

MEMORANDUM

To: Honorable Members of the Clay County School Board
Mr. Addison Davis, Superintendent of Schools

From: David J. D'Agata, School Board Attorney 

Date: August 18, 2017

Re: Update No. 1, Anticipated HB 7069 lawsuit

At the Board's request on August 3, I provide the following update on anticipated collective legal action initiated by a number of Florida school boards to challenge the constitutionality of newly-enacted laws arising from House Bill 7069 ("the Legislation"). This memorandum supplements my July 28, 2017 memorandum on the matter.

STATUS OF PARTICIPATING DISTRICTS

In June 2017, the School Board of Broward County set aside funds to pursue prospective litigation calculated to challenge various provisions of the Legislation ("collective action"). As of our Board's August 3, 2017 meeting, the School Boards of St. Lucie, Bay, Lee, and Volusia Counties also committed funds to join the cause. Since then, the School Boards of Palm Beach, Miami-Dade, and Hamilton Counties have similarly decided to invest in and proceed with the collective action. The amount of funding set aside by each ranges from \$5,000 to \$30,000. I refer to these eight school boards hereinafter as "Participant Districts." Orange County School Board is expected to authorize its financial support and joinder at its meeting next week, and final decisions of other school boards contemplating the matter are anticipated by the end of September.¹

STATUS OF COLLECTIVE ACTION

The nature, scope, and timing of the collective action have not been finalized. Indeed, some school board representatives have volleyed the concept of first calling upon our State Legislature to partake in a special session to address the ills of the Legislation before filing a lawsuit. Others have urged the formulation and filing of a state or federal court complaint as soon as possible. Notwithstanding any additional lobbying efforts, I believe that a complaint will be filed within the next 60 days.

Several law firms have expressed interest in representing the Participant Districts (collectively) in the prospective litigation, and at least four have been considered by the Participant Districts: Boies Schiller, Husch Blackwell, Hogan Lovells, and Berger

¹ I believe that these include the School Boards of Alachua, Collier, Manatee, Osceola, and Pinellas Counties.

Singerman. The rates of proposed attorney's fees apparently range from \$250 per hour up to \$600 per hour. I suspect that such rates may be reduced or discounted depending on the terms and conditions of a final collective engagement/contract for legal services. The estimated amount of attorney's fees incurred through judgment in trial court ranges from \$150,000 up to \$400,000, and appellate fees are estimated at \$200,000. I underscore that these are merely *estimated* figures, as it is quite difficult to accurately account for the uncertainties often arising in the course of litigation. Moreover, the nature and breadth of the claims ultimately selected and prosecuted by the Participant Districts will directly impact the amount of associated legal services. To offset such uncertainty, parties sometimes negotiate a "flat fee" arrangement which caps the total amount of fees to be paid regardless of hours billed beyond the capped amount. It is unclear whether such an arrangement will be achieved here.

Notably, certain school board attorneys and assistant school board attorneys from other counties have indicated a willingness to take an active role in the litigation. This could substantially reduce the amount of legal costs incurred by participating school boards. In addition, legal counsel representing the Council of Great City Schools (members of which include the school districts of Duval, Broward, Hillsborough, Miami-Dade, Orange, Palm Beach, and Pinellas Counties) have offered to lend a "helping hand" in the collective action. It appears that such assistance would be provided at no additional cost to the Participant Districts.

Once an engagement for legal services has been entered, it is presently anticipated that each participating school board will be responsible for a one-time "up front" payment of \$5,000. Thereafter, each board will be responsible for payment of legal fees on a pro-rata basis. The pro-rata share/percentage of payment likely would be based on each board's total student enrollment figures as compared to the total student enrollment figures of other participating school boards. FDOE's 2016-17 K-12 enrollment data reports the following:

School District	Total K-12 Enrollment
Bay	28,027
Broward	271,828
Clay	37,052
Hamilton	1,688
Lee	92,682
Miami-Dade	357,311
Orange	200,667
Palm Beach	192,729
St. Lucie	40,417
Volusia	63,100

Under this scenario, Miami-Dade, Broward, Orange, and Palm Beach obviously would be responsible for the greatest share of costs.

ANTICIPATED CLAIMS

As previously indicated, a lawsuit has not been filed, and it is my understanding that a complaint (specifying the parties, claims, venue, *etc.*) has not been completed or finalized to date. At this point, it is my impression that those school boards intent to join and fund the collective action before it is filed should do so by mid-September. School boards which have authorized and committed funding by then may have the greatest opportunity to weigh in on the claims to be advanced in the lawsuit. They may also influence the selection of a representative law firm, although I suspect that Participant Districts will select counsel before then.

I remain confident that the anticipated litigation will challenge those provisions of the Legislation which intrude upon the authority of school boards under the Florida Constitution, including the Legislation's unlawful division of local tax dollars and erosive effects on local taxing power. To that end, the reasoning and details set forth in the "Discussion" section of my July 28 memorandum still obtain.

I would only add at this time increasing attention drawn to the detrimental impacts of the Legislation insofar as local control over Title 1 funds, and the treatment of charter schools as Local Education Agencies. I believe that meritorious claims specifically associated with these changes can be asserted. Because such claims are federal in nature, the assertion of them in an initial complaint could very well dictate whether the litigation ultimately proceeds in federal or state court.

CONCLUSION

In light of the foregoing, the Board may decide to join the collective action. If it is inclined to do so, the Board should authorize a financial commitment before mid-September to the extent it wishes to influence the selection of claims to be advanced in the action. Alternatively, the Board may decide against the pursuit of legal action at this juncture, or take a "wait and see" approach.

Please contact me at your convenience should you have any questions or concerns regarding this matter.