

IN THE SUPREME COURT OF THE STATE OF NEVADA

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DAN SCHWARTZ, in his capacity)
as Treasurer of the State of Nevada,)
)
 Appellant,)
v.)
)
HELLEN QUAN LOPEZ, *et al.*,)
)
 Respondents.)
)
)

Supreme Court No.: 69611

Dist. Ct. No.: 15-OC-00207-1B

**BRIEF FOR THE NEVADA STATE EDUCATION ASSOCIATION
AND THE NATIONAL EDUCATION ASSOCIATION AS *AMICI CURIAE*
IN SUPPORT OF RESPONDENTS**

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NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certifies that *amici* Nevada State Education Association and National Education Association are entities as described in NRAP 26(a), and must be disclosed. These representations are made in order that the judges of this Court may evaluate possible disqualifications or recusal.

Amici have no partner corporations, and no publicly held company owns 10% or more of their stock. Francis C. Flaherty (Nevada Bar No. 5303), Casey A. Gillham (Nevada Bar No. 11971), and Kristen L. Hollar (*pro hac vice* pending), are the only attorneys appearing for *amici* in this case, and no others are expected to appear in this Court in this case. The Dyer-Lawrence Law Firm is the only law firm whose partners or associates have appeared for the party or amicus in the case or are expected to appear in this Court in this case.

DATED this 29th day of March, 2016.



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STATEMENT OF THE IDENTITIES AND INTERESTS OF *AMICI*

The Nevada State Education Association (“NSEA”) is an organization of education professionals, with more than 24,000 members employed in public schools throughout the State of Nevada. The National Education Association (“NEA”) is NSEA’s national affiliate, representing nearly three million education professionals employed by public school districts, colleges, and universities.

NSEA and NEA believe that public education is the cornerstone of our social, economic, and political structure, and that students of all backgrounds have the right to quality public schools. NSEA and NEA also believe that individuals, at their expense, should be free to supplement or substitute public education using non-segregated, nonpublic schools—but that funding arrangements that use tax monies to subsidize private primary and secondary education undermine public education.

In keeping with these principles, NSEA and NEA submit this brief to present sound social science research in support of Respondents’ claim that, far from improving the state of education in Nevada, SB 302’s Education Savings Account Program (“ESA Program” or “the Program”) would cause irreparable harm to public schools.

INTRODUCTION

Amici NSEA and NEA believe that, in considering whether SB 302 complies with the Constitution's command to provide for and maintain a "uniform system of common schools," Nev. Const. art. XI, § 2, this Court will benefit from a deeper understanding of the research regarding the impacts of similar programs and the effects that program design has on those outcomes. This is particularly so in light of the fact that the State has made broad claims that empirical research indicates that the ESA Program will lead to improvement of Nevada's education system.

NSEA and NEA submit this brief to show that empirical research does *not* support these contentions. In Part A we explain that the empirical research on voucher programs shows that even more thoughtfully-designed programs have had no meaningful positive impacts on student achievement. And, as we explain in Part B, particular features of the ESA Program's design make it especially likely to cause socioeconomic stratification in Nevada's education system by concentrating the least advantaged students in public schools. Such an outcome would be inconsistent with the Nevada Constitution's decree that the Legislature create and maintain a uniform system of common schools.

ARGUMENT

A. Research Shows That Voucher Programs Do Not Improve Educational Outcomes Either For Program Participants Or Students Who Remain in Public Schools

In its opening brief the State cites two claims in the legislative record about voucher programs:¹ (1) that such programs are an effective means of improving educational outcomes for participants, and (2) that such programs improve educational outcomes in the public schools by “enhancing competition in the public education system.” (State Br. at 19-21.) As we show in the following, both claims rest on deeply flawed studies by voucher advocates—notably and primarily the publication the State cited from the Friedman Foundation for Educational Choice, Inc., “the nation’s leading advocate for vouchers.”² Rigorous studies conducted by independent researchers reveal just the opposite: students who

¹ The State insisted before the district court that that the ESA Program “is not a voucher program.” Respondents’ Appendix, Vol. I at 134. However, we use the term here both for convenience, as it is the term used in the research, and because it accurately describes the Program according to its primary intent: to use per-pupil monies that would otherwise fund public schools to transfer children to private schools. *Id.* at 2-3 (citing legislative record).

² Editorial Board, *Extra Credit*, WALL ST. J. (Sept. 5, 2001), *available at* <http://goo.gl/VyhQsX>. Indeed, the notion that vouchers can improve public schools originated with Milton Friedman, who speculated that competition amongst a variety of schools might stimulate the improvement of all schools affected. Milton Friedman, *Capitalism and Freedom* 93 (1962). Friedman later founded the Friedman Foundation for Educational Choice to “promote universal school choice.” Friedman Foundation, *Who We Are*, <http://goo.gl/wPbhFY>. Greg
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participate in voucher programs typically show achievement that is equivalent to their similarly-situated public school peers; and research does not demonstrate any beneficial “competitive effect” from voucher programs.

1. In claiming that voucher programs improve the academic performance of program participants, the State, like many voucher advocates in cases similar to this one, relies on a Friedman Foundation publication by Greg Forster (“Friedman Foundation Report”).³ (State’s Brief at 19-20.) As we demonstrate below, the Friedman Foundation Report is a deeply flawed document, and its conclusions are not supported by rigorous, peer-reviewed research.

It is important to stress at the outset that—contrary to assertions made by the State on the basis of the Friedman Foundation’s advocacy literature—the most reputable studies of programs similar to the ESA Program have repeatedly noted the lack of reliable research offering conclusive answers as to their efficacy. In

Forster, author of the Friedman Foundation Report, is a senior fellow at the Friedman Foundation.

³ See Greg Forster, Friedman Foundation for Educational Choice, *A Win-Win Solution: The Empirical Evidence on School Choice* (3d ed. 2013), available at <http://goo.gl/Buf3TA>. There are two earlier iterations of this report. Greg Forster, Friedman Foundation for Educational Choice, *A Win-Win Solution: The Empirical Evidence on School Vouchers* (2d ed. 2011), available at <https://goo.gl/SqM48Y>; Greg Forster, Friedman Foundation for Educational Choice, *A Win-Win Solution: The Empirical Evidence On How Vouchers Affect Public Schools The Empirical Evidence on School Vouchers* (2009), available at <http://goo.gl/ZIQOPm>. The 2013 version is virtually identical to its predecessors, citing only two additional studies.

particular, a 2007 review of the literature by the RAND Corporation (“2007 RAND Study”) undertook an “exhaustive review” of studies on voucher programs and concluded that “none of the important empirical questions [on vouchers] has been answered definitively”—including the question of whether vouchers improve the academic performance of participating students.⁴ Likewise, a recent paper from the National Bureau of Economic Research⁵ (“2015 NBER Paper”) reviewed all of the existing research on vouchers and concluded that many fundamental questions about their merits remain essentially unanswered.⁶

⁴ Brian Gill, *et al.*, *Rhetoric Versus Reality: What We Know and Need to Know About Vouchers and Charter Schools* 217 (RAND Corporation 2d Ed. 2007), available at <http://goo.gl/fsrXIF>.

⁵ Dennis Epple, Ricard Romano & Miguel Urquiola, National Bureau of Economic Research Working Paper, *School Vouchers: A Survey of the Economics Literature* (Sept. 2015), available at <http://goo.gl/1u0v1v>.

⁶ Both the 2007 RAND and 2015 NBER papers are cited extensively herein because these organizations, in contrast to the Friedman Foundation, represent the highest research standards. RAND Corporation is a non-profit institution that has for 70 years focused on “blending scrupulous nonpartisanship with rigorous, fact-based analysis to tackle society’s most pressing problems.” RAND Corporation, *A Brief History of RAND*, <http://goo.gl/bvmwWy>. RAND has been affiliated with 32 Nobel Laureates, including John Nash and Ronald Coase. RAND Corporation, *The Nobel Prize and RAND*, <http://goo.gl/4paUPV>. The National Bureau of Economic Research is a ninety-five-year-old non-profit economic research organization. Twenty-five Nobel Prize winners in Economics have been researchers at the NBER. National Bureau of Economic Research, *About the NBER*, <http://goo.gl/uEbYQS>.

The absence of conclusive research stems in part from the fact that voucher programs are inherently difficult to study.⁷ Selection bias is difficult to control for under the best of circumstances, and all the more so with voucher studies given that programs may attract students who are more socioeconomically advantaged than their peers.⁸ Longitudinal studies that attempt to follow individual students are often disrupted by the tendency of students not to stay in one school for the entire study, and eligibility for programs may change over time.⁹ Peer effects—the impact that classmates have on one another’s achievement—are poorly understood.¹⁰ And there is simply an overall lack of rigor in existing studies, many of which are not peer-reviewed.¹¹

To the extent that rigorous studies have been performed on the impact of particular programs, there has been “no clear consensus that any [voucher

⁷ And as we discuss in Part B, variations in program design often mean that the outcome of one program provides little or no insight into the likely outcome of a program with dissimilar design.

⁸ 2007 RAND Study, *supra* note 4, at 75-77 (describing selection bias as “the single thorniest methodological problem in empirical studies of vouchers and charter schools”).

⁹ Patrick Wolf, *The Comprehensive Longitudinal Evaluation of the Milwaukee Parental Choice Program: Summary of Final Reports 1* (Feb. 2012), available at <http://goo.gl/Q4yN27>.

¹⁰ Angela K. Dills, *Does Cream-Skimming Curdle the Milk? A Study of Peer Effects*, 24 *Econ. Educ. Rev.* 19 (2005) (“[N]o one has been able to isolate the effect of the quality of a student’s peers on achievement.”), available at <http://goo.gl/Xo7AJ2>; 2015 NBER Paper at 41 (discussing lack of research consensus on peer effects).

programs] are having strong effects on test scores.”¹² A 2011 review of voucher studies by the Center on Education Policy (“CEP Meta-Study”) found that the empirical evidence on vouchers is inconclusive, and further found that any gains in student achievement are modest if they exist at all.¹³

The CEP Meta-Study was exceedingly thorough, having reviewed more than 30 studies of voucher programs, reviews of voucher studies (including the 2011 iteration of the Friedman Foundation Report), and critiques of such studies. For each study the CEP authors examined the findings, critiqued the methodology, and offered suggestions to improve the quality of future studies. They concluded that “[w]hile some studies have found limited test score gains for voucher students in certain subject areas or grade levels, these findings are inconsistent among studies, and the gains are either not statistically significant, not clearly caused by vouchers, or not sustained in the long run;” and overall, “achievement gains for voucher students are similar to those of their public school peers” among students with similar prior achievement, mobility, and minority status.¹⁴

¹¹ 2007 RAND Study, *supra* note 4, at 75-79.

¹² Brookings Institution, *3 Urban and Regional Policy and Its Effects 5* (Nancy Pindus, *et al.*, eds. 2008).

¹³ Alexandra Usher & Nancy Kober, Center on Education Policy, *Keeping Informed about School Vouchers: A Review of Major Developments and Research* (2011), available at <http://goo.gl/faCu4s>.

¹⁴ *Id.* at 9.

Another study, published by the Federal Reserve Bank of Chicago in 2008, concluded that “the best research to date finds relatively small achievement gains for students offered education vouchers, most of which are not statistically different from zero.”¹⁵ And the 2015 NBER Paper reached the same conclusion, finding that a “large proportion of the most rigorous studies suggest that being awarded a voucher has an effect that is statistically indistinguishable from zero.”¹⁶

Rigorous studies of particular voucher programs paint a similar picture. A 2010 study of Milwaukee’s voucher program—the oldest program in the United States—found “no difference” in performance between achievement gains of private school voucher recipients and a matched sample of public school students.¹⁷ One study—of the District of Columbia’s voucher program—does show higher *graduation rates* among some participant subgroups as compared with non-participants, but the key finding of the study was: “*There is no conclusive evidence that the [voucher program] affected student achievement.*”¹⁸ And a study released

¹⁵ Cecilia Rouse & Lisa Barrow, Federal Reserve Bank of Chicago, *School Vouchers and Student Achievement: Recent Evidence, Remaining Questions* at 20-24 (2008), available at <http://goo.gl/W1JJ3C>.

¹⁶ 2015 NBER Paper, *supra* note 5, at 3.

¹⁷ John Witte, *et al.*, *The MPCP Longitudinal Educational Growth Study Third Year Report* 14, 15 (2010), available at <http://goo.gl/P4IDyx>.

¹⁸ Patrick Wolf, *et al.*, U.S. Department of Education, *Evaluation of the D.C. Opportunity Scholarship Program* at pp. xv, xx n.6, xxi. (June 2010), available at <http://goo.gl/Z5Mzll> (emphasis added). In any event, graduation rates are a poor measure of school performance even among public schools. Daria Hall, The

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last month of the Louisiana Scholarship Program found that the use of a voucher was “associated with statistically significant—and substantively large—*negative* effects on student math achievement in the first two years of the program’s statewide expansion.”¹⁹

The Friedman Foundation Report completely ignores the absence of any consensus among independent academic researchers that vouchers have positive effects on participants, glibly asserting that the “evidence points clearly in one direction ... consistently show[ing] that choice improves academic outcomes for participants and public schools.”²⁰ In reaching this conclusion, the Friedman Foundation Report, in the words of one reviewer, “selectively reads the evidence”

Education Trust, *Getting Honest About Grad Rates: How States Play The Numbers And Students Lose* (June 2005), <http://goo.gl/3IJjXd>. Indeed, given that the District’s program, like virtually all other voucher programs, does not require participating private schools to use the same graduation standards as public schools, the finding that the voucher program increased participants’ graduation rates simply suggests that the voucher schools had more lax graduation criteria than did the public schools.

¹⁹ Jonathan Mills & Patrick Wolf, Education Research Alliance for New Orleans, *The Effects of the Louisiana Scholarship Program on Student Achievement After Two Years*, 3-4, 35 (Feb. 2016) (emphasis added), available at <http://goo.gl/8Qv7Dw>.

²⁰ Friedman Foundation Report 2013, *supra* note 3, at 1. The Friedman Foundation Report’s conclusion as to voucher programs’ effects on public schools is discussed in the following section.

and relies on studies that were themselves “produced by voucher advocacy organizations” and that lack “methodology, interpretation, and generalizability.”²¹

2. The other popular argument in support of voucher programs cited in the State’s brief is as unfounded as the first. The State suggests that, even if vouchers do not improve achievement among students who actually participate in the program, they are still beneficial because they “improve public schools” by “introducing healthy competition that keeps schools mission-focused.” (State Br. at 20, citing the Friedman Foundation Report and *Minutes of the Assembly Committee on Education*, 78th Sess. 30 (Nev. May 28, 2015).)

As noted above, the Friedman Foundation Report, like many studies by voucher advocates, completely ignores widespread disagreement over the impact of voucher programs. This fundamental flaw is apparent not only with respect to the Report’s conclusion on the question of whether such programs increase achievement among participants, but also its conclusion on the question of whether they improve public schools through a competition effect. As to the latter, the report asserts that there is consensus among studies that “vouchers improve

²¹ Christopher Lubienski, *Review of a Win-Win Solution* at 5 (Nat’l Educ. Policy Ctr. 2009), available at <http://goo.gl/UCxSAM>. Dr. Lubienski’s paper reviews the 2009 version of the Friedman Foundation’s Report. However, as noted *supra* note 3, the 2011 and 2013 versions of the report are virtually identical to the 2009 paper, and thus contain all of the same flaws in methodology and analysis.

outcomes for both participants and public schools.”²² There is in fact no such consensus.

The lack of consensus on the competitive effects of voucher programs, as with the lack of consensus on participant impacts, stems in part from the fact that determining their effects is an exercise fraught with statistical difficulties even in the best of circumstances.²³ Rather than acknowledge these complexities, the Friedman Foundation Report, as noted above, “selectively reads the evidence.”²⁴

For example, the Friedman Foundation Report cites articles from voucher advocate Jay Greene that have been thoroughly debunked by academic studies.²⁵ In one instance, in a peer-reviewed journal Rutgers researchers found that in his work on Florida’s A+ Program, Greene vastly overstated the competition effect because he computed aggregate school gains rather than individual gains, failed to account for an average trend in score growth that had nothing to do with the competition effect, and declined to account for the regression to the mean²⁶ that one expects

²² Friedman Foundation Report 2011, *supra* note 3, at 1.

²³ See *supra* notes 7-11 and accompanying text.

²⁴ Lubienski, *supra* note 21, at 5.

²⁵ See Friedman Foundation Report 2011, *supra* note 3, at 18-19 (citing Winters & Greene, *infra* note 39, and Jay Greene, Manhattan Institute, *An Evaluation of the Florida A-Plus Accountability and School Choice Program*, (2001), available at <http://goo.gl/XgnGkk>).

²⁶ “Regression to the mean” is a statistical phenomenon whereby natural variations in repeated measurements look like real change because the initial measurement was at one extreme of the bell curve. Adrian Barnett, *et al.*, *Regression to the*
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when observing the extreme low end of any statistical distribution.²⁷ They concluded that Greene’s results “were implausible and should have been submitted to additional methodological scrutiny.”²⁸ Indeed, even the Friedman Foundation Report acknowledges that the Greene study was “methodologically simple.”²⁹

In those instances in which the Friedman Foundation Report does cite more rigorous independent studies, it often distorts or misrepresents their findings.³⁰ For example, the Report misrepresents a 2007 case study of the Milwaukee voucher program. That study describes two analyses undertaken by researcher Martin Carnoy and his colleagues.³¹ The first was a replica of an earlier study, which essentially confirmed small short-term gains seen in the first two years of the program among public school students. The Friedman Foundation Report quotes

Mean: What it is and How to Deal with It, 34 Int’l J. of Epidemiology 215 (2004), available at <http://goo.gl/n9GYFZ>. In such situations, subsequent measurements are likely to be relatively less extreme, regardless of causative factors. *Id.* This effect can be minimized by good sampling methods and by performing control studies before the real “intervention” study takes place. It also tends to dissipate with repeated measurements, which may explain why positive effects may be observed in the first year or two of voucher programs but then disappear the longer the program is in place. See CEP Meta-Study, *supra* note 13, at 9.

²⁷ See Gregory Camilli and Katrina Bulkley, *Critique of “An Evaluation of the Florida A-Plus Accountability and School Choice Program,”* 9 Educ. Pol’y Analysis 7 (2001), available at <http://goo.gl/hRisgN>.

²⁸ *Id.* at 13.

²⁹ Friedman Foundation Report 2011, *supra* note 3, at 18-19.

³⁰ See Lubienski, *supra* note 21, at 5-6.

this portion of the study, then ignores the portion that documented a lack of student progress in subsequent years—even while the number of voucher students increased—as well the authors’ skepticism about “whether traditional notions of competition among schools explain these increased scores in the two years immediately after the voucher plan was expanded.”³² The second Carnoy analysis consisted of an independent—and more sophisticated—original analysis of the program, and found that “test score gains are generally *not* significantly related to various indicators of direct competition associated with families’ increased potential choice of schools.”³³ The Friedman Foundation Report essentially glosses over this finding.³⁴

Rather than addressing the lack of reliable evidence for its conclusions, the Friedman Foundation Report cavalierly insists—without citing any research in support—that the lack of empirical support for voucher programs is in fact evidence of a need for *more expansive* voucher programs.³⁵ This bizarre conclusion is premised, in part, on the notion that voucher programs at least do not *hurt* our

³¹ Martin Carnoy, *et al.*, Economic Policy Institute, *Vouchers and Public School Performance: A Case Study of the Milwaukee Parental Choice Program* (2007), available at <http://goo.gl/foVjtQ>.

³² *Id.* (executive summary).

³³ *Id.* (emphasis in original).

³⁴ See Friedman Foundation Report 2011, *supra* note 3, at 17.

³⁵ *Id.* at 27-29.

system of public education.³⁶ Like many of the other assertions in the Friedman Foundation Report, this point is hotly debated among scholars not on the payroll of voucher advocacy organizations—and is directly contradicted by the most recent study from Louisiana.³⁷ And in any event, the notion that transferring public education funds to private schools (with all the administrative costs involved) on the ground that doing so at least does no harm is—even if true—hardly a sound basis for good public policy.

Beyond the Friedman Foundation Report, voucher advocates advancing the “competitive effects” theory frequently cite a pair of sources discussing Florida’s A+ program³⁸—neither of which is sound. The first is essentially an adaptation of the same study, written by Marcus Winters and Jay Greene, that even the Friedman Foundation Report considered “methodologically simple.”³⁹ As it turns out, that description was generous. In essence, the authors of the article compared Florida test scores on the 2002-03 administrations of the FCAT and Stanford-9 standardized tests to scores from the prior school year, and noted that “F” schools

³⁶ *Id.* at 8.

³⁷ See Mills & Wolf, *supra* note 19.

³⁸ As explained in these two sources, the A+ program assigned letter grades to public schools and then used a system of carrots and sticks—giving \$100 per pupil to schools that improved their ratings by a full letter grade while allowing students attending “F” schools to switch to private school via vouchers—in an attempt to incentivize administrators to improve test scores.

under threat of losing students to vouchers made the greatest test score gains. The authors then concluded that these gains must be attributable to the competitive effects of the A+ program.

It is hardly necessary to point out that one year of test score data is virtually meaningless for purposes of drawing any statistical conclusions. Moreover, the authors also failed to consider any number of other factors—including other reform measures underway at the time such as the state’s implementation of the landmark No Child Left Behind legislation—that could have accounted for the changes. Indeed, one factor is especially likely to have done so: Florida undertook an aggressive effort to end “social promotion”—the advancement of students to the next grade, regardless of academic performance, in order to keep them with their peers—beginning in the late 1990’s,⁴⁰ which culminated in a statute passed in 2002.⁴¹ Retention rates increased due to these policies, such that underperforming students became less likely to advance to material on which they might perform poorly.

³⁹ Marcus Winters & Jay Greene, *Competition Passes the Test*, Education Next (Summer 2004), available at <http://goo.gl/hYQUZJ>.

⁴⁰ U.S. Department of Education, *Taking Responsibility for Ending Social Promotion: A Guide for Educators and State and Local Leaders* 13 (1999), available at <http://goo.gl/YTfi4N>.

⁴¹ Fla. Sess. Laws Ch. 387 § 370.

Aside from these glaring problems with the Winters and Greene paper, the basic statistical principle of regression to the mean teaches that one should expect schools with nowhere to go but up to make the largest gains.⁴² Indeed, the authors vaguely admitted that “regression to the mean could be influencing our results.”⁴³

The second study of the A+ Program suffers from similar defects, and it nevertheless found only miniscule gains for subsets of low-income and African-American students, and no statistically significant gains for other students.⁴⁴

In short, if there is any consensus on the competition effect touted by the Friedman Foundation Report, it is that there is no reliable evidence that such an effect exists. A 2009 RAND study on charter schools examined data from eight different geographic areas and found a “near-complete absence of positive competitive effects” on traditional public schools.⁴⁵ The study noted that this finding was “consistent with the predictions of political scientist Frederick Hess ... who has extensively chronicled the inability of local school districts to respond

⁴² Barnett, *supra* note 26.

⁴³ Winters & Greene, *supra* note 39.

⁴⁴ Martin West & Paul Peterson, *The Efficacy of Choice Threats Within School Accountability Systems: Results from Legislatively Induced Experiments*, 116 *Econ. J.* C46, C54 (2006) (“Impacts of the ‘F’ grade on African Americans and those eligible for the federal free lunch programme were about 6% of a standard deviation.”), available at <http://goo.gl/5Xg7EL>.

⁴⁵ Ron Zimmer, *et al.*, *Charter Schools in Eight States: Effects on Achievement, Attainment, Integration, and Competition 90-91* (RAND Corp. 2009), available at <http://goo.gl/QXY11F>.

productively to competitive pressure.”⁴⁶ Studies of voucher programs have likewise found no reliable evidence of positive competitive effects—in 2011 the Cato Institute examined the existing literature on the topic and concluded that “no one theory appears to be predominant among the research community.”⁴⁷ Likewise, the CEP Meta-Study noted modest gains in public school student achievement in a few cases, but found it “difficult, if not impossible to decisively attribute the causes of achievement gains” to voucher programs.⁴⁸

On the whole, research does not establish either that private school choice programs improve achievement among participants, or that they improve educational performance in public schools through competition.

B. The ESA Program’s Design Virtually Guarantees That It Will Harm Nevada Public Schools

As mentioned in the previous section, voucher advocates often claim that even where there is a lack of evidence that voucher programs improve

⁴⁶ *Id.* at 91.

⁴⁷ Matthew Carr, *The Impact of Ohio’s Ed Choice on Traditional Public School Performance*, 31 *Cato Journal* 257, 260 (2011), available at <http://goo.gl/SX2Uo6>. See also Clive Belfield & Henry Levin, *The Effects of Competition Between Schools on Educational Outcomes: A Review for the United States*, 72 *Rev. Educ. Res.* 279 (2002), available at <http://goo.gl/k4lJTt>; Gregory Elacqua, Teachers College, Columbia University, *School Choice in Chile: An Analysis of Parental Preferences and Search Behavior* (2004) (finding that data from Chile do not support the claim that competition improves public schools).

⁴⁸ CEP Meta-Study, *supra* note 13, at 11.

achievement, such programs at least do no harm.⁴⁹ But in fact, existing research on voucher programs provides compelling evidence that the design of the ESA Program will result in significant harm to Nevada public schools. Even though existing voucher programs have done little to improve educational quality, their creators have in most cases at least paid heed to research showing that poorly-designed programs can do real harm to the health of an education system. By contrast, several features of the ESA Program make it highly likely to lead to an unequal system of schools, in which voucher students attending private schools are no better off than they were in the public schools from which they departed, while harder-to-educate students will be far worse off as they become increasingly concentrated in under-resourced public schools.

1. As discussed in detail above, there is broad disagreement about the impact of voucher programs generally. But if there is one area on which even scholars at opposite ends of the ideological spectrum agree, it is that design of a program is “critical to predicting [its] empirical effects,” and that “[s]pecific variations in the details of voucher/charter policies are likely to make a big difference in many of the empirical outcomes.”⁵⁰ Accordingly, both predictive

⁴⁹ See *supra* notes 35-37 and accompanying text.

⁵⁰ 2007 RAND Study, *supra* note 4, at 74; xviii. See also Rajashri Chakrabarti, Federal Reserve Bank of New York, *Impact of Voucher Design on Public School Performance: Evidence from Florida and Milwaukee Voucher Programs* 32 (2008) (Cont'd...)

research models and empirical studies on existing voucher programs have emphasized that design is critical.⁵¹ Yet the ESA Program contains none of the design features recommended by researchers.

The 2007 RAND study identified a number of design features that would give voucher programs the best possible chance of increasing student achievement and avoiding harm to the overall system of education—several of which are highly significant for purposes of analyzing the ESA Program. Perhaps the most straightforward of these is targeting vouchers to at-risk students—a strategy currently employed by all voucher programs in the United States, aside from Nevada’s ESA Program.⁵² Targeting cannot require the best private schools to participate, nor can it compel them to accept at-risk students—and indeed they typically choose to do neither⁵³—but it does ensure that any participating schools

(“[U]nderstanding the effect of different voucher designs is essential to the formulation of effective voucher policies.”), available at <https://goo.gl/s5CTSX>.

⁵¹ *Id.* See also 2015 NBER Paper, *supra* note 5, at 4.

⁵² 2015 NBER Paper, *supra* note 5, at 23 n.36 and Tables 1 and 2. See also Hanover Research, *Assessing the Effectiveness of School Voucher Programs* 6 (2013) (“Of the 17 publicly-funded voucher programs in the U.S., seven are open only to students with special needs, six are means-tested, two are open to students who lack public schools at their grade level, one is based solely upon students’ enrollment in failing schools, and only one is open to all school-age children.”), <http://goo.gl/oSShvr>. The one program described as “open to all school-age children” was subsequently struck down as unconstitutional by the Colorado Supreme Court. *Taxpayers for Public Educ. v. Douglas County Sch. Dist.*, 351 P.3d 461 (Colo. 2015).

⁵³ 2015 NBER Paper, *supra* note 5, at 14 n.22 (discussing Chilean program).

will serve low-income and special needs students, and can mitigate any harmful systemic effects on the public schools.⁵⁴

Aside from targeting, the RAND study identifies various other methods that can be used, individually or in concert, to reduce stratification that may result from voucher programs. For example, participating schools can be required to practice open admissions—with the aim of making “school choice” meaningful to *families*, rather than simply allowing schools to choose students. The RAND study also suggests providing supplemental funding for special needs students, both to subsidize the higher costs associated with educating them and to incentivize private schools to admit them. It suggests forbidding participating schools from charging tuition above the amount of the voucher—a practice that may exclude lower-income students from the best private schools, which almost uniformly charge tuition that is several times the amount of a voucher. Finally, it urges policymakers to ensure that there is no information gap among parents that would skew participation towards students with more advantaged and engaged parents.⁵⁵

The 2015 NBER Paper also points to research highlighting the importance of many of these same design features. Noting that answers to the most fundamental questions about voucher programs’ impacts “depend on voucher

⁵⁴ 2007 RAND Study, *supra* note 4, at 240.

⁵⁵ *Id.* at 239-44.

design,” the paper reports that virtually all scholars now understand that a “laissez-faire” voucher design like that advocated by Milton Friedman⁵⁶ will induce “cream-skimming”—the drawing away of the most advantaged students to private schools—and lead to a highly stratified system of education.⁵⁷ Accordingly, NBER suggests the use of measures such as requiring over-subscribed private schools to admit students on a lottery basis, requiring that private schools accept vouchers as full tuition payment, and providing incentives (financial or otherwise) for schools to enroll “less able” students.⁵⁸

In sum, there is widespread agreement among academic experts that voucher programs that focus on encouraging private schools to serve at-risk students will be most effective at mitigating the cream-skimming effect.⁵⁹ Conversely, there is broad agreement and substantial evidence that programs that allow participating schools to choose their students are most likely to see widespread stratification.⁶⁰

⁵⁶ See generally Milton Friedman, “The Role of Government in Education,” Chapter 6 in *Capitalism and Freedom* (1962).

⁵⁷ 2015 NBER Paper, *supra* note 5, at 18-19.

⁵⁸ *Id.* at 22.

⁵⁹ *Id.* See also Helen Ladd, *School Vouchers: A Critical View*, 16 J. Econ. Perspectives 3, 19-21 (2002); Caroline Hoxby, *School Choice and School Competition: Evidence from the United States*, 10 Swedish Econ. Pol’y Rev. 9, 56-61 (2003) (discussing how program design in some voucher programs has mitigated cream-skimming), available at <http://goo.gl/AMgE3B>.

⁶⁰ Ladd, *supra* note 59, at 13 (predicting that vouchers would “contribute to stratification to the extent that they placed low income families in a less favorable position to exercise choice than higher income families.”).

2. The ESA Program contains none of the features researchers deem critical to designing a voucher program that at least does no harm. Indeed, the Program breaks every rule in this respect: it is not geared towards at-risk students; private schools are not required to practice open admissions, they do not need to admit students on a lottery basis if demand for seats outpaces supply, and they may charge tuition in excess of the voucher amount; and no other mechanisms exist in the Program to ensure that private schools serve the neediest students. Consequently, the highest-income, highest-achieving students will find it easiest to take advantage of the Program.⁶¹

At the same time, the screening procedures employed by participating schools will result in few voucher options for at-risk students. While participating private schools will presumably have to refrain from discriminating against prospective students based on certain characteristics protected by federal or state law—such as race—the Program imposes no requirement that participating schools be open to all students. For example it does not prohibit discrimination

⁶¹ The Program nominally requires public school attendance prior to receiving a voucher, but the requirement can be met by existing private school students if they enroll in just one public school class for 100 days. SB 302 § 7. Pending regulations would also allow students entering school for the first time to receive vouchers under the Program even if they have never attended public schools. Nevada State Treasurer, *Third Revised Proposed Regulation*, LCB File No. R061-15, § 9 (Nov. 9, 2015), available at <http://goo.gl/mLGWfK>.

against students due to past behavior problems, perceived academic ability, religious affiliation or belief, or sexual orientation.

Indeed, a review of the informational materials of Nevada private schools shows that most private schools discriminate in admissions on the basis of disability,⁶² behavior problems,⁶³ religion,⁶⁴ sexual orientation,⁶⁵ or academic ability⁶⁶—and they often discriminate on the basis of several of these categories. Moreover, outside of Reno and Las Vegas, virtually all of Nevada’s private schools are religiously affiliated.⁶⁷ And to the extent that such data is available, it appears that *all* of the private schools at which an ESA award would cover the full

⁶² For example, Grace Christian Academy does not accept disabled students, *GCA Parent-Student Handbook* 37, <http://goo.gl/wjYkHG>; Sage Ridge School provides “no or minimal accommodations” to special needs students, <http://goo.gl/6QmkBk>.

⁶³ Virtually all of Nevada’s private schools reserve the right to expel students for behavioral infractions.

⁶⁴ For example, Bethlehem Lutheran School requires families to agree to attend church. BLS Enrollment Packet 2, <http://goo.gl/GFRkdx>. Faith Christian Academy requires parents to be Christians. FCA Handbook at 5-6 <http://goo.gl/EUitGD>. In addition, most Catholic schools prioritize Catholic students for admission or offer a discount to parishioners, as with Bishop Gorman High School. <http://goo.gl/72AABJ> (explaining admission priority); <http://goo.gl/o9VK1n> (reflecting parishioner discount).

⁶⁵ For example, International Christian Academy discriminates against students who are gay or whose parents are gay. ICA Moral Principle Agreement, Enrollment Packet 13, <http://goo.gl/GH3HWD>.

⁶⁶ Most private schools require submission of test scores and existing grades as part of a student’s admissions package, and most reserve the right to eject pupils for failure to perform well academically.

⁶⁷ See Nevada Department of Education, *Private School Directory 2015-16*, <http://goo.gl/IxUfh1>.

cost of tuition are religious—schools where non-religious students and special needs students may be unwelcome or at least disadvantaged in the admissions process.⁶⁸ Under these policies, particularly given most private schools’ practice of discrimination against special needs students, the most difficult-to-educate students will likely find it impossible as a practical matter to use ESA funds to attend a private school.

The cream-skimming effect in Nevada will be further aggravated by the fact that ESA vouchers will not cover the total cost of education at most participating schools. Few private schools in Nevada charge tuition at levels that would be fully covered by an ESA Program voucher beyond the elementary school level.⁶⁹ The number of private high schools in Nevada is small—the Nevada Department of Education lists just over 30 private schools in the entire state serving grades 9-12⁷⁰—and their tuition nearly always exceeds the voucher amount; indeed, many private high schools charge tuition that is two to four times the maximum ESA

⁶⁸ *Id.*

⁶⁹ See Trevon Milliard, *Most Takers For Private School Money Come From Nevada's Wealthiest Areas*, Reno Gazette Journal (Oct. 29, 2015) (“The average annual tuition of a Nevada private elementary school is \$7,432, increasing to \$8,543 in middle school and \$10,726 in high school.”), available at <http://goo.gl/dZosgF>.

⁷⁰ See *supra* note 67.

award.⁷¹ Furthermore, there is nothing in SB 302 or its proposed regulations prohibiting schools from raising tuition levels for voucher students, charging them additional fees, or declining to grant them financial aid on equal footing with non-voucher students. Finally, private schools typically do not provide transportation, adding an additional logistical barrier for low-income students.⁷²

There is evidence that the cream-skimming that would appear inevitable in light of the ESA's design is already occurring. An early analysis by the Reno Gazette-Journal revealed that 80 percent of ESA Program applicants lived in neighborhoods where household incomes are above the state median.⁷³ By contrast, only about 7 percent of applicants lived in low-income areas, even though over half of Nevada's public school students are low-income.⁷⁴

3. This cream-skimming effect will be seriously detrimental to Nevada's public schools. While the ESA Program is unique among U.S. voucher schemes,

⁷¹ For example, Sierra Lutheran High School in Carson City charges over \$8,000 in tuition and fees <http://goo.gl/TDgjCT>; The Meadows School in Las Vegas charges over \$24,000 for high school students, <http://goo.gl/dIVwjT>; and Bishop Manogue Catholic High School in Reno charges over \$10,000, <http://goo.gl/doQZ7j>.

⁷² A recent study of North Carolina's charter school system found that a lack of transportation "coincides with lower enrollment of low-income students." Shelby Dawkins-Law & Azaria Verdin, North Carolina State Board of Education, *Public Charter Schools with Transportation: Increasing Access to Learning Opportunities for All Students* (Aug, 2013), <http://goo.gl/rcVHVh>.

⁷³ See Milliard, *supra* note 69 (comparing data on applicants to the ESA Program with Census Bureau data).

⁷⁴ *Id.*

there is a long-standing voucher program like it—one that confirms the accuracy of researchers’ predictions. In 1981, Chile implemented a large-scale voucher program “strongly based” on Milton Friedman’s ideal of a market-based education system.⁷⁵ This program remained in place largely unchanged for over 20 years—making it extraordinarily stable among voucher programs and thus especially useful in determining long-term effects.⁷⁶ Chile’s voucher program matches the design of the ESA Program in almost every respect. It allows any student wishing to attend a private school to take her per-pupil funding from the public schools and use it to attend a participating private school.⁷⁷ As in Nevada, participation is not means-tested, admissions to participating schools are not open, and private schools are permitted to—and do—reject students whom they view as potentially low-performing.⁷⁸

The outcome of Chile’s program has, tragically, reflected what researchers would predict based on its design. It has improved nothing about Chilean education save for enrollment figures at private schools, with the proportion of school-age children attending private schools roughly doubling in the decade following the

⁷⁵ 2007 RAND Study, *supra* note 4, at 113.

⁷⁶ Chang-Tai Hsieh & Miguel Urquiola, *The Effects of Generalized School Choice on Achievement and Stratification: Evidence from Chile’s Voucher Program*, 90 J. Pub. Econ. 1477, 1478, 1480-81 (2006), available at <http://goo.gl/Ht5OQz>.

⁷⁷ *Id.* at 1478.

⁷⁸ *Id.* at 1498-99.

program's creation.⁷⁹ To meet this demand, the number of private schools increased—but most of the new entrants were for-profit schools of relatively low quality.⁸⁰ On the other hand, elite private institutions largely opted to continue operating without public funding and their enrollment numbers stayed relatively constant.⁸¹

The program did not improve schooling outcomes in Chile. Instead, the country saw an overall decline in student achievement following the implementation of the program—a decline that was especially pronounced in public schools where vouchers lured the largest number of students away to private schools.⁸² And the cream-skimming practiced by private schools resulted in middle class flight from public schools, such that Chile now has the second most socio-economically stratified education system among OECD countries.⁸³ This outcome is consistent with the 2007 RAND study's prediction that “removing high-

⁷⁹ *Id.* at 1481.

⁸⁰ *Id.* at 1482-83.

⁸¹ *Id.* at 1480.

⁸² Hsieh & Urquiola, *supra* note 76, at 1488, 1498-99.

⁸³ 2015 NBER Paper, *supra* note 5, at 37 (citing Cristián Bellei, Juan Pablo Valenzuela, & Danae De Los Ríos, *Segregación Escolar en Chile* in Sergio Martinic and Gregory Elacqua, eds., *Fin de Ciclo?* 219 (UNESCO 2010), available at <http://goo.gl/CJ5Y1k>). The state of Chile's education system has led to persistent student protests. *Id.* at 38, 55-56; Gram Slattery, *Chile's Emboldened Students Back On Streets To Defy Government*, Reuters (June 25, 2015), <http://goo.gl/OXixre>.

achieving students will reduce the achievement of those left behind.”⁸⁴ It is difficult to imagine that Nevada will escape similar results if the ESA Program is implemented.

Voucher proponents frequently argue that, since “the funding follows the student” under programs like the ESA Program, public and private schools are on equal footing and need only compete to attract more students. This is not necessarily the case. Each student requires somewhat different funding and resources, but when a student enrolls in the ESA Program the public school will lose funding based on *average* per-pupil cost. The design of the ESA Program is such that the students most likely to use vouchers are also those most likely to take more funding away from the district than it costs to educate them. At the same time, public schools must continue to be open to all students—including children whose needs require greater than average resources. And they must provide a much wider range of services than private schools, such as special education, transportation, food services, and vocational education. Costs for these programs may remain relatively constant even if there is a small to moderate decline in enrollment due to the ESA Program. Likewise, many fixed overhead costs remain

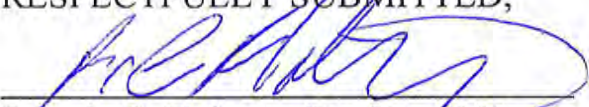
⁸⁴ 2007 RAND Study, *supra* note 4, at 236. See also Robert Bifulco, *et al.*, *The Effects of Public School Choice on Those Left Behind: Evidence from Durham, NC*, 84 Peabody J. of Educ. 130 (2008) (finding that a cream-skimming effect resulted from North Carolina’s school choice programs).

the same regardless of enrollment levels, meaning that when the funding assigned to one student leaves a public school an equal budgetary reduction cannot necessarily be made. In sum, if the Program causes a significant shift in the student bodies of public schools, a decline in educational services will likely result.

CONCLUSION

This Court's consideration of the constitutional issues presented by this lawsuit should not be colored by ill-founded claims about the educational merits of voucher programs advanced by the State. Research examining the impact of voucher program design uniformly suggests that a program like Nevada's will lead to stratification and decline in public school quality. The district court correctly found that this was not what the framers of the Nevada Constitution envisioned when they directed the Legislature to establish and maintain a "uniform system of common schools." Nev. Const. art. XI, § 2.

RESPECTFULLY SUBMITTED,


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NRAP 28.2 CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word, Times New Roman, 14 point font.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 6,961 words.

3. Finally, I hereby certify that I have read this *Amici Curiae* brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be

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subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 29th day of March, 2016.



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CERTIFICATE OF SERVICE

I hereby certify pursuant to NRCP 5(b) that, on this 29th day of March, 2016, I caused the foregoing BRIEF FOR THE NEVADA STATE EDUCATION ASSOCIATION AND THE NATIONAL EDUCATION ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS to be electronically filed with the Court and, therefore, to be served by way of the Court's eFlex electronic filing system to the parties listed below:

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