Florida Citizens Alliance 2019 Legislative Agenda

The Florida Citizens’ Alliance (FLCA), a coalition of more than 90 grassroots groups with more than 50,000 supporters and advocates, works through education, outreach and community involvement to advance the ideals and principles of liberty. Specifically, FLCA advocates for K-12 education reform in Florida focusing on competition, innovation and parental choice.

We urge you to improve student outcomes by advancing these education initiatives:

1) Support a “fix it” bill for CS 989.

   In 2017 the legislature passed, and the governor signed into law CS 989. Residents of Florida now have the opportunity to provide input to school boards on instructional materials selected for classroom use.

   Four counties conducted the required adoption hearings and yet they failed to comply with HB 989, FS 1006.31 and FS 1006.283 (See Attachment 1 for the text of these statutes). It appears that all other 63 counties ignored the requirement hold instructional materials hearings before purchasing materials.

   Legal assessments of the violations in Collier and Charlotte County are included as Attachment 2.

   Find the critical elements of a “fix it” bill as Attachment 3.

   Why allow school boards to side step the will of the people expressed through the legislature?

2) Support a Meet or Exceeds Standards bill.

   We believe the Next Generation Sunshine State Standards and supporting curriculum should be viewed as a baseline; the minimum requirements that all Florida schools must achieve.

   A Meet or Exceeds Standards bill would allow school boards to excel beyond the minimum requirements. Currently they are required to meet the standards.
We believe they should have the opportunity to raise the level of student achievement above the baseline. It’s a solution to improve student learning.

Why should state law limit a school board’s opportunity to improve student performance?


Incentivize school districts to implement zero based budgeting, benchmarking results to similar school districts, direct teacher and student expense versus indirect overhead expense analysis and a return on investment analysis comparing student outcomes to total operating and capital expenditures.

Isn’t it important for school boards to model what they expect of students; continuous improvement?

4) Support the expansion of five Step Up for Students scholarships: McKay, Gardener, Hope, Tax Credit and Reading.

Having established such excellent scholarships, why allow resource limitations to prevent student participation?

5) Support the establishment of a math scholarship similar to the existing reading scholarship.

If a scholarship supports improved reading performance, why not do the same for math?

Attachment 1 - Executive summary HB 989 Final approved, FS 1006.31, FS 1006.283

Attachment 2- Legal assessments of Instructional Materials violations
   a: Collier Letter 1 and Letter 2
   b. Charlotte Letter

Attachment 3- Critical elements needed to Fix 989
Final CS/HB 989 Instructional Materials
Bill Key Components

- Expands ability to object to instructional materials used in public schools in each county to include parents and residents.

- Specifically requires compliance with sexually explicit age-inappropriate prohibitions FS 847.012.

- Requires Counties that acquire materials via FL DOE approved list or “off list” with a local committee via 1006.283 to hold a formal objection process for local residents.

- Revises the requirement for Instructional Materials allocation (removes requirement that 50% of annual funds must be spent on digital materials).

- Establishes requirement for an unbiased and qualified hearing officer who is not an employee, agent or contractor of the school district to hear formal objections.

- Allows residents to have access to instructional materials in the school libraries.

- Defines “Instructional Materials” to include electronic content/ i.e. online materials used in the classroom.
The 2018 Florida Statutes

Title XLVIII  
K-20 EDUCATION CODE

Chapter 1006  
SUPPORT FOR LEARNING

Duties of the Department of Education and school district instructional materials reviewer.  
The duties of the instructional materials reviewer are:

(1) PROCEDURES.—To adhere to procedures prescribed by the department or the district for evaluating instructional materials submitted by publishers and manufacturers in each adoption. This section applies to both the state and district approval processes.

(2) EVALUATION OF INSTRUCTIONAL MATERIALS.—To use the selection criteria listed in s. 1006.34(2)(b) and recommend for adoption only those instructional materials aligned with the Next Generation Sunshine State Standards provided for in s. 1003.41. Instructional materials recommended by each reviewer shall be, to the satisfaction of each reviewer, accurate, objective, balanced, noninflammatory, current, free of pornography and material prohibited under s. 847.012, and suited to student needs and their ability to comprehend the material presented. Reviewers shall consider for recommendation materials developed for academically talented students, such as students enrolled in advanced placement courses. When recommending instructional materials, each reviewer shall:

(a) Include only instructional materials that accurately portray the ethnic, socioeconomic, cultural, religious, physical, and racial diversity of our society, including men and women in professional, career, and executive roles, and the role and contributions of the entrepreneur and labor in the total development of this state and the United States.

(b) Include only materials that accurately portray, whenever appropriate, humankind’s place in ecological systems, including the necessity for the protection of our environment and conservation of our natural resources and the effects on the human system of the use of tobacco, alcohol, controlled substances, and other dangerous substances.

(c) Include materials that encourage thrift, fire prevention, and humane treatment of people and animals.

(d) Require, when appropriate to the comprehension of students, that materials for social science, history, or civics classes contain the Declaration of Independence and the Constitution of the United States. A reviewer may not recommend any instructional materials that contain any matter reflecting unfairly upon persons because of their race, color, creed, national origin, ancestry, gender, religion, disability, socioeconomic status, or occupation.

(3) REPORT OF REVIEWERS.—After a thorough study of all data submitted on each instructional material, to submit an electronic report to the department. The report shall be made public and must include responses to each section of the report format prescribed by the department.

The 2018 Florida Statutes

Title XLVIII  
K-20 EDUCATION CODE  

Chapter 1006  
SUPPORT FOR LEARNING  

View Entire Chapter

1006.283  
District school board instructional materials review process.—

(1) A district school board or consortium of school districts may implement an instructional materials program that includes the review, recommendation, adoption, and purchase of instructional materials. The district school superintendent shall certify to the department by March 31 of each year that all instructional materials for core courses used by the district are aligned with applicable state standards. A list of the core instructional materials that will be used or purchased for use by the school district shall be included in the certification.

(2)(a) If a district school board chooses to implement its own instructional materials program, the school board shall adopt rules implementing the district’s instructional materials program which must include its processes, criteria, and requirements for the following:

1. Selection of reviewers, one or more of whom must be parents with children in public schools.
2. Review of instructional materials.
3. Selection of instructional materials, including a thorough review of curriculum content.
4. Reviewer recommendations.
5. District school board adoption.

(b) District school board rules must also:

1. Identify, by subject area, a review cycle for instructional materials.
2. Specify the qualifications for an instructional materials reviewer and the process for selecting reviewers; list a reviewer’s duties and responsibilities, including compliance with the requirements of s. 1006.31; and provide that all instructional materials recommended by a reviewer be accompanied by the reviewer’s statement that the materials align with the state standards pursuant to s. 1003.41 and the requirements of s. 1006.31.
3. State the requirements for an affidavit to be made by each district instructional materials reviewer which substantially meet the requirements of s. 1006.30.
4. Comply with s. 1006.32, relating to prohibited acts.
5. Establish a process that certifies the accuracy of instructional materials.
6. Incorporate applicable requirements of s. 1006.31, which relates to the duties of instructional materials reviewers.
7. Incorporate applicable requirements of s. 1006.38, relating to the duties, responsibilities, and requirements of publishers of instructional materials.
8. Establish the process by which instructional materials are adopted by the district school board, which must include:
   a. A process to allow student editions of recommended instructional materials to be accessed and viewed online by the public at least 20 calendar days before the school board hearing and public meeting as specified in this subparagraph. This process must include reasonable safeguards against the unauthorized use, reproduction, and distribution of instructional materials considered for adoption.
b. An open, noticed school board hearing to receive public comment on the recommended instructional materials.

c. An open, noticed public meeting to approve an annual instructional materials plan to identify any instructional materials that will be purchased through the district school board instructional materials review process pursuant to this section. This public meeting must be held on a different date than the school board hearing.

d. Notice requirements for the school board hearing and the public meeting that must specifically state which instructional materials are being reviewed and the manner in which the instructional materials can be accessed for public review. The hearing must allow the parent of a public school student or a resident of the county to proffer evidence that a recommended instructional material does not meet the criteria provided in s. 1006.31(2), taking into consideration course expectations based on the district’s comprehensive plan for student progression under s. 1008.25(2) and course descriptions in the course code directory.

9. Establish the process by which the district school board shall receive public comment on, and review, the recommended instructional materials.

10. Establish the process by which instructional materials will be purchased, including advertising, bidding, and purchasing requirements.

11. Establish the process by which the school district will notify parents of their ability to access their children’s instructional materials through the district’s local instructional improvement system and by which the school district will encourage parents to access the system. This notification must be displayed prominently on the school district’s website and provided annually in written format to all parents of enrolled students.

(3)(a) The school board may assess and collect fees from publishers participating in the instructional materials approval process. The amount assessed and collected must be posted on the school district’s website and reported to the department. The fees may not exceed the actual cost of the review process, and the fees may not exceed $3,500 per submission by a publisher. Any fees collected for this process shall be allocated for the support of the review process and maintained in a separate line item for auditing purposes.

(b) The fees shall be used to cover the actual cost of substitute teachers for each workday that a member of a school district’s instructional staff is absent from his or her assigned duties for the purpose of rendering service as an instructional materials reviewer. In addition, each reviewer may be paid a stipend and is entitled to reimbursement for travel expenses and per diem in accordance with s. 112.061 for actual service in meetings.

(4) Instructional materials that have been reviewed by the district instructional materials reviewers and approved must have been determined to align with all applicable state standards pursuant to s. 1003.41 and the requirements in s. 1006.31. The district school superintendent shall annually certify to the department that all instructional materials for core courses used by the district are aligned with all applicable state standards and have been reviewed, selected, and adopted by the district school board in accordance with the school board hearing and public meeting requirements of this section.

(5) A publisher that offers instructional materials to a district school board must provide such materials at a price that, including all costs of electronic transmission, does not exceed the lowest price at which the publisher offers such instructional materials for approval or sale to any state or school district in the United States.

(6) A publisher shall reduce automatically the price of the instructional materials to the district school board to the extent that reductions in price are made elsewhere in the United States.

(7) The school district shall make available, upon request for public inspection, sample copies of all instructional materials that have been purchased by the district school board.

RE: Instructional Materials Objection Hearing Set for June 18, 2018

Dear School Board,

I represent Florida Citizens’ Alliance (FLCA) who has asked me to provide a legal review of the procedure you have taken in relation to your upcoming evidentiary hearing set for June 18, 2018. On behalf of FLCA and the individual objectors, Keith Flaugh, Joseph Doyle, and Michael Mogil, I have reviewed the Board’s actions and procedure in relation to this hearing and have several concerns about the legality of the upcoming evidentiary meeting that I am presenting herein in the form of objections.

Objection #1: The Board is Redefining the term “Hearing Officer” and misapplying Florida statute 1006.28(3).

The title “Hearing Officer” is a term of art in Florida, i.e., it carries a specific meaning in Florida law. A hearing officer in Florida is a judicial officer assigned to hear administrative cases. Hearing officers are statutorily identified as an element of Florida’s judiciary and are paid for by state funds allocated to the judiciary. Fla. Stat. 29.004 (8). Every judicial circuit in Florida has hearing officers.

The hearing management plan created by District counsel, Jon Fishbane, outlines a hearing in which, Shannon McFee, a well-respected attorney but not a hearing officer, will act as
a parliamentarian rather than a hearing officer. In fact, in an email to a prospective candidate for the hearing officer position that was obtained by a public records request, District counsel described the role of the hearing officer as that of a “referee.” The email is attached as “Attachment A.” As such, the hearing officer will merely keep order during the hearing and will make no findings, no recommended order, and turn the hearing over to you, the Board, to deliberate and render a ruling. This is a novel use of a hearing officer that renders the requirement of 1006.28(3) for a hearing officer meaningless. I have done an exhaustive search of Florida’s canon of statutes and cannot find a single instance where a hearing officer does not make findings and draft a written ruling or recommended order. I’m attaching a list to this letter that enumerates Florida statutes that utilize a hearing officer. This list is “Exhibit B.” You’ll notice in every single instance the officer presides over the hearing, makes findings, and enters a recommend order or a ruling. Again, nowhere in the canon of Florida law does a hearing officer act as a referee and then turn the hearing over to someone else or some other body to make findings and enter a ruling.

I would argue that it makes no sense to have the School Board sitting in the audience to hear the evidence presented by the objectors and then proceed to take over the meeting when the evidentiary portion is concluded just as it would make no sense to have an administrative law judge sitting in the gallery observing a hearing officer preside over the evidentiary portion of a hearing only to take over the hearing after the evidence has been presented. If the Board is going to make the findings and enter a ruling, the Board might as well run the hearing from start to finish.

In fairness to you, Florida Statute 1006.28(3) does not layout in detail the contemplated process of conducting a hearing before a hearing officer. However, it states the objectors are to “present evidence to the hearing officer.” If the hearing officer is not making any findings or a recommended order, then the objectors are really presenting their evidence to the Board, not the hearing officer. Moreover, I think the statute is scant in its details regarding the hearing office because, in my opinion, it goes without saying in the legal community that a hearing officer conducts hearings, makes findings, and enters a recommended order or ruling, and it’s clear from my attachment that this is exactly how they are utilized wherever they are utilized in Florida law.

Thus, I fear the Board is taking a serious legal misstep in reducing the role of the hearing officer to that of a referee, and FLCA and the above-named individuals object to the meeting being conducted this way.
Objection #2: The Board meeting to allocate funds to the purchase of texts should not be directly after the hearing on objections.

A hearing officer should be given the opportunity to take the objections under advisement and review the materials at his/her own pace before rendering an opinion. Moreover, he or she should make written findings in the form of a ruling. By holding your Board meeting to appropriate funds directly after the objections hearing, you are forcing a decision to be made on the spot and making it impossible for the hearing officer to give full consideration to the arguments presented and draft a written opinion. This is not only a bad way to conduct judicial proceedings, but it gives the appearance of impropriety to the public that the Board already knows the outcome of the objections hearing and that the whole process is a sham proceeding.

Objection #3: Shannon McFee is not a hearing officer

Mr. McFee is well-respected criminal lawyer and upstanding citizen of Collier County, but he’s not a hearing officer. As I indicated above, hearing officers are judicial officers who comprise an element of the State court system. Fla. Stat. 29.04(8). I see nothing in Fla. Stat. 1006.28(3) that would authorize this Board to appoint a hearing officer.

From a public records request conducted by my client, it is clear that the Board’s process for finding a hearing officer went no further than simply having the District counsel call five local attorneys and inquiring whether or not these attorneys had an interest in serving as a hearing officer. In my opinion, what the Board should have done is either 1) contacted the Florida Department of Education and inquired as to availability of hearing officers assigned to their department to preside over this hearing or 2) contacted court administration for the 20th judicial circuit (which covers Collier County) and arranged to have the objection hearing(s) before a hearing officer that is currently employed by the 20th Judicial Circuit.

Thus, it is my position that you are not using a hearing officer as required by the statute and have attempted to appoint one without authority to do so.

Objection #3. You’ve made Mr. McFee an agent of the School Board and District.
From the public records request conducted by my client as well as the materials presented in your May 30 hearing, it is clear that you have contracted Mr. McFee at a rate of $200 per hour to “referee” a hearing on your behalf. As a contractor being paid by the Board/District to work on behalf of the Board, you have made Mr. McFee an agent of the District. This is explicitly forbidden in Fla. Stat. 1006.28(3) where it states “The hearing officer may not be an employee or agent of the school district.” Again, I think the correct application of the statute would have been to utilize a hearing officer that is already paid out of the state judiciary funds rather than presuming to yourselves the authority to appoint a judicial officer.

Objection #4: Mr. McFee has not been allowed to decide what due process to provide to the objectors.

In the public records request submitted by FLCA on May 29, 2018, FLCA requested all correspondence from any potential hearing officer. As it relates to Mr. Mcfee, the only correspondence in the possession of the District, is an email from District counsel to Mr. McFee. It’s attached hereto as “Attachment 3.” There is no correspondence from Mr. McFee concerning the hearing management plan, nor is there any correspondence from District counsel requesting or directing Mr. McFee to draft such a plan. This means that the procedures outlined in the Hearing Management Plan are not the product of Mr. McFee, but rather are the product of District counsel. This is deeply concerning as Mr. McFee is the person charged with presiding over the hearing. As the presiding officer, Mr. McFee (and only Mr. Mcfee) should have determined what the procedure should be and how much time each objector should have. Otherwise, he cannot fulfill his duty to ensure each objector has “sufficient procedural protections to allow each petitioner an adequate and fair opportunity to be heard.” Fla. Stat. 1006.28(3)

On behalf of FLCA and the above-named individual objectors, I submit this list of objections and respectfully request that the School Board reschedule the hearing before a duly and lawfully appointed hearing officer, allow the hearing officer to conduct the meeting without interference from the District counsel, allow the hearing officer to make findings and submit a written ruling, and refrain from setting the hearing or hearings on the same date that the Board contemplates appropriating funds for the books that are being objected to.
Respectfully Submitted,

/s/ Brantley Oakey, Esq.
FL Bar #99076
780 5th Ave. South, Ste. 200
Naples, FL 34102
239-963-2897
boakey@naplesattorney.biz

CC:

Jon Fishbane
fishbj@collierschools.com

Representative Byron Donalds
staterepdonalds@gmail.com

Representative Bob Rommell
bobrommel@comcast.net
Chapter 318

Provides for hearing officers to handle hearings dealing with traffic citations. The hearing officer makes findings and renders a ruling in each case. “Hearing officers shall be empowered to accept pleas from and decide the guilt or innocence of any person, adult or juvenile, charged with any civil traffic infraction and shall be empowered to adjudicate or withhold adjudication of guilt in the same manner as a county court judge under the statutes, rules, and procedures presently existing or as subsequently amended…” Fla. Stat. 318.32.

Chapter 322

Provides that hearing officers shall preside over hearings related to informal and formal review of any driver’s license revocation and suspension. “The hearing officer shall be authorized to administer oaths, examine witnesses and take testimony, receive relevant evidence, issue subpoenas for the officers and witnesses identified in documents provided under paragraph (2)(a), regulate the course and conduct of the hearing, question witnesses, and make a ruling on the suspension.” Fla. Stat. 322.2615.

Chapter 97

Provides for hearing officers to hear all complaints relating to the Help America Vote Act. Hearing officers have the power to administer oaths, subpoena witnesses, make findings, and enter a determination as to whether or not a violation has occurred. Fla. Stat. 97.028(2).

Chapter 39

Provides that a hearing officer shall preside over hearings related to persons alleged to have made a false report of child abuse. The hearing officer will render a decision as to whether or not to impose a fine based on a preponderance of the evidence standard. Fla. Stat. 39.206.

Chapter 373
In dispute arising out of the Apalachicola-Chattahoochee-Flint River Basin Compact, “a hearing shall be held by the Commission or its designated hearing officer. Following a hearing conducted by a hearing officer, the hearing officer shall submit a report to the Commission setting forth findings of fact and conclusions of law, and making recommendations to the Commission for the resolution of the dispute.” Fla. Stat. 373.69(13).

Chapter 110

Hearing officers preside over hearings where public employees challenge suspensions, dismissals, etc. After the hearing, the hearing officer submits his/her findings in a recommended order. Fla. Stat. 110.227(6)

Chapter 394

Provides for a hearing officer to submit a recommended order after a hearing to determine whether to restore a patient’s competence who was previously ruled incompetent and for whom a guardian was appointed. Fla. Stat. 394.4598.

Chapter 409

Allows for a hearing officer to be appointed by the Department of Children and Families to conduct a hearing when an applicant for public assistance appeals a decision to deny his or her application. If a hearing officer is utilized, his or her ruling is final and binding. Fla. Stat. 409.285.

Chapter 447

Upon a charge of unfair labor practices in a labor union where there is an issue of material fact, a hearing shall be held before a hearing officer who will take evidence and submit a recommended order within 45 days of the hearing. Fla. Stat. 447.503
Fishbane, Jon (Jonathan)

From: Jim Nulman <jim@nulmanmediation.com>
Sent: Monday, May 7, 2018 8:06 PM
To: Fishbane, Jon (Jonathan)
Subject: Re: Hearing Officer - June 18th

Jon: I appreciate the further explanation. With that in mind, people who I think could do a very good job would include (in no particular order):

Robin Doyle
Bill Hazzard
George Knott
Simon Harrison

Let me know if you would like to discuss any of them or any other aspect of this matter.

Thank you again for thinking of me, and I wish you the best of luck with it.

Jim

Jim Nulman
Certified Circuit Civil
and Appellate Mediator

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> On May 7, 2018, at 1:31 PM, Fishbane, Jon (Jonathan) <fishbj@collierschools.com> wrote:
> 
> > Jim:
> > I appreciate your writing back and letting me know. If you have a few names of persons who might be interested, please let me know. I have a few persons in mind at this point but would welcome learning about others. The role of the Hearing Officer, in essence, is to serve as a kind of referee in terms of length of arguments, receipt of evidence, keeping the proceeding moving forward smoothly etc. At the end of the hearing itself, the Hearing Officer will turn it back over
to the Board for discussion and making a decision. The Hearing Officer’s role is not to provide a recommended order. I hope that makes sense.

> As always, thank you!
> Jon
> 
> Jon Fishbane
> District General Counsel
> Collier County Public Schools
> 5775 Osceola Trail | Naples, FL 34109
> p: 239.377.0498 | email: fishbj@collierschools.com
>
> --------------- The District School Board of Collier County, Florida intend
> that this message be used exclusively by the addressee(s). This message may contain information that is privileged, confidential, and exempt from disclosure under applicable law. Unauthorized disclosure or use of this information is strictly prohibited. If you have received this communication in error, please permanently dispose of the original message and notify Jon Fishbane immediately at the phone number listed above. Thank you.
>
> -----Original Message-----
> From: Jim Nulman [mailto:jim@nulmanmediation.com]
> Sent: Monday, May 7, 2018 1:22 PM
> To: Fishbane, Jon (Jonathan) <fishbj@collierschools.com>
> Subject: Hearing Officer - June 18th
>
> Jon: I got your voicemail and appreciate your thinking of me. Unfortunately, I will be out of state on vacation the week of June 18th and am therefore unavailable. I assume you have a number of other candidates, but please let me know if you’d like me to provide you with a few names of potential candidates.
>
> Jim Nulman
> Sent from my iPad
>
> Jim Nulman, Nulman Mediation Services, Inc., 15880 Summerlin Rd., Ste. 300 - PMB 146, Fort Myers, FL 33908; Phone: (239-433-3539); Fax: (239) 433-0067; Cell: (239) 841-0108.
Dear Shannon:

I appreciated speaking with you yesterday and am glad that you are interested in serving as a Hearing Officer. I have attached a proposed letter of interest for your review. Feel free to revise it as necessary and put on your firm’s letterhead if you wish to do so. Otherwise, if acceptable, please sign and return to me and be sure to include your hourly rate (we left some space for that at the end of the first line of the second paragraph). Please attach a copy of your resume as well. As discussed, if you can email everything to me by the end of the day today or tomorrow morning at the latest, that would be appreciated.

If you have any questions, please call.

Thank you again.

Best regards,

Jon

Jon Fishbane
District General Counsel
Collier County Public Schools
5775 Osceola Trail | Naples, FL 34109
p: 239.377.0498 | email: fishbj@collierschools.com

The District School Board of Collier County, Florida intend that this message be used exclusively by the addressee(s). This message may contain information that is privileged, confidential, and exempt from disclosure under applicable law. Unauthorized disclosure or use of this information is strictly prohibited. If you have received this communication in error, please permanently dispose of the original message and notify Jon Fishbane immediately at the phone number listed above. Thank you.
May 23, 2018

RE: Independent Hearing Officer

Dear Board Members:

I want to express my interest in serving the District School Board of Collier County as an independent Hearing Officer in conjunction with objections to Board adopted Instructional Materials and the provisions of Board Policy.

I am available to serve subject to the following terms: my hourly rate is $________ per hour and reimbursement for any postage or express mail charges or copying fees that may be incurred in the process of preparing for the hearing.

I have attached a copy of my resume for your review. I want to thank you very much for considering me for this matter.

Very truly yours,

Shannon McFee
June 29, 2018

RE: Instructional Materials Objection Hearing Set for June 18, 2018

Dear School Board,

I’m writing you about your June 18, 2018 hearing. I previously wrote you with objections to the format of the hearing and explained how you would be violating Florida law. This letter dated June 16 was ignored entirely by the Board and your counsel. On behalf of FLCA and the individual objectors, Keith Flaugh, Joseph Doyle, and Michael Mogil, I am noting all the legal violations and demanding a rehearing in compliance with Florida law.

The Board violated Florida Statute 1006.283(2)(b)(8)(c) by holding the meeting to allocate funds to the purchase of texts directly after the hearing on objections.

Florida statute 1006.283(2)(b)(8)(c) states the public meeting to approve an annual instructional materials plan must not be held on the same date as public objections hearing. The Board violated this statute by approving the purchase of texts on the same day in the same meeting as the hearing on objections. Not only is this a violation of the statute, but it gives the
appearance of impropriety to the public that the Board already knew the outcome of the objections hearing and that the whole process was a sham proceeding. This view is further bolstered by the fact that you refused to discuss each book individually and voted instead to deny the objections on all 16 books without any discussion about any particular point raised by the objectors.

**The Board violated Florida Law by making Mr. McFee an agent of the School Board and District.**

You contracted Mr. McFee at an hourly rate to “referee” the hearing. As a contractor being paid by the Board/District to work on behalf of the Board, Mr. McFee was an agent of the District. This is explicitly forbidden in Fla. Stat. 1006.28(3) where it states “The hearing officer may not be an employee or agent of the school district.” As I noted to you in my objections prior to the hearing, the Board should have utilized a hearing officer rather than presuming authority to appoint one, which is not given in the statute. Thus, you violated the law in using Mr. McFee.

**The District’s agent and appointed hearing officer, Shannon McFee, is not a hearing officer.**

As I indicated to you previously, hearing officers are judicial officers who comprise an element of the State court system. Fla. Stat. 29.04(8) and typically receive special training as hearing officers. Mr. McFee has not been appointed by any administrative agency or the Florida judiciary. Moreover, nothing in Fla. Stat. 1006.28(3) authorizes this Board to appoint a hearing officer. Thus, you violated Florida law by not using a hearing officer and appointing your own without authority to do so.

**The Board failed to apply Florida Statute 1006.31 in evaluating the objections.**

The hearing plan that was promulgated by the Board acknowledged that the objectors would present evidence that the texts did not meet the standards of 1006.31. Among other things, this statute requires texts to be accurate, objective, and balanced. At the end of the hearing, the Board voted to overrule or deny the more than 200 objections in one single motion. Not only did the Board not make findings as to each objection, it did not make findings as to each book, but worse than that, the Board did not state what standards it was utilizing to judge the objections. At no time did the Board move to find the texts accurate, balanced, and objective. At no time did the Board move to find that the texts complied with Florida Statute 1006.31. It’s completely unclear
to the objectors and the citizens of Collier County whether or not the Board applied any statutory standards at all in coming to its decision to overrule the objections en masse.

The Board misapplied term “Hearing Officer” and misapplied Florida statute 1006.28(3).

The title “Hearing Officer” is a term of art in Florida, i.e., it carries a specific meaning in Florida law. A hearing officer in Florida is a judicial officer assigned to hear administrative cases. Hearing officers are statutorily identified as an element of Florida’s judiciary and are paid for by state funds allocated to the judiciary. Fla. Stat. 29.004 (8). Every judicial circuit in Florida has hearing officers.

The hearing held by you on June 18 was novel in its approach. The Board opened the meeting, thus making it a board meeting, not a separate hearing. Then, the Board turned the gavel over to Mr. McFee to “referee” a hearing within your meeting. Mr. McFee proceeded to “referee” the hearing, acknowledging that he would turn the gavel back over to the Board after the evidence was presented. Strangely, after acknowledging that he would do nothing more than referee, Mr. McFee proceeded to ask questions, as if his understanding of the objection mattered at all when it clearly didn’t because he would not be making any findings or submitting a recommendation.

This setup of having a hearing officer merely referee a hearing is unheard of in Florida, and nowhere in our courts or administrative proceedings do similar proceedings take place. You’ll recall that I attached a list of statutes that reference a hearing officer in Florida to my last letter. In no place in the canon of Florida law is a hearing officer utilized as a referee. You should have allowed the hearing officer to conduct the hearing from start to finish, make findings, and submit a recommended order to the Board. You made the Legislature’s requirement for a neutral hearing officer a nullity. Florida Statute 1006.28(3) states the objectors are to “present evidence to the hearing officer.” If the hearing officer is not making any findings or a recommended order, then the objectors are really presenting their evidence to the Board, not the hearing officer.

In Conclusion, this Board violated the law by 1) holding the objection hearing on the same day as its meeting to approve the purchase of texts; 2) utilizing an agent of the District to be a hearing officer; 3) appointing a hearing officer without the authority to do so rather than utilizing an actual hearing officer; 4) utilizing an attorney instead of a hearing officer, 5) failing to apply the standards of 1006.31 in its assessment of the objections, and 6) utilizing the hearing officer merely as a referee instead of allowing the officer to make findings and submit a
recommended order. My clients demand a rehearing with the foregoing violations corrected. As Mr. McFee was just a referee and not an actual hearing officer with authority to grant this rehearing, I’m submitting this demand to the Board.

Respectfully Submitted,

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**RE:** Board Policy 2520, Section 1006.28(2)(a)3., Florida Statutes, and Section 1006.283 (2)(b)8. and 9., Florida Statutes

Dear Charlotte County School Board Members:

We represent Mr. John R. Doner, who (along with other petitioners) contested the adoption of the following instructional materials, on Tuesday, April 17, 2018, based on the portion of the criteria under 1006.31(2) that the educational materials to be adopted must be “accurate, objective, balanced, ...”:

- Modern World History-Houghton Mifflin Harcourt Publishing Company- Copyright© 2018
- The Cultural Landscape- An Introduction to Human Geography-Pearson-12th Edition/AP® Edition-Copyright ©2017; and
- Gateway to History-The Bridge to Success on Florida’s EOC Test- Florida Transformative Education Copyright © 2015. (collectively, the “Challenged Textbooks”)

In connection with the same, we hereby bring the following items to your attention and look forward to your response.

First, the School Board failed to enter a final order at the May 8, 2018 Board meeting approving the recommended order by the hearing officer, Mr. Current, as required by Board Policy 2520 and 1006.28(2)(a)3., Florida Statutes. Additionally, the motion made and seconded was to accept or decline to move forward to adopt and purchase the instructional materials of subject areas K though 8 Science and 9 through 12 Social Studies to include all instructional materials for which petitions were received and heard. As such, (i) the Board took no action on May 8, 2018 to either accept or decline to move forward to adopt

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and purchase the instructional materials of subject areas K through 8 Science and 9 through 12 Social Studies to include all instructional materials for which petitions were received and heard, and (ii) any action by the District to purchase such instructional materials based on said motion is ultra vires and improper. While it is clear that the School Board Chair, while reading from a prepared meeting script¹, recommended, at the May 8, 2018 School Board meeting, that the Board accept Mr. Current’s findings, no motion do so was ever made, seconded or voted on at the May 8, 2018 Board meeting or otherwise.

The following is the relevant transcript of the May 8, 2018 School Board Meeting (see, minute 44 at https://www.youtube.com/watch?time_continue=2766&v=EbMSHE_ziD8):

School Board Chair
“Upon review of the written recommendation of Mr. Alfred Current, the citizen volunteer, serving as the unbiased hearing examiner for the 2017-18 instructional materials adoption year, I am recommending that we accept Mr. Current’s findings that the instructional materials contested are usable in the school system.

“At this time, I will accept a motion to accept or decline to move forward to adopt and purchase the instructional materials of subject areas K through 8 Science and 9 through 12 Social Studies to include all instructional materials for which petitions were received and heard.”

Another Board Member
So moved.

A Different Board Member
Second.

School Board Chair
“It has been moved and seconded to accept Mr. Current’s findings that all instructional materials for which petitions to contest the adoption of such specific instructional materials were reviewed and heard are usable in the school system and to move forward with the adoption and purchase of all instructional materials under consideration in the 2017-18 school year. Is there any Board discussion?”

Further discussion by the Chair only.

School Board Chair
All in favor signify by saying aye. Opposed?

¹ After the Chair, pursuant to the meeting script that he was reading from as evidenced by the meeting video, asked for a motion to accept or decline to move forward to adopt and purchase the instructional materials of subject areas K through 8 Science and 9 through 12 Social Studies to include all instructional materials for which petitions were received and heard, the Chair immediately turns his head to the audiences’ left, makes eye contact with his fellow Board member, waits, and then nods his head. After receipt of these nonverbal cues, that appear from the video to be pre-staged, this Board member is heard to say, “so moved.” The Chair then turns his head to the audiences’ right, makes eye contact with another fellow Board member and waits. After receipt of this non-verbal cue, this Board member is heard to say, “second.” The scripting of meetings by Board members outside of the Sunshine is a violation of Florida law and the video presents some significant concerns in this regard that warrant further investigation. As such and by way of this letter, we also make formal records request for the pre-written script that the Chair was reading from at the May 8, 2018 Board meeting, and we respectfully ask for all electronic copies of the same from every user/computer that worked on this meeting script, with all metadata being preserved for review and inspection.
The Chair then announced that the Motion passed unanimously and that the Board’s decision is final and not subject to petition or review. However, and notwithstanding the mis-statement made by the Chair after the motion was moved and seconded, the actual motion on the floor that was moved and seconded did not include a final order to accept Mr. Current’s findings that all instructional materials for which petitions to contest the adoption of such specific instructional materials were reviewed and heard are usable in the school system. Further, the motion made and seconded was to accept or decline to move forward to adopt and purchase the instructional materials of subject areas K through 8 Science and 9 through 12 Social Studies to include all instructional materials for which petitions were received and heard. As accept or decline are mutually exclusive, the motion can have no legal effect. Pursuant to the requirements of Rule 6A-10.081, Florida Administrative Code, kindly cause the May 8, 2018 meeting minutes to accurately reflect the foregoing motion as described above and advise this office when the Board will: (i) enter a final order on the Section 1006.28(2)(a)3., Florida Statutes, and (ii) take action to accept or decline to move forward to adopt and purchase the instructional materials of subject areas K through 8 Science and 9 through 12 Social Studies to include all instructional materials for which petitions were received and heard. Also, please confirm that the District has not entered into any contracts or taken any other ultra vires action with respect to the procurement of instructional materials based on the May 8, 2018 Board meeting.

Second, in reviewing Board Policy 2520, it appears that key statutory criteria has been omitted from said District Policy. Further, it appears that such omissions impaired the Section 1006.28(2)(a)3 hearing process, the procedural protections and hearing officer’s ability to apply the proper criteria to the evidence. As such, we respectfully request the opportunity to meet with your attorney and the hearing officer to discuss an acceptable remedy.

Board Policy 2520, provides in relevant part, “The petition must be signed by the petitioner, include the required contact information, and state the objection to the instructional material, based on the following criteria set forth in F.S. 1006.31(2) or 1006.40(3)(d).” Curiously, however, Policy 2520 then proceeds to lists only the criteria as set forth in F.S. 1006.34 (2)(b) and F.S. 006.40(3)(d) and omits reference to additional criteria, as contained in 1006.31(2), which additional criteria formed the stated and accepted basis for objections in the petitions (hereinafter defined) to instructional materials contained in the Challenged Textbooks.

Each of the Petitions for Objection to the Adoption of Instructional Materials (the “petitions”) cite the criteria under F.S. 1006.31(2) that the instructional materials must be, “accurate, objective, balanced, ....” as the criteria for objection to be evaluated by the hearing officer. The Petitions do not implicate any other criteria under F.S. 1006.31(2) or 1006.40(3)(d) as a basis for objection. Further, Board Policy 2520 omits the criteria under F.S. 1006.31(2) that the instructional materials must be, “accurate, objective, balanced, ....”, and we respectfully request that Board Policy 2520 be amended to include said and all other F.S. 1006.31(2) criteria so that: (i) parents and community members can specifically identify the relevant criteria that forms the basis for objection(s), and (ii) the hearing officer can correctly apply (and make findings and recommendations based only on) the relevant criteria implicated by the specific objection. For example, a hearing officer would not evaluate an objection to instructional materials contained in a math textbook on the basis of criteria that provides that instructional materials may not contain pornography and material prohibited under s. 847.012 (per 1006.40(3)(d)1.), when in fact the applicable criteria used by a petitioner for contesting is, for example, based on accuracy (1006.31(2)), not being suited to students’ ability to comprehend (per 1006.40(3)(d)2.), etc.

At no point, has staff, the hearing officer or the Board disputed the application of the F.S. 1006.31(2) criteria that instructional materials must be, “accurate, objective, balanced, ....” Further, at no point has staff, the hearing officer or the Board disputed that all of the specific evidence and objections (that were to be heard by the hearing officer) were centered solely on the objection that all of the instructional materials contained in the Challenged Textbooks must meet the “accurate, objective, balanced,
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...” criteria found in F.S. 1006.31 (2). As such, the Section 1006.28(2)(a)3 hearing process and AP 2520 required findings and recommendations from the hearing officer to the Board pertaining to his specific findings and recommendations on each contested instructional materials in the Challenged Textbooks based on the “accurate, objective, balanced, ...” criteria found in F.S. 1006.31 (2).

In applying the “accurate, objective, balanced, ...” criteria found in F.S. 1006.31 (2), the hearing officer found, in his recommended order dated April 30, 2018, as follows:

Having reviewed the books in short order by “thumbing through pages from beginning to end”, I felt myself in a bit of wonder since the layout and some of the topics were vastly different as I remembered text books in my high school years. I concur with the petitioners that there is perhaps some bias, slant, and the introduction of unnecessary information with regards to lifestyle choices, religious views, and political persuasion that could be presented in a different fashion.

As such and with respect to the applicable criteria as cited by the petitioners, it is clear that the hearing officer found instructional material in the Challenged Textbooks to be not objective and balanced. Consistent with this hearing officer finding, I respectfully remind the Board of its obligation to comply with the following Policy 2520 mandate, “If the petitioner proves that instructional material does not meet the criteria required under F.S. 1006.28, or contains prohibited material under that statute, it shall be removed in accordance with Florida law.”

While it is clear that the hearing officer found some bias, slant and introduction of unnecessary political and religious views in the Challenged Textbooks, the hearing officer failed to provide his specific recommending order as to the each instructional materials objection raised in the addendums and supplements to the petitions, so we are left without the required finding or recommendation from the hearing officer on the applicable “accurate, objective, ....” criteria as to each alleged instructional material violation in the Challenged Textbooks. Further, I see no finding or recommendation from the hearing officer regarding the “accurate” criteria objection raised by the petitioners.

In fact, the concluding statement by the hearing officer, in his recommended order dated April 30, 2018, is curious. It appears that the hearing officer was, perhaps, guided by someone else and some other criteria in crafting his recommended order language. He states as follows, “Therefore, based on the Florida Statutes presented to me to use for this ruling, I don’t find the books to be unusable for the school system.” The language, when put in context with the forgoing, gives rise to a presumption that the hearing officer did not apply the accurate, objective, balanced, ...” criteria found in F.S. 1006.31 (2) in crafting his recommended order language. As such and consistent with Policy 2520 and Section 1006.28(2)(a)3., Florida Statutes, the April 30, 2018 recommended order language should be amended to provide an affirmative finding/recommendation by the hearing officer pertaining to the petitions and each of the challenged instructional materials in the Challenged Textbooks in relation to the “accurate, objective, balanced, ...” criteria found in F.S. 1006.31 (2).

Respectfully,


Douglas A. Lewis  
For the Firm

cc: Mr. Keith Flaugh  
Michael R. McKinley, Esquire  
Mr. Alfred C. Current, III
2019 Fixes Necessary to strengthen existing FL Instructional Materials laws

- School Board financial penalties for not complying with Florida Instructional Materials existing laws.
- Strengthen quality requirements for all Instructional materials in FS 1006.31 (I.E Textbooks and Supplemental materials used in the classroom, libraries and reading lists)
- Make Independent Hearing Officer subject to FL Chapter 120 (Administrative Procedures Act) making local hearings quasi-judicial hearings
- Required FL Commissioner of Education and School Boards that adopt materials to certify full compliance with Florida Statutes FS 1006.31, 1003.42, 847.012 and 1002.206
- Remove the current part of FL law that says “the school district decision on adopted materials is final” by allowing for an appeal to the Florida State Board of Education.
- Incentivize School Boards and FL DOE to use “original sourced” documents