

**IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA**

JOANNE McCALL *et al.*,

Appellants,

v.

Case No.: 1D15-2752

L.T. Case No.: 20214-CA-2282

RICK SCOTT, Governor of Florida, *et al.*,

and

UMENE PROPHETE *et al.*,

Appellees.

**BRIEF OF THE BLACK ALLIANCE FOR EDUCATIONAL
OPTIONS AS AMICUS CURIAE IN SUPPORT OF APPELLEES
AND FILED BY CONSENT OF ALL PARTIES**

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C. INTEREST OF AMICUS CURIAE BLACK ALLIANCE FOR EDUCATIONAL OPTIONS

The Black Alliance for Educational Options (“BAEO”) is a national Black-led non-profit advocacy organization. Founded in 1999, BAEO is committed to increasing access to high quality education options for Black children by actively supporting transformational education reform initiatives and parental choice policies that empower low-income and working class Black families. Black children from low-income and working class Black families in Florida and around the country often have very limited and low-quality educational options.

“A quality education for every child is a ‘new civil right’ for the 21st century,” said Richard W. Riley, Education Secretary under President Bill Clinton, speaking in 2000.¹ Agreeing with this statement, BAEO believes that neither a good education, nor any other civil right, should be denied because of a family’s zip code and income. Yet, fifteen years later, and educational opportunities are still so restricted. The American ideal of equal opportunity without regard to race or social standing is unattainable for economically disadvantaged Black children who lack access to high quality educational opportunities. Believing it is unacceptable to lose another generation of low-income Black students to poor schools, BAEO has

¹ Education World: Quality Education a ‘New Civil Right,’ Says Riley in State of Education Address, February 2000, http://www.educationworld.com/a_admin/admin/admin150.shtml (last visited Dec. 6, 2015).

participated as an Amici Curiae in other cases around the country impacting Black students' educational options.

D. SUMMARY OF THE ARGUMENT

BAEO requests the Court to affirm the trial court's holding that Appellants had no taxpayer standing and that Appellants' allegation of special injury was insufficient to have standing to challenge the constitutionality of the Florida Tax Credit Scholarship Program. The trial court correctly concluded that Appellants have not meaningfully alleged that the public schools have suffered a financial hardship as a result of the Program. And as explained in this brief, the insufficiency of Appellants' alleged injury is highlighted when contrasted with the harm Appellants threaten to visit upon low-income, mostly Black and Hispanic students if their complaint prevails. The termination of the Florida Tax Credit Scholarship Program would disrupt the education of almost 80,000 students. These scholarship students are from Florida's neediest families – and research reveals that the vast majority of these students were struggling academically in the public school system. The Florida Tax Credit Scholarship Program offers these students the opportunity for a good education. The data and studies cited in this brief demonstrate that scholarship students are improving academically as a result of the educational opportunities afforded to them by the Florida Tax Credit Scholarship Program.

E. ARGUMENT

In this case challenging the constitutionality of the Florida Tax Credit Scholarship Program (“FTC”), the trial court granted the Defendants’ motions to dismiss, holding both that Plaintiffs were not challenging appropriations, and therefore did not have taxpayer standing, and that the “Complaint also does not allege special injury sufficient to confer standing on Plaintiffs to challenge the constitutionality of the Tax Credit Program.” (R-356).

BAEO urges this Court to affirm Appellants’ lack of standing on both grounds, and specifically addresses in this brief² how Appellants’ allegation of injury is too insufficient and speculative to confer standing. The insufficiency of Appellants’ alleged injury is highlighted when contrasted with the harm Appellants threaten to visit upon low-income, mostly Black and Hispanic students if their complaint prevails. Appellants have not meaningfully alleged how the FTC scholarships harm the education of even one public school student. But their requested relief, the termination of the FTC program, would disrupt the education of almost 80,000 students, more Florida students than the public school population of all but nine of Florida’s sixty-seven school districts – more than twice the student population of Leon County.³

² A brief in the Brandeis tradition.

³ Membership FPS 1415,
<http://www.fldoe.org/core/fileparse.php/7584/urlt/MembershipFPS1415.xls> (last

The FTC scholarship students are from Florida's neediest families. Current initial eligibility for a scholarship is open to families with income up to 185% of the poverty level, *see* § 1002.395(3)(b) Fla. Stat. (2015), which in 2014 for a family of 4 was \$44,123. However, the average household income for all scholarship students in 2014 was only 105% of the poverty level, \$24,171, in a home with an average of 3.8 people.⁴ During the 2014-2015 school year, over 66% of scholarship students were Black or Hispanic, and 54% lived in a home with only a single parent or guardian.⁵

And, not only are the FTC scholarship students from Florida's neediest families, but they struggled academically in the regular public schools they previously attended.

New FTC students, as in previous years, tend to come from lower-performing public schools prior to entering the program. Moreover, they are more likely to be among the lower performing students in their prior school before attending the program, regardless of the performance level of their public school.

.....

Compared to eligible non-participant students, new FTC students had poorer test performance both in reading and math before entering the FTC program. All of these observed differences are statistically

visited Dec. 6, 2015).

⁴ 2014-2015 Annual Report, p10, https://www.stepupforstudents.org/wp-content/uploads/2015/10/SU_AnnualReport14.pdf (last visited Dec. 6, 2015).

⁵ *Id.*

significant and similar to the observed differences reported in previous reports.⁶

Comparing FTC students with students who would have been eligible to participate, but remained in the public schools, the entering FTC students were more likely to be Black (41.5 percent vs 31.3 percent), score lower in math (40.3 percentile vs 45.5 percentile in Florida Comprehensive Achievement Test (FCAT)), and score lower in reading (40.8 percentile vs. 45.1 percentile in FCAT). They were also more likely to come from lower-performing public schools.⁷

This data provides a window into why scholarship families were looking for educational alternatives: the public schools were not working for their children. The children struggled academically in regular public schools. And, even if by some miracle, they were zoned to attend a better public school, they were still academically among the lowest performing students at that school. These students needed a different learning environment.

It is shameful, but no secret, that there is a significant gap between the learning gains of Black students and white students. Florida has made more progress in

⁶ Evaluation of the Florida Tax Credit Scholarship Program Participation, Compliance and Test Scores in 2013-14, found at http://www.fldoe.org/core/fileparse.php/5606/urlt/FTC_FinalReport-13-14.pdf, pages 3, 27 (last visited Dec 6, 2015).

⁷ *Id.* at 27, 28.

closing this gap since 2003 than any other state.⁸ However, even with this progress, based on 2015 NAEP⁹ data, only 38% of all 4th grade Florida students were proficient or above in reading. This is a marked improvement from 1998, when only 22% of 4th grade students met this mark. Still, only 22% of Black 4th grade and 31% of Hispanic 4th grade Florida students were proficient or above in reading, while 60% of white students met this mark.¹⁰ So, in Florida, three out of four Black 4th graders and two out of three Hispanic 4th graders cannot read proficiently.¹¹ Based on a national study looking at NAEP data,

[a] student who can't read on grade level by 3rd grade is four times less likely to graduate by age 19 than a child who does read proficiently by that time. Add poverty to the mix, and a student is 13 times less likely to graduate on time than his or her proficient, wealthier peer.¹²

⁸ What States Are Closing Achievement Gaps?, http://www.nationsreportcard.gov/reading_math_2013/#!/state-gaps, (last visited Dec. 6, 2015).

⁹ NAEP is the National Assessment of Educational Progress, a test that is given to students in all states and is considered the gold standard in comparing state to state educational results.

¹⁰ Reading State Snapshot Report, Florida Grade 4, <https://nces.ed.gov/nationsreportcard/subject/publications/stt2015/pdf/2016008FL4.pdf> (last visited Dec. 6, 2015).

¹¹ Fourth grade reading data is used as an example because the national tests are given at 4th and 8th grade, but also because learning how to read by 4th grade is critical to mastering substantive content in all subsequent grades.

¹² Sarah D. Sparks on, *Study: Third Grade Reading Predicts Later High School Graduation - Inside School Research - Education Week*, http://blogs.edweek.org/edweek/inside-school-research/2011/04/the_disquieting_side_effect_of.html (last visited Dec. 6, 2015).

State-level data paints a bleak enough picture, but certain public schools serving a large percentage of Black students are truly abysmal. The *Tampa Bay Times* in August 2015 published an investigative series about five mostly Black elementary schools in St. Petersburg, Florida, that were failing to educate students.¹³ The investigation found that, in addition to serious student safety problems, “[n]inety-five percent of black students tested at the schools are failing reading or math. . . .” As Goliath Davis, a former police chief in St. Petersburg said, “What happens to all these kids? What do they do? Every time we fail one, the criminal justice system is a winner. And you’d rather pay to keep them incarcerated than try to straighten out the system?”¹⁴

Several thousand students in Pinellas County are using FTC scholarships. When low-income and working class Black families are zoned to attend public schools this bad, is it any wonder that the demand for FTC Scholarships continues to far outstrip the number of scholarships that can be funded by charitable corporate contributions? Florida businesses contributed almost 450 million dollars by the end

¹³ *How the Pinellas County School Board neglected five schools until they became the worst in Florida | Failure Factories | Tampa Bay Times*, <http://www.tampabay.com/projects/2015/investigations/pinellas-failure-factories> (last visited Dec. 6, 2015). We won’t rehash the many details of the schools failure here, but this article makes for somber reading.

¹⁴ *How the Pinellas County School Board neglected five schools until they became the worst in Florida | Failure Factories | Tampa Bay Times*, <http://www.tampabay.com/projects/2015/investigations/pinellas-failure-factories/5-schools-segregation/> (last visited Dec. 6, 2015).

of the fiscal 2015 year, yet there were still thousands of students applying for scholarships that could not be funded in the 2015-2016 year.¹⁵

The scholarship demand is high, even though the current amount is less than 80% of what the state would pay for a student in a regular public school, \$5,677, and may not cover full tuition at the over 1,500 private schools accepting scholarship students. Low-income families sometimes have to pay private school tuition and fees in addition to the scholarship amount. And, unlike the free transportation for most students in the regular public school system, transportation to and from the private schools is usually the parents' responsibility. (R-84) (noting a parent who has to get up at 5 a.m. each morning to drive her children to school). In spite of significant barriers, the scholarship families sacrifice to provide their children with a good education. They have hopes and dreams for their children, and understand how important a good education is for their children's future, especially if they themselves did not receive a good education.

It is no coincidence that the data shows students using scholarships often struggled academically in the public schools, even when compared to their low-income peers. Families with students thriving in the regular public schools were not going to seek out scholarships. But, the scholarship families sensed that their

¹⁵ 2014-2015 Annual Report, p14, https://www.stepupforstudents.org/wp-content/uploads/2015/10/SU_AnnualReport14.pdf (last visited Dec. 6, 2015).

children were struggling. For their children, each passing week, each month, each school year was a tragedy, the loss of a precious educational opportunity.

While the academic benefit to the scholarship students is implied by the strong demand for FTC scholarships, the families of 80,000 students did not move their children to a new school on a whim – there is other evidence that the scholarship students are improving academically. Every scholarship student in grades 3-10 must take a nationally norm-referenced test approved by the state (most take the Stanford Achievement Test). The most recent annual report found that

In 2013-24, the average national percentile ranking for FTC students was 46th percentile in mathematics and 48th percentile in reading. . . . Average national percentile rankings in 2013-2014 are very similar to national percentile rankings observed in prior years for both mathematics and reading. In fact, since the real-time test score collection began in 2006-07, the average national percentile rankings have varied by less than a percentile point in mathematics and about a percentile point in reading over the years including 2013-2014. . . . This means that the typical FTC students tends to maintain his or her relative position in comparison with others nationwide. . . . It is important to note that these national comparisons pertain to all students nationally, and not just students from low-income families.¹⁶

So, these low-income, mostly Black and Hispanic students are scoring at the average of national students from all demographics, and making a years' worth of learning

¹⁶ *Evaluation of the Florida Tax Credit Scholarship Program Participation, Compliance and Test Scores in 2013-14*, at pp 16, 19
http://www.fldoe.org/core/fileparse.php/5606/urlt/FTC_FinalReport-13-14.pdf
(last visited Oct. 30, 2015).

gains in a years' time.¹⁷ There is room for improvement, but for these scholarship students, this is educational progress.

BAEO knows from recent history that without high quality educational options such as the FTC scholarships, many of these students would never be in a position to enjoy their full panoply of civil rights – those rights can ring hollow for illiterate Black students. Becoming familiar with *Miranda*¹⁸ rights, or being unable to exercise the right to vote because of a felony conviction, is not what these families desire, or their children deserve. The Honorable Secretary of State Condoleezza Rice recently well stated the injustice of denying such students educational options:

Education is not for adults. It's not for the teachers. It's not for the unions. It's not for the politicians. It is actually for the children. And as Governor Hickenlooper so well said, it is not for those who would use our children as partisan fodder to divide us. Somehow, someday the country, from all sides of the political spectrum, from all walks of life has got to focus on our children. . . .

I'm a great believer in public schools. The public schools are one of the great foundational institutions of American democracy. But I understand now in the system that we have that choice is allowed, but for those that can afford it. If you are well off you will move to a district where the schools are good. Houses will be expensive in Palo Alto, California and in Hoover, Alabama. Houses will be expensive in Fairfax County, Virginia because you will move to a place where the schools are good. And if you're really well off you'll send your kids to private schools. And who's stuck in failing neighborhood schools? Poor kids. A lot of those are minority kids. And if you're not outraged when somebody says that a parent of that child should not be given the

¹⁷ *Id.* at 3.

¹⁸ *Miranda v. Arizona*, 384 U.S. 436 (1966).

choice to move that child to a school where his or her potential can be reached, I don't know what will outrage you.¹⁹

Since the beginning of the FTC program, over 400,000 scholarships have been issued (R-78), and BAE0 is eternally grateful for the scholarship families having “the choice to move [their] child to a school where his or her potential can be reached.”

The harm to Florida's scholarship students (i.e., students born into low-income families through no fault of their own) if the FTC program were to be terminated as Appellants request is serious, grievous, and almost beyond compare. Contrasting this magnitude of harm with Appellants' alleged special injury highlights why Appellants' allegation of special injury is too speculative and imprecise to legally support standing.

When considering a motion to dismiss, a court “need not accept internally inconsistent factual claims, conclusory allegations, unwarranted deductions, or mere legal conclusions made by a party.” *W.R. Townsend Contracting, Inc. v. Jensen Civil Const., Inc.*, 728 So. 2d 297, 300 (Fla. 1st DCA 1999) (citing with approval *Response Oncology, Inc. v. MetraHealth Ins. Co.*, 978 F. Supp. 1052, 1058 (S.D.

¹⁹ 2015 Opening Keynote: Dr. Condoleezza Rice - YouTube, <https://www.youtube.com/watch?v=6raN4oMm7Ns> at 19:49-20:32, 26:23-27:32(last visited Dec. 6, 2015).

Fla. 1997)). Appellants alleged that their special injury was that

[M]any of the plaintiffs (and members of the plaintiffs organizations) whose children attend public schools, or who are teachers or administrators in the public schools, have been and will continue to be injured by the Scholarship Program's diversion of resources from the public schools.

(R-16). Interestingly enough, in their Initial Brief, Appellants cite to section 1001.62, Florida Statutes (2015), which as a matter of law establishes that the alleged "diversion of resources" is not a specific injury caused by the TCP. Simply stated, Florida allocates education funds annually, but does not pay school districts to educate students not attending regular public schools in the district.

School districts get no per student funding to educate the over 80,000 home-schooled students in Florida,²⁰ or the over 250,000 students in charter schools,²¹ or the 330,000 students attending private schools in the state of Florida, including the 80,000 students using FTC scholarships.²² School districts don't get paid to educate students that have graduated, but poor graduation rates can actually result in districts

²⁰ Home Education, <http://www.fldoe.org/schools/school-choice/other-school-choice-options/home-edu/> (last visited Dec. 6, 2015).

²¹ Charter Schools, <http://www.fldoe.org/schools/school-choice/charter-schools/> (last visited Dec. 6, 2015).

²² Florida's Private Schools Annual Report 2014-15, p1, <http://www.fldoe.org/core/fileparse.php/7562/urlt/Private-School-Report-2014-15.pdf> (last visited Dec. 6, 2015).

being paid to educate a student for more than thirteen years. Florida only pays districts for students enrolled in the district schools.

Consequently, not being paid for not educating a student that is not in attendance at a regular public school is not a “diversion” of funds. Is it a “diversion” of funds when a student graduates, drops out, moves to another district or state? Would Appellants argue that every student that is home-schooled “diverts” funds from the district? Districts are not paid for the above examples for the same reason that they are not paid for students attending a private school on a tax credit scholarship – these students are not enrolled in the regular public schools. Appellants act as though they were “entitled” to funds for the students attending private schools, and that these funds were “stolen” away from them. But they had no entitlement to be paid for students not enrolled in the district. To the extent school districts have any “entitlement” to funds, it only arises as a result of a student annually enrolling in the public school district: no annual enrollment, no funding.

Furthermore, as has been well argued out in Defendants’ briefs (Answer Brief of the State Appellees at 9-28; Response Brief of Intervenor Appellees at 9-44) and will not be repeated here, FTC scholarships are not funded by appropriations, are not public funds, and were never destined for the public schools such that a diversion could occur. Suppose a Florida corporation made a charitable contribution directly to a private school, for which the corporation would receive a tax deduction, *see* §

220.13, Fla. Stat. (2015), and the private school then used that charitable contribution to provide a scholarship to a deserving student. Neither this contribution nor a contribution by a corporation to the tax credit program is a “diversion” of funds.

Understood in the legal context of how school districts are funded, Appellants’ legal conclusion as to a “diversion” is really an allegation that students enrolled in the school districts are harmed because the districts are not paid for educating students not enrolled in the districts. The underlying premise – that not being paid to educate a student not in attendance in the school district somehow deprives the district of something they are entitled to and harms the remaining students – is not only speculative, but contrary to what is known about school district funding.

First, not considering a net gain or loss to the districts and looking only at the number of students on a FTC scholarship, while knowing that a district is not paid for students it does not educate, would seem to miss the whole point of demonstrating injury. As previously set out, the students leaving the regular public schools are mostly Black and Hispanic, low-income, academically struggling students. Students with these characteristics tend to cost districts significantly more to educate than the average district student.²³ For example, as of the 2007-2008

²³ See, e.g., Duncombe, William D. and Yinger, John, “How Much More Does a

school year, public school districts in Florida were spending an average of \$2,152 more per student at schools in which 75% of the students received free or reduced-cost lunches (students with characteristics of the scholarship students) than in schools in which only 25% of students received free or reduced-cost lunches.²⁴

Because of the high cost to the district of educating these students, for each FTC scholarship student, it is extremely likely that the district is left with more money to spend per remaining district student than if the scholarship student was enrolled in the district. Even if one made a speculative leap and equated fewer students with harm, it is hard to conceive how having more money to spend per student harms the remaining district students. Perhaps that is one reason Appellants declined to amend their pleading. (R-358). Any alleged harm looks less and less like an injury the more it is scrutinized.

This is so even before considering whether students that remain in the regular public schools are suffering academic harm because the districts are not being paid for scholarship students not enrolled in the districts. Since 2003 or before, Florida

Disadvantaged Student Cost?" (2004), *Center for Policy Research*, Paper 103. <http://surface.syr.edu/cpr/103> (last visited Dec. 6, 2015) (Noting at page 25 that the typical weight a state gives a low poverty student is about 125%, but they estimate needed weighting over 200%.)

²⁴ See Per Pupil Expenditures, 2007-08, http://www.fldoe.org/core/fileparse.php/7579/urlt/0069126-ppe_schl_0708.xls; Student Membership by Category, 2007-2008, http://www.fldoe.org/core/fileparse.php/3/urlt/mem_category_schl_0708.xls (last visited Dec. 6, 2015).

has made significant progress in improving educational outcomes, particularly among the Black and Hispanic and low income students, as reflected in the NAEP data.²⁵ Looking at the aggregate state level, students remaining in the regular public schools, particularly Black and Hispanic students, are achieving at higher levels than before the start of the FTC program. It is hard to characterize this as harm. And, at the school level, a study has shown that students remaining in public schools where a significant number of students used FTC scholarships perform better than similarly situated students in schools where FTC scholarships are not a significant option.²⁶ Again, it is hard to characterize this as harm.

As a final data point, more students in Florida were actually attending private schools in 2004 (366,000) than are currently attending private schools in 2015 (330,000) even with almost 80,000 tax credit scholarships.²⁷ Looking at the data on overall public school enrollment for 2000-2001, the year before the Tax Credit Scholarship program was created, there were 2,431,521 students enrolled in public

²⁵ See notes 9 & 10 supra and related text.

²⁶ Competitive Effects of Means-Tested School Vouchers by David Figlio, Northwestern University/Cassandra M.D. Hart, University of California-Davis, p4, 34, <http://www.sole-jole.org/12171.pdf>(last visited Dec. 6, 2015).

²⁷ Florida's Private Schools Annual Report 2014-2015, p2.

schools,²⁸ compared to 2,756,127 last school year.²⁹ More than 324,606 additional students are attending public schools since the start of the FTC program.

How tragic would it be if the relief sought in Appellants' complaint ended up harming not only the 80,000 low-income, mostly Black and Hispanic students using FTC scholarships, but the students remaining in the district schools? The probability of this is much greater than the speculative allegation that Appellants have suffered a specific injury sufficient to support standing.

Comparing the threatened injury to the FTC scholarship students to Appellants' allegation of injury to the students remaining in the public schools, an allegation based on speculation and false legal conclusions, highlights the insufficiency of Appellants' pled allegation to confer standing. Whether terminating the tax credit scholarship program would be of educational gain to even one Florida student is entirely speculative and contrary to existing evidence. This lack of injury reveals that Appellants' complaint is but a policy disagreement cloaked as an injury. "[A]bsent some showing of special injury as thus defined, the taxpayer's remedy

²⁸ Profiles of Florida's School Districts 2000-01, p138, <http://www.fldoe.org/accountability/data-sys/edu-info-accountability-services/pk-12-public-school-data-pubs-reports/archive.shtml> (last visited Dec. 6, 2015).

²⁹Membership in Florida Public Schools, Preliminary Survey 2 2014-2015, <http://www.fldoe.org/accountability/data-sys/edu-info-accountability-services/pk-12-public-school-data-pubs-reports/students.shtml> (last visited Dec. 6, 2015).

should be at the polls and not in the courts.” *Paul v. Blake*, 376 So. 2d 256, 259 (Fla. 3d DCA 1979).

F. CONCLUSION

BAEO therefore respectfully requests that this Court affirm the trial court's holding that Appellants had no taxpayer standing and that Appellants' allegation of special injury was insufficient to have standing to challenge the constitutionality of the FTC scholarship program.

Dated this 14th day of December, 2015.

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G. CERTIFICATE OF SERVICE

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