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Who Benefits from Leaving the “Bad” School?

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WHO BENEFITS FROM LEAVING THE “BAD” SCHOOL?

Annabelle V. González*

ABSTRACT:

The demand for school choice reflects a societal frustration with underperforming public schools. To bolster public schools’ performance, proponents of school choice advocate for parents to have a voice in where their children are educated. Specifically, parents exercise choice through school vouchers, which divert taxpayer money from traditional public schools to private schools. In 2006, the Florida Supreme Court in *Bush v. Holmes* held that school vouchers were unconstitutional. Under Article IX of the Florida Constitution, the state must adequately provide a uniform system of *public* schools. School vouchers contradict Article IX’s mandate. Notwithstanding precedent, the Florida Legislature enacted the Family Empowerment Scholarship, a school voucher that mirrors the voucher invalidated in *Holmes*. Considering Florida law and precedent, the Florida Supreme Court should strike down the Family Empowerment Scholarship as unconstitutional.

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* J.D., 2020, Florida International University (FIU) College of Law. I dedicate this comment to the students, teachers, and staff of Florida’s public schools. Thank you to the *FIU Law Review* staff for their edits and contributions.

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I. INTRODUCTION

Public schools are the backbone of society. They are the primary source of education in the country—educating nine out of ten students in the United States.¹ Public schools serve as the principal “inculcat[ors] [of] fundamental values” for an enlightened citizenry.² Yet, the importance of public schools extends past their provision of education; public schools are social centers.³

Notwithstanding their importance, public schools remain underfunded and overworked. States across the nation have taken drastic measures to cut back on school expenses.⁴ Unfortunately, public schools receive little support from the former President. In 2017, President Trump addressed the nation in his inaugural speech and criticized the United States’ education system.⁵ To him, the country’s education system is “American carnage.”⁶ The President was not referring to the increase in school shootings⁷ or campus bullying.⁸ The President explained that the current “education system *flush with cash* . . . leaves our young and beautiful students deprived of all knowledge.”⁹

What remedy does President Trump suggest? School choice. President Trump reiterated his allegiance to the school choice movement in the 2019 State of the Union address: “[T]he time has come to pass school choice for

¹ See *CCD Quick Facts*, NAT’L CTR. FOR EDUC. STAT., <https://nces.ed.gov/ccd/quickfacts.asp> (last visited on Feb. 23, 2019).

² *Ambach v. Norwick*, 441 U.S. 68, 77 (1979).

³ John Dewey, *The School as Social Center*, 3 *ELEMENTARY SCH. TCHR.* 73, 73 (1902).

⁴ Michael Leachman, Kathleen Masterson & Eric Figueroa, *A Punishing Decade for School Funding*, CTR. ON BUDGET & POL’Y PRIORITIES (Nov. 29, 2017), <https://www.cbpp.org/research/state-budget-and-tax/a-punishing-decade-for-school-funding>.

⁵ See Aaron Blake, *Trump’s Full Inauguration Speech Transcript, Annotated*, WASH. POST (Jan. 20, 2017, 12:34 PM), https://www.washingtonpost.com/news/the-fix/wp/2017/01/20/donald-trumps-full-inauguration-speech-transcript-annotated/?utm_term=.b664d7c91c3a.

⁶ *Id.*

⁷ See Tevi Troy, *Presidents and Mass Shootings*, NAT’L AFF. (Spring 2018), <https://www.nationalaffairs.com/publications/detail/presidents-and-mass-shootings>.

⁸ See Christina Walker, *10 Years. 180 School Shootings. 356 Victims.*, CNN (June 24, 2019), <https://www.cnn.com/interactive/2019/07/us/ten-years-of-school-shootings-trnd/>.

⁹ Blake, *supra* note 5 (emphasis added).

America’s children.”¹⁰ According to its advocates, school choice is “‘the panacea’ for whatever is wrong with public education in America.”¹¹ To fulfill this Administration’s educational priority, President Trump chose Betsy DeVos as his Administration’s Secretary of Education.¹² DeVos is known for her advocacy of school choice and private school vouchers;¹³ she served on the board for the American Federation for Children, which is described as “the nation’s voice for educational choice.”¹⁴ To promote choice, “DeVos’s Education Department is planning to spend an unprecedented amount of public money—well over \$1 billion.”¹⁵

In addition to the federal push for school choice, states have developed their own choice initiatives in the hopes of improving their education systems.¹⁶ In particular, Florida offers alternatives to traditional public schools, including school vouchers, charter schools, and magnet schools.¹⁷ Florida’s education system, which is ranked as twenty-nine out of fifty states,¹⁸ turned to school choice as a means to improve test scores and graduation rates.¹⁹

This Comment proposes that, under the guise of improving students’ academic performance, school choice diverts necessary funding and high-achieving students from underperforming public schools. Despite its proponents’ claims that school choice will ultimately improve the school

¹⁰ See Alyson Klein, *Trump in State of the Union Speech: ‘Pass School Choice,’ Fund Family Leave*, EDUC. WK. (Feb. 5, 2019, 10:20 PM), <https://blogs.edweek.org/edweek/campaign-k-12/2019/02/trump-sotu-paid-family-leave-infrastructure-immigration.html>.

¹¹ James E. Ryan & Michael Heise, *The Political Economy of School Choice*, 111 YALE L.J. 2045, 2045 (2002) (quoting JOHN E. CHUBB & TERRY M. MOE, *POLITICS, MARKETS AND AMERICA’S SCHOOLS* 217 (1990)).

¹² See Valerie Strauss, *What ‘School Choice’ Means in the Era of Trump and DeVos*, WASH. POST (May 22, 2017, 1:21 PM), https://www.washingtonpost.com/news/answer-sheet/wp/2017/05/22/what-school-choice-means-in-the-era-of-trump-and-devos/?noredirect=on&utm_term=.a30613954768.

¹³ See Mark Huelsman, *Betsy DeVos Is Failing an Entire Generation of Students*, CNN (Oct. 19, 2018, 5:10 PM), <https://www.cnn.com/2018/10/18/opinions/betsy-devos-failure-on-dept-of-education-anniversary-huelsman/index.html>.

¹⁴ Alia Wong, *Public Opinion Shifts in Favor of School Choice*, ATLANTIC (Aug. 21, 2018), <https://www.theatlantic.com/education/archive/2018/08/school-choice-gaining-popularity/568063/>.

¹⁵ Strauss, *supra* note 12.

¹⁶ See Lindsey Burke, *Moving Toward School Choice 2.0*, EDCHOICE (May 14, 2014), <https://www.edchoice.org/blog/moving-toward-school-choice-2-0/>.

¹⁷ See *School Choice*, FLA. DEP’T EDUC., <http://www.fldoe.org/schools/school-choice/> (last visited on Jan. 19, 2020).

¹⁸ See Samuel Stebbins & Thomas C. Frohlich, *Geographic Disparity: States with the Best (and Worst) Schools*, USA TODAY (Feb. 8, 2018, 8:05 AM), <https://www.usatoday.com/story/money/economy/2018/02/08/geographic-disparity-states-best-and-worst-schools/1079181001/>.

¹⁹ See Elena Gooray, *What Can Florida Teach Us About School Choice?*, PAC. STANDARD (Mar. 14, 2017), <https://psmag.com/news/what-can-florida-teach-us-about-school-choice>.

system by fostering competition, school choice is public schools' largest threat. In Florida, school choice is not only detrimental to students' academic progress, but also unconstitutional. Specifically, school vouchers run contrary to Florida's constitutional duty to provide a uniform system of public education to all children within its borders. Instead of employing school choice with the hopes of improving students' academic performance, Florida should allocate greater funding to traditional public schools.

II. SCHOOL CHOICE: THEN AND NOW

Traditionally, students attend the public school assigned to them by the local school district.²⁰ Private schools and public-school alternatives were, and continue to be, available to families at their own expense.²¹ With school choice, students may attend private schools without the financial burden. However, the present use of school choice comes a long way from the movement's roots.

A. School Choice: Then

The predecessor to modern day's school choice is freedom of choice plans.²² Pursuant to these plans, schools attempted to circumvent desegregation orders following the Supreme Court's decision in *Brown v. Board of Education*.²³ White resistance to desegregation efforts impeded the success of the freedom of choice plans. The freedom of choice plans left desegregation orders unfulfilled because there was limited individual participation; "only a handful of black[] [students] enrolled in white schools, while no white[] [students] enrolled in black schools."²⁴

Despite the limited reach of freedom of choice plans, in *Green v. County School Board of New Kent County*, the Supreme Court did not eliminate the plans.²⁵ Rather, the Court underscored that freedom of choice plans served

²⁰ See Alvin Chang, *We Can Draw School Zones to Make Classrooms Less Segregated. This Is How Well Your District Does.*, VOX (Aug. 27, 2018, 8:46 AM), <https://www.vox.com/2018/1/8/16822374/school-segregation-gerrymander-map>.

²¹ See *id.*

²² See Nick Lewin, *The No Child Left Behind Act of 2001: The Triumph of School Choice Over Racial Desegregation*, 12 GEO. J. ON POVERTY L. & POL'Y 95, 108 (2005).

²³ See *id.*; see also *Brown v. Bd. of Ed.*, 347 U.S. 483 (1954), supplemented *sub nom.* *Brown v. Bd. of Educ.*, 349 U.S. 294, 300 (1955).

²⁴ ROSLYN ARLIN MICKELSON, MARTHA BOTTIA & STEPHANIE SOUTHWORTH, *SCHOOL CHOICE AND SEGREGATION BY RACE, ETHNICITY, CLASS, AND ACHIEVEMENT* 4 (2008), <https://nepc.colorado.edu/publication/school-choice-and-segregation-race-class-and-achievement>.

²⁵ See *Green v. Cty. Sch. Bd. of New Kent Cty.*, 391 U.S. 430, 439 (1968).

one purpose: desegregation.²⁶ If the purpose remained unfulfilled, the Court charged school boards with developing a new method of ensuring desegregation.²⁷ The Court ultimately concluded that schools should be a product of a “unitary, nonracial system,” which must be achieved by any means necessary.²⁸

Racism is what started the choice movement, but it was xenophobia that propelled the choice movement forward. In the 1980s, school choice developed from the country’s fears of having subpar education in comparison with its international counterparts.²⁹ In 1983, the National Commission on Excellence in Education published *A Nation at Risk: The Imperative for Educational Reform* (“*A Nation at Risk*”).³⁰ *A Nation at Risk* stated: “Our nation is at risk. Our once unchallenged preeminence in commerce, industry, science, and technological innovation is being overtaken by competitors throughout the world.”³¹ *A Nation at Risk* startled the country and called for educational reform in light of the country’s then-dismal educational performance by the students.³²

As a result of an eighteen-month study, the report found that test scores of American students ranked last amongst students from industrialized nations; illiteracy was pervasive in American adults and high school graduates; and students earned declining scores in the College Board’s Scholastic Aptitude Test.³³ The report was a battle cry: either the country reformed its education or countries with far-superior education systems would conquer the United States.³⁴ Although charter schools and school choice options were absent from *A Nation at Risk*’s recommendations, the report catalyzed the search for alternatives to improve the educational system.³⁵

²⁶ *Id.* at 440.

²⁷ *Id.* at 442.

²⁸ *Id.* at 440 (quoting *Bowman v. Cty. School Bd. of Charles City Cty.*, 382 F.2d 326, 333 (4th Cir. 1967) (concurring opinion)).

²⁹ See NAT’L COMM’N ON EXCELLENCE IN EDUC., U.S. DEP’T OF EDUC., *A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM* (1983); Leland Ware & Cara Robinson, *Charters, Choice, and Resegregation*, 11 DEL. L. REV. 1, 1 (2009).

³⁰ See NAT’L COMM’N ON EXCELLENCE IN EDUC., *supra* note 29.

³¹ *Id.* at 9.

³² See *id.* at 9–13; Valerie Strauss, ‘*A Nation at Risk*’ Demanded Education Reform 35 Years Ago. *Here’s How It’s Been Bungled Ever Since*, WASH. POST (Apr. 16, 2018, 6:00 AM), https://www.washingtonpost.com/news/answer-sheet/wp/2018/04/26/the-landmark-a-nation-at-risk-called-for-education-reform-35-years-ago-heres-how-it-was-bungled/?noredirect=on&utm_term=.b61cca2992fc; Ware & Robinson, *supra* note 29.

³³ See NAT’L COMM’N ON EXCELLENCE IN EDUC., *supra* note 29.

³⁴ See Strauss, *supra* note 32.

³⁵ Ware & Robinson, *supra* note 29.

B. *School Choice: Now*

At its core, the modern concept of school choice is about investing in a child's future. The primary consideration for school choice is that a change in the environment is necessary for the improvement of the child's education. Although often overlooked, a common form of school choice is a parent's choice of residence; "[m]ost families exercise school choice by choosing what neighborhood in which to live."³⁶

Proponents advocate for the integration of school choice in school districts for many reasons. For example, school choice permits the participation of the education system in economics, which will, according to its proponents, yield better schooling options for all students.³⁷ Public schools hold a monopoly over the education system, therefore, they perpetuate their own defects onto the system.³⁸ By dismantling the monopoly, school choice will "forc[e] schools to compete in the marketplace . . ."³⁹ As a result, the educational system "will not only better match student needs and parental desires with educational resources, but will produce better education for all at lower cost."⁴⁰

Additionally, apart from producing better schools, school choice allows parents to choose a school that is better suited to the needs of their children.⁴¹ School choice provides economically disadvantaged families the opportunity to move schools without the financial concern that would have once inhibited them.⁴² With active parent participation in school options, school choice likely will increase parental engagement in a child's education.

C. *School Choice Options*

School choice encompasses different approaches. Three of the most used school choice options are magnet schools, charter schools, and voucher options.⁴³ Notably, magnet schools, charter schools, and school vouchers

³⁶ Clark Neily, *The Florida Supreme Court vs. School Choice: A "Uniformly" Horrid Decision*, 10 TEX. REV. L. & POL. 401, 403 (2006).

³⁷ See Stephen Eisdorfer, *Racial Ceilings and School Choice: Public School Choice and Racial Integration*, 24 SETON HALL L. REV. 937, 940 (1993).

³⁸ See *id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ See *id.*

⁴² See *id.*

⁴³ Other school choice options exist, however, for the purposes of this comment, they will not be discussed.

operate under regulating bodies of local school districts, which require them to function similarly to traditional public schools.⁴⁴

1. Magnet Schools⁴⁵

Proponents of school choice advocate for magnet schools as an alternative to traditional public schools in densely populated urban areas.⁴⁶ Appropriately named, magnet schools act like magnets to attract students from their assigned public schools.⁴⁷ Magnet schools serve dual purposes: (1) promote a different curriculum to be taught through non-normative instruction and (2) invite racial, ethnic, and socioeconomic diversity.⁴⁸

The dynamism of magnet schools stems from the schools’ freedom to teach differently.⁴⁹ Magnet schools provide students with learning methods that are traditionally void in public schools.⁵⁰ They often offer specializations and curricula in a particular focus, “such as health science, foreign languages, humanities, business management and computer science.”⁵¹

There are divergent opinions on whether magnet schools enhance or interrupt desegregation efforts. Some argue that magnet schools serve an important tool to desegregate traditionally mono-race or mono-ethnic schools.⁵² Specifically, magnet programs are incorporated into existing inner-city schools, predominately with a minority sociodemographic, “in order to lure white students into the city.”⁵³

Conversely, the efforts for desegregation are undermined by a pattern of classroom segregation occurring within the schools.⁵⁴ Although the racial and ethnic composition of the school *appears* balanced, students face segregation tactics such as placing minorities in less rigorous academic tracks or differing

⁴⁴ Robin D. Barnes, *Black America and School Choice: Charting a New Course*, 106 YALE L.J. 2375, 2401 (1997).

⁴⁵ MICKELSON, BOTTIA & SOUTHWORTH, *supra* note 24, at 7.

⁴⁶ See Janet R. Price & Jane R. Stern, *Magnet Schools as a Strategy for Integration and School Reform*, 5 YALE L. & POL’Y REV. 291, 292 (1987).

⁴⁷ See *id.*

⁴⁸ See Kimberly C. West, Note, *A Desegregation Tool That Backfired: Magnet School and Classroom Segregation*, 103 YALE L.J. 2567, 2568–69 (1994).

⁴⁹ See *id.* at 2569.

⁵⁰ See *id.*

⁵¹ See *id.* (quoting ROLF K. BLANK, R. DENTLER, D. C. BALTZELL, & K. CHABOTAR, SURVEY OF MAGNET SCHOOLS: ANALYZING MODEL FOR QUALITY INTEGRATED EDUCATION 10–11 (1983)).

⁵² See *id.*

⁵³ Barnes, *supra* note 44, at 2402.

⁵⁴ See West, *supra* note 48, at 2571.

disciplines on the basis of race or ethnicity.⁵⁵ As a result, efforts for desegregation are discarded by the realities of magnet schools.

Unlike traditional public schools, magnet schools require an application for admission.⁵⁶ They are not forced to educate all children who wish to attend. If a student is not accepted during the application process, the public-school system is still required to educate the student.⁵⁷

2. Charter Schools

Charter schools are publicly-funded institutions that usually form part of a local school district.⁵⁸ The management and operation of charter schools depends on the relevant state law.⁵⁹ However, unlike traditional public schools, charter schools are “independently managed” with “wide-ranging fiscal, personnel and curricular autonomy to run their schools”⁶⁰

Charter schools developed through the theories of the economist, Milton Friedman.⁶¹ According to Friedman, the establishment of charter schools would provide parents with choices for where their child should attend school.⁶² The option to choose between traditional public schooling and a charter school would drive the existing public school system to improve.⁶³ By fostering competition, the ultimate beneficiary would be the student.

Like magnet schools, charter schools are considered to work towards desegregated schools. However, charter schools face the same challenge as magnet schools: self-segregation. Because school choice allows parents to choose, “white, black, Native American, and Latino parents [] choose schools based more on their racial composition than on the relative academic quality of the charter school.”⁶⁴ Consequently, charter schools, like other school choice alternatives, become a situation of “racial isolation,” instead of integration.⁶⁵

⁵⁵ *See id.* at 2572–73.

⁵⁶ *See* Strauss, *supra* note 12.

⁵⁷ *See id.*

⁵⁸ *See* Josh Cunningham, *Charter Schools: Overview*, NAT’L CONF. ON ST. LEGIS. (Mar. 1, 2019), <https://www.ncsl.org/research/education/charter-schools-overview.aspx>.

⁵⁹ Libby Nelson, *Everything You Need to Know About Charter Schools*, VOX (Apr. 30, 2014, 12:59 PM), <https://www.vox.com/2014/4/30/18076968/charter-schools>.

⁶⁰ Nina S. Rees, *Does Education Need a Devolution Revolution?*, 6 GEO. J.L. & PUB. POL’Y 85, 93 (2008).

⁶¹ Dylan P. Grady, *Charter School Revocation: A Method for Efficiency, Accountability, and Success*, 41 J.L. & EDUC. 513, 520 (2012).

⁶² *Id.*

⁶³ *Id.*

⁶⁴ MICKELSON, BOTTIA & SOUTHWORTH, *supra* note 24, at 10.

⁶⁵ *Id.* at 13.

3. School Vouchers

Unlike magnet and charter schools, voucher programs provide students with state funding to attend a school of their choice, regardless if it is public or private.⁶⁶ Most vouchers function to aid students with disabilities or students attending poorly-ranked schools.⁶⁷ Voucher systems take the taxpayer funds that are allocated for a particular student’s attendance at a public school and distributes the funds to the public or private school of the student’s choice.⁶⁸

The primary use of a voucher is to incentivize parents to enroll their students in otherwise unattainable private schools.⁶⁹ States are required to provide K–12 educational instruction at no cost to their constituents.⁷⁰ To carry out this obligation, states created a system of public education for all children. In the face of free schooling, parents often enroll their children in the public school of their neighborhood versus a private and costly alternative.⁷¹ Through a school voucher, parents can opt for private education at no expense.⁷²

Notably, there are alternative tax-credit scholarships that allow student enrollment into private schools without using taxpayer funding.⁷³ For example, Florida has the Florida Tax Credit Scholarship, which provides low-income families with a scholarship opportunity to transfer their children into better-performing schools.⁷⁴ Unlike traditional voucher programs, the Florida Tax Credit Scholarship “avoids using general revenue dollars by giving corporations credit for directing tax money from any of six different state levies to a scholarship funding organization.”⁷⁵

⁶⁶ See Martha McCarthy, *The Legal Status of School Vouchers: The Saga Continues*, 297 ED. L. REP. 655, 657 (2013).

⁶⁷ *Id.*

⁶⁸ See Helen F. Ladd, *School Vouchers: A Critical View*, 16 J. ECON. PERSP. 3, 3 (2002).

⁶⁹ See *id.* at 4.

⁷⁰ See *id.*

⁷¹ See *id.*

⁷² The objective of school vouchers is to reduce the cost of attending private schools to that of public schools: free. However, school vouchers do not guarantee to cover the full expense of tuition and expenses of private schools. See Kate Kelly, *School Vouchers: What You Need to Know*, UNDERSTOOD, <https://www.understood.org/en/school-learning/your-childs-rights/basics-about-childs-rights/school-vouchers-what-you-need-to-know> (last visited Oct. 20, 2020).

⁷³ See *Florida Tax Credit Scholarships*, FLA. DEP’T EDUC., <http://www.fldoe.org/schools/school-choice/k-12-scholarship-programs/ftc/> (last visited Feb. 8, 2020).

⁷⁴ See *id.*

⁷⁵ John Kennedy, *Voucher Plan in Florida House Would Expand Aid to Some Middle-Income Families*, HERALD-TRIB. (Mar. 14, 2019, 9:08 PM), <https://www.heraldtribune.com/news/20190314/voucher-plan-in-florida-house-would-expand-aid-to-some-middle-income-families/1>.

Like magnet and charter schools, school voucher programs do not mandate private schools to take all interested students. Voucher programs can be used on private schools that actively discriminate against students based on the schools' religious agendas.⁷⁶ Private schools that are eligible to participate in voucher programs may expel a student because she identifies as gay or transgender and deny admission to a student because her parents are of the same sex.⁷⁷

III. THE PROMISES AND REALITIES OF SCHOOL CHOICE

Ideally, school choice presents a solution to the country's education problem. School choice provides students with opportunities to attend better-performing schools and, in turn, helps students achieve greater academic success. Not to mention, school choice gives parents the choice of where their children should go to school. However, the benefits of school choice are met with their drawbacks. School choice is only available to families who are knowledgeable of this opportunity, and it often leaves behind students who remain unaware of educational alternatives. Additionally, with each student exercising school choice, traditional public schools receive less funding and, therefore, less opportunities to improve.

A. *Benefits of School Choice*

The underlying premise of school choice is to improve traditional public schools. To do so, school choice fosters competition between traditional public schools and their school choice counterparts.⁷⁸ Both school types are vying for the enrollment of students and, ultimately, the parent decides where the child will be placed.⁷⁹ The public school will work to improve its conditions and appeal to the parents because it wants student enrollment, which in turn equates to funding.⁸⁰ Furthermore, the belief that charter schools will engender competition for traditional public schools and, in turn, cause public schools to perform better may be true.⁸¹

⁷⁶ Editorial, *Florida's School Vouchers Allow Discrimination Against LGBTQ Students, Teachers / Our View*, FLA. TODAY (Oct. 25, 2019, 10:22 AM), <https://www.floridatoday.com/story/opinion/2019/10/25/florida-school-vouchers-allow-lgbtq-discrimination/4073007002/>.

⁷⁷ *Id.*

⁷⁸ See Robert Holland & Don Soifer, *How School Choice Benefits the Urban Poor*, 45 HOW. L.J. 337, 345 (2002).

⁷⁹ See *id.*

⁸⁰ See *id.*

⁸¹ See Tim R. Sass, *Charter Schools and Student Achievement in Florida*, 1 EDUC. FIN. & POL'Y 91, 119–20 (2006).

Moreover, school choice allows students to attend higher-achieving schools. Students attend assigned public schools, which are organized by their geographic location. Although all schools receive state funding, part of the schools’ funding is derived from local property taxes.⁸² Schools within communities with higher socioeconomic constituents benefit from the higher local property taxes,⁸³ whereas schools in economically disadvantaged neighborhoods are relegated to less funding, even if more is needed. Families with sufficient income have the luxury to move neighborhoods to attend better-performing public schools or send their children to private schools. However, that luxury is not for everyone. School choice provides these students an escape from economically disadvantaged schools.⁸⁴

The Florida Department of Education released data from an analysis conducted on test scores from charter schools and public schools.⁸⁵ According to the report, charter school students, students actively exercising school choice, outperformed their public school counterparts on standardized tests.⁸⁶ Notably, studies show that “brand-new charters tend to have lower student achievement than the average traditional public school.”⁸⁷ However, after five years of operation, charter schools performed at par or exceeding the performance of traditional public schools.⁸⁸

School choice allows parents to become active participants in their children’s education.⁸⁹ A parent can assess the needs of his or her child, in conjunction with the needs of the family, to decide how the child will best succeed in school. This choice allows greater parental involvement in a child’s education, which increases the likelihood of a child’s academic success.⁹⁰ Moreover, parents have historically held the primary responsibility to control where their children attend schools.⁹¹ Parents have slowly lost that power when they move into districts with assigned public schools, in which

⁸² See Ladd, *supra* note 68, at 5.

⁸³ See *id.*

⁸⁴ See Barnes, *supra* note 44, at 2380.

⁸⁵ See Kyra Gurney, *Charter Students, Especially Minorities, Score Better on Florida Tests, Report Finds*, MIAMI HERALD (May 5, 2017, 5:41 PM), <https://www.miamiherald.com/news/local/education/article148915414.html>.

⁸⁶ See FLA. DEP’T OF EDUC., *STUDENT ACHIEVEMENT IN FLORIDA CHARTER SCHOOLS: A COMPARISON OF THE PERFORMANCE OF CHARTER SCHOOL STUDENTS WITH TRADITIONAL PUBLIC SCHOOL STUDENTS* (2017), http://www.fldoe.org/core/fileparse.php/7778/urlt/Charter_Student_Achievement_Report_1516.pdf.

⁸⁷ Sass, *supra* note 81, at 119.

⁸⁸ See *id.*

⁸⁹ See Barnes, *supra* note 44, at 2408.

⁹⁰ Philip Vassallo, *More Than Grades: How Choice Boosts Parental Involvement and Benefits Children*, CATO INST. POL’Y ANALYSIS, Oct. 26, 2000, at 1.

⁹¹ See Brad J. Davidson, *Balancing Parental Choice, State Interest, and the Establishment Clause: Constitutional Guidelines for States’ School-Choice Legislation*, 33 TEX. TECH L. REV. 435, 442 (2002).

their only alternative is to place their children in private schools. However, school choice grants back the power to parents to actively choose an education option for their children.

B. Drawbacks of School Choice

Notwithstanding its promises of better schooling, school choice attracts its fair share of drawbacks that cast doubt on the virtuosity of school choice.

School choice diverts funding from low-performing schools and invests the money in non-traditional schools.⁹² School choice operates under the guise of improving public schools, however, school choice takes funding from public schools that could have been used to improve the provision of education at public schools. Education advocates, like the National Education Association, denounced school choice because it “divert[s] essential resources from public schools to private and religious schools.”⁹³

In addition to diverting funds, school choice divests high-performing students from traditional public schools.⁹⁴ Although school choice is open to all students, *not all students receive the choice*.⁹⁵ Students exercising school choice tend to have educated parents who are involved with their children’s education.⁹⁶ Additionally, some forms of school choice, like vouchers, are only available to students whose parents can afford to pay for aspects not covered by the voucher (i.e. tuition and transportation).⁹⁷ In reality, school choice is mainly an option for students with involved and well-off parents.⁹⁸ And when a student has parents with the aforementioned factors, the student is already more likely to be successful in *any* school.⁹⁹ Therefore, the exercise of school choice, despite its possible benefits to the students, leads to a sort of “brain drain” from under-performing schools to magnet, charter, or private schools.¹⁰⁰ As a result, the under-performing public school loses funding

⁹² NEA on Vouchers: Opposed, NAT’L EDUC. ASS’N, <http://www.nea.org/home/19267.htm> (last visited Feb. 23, 2019).

⁹³ *Id.*

⁹⁴ See *State Constitutional Law – Education Clause – Florida Supreme Court Declares State’s School Voucher Program Unconstitutional*. – Bush v. Holmes, 919 So. 2d 392 (Fla. 2006), 120 HARV. L. REV. 1097, 1102–03 (2007) [hereinafter *State Constitutional Law*].

⁹⁵ See *id.*

⁹⁶ See *id.*

⁹⁷ See *id.*

⁹⁸ See *id.*

⁹⁹ See *id.*

¹⁰⁰ See *id.*

from its deficit in student enrollment and is devoid of high-performing students, who would have positively contributed to the school’s grade.¹⁰¹

A child’s exercise of school choice depends on privilege and socioeconomic status.¹⁰² Families in socioeconomically disadvantaged situations face “practical problems” to engage in school choice: “distance, geography, poverty, housing discrimination and lack of access to transportation.”¹⁰³ Additionally, the reality is that these families often do not conform to normative ideas of family structures. Oftentimes, these households are comprised of single parents who work full-time, factors that would inhibit a student’s ability to exercise choice.¹⁰⁴ Because school choice is inaccessible to students with socioeconomically disadvantage status, the alleged benefits seem pointless.

Moreover, a student’s eligibility for school choice is different from the student’s access to it. In 2019, there was a “waiting list of roughly 14,000 low-income students in the existing program, the Florida Tax Credit Scholarship Program.”¹⁰⁵ Students received all 18,000 vouchers allocated for the Family Empowerment Scholarship within six weeks into the school year.¹⁰⁶ The promises of school choice are mere temptations to low-income families who wish to exercise it but are left unable to because of school choice’s high demand.

One of the most sinister consequences of school choice is modern white flight.¹⁰⁷ Racial competition¹⁰⁸ is the genesis of white flight, in which individuals of different races or ethnicities interact with one another.¹⁰⁹ White families exercise school choice to escape “racially heterogeneous public schools into more racially homogeneous private schools.”¹¹⁰ Although some

¹⁰¹ *See id.*

¹⁰² *See* Monique Langhorne, *The African American Community: Circumventing the Compulsory Education System*, 33 BEVERLY HILLS B. ASS’N J. 12, 24 (2000).

¹⁰³ *Id.* at 30.

¹⁰⁴ *Id.*

¹⁰⁵ Ana Ceballos & Manny Diaz, *Senate Plan Would Expand School Choice, Bring Significant Changes to Florida Education System*, THE LEDGER (Feb. 22, 2019, 7:18 AM), <https://www.theledger.com/entertainmentlife/20190221/senate-plan-would-expand-school-choice-bring-significant-changes-to-florida-education-system>.

¹⁰⁶ John Haughey, *New School-Choice Program Caps 18,000 Enrollment Six Weeks into School Year*, CTR. SQUARE (Oct. 11, 2019), https://www.thecentersquare.com/florida/new-school-choice-program-caps-enrollment-six-weeks-into-school/article_0ec1bc98-ec62-11e9-9341-b7a36ece1531.html.

¹⁰⁷ *See* Linda Renzulli & Lorraine Evans, *School Choice, Charter Schools, and White Flight*, 52 SOC. PROBS. 398, 410 (2005).

¹⁰⁸ *See* TERRY BOSWELL, CLIFF BROWN, JOHN BRUEGGEMANN & T. RALPH PETERS JR. ALBANY, RACIAL COMPETITION AND CLASS SOLIDARITY 24 (2006).

¹⁰⁹ *See* Renzulli & Evans, *supra* note 107, at 402.

¹¹⁰ *Id.* at 400.

parents' desire to switch their children's school *may* be racist,¹¹¹ other parents' decisions are more inconspicuous. Parents may look at the racial composition of the school as a determinant of the quality of instruction or educational value of the school.¹¹² School choice then becomes a weapon of segregation. Parents are substituting traditional public schools with diverse enrollment for nontraditional public schools with primarily white enrollment.

Notwithstanding the aforementioned drawbacks of accessing school choice, it is important to also highlight that the alleged benefits of school choice are undermined by the quality of instruction that choice schools offer. Not all forms of school choice conform to certification and training requirements that are compulsory for public schools. For example, most Florida charter schools employ teachers with the requisite certification pursuant to the state. However, a strand of charter schools known as Schools of Hope "would be exempt from [the certification] requirement and eligible to receive millions in state funding."¹¹³ With the possibility of inadequately certified professionals providing instruction, utilizing school choice creates more harm than benefit.

Ultimately, school choice is around and has been around for the better part of fifty years. However, education in the United States continues to be a source of mockery for the world.¹¹⁴ Maybe the United States has approached education the wrong way.

By offering diverse schooling options, it has overlooked that "[d]iversity itself is not inherently good."¹¹⁵ "The use of different types of pedagogy is a quantitative change which does not necessarily result in the same qualitative educational improvement produced by interaction among students from diverse backgrounds."¹¹⁶ In providing additional schooling options, school choice allows parents to have greater control over their children's education. However, in doing so, school choice offers schooling options that may be to the detriment of the child.

¹¹¹ It would be naïve to ignore the weight racism plays in the decision to engage in school choice.

¹¹² See Eisdorfer, *supra* note 37, at 943 n.28.

¹¹³ Martin Vassallo, *You Asked: Should Charter Schools Be Allowed to Hire Teachers Who Are Not Certified?*, MIAMI HERALD (Sept. 17, 2018, 10:16 AM), <https://www.miamiherald.com/news/politics-government/influencers/article218428440.html?fbclid=IwAR3yb-Wgz1iSLU-rXrkwjfIoXQTrAUX0-QuNH0D4G3LKQO6LIHcqGGEzjyG>.

¹¹⁴ See Julia Ryan, *American Schools vs. The World: Expensive, Unequal, Bad at Math*, ATLANTIC (Dec. 3, 2013), <https://www.theatlantic.com/education/archive/2013/12/american-schools-vs-the-world-expensive-unequal-bad-at-math/281983/>.

¹¹⁵ Nancy Levit, *Embracing Segregation: The Jurisprudence of Choice and Diversity in Race and Sex Separatism in Schools*, 2005 U. ILL. L. REV. 455, 494 (2005).

¹¹⁶ Denise C. Morgan, *Anti-Subordination Analysis After United States v. Virginia: Evaluating the Constitutionality of K-12 Single-Sex Public Schools*, 1999 U. CHI. LEGAL F. 381, 398 (1999).

IV. CONSTITUTIONAL GUARANTEES FOR EDUCATION

School choice provides alternative means for children within a state to obtain their primary and secondary education. This section explores the legal framework of education on the federal and state level, with a focus on Florida.

A. Federal Background of Education

The United States’ treatment of public education lays the foundation to better understand Florida’s public education system. The United States Supreme Court in 1973 held that education is not a fundamental right.¹¹⁷ In *San Antonio Independent School District v. Rodriguez*, the Court found that the disparity in school-funding between privileged and underprivileged districts did not violate the Equal Protection Clause of the Fourteenth Amendment.¹¹⁸ Therefore, education did not require heightened judicial scrutiny and the Court would defer to the state legislature on educational matters.¹¹⁹ In *Rodriguez*, because the differential school-funding stemmed from efforts “to extend public education and to improve its quality,” the Court concluded that any scrutiny to the state’s education system required only rational basis review.¹²⁰

Noteworthy in the Court’s analysis of education is the possibility that education *may*, to some degree, be considered a fundamental right.¹²¹ As the Court distinguished fundamental rights from education, it stated: “Even if it were conceded that *some identifiable quantum of education* is a constitutionally protected prerequisite to the meaningful exercise of either right.”¹²² This remains a possibility.¹²³

¹¹⁷ See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 37 (1973).

¹¹⁸ See *id.* at 39–40; see also Omar J. Perez, *Florida’s Decision to Not Decide: Leaving the Neediest Students Without a Voice*, 41 NOVA L. REV. 79, 81 (2016).

¹¹⁹ See *Rodriguez*, 411 U.S. at 39–40.

¹²⁰ *Id.*

¹²¹ See *id.* at 37.

¹²² *Id.* at 36 (emphasis added).

¹²³ The Sixth Circuit recently held that access to literacy is a fundamental right. In *Gary B. v. Whitmer*, the plaintiffs argued that underfunded schools interfere with students’ literacy levels and, consequently, impede their success. The district court held that “access to literacy” is not a fundamental right, however, a panel of the Sixth Circuit recognized that there is a fundamental right to “basic minimum education.” *Gary B. v. Whitmer*, 957 F.3d 616, 642 (6th Cir. 2020). The decision of the Sixth Circuit panel was vacated when the Court of Appeals voted to rehear the case *en banc*. See *Gary B. v. Whitmer*, 958 F.3d 1216, 1216 (6th Cir. 2020); see also Rocco E. Testani, *A Short-Lived Constitutional Right to Education*, EDUC. NEXT (May 21, 2020), <https://www.educationnext.org/short-lived-constitutional-right-to-education-sixth-circuit-rehear-gary-b-whitmer/>.

With the precedent of *Rodriguez*, states maintained greater authority and control over their educational system.¹²⁴ Because education is not a fundamental right, any constitutional challenge to a state's education system will be satisfied with a showing that the system "bear[s] some rational relationship to legitimate state purposes."¹²⁵ Meaning, although education is vital in today's society,¹²⁶ the odds are stacked against prevailing when a party challenges the education system for the system's failures.

Although the outlook appeared grim, the Court's decision in *Rodriguez* brought forth a new wave of educational challenges targeted at a state's constitutional provisions for education.¹²⁷

B. Florida's Constitutional Guarantees: Uniformity v. Adequacy

The value of education in Florida cannot be undermined. Since the implementation of the Florida Constitution in 1838, the state has recognized its continuing duty to provide and fund education.¹²⁸ Primarily, the Florida Constitution establishes the state's compulsory provision of public education to all children within the state. Thus, education becomes the responsibility of the Florida Legislature.¹²⁹

Education in Florida is a "fundamental value."¹³⁰ In amending the Florida Constitution to include this language, legislative commentary indicated that the term "fundamental value" originated from the idea of education being a "fundamental right."¹³¹ Florida maintains a "paramount duty" to provide education for "all children residing within its borders."¹³² The "paramount duty" language of the Florida Constitution transforms education into "an important, if not the most important, duty of the state."¹³³ Notwithstanding the mandated provision of education, what type of education *must* all children in Florida receive?

¹²⁴ See *Rodriguez*, 411 U.S. at 39–40.

¹²⁵ *Id.* at 40.

¹²⁶ See *id.* at 30; *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483, 493 (1955).

¹²⁷ See *Perez*, *supra* note 118, at 82.

¹²⁸ See Stephen Messer, *School Vouchers and the Road to Academic Excellence After Bush v. Holmes*, 17 GEO. J. ON POVERTY L. & POL'Y 33, 34 n.4 (2010).

¹²⁹ See Jon Mills & Timothy McLendon, *Setting A New Standard for Public Education: Revision 6 Increases the Duty of the State to Make "Adequate Provision" for Florida Schools*, 52 FLA. L. REV. 329, 343 (2000).

¹³⁰ FLA. CONST. art. IX, § 1.

¹³¹ William A. Buzzett & Deborah K. Kearney, Commentary, art. IX, § 1, 26A FLA. STAT. ANN. (West Supp. 2006).

¹³² FLA. CONST. art. IX, § 1.

¹³³ Mills & McLendon, *supra* note 129, at 345.

Originally, the Florida Constitution stated that Florida “shall provide for a uniform system of public free schools and for the liberal maintenance of such system of free schools.”¹³⁴ The Florida Supreme Court in *State ex rel. Clark v. Henderson* construed the uniformity clause to require the provision of education through “principles that are of uniform operation throughout the State.”¹³⁵ The court in *Henderson* reasoned that state-wide uniformity would, in turn, produce and maintain “enlightened citizenship.”¹³⁶

Notwithstanding the court’s initial interpretation of “uniformity,” the Florida Supreme Court distinguished a uniform school system from equal funding. In *St. Johns County v. Northeast Florida Builders Association*, the court recognized the existence of disparate funding for school districts.¹³⁷ In addressing this issue, the court held that the Florida Constitution does not mandate that all school districts receive equal amounts of funding to support education.¹³⁸ According to the court, the extent of the state’s duty is to provide “every student an equal chance to achieve basic educational goals prescribed by the legislature.”¹³⁹ Consequently, uniformity in education refers “only [to] an equal chance and *not* true equality.”¹⁴⁰

Subsequently, the Florida Supreme Court evaded defining uniformity, as it did in *St. Johns County*, in *Florida Department of Education v. Glasser*.¹⁴¹ In *Glasser*, the court rejected the school board’s imposition of additional taxes without legislative authorization.¹⁴² The school board argued that the taxes were acceptable in the wake of the court’s decision in *St. John’s County*.¹⁴³ According to the school board, the uniformity clause, as interpreted in *St. John’s County*, was “merely requiring a ‘floor’ of educational opportunity and thus the counties [were] empowered to put into place their own ‘ceilings.’”¹⁴⁴ However, the court reiterated that the provision of education was a legislative duty, and it was the Florida Legislature that must “give content to this constitutional mandate.”¹⁴⁵ Justice Kogan, in his concurring opinion, wrote that the current view of the uniformity clause was

134 *State ex rel. Clark v. Henderson*, 188 So. 351, 352 (1939).

135 *Id.*

136 *Id.*; see also *Mills & McLendon*, *supra* note 129, at 352.

137 *St. Johns Cty. v. Ne. Fla. Builders Ass’n*, 583 So. 2d 635, 641 (Fla. 1991).

138 *Id.*

139 *Id.*; see also *Perez*, *supra* note 118, at 84.

140 See *Perez*, *supra* note 118, at 85 (emphasis added).

141 *Fla. Dep’t of Educ. v. Glasser*, 622 So. 2d 944, 947 (Fla. 1993).

142 See *id.*

143 See *id.*

144 *Id.*

145 *Id.*

that disparate funding between counties was acceptable.¹⁴⁶ In his view, the “variance from county to county” became an issue when a “district suffer[ed] a disadvantage in the basic educational opportunities available to its students.”¹⁴⁷ According to Justice Kogan, there existed no disadvantage if one district offered “Latin or painting classes,” when another district could not afford it.¹⁴⁸

Yet, the uniformity clause is not the only qualitative measure for education in the Florida Constitution. The Florida Constitution guarantees not only the provision of education but also its adequacy.¹⁴⁹ The predecessor to the current clause of the Florida Constitution failed to define “adequate provision.”¹⁵⁰ The Florida Supreme Court in *Coalition for Adequacy and Fairness in School Funding, Inc. v. Chiles* distinguished “adequate” from “uniform.”¹⁵¹ The court agreed that “uniform” had an accepted definition: “this word means a lack of substantial variation.”¹⁵²

On the contrary, “adequate” lacked a definition as to what is adequate and what is inadequate.¹⁵³ The court found that, despite the inclusion of the clause, the Legislature fell short of defining *adequacy*, and the court was not in the position to impose its will on the Legislature.¹⁵⁴ “However, of critical importance is the conclusion of a majority of justices that Article IX created a duty for the Legislature to provide some minimal level of support for public education, and that this duty was enforceable by the courts.”¹⁵⁵ This decision allowed for courts to hear future challenges to whether the adequacy threshold in public education has been met.¹⁵⁶

The Florida Legislature reformed the uniformity clause in 1998. The amended provision reads: “Adequate provision shall be made by law for a uniform, *efficient, safe, secure, and high quality* system of free public schools *that allows students to obtain a high quality education[.]*”¹⁵⁷ The italicized portions of the clause represent the Legislature’s changes to the uniformity

¹⁴⁶ *Id.* at 950 (Kogan, J., concurring).

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ See FLA. CONST. art. IX, § 1.

¹⁵⁰ See DOUGLAS N. HARRIS, FUNDING FLORIDA’S SCHOOLS: ADEQUACY, COSTS, AND THE STATE CONSTITUTION 4.6 (2004), https://pdfs.semanticscholar.org/9a37/4e7b180bdf377152b431fff80606be68e133.pdf?_ga=2.122270728.2011033830.1587165682-426256202.1587165682.

¹⁵¹ See *Coal. for Adequacy & Fairness in Sch. Funding, Inc. v. Chiles*, 680 So. 2d 400, 408 (Fla. 1996).

¹⁵² *Id.* at 408.

¹⁵³ See *id.*

¹⁵⁴ See HARRIS, *supra* note 150, at 4.5.

¹⁵⁵ Mills & McLendon, *supra* note 129, at 357–58.

¹⁵⁶ See Perez, *supra* note 118 at 102.

¹⁵⁷ FLA. CONST. art. IX, § 1 (emphasis added).

clause. A noteworthy theme in the above-mentioned cases is that there is a “presumption favoring the Legislature’s actions.”¹⁵⁸

Under this backdrop, Florida’s provision of education is relatively flexible. It is permissible for local school districts to receive varied funding, which in turn produces different educational capabilities for the schools. Article IX also states that the Florida Legislature is responsible for a “system of free public schools.”¹⁵⁹ Do all forms of school choice fit into this system?

V. SCHOOL VOUCHERS IN FLORIDA

The school choice initiative in Florida began as a response to the state’s underperforming public schools. In 1999, Governor Jeb Bush enacted the A-Plus Plan for Education (“A-Plus Plan”).¹⁶⁰ The A-Plus Plan was multifaceted in that it assessed students in each school, then used the assessments to grade the school’s performance.¹⁶¹ Depending on the grade and how long the school maintained the unsatisfactory grade, a student may be eligible to change schools.¹⁶² In theory, the A-Plus Plan purported to encourage under-performing schools to improve their school grade “to avoid the political embarrassment and potential loss in revenues from having their students depart with tuition vouchers.”¹⁶³

The A-Plus Plan served to hold schools accountable for their students’ performance on standardized tests.¹⁶⁴ Once students across the state completed the standardized tests, the schools received a letter-grade based on the performance of the students.¹⁶⁵ The state offered cash incentives for schools that received above satisfactory letter-grades.¹⁶⁶ Conversely, schools that did not perform satisfactorily received sanctions, and their students were eligible for vouchers to transfer schools.¹⁶⁷ The vouchers formed part of the

¹⁵⁸ Fla. Dep’t of Educ. v. Glasser, 622 So. 2d 944, 951 (Fla. 1993) (Kogan, J., concurring).

¹⁵⁹ FLA. CONST. art. IX, § 1.

¹⁶⁰ Neily, *supra* note 36, at 407.

¹⁶¹ See JAY P. GREENE, AN EVALUATION OF THE FLORIDA A-PLUS ACCOUNTABILITY AND SCHOOL CHOICE PROGRAM I (2001).

¹⁶² *See id.*

¹⁶³ *Id.*

¹⁶⁴ See EDUCATION REFORM IN FLORIDA: DIVERSITY AND EQUITY IN PUBLIC POLICY, 133 (Kathryn M. Borman & Sherman Dorn eds., 2007).

¹⁶⁵ Kathleen McGrory, *Birth of a Charter School and Jeb Bush’s Vision for Education*, MIAMI HERALD (Mar. 7, 2015, 11:00 AM), <https://www.miamiherald.com/news/local/education/article12923990.html>.

¹⁶⁶ *See id.*

¹⁶⁷ *See id.*; Cecilia E. Rouse, Jane Hannaway, Dan Goldhaber & David Figlio, *Feeling the Florida Heat? How Low-Performing Schools Respond to Voucher and Accountability Pressure* 4 (CEPS, Working Paper No. 256, 2007).

Opportunity Scholarship Program,¹⁶⁸ which provided state-funded vouchers to allow students to transfer from underperforming public schools to higher-performing public or private schools.¹⁶⁹

The totality of the A-Plus Plan is no longer active in the state; however, the Florida Department of Education maintains the Florida School Recognition Program.¹⁷⁰ Under the Florida School Recognition Program, the Department of Education measures the performance of individual students and of the school.¹⁷¹ High performance for the student or the school results in an award.¹⁷²

Currently, Florida students may elect to exercise school choice.¹⁷³ Among the K–12 options for students are charter schools, private schools, Schools of Hope, Innovation Schools, virtual education, and home education.¹⁷⁴

The political climate of Florida has expanded school choice. During Governor Rick Scott's final decisions in office, Governor Scott enshrined school choice's place in the Florida education system.¹⁷⁵ Pursuant to House Bill 7029, "Florida's public school students . . . will be able to attend any school in the state that has space available."¹⁷⁶ Now, under the leadership of Governor Ron DeSantis, whose gubernatorial win is accredited to "school choice moms,"¹⁷⁷ the path for the education system is clear: more funding for school choice.¹⁷⁸

¹⁶⁸ See Rouse, Hannaway, Goldhaber & Figlio, *supra* note 167.

¹⁶⁹ Neily, *supra* note 36, at 406.

¹⁷⁰ See *Florida School Recognition Program FAQ*, FLA. DEP'T EDUC., <http://www.fldoe.org/accountability/accountability-reporting/fl-school-recognition-program/FAQ.html> (last visited Apr. 17, 2020).

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ See *School Choice*, FLA. DEP'T EDUC., <http://www.fldoe.org/schools/school-choice/> (last visited Apr. 17, 2020).

¹⁷⁴ *Id.*

¹⁷⁵ Florida House Bill 7029 (2016) amended Florida Statutes section 1002.20(6)(a). <https://www.flsenate.gov/Session/Bill/2016/7029/BillText/er/PDF>; see also Kristen M. Clark, 'School Choice' Becomes Florida Law; Scott Also Signs 19 Other Bills, MIAMI HERALD (Apr. 14, 2016, 4:19 PM), <https://www.miamiherald.com/news/politics-government/state-politics/article71865977.html>.

¹⁷⁶ Clark, *supra* note 175; see also Fla. Dep't of Educ. Memorandum - Chapter 2016-237, Laws of Florida (House Bill 7029) – Statutory Revisions (June 17, 2016), <https://info.fldoe.org/docushare/dsweb/Get/Document-7662/dps-2016-79.pdf>.

¹⁷⁷ William Mattox, 'School Choice Moms' Tipped the Governor's Florida Race, WALL ST. J. (Nov. 20, 2018, 6:51 PM), <https://www.wsj.com/articles/school-choice-moms-tipped-the-governors-florida-race-1542757880>.

¹⁷⁸ See A.G. Gancarski, *School Choice a Priority for Ron DeSantis*, Richard Corcoran, FLA. POL. (Dec. 28, 2018), <https://floridapolitics.com/archives/284217-corcoran-desantis-school-choice>.

A. Bush v. Holmes

The Florida Supreme Court addressed the validity of school vouchers in 2006 when it pronounced a school voucher program unconstitutional.¹⁷⁹ In *Bush v. Holmes*, the issue before the court concerned a voucher program that diverted taxpayer money from public schools to private schools.¹⁸⁰ Specifically, *Holmes* challenged the Opportunity Scholarship Program (“OSP”), established under then-Governor Bush’s A-Plus Plan for Education.¹⁸¹

The Florida Legislature enacted the OSP for students to enroll in public or private schools of their choice, irrespective of the students’ assigned schools.¹⁸² Under the OSP, students would be able to transfer from “failing public schools . . . into better-performing public schools or into private schools.”¹⁸³ The OSP created an avenue for students to leave their assigned public school to attend a more promising school. However, it does not appear that the Legislature intended for the OSP to motivate underperforming schools to improve because students who left their assigned public schools were not required to return, regardless of if the school improved.¹⁸⁴ The OSP appeared to permanently divert public funds to private schools, absent an opportunity for public schools to recoup the students (and funding) they once lost.

In *Holmes*, the court noted that the state had maintained an education provision since the founding of the Constitution in 1838.¹⁸⁵ Notwithstanding subsequent changes to the language, the Constitutional Revision Commission in 1996 added the language that education is a “fundamental value” and a “paramount duty of the state.”¹⁸⁶ In doing so, the Legislature intended to retain education as a responsibility of the state. The court recognized that the language in Florida’s Constitution “impos[ed] a maximum duty on the state to provide for public education that is uniform and of high quality.”¹⁸⁷

¹⁷⁹ See *Bush v. Holmes*, 919 So. 2d 392, 412 (Fla. 2006).

¹⁸⁰ See *id.* at 397.

¹⁸¹ See *id.* at 400.

¹⁸² FLA. STAT. § 1002.38(1) (2005).

¹⁸³ Jamie Dycus, *Lost Opportunity: Bush v. Holmes and the Application of State Constitutional Uniformity Clauses to School Voucher Schemes*, 35 J.L. & EDUC. 415, 419 (2006).

¹⁸⁴ There is an exception for students who attend a private school in which the grade level is limited to the eighth grade. If the private school does not offer other grade levels and the student’s assigned public high school received a performance grade of a C or better, then the student must attend her assigned public high school. FLA. STAT. § 1002.38(2)(b) (2005); *Holmes*, 919 So. 2d at 401.

¹⁸⁵ See *Holmes*, 919 So. 2d at 402.

¹⁸⁶ *Id.* at 403.

¹⁸⁷ *Id.* at 404.

Ultimately, the court held that the OSP's private school provision was unconstitutional.¹⁸⁸ The court focused on the Legislature's obligation under Article IX, section 1(a) of the Florida Constitution. The court noted that Florida's education article has three distinct requirements. First, education for children is a fundamental value.¹⁸⁹ Second, the state bears the obligation to provide education to all children within the state.¹⁹⁰ Third, the "adequate provision" of education is through the means of a "uniform, efficient, safe, secure, and high quality *system of free public schools*."¹⁹¹

Accordingly, any legislation must be congruent with Article IX's mandate. The court then turned to the legislation that enacted the OSP and attempted to reconcile the OSP with Article IX.¹⁹² The OSP legislation omitted any reference to the state's duty to provide a "system of free public schools."¹⁹³ In both the 1999 and 2002 legislation, the Legislature referred to the state's constitutional obligation to provide students with "a high-quality education."¹⁹⁴ Notably absent from the OSP legislation is reference to the state's duty to educate students *through* public schools.¹⁹⁵ In noting this disparity, the court underlined that Article IX, section 1(a) simultaneously grants and limits the Legislature's authority.¹⁹⁶ By interpreting the constitutional provision as a whole, rather than as separate obligations,¹⁹⁷ the court recognized that the Legislature retained the power to educate the state's children, but it is restricted on how it does so. The OSP was unconstitutional because it divested money from public schools and invested it into an alternate education system.¹⁹⁸ The court further noted that any diversion of funds from the public school system, irrespective of amount, did not comply with Article IX.¹⁹⁹

Additionally, the OSP functioned in direct contravention to the uniformity requirement of Article IX. Specifically, the court found that the

¹⁸⁸ *See id.* at 412.

¹⁸⁹ *See id.* at 405.

¹⁹⁰ *See id.*

¹⁹¹ *Id.* (emphasis added).

¹⁹² *Id.* at 406.

¹⁹³ FLA. CONST. art. IX, § 1(a).

¹⁹⁴ FLA. STAT. § 229.0537(1) (1999); FLA. STAT. § 1002.38(1) (2005).

¹⁹⁵ *Holmes*, 919 So. 2d at 406.

¹⁹⁶ *Id.*

¹⁹⁷ The court applied *in pari materia*, the principle of statutory construction, to interpret the second and third sentence of Article IX. In doing so, the court recognized that the state's duty to educate must be read together with the provision that education must come from a system of public schools. Article IX's mandate of a system of public schools is construed as exclusionary, not allowing for an alternate system. *See id.* at 406–08.

¹⁹⁸ *See id.* at 407.

¹⁹⁹ *See id.* at 409.

OSP’s unconstitutionality stemmed from “allow[ing] some children to receive a publicly funded education through an alternative system of private schools that [were] not subject to the uniformity requirements of the public school system.”²⁰⁰ If private schools were to obtain funding, then “private and public schools must be accountable for the same standards if they are receiving public support.”²⁰¹ However, the court found that the OSP failed to ensure uniformity between private schools receiving OSP funds and its public school counterparts.²⁰² Among its consideration, the court found differences between public schools and private schools receiving OSP funds.²⁰³ The differences included: private school teachers did not require the certification of their public school counterparts;²⁰⁴ private schools lacked the required public school curriculum;²⁰⁵ and the Legislature’s general lack of control over private school activities.²⁰⁶ Furthermore, “the Legislature expressly state[d] that it d[id] not intend ‘to regulate, control, approve, or accredit private educational institutions.’”²⁰⁷

The court has been heavily criticized for its decision in *Holmes*. Many argue that the court construed Article IX literally, without need, and read the uniformity provision “to require consistency among two of the most basic programmatic elements of schooling: curriculum and teacher training.”²⁰⁸ Moreover, the court failed to address an actual injury caused by the OSP.²⁰⁹ The court addressed a “theoretical diversion” of funds from public schools as an “inevitable injury,” however, the court failed to acknowledge whether the alleged diversion actually existed or if it would actually improve public schools.²¹⁰ Many speculated that the court’s decision would detract from the school choice movement and cause needless litigation challenging all forms of school choice. However, school choice persists in Florida.

200 *Id.* at 412.

201 Martha McCarthy, *The Legal Status of School Vouchers: The Saga Continues*, 297 ED. LAW REP. 655, 663 (2013) (citing *Holmes*, 919 So. 2d at 408–10).

202 *See Holmes*, 919 So. 2d at 409.

203 *See id.*

204 *See id.* at 410.

205 *See id.*

206 *Id.* at 409 (citing FLA. STAT. § 1002.42(2)(h) (2005)).

207 *Id.*

208 Dycus, *supra* note 183, at 417.

209 *See State Constitutional Law*, *supra* note 94, at 1101.

210 *Id.*

B. *Aftermath of Bush v. Holmes: School Choice's Illegitimacy in Florida*

The viability of school choice is noteworthy in *Citizens for Strong Schools, Inc. v. Florida State Board of Education*.²¹¹ In *Citizens for Strong Schools*, the plaintiffs challenged the Florida public education system, claiming that Florida failed to satisfy the uniformity clause of the Florida Constitution.²¹² With *Bush v. Holmes* as its precedent, the plaintiffs in *Citizens for Strong Schools* requested the Florida Supreme Court revisit the commands of Article IX of the Florida Constitution and invalidate school choice as an educational means.²¹³

In the Amicus Curiae Brief in Support of Appellant/Petitioners, the Amici argued that the court's decision in *Bush v. Holmes* heightened the judicial scrutiny of educational measures in the state.²¹⁴ To support its claims, the Amici suggested that the "paramount duty" language of Article IX should be read *in pari materia* with other constitutional provisions.²¹⁵ In order for the court to comply with this, the court would read Article IX as it does the Equal Protection Clause of the Florida Constitution.²¹⁶ Such reading, according to the Amici, is appropriate because the commands of Article IX "comport with the Constitution's guarantee of equal protection for all children."²¹⁷

According to the plaintiffs, the Florida Constitution required the state to provide a "high quality" system that would result in "high quality education."²¹⁸ However, because of funding disparities in school districts, students' educational standards are suffering; the plaintiffs argued that there is a "high number of students reading at less than grade level."²¹⁹ Because of this academic disparity, which is causally connected to the disparity in funding, the plaintiffs argued that they had a justiciable claim.

²¹¹ See *Citizens for Strong Sch., Inc. v. Fla. State Bd. of Educ.*, 232 So. 3d 1163, 1165 (Fla. Dist. Ct. App. 2017), *aff'd*, 262 So. 3d 127 (Fla. 2019).

²¹² See *id.*

²¹³ See *id.* at 1173.

²¹⁴ See Amicus Curiae Brief in Support of Appellant/Petitioners at 6, *Citizens for Strong Sch., Inc. v. Fla. State Bd. of Educ.*, 262 So. 3d 127 (2019) (No. SC 18-67), 2018 WL 310912.

²¹⁵ See *id.* at 7.

²¹⁶ See *id.*

²¹⁷ *Id.* at 8.

²¹⁸ Plaintiffs' Response in Opposition to Defendants' Motion to Dismiss Amended Complaint at 22, *Citizens for Strong Sch., Inc. v. Fla. Bd. of Educ.*, 262 So. 3d 127 (2019) (No. 09-CA-4534) (Fla. Cir. Ct.).

²¹⁹ Carlee Poston Escue, William E. Thro & R. Craig Wood, *Some Perspectives on Recent School Finance Litigation*, 268 EDUC. L. REP. 601, 607 n.26 (2011).

Notwithstanding, the Florida Supreme Court noted that it placed great deference on the decisions of the state, and the plaintiff lacked a justiciable question for the review of the court.²²⁰ Furthermore, the court held that, despite the language in Article IX, section 1(a), a judge lacks the authority to control “teaching methods and accountability, the appropriate funding of public schools, the proper allowance of charter schools and school choice, the best methods of student accountability and school accountability, and related funding priorities.”²²¹ The court held that it reserved the education decision-making exclusively to “the elected representatives and executives who make the difficult and profound decisions regarding how our children are to be educated.”²²²

With the Legislature retaining great deference when it comes to educational matters, a child’s education is subject to the whim of the political party that composes the legislative majority.

C. Family Empowerment Scholarship

Despite the holding in *Bush v. Holmes*, in which the Florida Supreme Court invalidated the Opportunity Scholarship Program because it diverted funding for public schools to private schools, the Florida Legislature launched a new voucher program in 2019. Senate Republicans proposed the Family Empowerment Scholarship (“FES”), which Governor Ron DeSantis signed into law as Senate Bill 7070.²²³ The FES has the same objective as the OSP: providing low-income families with a pathway to enroll their children into private schools.²²⁴ Like its unconstitutional counterpart, the FES diverts “funds Florida taxpayers have already dedicated to education to provide school choice options.”²²⁵

The FES legislation authorized 18,000 school vouchers for its debut school year, 2019–2020.²²⁶ Recently, Governor DeSantis approved House

²²⁰ See *Citizens for Strong Sch., Inc. v. Fla. State Bd. of Educ.*, 232 So. 3d 1163, 1165–66 (Fla. Dist. Ct. App. 2017), *aff’d*, 262 So. 3d 127 (Fla. 2019).

²²¹ See *id.* at 1166.

²²² See *id.*

²²³ See *Family Empowerment Scholarship*, FLA. DEP’T EDUC., <http://www.fldoe.org/schools/school-choice/k-12-scholarship-programs/fes/> (last visited Jan. 19, 2020); FLA. STAT. § 1002.394.

²²⁴ See Ryan Dailey, *Florida Senate’s Education Package Looks to Create New State Scholarship, Expand Community Schools*, WLRN (Feb. 22, 2019, 5:08 PM), <https://www.wlrn.org/post/florida-senates-education-package-looks-create-new-state-scholarship-expand-community-schools>.

²²⁵ Press Release, Fla. Senate, Senate Education Leaders Announce 2019 Priorities (Feb. 21, 2019), <https://www.flsenate.gov/Media/PressRelease/Show/3082>.

²²⁶ FLA. STAT. § 1002.394(11)(a).

Bill 7067 to extend the reach of the FES.²²⁷ Effective July 1, 2020, there will be an additional 29,000 FES vouchers available for students.²²⁸ The FES vouchers will increase annually in proportion to the enrollment in public schools.²²⁹

The Florida Supreme Court in *Bush v. Holmes* held that the OPS was unconstitutional because it funded private schools in direct competition with the state's public-school systems.²³⁰ The court invalidated the school vouchers because they violated Article IX of the Florida Constitution. Now, under the FES, the State will engage in the same behavior that the court in *Holmes* found to be contrary to the State's "paramount duty" to provide a public-school system for the children.²³¹

The FES is the new OPS. It is unconstitutional for the same reasons that the Florida Supreme Court noted in *Holmes* for the OPS. Yet, if the Florida Supreme Court is prompted to resolve the legality of the FES, it is unlikely for the court to hold it unconstitutional. When Governor Ron DeSantis took office, one of his first actions was to replace three retiring liberal justices from the Florida Supreme Court with three conservative justices.²³² In doing so, Governor DeSantis ensured to silence any opposition to his objective of advancing his school choice agenda in the state.²³³

Since FES's enactment, it has been projected that Florida will face a lawsuit over the voucher program.²³⁴ If the FES makes it to Florida courts, it is likely that the Florida Supreme Court will reverse *Bush v. Holmes*. Although some argue that *Holmes* failed to stop voucher programs from persisting in Florida,²³⁵ the decision remains an important precedent for

²²⁷ FLA. STAT. § 1002.394(11)(a); *see also* Governor Ron DeSantis Signs Scholarship Legislation, FL GOV (June 25, 2020), <https://www.flgov.com/2020/06/25/governor-ron-desantis-signs-scholarship-legislation/>.

²²⁸ Governor Ron DeSantis Signs Scholarship Legislation, *supra* note 227.

²²⁹ FLA. STAT. § 1002.394(11)(a).

²³⁰ *See* *Bush v. Holmes*, 919 So. 2d 392, 398 (Fla. 2006).

²³¹ FLA. CONST. art. IX, § 1.

²³² *See* The Palm Beach Post Editorial Bd., *Editorial: DeSantis Private School Voucher Plan Robs Florida's Public Schools of Needed Money*, PALM BEACH POST (Apr. 7, 2019, 7:01 AM), <https://www.palmbeachpost.com/opinion/20190407/editorial-desantis-private-school-voucher-plan-robbs-floridas-public-schools-of-needed-money>.

²³³ *See id.*

²³⁴ Ron Meyer, the attorney who challenged the OPS in *Bush v. Holmes*, and organizations like Americans United for Separation of Church and State and the Southern Poverty Law Center are likely to become litigants in lawsuits challenging the legality of the FES. In response, the State has set aside additional funds in preparation for litigation expenses. *See* News Serv. of Fla., *More Money Sought for School Legal Fights*, FLA. POL. (Aug. 27, 2019), <https://floridapolitics.com/archives/304394-more-money-sought-for-school-legal-fights>.

²³⁵ Emily L. Mahoney & Jeffrey S. Solocheck, *Ron DeSantis May Finish the K-12 Education Transformation that Jeb Bush Started*, MIAMI HERALD (Mar. 3, 2019, 6:00 AM), <https://www.miamiherald.com/news/politics-government/state-politics/article226940524.html>.

future litigation on school choice. The Florida Supreme Court, with its conservative-leaning majority and recent reversal of its own decisions,²³⁶ likely will not hesitate to overturn precedent.

VI. THE FUTURE OF EDUCATION IN FLORIDA

Governor Rick Scott ensured the security of school choice opportunities when he signed legislation that extended school choice’s reach to all children in the State of Florida.²³⁷ With the transfer of title from Governor Scott to Governor Ron DeSantis, school choice will expand. In February 2019, Governor DeSantis announced that “nearly \$111 million” in taxpayer money will be used to send up to 15,000 students to private schools of their choice.²³⁸ However, school choice should not be how education progresses into the future.

Florida’s constitutional mandate is clear: it is the “paramount duty of the state to make adequate provision for the education of all children residing within its borders.”²³⁹ Yet, despite its clarity, the actions of the State leave these terms riddled with ambiguity. Terms such as uniform and adequate, although expressly stated in the Florida Constitution, are negated by the State’s actions in promoting school choice. School choice impedes on the promise made to children by the Florida Constitution. It is a method of diverting funds from low-resourced schools to privatized institutions under the façade that it will ultimately help all students. School choice fails to comport with the state’s duty to *adequately* educate students through a public-school system.²⁴⁰ By promoting school choice, Florida ignores the need for educational equity and further propagates a system that disadvantages its children.

Furthermore, school choice contributes to the worsening conditions of public schools.²⁴¹ The United Teachers of Dade argue that “overfunding of

²³⁶ The Florida Supreme Court recently reversed its own precedent in the absence of pending litigation. In an unprecedented move, the Court issued a per curium opinion adopting the *Daubert* expert testimony standard. The decision overturned the court’s 2018 decision that held that the *Frye* test controlled admissibility of expert testimony. The court’s reversal followed the appointment of two conservative justices by Governor Ron DeSantis. See Gary Blankenship, *Supreme Court Replaces Frye with Daubert in Evidence Rules*, FLA. B. (May 29, 2019), <https://www.floridabar.org/the-florida-bar-news/supreme-court-replaces-frye-with-daubert-in-evidence-rules/>.

²³⁷ Clark, *supra* note 175.

²³⁸ The Palm Beach Post Editorial Bd., *supra* note 232.

²³⁹ FLA. CONST. art. IX, § 1.

²⁴⁰ *Id.*

²⁴¹ See generally Colleen Wright, *Paying Miami Teachers More Is Such a Great Idea that Charter Schools Want in, Too*, MIAMI HERALD (Dec. 4, 2018, 6:13 PM), <https://www.miamiherald.com/news/local/education/article222553840.html>.

charter schools” and public-school alternatives remove needed funds from public schools.²⁴² Despite the Friedman theories that competition will lead to improvement, public schools are in dire need of funding in order to improve their conditions. However, if funding is continuously diverted to funding private schools, the public schools will remain fixed in their conditions.

Ultimately, failing public schools should not be met with a replacement. The State should restore and adequately fund public schools to better serve their community without incentivizing public-school alternatives that fail to meet certification requirements. By providing public schools with greater funding, the public schools will be able to improve their infrastructure and accrue new materials for the students. Additionally, an increase in funding would allow schoolteachers to receive well-deserved raises and make technological improvements to their classrooms. Curricula can be better adapted to the needs of the student without the worry of how much the change in curricula will cost. Allocating greater funding to public schools will ensure that students are receiving an education that meets the standards of the Florida Constitution.²⁴³

²⁴² *Id.*

²⁴³ FLA. CONST. art. IX, § 1.