal to four charter schools one day before the expiration of the contracts.

Conclusion: Since section 1002.33(8) requires that written notice be provided at least 90 days before nonrenewal, the School Board of Hillsborough County violated section 1002.33(8) by providing written notice to the charter schools one day before expiration of the contracts.

Issue 2: Whether the violation was cured by making the nonrenewal effective on September 27, 2021, which is 90 days after the written notice of nonrenewal was provided to the charters.

Conclusion: This action did not cure the violation; there is no provision for unilateral extension of the contracts, and a nonrenewal after the school year begins would result in harm to the educational system, students and their families.

Issue 3: Whether there is probable cause to find that Hillsborough County School Board violated the law by failing to provide sufficient grounds for an emergency termination and by failing to make academic achievement the most important factor in a non-emergency nonrenewal decision.

Conclusion: The District failed to proffer any of the grounds for emergency termination and failed to utilize the process for immediate termination, as provided for in section 1008.33(8)(c). Moreover, the School Board failed to make student academic achievement the most important factor when determining whether to renew, as required by section 1002.33(8)(a), Florida Statutes.

Issue 4: Whether the State Board of Education's authority to supervise the system of education as a whole, under section 1008.32, authorizes it to take action concerning the School Board's action even though that decision can be challenged by the charters in the Division of Administrative Hearings.

Conclusion: Section 1008.32, Florida Statutes, provides the State Board the authority to order compliance with laws and rules and, ultimately, initiate actions against the school boards for failing to comply. Because the State Board can consider the interests of nonparties to the contract and order remedies that the Division of Administrative Hearings cannot, it retains the authority to take action. In this case, there is probable cause to find that the School Board of Hillsborough County violated section 1002.33(8), Florida Statutes.

FACTUAL BACKGROUND

Hillsborough County is the fourth most populous county in Florida, with nearly 1.5 million people. Hillsborough County Public Schools serves approximately 220,000 students. Since 2016, the Hillsborough County School District has had more of the lowest-performing elementary schools than any other district in the state. Since 2017, the District has had the highest number of persistently low-performing schools in the state, with more than 21% of the state's persistently low-performing schools.

Since at least 2014-15, Hillsborough's charter schools have outperformed Hillsborough's traditional public schools on ELA and Math assessments. During the 2018-19 school year, which is the most recent year data is available, 61% of Hillsborough's charter school students scored at grade level or above on the ELA assessment, compared to 53% of non-charter students. Similarly, 59% of charter school students scored at grade level or above on the Math assessment, compared to 54% of non-charter students.

A. The Four Charter Schools

The charter schools had been operating under contracts signed five or ten years earlier. One school is a Title I school and more than one-third of the student population from two of the other schools come from economically disadvantaged homes. All four serve high percentages of minority students. The details of the schools are listed below, along with the analysis provided by District staff when reviewing the schools for renewal of their contracts.

Kid's Community College Charter High School's initial charter contract was signed in April 2016 and expired five years later, on June 30, 2021. It first opened its doors to students for the 2017-18 school year. It currently enrolls approximately 178 students in grades 9-12, with nearly 33% of the student population being economically disadvantaged. Kid's Community College Charter High School also serves a large minority student population: 37% Black students and 43% Hispanic students. The school's most recent grade is a C.

In April 2021, specialized District staff performed a comprehensive charter contract renewal review and found that the school "successfully met the majority of performance criteria." In particular, there were 141 performance criteria, 134 of which were applicable to the school. The school met 132 of the 134 performance criteria, and "partially met" the remaining two criteria:

- Evidence that expenditures do not exceed available resources in each fund.
- Evidence of payments and receipts for Teacher Lead Funds.

Accordingly, the staff and Superintendent recommended a five-year renewal, with two recommendations to the school related to the above-stated criteria.

Pivot Charter School's initial charter contract was approved in May 2011 and renewed in June 2016. The renewal contract expired five years later, on June 30, 2021. It first opened its doors to students for the 2011-12 school year, and it currently enrolls approximately 220 students in grades 6-12, with at least 35% of its student population being economically disadvantaged. The school has maintained a school grade of C the past two years.

In April 2021, specialized District staff performed a comprehensive charter contract renewal review and found that the school "successfully met the majority of performance criteria." In particular, there were 141 performance criteria, 134 of which were applicable to the school. The school met 132 of the 134 performance criteria, and "partially met" the remaining two criteria:

- Evidence that budget estimates are reasonably accurate.
- Evidence that expenditures do not exceed available resources in each fund.

Accordingly, the staff and Superintendent recommended a five-year renewal, with two recommendations to the school related to the above-stated criteria.

Southshore Charter Academy's initial charter contract was approved in April 2016 for a five-year term, expiring on June 30, 2021. The school opened in the 2016-17 school year and

now enrolls approximately 1080 students in grades K-8. The school's most recent school grade is a B.

In March 2021, specialized District staff performed a comprehensive charter contract renewal review and found that the school "successfully met the majority of performance criteria." In particular, there were 141 performance criteria, 137 of which were applicable to the school. The school met 120 of the 137 performance criteria, "partially met" five criteria, and did not meet twelve criteria.

Based on the review, the staff and Superintendent recommended a five-year renewal, with recommendations that the District staff would monitor over the contract term to ensure compliance with the criteria that were not sufficiently met.

Woodmont Charter School's initial charter contract was approved in April 2011 and renewed in 2016. The renewal contract provided that the contract term was for five years, expiring on June 30, 2021. The school opened in the 2011-12 school year and now enrolls approximately 758 students in grades K-8. Woodmont's student population is diverse: 67% of its population is comprised of Black students and 21% are Hispanic students. It is a Title I school, meaning that 100% of its student population is economically disadvantaged. The school has been graded a B school since 2017-18.

In March 2021, specialized District staff performed a comprehensive charter contract renewal review and found that the school "successfully met the majority of performance criteria." In particular, there were 141 performance criteria. The school met 125 of the 141 performance criteria, "partially met" fifteen criteria, and did not meet one of the criteria, which related to timely entering data in the student information system.

Based on the review, the staff and Superintendent recommended a five-year renewal, with recommendations that the District staff would monitor over the contract term to ensure compliance with the criteria that were not sufficiently met.

B. June 15, 2021 School Board Meeting

On June 15, 2021, the Hillsborough County School Board considered whether to renew the four charter contracts, set to expire on June 30, 2021. District staff had thoroughly reviewed the charters and recommended renewal. Superintendent Addison Davis recommended renewal. The School Board voted to nonrenew.

While the School Board did provide reasons for each nonrenewal, summarized below, the general discussion throughout the meeting included members' concerns about charter schools that were operated by management companies, competition with nearby traditional public schools, and the perception of funds being pulled from traditional public schools to fund the charter schools.

Name	Action Item Description	Superintendent Recommendation	Board Decision	Reasons Stated at the 6/15 Meeting
Kid's Community College Charter High School	Renewal and consolidation ¹ (Contract exp. 06/30/2021)	Approve for 5-year renewal	Deny	<ul style="list-style-type: none"> • Financial issues² • Student performance/academic achievement
Pivot Charter School	Renewal (Contract exp. 06/30/2021)	Approve for 5-year renewal	Deny	<ul style="list-style-type: none"> • Financial issues • Academic performance
SouthShore Charter Academy	Renewal (Contract exp. 06/30/2021)	Approve for 5-year renewal	Deny	<ul style="list-style-type: none"> • High teacher turnover • ESE compliance issues • Failure to meet class size requirements • No gifted teacher at the school
Woodmont Charter School	Renewal (Contract exp. 06/30/2021)	Approve for 5-year renewal	Deny	<ul style="list-style-type: none"> • ESE and ESOL compliance issues • High administration turnover • Failure to comply with class size • Student performance

C. Commissioner Corcoran's Letter to the School Board

On June 23, 2021, the Commissioner advised Superintendent Davis and School Board Chair Lynn Gray, by letter, that the purpose of the 90-day nonrenewal notice is to minimize disruption to the parents, students, and teachers, and that the notice of intention is clearly meant to occur no later than 90 days before the charter contracts are set to expire. The Commissioner requested that the School Board reconsider its actions and renew the charter contracts, pursuant to statute and the School Board's staff recommendations. Failing this, the Commissioner

¹ The action item was to consolidate Kid's Community College Charter High School with and Kid's Community College Charter Riverview South and then renew the charter contract as one school. The high school's charter contract expired June 30, 2021; however Riverview South's charter maintains intact and is not yet up for renewal.

² Note: This school was put on a corrective action plan in 2018 to remedy the financial issue but is now "in the black." The school board continues to monitor the corrective action plan.

requested that the School Board provide the factual and legal justifications supporting the School Board's actions taken on June 15, 2021.

D. June 29, 2021 School Board Special Meeting and 90-day Notice Letters

On June 29, 2021, the School Board held a special meeting in response to Commissioner Corcoran's letter. During this meeting, the School Board did not renew the contracts, but instead approved nonrenewal letters for the four charter schools, dated June 29, 2021. The special meeting included public testimony from parents, staff, and others regarding the charter schools.³

LEGAL ANALYSIS SUPPORTING A FINDING OF PROBABLE CAUSE THAT THE SCHOOL BOARD FAILED TO FOLLOW THE LAW

Issue 1: Whether there is probable cause to find that the Hillsborough County School Board violated the law when it provided written notice of nonrenewal to four charter schools one day before the expiration of the contracts.

Analysis: School boards must comply with specific legal requirements when determining contract renewal or nonrenewal decisions and noticing affected parties. The 90-day requirement for written notice is found in section 1002.33(8)(b), Florida Statutes:

At least 90 days before renewing, nonrenewing, or terminating a charter, the sponsor shall notify the governing board of the school of the proposed action in writing. The notice shall state in reasonable detail the grounds for the proposed action and stipulate that the school's governing board may, within 14 calendar days after receiving the notice, request a hearing. . .

Where the charter contract expires without a provision for extending it beyond the term, the date that the contract expires is the point from which the 90-day notice must be provided. This is because nonrenewal happens automatically when a contract reaches the end of its term; it simply expires. To provide 90-days' notice before nonrenewal, notice must have been provided 90 days before June 30, 2021, or by April 1, 2021. Instead, the District provided written notice on June 29, 2021, just one day before expiration of the contracts.

³ One brief example of the public comment made by a parent of a student attending Kid's Community College Charter High School is quoted below.

"My oldest has an anxiety disorder, and he has panic attacks and shuts down in large crowds. But he needed to find a high school. So we found the KCC High School. And he not only survived his first year, he thrived. All of the teachers knew him. He knew everybody. He joined clubs which were amazing. This is a kid that is terrified of everybody. And being in public. And did so well. He did so well, but he went and got a job. He's not in the public eye. He's in the back of a kitchen. But he is leaving his room and I am so proud. And I am not anti-public. My two youngest went to [named school] last year and my [middle] son will go to [named school] next year. He does well in crowds and enjoys other people. But [the oldest student] needs a small environment. And they took such good care of him. They went over his IEP, they made sure that he had everything he could need, and he thrived and it was amazing. That's all I have to say. I need that school."

Conclusion: As a result, there is probable cause to find that the Hillsborough County School Board violated section 1002.33(8) by providing written notice to the charter schools one day before expiration of the contracts.

Issue 2: Whether the violation is cured by making the nonrenewal effective on September 27, 2021, which is 90 days after the written notice of nonrenewal was provided to the charter schools.

Analysis: Where a statute does not provide the remedy for a failure to meet a statutory time limit, as is the case here, courts analyze whether the delay affected the fairness of the proceeding, the correctness of the decision or caused prejudice, in order to determine whether the action is unenforceable. *See, Dep't of Business Regulation v. Hyman*, 417 So. 2d 671 (Fla. 1982); *School Board of Volusia County v. Volusia Elementary Charter School*, 12-1612 (Fla DOAH December 14, 2012) (Recommended Order) (failure to establish that the delay of at most one day in delivering 90 day notice prejudiced the charter's ability to defend itself or impaired the fairness of the proceeding or correctness of the action). First, there is no authority for a unilateral extension of a charter contract. Since a contract represents an agreement, one party cannot unilaterally extend its term. Whether a district can extend a contract, which on its terms has already expired, is unknown. Had Hillsborough provided *written* notice to these charters on or before April 1, 2020, stating in "reasonable detail the grounds" for its intent not to renew their contracts, all of the issues presented could have been, and almost certainly would have been, resolved in an orderly and efficient manner with minimal disruption to the delivery of educational services. Instead, the district proposes to nonrenew months into the 2021-22 school year. This action is clearly contrary to the best interest of students and Florida's education system. The Department is not aware of a single example where a school board has done this in the past. Well over 2,000 students who attend these schools and their parents must make decisions about enrollment in the 2021-22 school year, with the potential for closure sometime in the middle of the school year. Each of the impacted schools would have already begun the 2021-22 school year, signed teacher and staff contracts, secured their school facilities, purchased instructional materials, and expended various funds in order to obtain services necessary to run the school for the year. The uncertainty and disruption caused by the untimely action of the Hillsborough County School Board is harmful to the state's educational system.

Conclusion: Extending the date of nonrenewal until September 27, 2021, did not cure the violation; there is no provision for unilateral extension of the contracts and a nonrenewal well after the school year begins would result in harm to the educational system, students and their families.

Issue 3: Whether there is probable cause to find that Hillsborough County School Board violated the law by failing to provide colorable grounds for an emergency termination and by failing to make academic achievement the most important factor in a non-emergency nonrenewal decision.

Analysis: A district need not provide 90-days' notice when it terminates or nonrenews on an emergency basis; however, it must meet the heightened requirements for such action. A charter may be terminated immediately in narrow circumstances as provided in section 1002.33(8)(c), which provides in part as follows:

A charter may be terminated immediately if the sponsor sets forth in writing the particular facts and circumstances indicating that an immediate and serious danger to the health, safety, or welfare of the charter school's students exists. . . . The sponsor shall clearly identify the specific issues that resulted in the immediate termination and provide evidence of prior notification of issues resulting in the immediate termination when appropriate. . . .

This language necessarily requires a school board to consider the *particular* facts and circumstances of *any given case* to determine whether, based on those *particular* facts and circumstances, an immediate and serious danger to the charter school's students exists in that specific case at the time a charter is terminated. See Broward County School Board v. Championship Academy of Distinction at Davie, Inc., No. 19-4818 and No. 19-5310RU, 2020 WL 4561286 (Fla. DOAH July 31, 2020) (Final Order). In School Board of Palm Beach County v. Survivors Charter School, Inc., 3 So. 3d 1220, 1233 (Fla. 2009), the Florida Supreme Court noted the immediate termination provision applies only to *emergency* circumstances where the health, safety, or welfare of the students is threatened immediately—i.e., without interval of time. See id. at 1233-34. The District did not attempt to utilize this procedure and the grounds it provided to the charters in its written notices does not even approach an immediate serious danger to the health, safety or welfare of students.

Aside from the heightened requirements for emergency termination, the statutory provisions for nonrenewal, as provided in section 1002.33(8)(a), Florida Statutes, requires that:

The sponsor shall make student academic achievement for all students the most important factor when determining whether to renew or terminate the charter. The sponsor may also choose not to renew or may terminate the charter **if the sponsor finds that one of the grounds set forth below exists by clear and convincing evidence:**

1. Failure to participate in the state's education accountability system created in s. 1008.31, as required in this section, or failure to meet the requirements for student performance stated in the charter.
2. Failure to meet generally accepted standards of fiscal management.
3. Material violation of law.
4. Other good cause shown.

There is no basis in Florida law, or in the terms of the instant charter contracts, to find that school grades of C or higher would support nonrenewal. In fact, a grade of C means that the school is making satisfactory progress. See, § 1008.34(2), Florida Statutes.

Under the charter statutes, as well as under the school improvement statute applicable to school districts, grades below a C require steps to improve student outcomes. See, §§ 1002.33(9)(n) and 1008.33(4)(c), Florida Statutes. In contrast, grades of C or higher allow a school to exit the special oversight imposed on lower-performing schools. Thus, "the most

important factor” that a school board must consider “when determining whether to renew or terminate the charter” provides no support for Hillsborough’s actions.

The charter statute provides four additional grounds for nonrenewing a charter, provided that the school board establish that these secondary grounds “exists by clear and convincing evidence.” This intermediate level of proof requires that the total sum of the evidence be of sufficient weight to convince the trier of fact without hesitancy. In re Hawkins, 151 So. 3d 1200 (Fla. 2014); In re Davey, 645 So. 2d 398, 404 (Fla. 1994).

As to the other four grounds for nonrenewal permitted by statute, there is no evidence – especially not clear and convincing evidence – that they have been met. First, the schools have all participated in the accountability system and have all achieved passing grades, unlike some other schools in Hillsborough County. Second, staff analysis has not uncovered any failure to meet generally accepted standards of fiscal management, and at most, only minor oversights in documentation have been alleged. Third, there has not been any material violation of law alleged, much less shown by clear and convincing evidence. Finally, there has not been any other “good cause shown.” The recording of the meeting demonstrates an animus against charter schools in general and these in particular, supported by flimsy reasons offered only at the direction of counsel, and despite the recommendation of the Superintendent and his staff.

Conclusion: The District did not proffer any ground approaching an immediate and serious danger to the health, safety, or welfare of the charter schools’ students, which might allow it to avoid the requirement to provide 90-days’ notice before nonrenewal. Moreover, given the performance of these schools, there is probable cause to find that the School Board failed to make student academic achievement the most important factor when determining whether to renew, as required by section 1002.33(8)(a), Florida Statutes.

Issue 4: Whether the State Board of Education’s authority to supervise the system of education as a whole, under section 1008.32, authorizes it to take action even though that decision can be challenged by the charters in the Division of Administrative Hearings.

Analysis: The Florida Constitution frames the relationship between the local school boards and the State Board of Education. Article IX, section 4(b) of the Florida Constitution provides that the “school board shall operate, control and supervise all free public schools within the school district.” It further provides that the State Board of Education shall have “such supervision of the system of free public education as is provided by law.” Art. IX, § 2, Fla. Const.

While the local school boards possess the constitutional authority to operate their local public schools, Florida courts have recognized that “[t]he Florida Constitution . . . creates a hierarchy under which a school board has local control, but the State Board supervises the system as a whole. This broader supervisory authority may at times infringe on a school board’s local powers, but such infringement is expressly contemplated—and in fact encouraged by the very nature of supervision—by the Florida Constitution.” Sch. Bd. of Collier Cty. v. Fla. Dep’t of Educ., 279 So. 3d 281, 292 (Fla. 1st DCA 2019) (quoting Sch. Bd. of Palm Beach Cty. v. Fla. Charter Educ. Found. Inc., 213 So. 3d 356, 360 (Fla. 4th DCA 2017)), review denied, No. SC19-1649, 2020 WL 1685138 (Fla. Apr. 7, 2020).

Section 1008.32, Florida Statutes, further describes the State Board's oversight and enforcement authority by giving the Commissioner the authority to investigate allegations of school boards' noncompliance with laws and rules and the State Board the authority to order compliance with laws and rules and, ultimately, initiate actions against the school boards for failing to comply.

The authority given to the State Board under section 1008.32 does not conflict with the charter schools right to challenge the nonrenewal decisions before the Division of Administrative Hearings. First, the State Board is charged with considering the interests of entities and individuals who are not parties to any litigation before the Division of Administrative Hearings. Second, remedies are available to the State Board that are not available to the Division of Administrative Hearings. To be clear, a finding of probable cause by the Commissioner under 1008.32 would not limit the authority of an administrative law judge to issue a de novo ruling on the facts presented at the hearing. However, the interests the Commissioner serves, as the state's chief educational officer under section 1001.10, Florida Statutes, and the interests protected by the State Board of Education under Article IX are far broader than the interests of the individual parties litigating in an administrative proceeding.

Conclusion: Section 1008.32, Florida Statutes, provides the State Board the authority to order compliance with laws and rules and, ultimately, initiate actions against the school boards for failing to comply. There is probable cause to find that the School Board of Hillsborough County violated section 1002.33(8), Florida Statutes.