

# Miami-Dade County Public Schools

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## **Superintendent of Schools**

Alberto M. Carvalho

## **School Board Attorney**

Walter J. Harvey

## **Miami-Dade County School Board**

Dr. Lawrence S. Feldman, Chair

Dr. Marta Pérez, Vice Chair

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Susie V. Castillo

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## **REVISED COVER MEMORANDUM**

**TO: Honorable Chair and School Board Members**

**CC: Alberto M. Carvalho, Superintendent of Schools  
Jose Montes-de-Oca, Chief Auditor**

**FROM: Walter J. Harvey, School Board Attorney**

**DATE: April 7, 2017**

**SUBJECT: THE SCHOOL BOARD'S POTENTIAL LEGAL OPTIONS RELATING TO  
FRIENDS OF WLRN, INC. AND SOUTH FLORIDA PUBLIC MEDIA**

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This cover memorandum serves as an overview of the more detailed memorandum attached. All of the possible action plans that follow require School Board approval.

### **I. THE SCHOOL BOARD'S ASSETS**

- WLRN Radio station: fair market value to be determined
- WLRN TV station: fair market value to be determined
- Numerous Educational Broadband Services (EBS) Licenses used for distance learning and broadband services
- 2016-2017 Florida Department of Education (FDOE) Television Community Service Grant (CSG): \$1,994,209
- 2008 – June 30, 2017 Clearwire Lease for EBS excess spectrum capacity: \$54,600,000
- June 30, 2017 – July 1, 2038 Clearwire Lease: \$165,300,000
  - The School Board may direct these proceeds to its general fund

### **II. THE CPB OFFICE OF INSPECTOR GENERAL'S AUDIT**

- Friends Chief Financial Officer (CFO) provided erroneous information to WLRN during the preparation of WLRN's Annual Financial Report (AFR) from 2008-2016. Friends financial data must be submitted to the Corporation for Public Broadcasting (CPB) in order for WLRN to obtain its CSG funding
- Since then, Friends has failed to provide necessary corrections, failed to provide its certified financial statements, and delayed the completion of WLRN's AFR for Fiscal Year 2017 despite multiple requests
- As a result, the CPB Office of Inspector General (OIG) notified WLRN of its intent to audit WLRN
- The School Board Attorney's Office (SBAO) obtained written assurances that Friends will be financially responsible for all penalties levied by the CPB
- In order to mitigate penalties, the CPB has approved an M-DCPS request to allow it to submit a partial audit without Friends financial data until such time as M-DCPS

receives the financial numbers from Friends. It is important to note, editorial or programming independence of WLRN will not be subject to the CPB audit

- Should WLRN's funding be affected as a result of Friends' non-compliance, the SBAO will seek indemnification from Friends

### **III. THE SCHOOL BOARD'S POTENTIAL LEGAL OPTIONS**

No operating agreement between Friends and the School Board has been finalized. Moving forward, the School Board could consider the following four options, which are described below:

#### **A. Revising the Current Arrangement**

- Key management positions at WLRN would be M-DCPS employees and report to the station manager only
- SFPM and Friends, as fundraiser only, would operate separately but will both be required to provide WLRN with Federal Tax Returns
- M-DCPS would be responsible for safeguarding the confidentiality of donor lists
- The School Board would retain the EBS licenses and revenue

#### **B. Ending the Relationship with Friends and/or SFPM**

- The School Board would be required to remove SFPM and/or Friends from both the property and the airwaves
- The School Board would be required to have in place alternative methods to obtain funds and personnel in order to continue broadcasting
- Friends should re-assign its EBS license back to the School Board or a successor entity that raises funds for the station
- If Friends fails to comply, this option could require litigation

#### **C. Enter into a Management Agreement with Another Nonprofit Entity**

- A nonprofit entity would run the station and hire employees while the Board oversees the nonprofit entity and retains the license
- All individuals employed by the entity would report directly to the station manager, who is a Board employee
- M-DCPS would retain its responsibilities to the FCC and the CPB

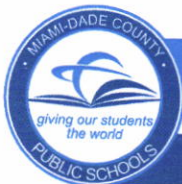
#### **D. Sale of WLRN**

- Should M-DCPS wish to explore this alternative, M-DCPS would need to receive School Board authorization to move forward
- Friends likely will not be able to establish a competing station
- Friends would not receive preference
- M-DCPS would obtain fair market value evaluations of the licenses and physical plant associated with WLRN
- The School Board can retain the EBS licenses and revenue to support educational programs

All of the above options require Board approval and action. Please see the full memorandum below for a more detailed discussion of the issues and options.

Attachment  
WJH/cm





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## MEMORANDUM

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On March 7, 2017, the School Board's Audit and Budget Advisory Committee unanimously approved a recommendation that the School Board Attorney "provide the Board with all possible options available to the Board to take necessary action against Friends and all its contracted entities/subsidiaries" relating to Friends of WLRN, Inc. (Friends), an organization established to fundraise for WLRN, and South Florida Public Media Company (SFPM)<sup>1</sup>. SFPM is a Florida not for profit corporation formed under Chapter 617, F.S., which Friends states was created as its wholly-owned subsidiary. Although Friends is a 501(c)(3) non-profit entity, SFPM is not. SFPM, therefore, is not subject to public disclosure of significant information that is typically included in Form 990 tax returns.

Friends has been directly funding SFPM, including the salaries of employees, some of whom are creating content for broadcast on WLRN. These SFPM employees often do not have a direct reporting line to the station manager, as required by the Editorial Integrity Policy that is incorporated by reference into School Board Policy 0172, which governs WLRN. Instead, many employees report directly to the Executive Director of Friends.

This memorandum examines the School Board's options based on legal authority and supported by industry practices across the country in the context of WLRN's

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<sup>1</sup> For a brief overview of the relationship between WLRN and the School Board, please refer to the attached memorandum issued by the School Board Attorney's Office (SBAO) on January 26, 2010.

history, as well as recent developments. All of the possible action plans that follow require School Board approval.

## **I. THE SCHOOL BOARD'S ASSETS**

### **A. WLRN TV and Radio Stations**

Since 1948, the WLRN radio station has been owned by the School Board. In 1955, the School Board acquired WLRN TV. These stations are separate and apart from the School Board's assets in the form of grants and Educational Broadband Services (EBS)<sup>2</sup> spectrum, discussed below.

### **B. The Corporation of Public Broadcasting Television and Radio Community Service Grants**

The Corporation of Public Broadcasting (CPB) awards funding to noncommercial television and radio stations in the form of Community Service Grants (CSG), the amount of which "depends on factors (determined by CPB through periodic system consultations) such as size of station, the amount of nonfederal financial support raised, the rurality of the audience served, and the number of stations in a given market."<sup>3</sup> On October 1, 2016, the School Board was awarded a Television CSG for Fiscal Year 2017 in the amount of \$1,031,346 and a Radio CSG for Fiscal Year 2017 in the amount of \$655,416.

### **C. Florida Department of Education Television Community Service Grant**

In addition, FDOE is required to provide funding to educational television stations qualified by the CPB, such as the School Board's station, WLRN television. Accordingly, for Fiscal Year 2017, the School Board also received a Community Service Grant from the Florida Department of Education (FDOE) to provide partial support for day-to-day operations of WLRN television in the amount of \$307,447.

### **D. Educational Broadband Service Licenses Proceeds**

The School District holds certain microwave licenses issued by the Federal Communications Commission (FCC) in the Educational Broadband Service ("EBS"), which were previously used for distance learning video services.

#### **1. The School Board's Clearwire Lease**

On June 27, 2008, the School Board entered into an EBS Long Term De Facto Lease Agreement with Clearwire Spectrum Holdings II, LLC (Clearwire)<sup>4</sup> to lease out its

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<sup>2</sup> Formerly known as Instructional Television Fixed Services (ITFS)

<sup>3</sup> <http://www.cpb.org/funding>

<sup>4</sup> Now a subsidiary of Sprint

excess EBS capacity. Section 47 CFR §27.1214 of the FCC's rules, allows the School Board, as licensee, to lease out its excess spectrum capacity to commercial operators, which generates additional revenue and wireless educational broadband services for the School Board.

Pursuant to Section 4 of the School Board's Clearwire Lease, entitled, "Compensation," Sprint pays the School Board Initial Fees, Monthly Fees, and Bonus Payments in accordance with the payment schedule attached to the Lease. To date, the School Board has received \$13,000,000 in Initial Fees, \$35,475,000 in Monthly Fees and \$5,000,000 in Bonus Payments, totaling \$53,475,000, under the Lease. By 2038, the School Board is expected to receive an additional \$165,300,000 in revenues under its Clearwire Lease.

Since neither the Lease agreement nor FCC regulations require the School Board to utilize the proceeds from its lease of these unrelated microwave licenses towards maintenance of the WLRN TV or Radio station, the proceeds are directed towards the School Board's general fund.

## **2. Friends' Clearwire Lease**

Certain other EBS Licenses held by the School Board jointly with a third party were given to Friends in order to generate revenue for WLRN TV and radio from a separate lease with Clearwire. Upon dissolution of Friends, those assets are to be assigned to the School Board, as the licensee of WLRN, or the School Board's designee, for the benefit of the station. To date, Friends has received \$3,000,000 in Initial Fees, \$6,675,000 in Monthly Fees, and \$3,000,000 in Bonus Payments plus \$1,280,000 in Interest Payments, totaling \$12,455,000, under the Lease. By 2038, Friends is expected to receive an additional \$44,400,000 in revenues under its Clearwire Lease.

## **II. THE CPB OFFICE OF INSPECTOR GENERAL'S AUDIT**

Friends representatives recently brought to the School Board's attention that the Friends Chief Financial Officer (CFO) provided erroneous information to WLRN during the preparation of WLRN's Annual Financial Report (AFR), which must be submitted to the CPB in order for WLRN to obtain its CSG funding<sup>5</sup>. Since then, Friends has failed to provide necessary corrections and delayed the completion of WLRN's AFR for Fiscal Year 2017 despite multiple requests. In an effort to comply with CPB requirements, the School Board, through its Chief Auditor, hired an accountant, Cynthia Borders-Byrd, to conduct an audit on its behalf of WLRN's consolidated operations, which includes both the radio and TV stations' operations, and Friends' underwriting reports. Since October of 2016, Ms. Borders-Byrd – and our office – have been requesting Friends' certified financial statements in order to complete the audit. To date, Friends has failed to provide its certified financial statements.

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<sup>5</sup> The CFO's malfeasance spanned multiple years.

While the CPB previously granted two (2) extensions of time to produce the AFR, the third request for an extension was denied. As a result, the CPB advised that the AFR would be due by February 13, 2017 in order "to avoid the possibility of a significant penalty for late filing." In response, the SBAO requested and obtained written assurance from Friends that it will be financially responsible and liable for any penalties levied against WLRN and releasing the School Board of any liability relating to this matter.

On March 2, 2017, the CPB Office of Inspector General (OIG) sent the School Board an engagement letter, advising that it would be auditing WLRN's CPB CSG funding commencing March 13, 2017. Following receipt of the engagement letter, our office again immediately requested written reassurance from Friends that it will be financially responsible for any additional penalties against WLRN that may result from any federal audit findings.

In its March 2<sup>nd</sup> letter, the CPB OIG stated that it would be reviewing whether: the CSG funds were expended appropriately, the underwriting revenues were reported accurately, WLRN has been compliant with open meeting requirements, and adequate financial controls are in place. Neither the OIG's letter nor the CPB regulations mention any review of the editorial or programming independence of WLRN, and that will not be subject to the CPB audit<sup>6</sup>. This fact was confirmed by the CPB's representatives.

Additionally, the SBAO and the School Board's Office of Communications contacted CPB's staff and legal counsel, Mr. Westwood Smithers, to determine the status of penalties levied for WLRN's inability to provide its latest AFR based on Friends' failure to provide certified financial statements. We were advised that any corrective measure taken on behalf of the School Board during the pendency of the audit will mitigate the penalties that the CPB may levy at its discretion. Accordingly, the SBAO recommends that certain steps be taken in order to mitigate the penalties that may be levied against the School Board and reduce the probability that future CPB funding will be jeopardized.

#### **A. Remedial Measures**

In an effort to continue to receive CPB funding through its grant program, our office, District staff, and the Chief Auditor contacted Mr. Smithers and the CPB's grants department and the CPB granted M-DCPS's request to allow the School Board to provide the partial audit of WLRN only. Once the School Board receives the final numbers from Friends, those can be submitted to, and reviewed by, the CPB. The

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<sup>6</sup> In fact, none of the CSG agreements between the School Board and the CPB contain any provision regarding editorial or programing independence. This fact discredits the statement in media reports that questions about the station's independence could harm WLRN's efforts to win grants, as it does not refer to any of the CSG agreements to which the School Board is a party. Editorial independence is clearly stated and enforced through School Board Policy 0172, which provides the necessary firewall to ensure integrity.

SBAO has also been assured by the CPB that the late filing penalties will be tolled upon the CPB's receipt of the partial audit. In addition, once the CPB receives the partial audit, the CPB will release the stations' 2<sup>nd</sup> FY 2017 CSG payments. The 2018 grant award, however, will not be calculated until the audit is completed.

The School Board may also implement other remedial measures to mitigate the CPB's penalties. For example, a financial entity or trained WLRN general manager may be tasked with undertaking certain structural safeguards, such as additional review of the AFR and Friends' allocations tables prior to submission to the CPB. Moreover, it should be emphasized that such additional remedial actions will prevent the funding misallocation from recurring.

The School Board may also wish to develop and adopt policies or procedures that specifically address the handling of WLRN's donor list as an additional remedial measure.<sup>7</sup>

**B. Assurances to the School Board that Friends Will Indemnify the School Board**

In the event that the CPB does not find any beneficial alternative option and WLRN fails to obtain its full CPB grants this year or in coming years, our office has preemptively requested written assurance from Friends that it will be financially responsible for all penalties levied by the CPB, including the amount of future funding forfeited as a result of Friends' non-compliance.

On March 31, 2017, the Friends Executive Director provided a statement in writing that Friends "will make itself responsible for penalties resulting from M-DCPS' use of information provided by the former CFO at Friends and discovered during the recent audit, evidenced to be exclusively the responsibility of Friends." In addition, however, he indicated that "[i]f CPB determines that the responsibility is shared, Friends will reassess its obligation."

**III. THE SCHOOL BOARD'S FUTURE OPTIONS**

The SBAO and the School Board's Office of Communications have been working towards finalizing an operating agreement among the parties for several years, with the latest draft circulated in January of 2017. Friends has not yet expressed their concerns with the draft operating agreement; however, a tentative meeting is set for April 7, 2017<sup>8</sup>.

The following addresses the options available to the School Board regarding the relationship between the School Board/WLRN, Friends, and SFPM.

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<sup>7</sup> For example, School Board Policy 9215 describes the safeguarding of donor information relative to Direct Support Organizations (DSO).

**A. Option 1: Revising the Current Arrangement**

To continue the current arrangement, several issues need to be addressed and changes need to be made in order for the arrangement to be advantageous for the School Board and to comply with current School Board Policies regarding WLRN as well as federal regulations and federal and state grant requirements. Some or all of the following measures should be considered:

- Key management positions at WLRN Radio and TV should be held by School Board employees or be under direct supervision and management through contract, reporting to the WLRN station manager. All individuals employed by WLRN should report directly to the station manager and not to Friends or any other entity. The employees should be subject to School Board policies including but not limited to, School Board Policy 0172 and the Editorial Integrity Policy;
- SFPM must conform to Internal Revenue Code Section 501(c)3 requirements, and adopt Articles and Bylaws, and form a Board and officers separate from Friends to prevent conflicts of interests. Alternatively, SFPM may enter into a contract or agreement with the School Board and report directly to the station manager in a manner consistent with the Editorial Integrity Policy. Its employees should report directly to the School Board through the station manager, and none should report directly to Friends or any other entity. In addition, SFPM should adopt the School Board's Editorial Integrity Policy and Code of Ethics, and execute an operating, programming or staffing agreement with the School Board/WLRN, that requires compliance with Jessica Lunsford Act, requisite insurance coverage, and liability provisions. The School Board should determine the extent of access that any non-WLRN employees should have;
- Friends should return to its original function and serve solely as a fundraising arm for the School Board/WLRN as it was originally established, and perhaps be designated as a Direct Support Organization (DSO) upon the School Board's approval. Either way, Friends should enter into an agreement with the School Board/WLRN, in which Friends must recognize that: (a) the CPB requires M-DCPS, as licensee, to be responsible for safeguarding the confidentiality and proper, legal use of donor lists; and (b) any EBS License(s) and EBS Leases held by Friends are held in trust for M-DCPS;
- Friends and SFPM should each be required to provide WLRN with a complete copy of their Federal Tax Returns and supporting documents for audit or review, upon request, in accordance with F.S. § 11.45(8), § 1001.453, and Board Policy 9215; and
- Since the Board still retains the EBS licenses under this option, the Board could keep the Clearwire/Sprint lease and associated revenue by ensuring the EBS educational services and programming requirements are still met.

The District may continue to pursue the current draft of the agreement among all three (3) parties, or consider contracting with Friends and SFPM separately. In the alternative, the District could explore contracting with an entity other than SFPM to



provide content and programming but the same operating criteria listed above should be required.

Should Friends and SFPM refuse to enter into any type of written agreement with the District for the fundraising and staffing or programming for WLRN, the District may explore adopting new policies to apply to Friends and SFPM that contain the essential contractual provisions. It is important to note, however, that School Board policies only extend to District employees and contractors and cannot bind private entities that do not have a contractual relationship with the School Board. This option is not a complete substitute for an executed contract among the parties which provides mechanisms for enforcement of School Board objectives.

**B. Option 2: Ending the Relationship with Friends and/or SFPM**

As the sole license holder, the School Board could end its relationship with Friends and/or SFPM. This option could be difficult and time-consuming. The School Board would be required to remove SFPM and/or Friends from both the property and the airwaves by way of Friends and/or SFPM's voluntary vacation of the premises, withdrawing access for Friends and/or SFPM to the airwaves, or through involuntary eviction, which would require the invocation of legal proceedings. Prior to taking this action, the District should have in place an alternative method to raise and collect funds for station operations and program underwriting. In addition, the District should have personnel to fill key roles and functions, which would be eliminated upon Friends' and/or SFPM's removal, to ensure no disruption in funding or programming. Upon severance, the School Board would need to demand that Friends assign the EBS license WHR866 to the School District in accordance with the requirements of its Articles of Incorporation. Should Friends refuse to do so, the School Board may be required to resort to litigation under a constructive trust theory.

An implied or constructive trust is an equitable remedy where courts recognize that a claimant has a better right to certain property than the person who holds the legal title to it. This legal theory is supported by the facts that: under Section 8(a) of the School Board's Clearwire Lease for WHR866, the School Board is required to "bear all costs of operating and maintaining the ITFS Equipment," Friends was created to act as a funding mechanism for WLRN, and the EBS licenses were given to Friends for fundraising purposes. Under Section VII of its Amended and Restated Articles of Incorporation, upon dissolution all assets are to be distributed to the licensee of WLRN. Given that the School Board obtained the license, and pays for the maintenance of the license and educational programming, the license for WHR866 should be transferred to the School Board, or a successor fundraising entity, should it end its relationship with Friends. For that reason, a provision requiring Friends to return the four (4) EBS Channels to the School Board should be included in any future agreement with Friends.

There are several issues to address and changes would need to be made in order for the removal of SFPM to be advantageous for the Board and to comply with current Board Policies. This would require:

- All news staff and management positions be converted to WLRN TV and Radio employees or under the direct supervision and management by contract with the School Board pursuant to School Board Policy or through the WLRN station manager. All individuals employed by WLRN, or by an entity that provides services to WLRN, would report directly to the station manager and not to Friends or any other third-party entity. The employees would be subject to all M-DCPS qualifications and employment requirements, including the School Board Editorial Integrity Policy and Code of Ethics; and
- Since the Board still retains the EBS licenses under this option, the Board could keep the Clearwire/Sprint lease and associated revenue by ensuring the educational services and programming requests are still met.

**C. Option 3: Enter into a Management Agreement with Another Nonprofit Entity**

The third option is to enter into a management agreement with a nonprofit entity, which would manage the station with Board oversight. Entering into a management agreement would require:

- Compliance with School Board procurement policies;
- The District to retain the licenses but delegate the day-to-day programming to another nonprofit entity that operates the stations under a contract. All employees would be employees of the nonprofit entity, while M-DCPS maintains certain management staff at the station as representatives. All individuals employed by the nonprofit entity would report directly to the station manager pursuant to School Board Policy. M-DCPS would maintain its responsibilities to FCC and CPB. The District would contribute to the station's operating costs such as: rent, electric, equipment, and salaries of District staff members. All proceeds from M-DCPS retained EBS leases would be reclaimed for the general fund and physical assets would remain the property of M-DCPS;
- The nonprofit entity would operate pursuant to a management agreement with a specific contract term, but not to extend past the station's license term. Financing would be raised by and augmented by Friends via grant application, and subject to approval of the School Board as Licensee, which would not be unreasonably withheld if used for infrastructure, station operations, staff or programming. The nonprofit entity would, by contract, implement an Editorial Integrity Policy and Code of Ethics, mirroring that of the District. Friends' audit reports for submission to the CPB would be confirmed and certified by the nonprofit entity and then provided to M-DCPS for review;
- Friends would return to its fundraising role under an agreement. It would provide audited financials and exhibits to the CPB and M-DCPS annually. Again, Friends would acknowledge that EBS station WHR866 and its associated lease are held in trust for M-DCPS. Funds raised by the EBS license could still flow to the station, and it may be appropriate to establish a separate fund overseen by Friends, with their use restricted to infrastructure spending;

- SFPM, if it continues to produce programming, would agree to abide by the Board's policies regarding WLRN, specifically Board Policy 0172, the Code of Ethics, and the Editorial Integrity Policy;
- Board policies would need to be amended to reflect this new arrangement; and
- Since the Board would still retain most EBS licenses under this option, the Board could keep the Clearwire/Sprint lease and associated revenue by ensuring the educational services and programming requirements continue to be met.

In considering Option 3, the School Board must recognize that these agreements could be as problematic as the current arrangements and that the CPB may not view it as an improvement. The CPB's preferred method is for the license holder to have direct supervision of day-to-day operations.

#### **D. Option 4: Sale of WLRN**

On March 31, 2017, Friends' Executive Director expressed a willingness to discuss pending issues in the context of media reports concerning the Superintendent's Task Force to Ensure Integrity in Public Broadcasting meeting on March 24, 2017.

Neither the Superintendent nor the SBAO has been authorized by the School Board to discuss, negotiate or consider any options beyond Friends' current role as set forth in Friends' Bylaws as the primary fundraising entity for WLRN<sup>9</sup>. Should the School Board wish to explore a sale of WLRN, the SBAO would need to receive explicit authority to engage with Friends in this context. As the Superintendent emphasized at the Task Force meeting on March 24<sup>th</sup>, the School Board has ultimate authority over any decisions about the station's license.

##### **1. Effect of Sale on Friends and SFPM**

The TV and Radio licenses held by the School Board were issued by the Federal Communications Commission (FCC). Through its EBS Licenses and Clearwire Leases, the Board receives substantial revenue that can support its educational programs and mission. These EBS Licenses and Leases are separate assets that belong to the School Board and need not accompany any sale of the broadcast stations.

The FCC only allows accredited educational institutions and nonprofit educational organizations to hold noncommercial educational licenses of this nature.<sup>10</sup> To qualify each entity must be reviewed during any proposed assignment to ensure that it is qualified to hold such an authorization. In order for any noncommercial public station to operate separate from an educational institution or governmental body, under the license requirements, they must use the license primarily to serve the educational needs of the community and for the advancement of educational programs. There would also be greater scrutiny in ensuring that programming is "educational programming." Therefore, without oversight by the School Board, any entity operating

<sup>9</sup> As reported by the Miami Herald Article on March 24, 2017, which was cited by Friends Executive Director.

<sup>10</sup> See 47 CFR § 73.503 and 47 CFR § 73.621.

WLRN would be under greater scrutiny and would likely have to re-format its programming schedule to comply with FCC requirements. If the Broadcast stations were sold, the EBS license currently held by Friends should be returned to the Board due to an implied or constructive trust, as discussed above.

Friends would encounter serious challenges in any attempt to establish a competing station. They would have to acquire an NCE TV or NCE Radio station in the Miami Market and there are only a limited number that exist. WPBT Miami has just acquired WXEL in Palm Beach, and it is unlikely either is currently for sale.

CPB awards grants to noncommercial television and radio stations, of which WLRN is a recipient. CPB's grants for funding for a radio station offered under The Radio CSG program, is limited in number. It provides very few to new radio stations each year, which requires the station to operate under the noncommercial educational license in addition to other eligibility criteria. Furthermore, CPB grants for funding a television station under the television's CSG is currently not accepting new applications for stations. Therefore, Friends would not be able to establish a new noncommercial public television station and would likely not be able to establish a radio station either.<sup>11</sup> Other grants will not be available to Friends or SFPM either, such as the Department of Education grant provided for under § 1001.26, F.S.

A purchaser may decide to continue the relationship with Friends or they may decide not to utilize Friends and sever the relationship completely.

## **2. Effect of Sale on the School Board**

To effectuate a sale, M-DCPS would obtain one or more market evaluations of the value of the licenses and physical plant associated with the WLRN Radio and Television stations. M-DCPS would retain its EBS stations and all lease proceeds generated from leases associated with those stations, which is a separate asset. The District would implement a competitive solicitation seeking offers to buy the assets either together as one package or in separate packages. The goal would be to maximize the revenue raised by the sale of the stations for M-DCPS.

No entity would receive preference due to prior standing or association. Specifically, Friends should not be able to use funds raised to support WLRN for purchasing the station or to support any bid because those funds were given from donors to support programming. Friends may or may not retain its fundraising role for whatever new entity or entities acquired the WLRN TV and Radio stations. Friends would still need some form of agreement with the new licensee(s) and would need to recognize CPB and statutory requirements that the new licensee(s) retain ultimate responsibility for safeguarding the donor lists and that such lists are ultimately the property of the licensee. Friends would also need to provide audited financials and exhibits for use for CPB to the new Licensee(s) annually. Friends would need to acknowledge that the EBS license held by Friends was placed there to fund M-DCPS

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<sup>11</sup> <http://www.cpb.org/faq>



owned stations and that such EBS license and its associated lease were held by Friends in trust for M-DCPS. Accordingly, upon sale of the stations by M-DCPS, Friends would need to assign them over and return to the station any unspent proceeds generated by the lease. All other funds held by Friends would remain with Friends to be used to fund the operations of the WLRN stations following sale.

#### **E. Overall Issues for School Board Consideration and Action**

In deciding the best action for the School Board to take, there are several points to consider.

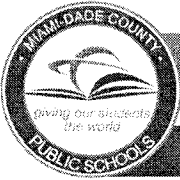
1. Agreements frequently take a while to achieve. The undertaking of the formal process, however, helps to mitigate fines and penalties assessed by the CPB.
2. Formal recognition by Friends that confidential donor lists are under the control of M-DCPS would reduce the potential for a fine based on this issue, which is why it was included under every option available to the School Board. The same is true for certified financial statements. Friends must agree to provide it in order to mitigate the size of penalties.
3. Potential failure of management to spot irregularities over time may be a factor in the size of fines and penalties under the current CPB Audit. Adoption of specific measures to ensure that management is in a position and has the tools to review and spot future irregularities and prevent a recurrence of this problem may help to mitigate the size of fines and penalties.
4. A valuable asset of M-DCPS was given to Friends in trust to raise funds for WLRN. Friend's Articles require its return to M-DCPS upon dissolution of Friends. It is important that these be returned to M-DCPS now, or that there be a formal acknowledgement that it will be returned to the station if the stations are ever sold to a third party, if operations were ever handed over to a third party, or if Friends were to cease funding WLRN.
5. In order to ensure editorial integrity by whatever entity ultimately programs or produces programming for WLRN, it is imperative for the licensee to ensure that all programming decisions are subject to a common and rigorous Editorial Integrity Policy and Code of Ethics.

#### **IV. CONCLUSION**

Notwithstanding the alternatives available, the District's efforts to rectify pending issues with Friends over the years, and most recently with SFPM, including the attempts to reach an agreement, should be shared with the CPB OIG in order to mitigate any finding or allegations against the District of mismanagement. These efforts have been documented in the form of various communications and agreement drafts.

Our office looks forward to receiving direction from the School Board in light of the options presented. If you have any questions in the interim, please do not hesitate to contact me.

WJH/cm



# Miami-Dade County Public Schools

*giving our students the world*


*Superintendent of Schools*  
Alberto M. Carvalho

*School Board Attorney*  
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*Miami-Dade County School Board*  
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Ana Rivas Logan  
Dr. Marta Pérez

## MEMORANDUM

**TO: Jose Montes de Oca, Chief Auditor  
Audit & Investigative Affairs**

**FROM: Walter J. Harvey, School Board Attorney** 

**DATE: January 26, 2010**

**SUBJECT: BOARD ATTORNEY OPINION REGARDING THE RELATIONSHIP OF  
WLRN-TV, WLRN-FM AND FRIENDS OF WLRN, INC.**

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On December 8, 2009, the Audit Committee requested that the School Board Attorney review the relationship between the School Board and Friends of WLRN. The Audit Committee also had questions concerning what records Friends of WLRN, Inc. must provide to the Committee upon request. The information that follows is meant to provide a brief overview and is not an analysis of all aspects of the very intricate relationships among the parties.<sup>1</sup>

### **RELATIONSHIP OF WLRN-TV, WLRN-FM AND FRIENDS OF WLRN, INC.**

#### **I. WLRN-TV AND WLRN-FM (THE SCHOOL BOARD)**

##### **A. WLRN Is a Licensed Station And Registered Trademark**

The School Board of Miami-Dade County, Florida is a licensee, granted by the Federal Communications Commission ("FCC"), for non-commercial educational television and radio. The "call signs" are "WLRN-TV" for television and "WLRN-FM" for

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<sup>1</sup> This opinion will not cover issues concerning the revenues, financial statements or use of funds. This opinion will only cover the legal status of the parties, their relationships, and disclosure requirements in a general manner. If the Audit Committee wants further elaboration or analysis, the School Board Attorney's Office will be happy to assist.

radio. A call sign is, among other things, the unique designation for a transmitting station and is also used as a name for broadcasting stations. WLRN-TV and WLRN-FM are not separate or distinct legal entities, but are licensed and registered to the School Board.<sup>2</sup> WLRN is a trademark registered by the School Board.<sup>3</sup> Pursuant to the FCC and School Board Rule, the School Board is responsible "for the operation of the stations, as well as establishing programming policy and guidelines that provide the South Florida community with balanced programming of educational services, information and entertainment while consistently adhering to federal, state and local laws." See School Board Rule 6Gx13-8C-1.011. In its role and authority as Licensee/Trustee of WLRN-TV and WLRN-FM, the School Board has also established specific procedures in the document, "Editorial Integrity Policy and Advisory Mechanisms for WLRN Public Television and Radio," which is incorporated in Board Rule 6Gx13-8C-1.011.

#### **B. School Board Owns And Operates WLRN**

The School Board owns and operates all WLRN-TV and WLRN-FM station property (tangible and intangible) and all other station assets, and has several other registered FCC licenses.<sup>4</sup> The School Board hires all WLRN personnel as recommended by the Superintendent, including the station's General Manager, John LaBonia. The School Board has all of the rights, duties and responsibilities of ownership and use associated with the operation of these stations unless otherwise delegated by agreement.

#### **C. WLRN Meetings And Records Are Open To The Public**

WLRN is subject to the FCC regulations governing the operation of public television and radio stations and also certification requirements from the Corporation for Public Broadcasting. These regulations and the Florida Public Records Act require that the School Board's records concerning the operation of the station be made available to the public, and that the governing board (School Board) and its advisory committee meetings be open.

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<sup>2</sup> The School Board has several licenses listed with the FCC: TV Pickup License – KA88874, Broadcast Auxiliary Remote Pickup License – KC25018; TV Studio Transmitter Link License – KJJ36; TV Intercity Relay License – WCT846; TV Intercity Relay License WHM951; TV Studio Transmitter Link License – WPNM419;

<sup>3</sup> "WLRN" is a trademark registered by Miami-Dade Public Schools, serial number 77021939, registration number 3376945.

<sup>4</sup> For example, the School Board has the following licenses listed with the FCC: TV Pickup License – KA88874, Broadcast Auxiliary Remote Pickup License – KC25018; TV Studio Transmitter Link License – KJJ36; TV Intercity Relay License – WCT846; TV Intercity Relay License WHM951; TV Studio Transmitter Link License – WPNM419;

#### **D. CPB Grant Funding**

Each year, WLRN-TV and WLRN-FM receive grant funding from the Corporation for Public Broadcasting (CPB) for its television and radio programming. In addition, WLRN-TV pays dues to the Public Broadcasting Service (PBS) and other program distributors for programming and WLRN-Radio pays dues to National Public Radio (NPR) for programming. The CPB grants awarded and the PBS dues paid are based primarily on formulas predetermined by CPB, PBS and NPR. However, a major portion of the grant award formula is based on non-federal financial support (NFFS) which includes fundraising by WLRN, and cash and in-kind services provided by the licensee. As WLRN raises more NFCS, its CPB grant increases. WLRN-TV receives two grants from CPB: WLRN-TV receives a Television Interconnection Grant, which is a restricted grant in the amount of \$25,811 for 2009-10; WLRN also receives a Television Community Service Grant of \$1,256,820 for 2008-10.

WLRN-FM receives a Radio Community Service Grant from CPB. The last grant award was \$394,769.00, of which 73.89% (\$291,695) is unrestricted and 26.11% (\$103,074) is restricted and must be paid to a program distributor such as NPR.

As part of WLRN-TV's and WLRN-FM's applications for grant funding, they must submit a "Certification of Eligibility" application in which "WLRN-FM" and "WLRN-TV" each certify that it operates a "noncommercial, education, on-the-air" station under a renewable license(s) granted by the FCC.

To receive CPB funding, the stations' daily broadcast schedule(s) must be devoted primarily to quality programming that serves the community service needs of an education, informational, and cultural nature within its/their primary service area, and that such programming is intended for a general audience. The program schedule may not advance any particular political, religious philosophy or one primarily for in-school or professional in-service audiences. The grantee must originate significant, locally produced programs that educate and serve its community of license.

#### **E. WLRN Must Comply With FCC And CPB Requirements**

As the FCC licensee and CPB grantee, the School Board must comply with all applicable FCC rules and regulations including equal employment opportunities. For example, job openings identified in the employment portion of its 2007 Annual Station Activities Survey must be filled in accordance with FCC regulations concerning equal employment opportunity (47 CFR 73.2080).

In addition, School Board certifies it will comply with the Communications Act of 1934, which requires:



1. Section 396(k) all meetings of the governing body of the recipient, any committee of such governing body, and any advisory body of the recipient to be open, preceded by reasonable notice to the public to the extent that the deliberations of those bodies relate to public broadcasting, with exceptions defined in this section. Section 397(5) defines "meeting."
2. Section 396(k)(8) requires that copies of the recipient's annual financial and audit reports, and other information regarding finances submitted to CPB be made available by the recipient for public inspection.

#### **F. WLRN Governance**

Clearly, there is no question that WLRN-TV and WLRN-FM must make station records and meetings open to the public. Although like other School District Departments, ultimate policy authority rests with the School Board and ultimate management authority rests with the Superintendent, the School Board has established a number of advisory bodies to assist with governance.

WLRN has a volunteer Community Advisory Board ("CAB"). The CAB has three officers, Alex Herrera, the Chairperson, Ines Castro, Vice-Chairperson and Alan Greer, Secretary. The CAB has five standing committees: (1) Outreach, (2) Membership, (3) Reports, (4) Mission and Long Range Planning and (5) Social and Special Events. The current CAB is comprised of twenty-three volunteer members including one appointee from the School Board (there is one vacancy), one appointee from Friends of WLRN, Inc. ("Friends") (there is one vacancy) and one appointee from the South Florida Chapter of the Society of Professional Journalists (SPJ).<sup>5</sup> The School Board member is Dr. Martin Karp.

To assist in the management of assets and opportunities, the School Board has also established a Telecommunications Facilities ("TC") Committee that, among other things, establishes a process for considering proposals for telecommunications facilities on Board-owned sites. The TC Committee is comprised of the Associate Superintendent for Procurement and Materials Management, the Administrative Director for Facilities Operations and Legislative Support, the General Manager of WLRN, the President of the Citizen's Advisory Council and the President of the Dade County Council PTA/PTSA. See School Board Rule 6Gx13-2C-1.121 attached hereto.

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<sup>5</sup> See WLRN Annual Programming Report, WLRN Public Radio and Television, Fiscal Year 2008-09.

## **II. FRIENDS OF WLRN, INC.**

### **B. Friends Of WLRN Is A Florida Not-For-Profit**

Although the open meetings and records requirements apply to the School Board and its advisory bodies, these requirements may not extend to Friends of WLRN, Inc. ("Friends") a Florida not-for-profit corporation pursuant to Chapter 617, Florida Statutes. However, certain records are publicly available. For example, Friends' incorporation documents that were filed with the Department of State on February 15, 1974, are public, as is its principal address (169 Flagler Street, Suite 1400, in Miami, Florida). In addition, Friends' last Annual Statement that was filed with the Department of State on January 4, 2010, can be viewed online, and it lists certain officers and directors report.

According to Article II of its Amended and Restated Articles, Friends is "organized for the purpose of providing assistance to publicly supported broadcasting, specifically radio station WLRN-FM 91.3, or as otherwise designated by the Federal Communications Commission, or WLRN-TV, Channel 17, or as otherwise designated by the Federal Communications Commission, or such other broadcast properties licensed to the School Board of Miami-Dade County, Florida or to the corporation and the provision of educational and instructional television material to schools for formal education." The bylaws further state, "These purposes shall be accomplished by means of (a) fundraising and other efforts that increase public recognition and appreciation and give these stations higher profile in the community and (b) underwriting of programming." Friends also has a registered Educational Broadband Service license from the FCC.<sup>6</sup>

### **B. FRIENDS Must File A Form 990**

As a Florida Not-For-Profit Corporation and a tax exempt organization under 501©(3), WLRN is required to file a Form 990, tax income and expenditure statement every year, detailing its corporate structure and financial activities. The Form 990 was revised for tax year 2008, the IRS Form 990, *Return of Organization Exempt From Income Tax*. The annual information return now requires reporting organizations to answer detailed questions about governance, management, and disclosure. In addition, six governance and related topics are also included: mission, organizational documents, governing body, governance and management policies, financial statements and Form 990 reporting, and transparency and accountability. The last three Form 990s filed by Friends are available to the public for inspection.

According to its Form 990s, the primary exempt purpose of Friends is "[t]o raise funds in order to provide financial support exclusively to WLRN TV and FM stations,

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<sup>6</sup> License #0008076770

both of which are owned by the Miami-Dade County School Board . . ." Friends has an Executive Director, Rick Lewis, and several other executives and directors, whose position and compensation are listed on its Form 990, Part A. John LaBonia of WLRN TV/FM serves on Friend's Executive Committee and Board of Directors.

**C. Governance**

According to Article V of its current Amended and Restated Bylaws, Friends has three standing committees: Executive, Finance and the Nominating. Friends may also establish other committees pursuant to its bylaws. In addition, although the School Board (WLRN-TV and WLRN-FM) and Friends have many activities that are interrelated and Friends uses WLRN's call name, brand, reputation, facilities and air-time to raise funds, there is currently no agreement between the parties to coordinate and regulate their joint activities. Friends is referenced in Board Rules, but the rules do not directly impact the operations of Friends, nor do they define the duties and responsibilities of Friends as it relates to its interrelated fundraising activities.

The lack of a document coordinating the joint activities between WLRN and Friends is a more recent phenomenon. In 1995, the Amended and Restated Bylaws of Friends provided that the Superintendent's approval was required in order to amend the Friends' Bylaws and that the Superintendent also had authority to nominate for appointment the CEO/President of Friends, subject to Friends' board approval. These two provisions were eliminated since 1998 through amendment to Friends' Bylaws and there is no documentation that these significant, sea change amendments were effectuated with the Superintendent's approval. In addition, there is no documentation that the Superintendent was involved in the appointment process of Rick Lewis, its current President/CEO. The latest Bylaws have since been amended several times without Superintendent approval.

If you have any additional questions, please do not hesitate to contact me.