IN THE SUPREME COURT OF FLORIDA

THE FLORIDA SENATE, and
TONI JENNINGS, in her official capacity as a
Member of and as the President of The Florida Senate
and as a citizen and taxpayer of the State of Florida,

Petitioners,

v. Case No. 95,960

KATHERINE HARRIS, in her official capacity
as Secretary of State of the State of Florida, and
ROBERT MILLIGAN, in his official capacity
as Comptroller of the State of Florida,

Respondents / Cross-Respondents,

and

JEB BUSH, in his official capacity
as Governor of the State of Florida,
and as a citizen and taxpayer of the State of Florida,

Intervenor-Respondent / Cross-Petitioner.
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# GOVERNOR JEB BUSH'S REPLY TO THE FLORIDA SENATE'S ANSWER TO CROSS-PETITION FOR WRIT OF MANDAMUS

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## CERTIFICATE OF SIZE AND STYLE OF TYPE

This Reply to the Florida Senate's Answer to Cross-Petition for Writ of Mandamus is typed in 14-point proportionately spaced Times New Roman.

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## SUMMARY OF ARGUMENT

Of all the principles informing the Florida Education Finance Program ("FEFP"), two rise above the rest: equitable funding and equal access. The first – equitable funding – ensures that the fortunes of school districts will not suffer from the vicissitudes of geographic location or tax base. The second – equal access – ensures that access to funding is protected from politics, misinformation or caprice. If every child in this state is to have equal educational opportunity, these principles must be left inviolate.

Recognizing that an Extended School Year is simply an extension of the basic operating year from 180 to 210 days, the Legislature adopted statutory authority for funding the program and embedded it squarely within the FEFP statute covering school operations. *See* Section 236.081(1)(o), Fla. Stat. The message was unsurprising and unmistakable: the same substantive and procedural principles underlying the FEFP basic operating funding formula should apply to any extension of basic operating schedules. Despite this statutory authority, no funding was provided for the Extended School Year program until the 1999 Legislature funded Operations Grants in Line Item 117C of the General Appropriations Act.

In response to the Governor's Cross-Petition seeking to have the Operations Grants stricken as an unconstitutional amendment to the FEFP, the Florida Senate and President Toni Jennings (collectively, "the Senate") deny that the Extended School Year program is part of the FEFP, claiming instead that it is just a "grant

program." The Senate further argues that even if the Extended School Year program were part of the FEFP, the Line Item 117C Operations Grants proviso does not depart from the FEFP in a constitutionally significant manner. The Senate's Answer not only fails to demonstrate convincingly that the Extended School Year program is not part of the FEFP, it proves that the Line Item 117C proviso dismantles the bedrock FEFP principles of equitable funding and equal access.

## ARGUMENT

### I. THE SENATE FAILS TO ESTABLISH THAT THE EXTENDED SCHOOL YEAR PROGRAM IS NOT PART OF THE FEFP

Statutory authorization for funding an Extended School Year is found in the middle of the FEFP statute entitled, "Funds for Operation of Schools ... Computation of the Basic Amount to be Included for Operation." *See* § 236.081(1), Fla. Stat. Similarly, Fla. Stat. § 236.013(6) defines the FEFP as "*all* programs and costs as provided in s. 236.081" (emphasis added). The Senate offers no explanation for why the Legislature would place the Extended School Year program squarely within the basic FEFP formula if it did *not* intend (as the Senate now contends) for the program to be part of the FEFP and funded under FEFP principles. By sheer force of the FEFP statute and the statutory definition in § 236.013(6) (which the Senate fails to mention in its Answer), the Extended School Year program *must* be part of the FEFP.

Moreover, if the Extended School Year program, § 236.081(1)(o), is not part of the FEFP, it is the *only* subsection of § 236.081(1) for which that is true.

For example, a similar program – the "Year-round-school program" – in the immediately preceding subsection, § 236.081(1)(n), is funded under the FEFP. Why the Legislature would place funding authority for the Extended School Year program within the FEFP if it did not intend to fund the program according to the FEFP, and why funding for this program would be the *only* portion of § 236.081(1) not subject to the FEFP, are mysteries for which the Senate offers no answers.

The Senate instead is relegated to the following arguments, all of which fail. First, it states that because § 236.081(1)(o) envisions a grant process, it is not part of the FEFP. *See* Answer at 2-3. But here the Senate confuses *how* with *how much*. The statutory grant process sheds some light on *how* to apply for Extended School Year funds, but it is the FEFP formula that specifies *how much* each district will receive. A perfect example of the irrelevance of the Senate's argument is the dropout prevention program, which for years was treated as a grant program, but funded according to the FEFP. *See* §§ 230.2316, 236.081(1)(c), Fla. Stat. Thus, the fact that the statute calls for a grant process cannot alone answer the central question raised by the Cross-Petition: whether the program is part of the FEFP. Moreover, by failing to provide equal access to funding, the Senate's proviso actually ignores the statutory grant process. *See infra* Section II.

The Senate next claims that "[t]he [FEFP] funding formula contains many elements; some of which are referenced in the statutes ... and others that are not specified in section 236.081 ...." Answer at 3. But the Senate can point to no

other element that *is* specified in the FEFP statute and yet somehow is *not* part of the FEFP. Suffering from a fatally similar flaw is the claim that "[g]rant programs ... are not commonly included in the FEFP formula." Answer at 4. The only examples given – school choice and reading programs – are programs that do not find as their statutory authority portions of the FEFP statute.

The Senate also argues that "[i]t is not uncommon for the Legislature to exempt certain components or categorical programs from the calculation of other [FEFP] components." Answer at 5. The only example given is "preschool funds," *id.*, which were never a statutory component of the FEFP. The Senate provides no example of a statutory component of, or statutory categorical program within, the FEFP that was removed from the FEFP other than through substantive legislation.

Thus, the Senate would elevate § 236.081(1)(o) to a unique and rarified status – a statutory subsection within the FEFP statute that somehow is not part of the FEFP. The Senate's arguments serve only to highlight the strained and tortured reading it places upon the Extended School Year statute.

Finally, the Senate advances an argument previously rejected by this Court. Quoting the first sentence of § 236.081 ("If the annual allocation from the [FEFP] to each district for operation of schools is not determined in the annual appropriations act or the substantive bill implementing the annual appropriations act, it shall be determined as follows [in the FEFP formula]"), the Senate asserts that it can fund Extended School Year any way it likes, as long as it spells it out in proviso. *See* Answer at 3-4. Yet the very same quoted language was similarly used by the Legislature in *Chiles v. Milligan*, 659 So. 2d 1055, 1058-59 (Fla.

1995), to argue that it could adjust the FEFP formula through proviso. This Court disagreed, holding that "the Legislature cannot erect a statutory scheme designed to circumvent this Court's admonition" against altering a statutory distribution formula through proviso. *Id.* at 1059.

Actions here speak louder than words. Early on, the Senate knew full well that funding for the Extended School Year program is part of the FEFP. Thus, at the beginning of the 1999 legislative session, the Senate prepared a 1999-2000 FEFP Allocation Report which, contrary to the Senate's claims herein, specifically *included* funding for the Extended School Year program. *See* Supplemental Appendix ("S.A.") Tab 1 at 25. But when the calculations were run, the fact that only some districts were allocated Extended School Year funds affected or threatened to affect severely two FEFP elements: the disparity compression adjustment (which adjusts allocations to compensate for disparities between the most- and least-funded districts), and the hold harmless provision (which guarantees each district a minimum increase over its previous year's FEFP allocation). *See* Answer at 5 (Legislature avoided the FEFP "so as not to affect other formula entitlement amounts, such as hold harmless and disparity compression calculations").

The Senate was faced with three options at that point – two legitimate, one not. The first legitimate option was to live with what the Legislature had wrought. The Legislature had placed funding for the Extended School Year program in the FEFP, the Senate ran the calculations *knowing* that it belonged there, and it could have accepted the consequences. The second legitimate option was to fix

perceived problems through substantive legislation, either by taking the Extended School Year program out of the FEFP mix, or by amending the FEFP to negate any undesired effects the addition of Extended School Year would have on the FEFP (such as by adjusting the definition of full-time-equivalent (FTE) student to adjust for the additional hours of instruction). *See infra* Section II.

The illegitimate option was alchemistic in nature – take Extended School Year out of the FEFP Allocation Report, make Extended School Year its own line item separate and distinct from the FEFP line item in the General Appropriations Act, and – like magic – the problem would disappear. The Senate opted for this third option, thereby running afoul of the Article III, Section 12 prohibition against using proviso to change law on a subject other than appropriations.

## II. THE LINE ITEM 117C PROVISO VIOLATES THE REQUIREMENTS OF THE FEFP

Having failed to establish that the Extended School Year program is not part of the FEFP, the Senate next argues that its departure from the FEFP makes little difference. Its Answer proves otherwise, for the Line Item 117C proviso clearly undermines the FEFP substantive requirement of equitable funding and the procedural requirement of equal access to funding.

On the substantive issue of equitable funding, the Senate concedes that had it stayed true to the FEFP, the Line Item 117C amount would have been different, even if only by a few percentage points, because of the difference between base and total FEFP funding. *See* Answer at 7; Cross-Petition at 32. This alone is fatal to the contested proviso. The Senate is left to argue that use of the proviso

formula would have been "much the same" as the FEFP formula, Answer at 5, but unless the end result is *exactly* the same, the Senate has amended a law on a subject other than appropriations. *Why* the Senate changed the formula is irrelevant. The sole fact that the Senate changed it at all is dispositive, for the law does not tolerate even slight amendments to substantive law through appropriations proviso.

But, more importantly, the Senate implicitly concedes its approach leads to inequitable funding. The Senate entirely fails to address the point that its funding approach, by eliminating the local effort requirement, would have resulted in great disparity between wealthy and less wealthy school districts. Wealthy districts, relieved of the local effort requirement, would receive as much as *ten times* their normal daily FEFP amount for extended school days. Less wealthy districts would have no such luck. *See* Cross-Petition at 33. Thus, for wealthier school districts, the difference is much more than a few percentage points; for them, the end result is hardly "much the same." And for less wealthy districts, the end result is that they will be much less likely than wealthier districts to afford extending the school year.

The Senate's Answer also largely neglects the Cross-Petition's point that the number of extended school days in the fiscal year varies widely between districts. As a result of the Senate's arbitrary (and admittedly uninformed) selection of 15 days, some districts would face a shortfall of Extended School Year dollars in comparison to their usual FEFP allocation, while others would reap a windfall.

*See* Cross-Petition at 31. Again, equity suffers.[1]

The result is the same on the issue of equal access to funding. The Senate overlooked the § 236.081(1)(o) grant process. It concedes that it limited funding to 234 schools, thus neglecting the statutory guarantee that *all* districts may apply. *See* Cross-Petition at 36. This is yet another amendment to substantive law which the Senate does not explain. It appears to make a half-hearted effort by claiming that "[a]ll districts had an equal chance to choose extended school year implementation." Answer at 2. Yet the Extended School Year "choice" to which the Senate refers is merely a survey which contains not the slightest indication that only those schools responding would be eligible for funds. *See* S.A. at Tab 2. The Senate's arbitrary decision to limit funding *only* to those schools responding to the February survey has caused confusion and frustration throughout districts that did not respond to the simple survey of interest. More importantly, it vitiates the promise that *all* districts may apply for funding, as well as the statutory directive that the Commissioner of Education play a role in funding decisions.

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[1] Of course, equal damage to the principle of equitable funding is inflicted by the Senate's attempted punitive withholding of 2000-2001 FEFP funds. The Senate candidly admits that the proviso "requir[es] the Commissioner of Education to deduct from each non-reporting school's 2000-2001 FEFP entitlement the amount of its 1999-2000 allocation of extended school year operational dollars." Answer at 8. The Senate attempts to justify this as a return of the Line Item 117C Operations Grant, *id.* at 7-9, but the clear result is a reduction in the 2000-2001 FEFP entitlement. This Court in *Chiles v. Milligan*, 659 So. 2d 1055 (Fla. 1995), could not have been more clear: any such changes to the "FEFP *entitlement*," Answer at 8 (emphasis added), must be enacted through substantive legislation. The result in *Chiles*, which invalidated a much less consequential alteration to the FEFP entitlement, would be rendered meaningless if the Court were to accept the Senate's reasoning here.

The Senate asks, "If the Legislature had done whatever the Governor suggests it should have done to 'track' the FEFP formula, what would the Legislature have done differently?" Remarkably, the Senate answers its own question: "The Legislature could have amended current statutes to change the definition of a full-time equivalent student to allow each student participating in an extended school year to be counted for funding purposes as more than a 1.0 full-time-equivalent student." Answer at 4. This would allow districts to report actual enrollment in the program and then be funded for such enrollment pursuant to the statutory FEFP formula. This would have been one constitutionally permissible solution, but one which the Senate obviously decided to forgo. Another constitutionally permissible solution would have been to follow the present FEFP formula by calculating each school's allocation based on its pro-rata share of the district's total "Gross State and Local FEFP" instead of the district's "Base Funding Allocation," and then observing the other statutory adjustments in the FEFP formula.

Regardless of how the Senate could have addressed the matter differently, the fact remains that it was not faithful to the FEFP principles of equitable funding and equal access to funding. By failing to address these matters, the Senate concedes as much.[2]

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[2] As a final defense, the Senate maintains that the Line Item 117C Operations Grants are defensible as a supplement to the FEFP allocation, under the reasoning of *Department of Education v. School Board of Collier County*, 394 So. 2d 1010 (Fla. 1981). *See* Answer at 9-10. This argument comes last for a reason, because the differences between this case and the present situation are obvious. The one-time grant in *Collier County* provided more money than required under the FEFP

## CONCLUSION

As in *Chiles v. Milligan*, "it is clear that [the Legislature's Extended School Year funding choice] is a policy decision which should be debated as a proposed amendment to the distribution formula in section 236.081." 659 So. 2d at 1059. To depart so seriously from fundamental FEFP principles for funding basic operations, the Legislature was required to proceed through substantive legislation. Its failure to do so is fatal to its effort.

Accordingly, this Court should strike the contested proviso as unconstitutional. By doing so, the Court will obviate the need to reach the merits of the Senate Petition.

Respectfully submitted,

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to certain school districts for the same number of days. Here, the Legislature has provided more money, but the schools will be open more days. The Cross-Petition proves and the Senate concedes that those districts with more than 15 additional days in this fiscal year are receiving less per day than they would have received under the FEFP. *See* Cross-Petition at 31. Clearly, this is not supplemental funding of the type in *Collier County.* Moreover, the "hold harmless" provision at issue in *Collier County* merely guaranteed that each district would receive at least as much as it had received the previous year. It was undisputed that this provision was "not activated" because all the districts received an increase, even after application of the disputed one-time supplement. *Id.* at 1012-13. Here, it is undisputed that there *is* a difference between the Line Item 117C allocation and what the allocation would have been under the FEFP. The Senate's reliance on *Collier County* assumes the very question at issue: whether the Extended School Year program is part of the FEFP. Finally, the *Collier County* Court found that the record justified the one-time guaranteed supplemental increase for all but the four wealthiest counties; "disparity in school funding between rich and poor districts was clearly the reason the legislature decided to provide supplemental money only" to certain districts. *Id.* at 1013. Here, of course, the opposite is true, for wealthier districts fare much better than poorer districts relative to the normal FEFP allocation.

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## CERTIFICATE OF SERVICE

I certify that a true and correct copy of Governor Jeb Bush's Reply to The Florida Senate's Answer to Cross-Petition for Writ of Mandamus has been furnished by hand delivery to the parties listed below, this 23rd day of August, 1999:

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