

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
FOURTH DISTRICT

Case No. 4D15-2032

SCHOOL BOARD OF PALM BEACH COUNTY, FLORIDA,

Appellant,

v.

FLORIDA CHARTER EDUCATIONAL FOUNDATION, INC.,
AND SOUTH PALM BEACH CHARTER SCHOOL,

Appellees.

On Appeal from the State of Florida
Department of Education
(Case No. 2015-3112FOI)

**BRIEF AMICUS CURIAE OF PACIFIC LEGAL
FOUNDATION IN SUPPORT OF APPELLEES**

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Pursuant to Rule 9.370, Florida Rules of Appellate Procedure, Pacific Legal Foundation (PLF) submits this brief amicus curiae in support of the Appellees, Florida Charter Educational Foundation, Inc., and South Palm Beach Charter School.

INTEREST OF AMICUS CURIAE

Pacific Legal Foundation (PLF) is a nonprofit, tax-exempt foundation organized for the purpose of litigating matters affecting the public interest. Founded in 1973, PLF provides a voice in the courts for citizens committed to limited government, private property rights, individual freedom, and free enterprise. PLF supports school choice programs across the country because they empower parents to select schools that best fit the needs of their children.

To that end, PLF has participated in the United States Supreme Court in cases involving kindergarten through 12th grade (K-12) education reform, including *Arizona Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436 (2011) (tuition tax credit); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (Ohio voucher programs); and *Mitchell v. Helms*, 530 U.S. 793 (2000) (state and federal school aid programs). PLF has also participated in state court cases involving education reform and school choice, including *Taxpayers for Public Educ. v. Douglas Cnty. Sch. Dist.*, 2015 WL 3948220 (Colo. June 29, 2015) (scholarship program); *California Charter Schools Ass'n v. Los Angeles Unified Sch. Dist.*, 345 P.3d 911 (Cal. 2015) (charter school facilities); *Duncan v. New Hampshire*, 102 A.3d 913 (N.H. 2014) (tax credit

scholarship program); *Atlanta Indep. Sch. Sys. v. Atlanta Neighborhood Charter Sch., Inc.*, 748 S.E.2d 884 (Ga. 2013) (charter school funding); *Meredith v. Pence*, 984 N.E.2d 1213 (Ind. 2013) (school voucher program); and *Cain v. Horne*, 202 P.3d 1178 (Ariz. 2009) (school voucher program). PLF has also filed amicus briefs regarding Florida’s charter school law and other school choice programs in Florida courts. *See Sch. Bd. of Palm Beach County v. Survivors Charter Sch., Inc.*, 3 So. 3d 1220 (Fla. 2009); *Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006).

INTRODUCTION AND SUMMARY OF ARGUMENT

In 1996, the Florida legislature adopted the state’s first charter school law, which established charter schools as “nonsectarian public schools that operate under a performance contract (charter) with a public sponsor—either a district school board or university.” *Survivors*, 3 So. 3d at 1228. Charter schools operate free from many state laws and regulations so that they have more freedom and flexibility to tailor their programs to their students and to focus on providing students with the best education possible. *Id.* The legislature’s primary purpose for charter schools is to improve education for Florida students. *See* § 1002.33(2), Fla. Stat; § 1000.01, Fla. Stat. Charter schools are succeeding at that goal, by improving educational outcomes for students nationwide. National Alliance for Public Charter Schools, *Public Charter*

School Success: A Summary of the Current Research on Public Charters' Effectiveness at Improving Student Achievement 1 (Apr. 2013).¹

Unlike traditional public schools, that enroll students based on their home addresses, parents must affirmatively choose to enroll their children in charter schools. *See Survivors*, 3 So. 3d at 1228. Charter schools must therefore compete with neighborhood schools for students by providing families with a better option that meets the needs of their children. *See* 1002.33(2)(c)(2), Fla. Stat. Because charter schools allow parents to hold traditional public schools accountable, charter schools improve educational outcomes for students in traditional public schools. Tim R. Sass, *Charter Schools and Student Achievement in Florida*, 1 Education Finance and Policy 91 (Winter 2006).²

Despite improving student achievement, charter schools still encounter resistance by traditional school interests. Here, the Palm Beach County School Board (School Board) was frustrated that its traditional public schools were losing students to charter schools. *See generally* Transcript of School Board Hearing, Appellee's Answer Brief at 9-16. Consequently, the School Board rejected the Florida Charter Educational Foundation's application to establish the South Palm Beach Charter

¹ http://www.publiccharters.org/wp-content/uploads/2014/01/NAPCS_2013_Research_Summary_20130424T145509.pdf

² <http://www.mitpressjournals.org/doi/pdf/10.1162/edfp.2006.1.1.91>

School, claiming that it lacks “innovation” and fails to fulfill the requirement in Florida’s charter school statute that charter schools “[e]ncourage the use of innovative learning methods.” § 1002.33(2)(b), Fla. Stat. The School Board claims the school is not innovative because existing district schools employ similar learning methods. Appellant’s Initial Brief at 6.

The School Board’s rationale for rejecting the Foundation’s charter school application is not supported by Florida law. Contrary to the School Board’s claims, South Palm Beach Charter School does not have to use an untested education model to satisfy the law’s “innovation” requirement. South Beach Charter School’s methods do not cease to be innovative simply because they have proven popular and successful. The charter school law does not require schools to use unusual or different methods than existing district schools. *See* § 1002.33, Fla. Stat. Indeed, the legislature rejected the School Board’s argument when it eliminated a requirement that charter schools employ “different learning methods.” Moreover, Florida law encourages the creation of new charter schools that use identical methods as existing successful schools. § 1002.331, Fla. Stat. The decision of the State Board of Education should be affirmed.

I

THE SCHOOL BOARD'S DECISION VIOLATES FLORIDA LAW

The charter school law has numerous requirements governing a charter school application. § 1002.33(6), Fla. Stat. For example, charter school applicants must provide a detailed curriculum plan, ensure fiscal responsibility by predicting the budget and including an annual financial plan, and demonstrate how they will meet the statutory purposes for charter schools. *Id.* One purpose of the charter law is for charter schools to “[e]ncourage the use of innovative learning methods.” § 1002.33(2)(b), Fla. Stat. The charter law also establishes responsibilities for a charter school sponsor, including the requirement that the “sponsor shall ensure that the charter is innovative.”³ *See* § 1002.33(5)(b)(1)(e), Fla. Stat. Plucking these provisions from the litany of requirements for approving a charter school, the School Board argues that charter schools must provide students with an education that is more innovative than traditional district schools. *See* Appellant’s Initial Brief at 19. The

³ The charter statute provides that any sponsoring entity “shall ensure that the charter is innovative and consistent with the state education goals,” § 1002.33(5)(b)(1)(e), Fla. Stat. But under § 1002.33(6)(h), a School Board’s “written contractual agreement” governing the terms and conditions for the charter school shall be “called a charter.” Thus Amicus Curiae agrees with Appellees’ straightforward interpretation that the statute requires the sponsoring entity to ensure the contractual agreement governing the charter school to be innovative. But regardless of whether the Court agrees with the Appellees’ or the School Board’s interpretation of § 1002.33(5)(b)(1)(e), the arguments in this brief compel the same conclusion: the School Board wrongly denied the Appellees’ application.

School Board also claims that to be innovative, a school must employ an instructional model that is different from existing district schools. *See id.* at 30-31 (“previous submission of identical applications demonstrates the *lack* of innovation”). The School Board’s arguments reach well beyond the permissible bounds of statutory construction, and are not supported by Florida law. As explained in more detail below, “innovative” is more accurately defined as “using modern or recent ideas or methods.” “Innovative” doesn’t simply mean “new” or “different;” it refers to a willingness to experiment and explore a variety of models. A plain reading of the statute reveals that the Appellees’ application satisfies the charter school statute. Moreover, the legislature has already rejected any requirement that charter schools provide a different education, and instead it has endorsed the duplication of successful models.

**A. Appellees’ Proposed Charter School Is “Innovative”
According to the Intent and Plain Language of the Statute**

In 2002, the legislature repealed the original charter school statute and passed a version of the current charter law as part of the state’s K-20 Education Code. Ch. 2002-387, Senate Bill No. 20-E.⁴ “The purpose of the Florida K-20 Education Code is to provide by law for a state system of schools, courses, classes, and educational institutions and services adequate to allow, for all Florida’s students, the opportunity

⁴ <http://laws.flrules.org/2002/387>

to obtain a high quality education.” *Id.* at § 3(3); § 1000.01, Fla. Stat. (2015). The primary goal of all parts of the K-20 program, including the charter school program, is to provide students with the opportunity for a quality education. *See* § 1002.33(2)(a)(1), Fla. Stat.

When interpreting the meaning of a statute, the Court must look toward effectuating legislative intent. *Survivors*, 3 So. 3d at 1232. Thus, the purpose that charter schools “[e]ncourage the use of innovative learning methods” must be interpreted in a manner that effects the legislature’s intent to create a school system that improves students’ opportunity to obtain a high quality education. *See* § 1002.33(2)(a), Fla. Stat; § 1000.01, Fla. Stat. Echoing the K-20 program’s goal, most of the charter school statute’s guiding principles and purposes for charter schools focus on improving education for students (student learning, achievement, academic success, or learning opportunities). *See id.* The body of the charter statute references improving learning or outcomes regularly.

Because the charter school statute does not define “innovative,” the term “should be given its plain and ordinary meaning.” *Survivors*, 3 So. 3d at 1233. To determine the plain and ordinary meaning of a word, courts look to dictionary definitions. *Id.* The Merriem-Webster Dictionary defines “innovative” as “introducing or using new ideas or methods” or “having new ideas about how

something can be done.”⁵ The same dictionary defines “new” as “recent” and “modern.”⁶ Thus “innovative” may be defined as “using modern or recent ideas or methods.” Appellees’ proposal to use Blended Instruction, for example, is unequivocally a modern teaching method, because it relies on modern technological advances. *See* Ian Quillen, *The Rise of Blended Learning*, Smithsonian, July 7, 2013.⁷ “Innovative” may also be defined as a willingness to experiment and explore a variety of models. *E.g.*, § 163.340(23), Fla. Stat. (defining “community policing innovation” as an umbrella term covering numerous and varied approaches to reducing neighborhood crime), or § 985.668, Fla. Stat. (defining “innovation zone” as an area “providing a laboratory for the research, development, and testing of the applicability and efficacy of model programs, policy options, and new technologies”).

A school can “encourage” innovation in different ways, without necessarily being new or unique. For example, a school can give teachers freedom to experiment with innovative approaches in their classrooms, or it can provide professional development training in such methods. *See, e.g.*, Edutopia, *What You Need to Be an Innovative Educator* (July 30, 2013) (flexibility from administrators can allow

⁵ <http://www.merriam-webster.com/dictionary/innovative>

⁶ <http://www.merriam-webster.com/dictionary/new>

⁷ <http://www.smithsonianmag.com/innovation/the-rise-of-blended-learning-7719337/?no-ist>

teachers to try different teaching methods);⁸ Nichole Dobo, *After 20 years, a teacher reinvents her classroom using technology*, Hechinger Report, Oct. 15, 2014 (professional training in blended learning empowered teacher to innovate in classroom).⁹

Even if the charter school statute required charter schools themselves (as opposed to just the charter) to be innovative, the Appellees’ application would still satisfy the charter school statute. Nowhere is “innovative” read to mean “*sui generis*” as the School Board argues. For a method to be innovative, it need not be untested or more innovative than competitors. Schools may employ the same general learning method—like the Blended Instruction approach proposed by the Appellees here—for many years, but continue to innovate within that method by gradually building upon previous advances, trying new approaches, or taking advantage of new technology. *See, e.g.*, DreamBox Learning, Inc., *Blended Learning Innovations: 10 Major Trends* at 2-3 (2014) (describing gradual or minor “refinements” within blended learning as “innovative”);¹⁰ Michael B. Horn & Heather Staker, *The Rise of K-12 Blended*

⁸ <http://www.edutopia.org/blog/what-you-need-innovative-educator-terry-heick>

⁹ <http://hechingerreport.org/20-years-teacher-reinvents-classroom-using-technology/>

¹⁰ http://cdno3.gettingsmart.com/wp-content/uploads/2014/10/wp_blended_learning_innovations.pdf

Learning, Innosight Institute, Jan. 2011 (describing past and future of blended learning).¹¹

In this sense, innovative education models, are no different than innovative consumer products. For example, the invention of the iPhone “set off an entire rethinking of how humans interact with machines.” Fred Vogelstein, *And Then Steve Said, ‘Let There Be an iPhone,’* The New York Times Magazine, Oct. 4, 2013.¹² Apple sold 270,000 iPhones on its first day on the market in 2007. Reuters, *A Million New iPhones Sold in the First Weekend*, New York Times, July 15, 2008.¹³ Likewise, each iteration of the phone sells millions—amounting to more than 700 million sold since 2007—and each one incorporates innovations. Subsequent versions of the iPhone are no less innovative simply because they are popular and somewhat duplicative of the early versions. See Vogelstein, *supra*.

Because innovations consistently build upon previous advancements, a school may use popular and well-known methods and still qualify as innovative. The charter school statute does not require charter schools to be more innovative than traditional

¹¹ <http://www.christenseninstitute.org/wp-content/uploads/2013/04/The-rise-of-K-12-blended-learning.pdf>

¹² <http://www.nytimes.com/2013/10/06/magazine/and-then-steve-said-let-there-be-an-iphone.html>

¹³ <http://www.nytimes.com/2008/07/15/technology/15apple.html>

public schools, because the primary intent of the statute is to improve students' educational outcomes, not to increase innovation.

**B. The Charter School Law Encourages
the Use of Successful Learning Methods**

Even if “innovation” in Section 1002.33 could be narrowed to mean “different” or “unique,” the legislature rejected that interpretation. The original 1996 charter law provided that one of the eight purposes of charter schools was to “[e]ncourage the use of *different* and innovative learning methods” (emphasis added). But in 2002, the legislature rejected that requirement, amending the charter law to strike the requirement that charter schools encourage “different” learning methods. Ch. 2002-387, Senate Bill No. 20-E.¹⁴ “When the legislature amends a statute by omitting words, courts may presume it intends the statute to have a different meaning than that accorded before the amendment.” *Guadalupe v. Peterson*, 779 So. 2d 494, 497 (Fla. 2d DCA 2000). *See also State ex rel. Szabo Food Servs., Inc. of North Carolina v. Dickinson*, 286 So. 2d 529, 531 (Fla. 1973). By deleting the requirement that charter schools should encourage “different” learning methods, the legislature signaled that charter schools should be free to pursue existing and successful education models.

This legislative change reflects good public policy. Schools that succeed at educating Florida’s children should be encouraged, and not be forced to abandon their

¹⁴ <http://laws.flrules.org/2002/387>

model for the sake of being different. The amended charter school statute encourages charter schools to adopt learning methods proven successful. Section 1002.331 of the Florida Statutes makes it easier for a high-performing charter school to expand or replicate itself than it would be to start a charter school employing different methods. *See, e.g.*, § 1002.331(3)(b), Fla. Stat. (“If the sponsor fails to act on the application within 60 days after receipt, the application is deemed approved”); § 1002.33(6)(b)(3)(b), Fla. Stat. (heavier burden on School Board when denying a charter application from a high-performing charter school). Accordingly, the charter school law provides shortcuts in the approval process, so long as the new charter school “will substantially replicate its educational program.” § 1002.331(3)(b), Fla. Stat.; *Sch. Bd. of Seminole County v. Renaissance Charter Sch., Inc.*, 113 So. 3d 72, 74 (Fla. 5th DCA 2013). The charter school statute’s preferential treatment for high-performing charter schools conflicts with the School Board’s claim that state law requires charter schools to provide a different educational model than existing schools. “Where possible, courts must give full effect to all statutory provisions and construe related statutory provisions in harmony with one another.” *See Woodham v. Blue Cross & Blue Shield, Inc.*, 829 So. 2d 891, 898 (Fla. 2002) (quoting *Forsythe v. Longboat Key Beach Erosion Control Dist.*, 604 So. 2d 452, 455 (Fla. 1992)). Accordingly, the high-performing charter school statute must be “read together” with

the innovation requirements of section 1002.33 “to achieve a consistent whole.”
Woodham, 829 So. 2d at 898; *also quoted in Survivors*, 3 So. 3d at 1234.

II

SUCCESSFUL CHARTER SCHOOLS SHOULD BE EMBRACED, NOT SHUNNED, BY THE TRADITIONAL EDUCATION ESTABLISHMENT

To improve students’ education, the legislature purposed that charter schools would increase students’ educational opportunities and “[p]rovide rigorous competition within the public school district to stimulate continual improvement in all public schools.” § 1002.33(2)(c)(2), Fla. Stat. By giving parents a choice about where their children will be educated, the legislature created an escape hatch for students and parents who are dissatisfied with their district-run public school. *See id.* Because charter schools increase educational options, under the charter school model, “schools must begin to treat parents and students as customers to be served rather than as a captive audience.” Matthew Ladner & Matthew J. Brouillette, *The Impact of Charter Schools and Public School Choice on Public School Districts in Wayne County, Michigan*, 45 How. L.J. 395, 396 (2002). Indeed, the mere existence of charter schools encourages district schools to adopt more innovative methods. Paul Teske, et al., *Does Charter School Competition Improve Traditional Public*

Schools?, Center for Civil Innovation at the Manhattan Institute at 6, June 2000.¹⁵ Accordingly, in this way, charter schools, by their very competitive nature, “[e]ncourage the use of innovative learning methods,” fulfilling that statutory purpose. As a result, charter schools are improving educational outcomes for students in traditional public schools. *E.g.*, Sass, 1 *Education Finance and Policy* 91;¹⁶ Marcus A. Winters, *Measuring the effect of charter schools on public school student achievement in an urban environment: Evidence from New York City*, 31 *Economics of Education Rev.* 293 (Apr. 2012).¹⁷ Charter schools are also fulfilling their primary purpose by providing Florida students with a better education, on average, than traditional public schools. Florida Department of Education, *Student Achievement in Florida’s Charter Schools: A Comparison of the Performance of Charter School Students with Traditional Public School Students* (June 2015);¹⁸ Edward Cremata, et al., *National Charter School Study* at 3, Center for Research on Education Outcomes, Stanford (2013);¹⁹ *Public Charter School Success, supra*, at 1 (discussing thirteen published

¹⁵ <http://files.eric.ed.gov/fulltext/ED469277.pdf>

¹⁶ <http://www.mitpressjournals.org/doi/pdf/10.1162/edfp.2006.1.1.91>

¹⁷ <http://www.sciencedirect.com/science/article/pii/S0272775711001476>

¹⁸ http://www.fldoe.org/core/fileparse.php/7778/urlt/Charter_Student_Achievement_Report_1314.pdf

¹⁹ <http://credo.stanford.edu/documents/NCSS%202013%20Final%20Draft.pdf>

studies that show charter schools outperform traditional public schools).²⁰ The performance gains demonstrated by charter schools are especially pronounced among students from low-income households and minority students, helping close long-standing achievement gaps with their more privileged peers. Florida Department of Education, *supra*. Because charter schools often attract those students who are dissatisfied in traditional schools, charters tend to enroll students who are initially “academically behind their peers in traditional public schools.” Gerard Robinson & Edwin Chang, National Alliance for Public Charter Schools, *Issue Brief: The Color of Success: Black Student Achievement in Public Charter Schools* 11 (June 2008).²¹

Charter schools are doing so well in Florida that parents are increasingly seeking out charter schools to provide their children with better educational opportunities. Last year, there were 650 charter schools statewide, teaching more than 250,000 students. Associated Press, *Florida Gov. wants more money to help charter schools*, WTSP News, Jan. 15, 2015.²² An estimated 86,000 students were on wait lists to attend a Florida charter school. Travis Pillow, *About those Florida charter*

²⁰ http://www.publiccharters.org/wp-content/uploads/2014/01/NAPCS_2013_Research_Summary_20130424T145509.pdf

²¹ http://www.publiccharters.org/wp-content/uploads/2014/01/The_Color_of_Success_Full_Report_20110402T222340.pdf

²² <http://www.wtsp.com/story/news/2015/01/15/rick-scott-money-charter-schools/21806841/>

school waiting lists, RedefinED, May 14, 2015.²³ In Miami-Dade County alone, 128 charter schools enrolled 55,000 students—about 15 percent of the district’s public school students. Susan Pendergrass & Nora Kern, *Waiting for Their Chance: A Closer Look at Wait Lists in Urban Public Charter Schools* at 3 (May 2015).²⁴ Approximately 24,500 students were on wait lists to attend one of those charter schools. *Id.*

Despite the clear benefits to students, some school districts actively oppose competition and resist charter schools. *See, e.g.*, Travis Pillow, *Proposed amendment would overhaul Florida charter school approvals*, RedefinED, Nov. 20, 2015;²⁵ Terri Hardy, *Commission says local districts, state impeding charter schools*, Daily News, Oct. 19, 1995, available at 1995 WLNR 1387624. The Palm Beach School Board appears to fear competition, denying applications at increasing rates. Sonja Isgar, *Advocate: PBC becoming ground-zero in charter battle; 3 schools denied*, Palm Beach Post, Oct. 7, 2015 (“The district has denied other applications, including 15 this year. In 2013, the district received 33 applications and denied 17. The following

²³ <https://www.redefinedonline.org/2015/05/about-those-florida-charter-school-waiting-lists/>

²⁴ http://www.publiccharters.org/wp-content/uploads/2015/05/waitlist_web.pdf

²⁵ <https://www.redefinedonline.org/2015/11/constitutional-florida-charter-school/#sthash.nKeGq6IK.dpuf>

year 22 applied and none were approved, said Jim Pegg, the director of the district's charter school office.”).²⁶

Fortunately, Florida's charter school statute protects charter school applicants from unfair denials, by allowing applicants to appeal to the State Board of Education. § 1002.33(6)(c), Fla. Stat. The appeal opportunity helps protect the legislature's intent of improving students' education by giving families more educational opportunities and creating competition for students. Center for Education Reform, *Model Legislation for States: Grounded on Experience and Practice* at 6 (Oct. 2012).²⁷ It did so here. The State Board of Education rejected the School Board's attempt to limit charter schools on the basis of the educational model's past successes.

Charter schools are succeeding at improving educational opportunities in Florida. Charter school students are performing better than average, despite attracting less prepared students. And because traditional public schools want to keep student enrollment and public funding, charter schools are motivating regular public schools to innovate and improve their programs to better meet their students' needs. In this way, charter schools inherently encourage innovation.

²⁶ <http://www.mypalmbeachpost.com/news/news/local-education/advocate-pbc-becoming-ground-zero-in-charter-battl/nxfy/>

²⁷ <https://www.edreform.com/wp-content/uploads/2012/10/CER-ModelCharterLegislation.pdf>

CONCLUSION

Florida's charter law does not require schools to use unusual or different methods than other schools in Palm Beach County. Innovation is not to be pursued for its own sake. Charter school organizations that replicate successful teaching models help bring better educational outcomes to more students across the state and country. The State Board of Education's decision should be affirmed.

DATED: January 19, 2016.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the font used in this brief is Times New Roman 14 point and in compliance with Fla. R. App. P. 9.210(a)(2).

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF APPELLEES has been electronically filed with the Clerk of Court using the E-Filing Portal on this 19th day of January, 2016, which will send a notice of electronic filing to the following:

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