

IN THE COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO

COLUMBUS CITY SCHOOL
DISTRICT, *et. al.*,

Case No. 22-cv-000067

Plaintiffs,

JUDGE JAIZA N. PAGE

v.

STATE OF OHIO, *et. al.*,

Defendants,

v.

CHRISTOPHER BOGGS, *et. al.*,

Intervenor-Defendants,

BRIEF OF *AMICUS CURIAE*

OHIO ADVOCACY AND LEGAL SERVICES ORGANIZATIONS

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Interests of the Amicus Curiae

Amicus Curiae are advocacy and legal services organizations committed to promoting opportunity for and protecting the rights of low-income individuals and individuals with disabilities in Ohio.

The Civil Legal Aid Amici Curiae parties include **Southeastern Ohio Legal Services, The Legal Aid Society of Columbus, The Legal Aid Society of Cleveland, Community Legal Aid Services Inc., Advocates for Basic Legal Equality Inc., and Legal Aid of Western Ohio.** These Ohio legal aid organizations have a particular interest in this case as its outcome directly affects the rights and opportunities of low-income Ohio families. Civil Legal Aid provides representation in a broad range of civil matters to low-income Ohioans, including assistance in K-12 education law matters. Therefore, these Amici are well situated to inform the Court on this matter of great importance.

Disability Rights Ohio is a non-profit corporation with a mission to advocate for the human, civil and legal rights of people with disabilities in Ohio.

The Ohio Poverty Law Center, a nonprofit limited liability company, provides support and assistance to the Legal Aid community through project management, policy advocacy, and training.

The League of Women Voters of Ohio, a nonpartisan political organization, encourages informed and active participation in government, works to increase understanding of major public policy issues, and influences public policy through education and advocacy.

I. Introduction¹

The State of Ohio has long recognized public education as an important and indispensable public good. Our Constitution enshrines this value, requiring that the General Assembly will “secure a thorough and efficient system of common schools throughout the state.” Ohio Constitution, Article VI, Section 2. Over time, Ohio has codified the standards that this thorough and efficient system of common schools should be held to. The State has passed nondiscrimination laws that specifically protect students in public schools against discrimination on the basis of race, sex, sexual orientation, and disability. Laws passed at the Federal and State level ensure students with disabilities are provided an adequate public education.

While our legislature was working to create laws to protect our most vulnerable students in our common schools, our highest court recognized the importance of adequately funding these common schools. In 1997, in *DeRolph v. State* (“DeRolph I”), 78 Ohio St. 3d 193, the Ohio Supreme Court declared the State’s school funding system unconstitutional, specifically citing four major flaws in the system, including insufficient state funding for school facilities. In 2000, in the subsequent funding case, *DeRolph v. State* (“DeRolph II”), the Court wrote: “A thorough system means that each and every school district has enough funds to operate. An efficient system is one in which each and every school district in the state has an ample number of teachers, sound buildings that are in compliance with state fire and building codes, and equipment sufficient for all students to be afforded an educational opportunity.” 89 Ohio St. 3d 1, 10 (2000).

¹ *Amicus Curiae* would like to thank the numerous law students who contributed research to this brief. This includes Paul Hergenroeder (Legal Aid Society of Cleveland), James Douglas (Southeastern Ohio Legal Services), Nadine Jones (Community Legal Aid Services), Brandon Burkey (Community Legal Aid Services), Annie Patterson (Advocates for Basic Legal Equality), and Mackenzie Halliday (Community Legal Aid Services).

Ohio's expansion of the EdChoice Scholarship Program, through H.B. 110, threatens these core values, laws, and, most importantly – our system of common schools, itself. This *Amicus* brief explains how the EdChoice Scholarship Program directly and concretely creates educational injuries to the students of Ohio and its school districts, causing particular harm to the student Plaintiffs in this case. This brief focuses on four injuries created by H.B. 110, arguing that EdChoice: 1) exacerbates the underfunding of the public schools in Ohio, harming Ohio's most economically disadvantaged students; 2) promotes racial segregation; 3) directly harms students with disabilities by removing crucial protections and services that students receive in public schools; and finally, 4) subjects LGBTQIA+ students and other students in protected classes to publicly funded discrimination.

This issue is of great public importance. Plaintiffs should be found to have standing to assert their claims, and the Motion to Dismiss and the Motion for Judgment on the Pleadings should be denied.

II. Plaintiffs Have Standing to Challenge Voucher Law

Defendants' contentions that Plaintiffs lack standing should be rejected. According to Defendants, *no one* has standing to challenge the expansion of EdChoice—not the District Plaintiffs whose funding is heavily impacted by EdChoice, not the Ohio Coalition whose members see the direct negative impact of EdChoice on their resources and communities, nor the families whose children attend the public schools who are harmed by this legislation.

Similar to *DeRolph I*, this is a case of great public interest. As the Court explained in that case,

The importance of this case cannot be overestimated. It involves a wholesale constitutional attack on Ohio's system of funding public elementary and secondary education. Practically every Ohioan will be affected by our decision: the 1.8 million children in public schools and every taxpayer in the state. For the 1.8 million children involved, this case is about the opportunity to compete and succeed. . . . [W]e dismiss as unfounded any suggestion that the problems presented by this case should be left for the General Assembly to resolve. This

case involves questions of public or great general interest over which this court has jurisdiction. Section 2(B)(2)(d), Article IV of the Ohio Constitution.

78 Ohio St. 3d at 198.

Here, to establish standing, Plaintiffs must show that they suffered “(1) an injury that is (2) fairly traceable to the defendant's allegedly unlawful conduct, and (3) likely to be redressed by the requested relief.” *ProgressOhio.org, Inc. v. JobsOhio*, 139 Ohio St. 3d 520, 521, 2014-Ohio-2382, 13 N.E.3d 1101, 1104.

The Defendants attempt to argue that the District and Coalition Plaintiffs have not had budgetary injury that resulted from the expansion of EdChoice. Defendants are wrong. As Plaintiffs persuasively allege in their Complaint: (i) for each voucher awarded, the districts lose significantly more funding from the Foundation Funding than they receive from the State per pupil; (ii) EdChoice inflates the calculation of the local share of school funding the districts must appropriate; and (iii) EdChoice is funded directly from the budget appropriation designated for public schools. *Plaintiff's Complaint*, 6-9. The District and Coalition Plaintiffs clearly establish budgetary injury directly caused by H.B. 110 and the expansion of EdChoice. Ohio courts have consistently found that standing depends on whether the plaintiffs have alleged such a personal stake in the outcome of the controversy that they are entitled to have a court hear their case. *Clifton v. Blanchester*, 131 Ohio St.3d 287, 2012-Ohio-780, 964 N.E.2d 414, ¶ 15; *State ex rel. Dallman v. Franklin Cty. Court of Common Pleas*, 35 Ohio St.2d 176, 178-179, 298 N.E.2d 515 (1973).

The Student Plaintiffs have likewise established injury. Defendants cite to *State ex rel. Walgate v. Kasich*, for the position that the Ohio Supreme Court has “rejected” standing for parents of students in the specific context of school funding. 147 Ohio St. 3d 1, 2016-Ohio-1176, 59 N.W.3d 1240. This is an overly broad reading of *Walgate*. In *Walgate*, the Parent Plaintiffs alleged no personal stake in the outcome of the case: their interest was simply that the “public-school system receives the proper funds,” an interest which is shared by the general public. *Id.* at 12. Unlike the Parent

Plaintiffs in *Walgate* however, here the Student Plaintiffs in this case suffer a much more particularized harm.

In this case, not all school districts, and thus not all students, are impacted the same by the voucher program. The McPherson-Donnelly family reside in Cleveland Heights, a district which receives approximately \$1,100 per pupil from the foundation funding for Fiscal Year 2022. *Plaintiff's Complaint*, 39-40. Fergus Donnelly and Malcolm McPherson have specifically alleged that they are harmed because their District *specifically* receives substantially less than their peer EdChoice voucher recipients who live in the district, who receive \$5500 or \$7500, depending on age. *Id.* As explained *infra* in Section IV of this brief, the EdChoice program has also racially resegregated the Cleveland Heights school district, leaving a District whose population does not reflect the racial makeup of the community, thereby creating a direct harm to these Student Plaintiffs. These Student Plaintiffs allege specific injury caused by the EdChoice expansion that can be redressed by this court, meeting the *ProgressOhio.org* standard. The same can be said for the Plaintiffs the Crawford-Hales family, and their children Chase Hales and Savanna Hales, who attend school at Richmond Heights Elementary School.

Finally, unlike the Plaintiffs in *ProgressOhio.org*, none of the Plaintiffs in this case are challenging the EdChoice Voucher program on ideological grounds, they are alleging direct injury that has occurred because of H.B. 110—the program and its expansion. As this brief argues, below, the injury caused by the expansion of the EdChoice Voucher program is widespread and concrete.

III. EdChoice Exacerbates the Underfunding of Public Schools in Ohio, Directly Harming Ohio's Most Vulnerable Students

Although Ohio's system of school funding was found unconstitutional in 1997 in *DeRolph I*, little has been done to address the structural funding deficiencies and barriers that keep many children in Ohio who live in poverty or who have disabilities from receiving an adequate education.

Underfunding has a disproportionate impact on certain communities whose members largely represent a protected class.² The Ohio Advisory Committee to the U.S. Commission on Civil Rights found, in its February 2020 Report “Education Funding and Civil Rights in Ohio,” that “[i]nadequate resources have the most significant impact on impoverished school districts, districts predominantly serving students of color, and students with disabilities.”³ EdChoice compounds the impact of these inadequate resources on our most vulnerable students.

a. EdChoice Diverts Resources from the Public Education Ohio is Obligated to Provide

EdChoice diverts public funds from the State’s budget for public schools to support *nonpublic* schools’ provision of many of the same educational resources and opportunities that their underfunded public school counterparts cannot afford. Most recently, in FY 22, \$390,300,000 was diverted to private schools via the EdChoice voucher program. *Defendants’ Motion*, Table 2. The Defendants and Intervenors focus on the “growth” in their motions—they assert (falsely) that each district will receive “more” funds in FY 22 than in FY 21, thus claiming that the districts have not been “injured.” Numbers alone do not tell the story of harm, however. The “increase” in state funding has not remotely kept pace with inflation. The full amount of funding in FY 2021 was only

² U.S. Department of Education, Office for Civil Rights, “Dear Colleague Letter: Resource Comparability,” 2, 5, (Oct. 1, 2014), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-resourcecomp-201410.pdf> (accessed June 26, 2022).

³ Ohio Advisory Committee to the U.S. Commission on Civil Rights, “Education Funding and Civil Rights in Ohio” (February 2020), <https://www.usccr.gov/files/pubs/2020/03-16-Ohio-School-Funding-Report.pdf>, Finding 2 (accessed June 26, 2022) (hereinafter, “Ohio Advisory Committee 2020 Report”).

\$365.8 Million (5.2%) higher than in FY 2011.⁴ This is far, far below the 19% rate of inflation over that same time period.

Research shows that diverting public education funding to private school voucher programs exacerbates public schools' severe resource deficiencies and directly impacts student educational outcomes.⁵ A 2018 study found that the cost of educating a student in an Arizona private school voucher program was far higher than the simple cost of the voucher.⁶ And a study of Wisconsin's voucher program showed that public school districts risk losing a significant portion of their state aid as the number of vouchers increases, concluding that the program's expansion posed "a significant fiscal threat to public schools."⁷

Furthermore, private school voucher programs shift significant portions of education costs to families. While Ohio public schools provide services such as bus transportation, free or reduced-price lunches, and counseling services, these services come at an additional cost to the families using

⁴ Ohio Education Policy Institute, "Changes in Ohio School Foundation Funding & TPP Replacement from FY 11-22" <http://www.oepiohio.org/index.php/newsroom/spring-2021-newsletter/changes-in-ohio-school-foundation-funding-tpp-replacement-from-fy11-fy21> (accessed June 26, 2022).

⁵ C. Kirabo Jackson, et al., "Do School Spending Cuts Matter? Evidence from the Great Recession," Nat'l Bureau of Econ. Research, NBER Working Paper Series (Jan. 2018), <https://www.nber.org/papers/w24203.pdf> (finding that a drop in per-pupil spending reduced test scores and college-going rates and had a disproportionate impact on students living in poverty) (accessed June 26, 2022).

⁶ Wells, D., "\$10,700 Per Student: The Estimated Cost of Arizona's Private School Subsidy Programs," Grand Canyon Institute (2018), <https://grandcanyoninstitute.org/research/budget/10700-per-student-the-estimated-cost-of-arizonas-private-school-subsidy-programs/>

⁷ Bruecker, E., "Assessing The Fiscal Impact of Wisconsin's Statewide Voucher Program National Education Policy Center," at 4-5 (October 5, 2017), <https://nepc.colorado.edu/publication/funding> (accessed June 26, 2022).

EdChoice vouchers. Many EdChoice vouchers do not even cover the full cost of private school tuition.

b. The EdChoice Program Segregates the Most High-Need Students in Public Schools, Compounding the Inadequate Funding

Research shows that voucher programs concentrate students with economic disadvantages, special education needs, behavioral issues, and the need to learn English in public schools, even as revenues decline for these schools.⁸ Because private schools are legally allowed to refuse to admit or provide adequate programs for students with disabilities, English language learners, and economically disadvantaged students who may require additional resources to access equitable educational opportunities, these students most frequently remain in public schools.

Between 2001 and 2018, the percentage of economically disadvantaged students in Ohio public schools has increased by almost 67%, while the funding has only increased by 22.7%.⁹ And while the base adjustment in funding for Districts for economically disadvantaged students is 10%, the national research suggests about 30% is what the real additional costs are.¹⁰ The state of Ohio, which enrolls 3% of all students in traditional public schools in the country, in 2020 was home to no fewer than seventeen of the country's fifty most socio-economically segregated school district boundaries.¹¹

⁸ Julie F. Mead & Suzanne E. Eckes, Nat'l Educ. Policy Ctr., How School Privatization Opens the Door for Discrimination (December 6, 2018), <https://nepc.colorado.edu/publication/privatization> (accessed June 26, 2022).

⁹ Ohio Advisory Committee 2020 Report at 7 (citing Fleeter Testimony, Cleveland Transcript, p 197 line 22 – p. 198 line 8).

¹⁰ Ohio Advisory Committee 2020 Report, at p. 13-14 (citing Fleeter Testimony, Cleveland Transcript p. 257- line 20- p. 259 line 13).

¹¹ EdBuild, "Fault Lines: America's Most Segregating School District Boundaries," p. 1-2 <https://edbuild.org/content/fault-lines/full-report.pdf> (accessed June 26, 2022).

Research confirms that EdChoice recipients are comparatively less economically disadvantaged than other voucher-eligible peers—and this research was conducted *prior* to the EdChoice expansion.¹² When comparing voucher usage between groups based on economic advantage, the *Fordham Institute* study showed that comparatively economically advantaged students were more likely to use the voucher system. The study concludes with a finding that “there are specific features of the ways in which the [Ohio] EdChoice program is designed and implemented that make it more difficult for struggling students and comparatively disadvantaged families to make use of the voucher. Allowing schools to use their admissions standards almost certainly affects selection by achievement, both directly and indirectly through its attraction of comparatively motivated families.”¹³ Further, rural students are only able to receive vouchers at a much smaller rate than their urban peers. According to a 2020 report by the federally-funded Comprehensive Center Network, 53% of urban families have access to school choice programs, compared to 32% of rural families.¹⁴

EdChoice expansion continues to amplify the concentration of economically disadvantaged students in public school districts, exacerbating the segregation that already plagued Ohio’s schools. Low-income students have resource-intensive needs, and these students are directly harmed by the diversion of funds to private schools and the continuing economic segregation of Ohio’s schools.

¹² David Figlio & Krzysztof Karbownik, “Evaluation of Ohio’s edchoice scholarship program Fordham Institute,” (2016) <https://edex.s3-us-west-2.amazonaws.com/publication/pdfs/FORDHAM%20Ed%20Choice%20Evaluation%20Report%20online%20edition.pdf> (accessed Jun 8, 2022).

¹³ *Id.* at 13.

¹⁴ Kelly Robson, et. al., “Portfolio of Choice: School Choice in Rural Communities,” (2020) <https://compcenternetwork.org/sites/default/files/Portfolio%20of%20Choice%20Rural%20School%20Choice.pdf> (accessed June 26, 2022).

IV. EdChoice Continues to Exacerbate Racial Segregation in Schools in Ohio

Ohio has long struggled with desegregating its public schools. *See, e.g., Columbus Bd. of Ed. v. Penick*, 443 U.S. 449, 458, 99 S. Ct. 2941, 2946 (1979) (finding the Columbus School district maintained “an enclave of separate, black schools” as recently as 1977); *See Dayton Bd. of Ed. v. Brinkman*, 443 U.S. 526, 527, 99 S. Ct. 2971, 2974 (1979) (finding that the Dayton school board engaged in many actions that had the effect of increasing or perpetuating segregation after *Brown v. Board* was decided); *Reed v. Rhodes*, 662 F.2d 1219, 1220 (6th Cir. 1981) (finding the Ohio State Board of Education and its Superintendent had knowledge of serious and intentional discrimination against Black children in the Cleveland School system and continued to support that school system including its segregative practices through state financing in spite of that knowledge and in spite of a duty to withhold such financing).

The EdChoice voucher program risks losing gains made in integrating our public schools in Ohio, exacerbating racial segregation. Research on school choice demonstrates that when holding constant other factors, parents of white students will choose to move from schools with more nonwhite students to whiter schools, triggering re-segregation.¹⁵ As shown below, this has been demonstrated to be true in Ohio as well.

a. Private School Voucher Programs are Rooted in a History of Racism

The private school voucher movement is rooted in a history of efforts to preserve racial segregation, born “at the margin of race/class conflict, nurtured in the context of a struggle to gain financing for public education from a fiscally conservative power structure, and born out of the

¹⁵ Charles T. Clotfelter. *After “Brown”: The Rise and Retreat of School Desegregation* Princeton University Press, 2006.

racial politics of the Deep South.”¹⁶ Courts have found that tuition voucher programs have “fostered the creation of private segregated schools. [Tuition voucher program statute] ... encourages, facilitates, and supports the establishment of a system of private schools operated on a racially segregated basis as an alternative available to white students seeking to avoid desegregated public schools.” *Coffey v. State Educ. Fin. Comm’n*, 296 F. Supp. 1389, 1392 (S.D. Miss. 1969).

Federal courts held that the nation’s first voucher laws were poorly disguised attempts to perpetuate racial segregation. For example, a U.S. district court concluded that Alabama’s voucher program was “nothing more than a sham established for the purpose of financing with state funds a white school system.” *Lee v. Macon Cnty. Bd. of Educ.*, 267 F. Supp. 458, 461 (M.D. Ala. 1967), *aff’d sub nom. Wallace v. United States*, 389 U.S. 215 (1967).

Given this history, it is unsurprising that even apparently race-neutral voucher programs can have the impact of perpetuating segregation in education programs today. For example, NPR reported that Indiana’s statewide voucher program increasingly benefits White, suburban, middle-class families more than the low-income students in underperforming schools whom the program was originally intended to serve.¹⁷ In 2017, around 60 percent of voucher recipients in Indiana’s program came from white families, an increase of 14 percent since the program’s inception in 2013.¹⁸ Data shows that large-scale voucher programs in other countries have had exactly this

¹⁶ Molly Townes O’Brien, *Private School Tuition Vouchers and the Realities of Racial Politics*, 64 *Tenn. L. Rev.* 359, 364 (1997).

¹⁷ Cory Turner, et.al., “The Promise And Peril Of School Vouchers,” National Public Radio, May 12, 2017, http://www.npr.org/sections/ed/2017/05/12/520111511/the-promise-and-peril-of-school-vouchers?utm_source=twitter.com&utm_medium=social&utm_campaign=npr (accessed June 26, 2022).

¹⁸ *Id.*

impact: socioeconomic and racial segregation increased significantly after private school vouchers and similar school choice programs in Sweden, Chile, and The Netherlands were implemented.¹⁹

b. Private Schools Nationally and in Ohio Disproportionately Serve White Students

Nationally, private school students are disproportionately white. National data shows that white students are overrepresented in private schools, making up 69% of private school enrollment while they comprise 51% of total enrollment of school-aged population in the country. Black and Hispanic students are severely underrepresented in private schools, comprising over 25% of students in the public sector but only 10% of students in private schools.²⁰

In Ohio, looking closely at the counties where the Plaintiff Districts are situated provides similar data. In 2022, in Cuyahoga County, Black students made up 40.5% of total public school students.²¹ This is nearly *double* the Black enrollment in private non-public schools in 2022, where Black students made up just 20.03% of the student population.²² In Franklin County in 2022, white

¹⁹ Richard Kahlenburg, “Why Private School Vouchers Could Exacerbate School Segregation” <https://tcf.org/content/commentary/private-school-vouchers-exacerbate-school-segregation/?session=1> (accessed June 26, 2022).

²⁰ Jongyeon Ee, et al., “Private Schools in American Education A Small Sector Still Lagging in Diversity,” https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/private-schools-in-american-education-a-small-sector-still-lagging-in-diversity/Ee-Orfield-Teitell-Private-School-Report_03012018.pdf (accessed June 26, 2022).

²¹ Data from <https://reports.education.ohio.gov/report/report-card-data-state-enrollment-by-student-demographic> (accessed June 26, 2022). Data found by sequence of home page, public data, enrollment, state enrollment, county – Cuyahoga.

²² Data from <https://reports.education.ohio.gov/report/nonpublic-data-state-enrollment> (accessed June 26, 2022). Data found by sequence of home page, non public data, enrollment, state enrollment, county – Cuyahoga).

students made up 44.2% of the public school population,²³ but 55.59% of the private non-public school population.²⁴

c. Ohio Schools Have Become Exponentially More Segregated Via the Expansion of EdChoice

Ohio Department of Education data reveals that the EdChoice Program exacerbates race-based segregation in Ohio's public schools. This effect is significantly heightened in school districts with student enrollment that includes more than 50% Black students. Parents of Ohio non-Black children, in school districts with designated poor performance schools, increase their usage of EdChoice vouchers from 1.5% in districts with less than 25% Black students, to 24.2% in districts with 75% or greater Black student enrollment. *See* Table 1 and 4. This data shows that parents of non-Black children are *over 16 times* more likely to use voucher programs if the school their child attends is predominately Black (greater than 75% Black student enrollment).

As EdChoice performance-based scholarships increased from 17,076 scholarships in 2014 to 33,129 scholarships in 2021, the percentage of these scholarships distributed to Black students has fallen from 47.8% to 35.4%.²⁵ Though the use of vouchers in school districts with designated schools state-wide is similar between parents of Black students and parents of non-Black students

²³ Data from <https://reports.education.ohio.gov/report/report-card-data-state-enrollment-by-student-demographic> (accessed June 26, 2022). Data found by sequence of home page, public data, enrollment, state enrollment, county – Franklin.

²⁴ Data from <https://reports.education.ohio.gov/report/nonpublic-data-state-enrollment> (accessed June 26, 2022). Data found by sequence of home page, non public data, enrollment, state enrollment, county – Franklin).

²⁵ Data from <https://reports.education.ohio.gov/overview> (accessed June 8, 2022). Data found by sequence of home page, non public data, scholarship, state scholarship participants, EdChoice, fiscal year and race/ethnicity data 2014 and 2021.

(8.7% and 8.9% respectively),²⁶ when viewed on the district level the segregating effect of the EdChoice vouchers becomes clear.

The rate of usage by parents of non-Black students increases as the percentage of Black students enrolled in those districts increases. In the 29 districts whose students qualify for EdChoice Vouchers with zero to 25% Black student enrollment, parents obtain the scholarship vouchers for 1.5% of the non-Black students in that district. *See* Table 1. In the 15 districts with 25% to less than 50% Black student enrollment, parents obtain EdChoice scholarships for 8.7% of the non-Black students in that district. *See* Table 2. For the next quartile of 8 districts with 50% to less than 75% Black student enrollment, parents obtain vouchers for 20.8% of the non-Black students. *See* Table 3. In the 8 districts with 75 to 100% Black students, parents obtain EdChoice Vouchers for 24.2% of the non-Black students. *See* Table 4. To summarize, parents of Ohio non-Black children increase their usage of EdChoice vouchers from 1.5% of students in districts with less than 25% Black students to 24.2% of their non-Black students in districts with 75% or greater Black student enrollment. Nearly one in four parents of a non-Black student receives an EdChoice voucher if their school is predominantly Black.

Usage of vouchers by Black parents also increases as the percentage of Black students enrolled in the district increases, but at less significant rates. Among the four quartiles described above, Black parents obtained scholarships in 3.7%, 8.1%, 9.3% and 8.0% for their school age children in the respective districts. *See* Tables 1 through 4. Since Black families are leaving districts at lower rates, these numbers support the segregating effect of EdChoice as well. Analysis of two of the Plaintiff districts show this segregative effect in the 2021-22 school year. In the 2021-22 school

²⁶ Data from <https://reports.education.ohio.gov/overview> (accessed June 8, 2022). Data found by sequence of home page, non public data, scholarship, current EdChoice designated list, 2022-2023 designated list.

year, 71.7% of the Cleveland Heights School District’s student body was Black. *See* Table 5. If students receiving poor performance EdChoice vouchers had attended the district schools, the proportion of Black students would have been 54.6%. *See* Table 5. The proportion of Black students in Dayton in the 2021-22 school year was 65.1%, and would have been 57.9% had the students receiving EdChoice vouchers attended the district schools. *See* Table 5. These Districts have markedly increased racial segregation, which can be directly attributed to the EdChoice voucher program.

d. Racially Segregated Public Schools Harm Ohio Students

Our nation has long recognized the harm of segregation in public schools, taking significant steps to integrate local public school systems throughout the country. Recent research shows that segregated schools are “profoundly unequal in terms of the level of preparation of teachers, the peer groups that are also much less prepared and achieve at far lower levels, the curriculum that is more limited, especially in advanced courses, and the students that have less success in higher education and later employment.”²⁷ Attendance for Black students at a school with more whites and more middle-class students is related to higher average educational achievement and completion, better preparation to live and work in interracial settings, more college success, improved economic outcomes in life and more adult interracial friendships.²⁸

As detailed in the previous section, EdChoice directly creates more segregated schools. The Student Plaintiffs in this case, Fergus Donnelly and Malcolm McPherson, attend the Cleveland Heights School District. Their District is significantly more segregated than it would be but for

²⁷ Gary Orfield and Danielle Jarvie, “Black Segregation Matters: School Resegregation and Black Educational Opportunity,” p. 12, (2020) <https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/black-segregation-matters-school-resegregation-and-black-educational-opportunity/BLACK-SEGREGATION-MATTERS-final-121820.pdf> (accessed June 27, 2022).

²⁸ *Id.*

EdChoice and EdChoice expansion: the racial proportion of Black students in the Cleveland Heights School district in the 2021-22 school year was 71.6%, but if students receiving poor performance EdChoice vouchers had attended the district's schools, then these schools would have been significantly less segregated and the proportion of Black students would have been 54.6%. *See* Table 5. The other Student Plaintiffs, Chase Hales and Savanna Hales, attend a school district that was comprised of approximately 26% white students and 74% students of color before the EdChoice Program was first implemented. Today, the Richmond Heights School District is comprised of approximately 3% white students and 97% students of color. *See* Plaintiff's Complaint, 35.

The Student Plaintiffs are experiencing direct harm in the form of increasingly segregated school because of H.B. 110. And as described above, many more students than the student Plaintiffs are significantly harmed by the increasing segregation in their school districts directly attributed to EdChoice.

V. EdChoice Removes Crucial Protections and Services that Students with Disabilities Receive in Public Schools

For over fifty years, children with disabilities in Ohio have been able to rely on federal and state laws to ensure that they receive the education that they are entitled to and are protected from discrimination and segregation in Ohio public schools.²⁹ Federally, the Individuals with Disabilities Education Act, 20 U.S.C. 1400 et seq. (IDEA), guarantees students with disabilities the right to a free and appropriate public education (FAPE), including an individualized education program, in the least restrictive environment, and it offers many other important rights and protections. Two other laws—Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 794 (Section 504); and

²⁹ Mitchell L. Yell et al., *The Legal History of Special Education: What a Long, Strange Trip It's Been!*, 19 *Remedial & Special Educ.* 219, 220 (1998).

Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. 12131 et seq. (ADA Title II)—prohibit public schools from discriminating against students based on their disabilities. In Ohio, the companion legislation to IDEA specifying the procedures for compliance with the IDEA is RC 3323, and the State regulations governing education for students with disabilities are found at Ohio Admin. Code Chapter 3301-51.

The EdChoice scholarship program risks eroding these decades of progress in establishing legal protections for students with disabilities in public schools, directing public money to private schools that usually fail to offer special education services to students with disabilities and commonly exclude them altogether.

a. Private Schools Often Exclude Students with Disabilities and Do Not Provide an Adequate Education

Children with disabilities enrolled in private schools who receive an EdChoice voucher do not have an individual entitlement to the special education and related services that they would receive if they were enrolled in a public school. Families of students with disabilities must choose to give up rights under IDEA and other federal and state statutes in exchange for the EdChoice voucher funds to utilize at private schools.

Under the IDEA, children with disabilities in public schools are entitled to an education that incorporates the specialized services and instruction they need, in the least restrictive environment. In contrast, many of the key IDEA provisions do not apply at all to children in private schools – provisions such as the right to a free appropriate public education, for qualified special education teachers, that students with disabilities be taught alongside nondisabled peers to the extent possible,

for equitable discipline procedures, and due process rights to challenge decisions and make complaints when the laws are not followed.³⁰

Students with disabilities who receive EdChoice vouchers and attend private schools are merely entitled to “a different amount of services” under the IDEA—fewer special education services, that is—than they would get if they attended that public school. 34 C.F.R. 300.137, 300.138(a)(2). These services are not individualized, and are limited to supplemental services, not the student’s primary educational services. The school district need not serve all eligible students unless proportionate funding might be available. 20 U.S.C. 1412(a)(10)(A)(iii)(IV). It is possible that private school children with disabilities using EdChoice vouchers will not receive any special education and related services at all.³¹

Additionally, under the EdChoice voucher program, teachers providing these equitable services to students with disabilities need not meet “special education teacher qualification requirements.” 34 C.F.R. 300.138(a)(1).³² This is a key difference between the EdChoice voucher program and other scholarship programs run by the Ohio Department of Education, i.e., the Autism Scholarship and the Jon Peterson Scholarship. Nonpublic schools receiving scholarship funds from the Autism or Jon Peterson scholarship programs are required to employ appropriately credentialed staff to work with the scholarship students. Ohio Rev. Code 3310.58(C); Ohio Rev. Code Ann. 3310.41(E). Further, students who enroll in the Autism or Jon Peterson scholarship program retain

³⁰ Government Accountability Office, “Private School Choice: Federal Actions Needed to Ensure Parents Are Notified About Changes in Rights for Students with Disabilities” (November 2017) <https://www.gao.gov/products/gao-18-94.pdf> (accessed June 27, 2022) (hereinafter “GAO Report”).

³¹ United States Department of Education, Office of Special Education and Rehabilitative Services (OSEP QA 22-01, February 2022) https://sites.ed.gov/idea/files/QA_on_Private_Schools_02-28-2022.pdf (accessed June 27, 2022).

³² GAO report at 8.

the right to file a state complaint or due process complaint with the Department of Education, where they can allege a violation of a requirement other than FAPE of the IDEA. Ohio Rev. Code Ann. 3310.41(B); Ohio Admin. Code 3301-101-12; Ohio Admin. Code 3301-103-04. No such right exists for students with disabilities who avail themselves of EdChoice vouchers.

While some private schools do attempt to educate students with disabilities in an inclusive environment, many explicitly do not, and may discourage parents of students with disabilities from enrolling their children. The Catholic Conference of Ohio provides a “Q&A Document to Assist Parents of Special Needs Children.”³³ This document makes clear the lack of protections for students who use EdChoice vouchers to attend Catholic schools in Ohio: “Parentally-placed private school children with disabilities have no individual entitlement for services. This means no matter the need or severity of the disability, no child parentally placed in a Catholic school and/or other nonpublic school is assured academic services to meet his or her needs.”³⁴ The document continues to explain that the “least restrictive environment is not mandated upon Catholic and other private schools for them to do so” and that “the [IDEA] does not place any requirement on private schools and their leadership.”³⁵

Private schools can also discipline students with no regard for the student’s disability. In public schools, IDEA protects students with disabilities from discipline for conduct resulting from their disabilities. *See* 20 U.S.C. 1415(k)(1)(E)-(G); 34 C.F.R. 300.530-300.536. Before a student with disabilities is expelled or suspended at length, the school must determine whether those disabilities

³³ Catholic Conference of Ohio “Q&A Document to Assist Parents of Special Needs Children and Serve As a Resource for Catholic Schools Enrolling Children with Disabilities, <https://www.ohiocathconf.org/Portals/1/Education/Q-A-special-needs.pdf> (accessed June 27, 2022).

³⁴ *Id.* at 2.

³⁵ *Id.* at 5 and 7.

caused the behavior at issue. 20 U.S.C. 1415(k)(1)(E)(i)(1)-(2). If the behavior is a “manifestation” of those disabilities, 20 U.S.C. 1415(k)(1)(E)-(F), the school must try to address those issues without imposing long-term discipline, 20 U.S.C. 1415(k)(1)(F). In private schools, students lose those protections.³⁶ As a result, private schools have more leeway to suspend or expel a child with disabilities, even when the underlying conduct results from those disabilities. In Ohio, if an EdChoice recipient is expelled from a private school because of behavior related to his or her disability, they can actually lose eligibility for a voucher altogether if they cannot find another private school to enroll in within 30 days. O.A.C. 3301-11-09.

These inadequate protections and services in private school programs for students with disabilities can also lead to the exclusion of these students altogether, as private schools often push out the students with disabilities who are hardest to serve. EdChoice redirects public funds to private entities largely unbound by the federal laws that for generations have guarded these students with disabilities’ rights and futures, directly harming students.

b. Parents of Students with Disabilities are Not Told and are Often Unaware that Their Children Will Lose Statutory Protections in Private Schools

No regulations require parents to be notified about any changes to legal rights or protections upon enrolling in a private school with tuition paid for by an EdChoice voucher.³⁷ A 2017 Government Accountability Office Report found that “[p]rivate school choice programs are not consistently providing information on changes in rights under the IDEA when a child with a

³⁶ GAO Report at 8.

³⁷ GAO Report at 24, 27-29.

disability moves from public to private school, and some programs are providing *incorrect* information.”³⁸

As legal services and disability rights advocates, attorneys in our programs have experienced firsthand that too often parents are not told and otherwise do not learn that their children will be giving up many of their statutory rights, services, and support if they use an EdChoice voucher to enroll in a private school. Parents of students with disabilities commonly receive little information about what will change if their children enroll in private schools; instead, parents end up waiving their children’s most important rights unknowingly.³⁹ Families with lower incomes or less education—the very families that private-school vouchers and tax credits purport to help the most—are especially likely to be caught off guard.⁴⁰

Once enrolled in a private school that is not required to offer an appropriate education or otherwise protect their rights, students with disabilities have few good options. They can stay in the private school and continue to forfeit the right to an appropriate education and risk suspension or expulsion for behaviors directly related to their disability, or they can abruptly switch schools and disrupt their schooling further.⁴¹ Either way, the education and development of students with disabilities suffers.

³⁸ GAO Report at 25.

³⁹ GAO Report at 17.

⁴⁰ Eloise Pasachoff, Special Education, Poverty, and the Limits of Private Enforcement, 86 Notre Dame L. Rev. 1413, 1437-1440 (2011).

⁴¹ GAO Report at 23.

c. When Private Schools Exclude and Fail Students with Disabilities, EdChoice Voucher Program Concentrates Students with Disabilities in Public Schools

For students for whose disability requires specialized educational instruction, accommodations, and related supports, a private school that provides none of these services is not an appropriate alternative, and EdChoice is not a viable option for these students.⁴² For the students with disabilities who are rejected or expelled by private schools, they also find themselves without the option of availing themselves of the EdChoice voucher program. As a result, students with disabilities return or remain in public schools, while their nondisabled peers have the option of attending a publicly-funded private school through EdChoice.

Because EdChoice vouchers are most frequently available for “poor performing” public schools, this means that students with disabilities are often left behind and increasingly concentrated in the “poor performing” public schools from which their peers are leaving. While the Ohio Department of Education does not track disability demographics for the students who receive vouchers, the same districts which are seeing a rapid racial resegregation impact with the advent and expansion of EdChoice also appear to have had an increase in percentage of students with disabilities. For example, Cleveland Heights school district enrolled 18.3% students with disabilities in 2016-17, and enrolled 19.3% students with disabilities in 2021-22.⁴³ Similarly, Columbus City

⁴² Claire Raj, Coerced Choice: Schools Vouchers and Students with Disabilities, 68 Emory Law Journal 1037, 1066.

⁴³ Data from <https://reports.education.ohio.gov/overview> (accessed June 27, 2022). Data found by sequence of home page, public data, enrollment, enrollment district, District – Cleveland Heights, FY 2016-17 and FY 2021-22.

Schools enrolled 16.4% students with disabilities in 2016-17, and enrolled 17.9% students with disabilities in 2021-22.⁴⁴

Not only may EdChoice have a resegregating impact by concentrating students with disabilities in public schools, if students with disabilities do avail themselves of an EdChoice voucher and enroll in a private school, they have the risk of being directly segregated from their non-disabled peers within that private school. Without IDEA protections to ensure that students are educated in the least-restrictive environment, students with disabilities who enroll in private schools with EdChoice vouchers may be segregated from their peers without legal consequence. Research shows that inclusive education results in the best learning outcomes for students with disabilities,⁴⁵ and public funds paying for a private education without this mandate for inclusion directly harms students in Ohio.

In sum, private schools that accept EdChoice vouchers need not admit or properly educate students with disabilities, eroding decades of progress made to create inclusive, adequate education for students with disabilities—and directly harms the students and school districts in Ohio.

VI. EdChoice Subjects LGBTQIA+ Students and other Students in Protected Classes to the Distinct Harm of Publicly Funded Discrimination

Students at public schools in Ohio enjoy protection from discrimination under numerous federal and state statutes. While nonpublic schools in Ohio which are eligible to receive vouchers must sign an “Affidavit of Intent Not to Discriminate,” this only prohibits discrimination for

⁴⁴ Data from <https://reports.education.ohio.gov/overview> (accessed June 27, 2022). Data found by sequence of home page, public data, enrollment, enrollment district, District – Columbus City Schools, FY 2016-17 and FY 2021-22.

⁴⁵ National Council on Disability, “IDEA Series: The Segregation of Students with Disabilities,” p. 9 (2018) https://ncd.gov/sites/default/files/NCD_Segregation-SWD_508.pdf (accessed June 27, 2022).

reasons of race, color, national or ethnic origin.⁴⁶ In contrast, public schools in Ohio must commit to vigorously enforce their prohibitions against discriminatory harassment based on race, color, national origin, sex (including sexual orientation and gender identity), disability, age (except as authorized by law), religion, ancestry, or genetic information.⁴⁷ Students are faced with an unreasonable decision: participate in the EdChoice voucher program and risk overt discrimination and exclusion.

This is particularly true for Ohio's LGBTQIA+ students. In public schools, Title IX of the Education Amendments of 1972 requires the district not to discriminate on the basis of sex, which includes gender identity and sexual orientation. Private schools that do not receive funding from the federal government are not subject to Title IX regulations, and may use sex-based classifications when making decisions about student access to facilities and services. A national study of a sample of private schools, found that at least 14% of religious schools actively discriminate against LGBTQIA+ students.⁴⁸

In addition to being insulated from the protections for students provided in Title IX, private schools are able to set their own criteria for student admission decisions. Private schools may decline to provide services to LGBTQIA+ students, or discontinue services for students whose

⁴⁶ Affidavit available at <https://education.ohio.gov/getattachment/Topics/Ohio-Education-Options/Private-Schools/Receiving-a-Charter/Racial-Nondiscriminatory-Policies-1.pdf.aspx?lang=en-US> (accessed June 27, 2022).

⁴⁷ R.C. 4112.02; 20 U.S.C. 1400 et seq., The Individuals with Disabilities Education Improvement Act of 2004 (IDEA); 20 U.S.C. 1681 et seq.; 29 U.S.C. 621 et seq., Age Discrimination in Employment Act of 1967; 29 U.S.C. 794, Rehabilitation Act of 1973, as amended; 29 C.F.R. Part 1635; 29 U.S.C. 6101, The Age Discrimination Act of 1975; 42 U.S.C. 12101 et seq., Americans with Disabilities Act of 1990, as amended; 42 U.S.C. 2000d et seq.; 42 U.S.C. 2000e et seq.; 42 U.S.C. 2000ff et seq., The Genetic Information Nondiscrimination Act; 42 U.S.C. 1983.

⁴⁸ Klein, Rebecca, "These Schools Get Millions of Tax Dollars to Discriminate Against LGBTQ students." https://www.huffpost.com/entry/discrimination-lgbt-private-religious-schools_n_5a32a45de4b00dbbcb5ba0be (accessed June 27, 2022).

LGBTQIA+ status is disclosed after they are admitted. As a class, LGBTQIA+ students face increased risk of homelessness, suicide, and eating disorders, and benefit greatly from legal protections designed to shield them from discrimination, harassment, and bullying which may contribute to or exacerbate the harms they suffer. In a public school, if a LGBTQIA+ student is bullied or harassed, they can invoke the district's (state-mandated) bullying & harassment policy. No such mandates exist for private schools.

These concerns also ring true for disabled students. Religious organizations, including schools, are not required to comply with the Americans with Disabilities Act unless they receive federal funding. *See* 42 U.S.C. 12187. A student requiring accommodation for their disability could be denied, no matter how reasonable the accommodation.

Lastly, although the private schools that accept vouchers may no longer explicitly discriminate on the basis of race, private schools often use policies like dress codes as a way to exclude and push out certain students. Zion Temple Christian Academy, a private Christian school in Hamilton County, Ohio, for example, told a Black family that their son was not welcome at school because he wore his hair in locks.⁴⁹ The family had no option except to disenroll. In comparison, when the Ohio public school district Groveport Madison fired an assistant principal who refused to enforce a dress code that he believed was racially discriminatory, the Department of Justice stepped in to enforce anti-retaliation laws.⁵⁰ Robust enforcement exists to protect students in public schools from discrimination in Ohio.

⁴⁹ Max Londberg, “‘Supposed to be accepting’: Ohio private school forces out Black children with locks, parents say”, USA Today/Cincinnati Enquirer (Aug. 18, 2020), <https://www.dispatch.com/story/news/education/2020/08/18/supposed-to-be-accepting-private-school-forces-out-black-children-with-locks-parents-say/113341792/> (accessed June 27, 2022).

⁵⁰ Department of Justice Press Release, June 15, 2022, <https://www.justice.gov/opa/pr/justice-department-secures-settlement-race-discrimination-suit-against-groveport-ohio-board-0> (accessed June 27, 2022).

The Supreme Court long ago held that States must “steer clear, not only of operating the old dual system of racially segregated schools, but also of giving significant aid to institutions that practice racial or other invidious discrimination.” *Norwood v. Harrison*, 413 U.S. 455, 467 (1973). Drawing on *Brown v. Board*, the Court explained that “discriminatory treatment exerts a pervasive influence on the entire educational process.” *Id.* at 469. Studies have confirmed this fact: discrimination has a proven negative impact on student educational achievement and wellbeing.⁵¹ The state-sanctioned discrimination allowed by the EdChoice program harms Ohio students - both those enrolled in the program and those left behind because they are unable to choose the discriminatory option.

VII. Conclusion

This *amicus curiae* urges this Court to find that the Plaintiffs have standing to assert their claims, and that the Defendant’s Motion to Dismiss and Intervenor’s Motion for Judgment on the Pleading should be denied.

Respectfully submitted,

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⁵¹ See Dorainne J. Levy et al., Psychological and Biological Responses to Race-Based Social Stress as Pathways to Disparities in Educational Outcomes, 71 AM.PSYCHOLOGIST 455 (2016).

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Appendix

Table 1. Data for calculating percentage EdChoice voucher use in districts with 0-25% Black student enrollment in 2021 fiscal year⁵²

	Black students	Vouchers to Black students	Non-Black students	Vouchers to non-Black students	Percentage of enrolled Black students
Springfield City School District	1697	141	5340	344	24.1%
Elyria City Schools	1099	20	4576	44	19.4%
Middletown City	1078	25	4635	267	18.9%
Maple Heights City	757	199	3300	32	18.7%
Painesville City Local	468	16	2279	108	17.0%
South-Western City	3515	15	17743	110	16.5%
Barberton City	523	0	2968	0	15.0%
Norwood City*	237	0	1497	0	13.7%
Hamilton city	355	9	2567	152	12.1%
Ravenna City	255	9	1854	9	12.1%
Massillon City	473	0	3474	0	12.0%
Alliance City	327	9	2576	1	11.3%
Washington Local	736	11	5943	131	11.0%
Zanesville City	302	9	2710	82	10.0%
Chillicothe City	169	9	2357	57	6.7%
Portsmouth City	109	9	1536	90	6.6%
Marion City	275	10	3960	37	6.5%
Ashtabula Area City	193	9	2887	91	6.3%
South Point local	79	0	1299	0	5.7%
East Liverpool	111	9	1950	2	5.4%
Bellaire Local	38	0	1063	31	3.5%
Athens City	78	0	2218	0	3.4%
New Miami Local	20	0	604	0	3.2%
Federal Hocking Local	27	0	894	0	2.9%
Wellsville Local	20	0	669	0	2.9%
Gallia County Local	37	0	2054	0	1.8%
Nelsonville-York City	10	0	1096	0	0.9%
Rock Hill Local	10	0	1321	0	0.8%

⁵² Ohio Department of Education Report Portal, available at <https://reports.education.ohio.gov/overview> accessed June 8, 2022

Adams County Ohio Valley Local	9	0	3544	21	0.3%
Pymatuning Valley Local	9	0	1035	0	0.9%
Trimble Local	9	0	733	0	1.2%
Crestline Exempted Village	9	0	542	0	1.6%
Rolling Hills Local	9	0	1514	0	0.6%
Meigs Local*	9	0	1624	0	0.6%
Switzerland of Ohio Local	9	0	1964	0	0.5%
New Lexington School District	9	0	1642	0	0.5%
Southern Local - Perry	9	0	596	0	1.5%
Eastern Local School District-Pike*	9	0	783	0	1.1%
Huntington Local	9	0	1018	0	0.9%
Paint Valley Local	9	0	768	0	1.2%
Clay Local	9	0	591	0	1.5%
Vinton County Local	9	0	1792	0	0.5%
Total	13124	509	103516	1609	
Percentage voucher use by eligible students		3.7%		1.5%	

Districts with less than 10 vouchers for Black students excluded due to actual number in this category not being available. If less than 10 black students in district, number of nine black students used in calculation of total. Data from <https://reports.education.ohio.gov/overview> (accessed June 8, 2022). Percentage of vouchers to non-Black students calculated by dividing vouchers to non-Black Students by total of enrolled non-Black students and number of non-Black students receiving EdChoice(not EdChoice-exp) vouchers. Here 1609 vouchers to non-Black students divided by total of 103,516 enrolled non-Black students and 1609 non-Black voucher students (105,125) resulting in 1.5% use of vouchers by non-Black students. Percentage of use of vouchers by Black students calculated in comparable manner.

Table 2. Data for calculating percentage EdChoice voucher use by non-Black students in districts with 25-50% Black student enrollment in 2021 fiscal year.⁵³

	Black students	Vouchers to Black students	Non-Black students	Vouchers to non-Black students	Percentage of enrolled Black students
Akron City	9538	1043	10896	768	46.7%
Lockland Local	253	18	291	26	46.5%
Toledo City	10071	1267	12134	2014	45.4%
Groveport Madison Local	2571	155	3107	122	45.3%
Whitehall City	1348	50	1750	39	43.5%
Warren City	1819	119	2659	295	40.6%
Princeton City*	2186	9	3422	24	39.0%
Lima City	1326	104	2114	423	38.5%
Canton City	2903	285	5025	376	36.6%
St Bernard-Elmwood Place City	281	14	492	73	36.4%
Sandusky City	1064	10	1985	96	34.9%
Mansfield City	933	28	2310	140	28.8%
Campbell City*	270	9	732	16	26.9%
Northridge Local-Month	402	9	1170	4	25.6%
Lorain City	1462	80	4287	557	25.4%
Totals	36427	3200	52374	4973	
Percentage voucher use by eligible students		8.1%		8.7%	

Districts with less than 10 vouchers for Black students excluded due to actual number in this category not being available. Data from <https://reports.education.ohio.gov/overview> (accessed June

⁵³ Ohio Department of Education Report Portal, available at <https://reports.education.ohio.gov/overview> accessed June 8, 2022

8, 2022). Percentage of vouchers to non-Black students calculated by dividing vouchers to non-Black Students by total of enrolled non-Black students and number of non-Black students receiving EdChoice (not EdChoice-exp) vouchers. Here 4973 vouchers to non-Black students divided by total of 52374 enrolled non-Black students and 4973 non-Black voucher students (57347) resulting in 8.7% use of vouchers by non-Black students. Percentage of use of vouchers by Black students calculated in comparable manner.

Table 3. Data for calculating percentage EdChoice voucher in districts with 50-75% Black student enrollment in 2021 fiscal year in 2021 fiscal year. ⁵⁴

	Black students	Vouchers to Black students	Non-Black students	Vouchers to non-Black students	Percentage of enrolled black students
Jefferson Township Local	194	42	70	50	73.5%
Cleveland Heights - University Heights	3479	144	1371	1642	71.7%
Mt Healthy City	1992	157	884	194	69.3%
Dayton City	7692	839	4120	2086	65.1%
Cincinnati Public Schools	21895	1823	13371	3770	62.1%
Winton Woods City	2039	24	1684	44	54.8%
Youngstown City	2597	725	2157	679	54.6%
Columbus City Schools District	24174	2789	21335	3333	53.1%
Total	64062	6543	44992	11798	
Percentage voucher use by eligible students		9.3%		20.8%	

⁵⁴ Ohio Department of Education Report Portal, available at <https://reports.education.ohio.gov/overview> accessed June 8, 2022

Cleveland Municipal schools omitted due to being in separate voucher program. Data from <https://reports.education.ohio.gov/overview> accessed June 8, 2022. Percentage of vouchers to non-Black students calculated by dividing vouchers to non-Black Students by total of enrolled non-Black students and number of non-Black students receiving EdChoice (not EdChoice-exp) vouchers. Here 11,798 vouchers to non-Black students divided by total of 44,992 enrolled non-Black students and non-Black voucher students (56,790) resulting in 20.8% use of vouchers by non-Black students. Percentage of use of vouchers by Black students calculated in comparable manner.

Table 4. Data for calculating percentage EdChoice voucher use in districts with 75 – 100% Black student enrollment in 2021 fiscal year.⁵⁵

	Black students	Vouchers to Black students	Non-Black students	Vouchers to non-Black students	Percentage of enrolled black students
East Cleveland	1619	161	25	13	98.5%
Warrensville Heights City	1517	81	82	9	94.9%
Richmond Heights local	598	73	80	34	88.2%
Euclid City	4023	691	644	586	86.2%
Trotwood-Madison City	2225	69	357	19	86.2%
Bedford City	2287	82	500	29	82.1%
Garfield Heights City Schools	2665	157	693	97	79.4%
North College Hill City	1048	83	275	59	79.2%
Totals	15982	1397	2656	846	
Percentage voucher use by eligible students		8.0%		24.2%	

Data from <https://reports.education.ohio.gov/overview> accessed June 8, 2022. Percentage of vouchers to non-Black students calculated by dividing vouchers to non-Black Students by total of enrolled non-Black students and number of non-Black students receiving EdChoice(not EdChoice-exp) vouchers. Here 846 vouchers to non-Black students divided by total of 2656 enrolled non-

⁵⁵ Ohio Department of Education Report Portal, available at <https://reports.education.ohio.gov/overview> accessed June 8, 2022

Black students and non-Black voucher students (3502) resulting in 24.1% use of vouchers by non-Black students. Percentage of use of vouchers by Black students calculated in comparable manner.

Table 5. Sampling of Plaintiff districts segregation effect of voucher program in 2021 fiscal year⁵⁶

District	Enrolled students	Enrolled Black students	Percentage Black enrollment	Voucher use by Black students	Voucher used by non-Black students	Black Percentage enrollment and vouchers total
Dayton	11812	7692	65.1%	9.8%	33.6%	57.9%
Cleveland Heights/	4850	3479	71.7%	4.0%	54.5%	54.6%

Data from <https://reports.education.ohio.gov/overview> accessed June 8, 2022. Percentage of vouchers to non-Black students calculated by dividing vouchers to non-Black Students divided by total of enrolled non-Black students and number of non-Black students receiving EdChoice(not EdChoice-exp) vouchers. Percentage of use of vouchers by Black students calculated in comparable manner. Black percentage enrollment and vouchers total calculated by total of enrolled Black students and Black voucher students divided by total of all enrolled students and all voucher students.

CERTIFICATE OF SERVICE

I hereby certify that, on July 1, 2022, a copy of the foregoing Merit Brief was filed and served on counsel for all parties by the electronic filing system of the Franklin County Court of Common Pleas Clerk of Court pursuant to Civ. R. 5(B)(3) and Local Rule 110.

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⁵⁶ Ohio Department of Education Report Portal, available at <https://reports.education.ohio.gov/overview> (accessed June 8, 2022)