

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 1569

Charter Schools

SPONSOR(S): Stargel

TIED BILLS:

IDEN./SIM. BILLS:

	REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1)	PreK-12 Policy Committee	12 Y, 0 N, As CS	Beagle	Ahearn
2)	PreK-12 Appropriations Committee			
3)	Education Policy Council			
4)				
5)				

SUMMARY ANALYSIS

The bill revises various statutory provisions related to charter schools. The bill:

- Creates the designation of “high performing charter school” status for a charter school that meets specified academic and financial benchmarks for three consecutive years. Such schools are entitled to an automatic 15-year charter renewal; an increase in enrollment beyond the maximum enrollment specified in its charter; an automatic qualification for startup grants; receipt of capital outlay funds in the first year it receives a high-performing designation; and an extension of the deadline to submit an initial application to replicate a successful charter school.
- Requires a charter school’s governing board to submit quarterly, rather than monthly, financial statements to its sponsor.
- Authorizes a charter school-in-the-workplace to receive charter school capital outlay funding. Currently, these schools are ineligible for such funds because the business partner provides the school facility.
- Prohibits school districts from imposing facilities restrictions on charter schools that are more stringent than those imposed by local governments.
- Exempts charter schools from concurrency exactions imposed by local ordinance.
- Deletes provisions requiring certain charter schools to report student assessment data and relaxes restrictions on the employment of relatives by charter schools.
- Adds furniture, equipment, and computer hardware, software, and network systems as allowable expenditures of charter school fixed capital outlay funding.

The bill does not appear to have a fiscal impact on state government, but the bill will reduce the amount of revenue local governments receive from concurrency exactions due to the bill’s exemption of charter schools from the payment of concurrency exactions imposed by local ordinance. *See infra* “Fiscal Analysis & Economic Impact Statement.”

The bill presents a number of drafting and other issues. *See infra* “Drafting Issues or Other Comments.”

HOUSE PRINCIPLES

Members are encouraged to evaluate proposed legislation in light of the following guiding principles of the House of Representatives

- Balance the state budget.
- Create a legal and regulatory environment that fosters economic growth and job creation.
- Lower the tax burden on families and businesses.
- Reverse or restrain the growth of government.
- Promote public safety.
- Promote educational accountability, excellence, and choice.
- Foster respect for the family and for innocent human life.
- Protect Florida's natural beauty.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Charter Schools Overview

In 1996, the Legislature enacted Florida's first charter school law.¹ Charter schools are nonsectarian, public schools that operate under a performance contract, referred to as a "charter," with its sponsor. The charter frees the school from many regulations applicable to traditional public schools in order to encourage the use of innovative learning methods, while holding the school accountable for academic and financial results.² Charter schools may be sponsored by a district school board, community college or state university, municipality or, in the case of a charter lab school, by a state university.³ Each charter school is administered by a governing board.⁴

Charter schools are subject to the same academic performance accountability requirements applicable to traditional public schools. Charter school students must take the Florida Comprehensive Assessment Test (FCAT) and the schools are graded annually.⁵

Since 1996, the number of charter schools in Florida has grown from five to 389 during the 2008-2009 school year. Charter schools served 118,169 students during the 2008-2009 school year.⁶

High-Performing Charter Schools

Present Situation

Florida law does not currently include a program for designating charter schools as "high-performing charter schools" based on academic performance and financial stability. However, academic performance and financial stability are factors in awarding charter school capital outlay funding and 15-year charter renewal. A charter school may receive charter school capital outlay funding if, among other things, it demonstrates satisfactory student performance and financial stability.⁷

¹ Chapter 96-186, L.O.F., initially codified as § 228.056, F.S., redesignated in 2002 as § 1002.33, F.S.

² Section 1002.33(1), (2), (7), (9), (16), & (17), F.S.

³ Section 1002.33(5)(a), F.S.

⁴ Section 1002.33(9)(i), F.S.

⁵ Section 1002.33(7)(a)4. & (9)(k)1., F.S.

⁶ Florida Department of Education, *Charter Schools Program*, (October 2009) available at:

http://www.floridaschoolchoice.org/information/charter_schools/files/fast_facts_charter_schools.pdf.

⁷ Section 1013.62(1), F.S.

The required term of a charter is four or five years.⁸ Florida law provides opportunities for charter schools that demonstrate strong academic performance and fiscal stability to be granted a 15-year charter. In order to facilitate long-term financing for charter school construction, a sponsor:

1. May grant a 15-year charter renewal to a charter school: (a) that has operated for at least three years; (b) that demonstrates exemplary academic programming and fiscal management; and (c) for which none of the grounds for nonrenewal have been documented.⁹ Such a long-term charter is subject to annual review and may be terminated during its term.¹⁰
2. Must grant a 15-year charter renewal to a charter school that meets the requirements expressed in Number 1. above, receives a school grade of “A” or “B” in three out of four years, and is not in a state of financial emergency or deficit position.¹¹ If granted, a long-term charter is subject to annual review and may only be terminated for specified reasons.¹²

Charter schools may also receive federal grant funding. Charter School Program (CSP) Grant funds are offered on an as available, competitive basis to:

- Newly-approved charter schools during the first three years of operation. The funds may be used for planning, design, and initial implementation of the school.
- Charter schools that have successfully been in operation for at least three consecutive years. These funds may be used for support activities that help open new public schools or share lessons learned by charter schools with other public schools.

Charter schools may apply for these funds through the Department of Education (DOE), which acts as the state educational authority for purposes of the CSP.¹³

The deadline for submitting an application to establish a new charter school is August 1 of each year. Unless otherwise agreed upon by the applicant and sponsor, the opening date of the charter school is the beginning of the next full school year.¹⁴ The student capacity of a charter school is annually determined by the governing board, in conjunction with the sponsor.¹⁵

Effect of Proposed Changes

The bill authorizes a charter school to be designated as a high-performing charter school if it meets the following conditions for three consecutive years:

- Receives a school grade of “A” or “B”;
- Receives unqualified opinions on its annual audited financial statements; and
- Maintains positive fund balances.

The bill provides that a high-performing charter school is entitled to the following:

- Automatic renewal of its charter for 15 years.
- Ability to increase enrollment in excess of the maximum enrollment specified in its charter.
- Automatic qualification for startup grants for new applicants.

⁸ Section 1002.33(7)(a)12., F.S.

⁹ Section 1002.33(7)(b)1., F.S.

¹⁰ Section 1002.33(7)(b)1., F.S. A charter may be terminated or not renewed for: failure to participate in the state’s education accountability system or failure to meet the charter’s requirements for student performance; failure to meet generally accepted standards of fiscal management; violation of law; or other good cause shown. Section 1002.33(8)(a), F.S.

¹¹ Section 1002.33(7)(b)2., F.S..

¹² *Id.*

¹³ U.S. Department of Education, *Charter Schools Program*, <http://www2.ed.gov/programs/charter/index.html> (last visited Mar. 14, 2010).

¹⁴ Section 1002.33(6)(b), F.S.

¹⁵ Section 1002.33(10)(h), F.S.

- Receipt of capital outlay funds beginning with the first year it receives a high-performing designation.
- Extension until January 1 to submit an initial application to replicate a successful charter school.

The bill does not specify a procedure for reviewing a charter school's status as "high-performing." It is unclear whether high performing charter school status can be reviewed or terminated. See *infra* "Drafting Issues & Other Comments."

Financial Monitoring

Present Situation

Legislation enacted in 2009 requires each charter school to provide a monthly financial statement to its sponsor.¹⁶ Monthly financial statements enable sponsors to closely monitor the financial health of sponsored charter schools. If a monthly financial statement indicates a deteriorating financial condition¹⁷ or financial emergency condition,¹⁸ the sponsor and governing board must develop a corrective action plan.¹⁹

Effect of Proposed Changes

The bill requires a charter school to provide a quarterly, instead of monthly, financial statement to the sponsor, unless the charter school is determined to be in a state of financial emergency, in which case the charter school must provide a monthly financial statement.

Charter Schools-in-the-Workplace

Present Situation

Charter schools-in-the-workplace are sponsored by local school districts in partnership with a company or business. In order to establish a charter school-in-the-workplace, a business partner must, among other things, provide the school facility to be used.²⁰ Any portion of a facility used for a public charter school is exempt from ad valorem taxes as long as it is used as a public school.²¹ Charter schools in-the-workplace are not eligible for charter school capital outlay funding because they serve students in facilities that are provided by the sponsor.²²

Effect of Proposed Changes

The bill relaxes the requirement that a business partner provide the school facility for a charter school-in-the-workplace by allowing the business partner to provide one of the following:

- Access to a school facility to be used;
- Resources that materially reduce the cost of constructing a school facility;
- Land for a school facility; or
- Resources to maintain a school facility.

¹⁶ Section 7, ch. 2009-214, L.O.F.; § 1002.33(10)(g), F.S.

¹⁷ "Deteriorating financial condition" means a circumstance that significantly impairs the ability of a charter school or a charter technical career center to generate enough revenues to meet its expenditures without causing the occurrence of a financial emergency condition described in s. 218.503(1)." Section 1002.345(1)(a)3., F.S.

¹⁸ A financial emergency condition includes: failure to pay short-term loans, make bond debt service or pay long-term debt payments due to lack of funds; failure to pay uncontested creditor claims within 90 days; failure to pay withheld employee income taxes; failure for one pay period to pay, wages, salaries, and retirement benefits owed; a fund balance or total net assets deficit. Section 218.503(1), F.S.

¹⁹ Section 1002.345(1)(a) & (c), F.S.

²⁰ Section 1002.33(15)(b), F.S.

²¹ Section 1002.33(15)(b), F.S. (flush-left provisions at end of paragraph).

²² Section 1013.62(1)(a)5., F.S.

The bill also provides that a charter school-in-the-workplace is eligible for capital outlay funding. Currently, these charter schools do not receive such funding. See *infra* “Drafting Issues & Other Comments.”

Charter School Facilities

Present Situation

Concurrency is a growth management procedure designed to accommodate the impacts of new growth on the availability of public facilities and services. Concurrency is essentially a timing mechanism. Under concurrency, public services must be available to serve new development within statutorily established time frames.²³ District school boards and local governments achieve school concurrency when there are adequate school facilities available to accommodate increases in student enrollment resulting from new development.²⁴

When school capacity is unavailable to support the impacts of a particular development proposal, such development is precluded from proceeding. “Proportionate-share-mitigation” enables a developer to execute a legally binding commitment to provide mitigation to offset the demand on public school facilities created by the development so that it may proceed. Options for proportionate-share mitigation are established locally in the public school facilities element of the comprehensive plan and interlocal agreement.²⁵

Construction of a charter school that meets the statutory requirements for charter school facilities is one of four mitigation options provided in statute.²⁶ If the educational facilities plan²⁷ and the public school facilities element of the comprehensive plan authorize the construction of a charter school as proportionate share mitigation, the local government must credit the developer towards any impact fee or exaction imposed by local ordinance for the same need, on a dollar-for-dollar basis at fair market value.²⁸

Charter schools are exempt from compliance with the State Requirements for Educational Facilities, but are required to comply with the Florida Building Code and the Florida Fire Prevention Code. A local governing authority may not impose local building requirements on charter schools that are more stringent than the Florida Building Code.²⁹ For purposes of inspection of a facility and issuance of a certificate of occupancy, the agency with jurisdiction is the local municipality or, if in an unincorporated area, the county governing authority.³⁰

Florida law provides several fee exemptions that financially benefit charter schools. Charter schools are exempt from assessments of fees for building permits, building and occupational licenses, impact fees,

²³ Section 163.3180(2), F.S.

²⁴ Florida Department of Community Affairs, *Best Practices for School Concurrency*, p. 8 (April 2007) available at <http://www.dca.state.fl.us/fdcp/DCP/SchoolPlanning/Files/schoolsbp.pdf>.

²⁵ Section 163.3180(13)(e), F.S. Local government entities, i.e., counties and municipalities, must adopt comprehensive plans that guide future growth and development. Section 163.3177, F.S. Each local government comprehensive plan must contain chapters or “elements” that address various development issues, including public schools. Section 163.3177(12), F.S. The county and each municipality within a school district must enter into an agreement with the school board which jointly establishes a process for coordinating school board educational facilities plans and the local government comprehensive plans. Section 163.3177(1)(a), F.S.

²⁶ Section 163.3180(13)(e), F.S.; See Section 1002.33(18), F.S. (charter school facilities requirements). The other three mitigation options are the contribution of land or payment for land acquisition; mitigation banking, which allows the developer to contribute mitigation that exceeds the actual impact of its development in exchange for proportionate share credits toward impact fees or future development; and construction or payment for construction of a public school facility. See also Florida Department of Community Affairs, *Proportionate Share Mitigation for School Concurrency* (May 2006) available at <http://www.dca.state.fl.us/fdcp/DCP/SchoolPlanning/Files/ProportionateShareMitigation.pdf>.

²⁷ An educational facilities plan is a comprehensive planning document that is adopted annually by the district school board. The plan includes long-range planning for facilities needs over 5-year, 10-year, and 20-year periods. The plan must be developed in coordination with local governments and be consistent with the local government comprehensive plans. Section 1013.35(1)-(2), F.S.

²⁸ Section 163.3180(13)(e)2., F.S.

²⁹ Section 1002.33(18)(a) & (b), F.S.

³⁰ Section 1002.33(18)(a), F.S.

service availability fees, and assessments for special benefits.³¹ Charter schools are not currently exempt from exactions imposed by local ordinance related to school concurrency.

Effect of Proposed Changes

The bill prohibits a school district from imposing more stringent facilities restrictions on charter schools than those imposed by the local municipality or county governing authority. The bill also provides that charter school facilities are exempt from exactions imposed by local ordinance related to school concurrency.

Public Information on Charter Schools

Present Situation

Legislation enacted in 2009 requires DOE to report student assessment data to charter schools that do not receive a school grade or a school improvement rating, but which serve at least 10 students who are tested on the FCAT. A charter school is then required to report such information to the parent of a student attending the charter school, the parent of a child on the charter school's waiting list, the district in which the charter school is located, and the governing board of the charter school.³² Each charter school is required to provide such information on its internet website and also provide notice to the public at large.³³ Reporting of data must comply with federal law governing education records privacy.³⁴

Effect of Proposed Changes

The bill removes the requirement that charter schools, which serve at least 10 students who are tested on the FCAT but which do not receive a school grade or school improvement rating, report student assessment data to specified parents, the district in which the charter school is located, and the governing board of the charter school. A charter school is still required to provide this information on its internet website.

Restriction of Employment of Relatives

Present Situation

Legislation enacted in 2009 prohibits personnel in a charter school operated by a private entity from appointing, employing, promoting, or advancing, or advocating for the appointment, employment, promotion, or advancement of a relative in the school in which the personnel works or exercises jurisdiction or control. Furthermore, the law prohibits an individual from being appointed, employed, promoted, or advanced in or to a position in the charter school if such action has been advocated by the individual's relative who serves in or exercises jurisdiction or control over the charter school, or if such appointment, employment, promotion, or advancement is made by the governing board of which a relative of the individual is a member.³⁵

Effect of Proposed Changes

The bill relaxes the restrictions on employment of relatives by prohibiting charter school personnel from *knowingly* recommending or engaging in the employment, promotion, or assignment of an individual or employee to a work location if that action will create a situation in which one employee will be responsible for the direct supervision of, or exercise jurisdiction or control over, a relative. The bill provides that the Commissioner or the sponsor may make exceptions to this provision if it would cause undue hardship on students or seriously disrupt a charter school's operations.

³¹ Section 1002.33(18)(d), F.S.

³² Section 7, ch. 2009-214, L.O.F.; § 1002.33(21)(b)1. & 2., F.S.

³³ Section 1002.33(21)(b)3.b., F.S.

³⁴ Section 1002.33(21)(b)2., F.S.; *See* 20 U.S.C. § 1232g.

³⁵ Section 7, ch. 2009-214, L.O.F.; § 1002.33(24), F.S.

Charter School Capital Outlay Funding

Present Situation

To be eligible for charter school capital outlay funding, a charter school must:

- Have been in operation for at least 3 years; be governed by a governing board established in the state for three or more years which operates both charter schools and conversion charter schools; be part of an expanded feeder chain with an existing charter school in the district; or be accredited by the Southern Association of Colleges and Schools;
- Demonstrate financial stability;
- Have satisfactory student performance;
- Have received final approval from its sponsor; and
- Serve students in facilities not provided by the charter school sponsor.³⁶

Capital outlay funds may be used by a charter school for the:

- Purchase of real property.
- Construction of school facilities.
- Purchase, lease-purchase, or lease of permanent or relocatable school facilities.
- Purchase of vehicles to transport students to and from the charter school.
- Renovation, repair, and maintenance of school facilities that the charter school owns or is purchasing through a lease-purchase or long-term lease of five years or longer.
- Purchase, lease-purchase, or lease of new and replacement equipment, and enterprise resource software applications.
- Payment of the cost of premiums for property and casualty insurance necessary to insure the school facilities.
- Purchase, lease-purchase, or lease of driver's education vehicles, motor vehicles used for the maintenance or operation of plants and equipment, security vehicles, or vehicles used in storing or distributing materials and equipment.³⁷

Enterprise resource software applications must be "classified as capital assets in accordance with definitions of the Governmental Accounting Standards Board, have a useful life of at least 5 years, and are used to support schoolwide administration or state-mandated reporting requirements."³⁸

Effect of Proposed Changes

The bill adds the purchase of equipment, furniture, and computer software, hardware, and network systems to the list of allowable uses of charter school capital outlay funding. Equipment is already an allowable use of these funds. (See Drafting Comments & Other Issues).

Charter School Funding Study

The bill directs the Office of Program Policy Analysis and Government Accountability (OPPAGA) to conduct a study comparing the funding of charter schools and traditional public schools. The study must:

- Identify school districts that distribute to charter schools funds generated by millage for capital improvements and the use of such funds by charter schools.
- Determine the amount of funds that would be available to charter schools if school districts equitably distributed funds generated by millage for capital improvements.

³⁶ Section 1013.62(1), F.S.

³⁷ Section 1013.62(2), F.S.

³⁸ Section 1013.62(2)(f), F.S.

- Examine the costs associated with supervising charter schools and determine if the five percent administrative fee paid for sponsor-provided administrative and educational services covers the cost of such services.

OPPAGA must make recommendations, if warranted, for improving the accountability and equity of the charter school funding system based on the study. The results of the study must be reported to the Governor and Legislature by January 1, 2011.

Technical Correction

Legislation enacted in 2009 requires governing board members of a charter school operated by a municipality or other public entity to make certain financial disclosures. The legislation cross-referenced the wrong section of law, thereby inadvertently subjecting the board members to the financial disclosure requirements for elected constitutional officers, rather than those for local officers. The bill corrects this cross-reference.

B. SECTION DIRECTORY:

Section 1: Amends s. 1002.33, F.S., establishes a high-performing charter school designation; revises financial reporting requirements; revises the requirements for establishment of a charter school-in-the-workplace; prohibits school districts imposing more stringent requirements on charter school facilities than local governments; provides for an exemption from certain exactions; removes a reporting requirement; revises restrictions on the employment of relatives, corrects a cross-reference related to financial disclosures.

Section 2: Amends s. 1013.62, F.S., authorizes additional uses for charter school capital outlay funds.

Section 3: Amends s. 163.3180, F.S.; conforms cross-references.

Section 4: Amends s. 1002.32, F.S., conforms cross-references.

Section 5: Amends s. 1002.34, F.S., conforms cross-references.

Section 6: Amends s. 1002.345, F.S.; conforms to bill provisions related to financial reporting; conforms cross-references.

Section 7.: Amends s. 1011.68, F.S., conforms cross-references.

Section 8: Amends s. 1012.32, F.S., conforms cross-references.

Section 9: Provides for an OPPAGA study.

Section 10: Provides an effective date of July 1, 2010.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

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

2. Expenditures:

The bill does not appear to have a fiscal impact on state expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

Local governments may experience a reduction in revenue resulting from the exemption of charter schools from concurrency exactions imposed by local ordinance.

2. Expenditures:

The bill does not appear to have a fiscal impact on local expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill allows charter schools established by businesses to receive charter school capital outlay funding. Such schools may be eligible for increased funding.

D. FISCAL COMMENTS:

The bill authorizes a charter school-in-the-workplace to receive charter school capital outlay funding. The bill also provides that a charter school may receive such funding in the first year it is designated as "high performing." These charter schools will receive increased funding. Because these provisions could increase the number of charter schools that are eligible for capital outlay funding, the amount that is disbursed to each eligible school may be reduced.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not require a city or county to expend funds or to take any action requiring the expenditure of funds.

The bill does not reduce the authority that municipalities or counties have to raise revenues in the aggregate.

The bill does not reduce the percentage of state tax shared with counties or municipalities.

3. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

High Performing Charter Schools: The bill's creation of "high performing charter school" status presents the following issues:

- The bill specifies that such high performing charter schools are entitled to an "automatic" 15-year charter renewal. Usually, charter renewal occurs at the expiration of the term of the charter. It is unclear whether the 15-year charter renewal is to occur immediately upon being designated as "high performing" or if this means that the charter school will be presumed eligible for such renewal at the expiration of the current charter term.
- The bill authorizes a high performing charter school to increase its enrollment beyond the maximum enrollment specified in its charter. Currently, a charter school's enrollment is jointly determined by the governing board and the sponsor. School districts perform various services for charter schools and serve as the local education agency for the purposes of receipt and distribution of federal funds. Such a unilateral increase in enrollment may impose logistical difficulties on school districts related to providing services and federal funding to charter school students.
- The bill entitles a high performing charter school to automatically qualify for charter school start-up grants. In awarding federal charter school grants, the DOE is required to follow federal regulations and employ a competitive process in determining grantee eligibility. The bill does not address this issue.
- The bill does not specify a procedure for reviewing a charter school's status as "high-performing." It is unclear whether high performing charter school status can be terminated if

student performance declines; the school encounters deficit fund balances; or the school receives audit criticism.

Charter Schools-in-the-Workplace: Currently, charter schools in-the-workplace are not eligible for charter school capital outlay funding because they serve students in facilities that are provided by the sponsor.³⁹ The bill provides eligibility for charter school capital outlay funding to these charter schools, but does not amend provisions in the charter school capital outlay statute which deny eligibility to charter schools that serve students in facilities provided by the sponsor.

Fixed Capital Outlay: The bill authorizes charter schools to use capital outlay funding to purchase furniture; equipment; and computer software, hardware, and network systems. Expenditure of capital outlay funds on equipment is already authorized under current law. Current law specifies limited and defined purposes for use of capital outlay funds.⁴⁰

IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES

On March 17, 2010, the PreK-12 Policy Committee adopted a strike-all amendment to HB 1569 and reported the bill favorably as a committee substitute. The strike-all amendment removes provisions from the original bill:

- Authorizing private universities and public entities to sponsor charter lab schools.
- Requiring a charter school sponsor to show good cause to the Commissioner of Education before terminating or not renewing a charter school's charter for cause.
- Requiring charter schools to comply with constitutional class size requirements and providing that compliance is to be measured at the school-level.
- Requiring school districts to share discretionary millage for capital improvements with charter schools.

In addition, the strike-all amendment adds provisions requiring OPPAGA to conduct a study comparing the funding of charter schools with traditional public schools. The study must:

- Identify school districts that distribute to charter schools funds generated by millage for capital improvements and the use of such funds by charter schools.
- Determine the amount of funds that would be available to charter schools if school districts equitably distributed funds generated by millage for capital improvements.
- Examine the costs associated with supervising charter schools and determine if the five percent administrative fee for sponsor-provided administrative and educational services covers the cost of such services.

OPPAGA must make recommendations, if warranted, for improving the accountability and equity of the charter school funding system based on the study. The results of the study must be reported to the Governor and Legislature by January 1, 2011.

³⁹.Section 1013.62(1)(a)5., F.S.

⁴⁰ See *supra* text accompanying note 37.