

# FINANCING SCHOOL CHOICE: HOW PROGRAM DESIGN IMPACTS ISSUES REGARDING LEGALITY AND EQUITY

*By James V. Shuls\**

*Since the first modern school choice laws were passed in the early 1990s, access to educational options has grown tremendously. Today, more than 6,900 charter schools exist in the 44 states and the District of Columbia which have charter school laws. These schools enroll more than 3.1 million children. During the same time period, prevalence of private school choice programs has grown dramatically with nearly 50 different programs in existence. Many have sought to examine the impacts of school choice programs on students. Indeed, there is a vigorous debate in the literature on this matter. This paper explores this issue from a different angle—school finance. The design of school choice programs, specifically how they are funded, has important implications for the legality of a program and with issues related to equity. These matters are incredibly important as states continually grapple with questions related to adequacy and equity in school finance. As school choice programs continue to expand, they offer an opportunity not just to expand educational options, as proponents suggest, but to improve how we fund education for all students. This paper explores the issues related to school finance and school choice litigation, then offers a school choice model that might be used to increase equity in finance and in educational options.*

## I. INTRODUCTION

Currently, school funding and school choice are two of the main discussions regarding equity in the education policy arena. For decades, state funding formulas have been challenged in the courts as plaintiffs claimed they were providing an inherently inequitable amount of funding for low-income communities. In many such cases plaintiffs prevailed, leading to the creation of funding formulas which attempt to minimize the impact of local property wealth. The goal is to ensure that every student regardless of their zip code has

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the opportunity to receive a high-quality education. Nevertheless, some disparities persist between property rich and poor school districts.

In more recent times, since the 1990s, school choice has increasingly been looked upon as another way to achieve the goal of educational equity. Rather than ensuring each school district has similar levels of funding, school choice attempts to equalize educational opportunities between advantaged and disadvantaged students. Through the creation of charter schools, magnet schools, and various private school choice programs, school choice advocates have sought to provide students, especially those in disadvantaged communities, with more educational options. However, these programs have typically been created to offer cost-savings to states or local school districts.

Creating these programs to save money helps buy political support, but it also explicitly creates inequitable funding. Charter schools, for example, often do not receive funding for capital expenses or debt servicing. This results in charter schools typically receiving significantly less money than their counterparts in the surrounding public school districts. Vouchers and other private school choice programs typically provide scholarships that are worth a fraction of the amount spent at traditional public schools. In other words, school choice programs, while seeking to increase equity of opportunity, have often been created explicitly to be inequitable in funding.

In this paper, I examine the relationship between finance and school choice. The purpose is two-fold. First, I will examine how the design of school choice programs may have important legal implications. Second, I will explain how states might create school choice programs that eventually help improve equity for all students, even those that remain in traditional public schools.

To understand these issues, I first explain some of the related literature regarding school finance and school choice litigation. Next, I discuss important issues related to adequacy and equity. Then I will explore the research on school choice programs. Finally, I propose a method by which school choice programs might serve both aims of equity related to finance and opportunity.

## II. SCHOOL FINANCE LITIGATION

In 1954, *Brown v. the Board of Education* marked the end of the doctrine of *separate, but equal*, or at least, the beginning of the end.<sup>1</sup> The injurious doctrine was continually assailed throughout the civil rights movement of the 1950s, 60s, and 70s by the Civil Rights Act of 1964 and was effectively eradicated through numerous court cases. As part of this movement, some sought intervention by the federal courts in school finance issues. Many of the early arguments were built upon the principle of fiscal neutrality.<sup>2</sup> The

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1. See *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954) (establishing separate public schools for black and white students was unconstitutional).

2. See John E. Coons, William H. Clune III & Stephen D. Sugarman, *Educational Opportunity: A Workable Constitutional Test for State Financial Structures*, 57 CALIF. L. REV.

principle is summarized in *Van Dusartz v. Hatfield* in which the justice wrote, "Plainly put, the rule is that the level of spending for a child's education may not be a function of wealth other than the wealth of the state as a whole."<sup>3</sup> In other words, local property wealth should not dictate the level of funding for a child's education.

In the past, schools were almost exclusively funded through local sources. In 1920, more than 80 percent of all education funding came from the local level.<sup>4</sup> When states began supporting public education, some awarded flat grants.<sup>5</sup> These grants were the same dollar amount for each district. Over time, states began to award money based on the number of students. Yet, they often did not fully account for the different levels of financial support among school districts. Challenges to these systems along the lines of fiscal neutrality initially were successful in two district courts<sup>6</sup> and in the California Supreme Court's ruling in *Serrano v. Priest*.<sup>7</sup> This success, however, was short lived following the U.S. Supreme Court's ruling in *San Antonio Independent School District v. Rodriguez*.<sup>8</sup> In a 5-4 decision, the Court ruled that education was not covered as a fundamental interest under the United States Constitution and that the plaintiffs were not considered a suspect class. As Koski and Hahnel note, "[t]hrough the Court left open the door to a federal constitutional claim against a state policy that deprived children of some basic floor of educational opportunity, *Rodriguez* effectively shut the door on federal school finance litigation under the U.S. Constitution to date."<sup>9</sup>

With the door shut at the federal level, school finance cases shifted to the states. School finance scholars typically separate school finance cases into three distinct phases.<sup>10</sup> The first wave consisted of those early cases at the

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305 (1969) (suggesting funding systems should not reward school districts based on how much the district can raise locally).

3. *Van Dusartz v. Hatfield*, 334 F. Supp. 870, 872 (D. Minn. 1971).

4. Matthew Springer et al., *History and Scholarship Regarding U.S. Education Finance and Policy*, in HANDBOOK OF RESEARCH IN EDUCATION FINANCE AND POLICY 3, 6 (Helen F. Ladd & Edward B. Fisk eds., 2nd ed. 2008).

5. *Id.* at 8.

6. See *Rodriguez v. San Antonio Indep. Sch. Dist.*, 337 F. Supp. 280 (W.D. Tex. 1971) (challenging the constitutionality of funding on the grounds of equal protection under the 14<sup>th</sup> amendment) (*rev'd*, *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973)); *Hatfield*, 334 F. Supp. at 870 (challenging the constitutionality of funding on equal protection grounds; plaintiffs dropped their complaint after the state made significant changes to the funding system).

7. See *Serrano v. Priest*, 487 P.2d 1241 (Cal. 1971) (holding the State's public school financing system violated the California Constitution's equal protection provision).

8. See *San Antonio*, 411 U.S. at 1 (holding school funding systems were not subject to strict scrutiny because education was not a fundamental right found in the U.S. Constitution).

9. William S. Koski & Jesse Hahnel, *The Past, Present, and Possible Futures of Educational Finance Reform Litigation*, in HANDBOOK OF RESEARCH IN EDUCATION FINANCE AND POLICY 41, 46 (HELEN F. LADD & EDWARD B. FISK EDS., 2ND ED. 2008).

10. See William E. Thro, *The Third Wave: The Impact of the Montana, Kentucky, and Texas Decisions on the Future of Public School Finance Reform Litigation*, 19 J. L. & LEGAL EDUC. 219 (1990) (Thro was the first to label the rounds of school finance reform in waves. He identified the first wave of federal cases from 1971 to 1973. The second wave spanned from 1973

federal level, the second wave of cases which challenged funding systems on the basis of equity, and the third wave shifted to adequacy. Augenblick, Myers, and Berk Anderson state, “[d]uring the 12 years between 1971 and 1983, some 17 state high courts ruled on the constitutionality of their state school finance systems.”<sup>11</sup> These lawsuits are known as the second phase of school finance litigation, the equity phase. The arguments in these cases typically revolved around disparities among school districts. As noted, these disparities often arose from state finance systems relying on local property taxes to fund public schools.<sup>12</sup>

The third wave of school finance litigation began in 1989, when the Kentucky Supreme Court ruled the state’s funding system unconstitutional on the grounds of adequacy in *Rose v. Council for Better Education*.<sup>13</sup> This new round of litigation shifted the argument from that of equal resources for school districts, to that of ample resources for each school. Despite the noticeable shift in legal challenges, issues of educational equity remain as pertinent today as they were in 1971. Indeed, many cases contain both adequacy and equity components. Most recently, Kansas school funding system has been found unconstitutional by the state’s Supreme Court on equity and adequacy grounds.<sup>14</sup>

### III. SCHOOL CHOICE

#### A. Types of Programs

In school finance, litigation has been sought as a means to prompting state legislatures to create more equitable finance systems or to increase overall education spending. When it comes to school choice, litigation has primarily focused on stopping choice programs. It is important here to recognize there are numerous types of school choice programs. There are public school choice programs, such as intra- and inter-district choice, magnet schools, and charter schools. Intra- and Inter-district choice programs let students choose among existing public schools. Magnet schools, on the other hand, are often newly created schools within a district that have a specific mission. The goal was to use these high performing, niche schools to attract more affluent, white families to urban school districts. Since that time, magnet schools have been created to offer more options to students in a district.

Charter schools are distinct from the aforementioned public school choice programs. Unlike the other programs, which are typically governed by the

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to 1989.)

11. John G. Augenblick, John L. Myers & Amy Berk Anderson, *Equity and Adequacy in School Funding*, 7 THE FUTURE OF CHILDREN 63, 67 (1997).

12. See Koski & Hahnell, *supra* note 9, at 41.

13. See *id.* at 47; Thro, *supra* note 10, at 220.

14. See *Gannon v. State*, 402 P.3d 513 (Kan. 2017) (holding the state failed to meet the constitution’s requirements to adequately fund education and that it must distribute funding more equitably).

local school board, charter schools are most often run by a self-appointing board. Depending on state law, the charter may be authorized by the local school district or another agency. Local school boards have no oversight role of charter schools, except in the cases where they are the charter's sponsor. Thus, charter schools are publicly financed, but privately-run schools. As such, they are not allowed to provide religious instruction to students. The first charter law was passed in 1991 in Minnesota.<sup>15</sup>

Just as there are different public school choice options, there are also numerous different private school choice programs. These programs can be differentiated along two dimensions: the funding stream and the number of uses of the educational dollars. States may choose to provide direct aid to individuals choosing to send their children to private schools in the form of a voucher. In a voucher system, the dollars flow from the taxpayer, to the state, and then are distributed for educational use. The individual chooses at which private school they will use their voucher, not the government. Other programs are funded indirectly, by tax credits. In these programs, the funding does not flow into the state treasury. Rather, it flows from the individual to a scholarship organization. The scholarship organization then distributes the funds to individuals. The donor, either an individual or a business, receives a credit towards their taxes. If the credit amount is 100 percent, then a \$1,000 donation to the scholarship fund would be the equivalent of paying \$1,000 towards your tax liability. In most cases, individual and total credits are capped at a specific amount.

The second dimension which distinguishes private school choice programs is the number of uses for the educational funds; some private school choice programs have one use, while others have multiple uses. In a voucher, for instance, the state provides a one-use voucher to for the purposes of paying private school tuition. If the tuition at a school is less than the voucher amount, the individual does not retain any of the funds. Education savings accounts, on the other hand, have multiple uses. The funds in an Education Savings Account are deposited into a bank account. The individual can then use that account to purchase private school tuition or a host of other education related services and goods, such as tutoring services. When the funds flow indirectly through a tax credit program, there are tax credit scholarship programs (single use) and tax credit education savings account programs (multiple use). Table 1 below displays these differences.

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15. JOE NATHAN, CHARTER SCHOOLS: CREATING HOPE AND OPPORTUNITY FOR AMERICAN EDUCATION. THE JOSSEY-BASS EDUCATION SERIES XXVII (1997).

Table 1: Private School Choice Program Types

	One Use	Multiple Uses
Direct Government Funding	Voucher	Education Savings Accounts
Indirect Funding	Tax Credit Scholarship	Tax Credit Education Savings Accounts

In Arizona, the first state to enact Education Savings Accounts in 2011, roughly 65 percent of the recipients used some of their funds for private school tuition.<sup>16</sup> Forty-one percent used their funds on education therapy.<sup>17</sup> Other popular uses were tutoring, homeschool curriculum, textbooks, and online classes.<sup>18</sup> An important feature of the education savings account is the ability to save funds for later use. If the recipient does not use all of the funds, they remain in the account for future use. The individual can then use them in subsequent years for education related expenses. If funds remain in the account when the student graduates high school, they may be used for college expenses.

**B. Public School Choice Litigation**

When it comes to school choice litigation, magnet schools are different than the other programs. They were, in many cases, the result of litigation.<sup>19</sup> Through the 1970s, many urban school districts were sued because they were allegedly maintaining a segregated system of schools.<sup>20</sup> In some cases, this was because of school districts deliberately drawing school boundaries to segregate students. In others, however, a major part of the problem was that white families and black families did not live in close proximity to one another. As such, schools were heavily segregated. When St. Louis Public Schools were challenged on this ground, the courts cautioned that a regional solution might be required.<sup>21</sup> Rather than face potential school district consolidation, this resulted in area school districts agreeing to a settlement

16. JONATHAN BUTCHER & JASON BEDRICK, SCHOOLING SATISFACTION: ARIZONA PARENTS’ OPINIONS ON USING EDUCATION SAVINGS ACCOUNTS 2 (2013), *available at* <https://www.edchoice.org/wp-content/uploads/2013/10/SCHOOLING-SATISFACTION-Arizona-Parents-Opinions-on-Using-Education-Savings-Accounts-NEW.pdf> [<https://perma.cc/2296-XAGL>].

17. *Id.* at 10. The percentages here do not add up to 100 because individuals can use their accounts for multiple uses.

18. *Id.*

19. *Jenkins v. Missouri*, 807 F.2d 657, 712 (8th Cir. 1986) (A voluntary inter-district transfer program was created as a remedy to segregation. The court suggested a magnet school component is needed to help integrate the urban St. Louis School District.)

20. See Janet R. Price & Jane R. Stern, *Magnet Schools as a Strategy for Integration and School Reform*, 5 YALE L. & POL’Y REV. 291 (1986) (noting that magnet schools were part of court-ordered desegregation plans in Charlotte, Boston, St. Louis, Buffalo, among other cities).

21. *Liddell v. Missouri*, 731 F.2d 1294, 1300 (8th Cir. 1984).

agreement.<sup>22</sup> The agreement involved allowing black city students to attend school in predominantly white suburban districts. It also involved the creation of magnet schools to draw in white students from the suburbs.

Public school choice programs, such as inter- and intra-district choice, are relatively less controversial than other forms of choice. As such, they tend to not be challenged as frequently as other programs, especially private school choice programs. One exception is in the case of inter-district choice that is triggered when a school district is failing. In Missouri, legislators passed a law in 1993 that would allow student to leave their school district and attend school in a nearby district if their home school district became unaccredited.<sup>23</sup> The law did not give any provision for the receiving school districts to determine how many students they would be willing to accept. Nor did it dictate a consistent level of tuition among school districts. For many years, the law sat untested because there were not unaccredited schools.<sup>24</sup>

When the St. Louis School District became unaccredited in 2007, a parent attempted to enroll in a nearby accredited district. The district challenged the state law, claiming an impossibility defense. They argued that it would be impossible for the school district to accommodate all the students in the St. Louis public school district. That Missouri Supreme Court upheld the law, stating that the district could only claim the impossibility defense if they first attempted to accommodate the students and could take no more.<sup>25</sup> Through numerous challenges, the court consistently upheld the law.<sup>26</sup>

### ***C. Private School Choice Litigation***

Private school choice programs have faced the most strenuous legal challenge. The first modern voucher program was created in 1990 in Milwaukee, although programs have existed in Vermont and Maine since 1869 and 1873, respectively.<sup>27</sup> There are three points on which these programs have been typically challenged, through the establishment clause of the first amendment, through Blaine amendments in state constitutions, or via specific education provisions in state constitutions.<sup>28</sup> Similar to the course of school

22. See BRUCE D. LA PIERRE, *Voluntary Interdistrict School Desegregation in St. Louis: The Special Master's Tale*, 1987 WIS. L. REV. 971 (1987).

23. JAMES V. SHULS, *Interdistrict Choice for Students in Failing Schools: Burden or Boon?*, SHOW-ME INSTITUTE 2 (April 29, 2015), [https://showmeinstitute.org/sites/default/files/Interdistrict%20Choice%20-%20Shuls\\_0.pdf](https://showmeinstitute.org/sites/default/files/Interdistrict%20Choice%20-%20Shuls_0.pdf) [<https://perma.cc/S488-75UR>].

24. *Id.* at 2.

25. *Breitenfeld v. Sch. Dist. of Clayton*, 399 S.W.3d 816, 836 (Mo. 2013).

26. See *Blue Springs R-IV Sch. Dist. v. Sch. Dist. of Kan. City*, 415 S.W.3d 110 (Mo. 2013) (holding the law did not create an unfunded mandate in violation of the Hancock Amendment of the state's constitution).

27. Ellen M. Halstead, *After Zelman v. Simmons-Harris, School Voucher Programs Can Exclude Religious Schools*, 54 SYRACUSE L. REV. 147, 150 (2004).

28. Congressman James G. Blaine introduced an amendment to the U.S. constitution which would prohibit public dollars going to religious institutions. The amendment failed at the federal level, however, many states imbedded similar amendments in state constitutions. See Mark Edward DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope,*

finance litigation, plaintiffs challenged the programs at the federal level until the door was effectively shut.

In *Zelman v. Simmons-Harris* the U.S. Supreme Court ruled that Ohio's voucher program, which could be used at religious schools, did not violate the establishment clause of the first amendment.<sup>29</sup> The program had a valid secular purpose, a broad class of beneficiaries, and was neutral with respect to religion because individuals made the decision about where their child would attend school.

Tax credit scholarships were first passed in Arizona in 1997.<sup>30</sup> They too were challenged in the federal court system. In *Arizona Christian School Tuition Organization v. Winn*, the U.S. Supreme Court determined the plaintiffs in the case did not have standing to bring the suit because the money in a tax credit scholarship never enters the public treasury.<sup>31</sup> Therefore, the dollars could not be considered public dollars. Here we see an important distinction emerge between direct and indirect subsidies for private school choice programs; when states directly fund programs, taxpayers may have standing to challenge the program. When the program is funded through a tax credit program, however, courts in New Hampshire, Georgia and Florida have ruled the plaintiffs do not have standing.<sup>32</sup>

Education Savings Accounts are relatively new compared to vouchers and tax credit scholarships. The first ESA program was established in Arizona in 2011.<sup>33</sup> To date, there has not been a significant federal challenge to ESA programs. Given the Supreme Court's decision in *Zelman* regarding voucher programs, it seems unlikely that ESAs would be overturned by the court.

In state courts, private school choice programs often face a more difficult hurdle. The challenges usually come along two lines. Some states have clauses in their constitution known as Blaine amendments. A total of 37 states have Blaine amendments.<sup>34</sup> The language of these amendments varies, but

and First Amendment Concerns, 573 HARV. J. L. & PUB. POL'Y. (2003).

29. See *Zelman v. Simmons-Harris*, 533 U.S. 639 (2002) (holding the program does not offend the establishment clause).

30. Carrie Lips & Jennifer Jacoby, *The Arizona Scholarship Tax Credit: Giving Parents Choices, Saving Taxpayers Money*, CATO INST., (2001), <https://object.cato.org/pubs/pas/pa414.pdf>.

31. See *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125 (2011) (holding Arizona taxpayers lacked standing because they were challenging a tax credit instead of a governmental expenditure).

32. See *Duncan v. New Hampshire* 102 A.3d 913 (N.H. 2014) (holding taxpayers lacked standing to challenge the state's Education Tax Credit Program because they could not demonstrate impairment or prejudice); *Gaddy v. Georgia Dep't of Revenue*, 802 S.E.2d 225, 230 (Ga. 2017); *Faasse v. Scott*, No. 2014-CA-001859, 2014 WL 6634183 (Fla. Cir. Ct. Oct. 7, 2014) (granting the state's motion to dismiss for plaintiff's lack of standing because plaintiff failed to show a special injury).

33. Lindsey M. Burke & Rachel Sheffield, *School Choice in America 2011: Educational Opportunity Reaches New Heights*, HERITAGE FOUND. (2011), <https://files.eric.ed.gov/fulltext/ED523233.pdf>.

34. See Blaine Amendments, INSTITUTE FOR JUSTICE, <http://ij.org/issues/school->



they essentially bar state dollars from being used at religious institutions. Blaine amendments do not make it impossible for a private school choice program to pass constitutional muster; indeed, numerous states with private school choice programs have voucher programs. Some states, however, have found private school choice programs in violation of the Blaine amendment.<sup>35</sup>

There is some question as to whether or not Blaine amendments will continue to be a significant barrier to school choice programs in the future. In *Trinity Lutheran v. Comer*, the United States Supreme Court ruled that Missouri's application of the Blaine amendment violated the free exercise clause of the first amendment.<sup>36</sup> Trinity Lutheran had applied to a state program that uses scrap tires to resurface playground areas. Although Trinity Lutheran's application was rated higher than other applicants, the school was denied the grant because they were religiously affiliated. They were denied access to scrap tires on the basis of religion.

In addition to Blaine amendments, states also have specific language in their constitutions regarding the provision of education. For example, some states have "uniform" clauses in their constitutions. In Washington, for instance, the state's constitution says, "The legislature shall provide for a general and uniform system of public schools."<sup>37</sup> This type of language has formed the basis for several legal challenges to school choice programs.

In the case of vouchers, the record is somewhat mixed with both plaintiffs and states winning cases. In Florida, for instance, the state's supreme court struck down a voucher program in 2006 for being in violation of the state's uniformity clause.<sup>38</sup> The court, however, failed to address whether the program violated the state's Blaine amendment. Later, the legislature established a tax credit program which was also challenged in the courts. Similar to the U.S. Supreme Court's ruling, Florida's First District Court of Appeals dismissed the case because the plaintiffs lacked standing. The Florida Supreme Court has taken up the case.<sup>39</sup>

The general consensus is that tax credit programs and education savings accounts tend to have more success in legal challenges as compared to vouchers.<sup>40</sup> Arizona offers an interesting illustration of this. In 2009, the Arizona Supreme Court ruled that the state's voucher program violated the Aid

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choice/blaine-amendments/ [https://perma.cc/9BUT-CZ8K].

35. See Erica Smith, *Blaine Amendments and the Unconstitutionality of Excluding Religious Options From School Choice Programs*, 18 FED. SOC'Y REV. 48 (2017).

36. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 2 (2017).

37. WASH. CONST. art. IX, § 2.

38. *Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006) 405 (holding the program violated the "no aid" provision of the Florida Constitution).

39. *Citizens for Strong Sch., Inc. v. Fla. State Bd. of Educ.*, 42 Fla. L. Weekly 2640 (Dist. Ct. App. 2017).

40. See Jason Bedrick, *Docket Watch: The Constitutionality of School Choice Tax Credits* (Gaddy v. Georgia Department of Revenue), FEDERALIST SOC'Y, <https://fedsoc.org/commentary/blog-posts/docket-watch-the-constitutionality-of-school-choice-tax-credits-gaddy-v-georgia-department-of-revenue>.

clause of the state's constitution.<sup>41</sup> The legislature responded by creating the nation's first education savings account program. The courts subsequently upheld the ESA program.<sup>42</sup> Arizona's courts have also upheld the state's tax credit scholarship program.<sup>43</sup> The argument in favor of ESAs is that they have multiple uses and the parents direct the spending. To date, no state has created a tax credit education savings account, although they have been proposed in Missouri.

#### ***D. Summary***

Lawmakers who create school choice programs should probably expect those programs to be challenged in the courts. The type of challenge will depend on the type of program. Thus far, it seems that public school programs fair better than private school programs, indirect spending fairs better than direct spending, and multiple use programs fair better than single use programs. Therefore, programs that build on these elements may be the most likely to withstand constitutional challenges.

### **IV. INEQUITABLE FUNDING OF SCHOOL CHOICE**

The argument in favor of school choice is often made on the grounds of equity. There are often tremendous disparities in terms of educational achievement between school districts that serve low-income students and those that serve more affluent students. School choice proponents argue that a student should not be forced to attend a failing school, simply because of where they live. Rather, students should be free to choose the school that will best meet their needs. Wealthy parents, they argue, already have educational options. They can choose to send their children to private schools or they can afford to move to wealthier communities with strong schools. Low-income families, without school choice programs, however, have little to no educational options. As a result, it is argued that school choice is an equity issue; it is about providing opportunity to low-income families who do not have opportunities.

Yet, when it comes to financing school choice programs the level of funding for these programs is often part of the negotiations. To sell these programs to some fiscal conservatives who might oppose increasing education spending and to union liberals who might oppose money leaving the traditional district, lawmakers often propose choice programs that will result in a cost-savings. In Arizona, for example students who leave public schools and use an Education Savings Account receive 90 percent of what the public schools would have received for that student.<sup>44</sup> This does not include the amount spent

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41. *Cain v. Horne*, 202 P.3d 1178 (Ariz. 2009)

42. *Niehaus v. Huppenthal*, 310 P.3d 983 (Ariz. App. 2013)

43. *Kotterman v. Killian*, 972 P.2d 606, 620, ¶ 46 (Ariz. 1999)

44. Kevin Mahnken, *Arizona Lawmakers Implement Nation's First Universal Education Savings Account Program*, THE 74 (2017), <https://www.the74million.org/article/school-choice->

on school facilities, making the difference in funding even greater. This is generous compared to other private school choice programs.

Scholarships provided by vouchers or tax credits can be a fraction of the amount spent at the public school district. In Alabama, the average scholarship amount for the state's tax credit program is \$3,550, roughly 40 percent of the amount spent on public school students.<sup>45</sup> Kansas' tax credit for low income student's scholarship program provides an average scholarship of \$1,344, just 15% of what the state and local community spend on public school students.<sup>46</sup> Nationwide, there are 50 private school choice programs in 26 states.<sup>47</sup> The average scholarship amount for all programs is \$4,406.<sup>48</sup>

It could be argued that subsidizing private school choice is not the same purpose as funding equitable public schools. Therefore, it is acceptable to spend less per-student in private school choice programs. Yet, many public school choice programs also provide less funding for choice schools. This is especially true of charter schools. On average, public charter schools receive \$5,721 less per-pupil than their district counterparts.<sup>49</sup> This is nearly a 30 percent difference in total spending. This typically results from charter schools being denied facilities and debt servicing funding.

In the foreseeable future, it is very likely that we will see choice schools begin to challenge funding systems that provide them with significantly less funding than their traditional public school counterparts. This is especially true in the charter sector. If the schools are public schools, considered essentially equal with the traditional public schools, it stands to reason that they should be entitled to a commensurate level of funding. We have already begun to see the initial wave of this litigation in places like Washington D.C. and in Oklahoma.<sup>50</sup>

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*leaps-forward-in-arizona-where-lawmakers-vote-to-expand-esas/*.

45. See AM. FED'N FOR CHILDREN, REPORT CARD: 2016/17 PRIVATE SCHOOL CHOICE RANKING 15 (2017), [https://www.federationforchildren.org/wp-content/uploads/2016/09/AFC\\_2016\\_reportcard2.1\\_hires.pdf](https://www.federationforchildren.org/wp-content/uploads/2016/09/AFC_2016_reportcard2.1_hires.pdf).

46. *Id.* at 24.

47. *Id.* at 3.

48. See *School Choice in America*, AM. FED'N FOR CHILDREN, <https://www.federationforchildren.org/school-choice-america/> [<https://perma.cc/9BEG-22X8>].

49. PATRICK J. WOLF, ET AL., CHARTER SCHOOL FUNDING: INEQUITY IN THE CITY 5 (2017), <http://www.uaedreform.org/downloads/2017/05/inequity-in-the-city.pdf> [<https://perma.cc/RW45-V54V>].

50. See generally Emma Brown, *D.C. Charter Schools Sue City, Alleging Unequal Funding*, WASH. POST (July 30, 2014), [https://www.washingtonpost.com/local/education/dc-charter-schools-sue-city-alleging-unequal-funding/2014/07/30/b19f88ca-1759-11e4-9e3b-7f2f110c6265\\_story.html?utm\\_term=.8b3e68105c59](https://www.washingtonpost.com/local/education/dc-charter-schools-sue-city-alleging-unequal-funding/2014/07/30/b19f88ca-1759-11e4-9e3b-7f2f110c6265_story.html?utm_term=.8b3e68105c59) [<https://perma.cc/34PD-2VCL>]; *Oklahoma Charter Schools Sue Over State Funding Inequities*, U.S. NEWS & WORLD REPORT (July 27, 2017), <https://www.usnews.com/news/best-states/oklahoma/articles/2017-07-27/oklahoma-charter-schools-sue-over-state-funding-inequities> (plaintiffs claim the funding formula provides inequitable funding for charter schools).

## V. HOW SCHOOL CHOICE CAN IMPROVE FUNDING EQUITY

The potential for future litigation surrounding the unequal funding of school choice should give us some pause about pushing school choice as a cost-savings mechanism. Rather, we should begin to think of school choice as a means to reform school funding in general. To date, school choice programs have helped to make modest impacts on the quality of other public schools.<sup>51</sup> They have failed, however, to impact the fundamental structure of public school financing. It seems no one has given this much thought or if they have, they have not enacted such policies. In most cases, charter school funding is simply lumped into the same funding system for traditional public schools. Meanwhile, funding for private school programs has come in myriad ways. Some states direct a portion of state funds into vouchers or ESAS, other locations have created a separate voucher fund, still others have raised funds through tax credits. Nevertheless, it is possible for school choice programs to be designed in a way that will help promote funding equity for all public schools.

First, we must understand the underlying problem with most state funding formulas. In most cases, variation in per-pupil spending exists because states rely partially on local effort; often derived from local property taxes. The problem here is not the property tax itself, it is the *local*. That is, school district boundaries create a system in which local effort may vary between communities. If you replaced the property tax with a local sales tax or income tax, the effects would be almost identical. To increase equity, therefore, states have only three options. They can increase state effort in low-wealth school districts, limit the amount of local effort collected in high-wealth school districts, or reduce the impact of school district boundaries.

The first two options have been tried in various instances and have had some success. States have increased state support from less than 20 percent in 1920 to roughly 45 percent today.<sup>52</sup> Despite efforts to bring more equity to spending among districts, differences persist between high and low spending districts in every state. The question is whether it is wise to continually bring the low-spending districts up to the spending levels of the very top districts. It is not only a question of whether it is feasible, it is also a question of responsibility. Do states have a responsibility, assuming they are meeting state definitions of adequacy, to keep spending levels in all districts on par with wealthier districts? If a wealthy district continually chooses to increase their local taxes, does the state have an obligation to increase funding everywhere else? This must naturally reach its limits at some point.

Some states have sought to reduce disparities by placing a cap on how much a wealthy school district can raise or by recapturing some of their

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51. See generally Dennis Epple et al., *Charter Schools: A survey of Research on Their Characteristics and Effectiveness* (Nat'l Bureau of Econ. Research, Working Paper No. 21246, 2015) (measuring by by standardized test scores).

52. See Springer et al., *supra* note 4, at 6.

spending.<sup>53</sup> Texas passed a “Robin Hood” style recapture plan in which property taxes from wealthy school districts were redistributed to poorer school districts.<sup>54</sup> Just as there are limitations to continually bringing low-spending districts up, proposals that hold the top down also have some problems. We want people to want to spend on education. We want people to invest in education. These caps stymie these efforts. They make it costly to invest and may reduce a community’s desire to invest in their schools. In fact, these type of policies lead to negative capitalization in property wealth.<sup>55</sup> Normally, the value of a high-quality school is capitalized in property value. When local funds are taken out of the community, however, the value of the property goes down. This reduces the amount of funds available for recapture.

In other words, achieving equality in spending, let alone equity, is extremely difficult when states maintain local school districts that rely in part on local taxes. A potential solution to this is to consolidate school districts. School consolidation was rampant through much of the 20<sup>th</sup> century, as small school districts joined together to benefit from economies of scale. What we are talking about here, however, is very different. It is the idea that wealthy school districts should consolidate with neighboring poor school districts. This arrangement is not seen as mutually beneficial to the wealthy school parents as the prior school consolidations may have been to parents in small districts. Indeed, many parents fight quite vociferously against school district consolidation today. Moreover, this type of school district consolidation may not actually address the issue of equitable spending at the school level. In many cases, school districts have high levels of inequitable spending among schools within a district.<sup>56</sup>

This is where school choice programs may be able to bridge the divide. School choice programs, if designed in a specific way, could address issues of equity without causing the problems associated with either of the other two proposals. The ideas presented here would not require the state to continually escalate funding, nor would it stymie wealthy communities from investing in their schools. It would require a universal system of school choice and this would necessarily entail a loss of some level of local control. It would also require us to begin thinking of public education in terms of access to educational options at public expense, rather than as the current system of

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53. See generally BRUCE D. BAKER & SEAN P. CORCORAN, CTR. FOR AM. PROGRESS, THE STEALTH INEQUITIES OF SCHOOL FUNDING: HOW STATE AND LOCAL SCHOOL FINANCE SYSTEMS PERPETUATE INEQUITABLE STUDENT SPENDING (2012), <https://www.americanprogress.org/issues/education-k-12/reports/2012/09/19/38189/the-stealth-inequities-of-school-funding/> [https://perma.cc/B9FE-988D].

54. Maurice Dyson, *The Death of Robin Hood? Proposals for Overhauling Public School Finance* 11 GEO. J. ON POVERTY L. & POL'Y 1, 1 (2004).

55. See generally Caroline Hoxby & Ilyana Kuziemko, *Robin Hood and His Not-So-Merry Plan: Capitalization and the Self-Destruction of Texas’ School Finance Equalization Plan* (Nat’l Bureau of Econ. Research, Working Paper No. 10722, 2004).

56. Marguerite Roza & Paul T. Hill, *How Within-District Spending Inequities Help Some Schools to Fail* 7 Brookings Papers on Educ. Pol’y 201, 209 (2004).

public schools.<sup>57</sup>

### ***A. Determine the Number of Available Seats***

The first step in using school choice to bring fiscal equity across district boundaries is to determine the number of available seats in each school. Unless a school is growing, it typically can accommodate a few more students. For a universal school choice system to work, participating schools must be required to determine the maximum number of students they can accommodate. For public schools, this may need to be developed as a standard state practice. Once the number of available seats is determined, the public school would be required to admit out of district students to the school. If more students apply than available seats, those seats could be awarded upon a weighted lottery in which students from the most disadvantaged communities have a greater weight in the lottery. Schools would not be required to admit more students than was determined as the school's maximum.

### ***B. Create New Choice Funding Model Based on Local Wealth***

Inter-district choice in and of itself would not begin to fix funding issues. To do this, the funding formula would need to accommodate different types of school switching. The state would also need to set a state minimum adequacy dollar amount. When a student leaves a high spending school, to attend a lower spending school they would take all of the funding with them to their lower spending school, including the facilities funding. When a student transfers to a higher spending school, they would take only a portion of the funds with them. In both cases, this would work to level the spending between high and low spending school districts. When a student with a large per pupil expenditure (PPE) transfers to a lower spending school, they raise their new school's PPE. When a student from a low PPE school transfers to a high spending school, they increase the PPE at their old school because they leave some money behind. They also lower the PPE at their receiving school because it would add an additional student, but not at the same level of funding.

### ***C. Include Private and Charter Schools in Choice Plan***

This system is far from perfect. In fact, it would not even work unless students actually switched school districts. That is why the determination of available seats is a must. If affluent schools are able to keep lower class sizes than their peers and can arbitrarily set their maximum load lower, then they can stymie student attempts to transfer to their schools. It is also imperative to include private and charter schools in choice funding formula. This has three effects. First, it increases the number of available options for all families. Second, it increases support for local property taxes. In many urban

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57. See generally James Shuls, *Redefining Public Education*, SHOW-ME INSTITUTE (July 26, 2013) <https://showmeinstitute.org/publication/school-choice/redefining-public-education>.

communities, wealthy families send their children to private schools. Many of these parents then vote against raising local taxes for their schools because they will not benefit. Including private schools in the plan thus broadens the base of beneficiaries from increasing taxes. Third, it increases the likelihood of mobility across traditional district lines.

#### ***D. Summary***

What I have presented here is a mechanism to increase equitable spending among wealthy and poor school districts by enabling students to take their educational dollars to public, public charter, and private schools outside of their school district boundaries. When this occurs with a funding system that is differential based upon where the student is transferring from and where they are transferring to, choice will facilitate spending equalization through voluntary choice. This system is not without its drawbacks, but it avoids the difficulty inherent in continually increasing spending in poor districts or in capping spending in wealthy school districts. In this system, if a wealthy school district continually chooses to raise their PPE they will be benefiting their entire region because every time a student chooses to leave their district, they will take a higher PPE with them.

### **VI. CONCLUSIONS**

Educational equity has been and will continue to be a major factor in education policy decision making. Over the past few decades, it has been a fundamental driver of remaking of state funding formulas to better account for the resources disparities that exist among local public school districts. It has also been a powerful argument used by advocates of greater school choice. The universal school choice program outlined here, with differential funding, would help increase both fiscal equity and equity of opportunity.

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