



## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. HOUSE PRINCIPLES ANALYSIS:

**Provide limited government** – The constitutional amendments proposed by the joint resolution, if approved by the voters, would: (a) limit government by substituting the Governor and Cabinet for the seven-member, appointed State Board of Education and by reducing the number of members on the Board of Governors from 14 to six; (b) increase government by creating a Florida college board for the Florida college system that is comprised of six gubernatorial appointees and the Commissioner of Education; and (c) rescind the Board of Governor’s authority to adopt rules relating to university admissions without compliance with the Administrative Procedure Act.<sup>1</sup>

**Promote personal responsibility** – The joint resolution would provide Florida voters with their first opportunity to comprehensively consider the governance structure for Florida’s public K through 12 schools, colleges, and universities. If adopted, the constitutional amendments would enable voters to hold the Governor and Cabinet, elected officials, directly accountable for decisions affecting each sector of the public education system.

#### B. EFFECT OF PROPOSED CHANGES:

**State Cabinet:** Article IV, s. 1 of the State Constitution establishes the executive branch of state government and provides that the “...supreme executive power shall be vested in a governor.” Article IV, s. 4 of the State Constitution subdivides the executive power by providing for three elected Cabinet officers: an Attorney General, a Chief Financial Officer, and a Commissioner of Agriculture. The Governor and Cabinet members serve as trustees of the Internal Improvement Trust Fund and Land Acquisition Trust Fund and as the agency head for the Florida Department of Law Enforcement.<sup>2</sup>

Prior to 2003, there were six elected members of the State Cabinet. In 1998, Florida voters approved Ballot Initiative No. 8, which became effective on January 7, 2003. This amendment reduced the Cabinet to three members by retaining the Commissioner of Agriculture and the Attorney General, merging the Treasurer and Comptroller into one Cabinet office called the “Chief Financial Officer,” and removing the Secretary of State and the Commissioner of Education from the Cabinet.<sup>3</sup>

**State Board of Education:** Article IX, s. 2 of the State Constitution establishes the SBE and provides it with the power to supervise Florida’s system of free public education as provided by law. The SBE is comprised of seven members appointed by the Governor to staggered four-year terms, subject to Senate confirmation.

Section 1001.02, F.S., states that the SBE is the chief implementing and coordinating body of K-20 public education in Florida, except for the state university system, and that its focus is to be on high-level policy decisions. The SBE is designated as the head of the Department of Education (DOE), which includes a Division of Community Colleges and Division of Public Schools.<sup>4</sup> It is authorized to adopt rules to implement its statutory duties and may delegate its general powers, unless otherwise prohibited by statute, to the Commissioner of Education.<sup>5</sup>

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<sup>1</sup> *NAACP, Inc. v. Florida Board of Regents*, 876 So.2d 636 (Fla. 1<sup>st</sup> DCA 2004)(holding that the Board of Governors’ power to adopt rules for university admissions flows from the State Constitution, and, as such, cannot be challenged under the Administrative Procedure Act contained in ch. 120, F.S.).

<sup>2</sup> Article IV, s. 4(f) and (g) of the State Constitution.

<sup>3</sup> Ballot Initiative Number 8, passed Nov. 2, 1998.

<sup>4</sup> Section 20.15, F.S.

<sup>5</sup> *Id.*; Section 1001.02, F.S.

Prior to 2003, the SBE was comprised of the Governor and Cabinet and was responsible for supervising the system of public education as provided by law. In 1998, Florida voters approved Ballot Initiative No. 8, which became effective on January 7, 2003. This amendment revised the composition of the SBE to make it a board of gubernatorial appointees and modified the SBE's authority to be the supervision of the system of *free* public education as provided by law (emphasis added).<sup>6</sup>

**Commissioner of Education:** Article IX, s. 2 of the State Constitution requires the SBE to appoint a Commissioner of Education. Statute provides that the Commissioner is the chief educational officer of the state and that his or her office must operate all statewide functions necessary to support the SBE.<sup>7</sup> The Commissioner also serves as the Executive Director of the DOE.<sup>8</sup>

Prior to 2003, the Commissioner of Education was an elected official responsible for supervising the public education system as provided by law. In 1998, Florida voters approved Ballot Initiative No. 8, which became effective on January 7, 2003. This amendment eliminated the requirement of voter approval for the Commissioner and required his or her appointment to be made by the appointed membership of the SBE.<sup>9</sup>

**State University System:** Article IX, s. 1 of the State Constitution provides that the Legislature is authorized to establish, maintain, and operate institutions of higher learning that the needs of the people may require.

Article IX, s. 7 of the State Constitution, which became effective January 7, 2003, establishes a system of governance for the state university system (SUS). The section provides for a 17-member statewide board of governors (BOG) comprised of: 14 gubernatorial appointees, subject to Senate confirmation, with staggered terms of seven years; the Commissioner of Education; the chair of the advisory council of faculty senates; and the president of the Florida student association. It requires the BOG to operate, regulate, control, and manage the SUS, but expressly limits the BOG's management authority to the Legislature's authority to appropriate and account for the expenditure of funds.<sup>10</sup>

The section also creates local boards of trustees to administer each state university. Each local board consists of 13 members: six appointees by the Governor; five appointees by the BOG; the chair of the faculty senate; and the president of the student body. Appointed members of each local board are subject to Senate confirmation and serve staggered terms of five years as provided by law. The BOG is required to establish the powers and duties of the local boards.<sup>11</sup>

Before 2001, state universities were administered by a statutory body, the Board of Regents, as provided by law. Local boards of trustees did not exist. The Board of Regent's statutory duties included appointing or removing university presidents, approving new degree programs, establishing student fees within statutory guidelines, establishing personnel and payroll programs for all university employees, terminating university programs, preparing university budgets for submission to the Legislature, and adopting rules for the system.<sup>12</sup>

In 2001, in order to begin implementation of the voters' constitutional restructuring of the SBE in 1998, the Legislature adopted the "Florida Education Governance Reorganization Implementation Act."<sup>13</sup> Under this Act, effective July 1, 2001, the Board of Regents was abolished and its powers, duties, functions, and personnel were transferred to the newly created transitional Florida Board of Education,

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<sup>6</sup> Ballot Initiative Number 8, passed Nov. 2, 1998..

<sup>7</sup> Section 1001.10, F.S.

<sup>8</sup> Section 20.15, F.S.

<sup>9</sup> Ballot Initiative Number 8, passed Nov. 2, 1998.

<sup>10</sup> *Article IX, s. 7(d) of the State Constitution.*

<sup>11</sup> Article IX, s. 7(c) of the State Constitution.

<sup>12</sup> See former s. 240.209, F.S., (repealed by ch. 2002-387, L.O.F.).

<sup>13</sup> See s. 1 of ch. 2001-170, L.O.F.

which later became the constitutional SBE on January 7, 2003.<sup>14</sup> The Act also created 11-member boards of trustees for each state university and outlined the powers and duties of those boards.<sup>15</sup>

In 2002, a group called “Floridians for Education Reform” filed an initiative petition to amend the State Constitution to create the current SUS governance structure.<sup>16</sup> In its opinion reviewing the ballot title and summary, the Florida Supreme Court held that the initiative petition “does not substantially affect or change” Article IX, s. 1 of the State Constitution, providing that the Legislature is authorized to establish, maintain, and operate institutions of higher learning.<sup>17</sup> The voters approved the initiative petition on November 5, 2002, and it took effect January 7, 2003.<sup>18</sup>

Since the establishment of the SUS in 2003, legislation has twice been enacted to clarify its governance structure.<sup>19</sup> This legislation created statutes that assigned management powers to the BOG, while reserving fiscal and other constitutionally-required legislative powers for the Legislature. Specifically, statute assigns:

- The BOG responsibilities that include submitting budget requests for the universities under its jurisdiction; adopting strategic plans for the SUS and each member university; governing university admissions; establishing a personnel system for university employees; and establishing tuition for graduate and professional programs and out-of-state fees for all programs.<sup>20</sup>
- The Legislature responsibilities that include establishing tuition and fees for undergraduates; establishing policies for merit and need-based financial aid and for the expenditure of, and accountability for, legislatively appropriated funds; and establishing policies relating to the health, safety, and welfare of university students and employees.<sup>21</sup>

In July 2007, litigation challenging the constitutionality of the above-described statutes, as well as numerous other sections of law, was filed by Bob Graham, the BOG, and others against Senate President Ken Pruitt and House Speaker Marco Rubio.<sup>22</sup> The plaintiffs have amended their complaint three times. In their latest complaint filed on February 4, 2008, the plaintiffs appear to argue, among other things, that statutes providing for the Legislature to determine undergraduate tuition and fees and placing limitations on the fees that universities may collect violate: (a) Article IX, s. 7 of the State Constitution, authorizing the BOG to operate the SUS; and (b) Article II, s. 7 of the State Constitution, prohibiting one branch of government from exercising powers appertaining to another branch.<sup>23</sup> On February 26, 2008, President Pruitt and Speaker Rubio filed a Motion to Strike Allegations of the Third Amended Complaint and a Motion to Dismiss the Third Amended Complaint.

**Effect of Proposed Changes:** During the past decade, Florida voters have been presented with proposed constitutional amendments separately addressing isolated components of public education governance. As illustrated above, this approach has: resulted in protracted litigation over constitutional ambiguities; failed to address governance for critical aspects of education, e.g., the community colleges and Florida Resident Access Grant institutions; and fragmented responsibility and accountability for education governance decisions among an appointed SBE and appointed Commissioner of Education for K through 12 schools and colleges and an appointed Board of Governors for the SUS.

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<sup>14</sup> See ss. 3 and 5 of ch. 2001-170, L.O.F.

<sup>15</sup> See s. 13 of ch. 2001-170, L.O.F.

<sup>16</sup> *Advisory Opinion to the Attorney General Re Local Trustees and Statewide Governing Board to Manage Florida's University System*, 819 So.2d 725 (Fla. 2002).

<sup>17</sup> *Id.* at 730.

<sup>18</sup> Ballot Initiative Number 11, passed Nov. 5, 2002.

<sup>19</sup> See chs. 2005-285 and 2007-217, L.O.F.

<sup>20</sup> Sections 1001.705(1)(b) and 1009.24(4), F.S.

<sup>21</sup> Section 1001.705(1)(c), F.S.

<sup>22</sup> *Bob Graham, et al v. Ken Pruitt, President of the Florida Senate and Marco Rubio, Speaker of the Florida House of Representatives*, Amended Complaint for Declaratory Judgment, Case No. 2007-CA-1818 (Fla. 2<sup>nd</sup> Judicial Circuit).

<sup>23</sup> *Id.*

This joint resolution would provide the voters with their first opportunity to comprehensively consider the governance structure for Florida's public K through 12 schools, colleges, and universities. As detailed below, it proposes amendments that, if approved by the voters, would enable the Governor and Cabinet, elected officials held directly accountable by the voters, to make decisions based on the interests of all sectors of the public education system.

*Commissioner of Education and the SBE:* Under the joint resolution, the Commissioner of Education would be reinstated as a member of the Cabinet, who is elected by the voters, rather than appointed by an appointed body (the SBE). The Commissioner of Education would be authorized to supervise the public education system as provided by law and would join the Governor and other Cabinet members as a trustee of the Internal Improvement Trust Fund and Land Acquisition Trust Fund and as the agency head for the Florida Department of Law Enforcement.<sup>24</sup> Further, the appointed membership of the SBE would be replaced with elected officials, the Governor and Cabinet. Accordingly, the amendments would: restore education governance to its 1998 structure with respect to the Commissioner, Cabinet, and SBE; make these officials directly accountable to the voters; and elevate the issue of public education to that of Cabinet-level significance.

*State University System:* The BOG would be retained in the governance structure for the SUS as a constitutional board. Its authority would be to administer the SUS as provided by law, rather than to govern the SUS, subject to the Legislature's power to appropriate. This amendment therefore places the resolution of the ongoing litigation and governance dispute among the BOG, state universities, and Legislature in the hands of the people, rather than the judiciary.

Further, the membership of the BOG would be comprised of six gubernatorial appointees, subject to Senate confirmation, with staggered four-year terms, rather than 14 gubernatorial appointees, subject to Senate confirmation, with staggered seven-year terms. The Commissioner of Education, chair of the advisory council of faculty senates, and president of the Florida student association would continue to be members.

Finally, each local board of trustees would be comprised of 11 gubernatorial appointees, subject to Senate confirmation, rather than six gubernatorial and five BOG appointees, subject to Senate confirmation. The chair of the faculty senate and president of the university student body would continue to be members. The powers and duties of each local board would be as provided by law, rather than established by the BOG.

*Florida College System:* For Florida colleges, the State Constitution would for the first time specifically address a system of governance. It would establish a Florida college system (FCS) for purposes of: maximizing open access for students; responding to community needs for postsecondary academic education and career degree education; and providing associate and baccalaureate degrees that will best meet the state's employment needs. The FCS would be comprised of two-year and four-year public postsecondary educational institutions that grant academic degrees at the undergraduate level as provided by law. These institutions would be prohibited from offering graduate degree programs.

Further, a Florida college board dedicated to the interests of its member institutions would be created to oversee and coordinate the FCS as provided by law. The seven-member board would be comprised of: (a) six gubernatorial appointees, subject to Senate confirmation, with staggered four-year terms; and

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<sup>24</sup> The percentage of cabinet members required to agree in order to act under the following provisions of the State Constitution will be impacted by the addition of the elected Commissioner of Education to the cabinet: (1) Article IV, s. 3 of the State Constitution authorizes the Supreme Court to determine the Governor's capacity or incapacity to serve upon the written suggestion of three cabinet members; (2) Article IV, s. 6 of the State Constitution states that, when provided by law, confirmation by the Senate or by three cabinet members shall be required for appointment to or removal from a statutory office; and (3) Article IV, s. 8 of the State Constitution provides that the Governor with the consent of two cabinet members may grant pardons, restore civil rights, commute punishment, and remit fines and forfeitures for offenses.

(b) the Commissioner of Education. Local boards of trustees would be created to administer each institution within the FCS as provided by law. Membership for each local board of trustees would be as provided by law.

*Implementation Schedule:* The joint resolution would place the proposed amendments on the ballot of the next general election in November 2008, and, if approved by the voters, the amendments would take effect on July 1, 2009. The terms for the currently appointed members of the SBE and BOG and the term for the Commissioner of Education would expire on that effective date. The Governor and Cabinet would be required to appoint a Commissioner of Education to serve until a Commissioner is elected in the November 2010, general election. The terms for the currently appointed members of the local boards of trustees for the state universities would not expire until the end of each term for which the member was originally appointed.

C. SECTION DIRECTORY:

The legislation is a joint resolution proposing a constitutional amendment and, therefore, does not contain bill sections.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The joint resolution does not appear to have a fiscal impact on state revenues.

2. Expenditures:

The Division of Elections within the Department of State has indicated that in the past the average non-recurring cost of compliance with the publication requirements for a constitutional amendment has been \$60,000; however, this cost has become higher in recent years and can be substantially greater depending on the advertising inches required by a joint resolution.<sup>25</sup> For example in 2007, publication of the fourteen-page joint resolution relating to property taxes cost \$350,000.<sup>26</sup> At the time of this analysis, estimated publication costs for this nine-page joint resolution were not yet available, but are expected to be less than \$350,000.

The elimination of the appointed SBE and the reduction in membership of the statewide BOG may reduce the administrative expenditures associated with the meetings of these boards. Annually, the SBE<sup>27</sup> and BOG<sup>28</sup> each spend approximately \$40,000 for travel and per diem costs; however, this savings may be offset by the joint resolution's creation of the Florida college board.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The joint resolution does not appear to have a fiscal impact on local government revenues.

2. Expenditures:

The joint resolution does not appear to have a fiscal impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

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<sup>25</sup> Information provided by Department of State representatives on February 29, 2008.

<sup>26</sup> Committee Substitute for Senate Joint Resolution 2-D, Enrolled (Special Session 2007D).

<sup>27</sup> Information provided by DOE representatives on February 25, 2008.

<sup>28</sup> Information provided by BOG representatives on February 27, 2008.

None.

D. FISCAL COMMENTS:

None.

### III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The municipality/county mandates provision relates only to general bills and therefore would not apply to this joint resolution.

2. Other:

Article XI, s.1, of the State Constitution provides for proposed changes to the Constitution by the Legislature:

**SECTION 1: Proposal by legislature.** – Amendment of a section or revision of one or more articles, or the whole, of this constitution may be proposed by joint resolution agreed to by three-fifths of the membership of each house of the legislature. The full text of the joint resolution and the vote of each member voting shall be entered on the journal of each house.

If passed, the proposed amendment must be submitted to the electors at the next general election held more than 90 days after the joint resolution is filed with the custodian of state records.<sup>29</sup> The proposed amendment must be published, once in the tenth week and once in the sixth week immediately preceding the week of the election, in one newspaper of general circulation in each county where a newspaper is published.<sup>30</sup> Submission of a proposed amendment at an earlier special election requires the affirmative vote of three-fourths of the membership of each house of the Legislature and is limited to a single amendment or revision.<sup>31</sup>

Article XI, s. 5(e) of the State Constitution requires 60 percent voter approval for a proposed constitutional amendment to pass.

B. RULE-MAKING AUTHORITY:

The First District Court of Appeals has held that the BOG's power to adopt rules for university admissions flows from Article IX, s. 7 of the State Constitution; thus, such rules may not be challenged under the Administrative Procedure Act (APA) contained in ch. 120, F.S.<sup>32</sup> If the voters approve the joint resolution's proposed amendments, the BOG's authority would be as provided by law. In s. 120.52(1)(b), F.S., the Legislature has provided that the BOG is subject to the APA when acting pursuant to its statutory authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

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<sup>29</sup> Article XI, s. 5(a) of the State Constitution.

<sup>30</sup> Article XI, s. 5(d) of the State Constitution

<sup>31</sup> Article XI, s. 5(a) of the State Constitution.

<sup>32</sup> *NAACP, Inc. v. Florida Board of Regents*, 876 So.2d 636 (Fla. 1<sup>st</sup> DCA 2004).

#### D. STATEMENT OF THE SPONSOR

None.

#### **IV. AMENDMENTS/COUNCIL SUBSTITUTE CHANGES**

On March 7, 2008, the Schools and Learning Council adopted one amendment and reported the proposed council bill (PCB) favorably. The amendment to the PCB provides that the terms for the currently appointed members of the university boards of trustees will not expire until the end of the term for which the member was originally appointed; whereas, under the PCB, the terms for such members would have expired on the effective date of the proposed amendments, July 1, 2009.