

NATIONAL REVIEW

Suing Choice Away

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On January 19, 2016, the day after Martin Luther King Jr. Day, King's son addressed more than 10,000 protesters gathered at Florida's state capitol. "This is about justice," Martin Luther King III intoned before the throngs of mostly black and brown protesters. "This is about righteousness. This is about truth."

The hashtag emblazoned on the protesters' fluorescent-yellow shirts read "#DropTheSuit." The target of their ire was the state's teachers' union, which — along with assorted left-wing groups and parts of the public-school establishment — was suing to end Florida's main school-choice program.

"This is about freedom," MLK III continued, "the freedom to choose what is best for your family and your child most importantly."

Signed into law in 2001 by then-governor Jeb Bush, Florida's tax-credit scholarship program offers taxpayers dollar-for-dollar tax credits in return for donations to qualified, nonprofit scholarship organizations that help low-income families afford the schools of their choice.

Two scholarship organizations currently participate in the program, AAA Scholarships and Step Up for Students. The latter issued 99 percent of the tax-credit scholarships last year. This year, Step Up is issuing more than 92,000 scholarships worth about \$5,300 on average. According to *Private School Review*, a website that compiles data to help families make informed education decisions, the average price of private tuition in Florida is \$6,639 for elementary schools and \$8,815 for high schools, although schools often reduce tuition for low-income families.

The scholarship recipients are among Florida's most disadvantaged citizens. Nearly seven out of ten are black (30 percent) or Hispanic (38 percent), with an additional five percent identifying as Asian, Native American, or multiracial. Their average household income is just \$24,074, 4.4 percent above the federal poverty line when adjusted for family size. More than half of them live in single-parent homes.

Contrary to fears that the scholarship program would induce an exodus of the best students from district schools, research commissioned by the state of Florida found that new scholarship students tend to be among the lowest district performers. After receiving a scholarship, the students' average performance reaches a level on par with the national average.

The program also appears to benefit students who don't receive scholarships. In 2010, researchers from Northwestern University published a study with the prestigious National Bureau of Economic Research reporting that increased competition resulting from the program had had a modest but statistically significant positive effect on district performance on standardized tests. Moreover, district schools subject to the most competition saw the greatest gains.

Alas, none of these results have stopped the Florida Education Association (FEA) and its allies from seeking to eliminate the scholarship program. In the summer of 2014, the FEA—joined by Americans United for the Separation of Church and State, the Florida chapters of the NAACP and the League of Women Voters, and several public-schooling interest groups — filed a lawsuit seeking to have the program declared unconstitutional.

The plaintiffs allege that the program violates two provisions of the Florida constitution. The first, known as a “Blaine Amendment,” states that “no revenue of the state . . . shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution.” The clause is named for former U.S. senator James G. Blaine of Maine, an anti-Catholic nativist who fought in the late 19th century to prevent Catholics from receiving state dollars for their schools. At the time, the publicly funded “common” schools used the Protestant Bible and led students in prayer in a manner acceptable to most Protestants, but not to Catholics, let alone non-Christians.

The FEA also alleges that Florida's program violates the state constitution's “uniformity clause,” which mandates that “adequate provision shall be made by law for a uniform, efficient, safe, secure, and high quality system of free public schools.” The union claims that “uniform” essentially means “exclusive” and that the state is therefore prohibited from creating a “parallel” school system, even though the same clause of the constitution also empowers the legislature to establish “other public education programs that the needs of the people may require.”

In February 2015, a circuit-court judge dismissed the lawsuit, holding that the plaintiffs lacked standing to sue because they failed to demonstrate that the program had harmed them in any way.

The union was also suffering in the court of public opinion. Supporters of the choice program—including representatives of several prominent organizations representing blacks, Hispanics, and Orthodox Jews—had formed the Save Our Scholarships Coalition to pressure the union and its allies to drop the suit. Their grassroots organizing and advocacy proved effective. Several newspapers editorialized against the lawsuit. Before the FEA announced that it was appealing the decision, both the Florida Association of School Administrators and the Florida School Boards Association withdrew from the suit.

The NAACP, however, remained a party to the lawsuit. Given that so many scholarship students were black—about 23,000 in the 2015–16 school year and more than 27,000 today—the NAACP’s stance caused a rift in the black community. “The NAACP is on the wrong side of history on this,” the Reverend R. B. Holmes Jr. told education news website *The Seventy-Four*. Holmes is the former president of Jacksonville’s chapter of the NAACP and was one of the 100 black pastors to sign a petition earlier this year calling on the NAACP to drop the suit. The petition criticized the NAACP for joining the lawsuit “without seeking a vote of NAACP chapter members or the counsel of the faith leaders in communities across the state.”

Had they taken a vote, the NAACP likely would have found high levels of support for the program among their members. According to *Education Next*’s 2016 poll on education policy, 64 percent of black Americans support tax-credit scholarship programs while only 17 percent are opposed. The poll also found high levels of support for the scholarships among parents (60 percent), Hispanics (62 percent), Democrats (57 percent), and the general public (53 percent). Republicans were slightly less likely to support the scholarship program, with 49 percent in favor and 33 percent opposed.

Along with King, Holmes was a featured speaker at the Drop the Suit “Rally in Tally” in February, which the Save Our Scholarships Coalition co-sponsored. They were joined by the Reverend H. K. Matthews, a civil-rights icon who marched at Selma and led sit-ins at segregated lunch counters in the 1960s. Matthews told *The Seventy-Four* that he saw the tax-credit scholarship program as “a continuation of the civil rights movement” because it “gives people an opportunity” to choose where their children attend school.

This summer, a Florida appellate court unanimously dismissed the FEA’s appeal. As before, the court ruled that the FEA’s alleged harms were too speculative to merit standing, but this time the judges’ reasoning also addressed the merits of the FEA’s central claims.

The tax-credit scholarships did not violate the Blaine Amendment, the court held, because they were privately funded. Following the precedent of the U.S. Supreme Court and every state supreme court to address the question thus far, the Florida appellate court held that private money does not become government revenue until it has “come into the tax collector’s hands.” Constitutionally, tax credits are no different from tax deductions or tax exemptions in this regard. Likewise, because the scholarships are privately funded and administered, they do not constitute a “parallel” school system.

But again the FEA is appealing the decision. By the time the Florida supreme court hears the case, there will likely be more than 115,000 K–12 students receiving tax-credit scholarships, the equivalent of about 4 percent of all the students enrolled in Florida’s K–12 district schools. In addition to the harm scholarship families would suffer, a decision striking down the tax credit would likely produce a massive and immediate influx into the district schools, seriously straining their facilities and resources.

A negative decision would affect taxpayers as well. In 2010, the Florida legislature’s Office of Program Policy Analysis and Government Accountability estimated that for every dollar by which the tax credits reduce state revenue, taxpayers save \$1.44 in expenditures. The state is

close to issuing the maximum \$559 million in tax credits this year, and the total credit cap increases by 25 percent annually. If even half the scholarship students returned to the district schools, the state would have to spend hundreds of millions of dollars more to provide for them.

But most important, a decision to strike down the tax-credit program would be devastating for the families who rely on the scholarships to enroll their children in the schools that work best for them. If the FEA and its allies really have the best interests of all children in mind, they should drop the suit.

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