

‘UNIFORMITY’ RULINGS JEOPARDIZE SCHOOL-CHOICE PROGRAMS

BY DOUG TUTHILL

Whether Florida needs a separately appointed state commission to authorize charter schools is a question on which reasonable people can disagree. But the problem with an appellate court having thrown out the 2006 law establishing the Schools of Excellence Commission is not merely that one tool aimed at giving students more educational options was eliminated. It is that a Florida court, for the second time in three years, turned to a constitutional provision with roots in the 19th Century to sort out an education policy dispute in the 21st Century.

“This statute,” wrote the First District Court of Appeal on Dec. 2 in an opinion only seven paragraphs long, “permits and encourages the creation of a parallel system of free education escaping the operation

and control of local elected school boards.” Those words echoed the 2006 Florida Supreme Court decision invalidating Gov. Jeb Bush’s Opportunity Scholarship program:

“It diverts public dollars into separate private systems parallel to and in competition with the free public schools.”

This judicial reasoning is particularly troublesome because it raises constitutional doubts about numerous other schools operated and controlled by the state, including five university laboratory schools,

the Florida Virtual School, the Florida School for the Deaf and the Blind, the Arthur Dozier School for Boys, and all of the state schools for juvenile offenders. But that is where this pitched legal battle looks more like a game of constitutional gotcha.



BigStockPhoto.com

No one, not even Ronald Meyer, the attorney who represented the Florida School Boards Association in the charter case and proclaimed its results as “far-reaching” in an interview with *Education Week*, is arguing to close the Florida Virtual School.

Rather, these lofty arguments, rooted in a constitutional provision calling for a “uniform” system of schools, are a form of selective prosecution, and they are anathema to future education innovations.

In the charter schools case, the 14 elected school boards that filed suit were responding to a law that took away their ability to approve or reject new charter schools unless the Board of Education granted them “exclusive authority.” Roughly 20 states allow other authorizers on the belief that school boards are too conflicted to objectively evaluate charter school applications, and the record suggests some Florida districts show bias against charter schools. On the other hand, 358 Florida charter schools with 105,239 students have blossomed in a dozen years without a state commission, and the state was clumsy, at best, in applying the law. The grant of “exclusive authority” was to be based on whether a district had provided “fair and equitable treatment” to charter applicants, but the Board of Education ended up approving only three districts and rejected even those that had never received a charter application.

Predictably, the school boards pointed to a constitutional provision empowering them to “operate,

control and supervise all free public schools within the school district” and the state countered with the provision that says “adequate provision shall be made by law for a uniform, efficient, safe, secure, and high quality system of free public schools.” But Meyer also turned to the 2006 *Bush v. Holmes* decision, arguing that the charter commission law created a “competing, non-uniform system of education.” As applied to charter school authorization, he wrote, the “uniform system” meant “a structure that requires single-county school districts governed by a district school board.”

That definition is hard to square with either the legislative history or previous court declarations on uniformity, but it is certainly encouraged by the *Holmes* decision. In *Holmes*, the Supreme Court went so far as to describe “uniformity” as the need for a uniform approach in: school accreditation; teacher certification and education qualifications, including a college GPA of at least 2.5; background screening for employees; and academic standards, reading curriculum and the provision of courses that teach “the contents of the Declaration of Independence, the essentials of the U.S. Constitution, the elements of civil government, Florida state history, African-American history, the history of the Holocaust, and the study of Hispanic and women’s contributions to the United States.”

That description led Jamie Dycus, an ACLU attorney and former high school teacher who wrote a thorough

analysis of the *Holmes* decision as a Yale Law School student, to this rather blunt conclusion: “The court’s cramped, simplistic definition of uniformity, unmoored from all possible sources of guidance, is impossible to justify on any terms.”

The uniformity clause first appeared in the 1868 Constitution, after Reconstruction, citing the need for a “uniform system of Common Schools” as a clear expression that all children deserve a fair educational opportunity no matter their station in life. Courts have generally embraced that history, with most of the struggles related to whether that fair opportunity translates into a certain level of financial commitment. In two of the most recent uniformity cases, in fact, school districts argued the other side.

In 1991, the St. Johns School Board fought back attempts to repeal a school impact fee by arguing that the uniformity clause did not require uniform funding sources across all 67 counties. The high court agreed, writing: “The Florida Constitution only requires that a system be provided that gives every student an equal chance to achieve basic educational goals prescribed by the legislature.” In 1993, the Sarasota School Board argued that it should be able to raise extra taxes locally because “the Constitution does not require that every school district receive equal funding nor does it require all school

districts to keep their educational programs at an artificially low level for the sake of uniformity.” The court said the district needed legislative permission for additional taxes, and Justice Gerald Kogan wrote a notable concurring opinion: “Florida law now is clear that the uniformity clause will not be construed as tightly restrictive, but merely as


establishing a larger framework in which a broad degree of variation is possible.”

That larger framework and broad variation have now given way to a quirky judicial definition that functions more as a threat than a precedent. For example, if uniformity means every teacher must be certified, then dual enrollment programs for high


school students are unconstitutional because the community college instructors who teach most of these courses have no K-12 certification. If uniformity means that only schools managed by county school boards are permissible, then the state-governed Florida Virtual School is unconstitutional. And if “uniformity” means no “parallel” systems, then all charter schools are unconstitutional since they operate under different rules and regulations. Even private schools serving pre-kindergarten, disabled, and low-income students are constitutionally suspect.

Many new and older forms of

To page 65 >



***“And if
‘uniformity’
means no
‘parallel’
systems,
then all
charter schools
are
unconstitutional.”***



debt to Sir Antony Fisher; and in addition, all of the people throughout the world who regard Margaret Thatcher as a champion of liberty, might well include the name of Antony Fisher in their prayers of thanks. ❧

Endnotes

¹ The new book titled *Funding Fathers: The Unsung Heroes of the Conservative Movement*, was written by Nicole Hoplin and Ron Robinson of the

Intercollegiate Studies Institute. Hoplin and Robinson have provided leadership for the conservative movement for many years through their writings. *Funding Fathers* has been the primary source for the background information on Fisher in this article. I have drawn heavily on Hoplin and Robinson in frequent references, and have been less concerned about the common bibliographic formalities than would be expected in a more scholarly document. I wish to express thanks to my friends Nicole Hoplin and Ron Robinson for writing an outstanding book to acquaint all of us with the giants who did much to create the present-day conservative movement and the think tanks that have so effectively advanced that movement.

UNIFORMITY RULINGS *(Continued from page 43)*

educational innovation now reside in this legal limbo that neither side seems eager to resolve. Gov. Charlie Crist and the Department of Education (DOE) declined to appeal the charter ruling, and the education groups that supported this lawsuit have yet to tackle the Florida Virtual School or dual college enrollment or the 136,436 four-year-olds in mostly private pre-kindergartens.

No one can say where this 19th Century definition of “uniformity” will lead, and this uncertainty is destabilizing and counterproductive. Public education today is an expanding continuum of options, including online classes, fundamental schools, magnet programs, career academies, dual enrollment, advanced placement, private scholarships for disabled students, and private scholarships for low-income students. A recent DOE report found that one in every four students is now enrolled in education offerings that are different from the traditional public school setting.

Most of these options didn’t exist a

generation ago, much less in the late 19th Century. To dismiss them as “parallel systems” that lack uniformity is to condemn their very educational purpose. They tailor learning to the individual needs of students, and they exist precisely because they do make schooling less uniform. These choices are part of a continuum of publicly funded learning strategies, and their uniqueness is their strength. If every attempt to meet the needs of individual students is now subject to this antiquated constitutional test, then we might as well abandon our global economic aspirations and hand students quill pens. ❧

Doug Tuthill is President of the Florida School Choice Fund, which promotes educational options and oversees the Corporate Tax Credit Scholarship program. He is a lifelong educator who previously served on the Florida Commission on Education Reform and Accountability and was elected president of the Pinellas County teachers’ union.