

# Tough Choices

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SETTING THE STAGE  
for  
INFORMED, OBJECTIVE DELIBERATION  
on  
**SCHOOL CHOICE**

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## The Institute on Education Law and Policy

at Rutgers-Newark is New Jersey's premier center for interdisciplinary research and innovative thinking on education policy. Its mission is:

- ▶ to stimulate and facilitate collaborative interdisciplinary research on education law and policy,
- ▶ to mobilize the best minds in New Jersey and in the nation to address complex and controversial issues in education law and policy in a comprehensive, in-depth manner, and
- ▶ to promote education reform and improvement through research, policy analysis and public discussion.

While issues affecting New Jersey's urban students are the Institute's primary focus, those issues are addressed in the context of the state's wide diversity and with an eye toward their ramifications for the nation as a whole.

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# **TOUGH CHOICES**

## *Setting the Stage for Informed, Objective Deliberation on SCHOOL CHOICE*

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# TOUGH CHOICES

## *Setting the Stage for Informed, Objective Deliberation* *on* *SCHOOL CHOICE*

### Preface

In June 2002, the United States Supreme Court issued its decision in *Zelman v. Simmons-Harris*, in which it ruled that the U. S. Constitution does not prohibit public funding of religious schools, at least in the form of Cleveland’s school voucher program. With this apparent boost for vouchers, many expected that the demand for school choice would increase dramatically and state legislatures would rush to adopt programs along the lines of the one in Cleveland.

It was in that context that the Institute on Education Law and Policy embarked on *Setting the Stage for Informed, Objective Deliberation on School Choice*. In the midst of legal complexity, increasing political pressure to expand parental choice, heightening rhetoric and scholarly debate that was at best confusing and at worst seemingly intended to obfuscate, we set out on **a project to help clear the air**. Our goal was to assist the public and policy makers to make responsible judgments about **the role school choice should play in the lives of our children**.

As it has turned out, the response to *Zelman* has not been as great as some expected. Only two legislatures – Colorado’s and the United States Congress, legislating for the District of Columbia -- have enacted new programs. Still, the prevailing view seems to be that school choice is on the rise. A recent report by the Brookings Institution says choice programs are part of the education landscape, like it or not, and policy makers should address their attention not to whether to support those programs but to what their provisions should be. Still, the scholarly debate is no less confusing, and the political debate is as charged as ever. **The need for clarity – for informed, objective deliberation – has never been greater.**

From the outset, we have realized the impossibility of producing a definitive report with findings and action recommendations. Instead, our aim is to shed as much light as possible, as objectively as we can, on a fuzzy universe. Sometimes, the best and most honest observation we can make is that we don’t know, and no one else really does either. As Albert Einstein, a great New Jerseyan, once said of his own work, we’ll try to “make everything as simple as possible, but not simpler.”

Two aspects of our approach should be noted. First, **we have looked at school choice in its broadest sense**. Vouchers and other public subsidies for enrollment in private schools may be the best known and most controversial, but choice encompasses a broad array of programs, many operating within public schools and some not involving schools at all. Choice programs run the gamut from those focused on individual schools, to those in single school districts, clusters of

districts, or entire states. They include **magnet schools, charter schools, interdistrict choice, and vocational programs.** They also include **home schooling** and **cyberschooling** in a variety of forms, and a wide range of privately funded programs.

In discussing choice in its broadest sense, our premise is that intelligent and responsible decisions about any program can only be made as part of broader policy decisions about the role choice should play in public education and educational improvement. While choice, or any particular choice program, may have some value of its own, our concern is not just with that inherent value, but with its impact – positive or negative – on the overall effort to improve public education.

Eighty to 90 percent of all children attend public schools, and are likely to continue to do so. That argues for an overriding principle -- that **choice must be structured and implemented in a way that strengthens rather than weakens public schools.** This may complicate the discussion, but to discuss choice without reference to this principle would miss the point.

Second, we have looked at school choice **in the specific context of New Jersey.** Choice may be on the rise in the nation as a whole, but education policy in New Jersey is a special case. In New Jersey we have a constitutional mandate, as declared by our state supreme court in *Abbott v. Burke*, to strengthen the public schools in our neediest districts, and to put those districts and their students on an even playing field with their suburban counterparts. This mandate has resulted in unprecedented levels of state support for urban schools and a number of ambitious reform programs. **The Abbott mandate is “inviolable,” the Court has said.** Therefore, in New Jersey, the appropriate role of school choice or any particular choice program can only be discussed in the context of *Abbott*. Every choice option must be evaluated in terms of its effect on urban school improvement. There may be room for vouchers or other expansion of school choice in this state, but only if they would not detract from compliance with the *Abbott* mandate.

In the course of the project we have drawn on the expertise of lawyers and scholars from around the country, who have been most generous with their time and advice. An invitational meeting of experts and practitioners in the field at the outset of the project, and an earlier similar meeting in January 2002, were instrumental in identifying research directions. We also visited schools and school districts and met with and interviewed dozens of individuals and representatives of organizations with interests or involvement in school choice issues and programs. And we visited Milwaukee and Cleveland, sites of the two voucher programs with the most substantial track records, and met with a diverse assortment of public officials and choice proponents and opponents in each city.

In this short report we *set the stage* with several important items that form the backdrop for discussion, then we discuss the *tough choices* that must be made in relation to school choice policy, and finally we identify *what we need to know* with recommendations for research that would further inform the discussion. This report will be followed by a **more detailed report** with descriptions of choice programs, further discussion of the issues, a bibliography and list of resources, and appendices summarizing the laws of the 50 states relating to interdistrict choice, charter schools, vouchers, and tax incentives. We also will publish **issue papers** with in-depth discussion of certain choice issues and profiles of noteworthy choice programs. We will

distribute a “**School Choice Discussion Package**” for organizations and individuals to carry on their own discussions, and we hope to participate in many of those discussions ourselves. We have a **school choice discussion group on our web site**, <http://ielp.rutgers.edu>. And we plan to discuss our project and our reports at meetings with policymakers, practitioners and scholars in New Jersey and across the country.

This project has been made possible by a distinctive collaboration of five New Jersey foundations -- the Prudential Foundation, the Fund for New Jersey, the Schumann Fund for New Jersey, the Geraldine R. Dodge Foundation and the MCJ Foundation -- and their executive directors or program officers. We are grateful for their generous support. We also wish to acknowledge the support of Rutgers University – Newark, and the assistance of our colleagues Jamie Lew, Louisa Visconti and Jason Barr, all of the Rutgers-Newark Faculty of Arts and Sciences. We also received assistance from three Rutgers Law School graduates, Lisa Kent, Marty Malague and Don Schels, and many law student research assistants. Our thanks go to all of them.

Our goal in this project is not to change the law or public policy on school choice in general or as to any particular program, but rather to raise issues and present facts and analysis so that informed, objective deliberation on the subject can take place. We hope, with this report and the rest of our project, to make a substantial contribution toward that goal.

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## ***SETTING THE STAGE . . . . .***

**Certain basic considerations set the stage for informed, objective deliberation.**

### **New Jersey, *Abbott v. Burke* and School Choice**

As a result of a series of rulings by the New Jersey Supreme Court in the case of *Abbott v. Burke*, our state is engaged in an urban education reform effort that is unprecedented anywhere in this country. The Court has established a series of constitutional mandates for reform, and has defined with specificity the rights of poor urban children to educational opportunities designed to fully meet their special needs and disadvantages. It has required the state to assure that the 30 neediest urban districts receive "parity funding" to enable them to provide a level of education equivalent to what students in the state's wealthiest districts receive, to implement a "whole school reform" process that will channel funds into educationally effective programs, to identify and provide supplemental programs directed at the special educational needs of urban students, to fund early childhood programs for three- and four-year-olds in urban districts, and to upgrade school facilities.

In a case involving a challenge to charter schools in 2000, the New Jersey Supreme Court cautioned that the mandate of *Abbott v. Burke* is "inviolable." At the same time, the Court stated, "The choice to include charter schools among the array of public entities providing educational services to our pupils is a choice appropriately made by the Legislature so long as the constitutional mandate to provide a thorough and efficient system of education in New Jersey is satisfied." Thus, there may be room for expansion of choice in our overall effort to improve education, as long as it does not interfere with or detract from the improvement effort, and specifically *Abbott* implementation efforts. Any choice proposal must be evaluated in the context of maintaining the effort to improve our state's public schools.

### **Education Reform and Urban Improvement**

Neither school choice, nor any other education reform, is a panacea. We are suspicious of claims that any reform, including school choice, will work wonders for our urban schools or our cities in the absence of policies that address the conditions outside schools. School improvement is a necessary but insufficient vehicle for urban improvement. We can't expect any education reform, alone, to work urban wonders. Even the most successful school improvement that we can imagine, or that our tax dollars can buy, cannot lead to significant improvement in the lives of our cities and their residents without a concurrent economic policy aimed at overall urban improvement. Does this mean that we should shelve school reform in favor of economic reform? Of course not; they go hand in hand. Does it mean we should give up on school reform in the absence of economic policies designed to improve cities and the lives of their citizens? Again, the answer is no. Although economic policy is important, urban school improvement is as urgent as ever. Without good schools, children in cities will not have the skills and knowledge they need to compete in a society in which education is a prerequisite for economic mobility.

**The School Choice Debate**

School choice has spawned a huge volume of literature, with new items appearing daily. Yet little agreement has emerged about the most basic elements of school choice. At the research level, problems abound: data is limited; setting up properly controlled studies is difficult; cross-study comparisons are problematic; much of the research is funded or conducted by partisans, clouding its objectivity; and interpretations, re-interpretations and counter-interpretations of the data proliferate. At the discussion and policy level, overblown claims and overstated concerns obscure the issues, as does the growing use of spin. The motives of the primary actors are continually questioned and impugned. Vouchers dominate the debate to the exclusion of other forms of choice. In short, on both sides, much of the school choice debate thus far has produced more heat than light.

**New Jersey’s School Choice Programs**

New Jerseyans exercise less school choice in the public school setting than residents of other states. Students are free to enroll in schools other than their neighborhood public schools to a much lesser degree in New Jersey than the nation as a whole, according to the National Center for Educational Statistics.

**Districts with School Choice Programs**  
(percentage of N.J. districts / all U.S. districts)

Students can enroll in another school within this district		Students can enroll in another school district at no cost		Students from other districts can enroll in this district at no cost	
<u>N.J.</u>	<u>U.S.</u>	<u>N.J.</u>	<u>U.S.</u>	<u>N.J.</u>	<u>U.S.</u>
5.2%	24.7%	4.6%	42.4%	8.7%	45.8%

Source: U. S. Dept. of Education, National Center for Education Statistics, *The Condition of Education 2002*, NCES 2002-025, Washington, DC: U.S. Government Printing Office 2002, Table 29-1 (available at <http://nces.ed.gov/pubsearch/pubsinfo.asp?pubid=2002025>); U.S. Dept. of Education, National Center for Education Statistics, *Schools and Staffing Survey, 1999-2000: Overview of the or Public, Private, Public Charter, and Bureau of Indian Affairs Elementary and Secondary Schools*, NCES 2002-213. Washington, DC: 2002 (available at <http://nces.ed.gov.pubs2002/2002213.pdf>)

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There may be many reasons for this. One may be that New Jerseyans exercise an unreported form of school choice, residential choice, to a greater degree than others. The relationship between residential choice and school choice should not be overlooked. Those who can afford to live near good public schools generally do. This is true in New Jersey no less than elsewhere, and perhaps more.

Still, New Jersey students and families have an array of choice options. Those options have different histories, different applicable statutes and regulations, different funding mechanisms and levels of funding. As a result, there is little consistency in their operations or their educational outcomes. It is difficult to determine the extent to which that inconsistency is by design or happenstance, though there appears to be little design or rational approach to choice as a whole. It is also difficult to determine the extent to which the available choice options, separately or in the aggregate, are meeting parental demand for choice or serving other educational purposes.

### ***Intradistrict Choice***

Many New Jersey districts have long allowed students and their families to exercise some degree of choice, with offerings such as traditional and multi-age elementary curricula, and college-prep, general and vocational high school programs, often within the assigned neighborhood school. Our research has disclosed no systematic survey of New Jersey's intradistrict choice programs, no definitive number of programs or participating students, and no data regarding whether, for instance, choice programs are more prevalent in suburban than urban districts or vice versa. New Jersey has some noteworthy examples of intradistrict choice: Montclair's magnet system is a nationally known controlled choice program established to foster racial integration. Four of Newark's 12 high schools are magnet schools, and the district is working toward establishing magnets at all its high schools. The Trenton district has open enrollment for all district residents in its elementary schools.

### ***Interdistrict Choice***

The Interdistrict Public School Choice Program is a five-year pilot in which the Commissioner of Education is authorized to designate one "choice district" per county and students from any other district are permitted to attend school in those districts free of charge. To be eligible, students must be enrolled in public schools, in kindergarten through grade 9, for one year immediately preceding enrollment in the program. In 2003-04, 14 districts serve as choice districts, and 735 students from 106 districts are participating. Choice districts receive state aid, known as "choice aid" for each participating student, including transportation aid and any applicable categorical aid. Sending districts receive "impact aid" in declining amounts for three years for each participating student. This program will expire in June 2005 unless reauthorized by the legislature.

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### *Charter Schools*

Charter schools are public schools that, theoretically, are freed of many of the rules applied to traditional public schools in exchange for accountability for student performance. They operate on the basis of a “charter,” or contract, with an authorizing agency (in New Jersey, the state Department of Education), and are governed by boards of trustees who have wide control over instruction, staffing, budget, internal organization, calendar, etc. As of October 15, 2003, New Jersey had 48 operating charter schools serving 12,686 students from 154 districts in 12 counties. About 83% of the state’s charter school students live in Abbott districts. Charter schools in New Jersey are not as free of regulatory requirements as their counterparts in some other states; in fact, they are required to comply with most of the administrative and programmatic requirements applicable to regular public schools and school districts. They receive funding from the state and local districts, through the districts in which their students reside, at lower levels than regular public schools: they receive 90% of the per-pupil amount spent in the district, except for Abbott funding, which they do not receive at all (charter school students are included in Abbott aid calculations, but districts are not required to pass the aid along to the charter schools). Nor do they receive any facilities funding. They do not participate in the state’s Public School Construction Program.

### *New Jersey Schools / School Enrollment \**

<u>Public Schools</u>		<u>Public School Enrollment</u>	
Elementary	1,906	Elementary	950,703.5
Secondary	389	Secondary	<u>390,799.5</u>
Handicapped	<u>86</u>		
Total	2,381**	Total	1,341,503
 <u>Nonpublic Schools</u>		 <u>Nonpublic School Enrollment</u>	
Elementary	842	Elementary	161,598
Secondary	107	Secondary	49,934
Elementary/Secondary	86	Special Education	<u>11,051</u>
Handicapped	<u>145</u>		
Total	1,180	Total	222,583

\*Data is for 2001-02, the most recent year for which detailed information is available. Total public school enrollment for 2002-03 was 1,367,249. This does not include pre-kindergarten students. Source: <http://www.state.nj.us/njded/data/enr03>.

\*\* Includes charter schools.

Source: New Jersey Dept. of Education, *New Jersey Vital Education Statistics 2001-02*, available at <http://www.state.nj.us/njded/data/vitaled/0102>.

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### ***Vocational Schools***

Every county in New Jersey has a vocational school district that is governed, funded and operated separately from other public schools. These districts operate more than 60 schools serving more than 64,000 students, including approximately 8,000 students from *Abbott* districts, in nearly 1,300 vocational and technical programs. According to the New Jersey Council of County Vocational-Technical Schools, six out of ten graduates from these programs go on to higher education. Eleven vocational districts operate magnet schools, often known as “career academies,” in fields such as information technology, engineering and health sciences, with integrated academic and vocational programs. Several of these programs, including those in Bergen, Monmouth and Union counties, have highly selective admissions processes.

### ***Early Childhood Education***

Early childhood education is provided through a school choice program in New Jersey. As part of the *Abbott* mandate, all 30 “special needs” urban districts in the state provide full-day pre-kindergarten programs for three- and four-year olds, serving approximately 36,000 children in their own schools, Head Start programs, and programs operated by private child care providers. Another 102 districts provide pre-kindergarten programs for approximately 7,200 four-year-olds, mostly in the public schools but some in programs operated by private providers. Parents in these districts may choose the pre-kindergarten program that best suits their needs. The programs are funded by the state through the local districts, and districts are responsible for ensuring that every provider meet state quality standards, including standards relating to curriculum, class size, teacher certification, professional development and fiscal management.

### ***Privately Funded Choice Programs***

Approximately 222,000 New Jersey students attend private school, but there is no data indicating the number receiving scholarships to attend those schools or the amount of funding for such scholarships. The largest provider of scholarships for private school enrollment in New Jersey appears to be the Scholarship Fund for Inner-City Children, a nonprofit organization based in Newark. The organization administers numerous scholarship funds, most notably funds created with the assistance of the Children’s Scholarship Fund (a national organization founded by Walmart heir John Walton and Gulfstream Aerospace creator Ted Forstmann) and local matching donations. According to information provided by the organization, it awarded Children’s Scholarship Fund scholarships to 708 Newark residents attending 102 different private schools, for a total of \$895,958; to 151 Jersey City residents attending 44 schools, for a total of \$191,245. and to 129 Elizabeth residents attending 37 schools, for a total of \$171,575.

### ***Home Schooling***

All parents in New Jersey are permitted to home-school their children, as long as they provide instruction that is “equivalent” to that which the children would receive in public school. Home-schooling parents are not required to register with a public school district or even report the fact that their children exist. For this reason, it is difficult to state with any accuracy, or even

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estimate, the number of home-schooled students in the state. According to the New Jersey Department of Education, districts reported 2,727 home-schooled students that were reported to them in 2002-03. The Home School Legal Defense Association reports that it has approximately 1,600 member families in New Jersey, and it believes the actual number is much larger and growing.

### **School Choice Programs in Other States**

#### ***Intradistrict and Interdistrict Public School Choice***

There is a wide variety of intradistrict and interdistrict public school choice programs available throughout the 50 states. The laws of 26 states authorize intradistrict choice, and the laws of 46 authorize interdistrict choice. Some states authorize both intradistrict and interdistrict choice while others explicitly authorize only one or the other; some require districts to participate in the programs while in others participation is voluntary; some are state-wide, such as in Minnesota, while others limit participation to students in certain districts or schools; some have been designed specifically to achieve racial balance or to improve low-performing schools or districts, such as in Michigan and Connecticut, while others have not; some include transportation funding while others make that the parent's responsibility. Some choice programs feature well known magnet schools, such as Boston Latin School and Bronx High School of Science, while others involve open enrollment without any magnet feature. Some states combine public school choice with public subsidies for private school, such as Florida, Ohio and Wisconsin for students in Cleveland and Milwaukee (for more as to these, see below), and Vermont and Maine, whose "tuitioning" programs provide vouchers for students in districts with no high schools to attend public or private high schools in other districts. Some public choice programs are in high demand, while others have not been as popular as anticipated, or hoped for, at the time of their creation.

#### ***Charter Schools***

As with intradistrict and interdistrict choice, there is a wide variety of state laws relating to charter schools. According to the Center for Education Reform, as of January 2004, the laws of 41 states and the District of Columbia authorize charter schools, and 2,996 charter schools are operating across the country, serving approximately 685,000 students. The numbers have grown steadily since the first charter school law was adopted in Minnesota in 1991. State laws vary in the extent to which charter schools are required to comply with generally applicable state education laws; their method of accountability, though most require at least participation in state standardized testing programs; the level of funding, and the degree to which charters receive per-pupil funding comparable to other public schools; the authorizing agency, which is usually the state but in some states may be the local board of education and in a few may be other entities such as institutions of higher education; and the extent to which private educational management companies may be involved in charter school operations. Also, not surprisingly, the number of charter schools operating in each state varies considerably: according to the Center for Education Reform, California has 500; Arizona has 491; Pennsylvania has 103; Massachusetts has 50; Connecticut has 16; the District of Columbia alone has 43.

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### ***Publicly Funded Voucher Programs***

The laws of four states, Colorado, Florida, Ohio and Wisconsin, as well as the District of Columbia, authorize school voucher programs, which provide public funding for private school enrollment. Since the laws in Colorado and the District of Columbia are very new, only the programs in Florida, Ohio and Wisconsin are in operation. Florida has two programs, both of which are state-wide (one for students with disabilities and one for students in “failing” schools), while Ohio’s program operates only in Cleveland and Wisconsin’s operates only in Milwaukee. All the programs allow funding of religious as well as non-religious private schools. Florida’s and Colorado’s programs are the subjects of litigation involving state constitutional challenges.

The programs vary in numerous respects, for instance: the size of the program (Milwaukee’s was limited, until a recent amendment, to 15,000 students; Colorado’s is limited to 20,000; Cleveland’s is limited only by annual appropriations; D.C.’s and Florida’s are available to any resident student); the voucher amount (Milwaukee’s is the lesser of the private school tuition or \$5,783; Cleveland’s is the lesser of 90% or 75% of the private school tuition, depending on family income, or \$2,250; Colorado’s is a percentage of the public school funding amount, depending on grade level; Florida’s is the lesser of the public school funding amount or the private school tuition; and D.C.’s is \$7,500); the method of funding (all but Florida and D.C. fund the program with a reduction in funding to the local district); and student income eligibility standards (all but Florida limit the program to low-income students, though with differing definitions). They also vary in the degree to which they regulate the programs or operations of participating private schools: one of the most controversial aspects of the Milwaukee program, for instance, is that since 1995 it has had no provision for voucher students to participate in standardized testing, and therefore no method of evaluating the performance of participating students, schools or the program as a whole.

### ***Tax Incentives for Education***

The laws of three states, Illinois, Iowa and Minnesota, authorize tax deductions or credits for parents’ expenses related to their children’s enrollment in private schools. The programs vary in the amount of the credits or deductions, the eligible expenses that may be included, and the extent of regulation of the schools in which participating students are enrolled (though it is relatively little). The laws of three other states, Arizona, Florida and Pennsylvania, authorize tax credits for individual or corporate taxpayers’ charitable contributions to schools nonprofit scholarship organizations. These laws vary in the amount of the credit, the eligibility requirements pertaining to students and participating schools, and the extent of state oversight. The extent of oversight (or lack thereof) over participating schools and “scholarship funding organizations” has been the subject of recent controversy in Florida, resulting in proposed legislative amendments to tighten accountability provisions.

## **Evidence of Impacts of School Choice**

Based on the evidence amassed thus far, choice programs don't have any negative educational impact on participating students or on the schools from which those students are drawn. Whether they have any positive impact is less clear -- the educational impact on students participating in voucher programs is slight at best, and the connection between choice programs and public school improvement is tenuous at best. Recent reports on the two largest voucher programs in the country, in Milwaukee and Cleveland, do not support the claims that vouchers produce superior achievement for participating students or improve the cities' public schools, independent of other public school reforms. Emily Van Dunk and Anneliese Dickman conclude in *School Choice and the Question of Accountability: The Milwaukee Experience* that the data required for a systematic evaluation of the Milwaukee program do not exist, and until they do neither advocates nor critics of vouchers have evidence to support their claims. Kim Metcalf, summarizing the findings of the official evaluation of the Cleveland program, states, "[C]onclusions about the impact of the voucher program on students' academic achievement remain elusive." Evidence on the effects of charter schools is also mixed. A 2002 Rutgers study of Newark's charter schools found that they mirror the educational inequalities of the state as a whole and its *Abbott* districts. In fact, charter schools overall have the lowest levels of student achievement of all public schools in New Jersey, but some are among the highest achieving schools in the state. The data indicate that urban charter schools are similar to other urban public schools -- some are excellent and some are mediocre at best.

## **Redefining "Public Education"**

Public funding of schools not directly operated by a public agency calls for a new concept of "public education." In our view, any school that receives substantial public funds takes on a public character and must accept an appropriate level of public oversight and accountability. Defining that level is difficult and controversial, but New Jersey's education laws provide some guidance. For example, a public school is defined as one that receives all or any part of its revenue from public funds, which seems to impose on a privately operated "public school" the whole body of regulation applicable to a publicly operated "public school." Additionally, the compulsory education law provides that, for any "private" educational program to satisfy its requirements, the program must offer "equivalent instruction" to the "public" schools.

Despite the fact that these provisions may be honored more in the breach than the observance, they remain in effect, and they should force us to confront the question of how our state's education policy should address changing educational realities. We need to recognize that our children increasingly are being educated in all sorts of public and private schools, and at home. For decades, modest amounts of public funds have helped to support some students receiving private instruction, but this has had little or no impact on the state's regulatory function. In fact, public oversight and regulation of educational programs considered "private" seem actually to



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have declined. But if we seriously consider substantial expansion of public funding of private education, we need to address the regulatory issue.

As the educational landscape grows more diverse and complex, the regulatory system must become more nuanced. We must recognize that different types of educational entities -- publicly operated schools, publicly chartered and publicly funded but privately operated schools, privately operated schools receiving substantial public funding, privately operated schools receiving insubstantial or no public funding and home-schooling families receiving insubstantial or no public funding -- each require a somewhat different regulatory approach. Cyberschools may either cut across categories or may be a category of their own.

Across the whole range of options, the state has a legitimate interest in assuring that students are safely and adequately educated, though the extent of that interest may differ between schools receiving public funding and those that don't. Some standard of adequacy should apply across the board, in order to give some meaning to the statutory requirement of "equivalent" instruction, and the "thorough and efficient" standard applicable to "free public schools" might apply to all the schools falling within a broadened definition of "public schools" (i.e., even to privately operated schools receiving substantial public funding). This is in addition to the policy issue regarding whether *Abbott* district students are entitled to the benefit of the *Abbott* remedies in whatever school they attend.

Moreover, state policy should have a rational basis for any distinctions among differing types of educational entities, and since all "public" schools have the same objective -- public education -- they should be encouraged to work together. Policy makers should consider ways in which the state may not only assure instructional quality, but also encourage communication and collaboration among different types of educational entities and programs.

### **School Choice Policy under No Child Left Behind**

One of the consequences of failure to meet the requirements of the federal statute known as "No Child Left Behind" is the threat of competition in the form of school choice. Every student in a school "in need of improvement" (every school that fails to meet proficiency standards or make adequate yearly progress toward them for two consecutive years) and every student in a "persistently dangerous" school has the right to enroll in any public school in his or her home district that has not been so identified. If every school in the district is in need of improvement or persistently dangerous, or there is no school with extra capacity serving the same grade level, the district must, "to the extent practicable," establish a "cooperative relationship" with another district. In addition, every low-income student in a school that does not meet proficiency standards for three consecutive years, who does not exercise the right to transfer, has a right to receive "supplemental educational services" -- tutoring and after-school services provided by public- or private-sector providers. Thus, federal policy promotes school choice. But hardly any students are exercising this choice: only 504 students throughout New Jersey had exercised their right to transfer under NCLB (207 of them from one school) as of September 2002, when the

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state last collected this data, and a recent nationwide study shows that this is typical of other states. Districts with schools in need of improvement had received only 1,003 requests for supplemental services as of September 2002 (again, when the state last collected this data), and only 342 requests came from districts in all of Bergen, Essex, Hudson, Passaic and Warren counties.

### **School Choice and School Desegregation**

Despite a strong policy against discrimination and segregation in the public schools, New Jersey's schools are among the most segregated in the nation. Choice can be either a positive or negative factor in connection with desegregation. Studies show that uncontrolled public school choice programs have significant tendencies to increase segregation by race, ethnicity and socioeconomic status. On the other hand, choice programs that carefully monitor their effect on racial balance, often known as "controlled choice plans," have been used to promote school desegregation. Because of the potentially positive impact that choice programs can have in promoting racial and ethnic diversity, the Civil Rights Project at Harvard University recently included using choice among the steps that "would make a very large difference" in reviving the promise of school desegregation. Its positive recommendation is strong, but sounds a cautionary note as well: "Use educational choice programs – magnet and charter schools and vouchers if they are enacted in an explicitly pro-integration mode, forbidding transfers that increase segregation and rewarding those that diminish it."

### **Public Funding of Religious Schools**

Under the U.S. Supreme Court's decision in *Zelman v. Simmons-Harris*, a school voucher program that gives payments directly to parents, which they may use for educational programs in a variety of settings, does not violate the federal constitution's prohibition against "establishment" of religion. New Jersey courts probably would rule similarly on this state's "establishment clause," but two other state constitutional provisions could be read to prohibit public funding of religious schools: Article VIII, section 3, paragraph 3, the "public purpose clause," could be read to prohibit public funding of any private institution, though it is unlikely to preclude a voucher program, since education surely serves a "public purpose" even in a private school setting. But Article I, section 3, which prohibits using taxpayer funds to support any religious "ministry," has been construed strictly by the New Jersey Supreme Court. The few rulings on this provision indicate that no public funding of religious institutions, however slight, is permissible. A similar provision of the Washington state constitution was the basis for excluding theology students from a state scholarship program, and this exclusion was upheld recently by the U.S. Supreme Court in *Locke v. Davey*. Thus, New Jersey may have a state constitutional impediment against vouchers for religious schools, even if they are the same as Cleveland's.

## **School Choice and Special Needs**

Parents of children with disabilities exercise school choice in a way which is different from other parents. Providing an appropriate educational program in the least restrictive environment sometimes involves choosing a school other than the local public school, and parents of children with disabilities are entitled to participate in that choice. While the policies behind such exercise of choice and the degree of choice offered to these parents may not apply in other circumstances, there may be lessons to be learned from school choice in the special education context. The state and local capacity needed to administer special education programs, and the administrative costs of these programs, including the costs of monitoring, oversight and transportation, may be similar in any carefully devised school choice program. Another consideration is that children with special needs – those with disabilities as well as with those with limited English proficiency or other needs – must not be excluded on that basis. The state must assure that any program receiving public funds serves all eligible students, including those whose needs require special attention.

## **Private School Capacity for Public School Students**

The New Jersey Association of Independent Schools reports that its members generally are not interested in receiving public funding. In contrast, the New Jersey Catholic Conference says its schools would be interested in enrolling students supported with public funds. We are aware of no data on the capacity or interest of private schools that are not members of either of these groups. The following figures shed some light on private school capacity: as of December 2003, Catholic schools in New Jersey had excess capacity for 36,496 students in elementary schools, including 6,114 in *Abbott* districts, and 6,325 students in secondary schools, including 1,295 in *Abbott* districts.

## **TOUGH CHOICES . . . . .**

**Having set the stage, we can address the tough choices:**

### **Should school choice play a larger role in our effort to improve education?**

School choice is not a panacea. It will not lead to dramatic improvement in our schools or our cities. The impact of school choice on academic performance appears to be slight at best, but there may be other reasons for policymakers to decide that choice in some form should play a larger role in our education policy. To the extent that choice engenders innovation (as in charter schools and career academies) or allows districts to use excess capacity or reduce class size (as in the interdistrict choice program), it can have tangible benefits. Parents who exercise choice in either public or private schools appear to be more likely to be very satisfied with their children's schools, and parents of private school students are more involved in their schools (but that may be because they are paying for them, as parents who exercise public school choice do not appear to be similarly involved). The equitable argument that low-income urban parents should have more choice in order to even the playing field also carries some weight (though there is no evidence that any feasible program will give those parents nearly the same degree of choice as wealthy parents). Another argument in favor of choice is that a concerted effort to increase interaction across urban-suburban lines, with funding following the children across those lines, could have the dual benefit of improving our record on desegregation and providing more efficient and equitable sharing of resources. Interdistrict choice has not provided these benefits thus far, but we have not made a concerted effort to use choice to achieve these ends, and there appears to be little political will to do so. But the goal of desegregation should not be abandoned. **School choice might play a role in improving our record on desegregation, or serving the objectives of innovation, efficiency, and equity, provided that it is combined with, or at least does not detract from, efforts to achieve urban school improvement through the *Abbott* mandates.**

#### **Percentage of Students with Parents Very Satisfied with their Schools**

<u>Assigned Public School</u>	<u>Chosen Public School</u>	<u>Private Religious School</u>	<u>Private Non-Religious School</u>
48	62	80	76

Source: U. S. Dept. of Education, National Center for Education Statistics, *Trends in the Use of School Choice 1993 to 1999*, NCES 2003-031, Washington, DC: 2003, Table 3 (available at <http://nces.ed.gov/pubsearch/pubsinfo.asp?pubid=2003031>)

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### Percentage of Students with Parents Involved with their Schools

	Assigned Public <u>School</u>	Chosen Public <u>School</u>	Private Religious <u>School</u>	Private Non-Religious <u>School</u>
Attended a general meeting	75	75	93	87
Attended a parent-teacher conference	66	67	86	74
Attended a school event	63	59	84	76
Volunteered/served on a committee	30	31	65	53

Source: U. S. Dept. of Education, National Center for Education Statistics, *Trends in the Use of School Choice 1993 to 1999*, NCES 2003-031, Washington, DC: 2003, Table 4a/4b (available at <http://nces.ed.gov/pubsearch/pubsinfo.asp?pubid=2003031>)

### **Should New Jersey's public school choice programs be expanded?**

Without a thorough evaluation of our state's public school choice programs, and their capacity to help or harm *Abbott* implementation, policymakers can't make informed judgments about whether they should be expanded, modified or reduced. A few things appear clear: first, as the NCES data indicates, New Jersey offers less public school choice than the national average, suggesting that expansion might be appropriate.

Second, several existing programs have had positive, if limited or disputed, results. "Choice districts" are, for the most part, satisfied with the impacts of the Interdistrict Public School Choice Program. But for the program to have broader impact, let alone serve the ambitious purpose suggested above -- to encourage efficient and equitable sharing of resources across urban-suburban lines and to foster desegregation -- it would need to be expanded, and greater incentives would need to be provided to encourage more districts to serve as choice districts. Some of the state's vocational districts have had considerable success in attracting talented students to their career academies and magnet schools, but they have been criticized by some others for draining students and funds. Whichever side one supports in that debate, it is clear that a poorly conceived or implemented system of interdistrict choice could backfire, and could drain resources -- funding, energy, administrative capacity -- from other districts, including possibly the state's urban districts.

Third, while charter schools provide a popular outlet for choice, especially in urban districts, their performance is mixed, and, in fact, their total numbers have not grown to anywhere near the

## ***TOUGH CHOICES***

statutory limit. The reasons for their uneven record, and whether any changes in state policy would improve their overall record, need to be examined more closely. Among the changes that should be examined is an increase in their financial support, especially for those in urban districts. Some also may need more technical support and others more flexibility to allow them to serve as the models of innovation they are supposed to be. The state also should consider a strategy to encourage greater communication and collaboration between charters and traditional public schools, and especially to ensure that the lessons of the most successful charter schools are made available to others.

### ***Should New Jersey provide public subsidies for students to enroll in private schools?***

Since Catholic schools appear to have the greatest interest in, and capacity for, accepting additional students with public funds, the state constitutional provision prohibiting public funding of religious institutions could be an impediment to a voucher program in New Jersey. Even if it could pass legal muster, since the benefits in terms of student achievement and improvement in the public schools appear to be minimal, we believe a voucher program would be supportable only if it served one or more of the other public purposes mentioned above – innovation, efficiency, equity, and desegregation. Of these purposes, equity – the asserted fairness of allowing low-income urban parents greater choice – is the one most frequently and strongly offered.

For policymakers to decide if the asserted benefits outweigh the costs, they need to evaluate carefully both the projected benefits and costs of vouchers. On the cost side, that includes, of course, the cost of the vouchers themselves, and that cost will vary greatly depending upon which students are eligible and how large the voucher amount is. Indeed, not only the cost, but also the whole nature of the program would be affected if the voucher were limited to poor children attending failing schools or were available to a much larger student population. As the amount increases, the program cost and the extent of educational choice both grow. As the Cleveland experience suggests, with a relatively low voucher amount, the only real choice for most students is a local parochial school.

But the costs of a program would extend beyond the voucher or tuition amount. There are also administrative costs, and these are not just measured in dollars. The costs of the program must be assessed in relation to state and district efforts to comply with the *Abbott* mandate. Budgets are already stretched very thin, and increasing state and district capacity to provide for improvement in our public schools must be our first priority. **The question is not whether vouchers would cause dramatic improvement – we see no evidence that they would. Rather, the question is whether we can afford both our efforts to provide a thorough and efficient system of public education and a program of public subsidies to be used in private schools. Vouchers are supportable only if the answer to that question is yes.**

### ***What accountability measures should be imposed on school choice programs?***

As discussed above, public funding should carry with it some degree of accountability. Indeed, any educational program that purports to satisfy compulsory education requirements should be subject to some public regulation. **The state should have reasonable standards and requirements that any school or educational program must meet in order to receive public education funds, and it should have a coherent policy of accountability that applies in appropriate ways to all schooling options, including those involving school choice.** Possible areas for regulation include (1) pre-admission: assurance that potential applicants have access to accurate and adequate information; (2) admission: a fair, nondiscriminatory and transparent process, including a lottery or other similar system if there are more applicants than positions; and (3) post-admission: virtually every aspect of a school's administration and operation, including facilities and equipment, administration, transportation, security, health, curriculum, teaching staff, instructional materials, technology, special services for students with disabilities and those with limited English proficiency, student discipline, pupil assessment, programs to improve attendance and reduce dropout rates, recordkeeping and reporting, and general oversight and monitoring. Of course, what constitutes "reasonable" regulation is a policy matter as well as a legal one. The tension is between providing the broadest possible array of choices and assuring that public funds are used in ways that advance and are consistent with public interests and values. The recent report by the Brookings Institution highlights the policy dilemma by indicating that **the greatest degree of choice occurs when a school choice program has a high level of funding and a low level of regulation, but such a combination also may create a substantial risk of abuse.**

### ***Should New Jersey regulate home schooling?***

According to a policy adopted by the state Department of Education in 2000, local school districts may request documentation that a child is receiving home schooling only if it receives credible evidence that the compulsory education law is being violated. Otherwise, they may not inquire about whether families are home schooling their children or review the curriculum or program of a home-schooled child or include home-schooled children in state testing. One might question, therefore, on what basis districts can conclude that any students are receiving "equivalent" instruction, or any instruction, through home schooling. This seems contrary to the spirit, if not the letter, of the compulsory education law. Curiously, at the same time that the state has effectively eliminated any accountability for home schooling, it has ratcheted up accountability for the public schools and their students. This is the context in which the possibility of public subsidies for home schooling must be weighed. As a practical matter, if the primary efforts of home schooling advocates are directed (as they seem to be) at eliminating public regulation and accountability rather than seeking public funding, there seems little or no chance of movement toward public funding. That would seem an appropriate result. That is not

## ***TOUGH CHOICES***

to say, however, that acquiescing in the position of no regulation and no accountability at all on the part of home schoolers is responsible public policymaking or statutory compliance.

### ***Should New Jersey authorize, encourage or regulate cyberschooling?***

Given the increasing role that technology plays in society and, particularly, the apparently increasing comfort level of children with computers, the potential demand for cyberschooling programs (those based on computer software packages or internet instruction), and their potential benefits, are enormous. But the risks are considerable as well, and the interplay among cyberschooling, home-schooling and charter schools is complex. Nationwide, an increasing number of for-profit companies are advertising cyberschooling opportunities. Under the laws of some states, such programs may qualify as private schools. In at least one state, Pennsylvania, cyberschools may be authorized as charter schools. Cyberschooling programs that stand alone or as supplements to home-schooling raise all the same questions discussed above regarding “equivalent” instruction and accountability. To the extent that they seek to qualify for public funds, as charter schools, supplemental service providers under NCLB or otherwise, they need to be responsive to an appropriate range of regulatory requirements. The appropriate level of funding, if any, for cyberschools, also needs to take their distinctive nature into account. Policymakers should be open to the possibilities of cyberschooling, and should be proactive in considering its role among school choice options.



## **WHAT WE NEED TO KNOW . . . . .**

### **Recommendations for Further Research**

### **Comprehensive Evaluations of New Jersey's Choice Programs**

Each of the major school choice options currently available to New Jersey students – intradistrict and interdistrict choice, charter schools, career academies and the early childhood education program -- should be evaluated to determine their impact on participating students, schools and school districts as well as the schools and districts from which participating students are drawn. The evaluations should consider:

- *Impact in terms of educational quality, innovation, efficiency, equity and desegregation; program modifications that would improve program performance in these areas; potential cost of such modifications*
- *Impact on efforts to implement the Abbott mandate*
- *Potential for expansion: interest, capacity, potential positive or negative effect of expansion; potential cost of expansion*
- *The role of the program in a comprehensive state policy on school choice*

### **Analysis of Private School Choice**

Certain essential questions remain unanswered regarding private school choice. In addition to all the issues regarding public school choice, any proposal to provide public subsidies for enrollment in private schools would raise additional questions that require further analysis:

- *Should a program of public subsidy be funded directly by the state, as part of the education budget, or in some other way, such as through tax credits or deductions?*
- *How much would such a program cost? How would it affect other budget and program priorities?*
- *What degree of public oversight, regulation and accountability would be necessary, appropriate and acceptable?*
- *What would be the optimal size of a private school choice program? Should it be limited to students currently in public schools? To students in urban districts? To students in schools designated “in need of improvement”? To low-income students?*

## **WHAT WE NEED TO KNOW . . . . .**

- *What is the optimal amount of subsidy? Should it be uniform or scaled to reflect the needs of individual students? Should a parent contribution be required or permitted?*

### **Examination of Compulsory Education Requirements and Enforcement**

Current interpretation and implementation of New Jersey's compulsory education law are problematic both for existing nonpublic education programs and for consideration of possible future publicly subsidized school choice programs. We lack even the most basic information about many children who are not enrolled in the public schools. As a result, we have no reliable way to determine the extent to which our compulsory attendance laws are being enforced or the extent to which children are receiving "equivalent" instruction. The state should initiate an effort to examine the following issues:

- *How many children in New Jersey are not enrolled in any public or private school program?*
- *Of the more than 220,000 enrolled in private schools, how many are in unaccredited programs?*
- *How many children in New Jersey are receiving home schooling? Based on census or other data, how many children of school age are not accounted for?*
- *What kind of instructional programs are children receiving in private schools, especially unaccredited schools, or in home schooling? Is there a need for greater oversight to ensure the provision of "equivalent" instruction?*
- *To what extent are those students who are not in public or private schools receiving instruction through cyberschool programs? What is the educational quality of those programs? Is there a need for greater oversight? Is there a role for such programs in a comprehensive state policy on school choice?*

# Tough Choices

SETTING THE STAGE  
for  
INFORMED, OBJECTIVE DELIBERATION  
on  
**SCHOOL CHOICE**

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Our full report on *TOUGH CHOICES* will set the stage with greater detail on all the issues considered briefly in this short report, and with sections on each of the following:

*Interdistrict School Choice in Minnesota, Michigan, Massachusetts and Connecticut*

*Charter Schools in Newark: Toward a System of Performance-based Accountability*

*School Vouchers in Cleveland and Milwaukee: A Tale of Two Cities*

*Florida Vouchers and Tax Incentives: A Question of Accountability*

*The D.C. Voucher Program*

*Public Opinion on School Choice*

Plus a bibliography, a list of resources, and appendices summarizing the laws of the 50 states relating to interdistrict choice, charter schools, vouchers, and tax incentives.

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