IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA

FLORIDA EDUCATION ASSOCIATION; STEFANIE BETH MILLER; LADARA ROYAL; MINDY FESTGE; VICTORIA DUBLINO-HENJES; and, ANDRES HENJES,

Plaintiffs,

v. Case No.: 2020-CA-001450

RON DESANTIS, in his official capacity as Governor of the State of Florida; RICHARD CORCORAN, in his official capacity as Florida Commissioner of Education; FLORIDA DEPARTMENT OF EDUCATION; FLORIDA BOARD OF EDUCATION,

Defendants.
_____/

MONIQUE BELLEFLEUR, individually and on behalf of D.B. Jr., M.B., and D.B., and KATHRYN HAMMOND,

Plaintiffs,

v. Case No.: 2020-CA-1467

RON DESANTIS, in his official capacity as Governor of the State of Florida, et al.,

Defendants.
_____/

DEFENDANTS' REPLY IN SUPPORT OF THE MOTION TO DISMISS

Defendants Ron DeSantis, in his official capacity as Governor of the State of Florida; Richard Corcoran, in his official capacity as Commissioner of Education; Andy Tuck, in his official capacity as the chair of the Florida Board of Education; Jacob Oliva, in his official

capacity as Chancellor, Division of Public Schools, Florida Department of Education (the "DOE"); and the Florida Board of Education (collectively, the "Defendants"), file this brief Reply in support of the Motion to Dismiss.

INTRODUCTION

The relief requested by the Plaintiffs in these cases inescapably undermines the foundational principle of separation of powers. It asks the Court to declare an emergency action taken by the DOE unconstitutional on the basis that the only acceptable "safe" school system is one that is closed for an indefinite period of time. Inherent in Plaintiffs Complaint is also a request for guaranteed funding that this Court cannot constitutionally provide. The Governor and the DOE exercised their emergency authority in this pandemic in an attempt to balance two important constitutional provisions in Article IX, Section 1(a) of the Florida Constitution: to provide both a "high quality" and a "safe" system of free public schools for students. Plaintiffs are asking the Court to second guess that decision, invalidate the Emergency Order, and then to assume the emergency powers of the Governor and guarantee funding to all schools. The case must be dismissed.

BACKGROUND

Section 252.36(1)(a), Florida Statutes, establishes that "[t]he Governor is responsible for meeting the dangers presented to this state and its people by emergencies." § 252.36(1)(a), Fla. Stat. In turn, section 252.36, Florida Statutes, provides the Governor with various statutory emergency management powers ("emergency powers"). The plain language of section 252.36, Florida Statutes, establishes that the vast majority of the Governor's emergency powers are to be exercised at his or her discretion. For example, section 252.36, Florida Statutes, authorizes the Governor to "delegate such powers as she or he may deem prudent,"§ 252.36(1)(a), Fla. Stat.

(emphasis added), "issue executive orders, proclamations, and rules and may amend or rescind them,"§ 252.36(1)(b), Fla. Stat. (emphasis added), and section 252.36(5), Florida Statues, exemplifies the discretionary nature of the Governor's emergency powers by enumerating a long list of powers that "she or he may [exercise]," § 252.36(5), Fla. Stat. (emphasis added).

The COVID-19 Pandemic is a natural emergency and the Governor has authority to issue executive orders to address it. *Abramson v. DeSantis,* Case No. SC20-646 (Fla. June 25, 2020) (attached hereto as Exhibit 1). *See also* Uhlfelder v. DeSantis, Case No. 2020-CA-000552 (2nd Judicial Circuit, Lean County, April 8, 2020) (granting motion to dismiss in case seeking to compel the Governor to use his emergency authority to close beaches "due to the separation of powers clause.") (attached hereto as Exhibit 2). On March 9, 2020, due to the COVID-19 pandemic, Governor DeSantis, under the authority vested in him by Article IV, section 1(a) of the Florida Constitution, and Chapter 252, Florida Statutes, issued Executive Order 20-52. This order declared a State of Emergency for the State of Florida and authorized state agencies to suspend statutes and rules if strict compliance would in any way prevent, hinder or delay necessary action in coping with the emergency where prescribed in the State Comprehensive Emergency Management Plan or ordered by the Florida's Division of Emergency Management's State Coordinating Officer.

On March 13, 2020, Florida's Emergency Management State Coordinating Officer issued Emergency Order 20-004. That order authorized "the Department of Education to take all appropriate actions coordinated with Florida's school districts, state colleges, and other educational providers to promote the health, safety, welfare and education of Florida students under the circumstances presented by this emergency." The order directed that these actions must be informed by guidance from the Centers for Disease Control and Prevention and the State

Health Officer and Surgeon General. On March 23, 2020, the DOE issued Emergency Order 2020-EO-01 recommending that school districts close all public schools in the state of Florida (a copy of this order is attached to the Bellefleur Amended Complaint at Exhibit C). On July 6, 2020, the DOE issued Emergency Order 2020-EO-06 (the "Emergency Order"). Consistent with safety precautions provided by health officials, the Emergency Order recognizes the need to open schools to ensure not only the continuity of the educational process for students, but their well-being.

RELEVANT STANDARD

The separation of powers clause of the Florida Constitution explicitly mandates that "[n]o person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein." Art. II, § 3, Fla. Const. This most basic principle is universally understood and transcends the formation of our federal government, through the adoption of the United States Constitution in 1787 and into the formation of state governments. As the Florida Supreme Court has recognized:

> "[S]eparation of powers recognizes three separate branches of government-the executive, the legislative, and the judicial-each with its own powers and responsibilities." *Bush v. Schiavo*, 885 So. 2d 321, 329 (Fla. 2004). In applying the separation of powers doctrine, the Court has done so strictly, explaining "that this doctrine 'encompasses two fundamental prohibitions. The first is that no branch may encroach upon the powers of another. The second is that no branch may delegate to another branch its constitutionally assigned power.' " *Id*. (*quoting Chiles v. Children A, B, C, D, E, & F*, 589 So. 2d 260, 264 (Fla.1991)).

Whiley v. Scott, 79 So. 3d 702, 708-09 (Fla. 2011) (alteration in original). This historically accepted understanding of the separation of powers is founded on a mutual respect of each of the three branches and their constitutional prerogatives and powers. The Florida Supreme Court in *Orr v. Trask* explained,

> Just as we would object to the intrusion of the executive or legislative branches into this Court's authority to promulgate rules of court procedures or to discipline parties before the courts as in contempt proceedings, we must be equally careful to respect the constitutional authority of the other branches. Art. II,§ 3; art. V, §§ 1, 2, 3 and 15, Fla. Const.; *Florida Motor Lines v. Railroad Commissioners*, 129 So. 876 (1930); *Markert v. Johnson*, 367 So. 2d 1003 (Fla.1978); *Ex parte Earman*, 95 So. 755 (1923). Courts should be loath to intrude on the powers and prerogatives of the other branches of government and, when necessary to do so, should limit the intrusion to that necessary to the exercise of the judicial power.

Orr v. Trask, 464 So. 2d 131, 135 (Fla. 1985). Courts should be wary of unduly "interfer[ing] with the constitutional authority and responsibility of Florida's Governor." *Whiley*, 79 So. 3d at 717 (Canady, CJ., dissenting).

ARGUMENT

The Court cannot craft a form of relief that grants the redresses demanded by Plaintiffs and avoid undermining the foundational principle of separation of powers. School funding is an inherent part of Plaintiffs requested relief. They allege, for example, that the Emergency Order is unconstitutional because it pressures local districts to reopen by threatening to withhold funding. FEA Compl. ¶ 39 ("The Emergency Order comes with severe pressure by the State Government Defendants to physically reopen schools or face the loss of critical funding for public education."); Bellefleur Am. Compl. at 3 (the School Board of Orange County "acknowledged during their meeting if they did not submit [a reopening plan required by the Emergency Order] they risked losing state funding and having to lay-off thousands of full-time teachers.").[1] This pressure to open, however, cannot be relieved by removing the Emergency Order. In its absence, school funding would revert to the default state under Florida law, which ties funding levels to in

[1] *See also*, Bellefleur Am. Comp. ¶ 51 ("it was clear at that the school board members were acutely aware of this predicament and chose to prioritize the need for funding over the health and safety of its teachers and students."); FEA Compl. ¶ 38 ("the order fails to provide adequate funding . . . ."); FEA Compl. ¶ 82 ("Many superintendents fear the loss of millions of dollars in state funding if they do not follow the Emergency Order's mandate.").

person attendance.[2] The only way to relieve that pressure is to waive Florida law and guarantee funding to all school districts regardless of in person attendance. The Court does not have that authority. *Citizens for Strong Sch., Inc. v. Florida State Bd. of Educ*., 232 So. 3d 1163, 1171 (Fla. 1st DCA 2017), approved, 262 So. 3d 127 (Fla. 2019) ("Absent explicit constitutional authority to the contrary, the legislative and executive branches possess exclusive jurisdiction in [educational policy choices and their implementation] . . . .") (a copy of this opinion is attached for the Court's convenience at Exhibit 3). The Governor and the DOE do and have chosen to exercise it in a manner that incentivizes districts to provide essential in person services to those students who need it. That Plaintiffs disagree with this decision is of no moment. It is a reasonable exercise of the discretionary emergency power of the Governor and the DOE that should not be second-guessed by the Court. *Id.*

Plaintiffs ask this Court to order Governor DeSantis and the DOE to exercise their emergency discretionary authority differently, to waive funding statutes and provide guaranteed funding to all school districts despite a significant reduction in services. Section 252.36, Florida Statutes, expressly vests in the Governor certain statutory emergency management powers. As explained previously, the plain, explicit language of section 252.36, Florida Statutes, provides the Governor with emergency powers that are primarily to be exercised at his or her discretion. See, e.g., § 252.36(1)(a)-(b), (5), Fla. Stat. Nowhere in section 252.36, Florida Statutes, or the entirety of the Florida Constitution is authority given to the judicial branch to determine whether the Governor should exercise his discretionary emergency powers.[3] Rather, Article IV, section

[2] Although a virtual option still exists under Florida law, funding for virtual schools are not intended to support a brick and mortar school.

[3] To be sure, the judicial branch has a historical role of judicial review under certain circumstances where the executive branch fails to carry out its statutorily mandated, ministerial tasks. However, that role of judicial review must be limited to matters where the executive lacks discretion, lest the judicial branch intrude upon and curtail the executive's ability to respond to emergencies.

l(a) of the Florida Constitution prescribes that "[t]he supreme executive power shall be vested in [the] governor," and as such that "[t]he governor shall take care that the laws be faithfully executed." Art. IV,§ 1(a).

Plaintiffs have not alleged that the Emergency Order exceeded the Governor's or the DOE's emergency authority and did not question their authority to recommend the closure of schools as they did in March. Yet, in this case they question the authority of the Governor and the DOE in supervising reopening the schools. The Florida Constitution, however, "creates a hierarchy under which a school board has local control, but the State Board supervises the system as a whole. This broader supervisory authority may at times infringe on a school board's local powers, but such infringement is expressly contemplated – and in fact encouraged by the very nature of supervision – by the Florida Constitution." *Sch. Bd. of Collier County v. Florida Dep't of Educ*., 279 So. 3d 281, 292 (Fla. 1st DCA 2019), review denied sub nom. *Sch. Bd. of Alachua County, Florida v. Florida Dep't of Educ*., SC19-1649, 2020 WL 1685138 (Fla. Apr. 7, 2020) (*quoting Sch. Bd. of Palm Beach Cty. v. Fla. Charter Educ. Found. Inc.*, 213 So. 3d 356, 360 (Fla. 4th DCA 2017)). Nowhere should this supervisory authority stretch broader than in an emergency.

The Complaints focus their challenge to the Emergency Order on the grounds that it violates Article IX, Section 1(a) of the Florida Constitution which provides, in relevant part,

> Adequate provision shall be made by law for a uniform, efficient, safe, secure, and high quality system of free public schools that allows students to obtain a high quality education . . . .

This section provides no guidance or measure for the Court to decide what constitutes "adequate provision" for "safe" schools, and Plaintiffs offer none. Instead, they allege that no in-person classes can occur "until such time that a safe, secure, and high quality environment is assured,"

Bellefleur Am. Compl. ¶ 95, and that schools "should remain physically closed during the resurgence of COVID-19 in Florida." FEA Complaint at 31. They request the Court "direct the Defendants to provide a satisfactory plan," Bellefleur Am. Compl. at 3-4, to order the Defendants to "develop and implement an online instruction plan aimed at all children," FEA Compl. at 31, and to require that, "before the physical reopening of brick and mortar schools, each school must have adequate personal protective equipment." FEA Compl. at 31. These broad policy directives are exactly what the political question doctrine and the separation of powers prevent. Courts are cautioned from "interfere[ing] with the discretionary functions of the legislative or executive branches of government absent a violation of constitutional or statutory rights.' " *Daly v. Marion Cty.*, 265 So. 3d 644, 649 (Fla. 1st DCA 2018) (citation omitted). In the absence of an appropriate standard for determining what constitutes "adequate provision" for safe schools, the case should be dismissed. *Citizens*, 232 So. 3d at 1169 ("Without 'satisfactory criteria' to channel discretion in judicial rulings, litigation involving a subjective advisory guideline invites arbitrary and capricious judicial actions which improperly invade the spheres of action of the political branches."); *Coal. for Adequacy & Fairness in Sch. Funding, Inc. v. Chiles*, 680 So. 2d 400, 408 (Fla. 1996).

These cases invite the Court to violate the constitution by assuming the emergency powers of the Governor and to improperly insert itself into a complex political question. These cases must be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 14, 2020, the foregoing was electronically filed using the E-filing Portal System, and a copy was furnished by email on the following Service List:

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EXHIBIT 1

Supreme Court of Florida

THURSDAY, JUNE 25, 2020

CASE NO.: SC20-646

WILLIAM S. ABRAMSON	vs.	RON DESANTIS, GOVERNOR
Petitioner		Respondent

William S. Abramson petitions this Court for a writ of quo warranto, arguing that Executive Orders 20-111 and 20-112, issued April 29, 2020, by Governor Ron DeSantis, are null and void because the State Emergency Management Act (the Act), §§ 252.31-.60, Fla. Stat. (2019), does not contemplate the Governor's use of his emergency powers to impose restrictions for the purpose of responding to a pandemic. We conclude that a pandemic is a "natural emergency" within the meaning of section 252.34(8). Accordingly, we further conclude that, under section 252.36(1)(b), the Governor has the authority to issue executive orders to address a pandemic in accordance with the Act. Abramson has not challenged, and we do not address, any specific provision of the executive orders at issue. The petition for writ of quo warranto is denied.

CANADY, C.J., and POLSTON, LABARGA, LAWSON, MUÑIZ, and COURIEL, JJ., concur.

A True Copy
Test:

John A. Tomasino
Clerk, Supreme Court

db
Served:

NICHOLAS A. PRIMROSE
JOSHUA E. PRATT
JOE JACQUOT
WILLIAM S. ABRAMSON

EXHIBIT 2

IN THE CIRCUIT COURT FOR THE SECOND JUDICIAL CIRCUIT, IN AND FOR LEON COUNTY, FLORIDA

DANIEL W. UHLFELDER,

Plaintiff,

CASE NO.: 2020-CA-000552

vs.

RON DESANTIS, in his official capacity as Governor of the State of Florida,

Defendant.
_____/

ORDER GRANTING MOTION TO DISMISS WITH PREJUDICE

THIS CAUSE came before the Court on April 7, 2020, on Defendant RON DESANTIS' Motion to Dismiss Amended Complaint for Emergency Injunctive Relief. This Court having reviewed the pleadings and the cited authorities, having heard argument of counsel, and being otherwise fully advised in the premises; finds as follows:

1. Defendant's Motion to Dismiss Amended Complaint is GRANTED, with prejudice. The Court finds that it lacks authority to grant the relief requested due to the separation of powers clause of the Florida Constitution. *See* Art. II, § 3, Fla. Const.

DONE and ORDERED, in Chambers, at the Leon County Courthouse, Tallahassee, Leon County, Florida this 8th day of April, 2020.

KEVIN J. CARROLL, Circuit Judge

Copies to:
Daniel W. Uhlfelder
Gautier Kitchen
Marie Mattox
Nicholas A. Primrose
Joshua E. Pratt

EXHIBIT 3

KeyCite Yellow Flag - Negative Treatment
Distinguished by Delawareans for Educational Opportunity v. Carney, Del.Ch., November 27, 2018

232 So.3d 1163
District Court of Appeal of Florida, First District.

CITIZENS FOR STRONG SCHOOLS, INC., Fund Education Now, Inc., Eunice Barnum, Janiyah Williams, Jacque Williams, Sheila Andrews, Rose Nogueras, and Alfredo Nogueras, Appellants,
v.
FLORIDA STATE BOARD OF EDUCATION; Andy Gardiner, in his official capacity as the Florida Senate President; Steve Crisafulli, in his official capacity as the Florida Speaker of the House of Representatives; and Pam Stewart, in her official capacity as Florida Commissioner of Education, Appellees,
and
Celeste Johnson; Deaundrice Kitchen; Kenia Palacios; Margot Logan; Karen Tolbert; and Marian Klinger, Intervenors/Appellees.

CASE NO. 1D16–2862
|
Opinion filed December 13, 2017

Synopsis
Background: Advocacy groups brought action against State Board of Education and various state officials seeking declaration that Board violated its paramount duty to provide uniform, efficient, and high quality system of free public schools, as required by Florida Constitution. Following bench trial, the Circuit Court, Leon County, George S. Reynolds, J., ruled in favor of defendants. Advocacy groups appealed.

Holdings: The District Court of Appeal, B.L. Thomas, C.J., held that:

[1] questions presented by advocacy groups raised political questions not subject to judicial review, and

[2] program providing scholarships to allow students with disabilities to attend private school did not violate Florida's constitutional requirement of a uniform system of free public schools.

Affirmed.

Wolf, J., filed specially concurring opinion.

West Headnotes (9)

[1] **Constitutional Law** Education
Constitutional Law Education

The strict separation of powers embedded in Florida's organic law requires judicial deference to the legislative and executive branches to adopt and execute educational policies those branches deem necessary and appropriate to enable students to obtain a high quality education, as directed by the Florida Constitution. Fla. Const. art. 9, § 1(a).

3 Cases that cite this headnote

[2] **Education** Right to instruction in general
Education Judicial supervision in general

Absent specific and clear direction to the contrary in the supreme organic law, which does not exist in the section of the Florida Constitution guaranteeing a quality education, the difficult and profound decisions regarding how children are to be educated are not subject to judicial oversight or interference. Fla. Const. art. 9, § 1(a).

[3] **Constitutional Law** Political Questions

Questions presented by advocacy groups, of whether legislative and executive branches of state government made adequate provision for public school system, whether system was uniform, efficient, and of high quality, and whether system allowed students to obtain high quality education, raised political questions not subject to judicial review, in their action seeking declaration that State Board of Education violated its paramount duty to provide uniform, efficient, and high quality system of free public schools, as required by

Florida Constitution, since terms "adequate," "efficient," and "high quality" lacked judicially discoverable or manageable standards that would allow for meaningful judicial interpretation, and an attempt to evaluate the political branches' compliance with the organic law would constitute violation of Florida's strict requirement of the separation of powers. Fla. Const. art. 2, § 3; Fla. Const. art. 9, § 1(a).

2 Cases that cite this headnote

[4] **Constitutional Law** Nature and scope in general

Constitutional Law Nature and scope in general

Constitutional Law Nature and scope in general

The Florida Constitution imposes a strict separation of powers requirement that applies just as vigorously to the judicial branch as it does to the other two branches of government. Fla. Const. art. 2, § 3.

2 Cases that cite this headnote

[5] **Constitutional Law** Political Questions

A strict separation of powers supports the foundation and logic of the political-question doctrine, in that Florida's organic law does not permit a dispersal of decisional responsibility which would allow the courts to dictate educational policy choices and their implementation to the other two branches of government, absent specific authorization by law. Fla. Const. art. 2, § 3.

2 Cases that cite this headnote

[6] **Constitutional Law** Education

Constitutional Law Education

Absent explicit constitutional authority to the contrary, and pursuant to the separation of powers doctrine, the legislative and executive branches possess exclusive jurisdiction in educational policy choices and their implementation, as the legislative branch has sole power to appropriate and enact substantive policy, and the executive branch has the sole power to faithfully execute the substantive policies and budgetary appropriations enacted by the legislative branch. Fla. Const. art. 2, § 3.

1 Cases that cite this headnote

[7] **Constitutional Law** Taxation and public finance

States Purposes of expenditures in general

Pursuant to the separation powers provision of the Florida Constitution, and the provision stating that the judiciary shall have no power to fix appropriations, the judiciary cannot dictate the manner of executing legislative policies or appropriations in any particular way. Fla. Const. art. 2, § 3; Fla. Const. art. 5, § 14(d).

2 Cases that cite this headnote

[8] **Municipal Corporations** Constructive notice, and facts putting on inquiry

Advocacy groups lacked standing to challenge Florida Tax Credit Scholarship Program, as violative of guarantee in Florida Constitution of uniform schools; Program did not violate a specific limitation on legislature's taxing and spending power, nor did it involve disbursement from public treasury. Fla. Const. art. 9, § 1(a).

[9] **Education** Public Aid

Program providing scholarships to allow students with disabilities to attend private school did not violate Florida's constitutional requirement of a uniform system of free public schools, where program was a specialized scholarship, only applied to 30,000 of total 2.7 million students in public school, and only made up fraction of statewide public school budget. Fla. Const. art. 9, § 1(a).

***1164** An appeal from the Circuit Court for Leon County. George S. Reynolds, Judge.

Attorneys and Law Firms

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Ari S. Bargil, Institute for Justice, Miami; Richard Komer, Institute for Justice, Arlington, VA, pro hac vice; and Timothy D. Keller, Institute for Justice, Tempe, AZ, pro hac vice, for Intervenors/Appellees Institute for Justice.

Opinion

B.L. THOMAS, C.J.

***1165** Eight years ago, Appellants initiated a legal challenge to Florida's public school system, asserting that the State's entire K–12 public education system—which includes 67 school districts, approximately 2.7 million students, 170,000 teachers, 150,000 staff members, and 4,000 schools—is in violation of the Florida Constitution. Appellants sued the Florida State Board of Education, the President of the Florida Senate, the Speaker of the Florida House of Representatives and the Florida Commissioner of Education seeking a declaration that the State violated its "paramount duty" to provide a "uniform, efficient ... and high quality system of free public schools that allows students to obtain a high quality education," as required by Article IX, section 1(a) of the Florida Constitution. Appellants sought declaratory and supplemental relief below, including: a demand that the State submit a remedial plan for the alleged constitutional deficiencies; a demand that relevant studies be conducted for necessary actions; and that the trial court retain jurisdiction to provide any further appropriate legal relief.

[1] We affirm the trial court's ruling denying relief on the basis that Appellants' arguments regarding the State's duty to make adequate provision for an efficient and high quality education raise political questions not subject to judicial review, because the relevant constitutional text does not contain judicially discoverable standards by which a court can decide whether the State has complied with organic law. Furthermore, the strict separation ***1166** of powers embedded in Florida's organic law requires judicial deference to the legislative and executive branches to adopt and execute educational policies those branches deem necessary and appropriate to enable students to obtain a "high quality" education, as directed by the Florida Constitution. There is no language or authority in Article IX, section 1(a) that would empower judges to order the enactment of educational policies regarding 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.

[2] The most effective manner in which to teach students science, mathematics, history, language, culture, classics, economics, trade skills, poetry, literature and civic virtue have been debated since at least the time of ancient Greece.

Brilliant philosophers, thinkers, writers, poets and teachers over the past twenty-five centuries have dedicated their talents to identifying the best means of providing a proper education to help each child reach his or her highest potential in a just society. In a republican form of government founded on democratic rule, it must be the elected representatives and executives who make the difficult and profound decisions regarding how our children are to be educated. Absent specific and clear direction to the contrary in the supreme organic law, which does not exist in Article IX, section 1(a) of the Florida Constitution, we uphold the trial court's correct ruling that such decisions are not subject to judicial oversight or interference.

We also affirm the trial court's ruling rejecting Appellant's arguments challenging the State's constitutional compliance with its duty to provide a "uniform" education. We agree that the John M. McKay Scholarship Program for Students with Disabilities—which affects only 30,000 students and does not materially impact the K–12 public school system—provides a benefit to help disabled students obtain a high quality education. Thus, the McKay Scholarship Program does not violate Article IX, section 1(a) of the Florida Constitution.

Background and Procedural History

In 2009, Appellants filed suit challenging the State's education policies as invalid under Article IX, section 1(a) of the Florida Constitution. Appellees moved to dismiss, asserting in part that the allegations raised political questions not subject to judicial review, and the motion was denied. Appellees then sought a writ of prohibition in this court, asserting that the claims were not justiciable, as they raised political questions. Sitting en banc, this court voted 7–1–7 to deny the petition for writ of prohibition and allowed the litigation to continue in the trial court. *Haridopolos v. Citizens for Strong Schools Inc.,* 81 So.3d 465, 467 (Fla. 1st DCA 2011) (en banc). The en banc court certified as an issue of great public importance the following question:

> Does Article IX, section 1(a), Florida Constitution, set forth judicially ascertainable standards that can be used to determine the adequacy, efficiency, safety, security, and high quality of public education on a statewide basis, so as to permit a court to decide claims for declaratory judgment (and supplemental relief) alleging noncompliance with Article IX, section 1(a) of the Florida Constitution?

Id. at 473. The dissenting judges would have granted the writ, based on the separation of powers requirement of Article II, section 3 of the Florida Constitution and the political question doctrine. *Id.* at 480–81 (Roberts, J., dissenting). The Florida Supreme Court declined to accept jurisdiction ***1167** to consider the certified question. *Haridopolos v. Citizens for Strong Schools Inc.,* 103 So.3d 140 (Fla. 2012) (unpublished table decision).

Appellants then filed a second amended complaint, alleging that the State's legislative and executive branches had violated their "paramount duty" to provide a "uniform, efficient ... and high quality system of free public schools that allows students to obtain a high quality education" under Article IX, section 1(a), in several respects: (1) the State failed to make "adequate provision" for a system of free public schools, because the overall level of funding for education is deficient; (2) the State failed to administer a "uniform" system of education, because two school choice programs, the Florida Tax Credit Scholarship Program and the John M. McKay Scholarship Program for Students with Disabilities (the McKay Scholarship Program), divert public funds to private schools not subject to the same requirements as public schools; [1] (3) the State failed to provide an "efficient" education system, because the accountability methods utilized by the State are ineffective and because charter schools are mismanaged; (4) the State failed to provide a "high quality" education system because schools provide insufficient services and coursework and have an insufficient number of highly qualified teachers and support staff; and (5) the public school system did not allow students to obtain a high quality education, based on various assessments. [2]

After extensive pre-trial discovery, a four-week bench trial was conducted by the successor circuit judge, in which more than forty witnesses testified and over 5,300 exhibits were submitted. The court made comprehensive findings on a broad range of subjects, including: the structure of Florida's education system; the various policies and programs implemented by the State to achieve its educational goals; the funding allocated for these programs; and

student performance—overall and by various demographics—under state and national assessments and other measures. Ultimately, however, the trial court found all of the issues raised by Appellants regarding educational adequacy, efficiency, and quality were properly considered "political questions best resolved in the political arena," as the organic law did not provide judicially manageable standards by which to measure the State's actions in enacting and implementing educational policies, as the dissenting judges on this court concluded in 2011. [3]

The trial court nevertheless addressed Appellants' arguments on the merits, concluding that the State had made significant efforts and advances in education, leading to sustained improvement on outcomes for Florida students:

> ***1168** [T]he State has made education a top priority both in terms of implementation of research-based education policies and reforms, as well as education funding. The State has an accountability and assessment system that is rated among the best in the nation .... The State has also adopted rigorous teacher certification, training and evaluation standards, resulting in over 94% of courses being taught by teachers who are 'highly qualified' under federal standards.

In addition, the court found that in the last two decades, "K–12 education has been the single largest component of the state general revenue budget. ... [E]ducation funding has outpaced inflation." The court further found that Florida's high school graduation rate has dramatically improved, "with more students of all racial, ethnic and socioeconomic backgrounds graduating than ever before," and that "Florida students have substantially improved their performance on the National Assessment of Education Progress ... a testing program required by federal and state law [and] ... Florida is now among the highest scoring states in the nation." The trial court thus ruled that Appellants had failed to demonstrate beyond a reasonable doubt that the State's education policies and funding were not rationally related to fulfilling its constitutional duty under Article IX, section 1(a) of the Florida Constitution. As to Appellants' challenge to the McKay Scholarship Program, the court concluded the evidence did not support their allegations that the program violated the uniformity requirements of Article IX, section 1(a).

Analysis

[3] Appellants argue that the issues raised do not present a political question, and additionally, that the trial court applied the wrong standard to determine whether the State had complied with Article IX, section 1(a) of the Florida Constitution. Thus, Appellants would have the judicial branch determine: 1) Whether the other two branches of state government have made adequate provision for the public school system; (2) whether the system is uniform, efficient, and of high quality; and (3) whether the system allows students to obtain a high quality education. We agree with the trial court that the terms "adequate," "efficient," and "high quality" as used in Article IX, section 1(a) lack judicially discoverable or manageable standards that would allow for meaningful judicial interpretation, and that an attempt to evaluate the political branches' compliance with the organic law would constitute a violation of Florida's strict requirement of the separation of powers. We therefore affirm the trial court's determination that these issues are non-justiciable, as discussed below.

The concept of a political question as nonjusticiable was comprehensively defined by the United States Supreme Court in *Baker v. Carr,* 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962), and adopted in *Coalition for Adequacy and Fairness in School Funding, Inc. v. Chiles,* 680 So.2d 400, 408 (Fla. 1996). In *Baker,* the United States Supreme Court discussed the political-question doctrine at length, including its jurisprudential foundation, logic, and analysis: "We have said that 'In determining whether a question falls within (the political question) category, the appropriateness under our system of government of attributing *finality* to the action of the political departments and also the *lack of satisfactory criteria* for a judicial determination are *dominant considerations*.' " 369 U.S. at 211, 82 S.Ct. 691 (emphasis added) (quoting *Coleman v. Miller*, 307 U.S. 433, 454–455, 59 S.Ct. 972, 83 L.Ed. 1385 (1939)). There could be no more relevant standard applicable here than the importance of finality, in a case consuming almost a decade of litigation and demonstrating ***1169** the lack of finality inherent in an attempt to litigate such a complex political dispute. The demand for finality in complex public-policy questions is obvious, as legislative and executive decisions

involving billions of dollars and multiple demographic, fiscal and logistical factors must be promptly implemented and then consistently reevaluated. Such a process is clearly not compatible with extensive civil litigation that consumes years in the court system, unlike political decisions, which in Florida are made in an annual 60–day legislative session, during and after which the governor can veto or acquiesce in those decisions and then execute them in the next fiscal year. Finality is inextricably intertwined with the perspective that such profound questions—such as those involved in adopting and executing education policies for millions of K–12 students—must necessarily be performed exclusively within the political branches, which by their nature are far more responsive and prompt to address the needs of parents and students than the courts could ever be.

The second "dominant consideration" cited by the United States Supreme Court in deciding whether a case involves an inherently political question is the "lack of satisfactory criteria." *Id.* This is linked to finality, because the lack of specificity in an operative legal text lends itself to endless litigation over the meaning of subjective and undefined phrases that might function to give guidance to political decision makers as laudable goals, but cannot guide judges in deciding whether a state or local government has in fact complied with the text. Without "satisfactory criteria" to channel discretion in judicial rulings, litigation involving a subjective advisory guideline invites arbitrary and capricious judicial actions which improperly invade the spheres of action of the political branches.

In *Baker,* the Supreme Court provided various "formulations" to be used in deciding whether a case raised a political question not subject to judicial review, stating that "each has one or more elements which identify it as essentially a function of the *separation of powers*." *Id.* at 217, 82 S.Ct. 691 (emphasis added). As analyzed below, Florida requires a strict separation of powers under Article II, section 3 of its organic law. The Court then repeated its view that the lack of objectively ascertainable standards was "prominent" in finding a legal claim to be nonjusticiable, but the court also ruled that "a textually demonstrable constitutional commitment of the issue to a coordinate political department" would constitute strong evidence that the issue was not to be decided by the courts, but instead by another branch of government. *Id.*

In *Coalition*, a case involving the previous iteration of Article IX, section 1, the Florida Supreme Court addressed arguments similar to those raised here, that "the State has failed to provide its students [the] fundamental right" of an adequate education." 680 So.2d at 402. In support of their argument, the plaintiffs alleged that students were not receiving adequate programs "to permit them to gain proficiency in the English language," that poor students were "not receiving adequate education for their greater educational needs," that special-needs students and gifted students were "not receiving adequate special programs," that students in "property-poor counties" were not receiving "an adequate education," that the legislature had not provided adequate capital outlay funds for schools, and that local school districts were "unable to perform their constitutional duties because of the legislative imposition of noneducational and quasi-educational burdens." *Id.* In essence, the supreme court faced a blanket challenge to the adequacy ***1170** of the education system under a prior version of Article IX, section 1.[4] *Id.* at 406.

Applying the criteria in *Baker*, the supreme court determined that "adequacy" was a non-justiciable political question, because the phrase "by law" suggested the issue was committed to the legislature and because—unlike "uniform"—" 'adequacy' simply does not have such straightforward content." *Id.* at 408. While the supreme court declined to hold that an adequacy challenge to the education system could *never* succeed, it concluded that the *Coalition* plaintiffs failed to demonstrate any manageable standards that could be applied without "a substantial risk of judicial intrusion into the powers and responsibilities assigned to the legislature." *Id.*

Following that decision, the 1997–1998 Constitution Revision Commission proposed, and the voters adopted, an amendment to the education provision, which now states:

> The education of children is a fundamental value of the people of the State of Florida. It is, therefore, a paramount duty of the state to make adequate provision for the education of all children residing within its borders. Adequate provision shall be made by law for a uniform, efficient, safe, secure, and high quality system of free

> public schools that allows students to obtain a high quality education ....

Art. IX, § 1(a), Fla. Const.

We agree with the trial court that the terms "efficient" and "high quality" are no more susceptible to judicial interpretation than "adequate" was under the prior version of the education provision, and to define these terms would require "an initial policy determination of a kind clearly for nonjudicial discretion." *Baker*, 369 U.S. at 217, 82 S.Ct. 691; *see also Coalition*, 680 So.2d at 408. Our conclusion is further supported by Florida's strict separation of powers doctrine and by the language of the amended constitutional article itself, which continues to commit the duty to achieve these aspirational goals to the legislative and executive branches of government.

[4] Turning first to the separation of powers, the Florida Constitution imposes a "strict" separation of powers requirement that applies just as vigorously to the judicial branch as it does to the other two branches of government. *State v. Cotton,* 769 So.2d 345 (Fla. 2000). In *Cotton,* the supreme court rejected the argument that the Prison Releasee Reoffender Punishment Act violated the separation of powers provision of Article II, section 3 of the Florida Constitution, holding that because substantive sentencing laws and prosecutorial discretion were vested in the legislative and executive branches respectively, the law imposing mandatory sentences based solely on prosecutorial discretion did not interfere with judicial power. *Id.* at 349–54. In explaining its rationale, the supreme court disagreed with the single dissenting opinion, which relied on New Jersey law that permitted judicial oversight of the executive function of prosecutorial discretion. *Id.* at 352–54. In rejecting the dissenting opinion's view, the majority in *Cotton* noted that Florida's organic law imposes a "strict" separation of powers between the branches of government:

> This Court, on the other hand, in construing the Florida Constitution, has traditionally applied a strict separation of powers doctrine. *Cf.* ***1171** *Avatar Dev. Corp. v. State,* 723 So.2d 199, 201 (Fla. 1998) (recognizing, in the context of a nondelegation analysis, that "[a]rticle II, section 3 declares a *strict separation of the three branches of government* and that: "No person belonging to one branch shall exercise any powers appertaining to either of the other two branches"(emphasis supplied)).
>
> In applying a strict separation of powers doctrine (as the Florida Constitution requires), rather than a doctrine effecting the "dispersal of decisional responsibility in the exercise of each power" (as the New Jersey constitution apparently requires), this Court is compelled to reach a different result. If we were to apply the New Jersey "dispersal of decisional responsibility" concept here, we would be deviating from well-established principles of Florida law, *which would have impact far beyond matters relating to prosecutorial decisions.*

Id. at 353–54 (second emphasis added) (quoting *State v. Lagares*, 127 N.J. 20, 601 A.2d 698 (1992)).

[5] **[6]** **[7]** A strict separation of powers supports the foundation and logic of the political-question doctrine, in that Florida's organic law does not permit a "dispersal of decisional responsibility" which would allow the courts to dictate educational policy choices and their implementation to the other two branches of government, absent specific authorization by law. *Id.* Absent explicit constitutional authority to the contrary, the legislative and executive branches possess exclusive jurisdiction in such matters, as the legislative branch has sole power to appropriate and enact substantive policy, and the executive branch has the sole power to faithfully execute the substantive policies and budgetary appropriations enacted by the legislative branch. The judiciary cannot dictate the manner of executing legislative policies or appropriations in any particular way. *See* Art. II, § 3, Fla. Const. ("No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein."); Art. V, § 14(d), Fla. Const. ("The judiciary shall have no power to fix appropriations.").

To agree with Appellants would entangle courts in the details and execution of educational policies and related appropriations, involving millions of students and billions of dollars, in an arena in which the courts possess no special competence or specific constitutional authority. Further, the drafters of Article IX, section 1(a) declined to allocate such a role to the judiciary. Quite the opposite, the language of Article IX, section 1(a) assigns such matters to the legislative branch, stating that "adequate provision shall be made *by law*." Art. IX, § 1(a), Fla. Const. (emphasis added). The fact that this language remains in the education amendment after *Coalition* demonstrates that the constitution continues to commit education policy determinations to the legislative and executive branches. *See Coalition*, 680 So.2d at 408.

Further, as the trial court recognized here, the lack of any definitive consensus regarding education policies and programs demonstrates the political nature of Appellants' assertions. While "adequate," "efficient," and "high quality" represent worthy *political* aspirations, they fail to provide the courts with sufficiently objective criteria by which to measure the performance of our co-equal governmental branches. Rather, it is the political branches that must give meaning to these terms in accordance with the policy views of their constituents. For these reasons, Appellants failed to demonstrate any meaningful standards under which the courts could find that the State has violated its constitutional duties regarding the ***1172** adequacy, efficiency and quality of the public school system. [5]

Looking to a similar case in another state, we agree with the conclusion of the Pennsylvania Supreme Court that it would be contrary to the very essence of our constitution's educational aspirations for the courts to " 'bind future Legislatures ... to a present judicial view' " of adequacy, efficiency, and quality. *Marrero ex rel. Tabalas v. Commonwealth of Penn.*, 559 Pa. 14, 739 A.2d 110, 112 (1999) (quoting *Danson v. Casey*, 484 Pa. 415, 399 A.2d 360, 366–67 (1979)); *see also Bonner ex rel. Bonner v. Daniels*, 907 N.E.2d 516, 522 (Ind. 2009) (denying declaratory relief because the determination of quality "is delegated to ... sound legislative discretion"). And although we recognize that courts in other states have sometimes purported to define "adequate," "efficient," "high quality," and similar terms in response to challenges to their own public school systems, *see, e.g.*, *Connecticut Coalition for Justice in Education Funding, Inc. v. Rell*, 295 Conn. 240, 990 A.2d 206 (2010) (concluding the state did not provide "suitable" educational opportunities); *Columbia Falls Elementary School District No. 6 v. State*, 326 Mont. 304, 109 P.3d 257 (2005) (holding that funding for education was inadequate and that determination of "quality" education was justiciable, but deferring to state legislature to provide threshold definition of "quality"); *Rose v. Council for Better Education, Inc.*, 790 S.W.2d 186 (Ky. 1989) (concluding that the legislative branch failed to comply with the constitutional requirement of providing an "efficient system of common schools"), we respectfully disagree with those decisions as insufficiently deferential to the fundamental principle of separation of powers imposed on Florida's judiciary and the practical reality that educational policies and goals must evolve to meet ever changing public conditions, which is precisely why only the legislative and executive branches are assigned such power. The New Jersey Supreme Court, for example, while concluding that the legislature failed to comply with its constitutional requirement of a "thorough and efficient" system of free public schools, observed that "what a thorough and efficient education consists of *is a continually changing concept*." *Abbott v. Burke*, 119 N.J. 287, 575 A.2d 359, 367 (1990) (emphasis added). That court further acknowledged the "radical interference with the legislative power" involved in determining that the educational system provided in New Jersey was constitutionally deficient. *Id.* at 376. As noted by our supreme court in *Cotton,* Florida law is much more protective of the separation of powers principle than is New Jersey law. Like the Florida Supreme Court noted in *Coalition*, although "the views of other courts are always helpful, we conclude that the dispute here must be resolved on the basis of Florida constitutional law[.]" 680 So.2d at 404–05.

***1173** **[8]** With respect to a "uniform" system of public schools, Appellants alleged in their second amended complaint that two of Florida's school choice programs, the Florida Tax Credit Scholarship Program and the McKay Scholarship Program, violate this requirement. Unlike the terms adequate, efficient and high quality, the Florida Supreme Court has interpreted the term "uniform" under Article IX in the context of school choice programs. *See Bush v. Holmes*, 919 So.2d 392 (Fla. 2006). As Appellants properly concede, however, the trial court's ruling that they lack standing to challenge the Florida Tax Credit Scholarship Program is controlled by this court's opinion in *McCall v. Scott*, 199 So.3d 359 (Fla. 1st DCA 2016) (holding that appellant parents and teachers lacked taxpayer standing to challenge the Florida Tax Credit Scholarship Program, because it did not violate a specific limitation on the legislature's taxing and spending power, nor did it involve a disbursement from the public treasury). Therefore, the sole uniformity claim on appeal relates to the McKay Scholarship Program.

[9] Appellants argue that the McKay Scholarship Program violates Article IX, because it diverts public funds to private schools, which are not subject to the same standards and oversight as public schools. They rely on *Holmes,* in which the Florida Supreme Court held that another school choice program, the Opportunity Scholarship Program, violated the constitutional requirement that education be provided through a uniform system of public schools. *Holmes*, 919 So.2d at 413. However, in disapproving the Opportunity Scholarship Program, which allowed *any* student attending a failing school to use a scholarship provided by the State to attend

a private school, the *Holmes* court expressly disavowed that its decision would necessarily impact other more specialized educational programs, even if those programs used public funds to pay for a private school education:

> We reject the suggestion by the State and amici that other publicly funded educational and welfare programs would necessarily be affected by our decision. Other educational programs, such as the program for exceptional students at issue in *Scavella [v. School Board of Dade County*, 363 So.2d 1095 (Fla. 1978)], are structurally different from the [Opportunity Scholarship Program], which provides a systematic private school alternative to the public school system mandated by our constitution.

919 So.2d at 412.

Here, like the program at issue in *Scavella*, the McKay Scholarship Program is a specialized scholarship limited to students with disabilities. *See* § 1002.39(2), Fla. Stat. (outlining eligibility requirements for the McKay Scholarship Program); *Scavella*, 363 So.2d at 1098 (describing a program through which exceptional students used public funds to attend private schools). The trial court correctly recognized that this opportunity for students with disabilities involved only approximately 30,000 of the total 2.7 million students in the public schools, and only a fraction of the statewide K–12 public school budget, such that it could not be reasonably argued that the McKay Scholarship Program had a "material affect" on the public K–12 education system. Rather, as the trial court observed, "evidence was presented that [this] school-choice program[ ] [is] reasonably likely to improve the quality and efficiency of the entire system."

The McKay Scholarship Program offers a beneficial option for disabled students to help ensure they can have a "high quality" education. As the trial court recognized, "research has shown that the McKay program has a positive effect on the public schools, both in terms of lessening the ***1174** incentive to over-identify students and by increasing the quality of services of the students with disabilities in the public schools." It is difficult to perceive how a modestly sized program designed to provide parents of disabled children with more educational opportunities to ensure access to a high quality education could possibly violate the text or spirit of a constitutional requirement of a uniform system of free public schools.

Conclusion

Thus, we affirm the trial court's ruling that Appellants' claims must be rejected, as those claims either raise political questions not subject to judicial review or were correctly rejected on the merits.

AFFIRMED.

WINOKUR, J., CONCURS; WOLF, J., SPECIALLY CONCURRING WITH OPINION.

WOLF, J., specially concurring.

In Haridopolos v. Citizens for Strong Schools, Inc., 81 So.3d 465 (Fla. 1st DCA 2011) (en banc), eight judges (a majority of the court) determined that article IX, section 1 of the Florida Constitution did not contain adequate standards by which the judiciary could measure whether the Legislature complied with the terms of the constitutional provision. In my concurring opinion, I agreed with the majority that the case needed to be remanded to the trial court. However, I agreed with the seven dissenting judges that the amendment lacked measureable standards and stated:

> Clearly, it was the intent of the Constitutional Revision Commission that drafted the 1998 amendment to article IX, section 1 of the Florida Constitution to address the decision in Coalition, 680 So.2d 400, by adding language to further elucidate the public's desires concerning the public education system. Unfortunately, this language still did not provide measurable goals by which the court could judge legislative performance and enforce the provision in any particular manner. This case is similar to Advisory Opinion to the Governor —1996 Amendment 5 (Everglades),

> 706 So.2d 278, 279–82 (Fla. 1997), where the public expressed its strong desire that polluters be "primarily responsible" for cleaning up the Everglades, yet the court held the amendment was not self-executing. Similarly, the public's desires here are not sufficiently definite to allow for enforcement without some measurable standards.

Haridopolos, 81 So.3d at 474 (Wolf, J., concurring) (emphasis added).

The trial in this case demonstrated that without measureable standards, there is no way that a trial court can assess whether the Legislature has complied with article IX, section 1 of the Florida Constitution. Both sides presented numerous statistics to support their position, with each side taking different views about which statistical categories best measured compliance with the amendment. The trial court did an admirable job of sorting through the mountain of evidence presented to it. The bottom line is that without measureable standards, the plaintiffs cannot demonstrate that the Legislature has violated constitutional standards.

As I expressed in my original concurring opinion in this case, a litigant may have a cause of action to require the Legislature to implement article IX, section 1 through the adoption of reasonable measurable standards to gauge compliance. The plaintiffs in this case chose not to pursue that remedy. I, therefore, concur.

All Citations

232 So.3d 1163, 351 Ed. Law Rep. 658, 42 Fla. L. Weekly D2640

Footnotes

1 The trial court allowed six parents interested in the Florida Tax Credit Scholarship Program and the McKay Scholarship Program to intervene in the proceedings. The trial court later granted their motion for judgment on the pleadings as to the Florida Tax Credit Scholarship Program, finding that Appellants lacked standing to challenge that program.

2 The second amended complaint also added a claim relating to the State's pre-kindergarten program. The trial court severed that claim, and it is not at issue in this appeal.

3 As to "safe" and "secure," the trial court ruled that these terms are subject to judicially manageable standards, but that Appellants had withdrawn any challenge to the safety or security of the public school system before trial. The court found that these issues were nonetheless tried with regard to the adequacy of funding to meet repair and maintenance needs, but that the evidence submitted did not demonstrate insufficient funding for these needs. As we hold that the overarching question of adequacy is not justiciable, we do not opine on the trial court's conclusion in this regard.

4 At the time of the *Coalition* decision, Article IX, section 1, stated: "Adequate provision shall be made by law for a uniform system of free public schools and for the establishment, maintenance and operation of institutions of higher learning and other public education programs that the needs of the people may require." Art. IX, § 1, Fla. Const. (1996).

5 As to the trial court's additional finding that, even if the issue is not a political question assigned solely to the political branches, Appellants failed to meet their burden to prove "beyond a reasonable doubt that the State's education policies and funding system were not rationally related to the provision 'by law' for a 'uniform, efficient, safe, secure, and high quality system of free public schools that allows students to obtain a high quality education," Appellants contend the trial court applied an overly stringent standard. Appellants urge this court to hold that a lower burden of proof and standard for evaluating the constitutionality of the State's actions should apply in this case and in all cases challenging the State's compliance with its obligations under Article IX of the Florida Constitution. We decline to do so, based on our holding that these claims are not justiciable.