Who Benefits from Leaving the “Bad” School?

Annabelle V. González
FIU College of Law, agonz1091@fiu.edu
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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.
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.\footnote{See CCD Quick Facts, NAT’L CTR. FOR EDUC. STAT., https://nces.ed.gov/ccd/quickfacts.asp (last visited on Feb. 23, 2019).} Public schools serve as the principal “inculcat[ors] [of] fundamental values” for an enlightened citizenry.\footnote{Ambach v. Norwich, 441 U.S. 68, 77 (1979).} Yet, the importance of public schools extends past their provision of education; public schools are social centers.\footnote{John Dewey, The School as Social Center, 3 ELEMENTARY SCH. TCHR. 73, 73 (1902).}

Notwithstanding their importance, public schools remain underfunded and overworked. States across the nation have taken drastic measures to cut back on school expenses.\footnote{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.} 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.\footnote{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.} To him, the country’s education system is “American carnage.”\footnote{Id.} The President was not referring to the increase in school shootings\footnote{See Tevi Troy, Presidents and Mass Shootings, NAT’L AFF. (Spring 2018), https://www.nationalaffairs.com/publications/detail/presidents-and-mass-shootings.} or campus bullying.\footnote{See Christina Walker, 10 Years, 180 School Shootings, 356 Victims., CNN (June 24, 2019), https://www.cnn.com/interactive/2019/07/us/tien-years-of-school-shootings-trnd/.} The President explained that the current “education system flush with cash . . . leaves our young and beautiful students deprived of all knowledge.”\footnote{Blake, supra note 5 (emphasis added).}

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

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

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

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15 Strauss, supra note 12.


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. Private schools and public-school alternatives were, and continue to be, available to families at their own expense. 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. Pursuant to these plans, schools attempted to circumvent desegregation orders following the Supreme Court’s decision in Brown v. Board of Education. 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.”

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. Rather, the Court underscored that freedom of choice plans served

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21 See id.


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

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. In 1983, the National Commission on Excellence in Education published *A Nation at Risk: The Imperative for Educational Reform* (“A Nation at Risk”). *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.” *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.

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. The report was a battle cry: either the country reformed its education or countries with far-superior education systems would conquer the United States. 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.

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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)).
30 See NAT’L COMM’N ON EXCELLENCE IN EDUC., supra note 29.
31 Id. at 9.
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.”

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. Public schools hold a monopoly over the education system, therefore, they perpetuate their own defects onto the system. By dismantling the monopoly, school choice will “force[s] schools to compete in the marketplace . . .” 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.”

Additionally, apart from producing better schools, school choice allows parents to choose a school that is better suited to the needs of their children. School choice provides economically disadvantaged families the opportunity to move schools without the financial concern that would have once inhibited them. 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. Notably, magnet schools, charter schools, and school vouchers

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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.  

1. Magnet Schools

Proponents of school choice advocate for magnet schools as an alternative to traditional public schools in densely populated urban areas. Appropriately named, magnet schools act like magnets to attract students from their assigned public schools. 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.

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

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. Specifically, magnet programs are incorporated into existing inner-city schools, predominately with a minority sociodemographic, “in order to lure white students into the city.”

Conversely, the efforts for desegregation are undermined by a pattern of classroom segregation occurring within the schools. 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

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45 MICKELSON, BOTTIA & SOUTHWORTH, supra note 24, at 7.
47 See id.
49 See id. at 2569.
50 See id.
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. 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. 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.

2. Charter Schools

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

Charter schools developed through the theories of the economist, Milton Friedman. According to Friedman, the establishment of charter schools would provide parents with choices for where their child should attend school. The option to choose between traditional public schooling and a charter school would drive the existing public school system to improve. 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.” Consequently, charter schools, like other school choice alternatives, become a situation of “racial isolation,” instead of integration.

55 See id. at 2572–73.
56 See Strauss, supra note 12.
57 See id.
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.\textsuperscript{66} Most vouchers function to aid students with disabilities or students attending poorly-ranked schools.\textsuperscript{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.\textsuperscript{68}

The primary use of a voucher is to incentivize parents to enroll their students in otherwise unattainable private schools.\textsuperscript{69} States are required to provide K–12 educational instruction at no cost to their constituents.\textsuperscript{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.\textsuperscript{71} Through a school voucher, parents can opt for private education at no expense.\textsuperscript{72}

Notably, there are alternative tax-credit scholarships that allow student enrollment into private schools without using taxpayer funding.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{75}

\begin{itemize}
\item \textsuperscript{67} Id.
\item \textsuperscript{68} See Helen F. Ladd, School Vouchers: A Critical View, 16 J. Econ. Persp. 3, 3 (2002).
\item \textsuperscript{69} See id. at 4.
\item \textsuperscript{70} See id.
\item \textsuperscript{71} See id.
\item \textsuperscript{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).
\item \textsuperscript{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).
\item \textsuperscript{74} See id.
\end{itemize}
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

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77 Id.
79 See id.
80 See id.
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.\textsuperscript{82} Schools within communities with higher socioeconomic constituents benefit from the higher local property taxes,\textsuperscript{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.\textsuperscript{84}

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

School choice allows parents to become active participants in their children’s education.\textsuperscript{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.\textsuperscript{90} Moreover, parents have historically held the primary responsibility to control where their children attend schools.\textsuperscript{91} Parents have slowly lost that power when they move into districts with assigned public schools, in which

\begin{footnotesize}
\textsuperscript{82} See Ladd, supra note 68, at 5.
\textsuperscript{83} See id.
\textsuperscript{84} See Barnes, supra note 44, at 2380.
\textsuperscript{87} Sass, supra note 81, at 119.
\textsuperscript{88} See id.
\textsuperscript{89} See Barnes, supra note 44, at 2408.
\end{footnotesize}
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.\(^\text{92}\) 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.”\(^\text{93}\)

In addition to diverting funds, school choice divests high-performing students from traditional public schools.\(^\text{94}\) Although school choice is open to all students, not all students receive the choice.\(^\text{95}\) Students exercising school choice tend to have educated parents who are involved with their children’s education.\(^\text{96}\) 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).\(^\text{97}\) In reality, school choice is mainly an option for students with involved and well-off parents.\(^\text{98}\) And when a student has parents with the aforementioned factors, the student is already more likely to be successful in any school.\(^\text{99}\) 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.\(^\text{100}\) As a result, the under-performing public school loses funding


\(^{93}\) Id.


\(^{95}\) 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.\footnote{101}

A child’s exercise of school choice depends on privilege and socioeconomic status.\footnote{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.”\footnote{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.\footnote{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.”\footnote{105} Students received all 18,000 vouchers allocated for the Family Empowerment Scholarship within six weeks into the school year.\footnote{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.\footnote{107} Racial competition\footnote{108} is the genesis of white flight, in which individuals of different races or ethnicities interact with one another.\footnote{109} White families exercise school choice to escape “racially heterogeneous public schools into more racially homogeneous private schools.”\footnote{110} Although some

\footnote{101} See id.


\footnote{103} Id. at 30.

\footnote{104} Id.


\footnote{109} See Renzulli & Evans, supra note 107, at 402.

\footnote{110} Id. at 400.
parents’ desire to switch their children’s school may be racist, 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. 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.” 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. 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.” 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. 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 Eis dorfer, supra note 37, at 943 n.28.
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.\(^{123}\)

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\(^{118}\) 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).


\(^{120}\) 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. 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.” Meaning, although education is vital in today’s society, 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.

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. 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.

Education in Florida is a “fundamental value.” 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.” Florida maintains a “paramount duty” to provide education for “all children residing within its borders.” The “paramount duty” language of the Florida Constitution transforms education into “an important, if not the most important, duty of the state.” Notwithstanding the mandated provision of education, what type of education must all children in Florida receive?

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125 Id. at 40.
127 See Perez, supra note 118, at 82.
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.” 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.” The court in *Henderson* reasoned that state-wide uniformity would, in turn, produce and maintain “enlightened citizenship.”

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. 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. 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.” Consequently, uniformity in education refers “only [to] an equal chance and not true equality.”

Subsequently, the Florida Supreme Court evaded defining uniformity, as it did in *St. Johns County*, in *Florida Department of Education v. Glasser*. In *Glasser*, the court rejected the school board’s imposition of additional taxes without legislative authorization. The school board argued that the taxes were acceptable in the wake of the court’s decision in *St. John’s County*. 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.’” 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.” Justice Kogan, in his concurring opinion, wrote that the current view of the uniformity clause was

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135 *Id.*
136 *Id.; see also Mills & McLendon, supra note 129, at 352.*
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.\textsuperscript{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.”\textsuperscript{147} According to Justice Kogan, there existed no disadvantage if one district offered “Latin or painting classes,” when another district could not afford it.\textsuperscript{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.\textsuperscript{149} The predecessor to the current clause of the Florida Constitution failed to define “adequate provision.”\textsuperscript{150} The Florida Supreme Court in \textit{Coalition for Adequacy and Fairness in School Funding, Inc. v. Chiles} distinguished “adequate” from “uniform.”\textsuperscript{151} The court agreed that “uniform” had an accepted definition: “this word means a lack of substantial variation.”\textsuperscript{152}

On the contrary, “adequate” lacked a definition as to what is adequate and what is inadequate.\textsuperscript{153} The court found that, despite the inclusion of the clause, the Legislature fell short of defining \textit{adequacy}, and the court was not in the position to impose its will on the Legislature.\textsuperscript{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.”\textsuperscript{155} This decision allowed for courts to hear future challenges to whether the adequacy threshold in public education has been met.\textsuperscript{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 \textit{that allows students to obtain a high quality education[.]}”\textsuperscript{157} The italicized portions of the clause represent the Legislature’s changes to the uniformity

\begin{enumerate}
\item \textit{Id.} at 950 (Kogan, J., concurring).
\item \textit{Id.}
\item \textit{Id.}
\item \textit{See FLA. CONST. art. IX, § 1.}
\item \textit{See DOUGLAS N. HARRIS, FUNDING FLORIDA’S SCHOOLS: ADEQUACY, COSTS, AND THE STATE CONSTITUTION 4.6 (2004), https://pdfs.semanticscholar.org/9a37/4e7b180bd6377152b431f80606be68e133.pdf?_ga=2.122270728.2011033830.1587165682-426256202.1587165682.}
\item \textit{See Coal. for Adequacy & Fairness in Sch. Funding, Inc. v. Chiles, 680 So. 2d 408 (Fla. 1996).}
\item \textit{Id.} at 408.
\item \textit{See id.}
\item \textit{See HARRIS, supra note 150, at 4.5.}
\item \textit{Mills & McLendon, supra note 129, at 357–58.}
\item \textit{See Perez, supra note 118 at 102.}
\item \textit{FLA. CONST. art. IX, § 1 (emphasis added).}
\end{enumerate}
clause. A noteworthy theme in the above-mentioned cases is that there is a “presumption favoring the Legislature’s actions.”

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.” 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”). The A-Plus Plan was multifaceted in that it assessed students in each school, then used the assessments to grade the school’s performance. Depending on the grade and how long the school maintained the unsatisfactory grade, a student may be eligible to change schools. 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.”

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

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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.
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).
166 See id.
Opportunity Scholarship Program, which provided state-funded vouchers to allow students to transfer from underperforming public schools to higher-performing public or private schools.

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. Under the Florida School Recognition Program, the Department of Education measures the performance of individual students and of the school. High performance for the student or the school results in an award.

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

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. Pursuant to House Bill 7029, “Florida’s public school students . . . will be able to attend any school in the state that has space available.” Now, under the leadership of Governor Ron DeSantis, whose gubernatorial win is accredited to “school choice moms,” the path for the education system is clear: more funding for school choice.

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168 See Rouse, Hannaway, Goldhaber & Figlio, supra note 167.
169 Neily, supra note 36, at 406.
171 Id.
172 Id.
174 Id.
A. Bush v. Holmes

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

The Florida Legislature enacted the OSP for students to enroll in public or private schools of their choice, irrespective of the students’ assigned schools.\(^\text{182}\) Under the OSP, students would be able to transfer from “failing public schools . . . into better-performing public schools or into private schools.”\(^\text{183}\) 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.\(^\text{184}\) 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.\(^\text{185}\) 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.”\(^\text{186}\) 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.”\(^\text{187}\)

\(^{179}\) 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).


\(^{184}\) 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. 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. Second, the state bears the obligation to provide education to all children within the state. Third, the “adequate provision” of education is through the means of a “uniform, efficient, safe, secure, and high quality system of free public schools.”

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. The OSP legislation omitted any reference to the state’s duty to provide a “system of free public schools.” In both the 1999 and 2002 legislation, the Legislature referred to the state’s constitutional obligation to provide students with “a high-quality education.” Notably absent from the OSP legislation is reference to the state’s duty to educate students through public schools. In noting this disparity, the court underlined that Article IX, section 1(a) simultaneously grants and limits the Legislature’s authority. By interpreting the constitutional provision as a whole, rather than as separate obligations, 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. The court further noted that any diversion of funds from the public school system, irrespective of amount, did not comply with Article IX.

Additionally, the OSP functioned in direct contravention to the uniformity requirement of Article IX. Specifically, the court found that the
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.” 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.” However, the court found that the OSP failed to ensure uniformity between private schools receiving OSP funds and its public school counterparts. Among its consideration, the court found differences between public schools and private schools receiving OSP funds. The differences included: private school teachers did not require the certification of their public school counterparts; private schools lacked the required public school curriculum; and the Legislature’s general lack of control over private school activities. Furthermore, “the Legislature expressly state[d] that it d[id] not intend ‘to regulate, control, approve, or accredit private educational institutions.’”

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.” Moreover, the court failed to address an actual injury caused by the OSP. 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. 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.

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200 Id. at 412.
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.* 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. 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.

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. 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. 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. 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.”

According to the plaintiffs, the Florida Constitution required the state to provide a “high quality” system that would result in “high quality education.” 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.” Because of this academic disparity, which is causally connected to the disparity in funding, the plaintiffs argued that they had a justiciable claim.

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212 See id.

213 See id. at 1173.


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.).

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. 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.” 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.”

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. The FES has the same objective as the OSP: providing low-income families with a pathway to enroll their children into private schools. Like its unconstitutional counterpart, the FES diverts “funds Florida taxpayers have already dedicated to education to provide school choice options.”

The FES legislation authorized 18,000 school vouchers for its debut school year, 2019–2020. Recently, Governor DeSantis approved House

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221 See id. at 1166.
222 See id.
226 FLA. STAT. § 1002.394(11)(a).
Bill 7067 to extend the reach of the FES. Effective July 1, 2020, there will be an additional 29,000 FES vouchers available for students. The FES vouchers will increase annually in proportion to the enrollment in public schools.

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. 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.

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. In doing so, Governor DeSantis ensured to silence any opposition to his objective of advancing his school choice agenda in the state.

Since FES’s enactment, it has been projected that Florida will face a lawsuit over the voucher program. 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, the decision remains an important precedent for

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228 See 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.


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.

future litigation on school choice. The Florida Supreme Court, with its conservative-leaning majority and recent reversal of its own decisions,\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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.\textsuperscript{241} The United Teachers of Dade argue that “overfunding of

\begin{footnotesize}
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\item 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 \textit{Daubert} expert testimony standard. The decision overturned the court’s 2018 decision that held that the \textit{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, \textit{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/.
\item Clark, \textit{supra} note 175.
\item The Palm Beach Post Editorial Bd., \textit{supra} note 232.
\item FLA. CONST. art. IX, § 1.
\item Id.
\end{itemize}
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charter schools” and public-school alternatives remove needed funds from public schools. 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.

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242 Id.
243 FLA. CONST. art. IX, § 1.