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## Maximizing The Educational Choice Wave By Rethinking State And Local Regulations

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# MAXIMIZING THE EDUCATIONAL CHOICE WAVE BY RETHINKING STATE AND LOCAL REGULATIONS

SHAKA MITCHELL\*

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## INTRODUCTION

The East African Maasai people offer one another a traditional greeting, “Kasserian Ingera,” that translates to “and how are the children?”<sup>1</sup> This greeting, spoken by all community members—including those without children of their own—highlights the value the Massai place on their youth, as well as how they orient their decisions. The eruption of educational

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1. Amelia Coleman-Brown et al., *And How Are the Children?*, 18 PERSPS. ON URB. EDUC. 1 (Sept. 2020), <https://urbanedjournal.gse.upenn.edu/archive/volume-18-issue-1-fall-2020/and-how-are-children> [<https://perma.cc/56QG-J36L>].

choice laws<sup>2</sup> in the United States in 2023 can be viewed as a legislative reaction that occurs when the response to Maasai interrogatory is found wanting. The need for system-wide change in K-12 education was made clear with the onset of Covid-19.<sup>3</sup> Newly passed programs may eventually result in millions of American children taking advantage of educational opportunities once reserved for those whose families could afford either the cost of private school tuition or moving into neighborhoods with high-quality zoned schools.<sup>4</sup> Various states across the nation, including Wisconsin, Nebraska, Iowa, and Florida, have passed school choice laws in the form of education savings accounts, vouchers, tax credit scholarship programs, and charter schools.<sup>5</sup>

However, even as these laws usher in a new era in K-12 education, the impact of the programs will not be fully realized if outdated local and state laws effectively ask whether the paperwork is in order, rather than asking the crucial question: “and how are the children?” Reforms are poised to change the education landscape in dozens of states—but, in many other locales, webs of local and state laws still restrict parents’ ability to customize their child’s education in the new choice landscape.<sup>6</sup>

This Article will first survey the flurry of education choice activity in 2023, touching on several of the factors that drove legislation. Next, it will examine both the dispositional and practical impediments to choice reforms. This Article concludes with recommendations for modernizing local and state policy to best achieve the goals of recently enacted educational programs.

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2. The terms “education choice,” “school choice,” and “parent choice” will be used interchangeably. Though “school choice” is more often used in the policy vernacular, the author has attempted to refrain from the term because new programs are less school-centric and focus more on customizing the educational experience for each participating student. See, e.g., Rick Hess, *What Is an Education Savings Account, and Why Does It Matter?*, EDUC. WK.: RICK HESS STRAIGHT UP (May 8, 2023), <https://www.edweek.org/policy-politics/opinion-what-is-an-education-savings-account-and-why-does-it-matter/2023/05> [<https://perma.cc/Z5WB-XFKB>]; Nicole Stelle Garnett & Richard W. Garnett, *From School Choice to Parent Choice*, CITY J. (Jan. 31, 2023), <https://www.city-journal.org/article/from-school-choice-to-parent-choice> [<https://perma.cc/W582-DUB8>].

3. See, e.g., Michael B. Horn, *The Rapid Rise of Pandemic Pods*, 21 EDUC. NEXT 93, 93–95 (2021).

4. See, e.g., Libby Stanford, *The Push for School Choice is Accelerating*, EDUC. WK. (Jan. 27, 2023), <https://www.edweek.org/policy-politics/the-push-for-school-choice-is-accelerating/2023/01> [<https://perma.cc/AMX3-YC8G>].

5. See *id.*; see also Libby Stanford, *6 More States Will Soon Let Almost all Students Attend Private Schools With Public Money*, EDUC. WK. (June 15, 2023), <https://www.edweek.org/policy-politics/6-more-states-will-soon-let-almost-all-students-attend-private-school-with-public-money/2023/06> [<https://perma.cc/9WJS-A8LM>].

6. See Nicole Stelle Garnett, *As Private-School-Choice Spreads, Implementation is Imperative*, EDUC. NEXT (Mar. 21, 2023), <https://www.educationnext.org/private-school-choice-spreads-implementation-is-imperative-excessive-eligibility-restrictions-undercut-effectiveness/> [<https://perma.cc/TS5U-JX7F>].

## I. 2023—THE MOST RECENT “YEAR OF SCHOOL CHOICE”

Less than halfway through 2023, Tommy Schultz, the CEO of the American Federation for Children, declared the year to be “the most successful cycle for school choice in history,”<sup>7</sup> although he noted that there was more work to be done. Just two years earlier, 2021 was lauded as a “breakthrough year”<sup>8</sup> and the “Year of Educational Choice.”<sup>9</sup> Indeed, during the first years of the Covid-19 pandemic (2020–2021) demand for options beyond zoned public schools skyrocketed and the attendant decline in public school enrollment was equally dramatic. For instance, the number of homeschooled children doubled, leading to a record 11% of all U.S. school children being homeschooled.<sup>10</sup>

Nevertheless, as of September 2023, nineteen states expanded their K-12 education choice offerings through a mixture of program designs.<sup>11</sup> In 2023 states demonstrated an increased willingness to expand tax-credit scholarship programs and voucher programs (though the latter expanded with lower frequency). Exceeding both vouchers and tax-credit scholarships are education savings accounts (“ESAs”), which have passed in eleven states.<sup>12</sup> ESAs give parents greater flexibility in customizing the educational experience for their child.<sup>13</sup> Though the programs vary state-to-state, ESAs can typically be used on a range of educational expenses including tuition at private school, books, technology, college credits, tutoring, and test preparation.<sup>14</sup>

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7. Press Release, Am. Fed’n for Child., American Federation for Children Announces “One Million More” Campaign to Close Out 2023 Legislative Cycle (May 16, 2023), <https://www.federationforchildren.org/american-federation-for-children-announces-one-million-more-campaign-to-close-out-2023-legislative-cycle/> [https://perma.cc/9R7L-85CA].

8. Jason Bedrick & Ed Tarnowski, *How Big Was the Year of Educational Choice?*, EDUC. NEXT (Aug. 19, 2021), <https://www.educationnext.org/how-big-was-the-year-of-educational-choice/> [https://perma.cc/L7TD-B6BD].

9. Lauren Forte, *All In on School Choice: In 2023, States Said Yes to School Choice*, NAT’L SCH. CHOICE WK. (Oct. 31, 2023), <https://schoolchoiceweek.com/2023-yes-to-school-choice/> [https://perma.cc/5LME-X9RB].

10. KERRY McDONALD, STATE POL’Y NETWORK, ENCOURAGING EDUCATION ENTREPRENEURSHIP 6–7 (2022), <https://spn.org/wp-content/uploads/2022/09/SPN-Education-Entrepreneurship-Policy-Guide.pdf> [https://perma.cc/UG3W-6NXQ].

11. Press Release, Lucia Matamoros, Nat’l Sch. Choice Awareness Found., More States Go “All in” on School Choice in 2023: What It Means for Families and K-12 Education (July 12, 2023), <https://schoolchoiceawareness.org/more-states-go-all-in-on-school-choice-in-2023-what-it-means-for-families-and-k-12-education/> [https://perma.cc/6WPE-9UP4].

12. Libby Stanford & Mark Lieberman, *Education Savings Accounts, Explained*, EDUC. WK. (Mar. 27, 2023), <https://www.edweek.org/policy-politics/education-savings-accounts-explained/2023/03> [https://perma.cc/HL9S-ZTH3].

13. *See id.*; *see also* Forte, *supra* note 9.

14. *See Programs & Eligibility*, AM. FED’N FOR CHILD., <https://www.federationforchildren.org/school-choice-in-america/programs-and-eligibility/> [https://perma.cc/9F3M-FX8X]; *see also* sources cited *supra* note 13.

The shift in program preference from vouchers to ESAs is indicative of parental responses that began rapidly emerging and multiplying because of Covid-19 school shutdowns.<sup>15</sup> When schools across the country remained shuttered in the fall of 2020, many parents took matters into their own hands and began to tailor school days according to the new rhythms and routines wrought by the pandemic. Some families pooled resources and hired tutors via online services.<sup>16</sup> Others found online education to be a better situation academically and socially than conventional brick-and-mortar schools.<sup>17</sup>

In September 2020, the publication *Education Next* asked whether “the parent response to Covid-19 [would] lead to lasting change”?<sup>18</sup> The answer is an overwhelming “yes.” For instance, participation in virtual education continues to not only exceed pre-pandemic levels but has even increased after schools reopened in the 2021–2022 school year.<sup>19</sup> Initially called “pandemic pods,” non-traditional modes of delivering education continue to not only exist but flourish and replicate.<sup>20</sup> One such example is Prenda, an organization that provides the tools and training necessary to run a pod, or “microschool” in a home or other space. The Prenda model began in a home with seven students in 2018 and has since grown to serve nearly 10,000 students.<sup>21</sup>

Whether the delivery method comes in the form of shared tutoring, online material, in-home microschools, or other formats, the education options available to families have never been greater. Perhaps just as diverse are the reasons driving parents to seek options beyond conventional, zoned schools operated by local school boards.<sup>22</sup>

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15. Joseph Olchefske & Steven Adamowski, *The Great Unbundling*, 23 EDUC. NEXT 18, 18 (2023).

16. See, e.g., Melinda Wenner Moyer, *Pods, Microschools and Tutors: Can Parents Solve the Education Crisis on Their Own?*, N.Y. TIMES (Aug. 18, 2020), <https://www.nytimes.com/2020/07/22/parenting/school-pods-coronavirus.html> [https://perma.cc/9KGL-7FCH].

17. See Asher Lehrer-Small, *Virtual School Enrollment Kept Climbing Even As COVID Receded, New Data Reveal*, THE 74 (Nov. 14, 2022), <https://www.the74million.org/article/virtual-school-enrollment-kept-climbing-even-as-covid-receded-new-data-reveal/> [https://perma.cc/G88Z-AYC7].

18. Horn, *supra* note 3, at 93.

19. Lehrer-Small, *supra* note 17.

20. See, e.g., Nancy Walser, *Pods Live On: School Districts Are Using The Pandemic-Era Invention To Help Kids Recover From ‘Learning Loss,’* THE HECHINGER REP. (Dec. 14, 2022), <https://hechingerreport.org/pods-live-on-school-districts-are-using-the-pandemic-era-invention-to-help-kids-recover-from-learning-loss/> [https://perma.cc/94JQ-URQL].

21. PRENDA, <https://www.prenda.com/> [https://perma.cc/H6JH-W6MK].

22. See, e.g., Sarah Grady, *Why Do Parents Choose Schools for Their Children?*, NAT’L CTR. FOR EDUC. STAT.: NCES BLOG (July 30, 2020), <https://nces.ed.gov/blogs/nces/post/why-do-parents-choose-schools-for-their-children> [https://perma.cc/E53T-3NS3].

### A. School Choice Stimuli

The vast majority of school-aged children in the United States attend a public school.<sup>23</sup> Yet, recent polling data suggests the status quo is indicative of acquiescence rather than enthusiastic acceptance.<sup>24</sup> Seventy one percent of those surveyed believe that more things about the educational system should change than stay the same.<sup>25</sup> Remarkably, one-fifth of those surveyed believe “nearly everything should change.”<sup>26</sup> Numerous instigating factors have merged in recent years, encouraging parents to choose new modes of education for their children.

The most glaring and disruptive factor prompting parents to seek non-typical educational options is Covid-19. Public school enrollment fell by roughly 1.4 million students in the first year of the pandemic, effectuating a 3% drop in the previous public school population.<sup>27</sup> In many communities, public school access policy vacillated between normal openness and complete closure, often finding a middle ground built on substantially restricting the learning environment (including the wearing of personal protective equipment, the enforcement of social distancing, and restrictions on the number of days in a week in which a building could remain open).<sup>28</sup> The unstable school situation, which forced some parents to lose or quit their jobs, spurred others to find alternative solutions that would reestablish consistency at home.<sup>29</sup> Thousands more students exited public schools in favor of private schools which often remained open while zoned schools eschewed in-person learning.<sup>30</sup>

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23. NAT'L CTR. FOR EDUC. STAT., FAST FACTS: PUBLIC AND PRIVATE SCHOOL COMPARISON (2021), <https://nces.ed.gov/fastfacts/display.asp?id=55> [<https://perma.cc/R65K-66GM>].

24. POPULACE, POPULACE EDUCATION INSIGHTS: PURPOSE OF EDUCATION INDEX 5 (2023), <https://static1.squarespace.com/static/59153bc0e6f2e109b2a85cbc/t/63e96b44a0e46d79a10ecf26/1676241761790/Purpose+of+Education+Index.pdf> [<https://perma.cc/8VGE-C4KM>].

25. *Id.*

26. *Id.*

27. Patrick Wall, *COVID Exodus: Where Did 1 Million Public School Students Go? New Data Sheds Some Light.*, CHALKBEAT (Feb. 8, 2023, 11:01 PM), <https://www.chalkbeat.org/2023/2/9/23591903/school-enrollment-data-decline-covid-attendance/> [<https://perma.cc/4CEN-UKGJ>].

28. See, e.g., Kalyn Belsha et al., *As Schools Try to Recover, COVID's Toll Lingers: 'We Haven't Seen Fine, Ever,'* CHALKBEAT (Mar. 19, 2022, 5:00 AM), <https://www.chalkbeat.org/2022/3/19/22983067/covid-schools-toll-remote-teachers-students-absences-learning-loss-graduation-rates/> [<https://perma.cc/WQ9M-E2HF>].

29. See Abha Bhattarai, *'I'm Barely Clinging Onto Work': Exhausted Parents Face Another Wave of School Shutdowns*, WASH. POST (Jan. 8, 2022, 1:26 PM), <https://www.washingtonpost.com/business/2022/01/08/omicron-working-parents-schools/> [<https://perma.cc/UNX2-XJ3D>].

30. See Neal McCluskey, *Survey: 55 Percent of Private Schools See Enrollment Rise*, CATO INST. (Dec. 16, 2022), <https://www.cato.org/survey-reports/survey-55-percent-private-schools-see-enrollment-rise> [<https://perma.cc/E5SQ-SMFW>]; Neal McCluskey, *Private Schooling After a Year of COVID-19*, POL'Y ANALYSIS NO. 914 (Cato Inst., Wash. D.C.),

The second factor driving school system shopping—that is, seeking options within and beyond the public school system—is the recent increase in public scrutiny associated with school curricula and teacher influence that has caused significant controversy both in school board meetings and within classrooms.<sup>31</sup> There is no single element that provoked parents ire, but topics such as critical race theory, gender and sexuality, parents' bills of rights, and student discipline practices proved to be more than many local school boards could manage.<sup>32</sup> While private schools are not immune to such conflicts, they are able to more firmly establish their academic and non-academic missions without being blown and tossed by the waves of an ever-changing culture.<sup>33</sup>

A third and long-standing motivator for parents exiting the public school system is academic quality. The academic proficiency of public school students as measured by the National Assessment of Educational Progress (NAEP) has essentially been flat since 2004.<sup>34</sup> Covid-19 school closures and disruption led to immediate academic backsliding, with students in some districts losing more than 1.5 years of academic

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Apr. 13, 2021, at <https://www.cato.org/sites/cato.org/files/2021-04/policy-analysis-no-914.pdf> [<https://perma.cc/EW6Z-FJAJ>].

31. See Katie Reilly, *Culture Wars Could Be Coming to a School Board Near You*, TIME (Mar. 23, 2023, 6:00 AM), <https://time.com/6159177/school-board-elections-covid-19-critical-race-theory/> [<https://perma.cc/NYD6-E2AX>].

32. See *id.*; see also, e.g., Kalyn Beshka, 'Am I not allowed to mention myself?' Schools grapple with new restrictions on teaching about gender and sexuality, CHALKBEAT (Apr. 12, 2022, 1:42 PM), <https://www.chalkbeat.org/2022/4/12/23022356/teaching-restrictions-gender-identity-sexual-orientation-lgbtq-issues-health-education/> [<https://perma.cc/9WCJ-6KMX>]; Lexi Lonas & Mychael Schnell, *House Republicans pass Parents Bill of Rights*, THE HILL (Mar. 24, 2023, 11:06 AM), <https://thehill.com/homenews/house/3916114-house-republicans-pass-parents-bill-of-rights/> [<https://perma.cc/G877-JZ84>]; Richard O. Welsh, *I Combed Through 81 Studies on School Discipline. Here's What Educators Need to Know*, EDUC. WK. (Oct. 6, 2023), <https://www.edweek.org/leadership/opinion-i-combed-through-81-studies-on-school-discipline-heres-what-educators-need-to-know/2023/10> [<https://perma.cc/4ZSV-BZUU>].

33. See Nicole LaPorte, *Will Private Schools Survive the Culture Wars?*, TOWN & COUNTRY (Aug. 27, 2021), <https://www.townandcountrymag.com/society/money-and-power/a37376687/private-schools-culture-race-curriculum-2021/> [<https://archive.is/VKWcg>]; Bella DiMarco & Liz Cohen, *The New Wave of Public Funding of Private Schooling, Explained*, FUTUREED (Mar. 9, 2023), <https://www.future-ed.org/the-new-wave-of-public-funding-of-private-schools-explained/> [<https://perma.cc/K4ME-9WDG>] (each describing how the "culture wars" have affected private schooling and enrollment); see also *The Distinctive Value of Independent Schools*, ERB, <https://www.erblearn.org/blog/what-are-independent-schools/> [<https://perma.cc/QT4B-8CN2>] (exemplifying one of the increasingly important considerations for parents when deciding whether or not to send their children to public school; namely, the importance of being able to choose and rely upon an institution's guiding values and mission).

34. *NAEP Long-Term Trend Assessment Results: Reading and Mathematics*, NAT'L ASSESSMENT OF EDUC. PROGRESS (2021), <https://www.nationsreportcard.gov/ltr/?age=9> [<https://perma.cc/56NE-AG2Y>].

progress.<sup>35</sup> This so-called “learning loss” resulted in the average student in grades three through eight losing the equivalent of half a year of learning in math and a quarter of a year in reading.<sup>36</sup> Losses were especially great for students whose districts chose to close for extended periods of time.<sup>37</sup> On the other hand, private Catholic school students, when counted in the aggregate, gained in academic proficiency according to the National Assessment of Educational Progress.<sup>38</sup> Simultaneously, Emily Hanford’s investigation into how reading is taught in thousands of schools across America instigated “reading wars.”<sup>39</sup> Fights on this front involve parents asking why their public schools and districts were using disreputable instructional practices, effectively leaving millions of students ill-equipped for reading at their grade level.<sup>40</sup> For many parents, teaching reading skills at the elementary school level is a baseline practice of a functional school.<sup>41</sup> Learning that only 32% of fourth grade students are deemed proficient in reading according to the NAEP was unforgivable for parents and policymakers alike, and likely hastened the move to expand school choice options.<sup>42</sup>

Another accelerant in the move away from conventional public schools is the erosion of trust in teachers and public school systems. A January 2022 Gallup poll found that Americans’ belief in grade-school

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35. *New Data Show How the Pandemic Affected Learning Across Whole Communities*, HARV. GRADUATE SCH. OF EDUC. (May 11, 2023), <https://www.gse.harvard.edu/ideas/news/23/05/new-data-show-how-pandemic-affected-learning-across-whole-communities> [<https://perma.cc/29A7-9XUB>].

36. *Id.*

37. ERIN M. FAHLE ET AL., SCHOOL DISTRICT AND COMMUNITY FACTORS ASSOCIATED WITH LEARNING LOSS DURING THE COVID-19 PANDEMIC 4 (2023), [https://cepr.harvard.edu/sites/hwpi.harvard.edu/files/cepr/files/explaining\\_covid\\_losses\\_5.23.pdf](https://cepr.harvard.edu/sites/hwpi.harvard.edu/files/cepr/files/explaining_covid_losses_5.23.pdf) [<https://perma.cc/A84R-2JY8>].

38. Ira Stroll, *Catholic Schools Are a Rare Bright Spot in Nation’s Report Card 2022 Data*, EDUC. NEXT (Oct. 24, 2022), <https://www.educationnext.org/catholic-schools-are-a-rare-bright-spot-in-nations-report-card-2022-data/> [<https://perma.cc/6LRS-NZFC>].

39. *See Sold a Story*, APM REPS., <https://features.apmreports.org/sold-a-story/> [<https://perma.cc/43B6-5APP>].

40. *See* Emily Hanford, *At a Loss for Words: What’s wrong with how schools teach reading*, APM REPS. (Aug. 22, 2019), <https://www.apmreports.org/episode/2019/08/22/whats-wrong-how-schools-teach-reading> [<https://perma.cc/PFR9-ECAX>] (describing the evolution of teaching practices with regard to teaching as well as which strategies have attracted past controversy); *see also, e.g.*, Meghan Mangrum, *Nashville PROPEL Parents Advocate For More Personalized Learning For Their Students*, THE TENNESSEAN (Aug. 8, 2021, 7:54 AM), <https://www.tennessean.com/story/news/education/2021/08/08/nashville-propel-parents-advocate-student-personalized-learning/5382627001/> [<https://perma.cc/QGV2-2R8K>].

41. *See* Emily Hanford, *School is For Learning to Read*, N.Y. TIMES (Sept. 1, 2022), <https://www.nytimes.com/2022/09/01/opinion/us-school-reading.html> [<https://perma.cc/6J7N-N7QU>].

42. *NAEP Reading: State Achievement-Level Results*, NAT’L ASSESSMENT OF EDUC. PROGRESS (2022), <https://www.nationsreportcard.gov/reading/states/achievement/?grade=4> [<https://perma.cc/TN69-6HLG>].



teachers' honesty had dropped to an all-time low, with 64% of adults reporting they believe those instructors are truthful and have ethical standards, down from a high of 75% in 2020.<sup>43</sup> Furthermore, a July Gallup poll found that just 28% of Americans have "a great deal" or "quite a lot" of confidence in public schools, which represents "the second lowest this figure has been since Gallup began asking this question in 1973."<sup>44</sup> Though there is variance across political lines, most troubling is that only 13% of Republican respondents said they had confidence in public schools. Confidence was higher among Democrats, though at 43% it remains a minority.<sup>45</sup> Support in heavily Democratic communities may continue to wane amidst ongoing teacher strikes that disrupt not only the school year, but also parents' ability to work outside the home.<sup>46</sup>

Lack of trust in school teachers and public schools dovetails at a critical moment when there is a nationwide teacher shortage.<sup>47</sup> Mid-year teacher resignations are especially challenging, and vacancies may go unfilled for the remainder of the school year, rendering students rudderless in critical content areas.<sup>48</sup>

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43. Hannah Natanson, *Trust in Teachers is Plunging Amid a Culture War in Education*, WASH. POST (Sept. 6, 2022), <https://www.washingtonpost.com/education/2022/09/06/teachers-trust-history-lgbtq-culture-war/> [https://perma.cc/66FE-T3J8].

44. *Id.*

45. *Id.*

46. For example, cities like Los Angeles, California, and Portland, Oregon, have faced significant recent conflict with regard to teachers' strikes, and parents have expressed their concerns when it comes to the amount of instructional time their students are losing. See, e.g., Sonja Sharp & Andrew J. Campa, *What? A Strike? Parents Blindsided by Looming LAUSD Walkout That is Closing Schools*, L.A. TIMES (Mar. 18, 2023, 5:00 AM), <https://www.latimes.com/california/story/2023-03-18/lausd-strike-closing-schools-parent-reaction> [https://perma.cc/ML2F-XB9Q]; Sarah Mervosh, *Portland Teachers' Strike Ends After More Than Three Weeks*, N.Y. TIMES (Nov. 26, 2023), <https://www.nytimes.com/2023/11/26/us/portland-teachers-strike-ends.html> [https://perma.cc/WN66-3BNR]; see generally Drew Desilver, *Chart of the Week: The most liberal and conservative big cities*, PEW RSCH. CTR. (Aug. 8, 2014), <https://www.pewresearch.org/short-reads/2014/08/08/chart-of-the-week-the-most-liberal-and-conservative-big-cities/> [https://perma.cc/YS96-5AWZ] (concluding that Los Angeles and Portland are among the most liberal cities in the United States). Both of these cities are among the left-leaning areas most disrupted by teachers' strikes, although the phenomenon is not unique to Democrat-run regions. See Christine Hauser, *West Virginia Teachers, Protesting Low Pay, Walk Out*, N.Y. TIMES (Feb. 23, 2018), <https://www.nytimes.com/2018/02/23/us/west-virginia-teachers-strike.html> [https://perma.cc/8N37-PMND]; see also *Political ideology among adults in West Virginia*, PEW RSCH. CTR., <https://www.pewresearch.org/religion/religious-landscape-study/state/west-virginia/political-ideology/#social-and-political-views> [https://perma.cc/QCG3-7PEG].

47. See Sara Chernikoff, *2023 Teacher Shortages: What to Know About Vacancies in Your Region*, USA TODAY (Aug. 24, 2023, 7:01 AM), <https://www.usatoday.com/story/news/education/2023/08/24/teacher-shortages-in-us-compare-your-state/70660263007/> [https://perma.cc/4MB8-C362].

48. See Elizabeth Heubeck, *Teachers Are Quitting Midyear. It's Leaving Some Schools in the Lurch*, EDUC. WK. (Mar. 8, 2022),

Not all factors contributing to the expansion of school choice programs are what might be considered “push” factors—that is, they push families or students away from the conventional public school system. At least two “pull” factors must be recognized.

The first such factor is the emergence of virtual (or remote) learning tools and platforms. By 2022, more than seventy million people across 190 countries were registered with the online learning platform Khan Academy, founded in 2004 by Sal Khan.<sup>49</sup> On one hand, school districts that went remote-only during the pandemic were correlated with student exits from the public school system.<sup>50</sup> On the other hand, virtual school enrollment rose to 176% of its pre-pandemic level in 2021–2022, suggesting that some parents were not disinterested in virtual learning—rather, they are not interested in *poor quality* virtual learning services provided by conventional school districts.<sup>51</sup> To their credit, more than 90% of teacher education programs report expanding virtual components for teachers in training.<sup>52</sup> Whether this will translate to new teachers better trained in virtual education remains to be seen. Virtual education is still gaining momentum, and the ubiquity of smart devices likely contributes to the rise in virtual education.<sup>53</sup> Learning remotely is not for everyone, but it can be an excellent option for students struggling with bullying, those in need of a more flexible schedule, those who wish to seek out more challenging content than their peers, and more.<sup>54</sup>

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<https://www.edweek.org/leadership/teachers-are-quitting-midyear-its-leaving-some-schools-in-the-lurch/2022/03> [https://perma.cc/KV2H-FYPY].

49. Shaka Mitchell, *Court Ordered Parent Choice: A Solution Fifty Years in the Making*, 12 WAKE FOREST J.L. & POL’Y 259, 261 (2022).

50. THOMAS S. DEE, URB. INST., WHERE THE KIDS WENT: NONPUBLIC SCHOOLING AND DEMOGRAPHIC CHANGE DURING THE PANDEMIC EXODUS FROM PUBLIC SCHOOLS 1 (2023), [https://www.urban.org/sites/default/files/2023-02/Where%20the%20Kids%20Went-%20Nonpublic%20Schooling%20and%20Demographic%20Change%20during%20the%20Pandemic%20Exodus%20from%20Public%20Schools\\_0.pdf](https://www.urban.org/sites/default/files/2023-02/Where%20the%20Kids%20Went-%20Nonpublic%20Schooling%20and%20Demographic%20Change%20during%20the%20Pandemic%20Exodus%20from%20Public%20Schools_0.pdf) [https://perma.cc/FXZ9-CWSM].

51. Lehrer-Small, *supra* note 17.

52. Kathryn Choate et al., *The Effects of COVID-19 on Teacher Preparation*, KAPPAN (Mar. 22, 2021), <https://kappanonline.org/effects-covid-19-teacher-preparation-choate-goldhaber-theobald/> [https://perma.cc/CS58-XBK7].

53. *See Applications of IoT technology in the education sector for smarter schooling*, INSIDER INTEL. (Jan 13, 2023), <https://www.insiderintelligence.com/insights/iot-technology-education/> [https://perma.cc/39MQ-7AP7]; *see also Mobile Fact Sheet*, PEW RSCH. CTR. (Apr. 7, 2021), <https://www.pewresearch.org/internet/fact-sheet/mobile/> [https://perma.cc/9HBD-TUEA] (finding that 85% of Americans surveyed owned a smartphone).

54. *See* Ian Kingsbury, *In Defense of Virtual Schooling*, CITY J. (Spring 2023), <https://www.city-journal.org/article/in-defense-of-virtual-schooling> [https://perma.cc/7AJ5-B8MR]; *see also* Lynda Cloud, *Three Benefits Of Remote Learning for Every Generation*, FORBES (Oct. 14, 2022), <https://www.forbes.com/sites/forbesbusinesscouncil/2022/10/14/3-benefits-of-remote-learning-for-every-generation/?sh=f90490e528e6> [https://perma.cc/TN38-VW2Q]; Ashley Abramson, *Capturing the Benefits of Remote Learning*, MONITOR ON PSYCH., Sept. 2021, at 46, 49–50.

The second “pull” factor drawing policymakers towards passing choice laws in record-setting numbers in 2023 is a legal climate that encourages freedom of religious expression and invalidates discrimination based on religious grounds. Since 2017, beginning with *Trinity Lutheran Church of Columbia, Inc. v. Comer*, the United States Supreme Court has issued a series of decisions that have given state lawmakers the confidence to pass laws that permit parents to use public dollars at religious schools.<sup>55</sup> In *Trinity*, and then again in *Espinoza v. Montana Department of Revenue*, *Carson v. Makin*, and *Kennedy v. Bremerton School District*, the Court chipped away at the 150-year-old anti-Catholic Blaine amendments that were adopted in more than two-thirds of the states.<sup>56</sup> These laws generally prohibit state dollars from going to religious institutions, but the Court has made it clear that they cannot limit a person’s ability to participate in a program that would otherwise be available to them but for their religious affiliation, status, or use.<sup>57</sup> It is important to note that the Court is ruling on state laws in this line of cases. State lawmakers have often worried that empowering parents to use state and local funds at the religious school of their choice would run afoul of state constitutional provisions. The Court has effectively knocked down that barrier and freed lawmakers to refute the bigoted Blaine amendments.<sup>58</sup>

55. See *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 449 (2017).

56. “Blaine Amendments” are amendments present in 37 states constitutions, which are intended to prevent state funds from being used in support of religious institutions. *Religious Liberty Backgrounder: Blaine Amendments*, U.S. CONF. OF CATH. BISHOPS (May 20, 2022), <https://www.usccb.org/committees/religious-liberty/religious-liberty-backgrounder-blaine-amendments> [https://perma.cc/PUM9-L4TE]. Such amendments have been implemented in the form of state policies or laws, often called “no-aid” provisions. See *id.* Starting with *Comer*, the Supreme Court has ruled against state “no-aid” policies enacted in the name of state constitutional Blaine amendments and has generally expanded religious constitutional freedoms in the educational context. See *Comer*, 582 U.S. at 455, 462; see also *Espinoza v. Montana Dep’t of Revenue*, 140 S. Ct. 2246, 2262–63 (2020); *Carson v. Makin*, 142 S. Ct. 1987, 2002 (2022); *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2432–33 (2022).

57. See *Comer*, 582 U.S. at 462–63.

58. In the past, Blaine Amendments have posed a significant obstacle to state lawmakers advocating for school choice, although it appears the tide is turning. See *Blaine Amendments*, INST. FOR JUST., <https://ij.org/issues/school-choice/blaine-amendments/> [https://perma.cc/Y9LU-D3SA]; RICHARD D. KOMER & CLARK NEILY, *SCHOOL CHOICE AND STATE CONSTITUTIONS: A GUIDE TO DESIGNING SCHOOL CHOICE PROGRAMS 2–6* (2007), <https://files.eric.ed.gov/fulltext/ED514959.pdf> [https://perma.cc/4CCG-5ECA] (describing the policy considerations attendant to implementing school choice laws in states with Blaine Amendments). For example, Nebraska lawmakers have recently succeeded in expanding school-choice in their state, despite the existence of a Blaine Amendment in their state constitution. See Paul Hammel, ‘Opportunity Scholarship’ Bill Given Final OK, Will Make Nebraska a ‘School Choice’ State, NEB. EXAM’R (May 24, 2023), <https://nebraskaexaminer.com/2023/05/24/opportunity-scholarship-bill-given-final-ok-will-make-nebraska-a-school-choice-state/> [https://perma.cc/RDX7-HS8D]; see also KOMER & NEILY, *supra* at 53–54 (describing the intersection of school choice and Nebraska’s Blaine Amendment).

## B. States Pass New Choice Laws

In 2023, lawmakers across the country responded to the myriad “push” and “pull” factors at play by passing laws that could upend the conventional brick-and-mortar zoned public school education system. Some states, such as Indiana, Ohio, and Wisconsin, expanded existing school choice programs.<sup>59</sup> These programs allow parents to direct the state share of allocated educational dollars towards tuition at the private school of their choice.<sup>60</sup> Other states, such as Iowa, Arkansas, and Utah, passed new programs that dramatically increase educational opportunities for students.<sup>61</sup> The vast majority of new programs that passed in 2023 can be classified as education savings account programs, though the details differ slightly from state to state.<sup>62</sup> ESAs have the widest range of uses and in 2023, lawmakers were determined to maximize parents’ ability to curate the educational experience for their children.<sup>63</sup>

To illustrate, the table below summarizes the actions states have taken that have created or expanded school choice programs:

Education Savings Accounts	Tax Credit Scholarships	Vouchers	Charter Schools	Homeschool & Virtual Education
AR, FL, ID, IN, IA, MT, NH, OK, SC, TN, UT	AL, IN, KS, LA, MT, NE	IN, NC, OH, WI	AL, AR, MT, NY, OH, WV	MT

In another banner year for school choice advocates and parents, 111 pieces of legislation were introduced in state chambers that would create new programs or expand existing programs for students.<sup>64</sup> This activity is good news for students, especially those lingering in low-performing or unsafe schools, but as Kerry McDonald, Senior Fellow at the Foundation for Economic Education notes, the “[educational] possibilities remain constrained in some states by onerous regulations and exclusions of

59. See Marc LeBlond & Ed Tarnowski, *Educational Freedom and Choice Hits Escape Velocity: End-of-Session Wrap-Up*, ENGAGE (July 19, 2023), <https://www.edchoice.org/engage/educational-freedom-and-choice-hits-escape-velocity-end-of-session-wrap/> [<https://perma.cc/U3CP-ZBY5>].

60. See *id.* (explaining the recent expansion of voucher and scholarship programs in Indiana, Ohio, and Wisconsin).

61. See *id.* (summarizing Utah’s newly-enacted universal school choice program implemented through education savings accounts, as well as similar expansions to education savings accounts signed into law in Iowa and Arkansas).

62. See *id.*

63. See *id.* (demonstrating significant lawmaker activity in the school-choice arena in 2023); see also sources cited *supra* note 14 (describing the various policies that can be used to expand school choice, with education savings accounts being the most flexible in terms of use).

64. LeBlond & Tarnowski, *supra* note 59.

innovative learning models.”<sup>65</sup> Following is an examination of the mindsets and practical barriers to such education innovation, reform that would seem to be encouraged by the flood of legislative activity in the space.

## II. BARRIERS TO MAXIMUM EDUCATION CHOICE

In its unanimous decision in *Wisconsin v. Yoder*, the United States Supreme Court struck down a Wisconsin statute that criminalized parents who, for religious reasons, refused to send their children to school through the age of sixteen.<sup>66</sup> Writing for the Court, Chief Justice Burger found that the values and programs of secondary school were “in sharp conflict with the fundamental mode of life mandated by the Amish religion” and that an additional year or two of high school would not produce the benefits cited by the state of Wisconsin as justifying the law and its criminal penalties.<sup>67</sup> One can be forgiven for thinking that this unanimous decision by the nation’s highest court would indicate an overall skepticism towards a one-size-fits-all education system, but the current system of public schools has been established in the American firmament since at least the turn of the twentieth century.<sup>68</sup> The John D. Rockefeller-funded General Education Board sought to create uniform schools that would mold lower-class students into workers in shops, farms, and factories.<sup>69</sup> During the late twentieth century, public schools began being described as conforming to a “factory model,” and a survey of state constitutions shows that sixteen states require a system of “uniform” instruction or schools.<sup>70</sup> Even states that do not call for a “uniform” system focus on systems over students.

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65. Kerry McDonald, *It’s The Year of Universal School Choice, But Barriers Remain*, FORBES (July 21, 2023, 11:48 AM), <https://www.forbes.com/sites/kerrymcdonald/2023/07/21/its-the-year-of-universal-school-choice-but-barriers-remain/?sh=641140557516> [https://perma.cc/73YB-BY4U].

66. *Wisconsin v. Yoder*, 406 U.S. 205–06 (1972).

67. *Id.* at 217, 224–26.

68. See NANCY KOBER & DIANE STARK RENTNER, CTR. ON EDUC. POL’Y, HISTORY AND EVOLUTION OF PUBLIC EDUCATION IN THE US 4 (2020), <https://files.eric.ed.gov/fulltext/ED606970.pdf> [https://perma.cc/U8J2-RY3G].

69. See Maria Sanchez, *Why Did John D. Rockefeller Create the School System?*, SAVE OUR SCHS. (Oct. 18, 2023), <https://www.saveourschoolsmarch.org/why-did-john-d-rockefeller-create-the-school-system/> [https://perma.cc/J34T-M3HB]; LOUISE E. FLEMING & RITA S. SASLAW, ROCKEFELLER AND GENERAL EDUCATION BOARD INFLUENCES ON VOCATIONALISM IN EDUCATION, 1880-1925 3 (1992), <https://files.eric.ed.gov/fulltext/ED349475.pdf> [https://perma.cc/R9FL-PJ8X].

70. See Arne Duncan, U.S. Sec’y of Educ., Speech at the American Enterprise Institute: Bang for the Buck in Schooling (Nov. 17, 2010), <https://www.aei.org/events/bang-for-the-buck-in-schooling/> [https://perma.cc/MY6U-UGVM] (referring to the historical “factory model” terminology as a vestige of the previous century); see also EMILY PARKER, EDUC. COMM’N OF THE STATES, 50-STATE REVIEW: CONSTITUTIONAL OBLIGATIONS FOR PUBLIC EDUCATION 5–22 (2016), <https://www.ecs.org/wp-content/uploads/2016-Constitutional-obligations-for-public-education-1.pdf> [https://perma.cc/W5AY-2AMW] (listing the constitutional education provision language in every state’s constitution).

Montana's Constitution creates a "basic system" of free and quality public elementary and secondary schools.<sup>71</sup> Oklahoma's Constitution establishes a "system of public schools," and the Texas Legislature is instructed to "establish and make suitable provision for the support and maintenance of an efficient system of public free schools."<sup>72</sup>

The recognition of the value of education and the enshrinement of this value within state constitutions is laudable. However, it seems that, at the time of their drafting, the authors of such state constitutional provisions were more concerned with the delivery method—that is, the *systems*, as opposed to the *students*, the very recipients of the proffered education services.<sup>73</sup> State constitutional provisions are just the start of the standardization of education. Constitutional and subsequent statutory systems-oriented language seeps into not only the standardization of curriculum, but even school building design and classroom standards.<sup>74</sup>

During the Common School movement of the 1840s, schools were paid for by local property taxes, which spurred the desire to create standardized school buildings.<sup>75</sup> Horace Mann, Massachusetts' first Secretary of Education, who is known for his efforts to improve and standardize public education through a system of common schools, also contributed to an early model of a classroom's ideal physical layout.<sup>76</sup> Common schools and a uniform classroom design flourished in the late nineteenth and early twentieth centuries.<sup>77</sup>

In the early 1900s, three books were written (Briggs, 1899; Hamlin, 1910; Mills, 1915) on the ideal design and construction of school buildings.<sup>78</sup> These books were very influential, and following their publication, school designers emphasized building schools that ensured proper ventilation, heating, air quality, and access to natural light. School

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71. MONT. CONST. art. X, § 1.

72. OKLA. CONST. art. XII, § 1; TEX. CONST. art. VII, § 1.

73. See generally KOBER & RENTNER, *supra* note 68, at 2–4 (summarizing American policies on public education starting at the founding of our nation, many of which appear to be more focused on systems rather than on individual students).

74. See, e.g., Wendy A. Paterson, *From 1872 to 2021: A Short History of Education in the United States*, BUFF. STATE UNIV. (Dec. 8, 2021), <https://suny.buffalostate.edu/news/1871-2021-short-history-education-united-states> [<https://perma.cc/KDT8-NCJE>] (describing how uniform standards have impacted the American public education system); LINDSEY BAKER, NAT'L CLEARINGHOUSE FOR EDUC. FACILITIES, A HISTORY OF SCHOOL DESIGN AND ITS INDOOR ENVIRONMENTAL STANDARDS, 1990 TO TODAY 3–4 (2012), <https://architecturalnetworks.research.mcgill.ca/assets/nationalinstituteofbuildingsciences-min.pdf> [<https://perma.cc/7JD8-G6AC>] (explaining the standardization of prevailing notions of school building and classroom design).

75. BAKER, *supra* note 74, at 4.

76. Emily Rodriguez, *Horace Mann: A Man Behind Public Education*, STMU RSCH. SCHOLARS (Nov. 26, 2022), <https://stmuscholars.org/horace-mann-a-man-behind-public-education/> [<https://perma.cc/FM2N-UHRP>].

77. Baker, *supra* note 74, at 4.

78. *Id.* at 5.

planning grew to emphasize minutiae; for example, ideally, “[l]ight should come over the left shoulder of each pupil.”<sup>79</sup> Likewise, in 1918, the Illumination Engineering Society published the Code of Lighting School Buildings, outlining the minimum and recommended amount of lighting in classrooms: three foot-candles minimum.<sup>80</sup>

This model proliferated until promotion of the “open air school” movement following the Great Depression, when 70% of new school construction in the United States was funded by the Public Works Administration.<sup>81</sup> Later years would see schools built or updated to meet new ideas in energy consumption (during the 1970s) or fluid enrollment projections (during the 1980s).<sup>82</sup> With every era in school design came state and local regulations that dictated the terms of construction to would-be school creators.<sup>83</sup>

Of course, standardization has not been limited to physical design<sup>84</sup> but extends even to the design of a school model itself.<sup>85</sup> To illustrate, Tennessee provides an example of the concept of school model standardization.<sup>86</sup> Even a non-public school seeking to open in the State of Tennessee must assure the State Board of Education that it will “comply with all rules and regulations and codes of the city, country, and state regarding planning of new buildings, alterations, and safety.”<sup>87</sup> Moreover, in order to receive recognition by the state, non-public schools must also comply with requirements such as ensuring student vaccination, reporting enrollment to the local public school district, requiring teachers to possess at least a baccalaureate degree, and administering a nationally-normed standardized test for students in grades three through eleven.<sup>88</sup> While these

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79. *See id.* at 5–7.

80. *Id.* at 7.

81. *Id.* at 8.

82. *See id.* at 18–21.

83. *See generally id.*

84. *See Paterson, supra* note 74.

85. This concept will be further developed *infra* Section II.A.

86. *See, e.g., Tennessee State Regulations*, U.S. DEP’T OF EDUC. (Dec. 30, 2016), <https://www2.ed.gov/about/inits/ed/non-public-education/regulation-map/tennessee.html> [<https://perma.cc/XF4W-NGPY>] (summarizing the accreditation, licensing, and approval requirements in the state of Tennessee, which apply to private and parochial schools as well as public ones).

87. TENN. COMP. R. & REGS. 0520-07-02-.02; *see also Non-Public Schools*, TN.GOV, <https://www.tn.gov/education/families/school-options/non-public-schools.html> [<https://perma.cc/7HDH-ZUSD>].

88. *See, e.g., Linda Wesson, State Standardized Testing Requirements for Public, Private, and Home Schools*, TENN. COMPTROLLER OF THE TREASURY (Apr. 2018), [https://comptroller.tn.gov/content/dam/cot/orea/advanced-search/2018/2018\\_OREA\\_StandardTestBrief.pdf](https://comptroller.tn.gov/content/dam/cot/orea/advanced-search/2018/2018_OREA_StandardTestBrief.pdf) [<https://perma.cc/7S2M-NRA6>]; TENN. COMP. R. & REGS. 1200-12-01-.29 (mandating that all K-12 schools, whether public, private, or church-related, obtain proof of vaccination from their students); *id.* at 0520-02-03-.03 (requiring licensed teachers to hold a bachelor’s degree). *See also* TENN. CODE ANN. § 49-1-

requirements can be burdensome for the non-public schools, non-compliance with the rule may result in revocation of the school's registration with the State.<sup>89</sup>

Requiring non-public schools to adhere to uniform standards might be characterized as a reasonable pursuit; if, of course, one disregards the Court's decision in *Yoder* discrediting the benefits of rigid standardization or fails to appreciate that the ultimate objectives of any school should operate to provide each student with an education that best meets their needs.<sup>90</sup> Local and state regulations that pre-determine what schools come into or remain in existence effectively displace the desires of parents in favor of the judgment of government bureaucrats.<sup>91</sup> Recent parents' bills of rights initiatives have created a new tension between systems orientation and parent decision making.<sup>92</sup>

Consider again Montana's constitutional provision, dictating that after providing a "basic system of free quality public . . . schools," the legislature may provide "other educational institutions, public libraries, and educational programs as it deems desirable."<sup>93</sup> This well-intended language can fairly be read to first ask the Montana legislature to be the arbiter of "quality" in public education.<sup>94</sup> Then, it allows for the same elected body to enable other institutions and programs as it, the legislature, "deems desirable."<sup>95</sup> This constitutional provision must be reconciled not only with the Court's ruling in *Yoder*, but with the Montana Parental Bill of Rights which states that a "governmental entity may not interfere with the fundamental right of parents to direct the upbringing, education, health care, and mental health of their children unless the governmental entity demonstrates that the interference: (a) furthers a compelling governmental interest; and (b) is narrowly tailored and is the least restrictive means available for the furthering of the compelling governmental interest."<sup>96</sup>

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201; *id.* § 49-1-302; *id.* § 49-6-3001; *id.* § 49-50-801 (all referring to requirements applicable to schools in Tennessee generally).

89. *See, e.g.*, TENN. COMP. R. & REGS. 0520-07-02-.03.

90. *Wisconsin v. Yoder*, 406 U.S. 205, 219–29 (1972).

91. *See* Corey A. DeAngelis & Heidi Holmes Erickson, *What Leads to Successful School Choice Programs? A Review of the Theories and Evidence*, 38 CATO J. 247, 257–58 (2018).

92. *See* Jackie Valley, *32 states and counting: Why parents bills of rights are sweeping US*, CHRISTIAN SCI. MONITOR (Mar. 24, 2023), <https://www.csmonitor.com/USA/Education/2023/0324/32-states-and-counting-Why-parents-bills-of-rights-are-sweeping-US> [<https://perma.cc/7VZB-MSAX>] (explaining the widespread legislative trends surrounding parents' "bills of rights"); *see also, e.g.*, Annie Karni, *Divided House Passes G.O.P. Bill on Hot-Button Schools Issues*, N.Y. TIMES (Mar. 24, 2023), <https://www.nytimes.com/2023/03/24/us/politics/parents-bill-of-rights-act.html> [<https://perma.cc/P7W4-NP3H>].

93. MONT. CONST. art. X, § 1.

94. *See id.*

95. *See id.*

96. MONT. CODE. ANN. § 40-6-701; *see also Wisconsin v. Yoder*, 406 U.S. 205, 205 (1972).



Further reconciliation among these competing considerations is required because local and state regulations, such as Tennessee's regulation of non-public schools, do not necessarily interfere with a parent's self-determination or ability to parent.<sup>97</sup> The regulations do, however, significantly inhibit a parent's ability to take advantage of a range of education service options<sup>98</sup> because parents are told they have maximum educational choice, yet they are limited by the narrow set of government sanctioned options.<sup>99</sup>

Consider the conundrum of education entrepreneur Chris Turner, founder of Moonrise in Decatur, Georgia.<sup>100</sup> Turner was unable to find a suitable educational setting for his five-year-old son, so he designed a membership-based, drop-off co-learning space for children ages five to fifteen.<sup>101</sup> In 2022, his facility could accommodate sixty children at a time, and hundreds more could still participate given the flexible attendance model.<sup>102</sup> Turner believes high demand for this type of model exists in other cities and states, but he is reluctant to open in large cities because the zoning and regulatory barriers are prohibitive.<sup>103</sup> Moonrise would likely not qualify for recognized, non-public school status according to Tennessee's law, nor would it satisfy building codes requirements for a "school" in many urban areas.<sup>104</sup> Thus, parents such as those who were victims to teacher strike-induced school closures in Los Angeles will not have the option of using public funds available in choice programs at a Moonrise model.

Chris Turner's worry about the feasibility of his model is echoed by many education entrepreneurs.<sup>105</sup> In a March 2023 report, Dr. Michael McShane found that, of those surveyed, 27% identify state regulations while 15% identify local regulations as barriers to their entrepreneurial endeavors.<sup>106</sup> Even more striking is how entrepreneurs perceive these regulations as influential to the success of their projects. Sixty-seven percent found the regulations to be "very and extremely influential."<sup>107</sup> The

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97. See generally *Tennessee State Regulations*, *supra* note 86.

98. See generally *id.*

99. See generally *id.*

100. See Zoe Seiler, *Moonrise, a Co-Learning Space for Kids, Opening in Decatur in November*, DECATURISH (Nov. 2, 2021), <https://decatrish.com/2021/11/moonrise-a-co-learning-space-for-kids-opening-in-decatur-in-november/> [<https://perma.cc/8LD7-DG6D>].

101. See *id.*

102. See *id.*

103. Kerry McDonald, *Are Innovative K-12 Education Models Coming to Your Community? It Depends On Where You Live*, FEE STORIES (Oct. 5, 2022), <https://fee.org/articles/are-innovative-k-12-education-models-coming-to-your-community-it-depends-on-where-you-live/> [<https://perma.cc/4HS4-N3VM>].

104. See generally TENN. COMP. R. & REGS. 0520-07-02-.01, *et seq.*

105. MICHAEL Q. MCSHANE, EDCHOICE, SURVEYING EDUCATIONAL ENTREPRENEURS 7 (2023), <https://files.eric.ed.gov/fulltext/ED628547.pdf> [<https://perma.cc/TR78-AVTV>].

106. *Id.*

107. *Id.* at 8.

most common regulations entrepreneurs encountered were safety, fire, and health regulations, followed by school registration regulations.<sup>108</sup> Zoning and school registration (more often termed “accreditation”) will be examined in greater detail in the following sections.<sup>109</sup> For now, it will suffice to say that despite newly passed laws that encourage education customization, the rigidity of state and local regulations can significantly limit education entrepreneurs bringing innovative models like Moonrise to life. The following section will discuss the outdated regulations that are discordant with school choice laws, specifically highlighting accreditation, licensure, and zoning regulations that hamper school choice expansion.

### A. Accreditation and the Definition of a “School”

School accreditation can serve a valuable purpose.<sup>110</sup> The seal of approval from an accrediting agency conveys adherence to a set of principles or standards that need not be personally investigated by each individual person (or parent) seeking information.<sup>111</sup> There are a number of K-12 accrediting organizations in the United States; the largest being Cognia, which serves forty thousand public and private institutions in ninety countries.<sup>112</sup> The private accreditation process is initiated by a school which pays a fee for an agency to conduct activities such as onsite reviews, interviews, and programmatic reviews over a time period which may range from some months to years in order to determine whether the school conforms to the agency’s best practices.<sup>113</sup> This process differs from a “registration” process mandated by a state or local authority.<sup>114</sup> When governmental agencies require “accreditation” or “registration,” the stakes are significantly higher than the optional, Cognia-like process described above.<sup>115</sup> If a school contracts with a private agency and fails to gain accreditation, the school incurs a loss of the service fee and lacks the stamp of approval, but it may gain insight as to how it can improve its own

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108. *Id.* at 11.

109. *See infra* Section II.C.

110. *See* COGNIA, COGNIA ACCREDITATION 1 (2023), <https://www.cognia.org/wp-content/uploads/2023/03/Research-Brief-Cognia-Accreditation.pdf> [<https://perma.cc/S85B-ZR4L>].

111. *Id.*

112. *Media Room*, COGNIA, <https://www.cognia.org/news-events/media-room/> [<https://perma.cc/4U6R-R7CX>].

113. *See, e.g., Become Accredited*, MIDDLE STATES ASS’N COMM’N ON ELEMENTARY & SECONDARY SCHS., <https://www.msa-cess.org/accreditation-process-and-standards/> [<https://perma.cc/B2JV-8EEZ>].

114. *See* sources cited *supra* note 86.

115. *See id.* (describing the mandatory approval process in Tennessee, without which a school may not operate, unlike an optional accreditation).

practices.<sup>116</sup> If a school fails to adhere to a state agency's requirements, the school's very existence may be in jeopardy.<sup>117</sup>

Tennessee's numerous requirements imposed on non-public schools create a minefield for school administrators.<sup>118</sup> A single misstep can result in the revocation of registration with the state and shuttered doors.<sup>119</sup> Furthermore, the rules create a compliance-driven ecosystem rather than one that is student-centric.<sup>120</sup> Former public school educator and private school founder Coi Morrison started The Lab School of Memphis as a small, project-based refuge for children who live in Shelby County, where roughly 60% of third graders in public schools failed the reading proficiency portion of the state assessment.<sup>121</sup> Morrison worries that increased regulations for non-public schools shift the focus to compliance and away from "encouraging, embracing, and learning from new

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116. See COGNIA, *supra* note 110, at 1 (explaining the benefits of the accreditation process, which include giving schools an opportunity to self-improve through self-study, observation, peer review, and feedback).

117. MARCUS A. WINTERS, MANHATTAN INST., SHOULD FAILING SCHOOLS BE CLOSED? WHAT THE RESEARCH SAYS 3 (2019), <https://files.eric.ed.gov/fulltext/ED599013.pdf> [<https://perma.cc/7EHP-RQHP>].

118. See sources cited *supra* note 86.

119. See, e.g., Katherine Gladson, *School Closings: Challenges for Students, Communities, and Litigators*, AM. BAR ASS'N (Oct. 3, 2016), <https://www.americanbar.org/groups/litigation/resources/newsletters/childrens-rights/school-closings-challenges-students-communities-litigators/#:~:text=School%20districts%20nationwide%20have%20generally,low%20academic%20performance%20and%20underutilization> [<https://perma.cc/8CM3-WPYT>] (explaining the reasons for which school closures might occur as well as the attendant consequences).

120. See generally WINTERS, *supra* note 117, at 4–5 (explaining how school closures can cause academic gains for some students and losses for others depending on the context of the closures, suggesting that school closures based on noncompliance fail to consider whether school closure is actually beneficial to all students).

121. See Kerry McDonald, *In This Business-Friendly State, Why is it So Hard to Start a Private School?*, FORBES (July 29, 2023, 8:37 AM), <https://www.forbes.com/sites/kerrymcdonald/2023/07/29/in-this-business-friendly-state-why-is-it-so-hard-to-start-a-private-school/?sh=251ef92167b9> [<https://perma.cc/E2BR-72HU>] (describing the Lab School of Memphis); see also Michaela A. Watts, *TN Preliminary Data is Out on Third-Grade Reading Levels: MSCS Will Way for Final Data*, COM. APPEAL (May 22, 2023, 5:06 PM), <https://www.commercialappeal.com/story/news/education/2023/05/22/memphis-shelby-count-schools-will-not-release-preliminary-reading-comprehension-data/70244578007/> [<https://perma.cc/F75P-9BF2>] (reporting on the proficiency demonstrated by Tennessee students generally in 2023). Although students in Shelby County have made gains in reading proficiency at the time of this writing, the latest numbers suggest that 42% of students scored "below" proficiency in 2023, and that 34% of students were "approaching" proficiency; only 23.6% of Shelby County students scored "proficient." Kim Chaney, *76% of Memphis-Shelby County Schools third graders fall short on TCAP*, ABC 24 (May 24, 2023, 5:16 PM), <https://www.localmemphis.com/article/news/education/mscs-memphis-shelby-county-schools-third-graders-tcap-reading-retention/522-66864028-dd2e-47c2-b3cc-bd1af55ba5ca#:~:text=According%20to%20the%20numbers%20MSCS,year%20for%20the%20same%20students> [<https://perma.cc/V3KH-SYCQ>].

models.”<sup>122</sup> In 2022, Tennessee further tightened private school regulations by setting a minimum number of students (ten), and by requiring such schools be open for a minimum number of hours per day and days per year.<sup>123</sup> The result may be a private school system that looks remarkably similar to the public school system.<sup>124</sup> Additionally, because Tennessee’s ESA program currently requires parents to spend the *first* dollars at a private school that meets the state’s accreditation and registration requirements,<sup>125</sup> it effectively bars students who prefer an atypical, part-time schedule even if a school like the Lab School of Memphis could serve their needs.<sup>126</sup>

A similar dynamic exists in Iowa, where the Students First ESA program was signed into law on January 24, 2023.<sup>127</sup> The Iowa Board of Education established rules and procedures for accrediting all non-public schools offering instruction in pre-kindergarten through twelfth grade.<sup>128</sup> These rules govern not only matters such as health and safety codes, but specific course offerings, staffing models, and the number of instructional hours in the school year.<sup>129</sup> Kerry McDonald explains that such regulations have a chilling effect on new educational entrants such as micro-schools (typically low-enrollment models) or hybrid schools (those that allow flexible in-person and remote schedules).<sup>130</sup> Unfortunately, Iowa’s ESA

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122. McDonald, *supra* note 121.

123. *Id.*

124. *See id.*

125. TENN. CODE ANN. 49-6-2602 (defining “participating school” under the ESA program); TENN. CODE ANN. 49-6-3001(c)(3)(A)(iii) (defining “private school” as schools that are accredited and approved by the state); *see Tennessee Education Savings Account (ESA) Program*, TN DEP’T OF EDUC., <https://www.tn.gov/education/esa> [<https://perma.cc/RN2C-SL68>].

126. THE LAB OF MEMPHIS SCH., <https://thelabschoolofmemphis.com/> [<https://perma.cc/2SUB-MCU8>].

127. *Students First Education Savings Accounts*, IOWA DEP’T OF EDUC., <https://educateiowa.gov/pk-12/options-educational-choice/students-first-education-savings-accounts> [<https://perma.cc/GSN3-Z9K6>].

128. *See Iowa State Regulations*, U.S. DEP’T OF EDUC. (Nov. 16, 2016), <https://www2.ed.gov/about/inits/ed/non-public-education/regulation-map/iowa.html> [<https://perma.cc/27XA-984U>].

129. *See id.*

130. Kerry McDonald, *Iowa Enacts Universal School Choice, But Regulations Will Limit The Supply Of Options For Families*, FORBES (Jan. 25, 2023, 11:46 AM), <https://www.forbes.com/sites/kerrymcdonald/2023/01/25/iowa-enacts-universal-school-choice-but-regulations-will-limit-the-supply-of-options-for-families/?sh=1d3a281f6935> [<https://perma.cc/E6LZ-ENWQ>]. “Micro-schools” have been defined as small, multi-family learning environments that are typically larger than a more conventional “homeschool.” *Microschools: Explained*, STATE POL’Y NETWORK (Mar. 1, 2023), [https://spn.org/articles/what-are-microschools/?gclid=Cj0KCQiAkeSsBhDUARIsAK3tiecjhMunkrIQfjrrJhk2k9jrp\\_1efVo-yfSi53g0Mpz8YGMRqU-mKUAAAtIgeALw\\_wcB](https://spn.org/articles/what-are-microschools/?gclid=Cj0KCQiAkeSsBhDUARIsAK3tiecjhMunkrIQfjrrJhk2k9jrp_1efVo-yfSi53g0Mpz8YGMRqU-mKUAAAtIgeALw_wcB) [<https://perma.cc/2LTU-3ZZH>]. “Hybrid schools” are learning situations that usually incorporate both in-home and at-school learning throughout the week. Colleen Hroncich & Sharon Sedlar, *Public, Private, Home School? Try Micro and Hybrid Schooling*, CATO INST. (May 22, 2023),

program, much like Tennessee's, requires that parents use their ESA resources only at private schools accredited by the State Board of Education.<sup>131</sup>

Iowa is not the only state with a new school choice program that places limits on how families can use funds based on the government's recognition and definition of a given school model.<sup>132</sup> Oklahoma's new Parental Choice Tax Credit program provides a refundable tax credit ranging between \$5,000 and \$7,500 per year to parents of private school students.<sup>133</sup> The law also provides parents of a homeschool student a refundable tax credit of \$1,000 to cover the cost of educational expenses.<sup>134</sup> Given the massive variance in funding, it behooves parents to seek out private schools rather than homeschool associations or co-ops.<sup>135</sup> The program's goals and design are laudable but because Oklahoma has only two basic classifications for nonpublic education—namely, homeschool or private school—the state law may pose a significant barrier to the creation of hybrid schools,<sup>136</sup> which could fill the gap between conventional private schools and single-family home schools where parents are teaching their own children.<sup>137</sup> Parents are seeking hybrid models in greater numbers, but state laws, like those in Oklahoma, must be updated to keep pace with the demand for modern education delivery methods.<sup>138</sup>

While Tennessee, Iowa, and Oklahoma regulate educational institutions based on government evaluation of the substantive qualities of an education provider's model, another state's methodology for the regulation of choice between education providers is based purely on geographic location.<sup>139</sup> According to the Massachusetts Department of Education, evaluation of a parent's own education decision for their child will differ based on whether the school is based within Massachusetts'

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<https://www.cato.org/commentary/public-private-home-school-try-micro-hybrid-schooling> [https://perma.cc/8C3W-X8NJ].

131. IOWA DEP'T OF EDUC., *supra* note 127; *see also* discussion *supra* notes 86–89 (discussing Tennessee's regulatory framework).

132. *See* EXCELINED, HYBRID HOMESCHOOLING AND EDUCATION SCHOLARSHIP ACCOUNTS 5–11, [https://excelined.org/wp-content/uploads/2023/09/ExcelinEd\\_PrivateSchoolChoice\\_HybridHomeschoolingAnd-ESAs\\_2023.pdf](https://excelined.org/wp-content/uploads/2023/09/ExcelinEd_PrivateSchoolChoice_HybridHomeschoolingAnd-ESAs_2023.pdf) [https://perma.cc/74TS-K8TF].

133. OKLA. ADMIN. CODE § 710:50-15-119.

134. *Id.*

135. *See id.*

136. *See Oklahoma State Regulations*, U.S. DEP'T OF EDUC. (Dec. 8, 2016), <https://www2.ed.gov/about/inits/ed/non-public-education/regulation-map/oklahoma.html> [https://perma.cc/9RMW-U7W4].

137. EXCELINED, *supra* note 132, at 6.

138. *See id.* at 3, 6.

139. *Compare Tennessee State Regulations*, *supra* note 86, and *Iowa State Regulations*, *supra* note 128, and *Oklahoma State Regulations*, *supra* note 136, with *Commonwealth of Massachusetts Virtual Schools: Questions and Answers for Parents/Guardians*, MASS. DEP'T OF ELEMENTARY AND SECONDARY EDUC. (Apr. 2021), <https://www.doe.mass.edu/cmvs/faqs/parents.docx> [https://perma.cc/3ECA-Y8X9].

borders.<sup>140</sup> Arguably, the geographic location of a school building has little bearing on the substantive merits of a parent's educational selection. Yet, the state of Massachusetts imposes this rule even on a parent's choice to enroll their student in a virtual school whose content is primarily delivered online. If a parent wishes to enroll his or her child in a private virtual school that is not based in Massachusetts, the parent's educational plan must be reviewed and approved by the school district in which the parent resides.<sup>141</sup> The Massachusetts regulations provide yet another example of how rigid definitions of what constitutes a proper, state-sanctioned school environment can reduce the number of provider options available to a family.<sup>142</sup>

The same barriers to innovative education solutions affect the homeschool community.<sup>143</sup> Some states, such as Arizona, allow ESA dollars to be used by homeschool students; however, in other states similar use would prove difficult.<sup>144</sup> In New York, where the average private school tuition is \$20,876, homeschooling laws make it difficult for groups of students to unite under the tutelage of a teacher.<sup>145</sup> State law prohibits students from participating in home instruction in a group setting for a majority of the instruction program.<sup>146</sup> Thus, while there is currently no ESA program in New York, if a group of parents nevertheless organizes to provide group instruction by a tutor, and if this instruction comprises the majority of the school day, the parents are considered to be operating a

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140. See *Commonwealth of Massachusetts Virtual Schools: Questions and Answers for Parents/Guardians*, *supra* note 139.

141. *Id.*

142. See *id.*

143. EXCELINED, *supra* note 132, at 3–4.

144. *Id.* at 8–14 (comparing the educational savings account schemes across various states, and describing Arizona's expansion of the program); see also *Education Options: Universal ESA Scholarship*, AM. FED'N FOR CHILD., <https://azschoolchoice.com/education-options/scholarships/universal-esa/> [<https://perma.cc/P53N-YMKW>].

145. See Emily D'Vertola, *NY 2nd in the Nation for Homeschooling Growth*, EMPIRE CTR. (Nov. 28, 2023), <https://www.empirecenter.org/publications/ny-2nd-in-the-nation-for-homeschooling-growth/#:~:text=A%20Washington%20Post%20analysis%20of,it%20has%20more%20than%20doubled> [<https://perma.cc/ZAD9-3DMF>] (noting that New York is considered one of the most highly regulated states in the country when it comes to homeschooling). As of the time of this writing, the average private school tuition in New York State has risen to \$21,213 per year. *New York Private Schools By Tuition Cost*, PRIV. SCH. REV., <https://www.privateschoolreview.com/tuition-stats/new-york> [<https://perma.cc/CW33-8PAH>].

146. *Home Instruction Questions*, N.Y. STATE EDUC. DEP'T, <https://www.nysed.gov/nonpublic-schools/home-instruction-questions-and-answers> [<https://perma.cc/5LGT-AUK8>] (“Parents providing home instruction to their children may arrange to have their children instructed in a group situation for particular subjects but not for a majority of the home instruction program. Where groups of parents organize to provide group instruction by a tutor for a majority of the instructional program, they are operating a religious or independent school and are no longer providing home instruction.”).

private school.<sup>147</sup> Consequently, such parents would then be subject to further regulations, such as those regarding teacher certification.<sup>148</sup>

Parents face similar circumstances in Maryland. The Maryland Department of Education makes it clear that parents have a good deal of autonomy in curating a homeschool experience.<sup>149</sup> For example, parents are permitted to utilize a co-op arrangement, wherein a group of parents and guardians provides instruction to their children in certain subjects or on certain days, either by dividing teaching duties among them or by collectively hiring a tutor.<sup>150</sup> However, at the same time, Maryland law prohibits regular daily instruction to an organized group of students who are not in the same family.<sup>151</sup> Thus, doing so might constitute the operation of a non-public school, which is subject to intervention by the Nonpublic Approval Branch of the Maryland State Department of Education.<sup>152</sup>

The New York and Maryland examples demonstrate the constraints to educational innovation that may exist when government agents are considered the final arbiters of what constitutes an appropriate school model.<sup>153</sup> Whether they are private schools attempting to keep up with state-imposed standards, hybrid and micro-school models excluded from the allowable expenses covered by new choice programs, or homeschooling families facing challenges in tailoring the experience to the needs of their children, over-regulation can impede the rapidly-changing education provider landscape.

Stated plainly, government registration and accreditation permits state agents to set the terms of educational innovation and effectively pick winners and losers from among an ever-diversifying education provider landscape. Ultimately, the students who stand to face the most harm are those students who do not thrive in a conventional school system.<sup>154</sup>

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147. *Id.*

148. See *New York State Regulations*, U.S. DEP'T OF EDUC. (Oct. 6, 2015), <https://www2.ed.gov/about/inits/ed/non-public-education/regulation-map/newyork.html> [<https://perma.cc/UJE5-MCUD>] (delineating the regulations to which private schools are subject in New York State).

149. See Karen B. Salmon, *Frequently Asked Questions Regarding Home Instruction in Maryland*, MD. STATE DEP'T OF EDUC. DIV. OF STUDENT, FAMILY, AND SCH. SUPPORT (revised July 24, 2020), <https://marylandpublicschools.org/about/Documents/DSFSS/SSSP/HomeInstruct/HomeInstructionFAQ.pdf> [<https://perma.cc/VF8R-TFDS>] (“The home instruction regulation outlines certain aspects of the program that must be present, but also reserves for the parent or guardian a certain amount of flexibility to create a program that meets the needs of the child.”).

150. *Id.*

151. *Id.*

152. *Id.*

153. See sources cited *supra* notes 145–48 (explaining the regulatory scheme in New York); see also sources cited *supra* notes 149–52 (explaining the same in Maryland).

154. See Kerry McDonald, *No, John Oliver, Homeschooling Doesn't Need More Regulation*, FOUND. FOR ECON. EDUC. (Oct. 10, 2023), <https://fee.org/articles/no-john-oliver-homeschooling-doesn-t-need-more-regulation/> [<https://perma.cc/4PRH-98DR>] (describing

## B. Licensure

Accreditation and registration is but one example of state government putting its thumb on the scale when judging the efficacy of non-governmental school models. A related exercise at the personnel level is occupational licensure. State occupational licensing schemes generally involve a governmental agency determining the appropriate training or practices required before a transaction can take place between two private parties. This means that while the government will not be involved in the transaction between say, a private person and an electrician, physician, or even a school tutor, it nevertheless sets many of the conditions under which the transaction can occur.<sup>155</sup>

Some of the most pernicious state licensure requirements govern classroom educators, making no distinction between whether the teacher will educate in a public or non-public school. Of course, it is well-settled that the operators of a school must seek out specific indicators of talent or training in order to ensure the quality of their educators.<sup>156</sup> To that end, it may be expected that local school boards, and perhaps even state boards of education, would attempt to incorporate licensure as a way to standardize and streamline their hiring process.<sup>157</sup> Arguably more questionable, however, is the practice of some state agencies in dictating hiring practices for schools it does not operate.<sup>158</sup> Such is the case in Alabama.<sup>159</sup>

Alabama requires professionals who teach in private secular schools to hold certificates issued by the state superintendent of

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the various ways in which homeschooling can address the disadvantages of conventional public schooling for certain types of students).

155. See CHRIS EDWARDS, CATO INST., EMPOWERING THE NEW AMERICAN WORKER: OCCUPATIONAL LICENSING 59 (2022), <https://www.cato.org/sites/cato.org/files/2022-12/empowering-the-new-american-worker-occupational-licensing.pdf> [<https://perma.cc/SWW6-43M4>]; see also NOAH TRUDEAU & EDWARD TIMMONS, 2023 STATE OCCUPATIONAL LICENSING INDEX, ARCHBRIDGE INST. 18 (2023), <https://www.archbridgeinstitute.org/wp-content/uploads/2023/03/2023-State-Occupational-Licensing-Index.pdf> [<https://perma.cc/AA6F-GY6W>].

156. See, e.g., *Teacher Quality*, OFF. OF ELEMENTARY & SECONDARY EDUC. (June 30, 2015), <https://oese.ed.gov/archived/oii/what-we-do/teacher-quality/> [<https://perma.cc/RME7-G6K>] (describing federal initiatives used to support and ensure educator quality).

157. See *Teaching License vs. Teaching Credential: What's the Difference in 2023?*, TCHRS. OF TOMORROW (Mar. 20, 2023), <https://www.teachersoftomorrow.org/blog/insights/teaching-license-vs-teaching-credential/> [<https://perma.cc/8ZVC-MU5V>] (describing the function of educator licensure, primarily used as an attestation that the applicant has met state-set standards and requirements).

158. See generally U.S. DEP'T OF EDUC., STATE REGULATION OF PRIVATE SCHOOLS (2009), <https://www2.ed.gov/admins/comm/choice/regprivschl/regprivschl.pdf> [<https://perma.cc/9QZD-ZR2F>] (compiling state regulations of private schools, including licensure requirements).

159. See *Alabama State Regulations*, U.S. DEP'T OF EDUC. (Apr. 30, 2013), <https://www2.ed.gov/about/inits/ed/non-public-education/regulation-map/alabama.html> [<https://perma.cc/HH7Q-NHT6>].



education.<sup>160</sup> This regulation would undoubtedly endear greater public support if the Alabama public school system consistently demonstrated optimal achievement levels, but a mere 28% of Alabama's fourth graders were found proficient in reading on the 2022 NAEP.<sup>161</sup> Despite the state-wide academic struggles, Alabama imposes barriers to those students who might need the extra help—Alabama law purports to require that even part-time tutors hold state-issued teaching certificates, providing that “instruction by a private tutor means and includes *only* instruction by a person who holds a certificate issued by the State Superintendent of Education.”<sup>162</sup> Practically, this means that Alabama's attempt to ensure educational quality shows very little additive value and may actually be counterproductive, making it more difficult for students to seek alternative options. The law also bars creative tutoring solutions that could benefit students.<sup>163</sup> To illustrate, a Ph.D. level mathematician in search of a flexible, work-from-home schedule could not offer tutoring services for three hours, three days a week without running afoul of the Alabama state code.<sup>164</sup> In this hypothetical case, there is a student need and available supply, but needless regulations prevent a connection. In fact, the effect of such competing considerations in Alabama is more than hypothetical, as Governor Kay Ivey announced that her office would put forward an ESA bill in the 2024 legislative session.<sup>165</sup> If existing codes are not amended, the impact of a new ESA program will be stunted because Alabama's licensing restrictions will limit parents' options—choices that are typically a chief motivator when ESA programs are enacted.<sup>166</sup>

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160. *Id.*

161. NAT'L CTR. FOR EDUC. STAT., THE NATION'S REPORT CARD 2022 READING SNAPSHOT REPORT: ALABAMA GRADE 4 (2022), <https://nces.ed.gov/nationsreportcard/subject/publications/stt2022/pdf/2023010AL4.pdf> [<https://perma.cc/EX7M-N7UK>].

162. *See* ALA. CODE § 16-28-5 (emphasis added); *see also* David Nichols, *Alabama's school children, a lost generation*, MONTGOMERY ADVERTISER (Aug. 8, 2023, 6:02 AM), <https://www.montgomeryadvertiser.com/story/opinion/contributors/2023/08/08/alabamas-school-children-a-lost-generation/70548240007/> [<https://perma.cc/QB5T-DD43>] (describing, at a high level, some of the issues facing Alabama students, including the notion that several reports classify Alabama as ranking 50th of all of the states in educational achievement).

163. *See* ALA. CODE § 16-28-5.

164. *See id.*

165. Craig Monger, *What could education savings accounts look like with Ivey's pledge to make school choice a priority in 2024?*, 1819 NEWS (July 26, 2023), <https://1819news.com/news/item/what-could-education-savings-accounts-look-like-with-iveys-pledge-to-make-school-choice-a-priority-in-2024#:~:text=According%20to%20Gov.,in%20the%20next%20legislative%20session> [<https://perma.cc/3FMZ-ASAN>].

166. *See* JOHN M. KRISTOF ET AL., REVISITING NEBRASKA'S PRIVATE EDUCATION SECTOR 3 (2023), <https://files.eric.ed.gov/fulltext/ED628534.pdf> [<https://perma.cc/5D35-J4A8>]. (“ESAs allow parents to withdraw their children from public district or charter schools and receive a deposit of public funds into government-authorized savings accounts with restricted, but multiple, uses. Those funds . . . can cover private school tuition and fees, online learning programs, *private tutoring* . . . and other approved customized learning

Another example of licensing hurdles which pose barriers to educational innovation exist in Nevada. The Silver State prevents private schools from opening unless school founders possess a state administrator's or teacher's license, and the school itself must be licensed by the Nevada Department of Education.<sup>167</sup> In one notable instance, these barriers prevented Naval Academy alumnus James Lomax from opening a private school.<sup>168</sup> Despite being a trained engineer with an MBA degree who joined a network designed to support educational entrepreneurs from non-traditional backgrounds, these endeavors were insufficient due to the state of Nevada's requirement of additional licenses or a teaching degree.<sup>169</sup> Instead of opening the school he desired for his children, he now operates a tutoring resource center which is limited in its ability to make his model available to more people, especially in lower-income communities.<sup>170</sup>

The web of occupational licensing regulations across the states can pose challenges for individual educational professionals (as in the case of Alabama) or would-be school leaders (as in the case of Nevada), but these regulations are in a distant second place to the impact state and local zoning laws can have on the education landscape.<sup>171</sup>

### C. Zoning Laws

One relationship between “zoning” and educational outcomes is well known; namely, that residential assignment to an academically high-performing school is associated with higher home values.<sup>172</sup> The following sections explore a different, often overlooked relationship—the impact

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services and materials.”) (emphasis added). The licensure impediment created by Alabama law will prevent some of the more flexible uses, such as private tutoring, from being entirely effective despite the enactment of a new ESA program. See ALA. CODE § 16-28-5.

167. See *Nevada State Regulations*, U.S. DEP'T OF EDUC. (Aug. 30, 2017), <https://www2.ed.gov/about/inits/ed/non-public-education/regulation-map/nevada.html> [https://perma.cc/ZYQ5-GXH3]; Kerry McDonald, *Why Can't A Retired U.S. Navy Officer And Engineer Open A Private School In Nevada?* FORBES (Feb. 22, 2023, 8:26 AM), <https://www.forbes.com/sites/kerrymcdonald/2023/02/22/why-cant-a-retired-us-navy-officer-and-engineer-open-a-private-school-in-nevada/?sh=546822fc3649> [https://perma.cc/TN9L-3YD5].

168. See McDonald, *supra* note 167.

169. *Id.*

170. *Id.*

171. See *Alabama State Regulations*, *supra* note 159; *Nevada State Regulations*, *supra* note 167. See discussion *infra* Section II.C for an explanation of the impact of zoning regulations.

172. SOCIAL CAPITAL PROJECT, ZONED OUT: HOW SCHOOL AND RESIDENTIAL ZONING LIMIT EDUCATIONAL OPPORTUNITY 4 (2019), [https://www.jec.senate.gov/public/\\_cache/files/f4880936-8db9-4b77-a632-86e1728f33f0/jec-report-zoned-out.pdf](https://www.jec.senate.gov/public/_cache/files/f4880936-8db9-4b77-a632-86e1728f33f0/jec-report-zoned-out.pdf) [https://perma.cc/G374-VDES].

local (and occasionally state) zoning regulations have on education innovation.<sup>173</sup>

Just as state regulations abound regarding school accreditation, they are prevalent with regard to school design and often dive into zoning minutiae.<sup>174</sup> California is one such state. California's building codes require a minimum number of plumbing related fixtures (toilets, urinals, sinks, drinking fountains, etc.) in buildings.<sup>175</sup> These requirements differ based on the declared nature and purpose of the building.<sup>176</sup> For instance, structures built for assembly require fewer plumbing fixtures per person than business or educational buildings.<sup>177</sup>

California's Department of Education sets specific requirements regarding the number of toilets and drinking fountains that ought to be accessible per person in a K-12 school building.<sup>178</sup> These requirements differ based on elementary and secondary education, and they even have different specifics for staff members.<sup>179</sup> Such specific regulatory directives can significantly hinder the creation of valuable, but non-conforming school models.<sup>180</sup>

A less obvious way zoning laws impact educational innovation occurs in communities that link zoning regulations with home-based businesses. According to a 2022 survey of nearly 2,000 home-based business owners across the country, respondents viewed home-based business regulations as the most onerous when starting their new enterprises.<sup>181</sup> A review of twenty large cities highlights the complex and confusing nature of the regulatory environment, with limitations placed on

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173. See McDONALD, *supra* note 10, at 11; see also, e.g., Phillip Suderman, *Micro School Entrepreneur Struggles to Make Sense of Zoning*, INST. FOR JUST. (Aug. 17, 2023), <https://ij.org/press-release/micro-school-entrepreneur-struggles-to-make-sense-of-zoning/> [<https://perma.cc/JK7P-RGHL>] (reporting on the plight of an Arizona micro school entrepreneur, struggling to find property where she can operate her school lawfully); Ian Lindsey, *Letter to the editor: Outdated zoning laws stand in the way of progress in education*, ST. GEORGE NEWS (Feb. 14, 2023), <https://www.stgeorgeutah.com/news/archive/2023/02/14/lte-letter-to-the-editor-outdated-zoning-laws-stand-in-the-way-of-progress-in-education/> [<https://perma.cc/8VYY-RV6K>].

174. See generally BAKER, *supra* note 75, at 24 (positing that innovation in the education space requires taking a second look at longstanding school design requirements).

175. *California Plumbing Code: Chapter 4 Plumbing Fixtures and Fixture Fittings*, UPCODES, <https://up.codes/viewer/california/ca-plumbing-code-2022/chapter/4/plumbing-fixtures-and-fixture-fittings#4> [<https://perma.cc/U7TD-YUQ7>].

176. *Id.*

177. *Id.*

178. *K-12 Toilet Requirement Summary*, CAL. DEP'T OF EDUC. (July 13, 2023), <https://www.cde.ca.gov/ls/fa/sf/toiletrequire.asp> [<https://perma.cc/L8DZ-KQJW>].

179. See *id.*

180. See *id.*

181. JENNIFER McDONALD, INST. FOR JUST., *ENTREPRENEUR FROM HOME 2* (2022), <https://ij.org/wp-content/uploads/2022/01/entrepreneur-from-home.pdf> [<https://perma.cc/32JG-5WUP>].

everything from client visits to non-resident employees.<sup>182</sup> Excessive restrictions on home-based business are in sharp contradiction to the post-Covid-19, increasingly work-from-home economy.<sup>183</sup> 2020 saw a steep rise in the percentage of people working from home and home-based businesses; however, existing regulations can impede workers seeking to become remote employees, business owners or operators.<sup>184</sup>

New work-from-home arrangements are especially attractive to caretakers who need or choose to be at home with their children.<sup>185</sup> Yet, the same flexibility that allows a caretaker to work from home might prohibit that work if it involves a few children per day visiting the home for tutoring services.<sup>186</sup> One education entrepreneur's experience is illustrative as demonstrating the massive obstacle that zoning regulations can pose: "I would not be able to open what I envisioned in anything zoned residential. It had to be zoned for commercial use. It's such a hassle that rules out otherwise great options, and to get an exception on zoning requires a really long process and there's no guarantee."<sup>187</sup> Zoning restrictions, many of which are outdated and come from centuries past, fail to appreciate both the flexibility modern professionals enjoy and the customization that modern parents seek for their children.<sup>188</sup>

### III. RECOMMENDATIONS FOR MODERNIZATION

Before addressing how state and local policymakers can update statutes and regulations governing accreditation, licensure, and zoning, a brief review of two United States Supreme Court decisions is illustrative of the underlying notions supporting the idea that such changes should be encouraged.

In *Pierce v. Society of Sisters*, a unanimous Court held that an Oregon statute requiring parents to send their children between the ages of eight and sixteen to a local public school violates the parents' Fourteenth Amendment liberty interest in directing the education and upbringing of their children.<sup>189</sup> *Pierce* involved the Society of Sisters, a Roman Catholic organization that instructed students in subjects usually taught in the Oregon public school system and alongside systematic religious instruction.<sup>190</sup> The Society argued that the Oregon law, which would (with some exceptions) fine, and eventually incarcerate parents who did not send their children to public schools, would have the effect of not only causing

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182. *Id.*

183. *See id.* at 4.

184. *See id.* at 4–5.

185. *Id.* at 11.

186. *See* McDONALD, *supra* note 10, at 11.

187. *Id.*

188. *See id.*

189. *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925).

190. *Id.* at 532.

the Society to close its doors, but would also limit parents' ability to choose non-governmental options for their children.<sup>191</sup> The Court agreed with the Society, dispelling any notion that a State's ability to dictate the terms of education for all students is absolute.<sup>192</sup>

The second case worth highlighting is *Troxel v. Granville*.<sup>193</sup> The facts of this 2000 case involve a Washington state statute that granted "any person" the ability to petition for child visitation rights "at any time," the only requirement being that the visitation serve the best interest of the child according to a determination made by a court.<sup>194</sup> In *Troxel*, two grandparents petitioned the court to increase their visitation rights over and above the wishes of their granddaughter's mother.<sup>195</sup> The court rejected the grandparents' petition and struck down the statute on the grounds that the "liberty interest at issue in this case—the interest of the parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court."<sup>196</sup> When the statute came before the Supreme Court for consideration, the Court went on to affirm its ruling from *Pierce v. Society of Sisters* and *Meyer v. Nebraska*, in which it held that the United States Constitution includes the right of parents to "establish a home and bring up children" and "to control the education of their own."<sup>197</sup>

Although, of course, states can and do regulate in a manner that does not unreasonably interfere with parents' rights, the fundamental right of parents to control the upbringing, and more specifically, the *educational* upbringing of their own children, has been consistently affirmed by the Court.<sup>198</sup> Policymakers should keep this fundamental right at the forefront of their minds when determining the necessity of accreditation, licensure, and zoning regulations insofar as they interfere with a parent's ability to control the education of their own children.

### A. Embrace New Education Service Models

As discussed previously, private school accreditation by a governmental agency is largely built on the premise that the state is best suited to determine which components of a school constitute the norm. This method of mandating standardization inherently lacks the nuance required to best serve individual students, and it prioritizes uniformity over parental preference. Albeit primarily related to building design, the definition of a

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191. *Id.* at 531–33.

192. *Id.* at 534.

193. *Troxel v. Granville*, 530 U.S. 57 (2000).

194. *Id.*

195. *Id.* at 60–61.

196. *Id.* at 65–67.

197. *Id.* at 65; see also *Pierce*, 268 U.S. at 534; *Meyer v. Nebraska*, 262 U.S. 390, 399–401 (1923).

198. See *Troxel*, 530 U.S. at 65.

post-secondary “classroom” used by the National Center for Education Statistics (NCES) is an illustrative guide in the K-12 context.<sup>199</sup> The NCES defines a classroom as “a room or space used primarily for instruction classes and that is not tied to a specific subject or discipline by equipment in the room or the configuration of the space.”<sup>200</sup> Rooms in educational facilities are thus distinguished by the primary use of the room rather than the components found in the space.<sup>201</sup> The use by credible educational organizations of standards which permit more flexibility in the use of educational spaces suggests the feasibility of such flexibility; as such, states should welcome new educational models that do not fit squarely within existing accreditation standards.<sup>202</sup>

Two states in particular are at the forefront of rethinking how statutory definitions can bolster innovative school growth. The West Virginia legislature crafted definitions of both “learning pods” and “microschools.”<sup>203</sup> “‘Learning pod’ means a voluntary association of parents choosing to group their children together to participate in their elementary or secondary academic studies as an alternative to enrolling in a public school, private school, homeschool, or micro-school, including participation in an activity or service provided to the children in exchange for payment,” and a “‘micro-school’ means a school initiated by one or more teachers or an entity created to operate a school that charges tuition for the students who enroll and is an alternative to enrolling in a public school, private school, homeschool, or learning pod.”<sup>204</sup> The primary distinction between the two modes is that the former is *parent*-initiated, and the latter is *teacher*-initiated. Neither formation is hindered by the issues related to payment or unrelated students gathering raised by New York and Maryland law.<sup>205</sup> Defining these new educational models gives parents and operators greater predictability in determining what regulations may attend their chosen form of schooling.<sup>206</sup> Here, the definitions proved helpful in yet another way, as they allowed lawmakers to specifically refer to them when expanding the Hope Scholarship Program (the state education savings

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199. See 4.3.1 *Space Use Codes: Definitions, Descriptions, and Limitations*, NAT’L CTR. FOR EDUC. STAT. (May 2006), <https://nces.ed.gov/pubs2006/ficm/content.asp?ContentType=Section&chapter=4&section=3&subsection=1#top> [https://perma.cc/Z855-DWR3].

200. *Id.*

201. See *id.*

202. See *id.*

203. W. VA. CODE R. § 18-8-1(n)(1)(A)–(B).

204. *Id.*

205. See discussion *supra* Section II.A.

206. In other words, defining alternative school models renders these options clearer for West Virginians, while New Yorkers or Marylanders might inadvertently run afoul of the law by providing “too much” group tutoring. Compare W. VA. CODE R. § 18-8-1(n)(1)(A)–(B), with discussion *supra* Section II.A.

account).<sup>207</sup> By having a definition of “micro-school,” lawmakers could refer to the classifications by name and make it clear that services or tuition at these schools are legitimate uses for Hope Scholarship funds.<sup>208</sup>

The state of Georgia has also acted to define “learning pod” as “a voluntary association of parents choosing to group their children in kindergarten through grade 12 together at various times, to include traditional before and after school hours, or places to participate in or enhance a remote learning option offered by their primary educational program.”<sup>209</sup> Most helpful to parents is that, according to the statute, “payment for services by parents of children who participate in a learning pod does not alter this definition of a learning pod.”<sup>210</sup> Thus, parents need not worry that their participation in a learning pod will expose them to additional, unforeseen regulations.

Policymakers should consider working in tandem with education entrepreneurs and homeschool parents to enact definitions that allow for and protect hybrid homeschool models. Hybrid schools that do not have the requisite enrollment size, school calendars, or instructional time relative to conventional private schools are not able to serve as options for families using school choice programs like Iowa’s Students First Act.<sup>211</sup> At the same time, hybrid schools may have elements (such as onsite education, paid teachers, and students across grade levels and from unrelated families, etc.) that place them outside the traditional definitions of homeschools.<sup>212</sup> So as to not foreclose the possibility that hybrid schools can operate and welcome families participating in school choice programs, lawmakers can officially define this new model or ensure that existing choice programs are broad enough to allow services to be covered as qualified expenses.<sup>213</sup>

The final recommendation for modernizing the school accreditation paradigm is enacting legislation that allows for “provisional” and “umbrella” accreditation classifications.<sup>214</sup> Provisional accreditation can be

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207. Ian Karbal et al., *West Virginia lawmakers approve public funding for microschools via Hope Scholarship*, MOUNTAIN STATE SPOTLIGHT (Jan. 25, 2023), <https://mountainstatespotlight.org/2023/01/25/wv-hope-scholarship-microschools-ss/#:~:text=Lawmakers%20extend%20Hope%20Scholarship%20to%20microschools&text=Microschools%20were%20defined%20in%20law,of%20students%20can%20attend%20one> [https://perma.cc/6RGG-9QVM].

208. *See id.*

209. GA. CODE ANN. § 20-2-690(f)(2)(A).

210. *Id.*

211. *Students First Education Savings Accounts*, *supra* note 127.

212. *See* EXCELINED, *supra* note 132, at 4 (explaining the intersection between the varying characteristics of homeschooling formats and the legal requirements that govern them); *see also* discussion *supra* Section II.A. (demonstrating how state laws barring certain homeschooling characteristics place such models out of the ambit of homeschooling definitions).

213. *See id.* at 6–7.

214. *See Homeschool Umbrella Schools*, COAL. FOR RESPONSIBLE HOME EDUC., <https://responsiblehomeschooling.org/guides/resources-for-homeschool-parents/support/homeschool-umbrella-schools/> [https://perma.cc/8FA2-KRLF] (defining

granted by an agency that determines a new school is in compliance with, or has made significant progress towards compliance with the agency's relevant standards.<sup>215</sup> Provisional accreditation is particularly important for new private schools in states that only allow choice program funds to flow through parents to accredited schools (such as Tennessee and Iowa).<sup>216</sup> The cost of accreditation is often more than a brand-new school can bear, especially when compounded by the fact that families cannot use their choice program dollars to cover or subsidize tuition absent accreditation.<sup>217</sup> In this environment, new private schools seeking to open in lower income communities must raise philanthropic dollars to cover expenses until accreditation and registration with the relevant governmental agencies is completed—a process that can take multiple years, especially when the syncing of accreditation and registration timelines is uncertain.<sup>218</sup> A better outcome in this regard may result if states recognize provisional or temporary accreditation for a limited period until final accreditation is achieved.<sup>219</sup> On the one hand, this asks a state agency to grant a new school the benefit of the doubt (though provisional accreditation does not foreclose all review by the state).<sup>220</sup> On the other hand, starting a new school is not an endeavor that can be taken lightly. New school leaders must have a diverse skill set, work long hours, and withstand the pressure of creating a space that responds to the needs of children (and the hopes of their parents).<sup>221</sup> That school founders are willing to take on these tasks and seek accreditation is already an indicator of their seriousness and commitment to providing a quality education.

“Umbrella” accreditation is slightly different from provisional accreditation; specifically, it allows a school (whether public or private)

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“umbrella” schools in the context of homeschooling); Ben Wieder, *School Accreditation Explained: Does a Seal of Approval Matter?*, STATELINE (Oct. 13, 2011, 12:00 AM), <https://stateline.org/2011/10/13/school-accreditation-explained-does-a-seal-of-approval-matter/> [<https://perma.cc/E2N2-F6XH>] (explaining provisional accreditation in the context of K-12 schools).

215. *Accreditation Process Overview*, LIAISON COMM. ON MED. EDUC., <https://lcme.org/about/accreditation-process-overview/> [<https://perma.cc/TP7E-FAQE>].

216. See *Non-public schools*, *supra* note 87; *Students First Education Savings Accounts*, *supra* note 127 (explaining how funds may only be used for accredited schooling in Tennessee and Iowa, respectively).

217. See discussion *supra* note 216; see also McDonald, *supra* note 121.

218. See sources cited *supra* note 217; see also discussion *supra* Section II.A. (describing the accreditation process generally).

219. See sources cited *supra* note 214.

220. See sources cited *supra* note 214 (describing how “provisional” and “umbrella” models of approval still require oversight or the achievement of certain criteria generally).

221. See generally Dexter Korto & Jill Thompson, *3 Pillars to Build On When Opening a New School*, EDUC. ELEMENTS (Mar. 13, 2019), <https://www.edelements.com/blog/3-pillars-to-build-on-when-opening-a-new-school#:~:text=Planning%20and%20opening%20a%20new,how%20it%20will%20be%20re-membered> [<https://perma.cc/4KBP-BG3V>].



that *already* has accreditation to vouch for the quality of a new school.<sup>222</sup> The umbrella concept already exists in the homeschool realm, with umbrella organizations often providing over-arching administrative services (such as legal, testing, and compliance reporting services) for numerous homeschoolers simultaneously.<sup>223</sup> By extending the use of umbrella accreditation and umbrella organizational services to new private schools, the new schools can not only open and operate more quickly, but they will build relationships with more established schools that can share best practices.<sup>224</sup>

States that pursue either provisional or umbrella accreditation classifications should update existing school choice programs to ensure such schools can receive funds from parents who choose these options.

### B. Reform Licensing Models

In *Pierce*, the Court provided additional support for the notion that educational licensing models should be approached with a high degree of skepticism.<sup>225</sup> The unanimous Court held that “the fundamental liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only.”<sup>226</sup> We must therefore ask the question: how can states like Alabama require even students in private schools to receive instruction only from educators who adhere to the state certification standards?<sup>227</sup> In other words, given the admonition of the *Pierce* Court, students, especially those outside of the public school system, ought to be able to avail themselves of instruction provided by educators whose qualification is not determined by a state’s licensing requirements. This opportunity is particularly important given the attenuated relationship between public school teacher licensing and improved teacher quality and student outcomes.<sup>228</sup>

Organizations such as Teach for America attract graduates from fields beyond colleges of education into the teaching profession, but the

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222. See *Homeschool Umbrella Schools*, *supra* note 214.

223. See *id.*

224. See *id.*

225. See *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 535 (1925).

226. *Id.*

227. See *id.*; see also discussion *supra* notes 158–62; ALA. CODE § 16-28-5.

228. See, e.g., Joshua D. Angrist & Jonathan Guryan, *Does Teacher Testing Raise Teacher Quality? Evidence from State Certifications Requirements*, 27 ECON. OF EDUC. REV. 483, 500 (2008) (finding that licensing and testing requirements are not necessarily associated with greater teacher quality); see also RICHARD BUDDIN & GEMA ZAMARRO, TEACHER QUALITY, TEACHER LICENSURE TESTS, AND STUDENT ACHIEVEMENT 21, 30 (2008), [https://www.rand.org/content/dam/rand/pubs/working\\_papers/2008/RAND\\_WR555.pdf](https://www.rand.org/content/dam/rand/pubs/working_papers/2008/RAND_WR555.pdf) [<https://perma.cc/8WML-6J3P>].

number of recruits has been declining in recent years.<sup>229</sup> Moreover, Teach for America corps members still must pass teacher licensing exams if they are to remain in the classroom beyond their two-year Teach For America term.<sup>230</sup> This shows that while Teach for America and similar programs may attract would-be teachers to the profession, licensure requirements continue to be a barrier to maximal participation.

Florida law provides multiple licensure pathways for prospective educators. Further, recently added pathways may help alleviate teacher shortages in the Sunshine State.<sup>231</sup> A pathway added in 2023 gives military veterans without college degrees the ability to receive a five-year temporary license while they pursue a college degree.<sup>232</sup> Whether the ultimate teacher's license proves valuable remains to be seen, but the state's appreciation of the experience veterans can bring to the classroom is commendable, and the lack of specific education required of the chosen veterans suggests this program need not be limited to veterans alone.<sup>233</sup> There are millions of college-educated adults currently working in jobs that typically do not require a college degree who could, with the appropriate classroom management training, enter schools as subject matter experts.<sup>234</sup> These proposed changes would benefit schools and students across the board, and especially those public schools where educator vacancies are particularly high.<sup>235</sup>

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229. Ben Backes & Michael Hansen, *Teach For America is shrinking—Is this cause for celebration?*, BROOKINGS (Jan. 31, 2023), <https://www.brookings.edu/articles/teach-for-america-is-shrinking-is-this-cause-for-celebration/> [https://perma.cc/S52T-M9Y4].

230. *See id.*; *see also* *Life as a Corps Member*, TEACH FOR AM., <https://www.teachforamerica.org/faqs/life-as-a-corps-member> [https://perma.cc/3PTZ-S5E2].

231. *Certificate Pathways & Routes*, FLA. DEP'T OF EDUC., <https://www.fldoe.org/teaching/certification/pathways-routes/> [https://perma.cc/HGE5-QTFJ]. *See generally* FLA. DEP'T OF EDUC., IDENTIFICATION OF CRITICAL TEACHER SHORTAGE AREAS FOR 2022-23 (2022), <https://www.fldoe.org/core/fileparse.php/20042/urlt/7-2.pdf> [https://perma.cc/QW7F-2HV4].

232. *Military Veterans Certification Pathway*, FLA. DEP'T OF EDUC., <https://www.fldoe.org/veterans/> [https://perma.cc/YT4T-3SVL].

233. *See id.*

234. Klajdi Bregu, *Students Increasingly Are Pursuing Degrees with Better Job Prospects*, DATA SHOW, FOUND. FOR ECON. EDUC. (June 5, 2019), <https://fee.org/articles/students-increasingly-are-pursuing-degrees-with-better-job-prospects-data-show/#:~:text=Causes%20of%20Underemployment,-As%20argued%20above&text=Yet%20the%20graph%20above%20shows,percent%20for%20about%2030%20years> [https://perma.cc/CX3M-RX7Q].

235. *See* Zachary Schermele, *Teacher shortages continue to plague US: 86% of public schools struggle to hire educators*, USA TODAY (Oct. 17, 2023, 1:46 PM), <https://www.usatoday.com/story/news/education/2023/10/17/teacher-shortage-2023-us-schools-struggle-hiring/71208579007/> [https://perma.cc/5GT2-T4LJ].

### C. Prioritize Education Over Zoning

Policymakers can support the establishment of new educational options by (1) prioritizing the consideration of educational land uses and (2) taking other specific policy steps, to be described herein. First for consideration is the foundational matter of the land use regulations governing educational institutions versus other types of businesses. Zoning rules and regulations are, in many ways, a manifestation of community priorities.<sup>236</sup> Every state has memorialized the value of elementary and secondary education in its constitution, thereby affirming that education is a core priority across the country, a sentiment which has also been upheld by the courts.<sup>237</sup>

The New York Court of Appeals has repeatedly held that “schools, public, parochial and private, by their very nature, singularly serve the public’s welfare and morals.”<sup>238</sup> This weighty purpose does not give schools carte blanche to ignore all zoning regulations, but it does place the burden on the zoning agency to show that the proposed educational use would actually have a net negative impact.<sup>239</sup> The competing interests of educational institutions and zoning boards came into conflict in 1986 in *Cornell University v. Bagnardi*. At issue in *Cornell University v. Bagnardi* was Cornell University’s desire to relocate an interdisciplinary academic program to a large house it owned in an area abutting the Cornell campus.<sup>240</sup> The City of Ithaca’s Board of Zoning Appeals denied the university’s application for the variance which would permit the university to use the residential building for academic purposes because the Board concluded there would be unspecified damage to the character of the neighborhood.<sup>241</sup> In a companion case, Sarah Lawrence College sought to house thirteen students and one staff member in a private house across the street from its main campus.<sup>242</sup> Sarah Lawrence College’s request for a special permit to proceed was denied by the local Planning Board which determined that the use might depreciate property values, increase traffic, damage the character of the neighborhood, and would lead to other similar applications along the same street.<sup>243</sup> In rejecting the decision of the zoning commission, the Court in *Cornell* was careful to note that educational uses

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236. See BEN FORMAN ET AL., URB. LAND INST., RESHAPING THE CITY: ZONING FOR A MORE EQUITABLE, RESILIENT, AND SUSTAINABLE FUTURE 4 (2023), [https://knowledge.uli.org/-/media/files/research-reports/2023/uli\\_report\\_reshapingthecity\\_fin.pdf](https://knowledge.uli.org/-/media/files/research-reports/2023/uli_report_reshapingthecity_fin.pdf) [https://perma.cc/3WXV-TH66] (suggesting that improving zoning laws involves aligning them with community priorities).

237. PARKER, *supra* note 70, at 5–22 (compiling state constitutional references to public education).

238. *Cornell Univ. v. Bagnardi*, 503 N.E.2d 509, 514 (N.Y. 1986).

239. *See id.* at 511.

240. *Id.*

241. *Id.*

242. *Id.* at 512.

243. *Id.* at 512.

that would unarguably be contrary to the public's health, safety, or welfare need not be permitted at all.<sup>244</sup> However, the Court emphasized that the controlling consideration is how a school's expanded use balances against the overall impact on the public welfare; as such, factors such as property values, impairment of use, and traffic were not weighty enough to foreclose the school's proposed use in light of the presumption of educational priority.<sup>245</sup> In order to remove the barriers that zoning restrictions place on educational innovation, local zoning boards across the states should proactively adopt the New York Court of Appeals' presumption regarding the inherent value of land use for educational purposes. Combining education-centric zoning rules with the evolving understanding that classrooms and schools are better defined by how a given space is used rather than its design and architecture will create a friendlier environment in which new educational models can thrive.<sup>246</sup>

The following are additional ways zoning and building-use regulations can be reformed to encourage education innovation and the use of school choice resources in a student-centric manner. First, policymakers can establish standards for zero-impact<sup>247</sup> home-based businesses and allow them to operate with a permit.<sup>248</sup> Impact should be measured by net-negative impact with the burden on a zoning commission to show the bona fide, expected harm to public safety and welfare.<sup>249</sup> Second, a more streamlined (albeit expansive) proposal related to zero-impact businesses is to allow educational home-based businesses to exist by right, rather than requiring variances or other permits.<sup>250</sup> Third, the laws restricting such activity across the states should change to allow education service providers, especially those working out of a home, to serve clients and have non-resident employees in the home.<sup>251</sup> These simple changes will allow for the flourishing of education service providers that want to be close to their core customers—families—and do not need (or want) large, commercial spaces.

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244. *Id.* at 515.

245. *Id.*

246. *See id.* at 515–16; *see also* discussion *supra* Section II.C. (explaining the impact of zoning as a barrier to educational innovation).

247. “Zero-impact” businesses are sometimes defined as those whose operation will not result in traffic, parking requirements, or in-person business transactions. *See, e.g., City Businesses*, CITY OF READING, PA, <https://www.readingpa.gov/business-guide-english> [<https://perma.cc/8RQ2-JF9W>].

248. *See* PATRICK TUOHEY & LINDSEY ZEA, BETTER CITIES PROJECT, JET: THE JOBS AND ENTREPRENEURSHIP TOOLKIT FOR CITIES 14 (2021), <https://better-cities.org/wp-content/uploads/2021/01/BCP-JET.pdf> [<https://perma.cc/QN75-YCJS>].

249. *See Bagardi*, 503 N.E.2d at 515.

250. *See* TUOHEY & ZEA, *supra* note 248, at 14.

251. *See* McDONALD, *supra* note 10, at 11.

### CONCLUSION

This Article examined three areas in which state and local laws stand in the way of accomplishing the fundamental objectives of educational programs and fail to give due weight to the fundamental rights at play. The core consideration of any community's educational practices is characterized by the question, "and how are the children?" The fundamental right that should take precedence over regulatory schemes is the interest of parents "in the care, custody, and control of their children."<sup>252</sup> By giving these two considerations priority over bureaucratic concerns, policymakers can ensure the 2023 educational choice wave will reverberate for years to come.

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252. *Troxel v. Granville*, 530 U.S. 57, 57 (2000).