

**INADEQUATE CHOICE IN SCHOOL CHOICE: AN ANALYSIS OF SOUTH  
CAROLINA’S HOUSE BILL 3843 AND THE IMPLICATIONS FOR PUBLIC  
SCHOOL STUDENTS AND RURAL SCHOOLS**

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I. INTRODUCTION.....813

II. BACKGROUND .....815

III. THEORETICAL POSITIVES .....819

A. *Expanded Opportunity and Student Achievement*..... 819

B. *Capacity Standards*..... 823

IV. INADEQUACIES OF HOUSE BILL 3843 .....824

A. *Transportation Barriers* ..... 824

1. *Socioeconomic Status and Race*..... 824

2. *Rural Schools* ..... 827

3. *Absenteeism, Tardiness, and Turnover* ..... 828

B. *Funding Implications for Inter-District Open Enrollment* ..... 829

C. *Student Achievement*..... 833

V. SOLUTIONS .....834

A. *State Specific Data Collection on Student Achievement*..... 834

A. *Providing Transportation Is Essential*..... 835

B. *Inter-District Funding Solutions Come with Their Own Risks*..... 838

VI. CONCLUSION .....840

I. INTRODUCTION

South Carolina consistently ranks poorly regarding its public education system, signifying a need for change.<sup>1</sup> South Carolina legislators have

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\* J.D. Candidate, May 2025, University of South Carolina Joseph F. Rice School of Law. First, I want to thank Dean Emily Suski for serving as my faculty advisor and providing me with guidance throughout the writing process of this Note. Next, I want to thank Mrs. Lara McElwee for providing me with her insight and experiences in the teaching profession. I also want to thank my teachers at James Island Charter High School and Clemson University for positively impacting my life and helping me get to where I am today. Lastly, I want to thank my mentors, friends, and family, especially my mother, for their unwavering support.

1. South Carolina ranked 42nd in public school systems. Adam McCann, *States with the Best School Systems*, WALLETHUB (Jul. 24, 2023), <https://wallethub.com/edu/e/states-with-the->

popularized school choice as a potential solution. “School choice” refers to “[a]ny policy that allows families to take their children’s education dollars to the approved education provider of their choosing,”<sup>2</sup> and the concept functions through mechanisms such as magnet and charter schools, voucher programs, open enrollment policies, tuition tax credits, educational savings accounts, and more.<sup>3</sup>

In 1955, free-market economist Milton Friedman advocated for the government to take an indirect approach toward education by advancing school choice programs.<sup>4</sup> Although Friedman particularly focused on voucher programs, his belief that “competition among schools would create a more efficient educational system, which would maximize student performance and reduce the direct activities government played in the operation of schools,” is relevant to all school choice programs.<sup>5</sup> Additionally, the liberal education movements, the civil rights movement, and Black Nationalism of the 1960s shaped the school choice movement after “liberals saw the need for school choice to promote educational opportunity for poor children and children of color, primarily African American or Black children.”<sup>6</sup> Thus, the modern school choice movement is considered to be a market-driven, competitive style of school reform that aims to “increase diversity and opportunity in K–12 education.”<sup>7</sup>

In 2023, South Carolina proposed House Bill 3843, which is currently pending in the Senate’s Education Committee.<sup>8</sup> This Bill sets out mandatory intra- and inter-district open enrollment policies. Intra-district policies allow families to send their children to another public school *within* their district of residence, while inter-district policies allow families to send their children to another public school *outside* of their district of residence.<sup>9</sup> Further, as a

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best-schools/5335 [https://perma.cc/G6AJ-2BWC]; South Carolina ranked 43rd in education. Kara Anderson, *Expert Perspectives: Exploring Why South Carolina Ranks 43rd in Education*, CHILD.’S TRUST OF S.C. (Nov. 7, 2022), https://scchildren.org/expert-perspectives-exploring-why-south-carolina-ranks-43rd-in-education/ [https://perma.cc/8MBW-TZRF].

2. *School Choice*, AM. FED’N FOR CHILD., https://www.schoolchoicefacts.org [https://perma.cc/EJU6-T8DP].

3. Guilbert C. Hentschke, *A Brief and Future History of School Choice*, in THE WILEY HANDBOOK OF SCHOOL CHOICE 28, 29 (Robert A. Fox & Nina K. Buchanan eds., 2017).

4. Stephanie R. Logan, *A Historical and Political Look at the Modern School Choice Movement*, 27 INT’L J. EDUC. REFORM 2, 3 (2018).

5. *Id.*

6. *Id.* at 4.

7. *Id.* at 3.

8. H.R. 3843, 2023–2024 Gen. Assemb., 125th Sess. (S.C. 2023).

9. Kelly Robson et al., *Portfolio of Choice: District Open Enrollment*, NAT’L COMPREHENSIVE CTR. 1, 2 (2020), https://compcenternetwork.org/sites/default/files/Portfolio%20of%20Choice%20Rural%20School%20Choice.pdf [https://perma.cc/54DP-JLUV].

mandatory policy, House Bill 3843 *requires* districts to create and implement open enrollment policies.<sup>10</sup>

The modern school choice movement has two central functions: (1) “promote better matches between students and schools,” and (2) “improve their educational quality and student achievement outcomes” through competition.<sup>11</sup> Using this framework as a lens for evaluating school choice legislation, House Bill 3843, if passed, could partially effectuate these goals. However, the proposed program is inadequate, as gaps in the legislation fail to account for barriers Black and lower income students face in their ability to access better school matches, and, contrary to theorized expectations, the effect of competition on student achievement is inconsistent and can instead adversely affect the operation of rural and lower income schools.<sup>12</sup> Thus, while House Bill 3843 is a step in the right direction, the legislature must resolve the Bill’s inadequacies if the state truly wants to promote individualized education and improve educational quality and academic performance.

Part II of this Note will examine some of the historic access barriers to education Black, rural, and low-income public-school students have endured in South Carolina. Part III of this Note will explain how House Bill 3843 could promote equity through better matches between students and their schools and lead to improvements in academic achievement. However, Part IV demonstrates that gaps in the legislation surrounding transportation, funding, and concrete evidence of improving student achievement, render the Bill as an inadequate means of promoting equity due to the insufficient support for low-income students and rural schools. Part V offers solutions and approaches taken by other states to ameliorate barriers posed by school choice legislation. Finally, Part VI concludes by questioning whether school choice policies are the best use of the legislature’s time and resources if the goal is to truly improve South Carolina’s public education system.

## II. BACKGROUND

In 1947, parents of Black students asked Clarendon County school officials to provide busing transportation for Black children, just as the county did for white children.<sup>13</sup> In Clarendon County, Black students did not have

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10. H.R. 3843, 2023–2024 Gen. Assemb., 125th Sess. (S.C. 2023).

11. Leslie S. Kaplan & William A. Owings, *Funding School Choice: Implications for American Education*, 44 J. EDUC. FIN. 199, 199 (2018).

12. *See infra* Section IV.

13. Roy Jones, *The Fight Against School Segregation Began in South Carolina, Long Before It Ended with Brown v. Board*, CLEMSON NEWS (May 16, 2022), <https://news.clemson.edu/the-fight-against-school-segregation-began-in-south-carolina-long-before-it-ended-with-brown-v-board/> [<https://perma.cc/AN7V-3HCH>].

access to buses and had to walk, sometimes up to eight miles each way, to school.<sup>14</sup> School officials refused to provide transportation to Black students, claiming that “since the African American community did not pay (collectively) much in taxes it would be unfair to expect white citizens to provide transportation for African American school children.”<sup>15</sup>

In 1950, the NAACP agreed to sponsor the Clarendon County parents in a case that came to be known as *Briggs v. Elliot*, seeking for the county to provide not just buses but equal “educational facilities, equipment, curricula, and opportunities” to Black students like they did for white students.<sup>16</sup> In particular, the plaintiffs sought to challenge the 1895 South Carolina state constitution, which provided “[s]eparate schools shall be provided for children of the white and colored races and no child of either race shall ever be permitted to attend a school provided for children of the other race,”<sup>17</sup> on equal protection grounds under the Fourteenth Amendment.<sup>18</sup>

Although the United States District Court for the Eastern District of South Carolina denied the parents’ requests to abolish school segregation and instead ordered the school board to begin equalization of the separate schools,<sup>19</sup> on appeal to the Supreme Court of the United States, the *Briggs* case was consolidated with four other school segregation cases under the name of *Brown v. Board of Education*.<sup>20</sup>

While *Brown* declared racial segregation in public schools unconstitutional,<sup>21</sup> South Carolina largely ignored desegregation orders and implemented policies to create “more legally defensible justifications for segregation.”<sup>22</sup> For example, the South Carolina constitution was amended to remove the state’s obligation to maintain public schools, racially biased standardized testing was used as a means to justify giving Black students a lesser education, and the state legislature passed a “pupil-placement law” giving local school boards the discretion and power to determine which school

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14. *Brown Case – Briggs v. Elliot*, BROWN FOUND., <https://brownvboard.org/content/brown-case-briggs-v-elliott> [<https://perma.cc/MF9R-V59F>].

15. *Id.*

16. *Briggs v. Elliott (Briggs I)*, 98 F. Supp. 529, 530–31 (E.D.S.C. 1951).

17. *Jones*, *supra* note 13.

18. *Briggs I*, 98 F. Supp. at 530.

19. *Id.* at 537.

20. *History – Brown v. Board of Education Re-enactment*, U.S. CTS., <https://www.uscourts.gov/educational-resources/educational-activities/history-brown-v-board-education-re-enactment> [<https://perma.cc/6SKR-TLP3>].

21. *Brown v. Bd. of Educ. (Brown I)*, 347 U.S. 483, 495 (1954).

22. Millicent Brown et al., *Delaying School Desegregation*, LOWCOUNTRY DIGIT. HIST. INITIATIVE, [https://ldhi.library.cofc.edu/exhibits/show/somebody\\_had\\_to\\_do\\_it/struggle\\_for\\_equal\\_ed/delaying\\_desegregation](https://ldhi.library.cofc.edu/exhibits/show/somebody_had_to_do_it/struggle_for_equal_ed/delaying_desegregation) [<https://perma.cc/74HK-TX8U>] [hereinafter *Delaying School Desegregation*].

was “best suited” for a student; thereby, allowing schools to remain segregated.<sup>23</sup>

In 1963, South Carolina became the last state to desegregate its public schools after the integration of Clemson University and Charleston County public schools.<sup>24</sup> However, that same year, South Carolina passed a tuition grant bill that provided “\$155 per pupil per year for children to attend private schools,”<sup>25</sup> and, given the pressure to integrate, white students took advantage of the voucher program.<sup>26</sup> With the increasing number of Black students in white schools, “large numbers of White families withdrew their children and enrolled them in ‘White flight’ private schools,”<sup>27</sup> with many new private schools created between 1963 and 1975.<sup>28</sup> For those white students still attending public schools, many white families “moved to suburban districts surrounded by nearly all-white neighborhoods and schools.”<sup>29</sup>

In effect, the white flight not only re-segregated the school system, as Black families could not afford private school tuition, but “it also worked to defund these now predominately Black school districts as wealthier white residents divested from their local public school systems.”<sup>30</sup> Hence, “[t]he ‘Corridor of Shame’ was borne out of a racist reaction to forced desegregation.”<sup>31</sup> The “Corridor of Shame” refers to South Carolina’s predominately Black,<sup>32</sup> highly concentrated, rural, and poverty-stricken communities that stretch along Interstate 95.<sup>33</sup>

Litigation over the state’s responsibility to educate those who live in the Corridor of Shame spanned over “21 years of contentious courtroom battles

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23. *Id.*

24. Rebekah Dobrasko, *Desegregation at Last (1963–1971)*, S.C.’S EQUALIZATION SCHS. 1951–1960, <http://www.scequalizationschools.org/desegregation-at-last.html> [<https://perma.cc/EM2D-LUMT>].

25. *Delaying School Desegregation*, *supra* note 22.

26. *Id.*

27. Millicent Brown et al., *Legacies of Desegregation*, LOWCOUNTRY DIGIT. HIST. INITIATIVE, [http://ldhi.library.cofc.edu/exhibits/show/somebody\\_had\\_to\\_do\\_it/struggle\\_for\\_equal\\_ed/desegregation\\_legacies](http://ldhi.library.cofc.edu/exhibits/show/somebody_had_to_do_it/struggle_for_equal_ed/desegregation_legacies) [<https://perma.cc/4G77-8D95>] [hereinafter *Legacies*].

28. Dobrasko, *supra* note 24.

29. *Legacies*, *supra* note 27.

30. Justin Brown, *South Carolina: The Corridor of Shame*, BATTLEGROUND (Feb. 8, 2022), <https://battleground.substack.com/p/redistricting-south-carolina> [<https://perma.cc/8PVF-5CE7>].

31. *Id.*

32. *Id.*

33. LaRaven Temoney & Laura D. Ullrich, *All Talk, But No Action: A Reexamination of Education in South Carolina’s Corridor of Shame*, 4 WINTHROP MCNAIR RSCH. BULL. 64, 64 (2018).

and legislative debate.”<sup>34</sup> In 1993, forty less-wealthy school districts, their public school students, and their taxpayers sued the State of South Carolina, contending the state’s scheme for funding public education violated the state and federal constitutions’ equal protection clauses, the Education Finance Act, and the education clause of the South Carolina constitution.<sup>35</sup> The South Carolina constitution’s education clause mandates: “The General Assembly shall provide for the maintenance and support of a system of free public schools open to all children in the state and shall establish, organize and support such other public institutions of learning, as may desirable.”<sup>36</sup>

In 1999, the case, which came to be known as *Abbeville County School District v. State (Abbeville I)*, was heard in front of the South Carolina Supreme Court.<sup>37</sup> Although the court affirmed the lower court’s dismissal of the equal protection and EFA claims,<sup>38</sup> the court held that the legislature had a constitutional duty to provide public school students with a “minimally adequate education.”<sup>39</sup> The court defined the minimally adequate education required by the South Carolina constitution to

include providing students adequate and safe facilities in which they have the opportunity to acquire: (1) the ability to read, write, and speak the English language, and the knowledge of mathematics and physical science; (2) a fundamental knowledge of economic, social, and political systems, and of history and governmental processes; and (3) academic and vocational skills.<sup>40</sup>

Additionally, the court reduced the number of plaintiff districts to eight—Allendale, Dillion 4 (previously Dillon 2), Florence 4, Hampton 2, Jasper, Lee, Marion 7, and Orangeburg 3<sup>41</sup>—and returned the case to the circuit court for arguments.<sup>42</sup>

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34. Carolyn Click & Dawn Hinshaw, *South Carolina Supreme Court Finds for Poor Districts in 20-Year-Old School Equity Suit*, THE STATE (Mar. 12, 2015, 8:01 PM), <https://www.thestate.com/news/politics-government/article13911206.html> [<https://perma.cc/H6YV-GCPP>].

35. *Abbeville Cnty. Sch. Dist. v. State (Abbeville I)*, 335 S.C. 58, 63–64, 515 S.E.2d 535, 538 (1999).

36. *Id.* at 66, 515 S.E.2d at 539 (quoting S.C. CONST. art. XI, § 3); S.C. CONST. art. XI, § 3.

37. *Abbeville I*, 335 S.C. at 63, 515 S.E.2d at 538.

38. *Id.* at 63–64, 515 S.E.2d at 538.

39. *Id.* at 68–69, 515 S.E.2d at 540–541.

40. *Id.* at 68, 515 S.E.2d at 540.

41. Click & Hinshaw, *supra* note 34.

42. *Abbeville Cnty. Sch. Dist. v. State (Abbeville II)*, 410 S.C. 619, 653, 767 S.E.2d 157, 175 (2014).

In 2014, the South Carolina Supreme Court ruled that the state had failed to meet its constitutional obligation.<sup>43</sup> In its analysis, the court noted that “[i]nadequate transportation fails to convey children to school or home in a manner conducive to minimal academic achievement.”<sup>44</sup> Additionally, the court found that plaintiff districts’ “outputs” (test scores and graduation rates) were “troubling,” given that the “institutions within these districts [were] largely unfit to provide students with the constitutionally mandated opportunity.”<sup>45</sup> Further, the court recognized that “poverty accounts for the fact that students in some districts perform better than students in others” after hearing expert testimony that revealed a “focus on poverty . . . likely would yield higher dividends than a focus on perhaps any other variable.”<sup>46</sup>

South Carolina’s history of intentional and unintentional access barriers—failing to provide adequate funding and transportation, removing the state’s obligations to maintain public schools, using standardized testing as a determinant to receive a good education, giving school boards discretion to pick and choose students, and creating private school vouchers—has created racial, geographical, and economic “segregative effects”<sup>47</sup> in public schools. In evaluating the potential implications of House Bill 3843, it is necessary to remember South Carolina’s history of inequity in schools to prevent a recurrence of historical mistakes.

### III. THEORETICAL POSITIVES

#### A. *Expanded Opportunity and Student Achievement*

For at least some students in South Carolina, House Bill 3843 could ameliorate the link between the intersections of a student’s identity (housing, race, and socioeconomic status) and their educational opportunity and achievement. In the 2022–2023 school year, approximately 94.12% of South Carolina’s prekindergarten through grade 12 students enrolled in the public school system.<sup>48</sup> For a majority of South Carolina public school students, the

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43. *Id.* at 624, 767 S.E.2d at 159.

44. *Id.* at 653, 767 S.E.2d at 175.

45. *Id.* at 634, 639–40, 767 S.E.2d at 167–68.

46. *Id.* at 654, 767 S.E.2d at 175.

47. See generally Philip Tegeler & Michael Hilton, *Disrupting the Reciprocal Relationship Between Housing and School Segregation*, HARV. JOINT CTR. FOR HOUS. STUD., 439,

[https://www.jchs.harvard.edu/sites/default/files/A\\_Shared\\_Future\\_Chapter\\_27\\_Disrupting\\_the\\_Reciprocal\\_Relationship.pdf](https://www.jchs.harvard.edu/sites/default/files/A_Shared_Future_Chapter_27_Disrupting_the_Reciprocal_Relationship.pdf) [<https://perma.cc/82S5-TSKJ>] (examining how current laws, policies, and practices mutually reinforce housing and school segregation).

48. In the 2022–2023 school year, there were a total of 833,953 students in South Carolina. 49,016 of those students were enrolled in private schools, whereas 784,937 students

school they attend depends on where they live, known as “residential zoning.”<sup>49</sup> However, while most homebuyers consider school district quality when purchasing a home,<sup>50</sup> the ultimate choice of schools is restricted by unequal access to housing.<sup>51</sup> A school district’s affordability index “influences the composition of the community of students,” as districts with inaccessible housing serve “much more affluent, lower poverty populations than school districts with highly concentrated low-income housing.”<sup>52</sup> Additionally, neighborhoods tend to have a racial majority as a result of budget constraints, cultural preferences, and discrimination in the housing market.<sup>53</sup> Thus, “the limited purchasing power of low-income families in housing markets directly constrains the public educational opportunities their children can access.”<sup>54</sup>

According to the United States Census Bureau, in 2021 the median household income in South Carolina was roughly \$59,447.<sup>55</sup> Median household income varied by county, with some counties, such as Allendale County (\$31,262), reporting significantly lower incomes than others, such as York County (\$73,466).<sup>56</sup> More generally, a county’s median household

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were enrolled in public schools. See *2022–2023 Private Headcount by County*, S.C. DEP’T OF EDUC., <https://ed.sc.gov/data/other/student-counts/private-school-headcounts/> [<https://perma.cc/NW6P-ZZLV>] (locate the “2022–2023 Private School Headcount by County” hyperlink, click and open the downloaded file titled “2022–2023 PRIVATE HEADCOUNT BY COUNTY”); *180 Day Active Headcount: District Headcount by Grade 2022-23*, S.C. DEP’T OF EDUC., <https://ed.sc.gov/data/other/student-counts/active-student-headcounts/> [<https://perma.cc/484Q-5RFS>] (locate the “2022-2023” heading; under 180-Day Active Headcount, click and download the file titled “District Headcount by Grade 2022-23”).

49. *Zoned Out: How School and Residential Zoning Limit Educational Opportunity*, U.S. CONGRESS JOINT ECON. COMM. (Nov. 12, 2019), <https://www.jec.senate.gov/public/index.cfm/republicans/2019/11/zoned-out-how-school-and-residential-zoning-limit-educational-opportunity> [<https://perma.cc/32X6-CQJ9>].

50. *Id.* (citing Meredith Dunn et al., *2018 Profile of Home Buyers and Sellers*, NAT’L ASS’N OF REALTORS (Oct. 2018), <https://www.maar.org/clientuploads/membership/brokers/nar-hbs-profile.pdf> [<https://perma.cc/X4FF-88WM>]).

51. See Alex Spurrier et al., *Priced Out of Public Schools: District Lines, Housing Access, and Inequitable Educational Options*, BELLWETHER EDUC. PARTNERS 10 (Oct. 2021), [https://bellwether.org/wp-content/uploads/2021/10/Bellwether\\_PricedOutOfPublicSchools-EDB\\_1021\\_Final.pdf](https://bellwether.org/wp-content/uploads/2021/10/Bellwether_PricedOutOfPublicSchools-EDB_1021_Final.pdf) [<https://perma.cc/S8GT-X7A7>].

52. *Id.*

53. See Angela Simms & Elizabeth Talbert, *Racial Residential Segregation and School Choice*, 56 *PHYLON* 33, 36–37 (2019).

54. Spurrier, *supra* note 51 at 6.

55. See *Small Area Income and Poverty Estimates (SAIPE)*, U.S. CENSUS BUREAU (2001), <https://www.census.gov/data-tools/demo/saipe/#/> [<https://perma.cc/BQJ6-ACSD>] (locate the county table and view median household income for South Carolina) [hereinafter *SAIPE*].

56. See *id.* (locate the county table, scroll to see median household incomes for Allendale and York counties).



income correlates to the student poverty rate of a school district residing in that county.<sup>57</sup> According to the South Carolina's School Report Card for 2021–2022, approximately 60.6% of South Carolina public-school students were living in poverty.<sup>58</sup> The South Carolina Report Card considers a student to be in poverty if the student was homeless or migrant for the applicable school year or was enrolled in Medicaid, Supplemental Nutrition Assistance Program (SNAP), Temporary Assistance for Needy Families (TANF), or foster care at any time in a three-year period.<sup>59</sup> School districts of lower income counties, such as Allendale County School District (94.31%), had much higher percentages of students in poverty than school districts in higher income counties, such as York School District One (66.68%), Two (32.91%), Three (61.48%), and Four (19.89%).<sup>60</sup>

In South Carolina, the correlation between student achievement and poverty in a given school district remains evident, especially in districts where there are significantly high levels of student poverty.<sup>61</sup> Students living in poverty often have fewer resources at home, lack access to technology, and face additional stressors associated with poverty such as health issues, homelessness, and food scarcity.<sup>62</sup> Additionally, schools in high-poverty school districts lack resources because generally high-poverty areas have lower property taxes, hence lower local per-pupil funding.<sup>63</sup> As a result, students in high-poverty schools often have lower levels of academic achievement than students in high-income schools or districts.<sup>64</sup>

In South Carolina, one of the primary ways to measure academic achievement is through the standardized test results of SC READY English Language Arts (ELA) and Mathematics tests for elementary and middle

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57. Compare *id.*, with *SC Funding Education Dashboard FY 2021–22*, S.C. REVENUE AND FISCAL AFFS. OFF. (2022), [https://public.tableau.com/views/RFA\\_Education/CompareDistricts\\_1?%3Adisplay\\_count=no&%3AshowVizHome=no#1](https://public.tableau.com/views/RFA_Education/CompareDistricts_1?%3Adisplay_count=no&%3AshowVizHome=no#1) [<https://perma.cc/Y4MY-LM7W>] [hereinafter *S.C. Funding Dashboard*] (illustrating the correlation between a county's median household income and the student poverty rate of school districts in that county).

58. *State of SC 2021–2022 Financial Data*, SC SCH. REP. CARDS, <https://screportcards.com/overview/school-environment/financial-data/?q=eT0yMDIyJnQ9UyZzaWQ9MDAwMA> [<https://perma.cc/RDF2-KZRP>].

59. *Id.*

60. Compare *SC Funding Dashboard*, *supra* note 57, with *SAIPE*, *supra* note 55 (illustrating the disparity in student poverty rates between high- and low-income counties).

61. See *SC Funding Dashboard*, *supra* note 57 (select the “Compare Districts” header, locate “Choose Your Comparison Criteria,” select “% of Students in Poverty” for “A,” select “% ELA & Math Meets/Exceeds” for “B,” locate “Sort by” and select “Comparison A.”).

62. See *Poverty and Its Impact on Students' Education*, NAT'L ASS'N OF SECONDARY SCH. PRINCIPALS, <https://www.nassp.org/poverty-and-its-impact-on-students-education/> [<https://perma.cc/F9DH-2VX3>].

63. *Id.*

64. *Id.*

school students and End-of-Course English II and Algebra I tests for high school students.<sup>65</sup> According to the 2021–2022 South Carolina School Report Card, 46.6% of students met or exceeded grade level expectations for SC Ready ELA tests, 38.9% students met or exceeded grade level expectations for SC Ready Mathematics tests, 58.0% students met or exceeded grade level expectations for End-of-Course Assessments for English II, and 44.3% students met or exceeded grade level expectations for End-of-Course Assessments for Algebra I.<sup>66</sup>

Three distinct locales in Charleston County School District—Mount Pleasant, West Ashley, and North Charleston—illustrate how race, median household income, median gross rent, and student achievement are intertwined. According to the United States Census Bureau, in Mount Pleasant, 88.59% of residents are white and 3.33% of residents are Black; the median income is \$114,237; and the median gross monthly rent is \$1,747 per month.<sup>67</sup> As for West Ashley, 69.51% of residents are white and 19.6% of residents are Black; the median household income is \$80,911; and the median gross monthly rent is \$1,399 per month.<sup>68</sup> In North Charleston, 39.77% of residents are white and 40.64% of residents are Black; the median household income \$62,091; and the median gross monthly rent is \$1,291 per month.<sup>69</sup>

Mount Pleasant's Laing Middle School had high student achievement with 80.4% of students meeting or exceeding grade level expectations for SC READY ELA and 68.8% for SC READY Math.<sup>70</sup> West Ashley's C.E. Williams Middle School had lower student achievement, with 51.6% of students meeting or exceeding grade level expectations for SC READY ELA and 30.3% for SC READY Math.<sup>71</sup> North Charleston's Northwoods Middle

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65 See *South Carolina College- and Career-Ready Assessments (SC Ready)*, S.C. DEP'T OF EDUC., <https://ed.sc.gov/tests/middle/sc-ready/> [https://perma.cc/ET5X-SDZQ].

66. *State of SC 2021–2022 Acad. Achievement*, S.C. SCH. REP. CARDS, <https://screportcards.com/overview/academics/academic-achievement/?q=eT0yMDIyJnQ9UyZzaWQ9MDAwMA> [https://perma.cc/W6X8-2HCJ].

67. *Mount Pleasant Town, South Carolina*, U.S. CENSUS BUREAU, [https://data.census.gov/profile/Mount\\_Pleasant\\_town,\\_South\\_Carolina?g=160XX00US4548535](https://data.census.gov/profile/Mount_Pleasant_town,_South_Carolina?g=160XX00US4548535) [https://perma.cc/TRY5-W97Q].

68. *West Ashley CCD, Charleston County, South Carolina*, U.S. CENSUS BUREAU (2020), [https://data.census.gov/profile/West\\_Ashley\\_CCD,\\_Charleston\\_County,\\_South\\_Carolina?g=060XX00US4501993646](https://data.census.gov/profile/West_Ashley_CCD,_Charleston_County,_South_Carolina?g=060XX00US4501993646) [https://perma.cc/8C3V-AGEE].

69. *North Charleston City, South Carolina*, U.S. CENSUS BUREAU, [https://data.census.gov/profile/North\\_Charleston\\_city,\\_South\\_Carolina?g=160XX00US4550875](https://data.census.gov/profile/North_Charleston_city,_South_Carolina?g=160XX00US4550875) [https://perma.cc/TU7P-H45N].

70. *School Comparison 2022–2023*, S.C. SCH. REP. CARDS, <https://screportcards.com/overview/?q=eT0yMDIzJnQ9TSZzaWQ9MTAwMTAzMCwxMDAxMDUxLDEwMDEwOTImaXNDb21wYXJlU2Nob29sPXRydWU> [https://perma.cc/8YK8-ADLB].

71. *Id.*

School had even lower student achievement, with only 30.8% of students meeting or exceeding grade level expectations for SC READY ELA and 11.0% for SC READY Math.<sup>72</sup>

In the American Educational Research Association's (AERA) 2011 study of Colorado and Minnesota's mandatory inter-district open enrollment policies, high educational quality, particularly student achievement, was one of the "most important drivers of open enrollment flows."<sup>73</sup> In the study, researchers found that "students leaving a given district tend[ed] to enroll into districts with even higher test scores than their district of residence."<sup>74</sup> Therefore, because House Bill 3843 requires districts to provide students with the fluidity to transfer, and research from other states has shown students tend to transfer to higher performing schools, it logically follows that students transferring to such schools could see improvements in their academic achievement given that the receiving school or district may have more abundant resources and efficient instruction.<sup>75</sup> Additionally, House Bill 3843 could increase overall student achievement by generating competition between schools.<sup>76</sup> For example, because House Bill 3843 expands the options a family may choose from, residential and nonresidential schools may be incentivized to improve the efficiency of their instruction in order to keep or gain students and the state and federal funding that follows them.

### B. Capacity Standards

Another positive component of House Bill 3843 is its mandatory nature and limited scope for rejecting transfers. The mandatory nature of House Bill 3843 is a "key component of a good open enrollment policy" because districts cannot opt out of open enrollment participation,<sup>77</sup> nor can they exercise the discretion voluntary policies permit of accepting and denying transfers to shape student enrollment and demographics.<sup>78</sup> Under House Bill 3843, school or program transfers "may only" be denied if (1) there is a "lack of capacity in the school, level, or program requested," (2) the school does not offer the requested program, (3) the pupil does not meet the established eligibility

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72. *Id.*

73. Deven Carlson et al., *The Determinants of Interdistrict Open Enrollment Flows: Evidence from Two States*, 33 EDUC. EVALUATION & POL'Y ANALYSIS, 76, 88 (2011).

74. *Id.* at 86.

75. See *Poverty and Its Impact on Students' Education*, *supra* note 62.

76. See Huriya Jabbar et al., *The Competitive Effects of School Choice on Student Achievement: A Systematic Review*, 36 EDUC. POL'Y 247, 248 (2022).

77. Jude Schwalbach, *Do You Think Your State Has K-12 Open Enrollment? You Might Be Wrong.*, REASON FOUND. (June 22, 2023), <https://reason.org/commentary/do-you-think-your-state-has-k-12-open-enrollment-you-might-be-wrong/> [<https://perma.cc/K2XJ-99CW>].

78. SUSAN PENDERGRASS, *BREAKING DOWN PUBLIC SCHOOL DISTRICT LINES* 27 (EdChoice 2023).

criteria, (4) the denial of a student is necessary to comply with a district's desegregation plan, or (5) the student has been suspended or expelled, or the student does not meet the standards of conduct and behavior enacted by a local board's standards of conduct and behavior.<sup>79</sup> Thus, in theory, House Bill 3843 affords all students more practical opportunities to attend schools other than those they are residentially zoned to, as transfers may only be denied for limited reasons.

Further, a district's school board is required to provide the South Carolina Department of Education with its policy and the data used to develop that policy and must post the policy and the data used for its creation on the district website.<sup>80</sup> In effect, this ensures that "districts are not improperly changing their caps to serve the goal of restricting access to students who they view as riskier to enroll."<sup>81</sup>

#### IV. INADEQUACIES OF HOUSE BILL 3843

##### A. *Transportation Barriers*

###### 1. *Socioeconomic Status and Race*

Although proponents of school choice argue that the expansion of school options ameliorates socioeconomic and racial inequity in accessing high-performing K–12 schools, and House Bill 3843, in theory, increases the choice options for South Carolina families, House Bill 3843 is inadequate in activating choice because it fails to remedy the access barriers Black and low-income students face. Even though the intent behind House Bill 3843 is to allow parents and children to decide which school *best* fits them, without implementing supports, such as transportation to receiving schools, research indicates that open enrollment policies can "have a net segregative effect."<sup>82</sup> Under House Bill 3843, school districts are only *permitted*—not required—to "provide transportation to a student . . . who is attending a school outside of the attendance zone of their residence," though school districts are not prohibited from providing transportation, requesting state or federal funds to provide transportation, or entering transportation agreements with other districts.<sup>83</sup>

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79. H.R. 3843(C)(4), 2023–2024 Gen. Assemb., 125th Sess. (S.C. 2023).

80. H.R. 3843(B)(e).

81. Sarah Winchell Lenhoff, *Unregulated Open Enrollment and Inequitable Access to Schools of Choice*, 95 PEABODY J. EDUC. 248, 267 (2020).

82. Tegeler & Hilton, *supra* note 47 at 439.

83. H.R. 3843(B)(2)(e), 2023–2024 Gen. Assemb., 125th Sess. (S.C. 2023).

A study on Colorado's and Minnesota's mandatory inter-district policies illustrates the differences in parents' ability to access choice.<sup>84</sup> Generally, neither Colorado nor Minnesota's inter-district policies provide families with entirely free transportation.<sup>85</sup> Thus, evidence from both states reveals that physical distance is a significant constraint on exercising choice because "[t]he farther apart a potential transfer district is from the district of residence, the lower the number of transfers."<sup>86</sup> Consequently, inter-district open enrollment could operate "predominantly as a public school voucher program for middle-class and upper-middle-class families" given that most students taking advantage of mandatory inter-district policies were transferring from already high-achieving districts to enroll into even higher achieving districts.<sup>87</sup> Other research from New Jersey, Massachusetts, Wisconsin, and Colorado further supports the finding that white and higher income students are more likely to participate in inter-district choice than less-affluent and minority students.<sup>88</sup>

Similarly, distance is a barrier for intra-district transfers and is more likely to influence the decisions of disadvantaged families.<sup>89</sup> Accordingly, in a 2012 study on intra-district open enrollment policies, intra-district transfers not only attracted more advantaged students, but advantaged families typically "choose from among the *most affluent* schools with the *highest* academic records. Meanwhile, disadvantaged families choose away from the schools with the highest poverty rates and the lowest academic records to attend schools that [are] *slightly* better."<sup>90</sup>

Open enrollment policies without transportation protections can exacerbate socioeconomic segregation because students "without good transportation options are routinely left behind in increasingly poverty-concentrated schools."<sup>91</sup> For example, transferring to a school in the same,

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84. See generally Carlson et al., *supra* note 73, at 88 (analyzing that student outflows in Colorado and Minnesota are "a function of structural characteristics, test scores, and socioeconomic and demographic considerations").

85. Colorado's statute is silent. See COLO. REV. STAT. § 22-36-101 (1990). In Minnesota, a nonresident district must pay for transportation within that district if parent requests, but parents are responsible for costs of transportation within their residential district unless that pupil is from a family whose income is at or below poverty level, in which case they can request reimbursement for said costs from the nonresident district. MINN. STAT. § 124D.03 (2023).

86. Carlson et al., *supra* note 73, at 88.

87. *Id.* at 89.

88. Jennifer Jellison Holme & Meredith P. Richards, *School Choice and Stratification in a Regional Context: Examining the Role of Inter-District Choice*, 84 PEABODY J. EDUC. 150, 152, 162 (2009).

89. Kristie J. R. Phillips et al., *Students Who Choose and the Schools They Leave: Examining Participation in Intradistrict Transfers*, 53 SOCIO. Q., 264, 274 (2012).

90. *Id.* at 286–87 (emphasis added).

91. Tegeler & Hilton, *supra* note 47, at 440.

large, county-wide district or to a school in an entirely different district could require long commute times, and “only students whose parents have the time and resources for this long commute can take advantage of the full spectrum of choices.”<sup>92</sup> Thus, parents of lower income families, who often work longer hours or multiple jobs, are not afforded equal opportunity to activate choice.<sup>93</sup> Further, because “[s]egregation by socioeconomic status is often reflected in schools’ student populations” and “the socioeconomic status of students is often reflected in measures of school performance,”<sup>94</sup> lower-income students are disadvantaged by the barriers to activating choice because they may not be afforded the same kind of opportunity to improve their academic performance in their residential school.

As explained in Part III, “school options are tethered to one’s residential location[,] and neighborhoods tend to have a racial majority.”<sup>95</sup> Drs. Angela Simms and Elizabeth Talbert explain that because “parents’ ability to choose a good school is secondary to their access to high-quality school options in the first place,” Black parents face a “parenting tax.”<sup>96</sup> Black families are “often compelled by their neighborhood schools’ low performance to seek alternative education options,”<sup>97</sup> unlike white families who “are more likely to have high-quality options nearby.”<sup>98</sup> In this sense, even though both Black and white parents pay taxes and are guaranteed access to a minimally adequate education in South Carolina,<sup>99</sup> Black parents are “taxed” because they receive less return from their contribution than their white counterparts and, hence, must expend more time and energy “to activate a public good most white parents can take for granted.”<sup>100</sup> Thus, without a mandatory transportation provision, House Bill 3843 primarily burdens Black families as they likely have a higher need to seek schools outside of their neighborhood.

Given that school choice was originally intended to function as “a means through which students from disadvantaged backgrounds [can] access a wider variety of educational options,” policies without equitable access protections,

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92. Phillips et al., *supra* note 89, at 268

93. *Poverty and Its Impact on Students’ Education*, *supra* note 62.

94. Ariel Gilreath, *It’s Not Policy Anymore, but 1 in 7 South Carolina Schools Remain Segregated*, GREENVILLE NEWS (Feb. 17, 2020, 5:52 AM), <https://www.greenvilleonline.com/story/news/2020/02/17/desegregation-1-out-of-7-south-carolina-schools-highly-segregated/2843394001/> [https://perma.cc/WM56-HD8D].

95. Simms & Talbert, *supra* note 53, at 37.

96. *Id.* at 38.

97. *Id.*

98. Kelley Fong & Sarah Faude, *Timing Is Everything*, 91 SOCIO. OF EDUC., 242, 243 (2018).

99. *Abbeville Cnty. Sch. Dist. v. State (Abbeville I)*, 335 S.C. 58, 68, 515 S.E.2d 535, 540 (1999); *see* S.C. CONST. art. XI, § 3.

100. Simms & Talbert, *supra* note 53, at 33, 35.

such as transportation, are inadequate.<sup>101</sup> Likewise, House Bill 3843's voluntary and unincentivized transportation provision is inadequate because "when free transportation does not accompany the choice parents make for their children, district size and access to transportation pose a differential barrier" to lower-income and Black families.<sup>102</sup> As a result, it's likely that House Bill 3843, if enacted in its current state, would primarily be taken advantage of by white middle-class families who have the additional resources to seek out the *best* schools.

## 2. Rural Schools

Furthermore, House Bill 3843's voluntary transportation provision is inadequate as school districts have no incentive to provide transportation for transfer students, raising problems for exercising choice in rural South Carolina. According to the National Center for Education Statistics, in the 2015–2016 school year, South Carolina had 1,182 public schools, 470 of which were considered "rural."<sup>103</sup> These rural schools accounted for 33.6% of the state's entire public elementary and secondary school student populations.<sup>104</sup>

Rural communities have less intra-district school choice than families in other geographies because rural families often live farther away from schools and have lower population densities.<sup>105</sup> In the United States, only 60% of rural families have access to at least two public elementary schools within ten miles of their homes, whereas 83% of all families "have access to . . . at least two public elementary schools within five miles."<sup>106</sup> Although inter-district choice reaches slightly more rural families, those families face similar access barriers.<sup>107</sup> Accordingly, rural schools and districts face unique challenges because they both "transport fewer students than urban districts" and the students "tend to be less concentrated and live farther from the schools they attend."<sup>108</sup> Hence, without provided transportation, rural families seeking to exercise choice face an increased barrier, and districts are disincentivized to

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101. Carlson et al., *supra* note 73 at 89.

102. Phillips et al., *supra* note 89, at 268

103. *Selected Statistics from the Public Elementary and Secondary Education Universe: Sch. Year 2015–2016*, NAT'L CTR. FOR EDUC. STATS. (2016), [https://nces.ed.gov/pubs2018/2018052/tables/table\\_04.asp](https://nces.ed.gov/pubs2018/2018052/tables/table_04.asp) [<https://perma.cc/P9EW-ENFG>].

104. *Id.*

105. Robson et al., *supra* note 9 at 18.

106. Kristin Blagg & Matthew M. Chingos, *Who Could Benefit from School Choice? Mapping Access to Public and Private Schools*, BROOKINGS INST. (Mar. 30, 2017), <https://www.brookings.edu/articles/who-could-benefit-from-school-choice-mapping-access-to-public-and-private-schools/> [<https://perma.cc/N8KU-QNSE>].

107. *See Id.*

108. Robson et al., *supra* note 9, at 18.

voluntarily provide transportation because bus rides are often longer for rural students, which results in higher costs for districts.<sup>109</sup>

### 3. *Absenteeism, Tardiness, and Turnover*

Additionally, House Bill 3843's inadequate transportation could result in higher absenteeism, tardiness, and turnover among student populations. In a 2019 study on transportation under Baltimore, Maryland's open enrollment policy, researchers found that increased absenteeism was a "potential hidden cost of public school choice for students."<sup>110</sup> Findings from the study indicated that "[m]ore difficult commutes, either in the form of increased travel time or complexity, [led] to students missing more days of school."<sup>111</sup> In particular, the study found that "[f]or each ten minutes added to the average student's commute, that student is absent an additional third of a day, net of other influences," and increased commute complexities increased the number of days a student was absent by 10% to 13%.<sup>112</sup> Although the study focused on public transit, the findings are nonetheless relevant in considering House Bill 3843's implications because the farther a student lives from their school of choice, the less likely it is for that student to arrive on time and attend school regularly.<sup>113</sup> Furthermore, research has shown absenteeism reduces an individual student's opportunity to learn and negatively affects the academic achievement of that student's classmates.<sup>114</sup>

Unsurprisingly, student turnover in switching schools negatively impacts the education achievement of students and schools.<sup>115</sup> First, when students frequently relocate, they lose the structures of "regular attendance, continuity of lesson content, and the development of relationships with teachers and peers."<sup>116</sup> Second, losing close friends or familiar environments at a young,

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109. *Id.*

110. Marc L. Stein & Jeffrey A. Grigg, *Missing Bus, Missing School: Establishing the Relationship Between Public Transit Use and Student Absenteeism*, 56 AM. EDUC. RSCH. J. 1834, 1855 (2019).

111. *Id.* at 1853.

112. *Id.*

113. *Transportation: The Key to School Choice*, HOPSKIPDRIVE, <https://www.hopskipdrive.com/blog/transportation-the-key-to-school-choice> [https://perma.cc/DEU3-P956].

114. Stein & Grigg, *supra* note 110, at 1853–54.

115. Joshua Tarwater, *What Effect Does Student Mobility Have on Productivity?*, in FOUNDATIONS OF EDUCATION AND INSTRUCTIONAL ASSESSMENT 6.7.1, (Jennifer Kidd et al, eds., 2006), [https://socialsci.libretexts.org/Bookshelves/Education\\_and\\_Professional\\_Development/Foundations\\_of\\_Education\\_and\\_Instructional\\_Assessment\\_\(Kidd\\_et\\_al.\)](https://socialsci.libretexts.org/Bookshelves/Education_and_Professional_Development/Foundations_of_Education_and_Instructional_Assessment_(Kidd_et_al.)) [https://perma.cc/3NDY-9MRX].

116. *Id.*



vulnerable age can adversely affect students' emotional status, leading to "distraction[s] from their studies and their involvement in their new educational domain."<sup>117</sup>

In a National Center for Research on Education Access and Choice (REACH) study on Michigan's inter-district open enrollment policies, additional commute time past a student's residential school correlated to an increased likelihood of that student exiting school choice.<sup>118</sup> REACH evaluated the turnover of students with different commute times who partook in inter-district open enrollment in kindergarten. The results showed that 61% of the kindergarteners who had a commute time to their choice school that was equal to or less than five minutes from their residential school were still attending their choice school in the fifth grade.<sup>119</sup> However, only 53% of the kindergarteners who had a commute time to their choice school that was more than five minutes from their residential school were still attending their choice school in the fifth grade.<sup>120</sup> Moreover, research from Ohio, Michigan, and Colorado also suggests that open enrollment is often short-lived, particularly for economically disadvantaged students who "are the most likely to move in and out of school through inter-district choice programs."<sup>121</sup>

### B. Funding Implications for Inter-District Open Enrollment

Although proponents of open enrollment cite that these policies can have positive competitive effects,<sup>122</sup> House Bill 3843 must be revised, given the potential implications for poor-performing districts and the students left in those districts. Under House Bill 3843, federal, state, and local per-pupil funding would "follow the student" for intra-district transfers.<sup>123</sup> For inter-district transfers, state and federal funding would likewise follow the student,

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117. *Id.*

118. Danielle Sanderson Edwards & Joshua Cowen, *The Roles of Residential Mobility and Distance in Participation in Public School Choice*, NAT'L CTR. FOR RSCH. ON EDUC., ACCESS, & CHOICE 1 (Oct. 18, 2022), <https://files.eric.ed.gov/fulltext/ED624270.pdf> [<https://perma.cc/JKT7-URCZ>].

119. *Id.* at 6.

120. *Id.*

121. Robson et al., *supra* note 9, at 11–12.

122. AARON GARTH SMITH & JUDE SCHWALBACH, THE CONSERVATIVE CASE FOR PUBLIC SCHOOL OPEN ENROLLMENT 2 (Am. Enter. Inst. 2023), <https://www.aei.org/wp-content/uploads/2023/06/The-Conservative-Case-for-Public-School-Open-Enrollment.pdf> [<https://perma.cc/A5CE-3AGK>].

123. See Seanna Adcox, *SC House Approves Letting Students Statewide Go to the Public School of Their Choice*, POST & COURIER (Mar. 29, 2023), [https://www.postandcourier.com/politics/sc-house-approves-letting-students-statewide-go-to-the-public-school-of-their-choice/article\\_3af09e4c-ce4f-11ed-8a33-2f76de8916ed.html](https://www.postandcourier.com/politics/sc-house-approves-letting-students-statewide-go-to-the-public-school-of-their-choice/article_3af09e4c-ce4f-11ed-8a33-2f76de8916ed.html) [<https://perma.cc/3WNV-44CJ>].

but residential school districts have discretion over the designation of local per-pupil funding as they are “not required to transfer local funds for a student enrolling in a nonresident school district.”<sup>124</sup> Additionally, House Bill 3843 states that each district’s open enrollment policy and process must disclose “itemized fees” and “whether the district will charge nonresident students a fee to cover costs associated with their enrollment that are not covered by federal or state funding,”<sup>125</sup> though those fees cannot “exceed the local per pupil expenditure amount in the receiving school district.”<sup>126</sup>

The South Carolina Revenue and Fiscal Affairs Office’s Statement of Estimated Fiscal Impact for House Bill 3843 notes that the “overall expenditure impact on local school districts to adopt and follow procedures for open enrollment” and the “overall revenue impact on local school districts” are undetermined.<sup>127</sup> However, the statement does mention that under House Bill 3843, local school districts could see increases in expenditures “by an amount up to \$170,000 per district” to purchase equipment for lottery systems and hire full-time equivalent staff to manage the application and enrollment processes.<sup>128</sup> Further, the statement indicates that changes in enrollment may impact expenditures and state pupil-based distributions for local school districts.<sup>129</sup> A Fiscal Impact Summary on a strikingly similar bill on open enrollment noted that “[s]ince the impact will depend upon the number of nonresident students and the actual base student cost funding per district,” “[s]ome districts may realize a reduction in base student cost funding, while other may experience an increase.”<sup>130</sup>

According to the Reason Foundation, under inter-district open enrollment policies, students generally “transfer from small rural districts to larger urban districts or from lower performing to higher performing districts.”<sup>131</sup> Thus, inter-district open enrollment can decrease student enrollment<sup>132</sup> and state funding<sup>133</sup> for small rural school districts. For example, the South Carolina Education Association (SCEA) worries about districts that may experience net losses despite still having “fixed costs that do not follow any students

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124. H.R. 3843(B)(3), 2023–2024 Gen. Assemb., 125th Sess. (S.C. 2023).

125. H.R. 3843(B)(1)(f)(i)–(ii).

126. H.R. 3843(B)(1)(f)(i).

127. S.C. REVENUE & FISCAL AFFS. OFF., STATEMENT OF ESTIMATED FISCAL IMPACT, H.R. 2023–3843, 125th Sess., at 1 (2023).

128. *Id.*

129. *See id.*

130. S.C. REVENUE & FISCAL AFFS. OFF., STATEMENT OF ESTIMATED FISCAL IMPACT, S. 2022–0544, at 8, 10 (2022) (evaluating proposed open enrollment bill).

131. Vittorio Nastasi, *Florida’s Open Enrollment Policy Can Serve as a School Choice Model*, REASON FOUND. (Jan. 29, 2020), <https://reason.org/commentary/floridas-open-enrollment-policy-can-serve-as-a-school-choice-model/> [<https://perma.cc/AN5L-8NPL>].

132. Robson et al., *supra* note 9 at 12.

133. *See* Nastasi, *supra* note 131.

leaving the district.”<sup>134</sup> Fixed costs such as transportation, providing food services, and maintaining school facilities are essentially the same regardless of the enrollment size of a district, which leaves “smaller-enrollment rural districts with higher costs per-pupil, relative to the larger urban and suburban districts with greater economies of scale.”<sup>135</sup>

Additionally, the SCEA cites long-term fiscal uncertainties, such as buildings built on a ten-year projected enrollment, as another issue with House Bill 3843’s funding scheme.<sup>136</sup> Even when an equitable formula for local and state funding exists, the combination of higher income districts’ local and state funding still generally exceeds lower income districts’ combination of local and state funding.<sup>137</sup> Thus, lower income districts that lose students—and their federal and state dollars—are even more disadvantaged because the local funding they may keep from a transferring student is often insignificant given the positive correlation between income and property taxes.<sup>138</sup>

In Massachusetts, open enrollment led to “substantial enrollment declines in the state’s rural schools” between 2008 and 2017.<sup>139</sup> Palmer School District saw a 24% decrease in student enrollment and Savoy School District saw a 34% decrease in student enrollment following the implementation of open enrollment policies.<sup>140</sup> In Wisconsin, the rural Palmyra-Eagle School District lost more than half of its enrollment and more than \$3 million in revenue.<sup>141</sup> Open enrollment policies in Ohio also led to enrollment declines and revenue losses in rural districts such as Federal Hocking Local School District, which lost over 100 students and \$384,000 in state aid—nearly 5% of its budget.<sup>142</sup>

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134. *The SCEA Testimony on Statewide Open Enrollment (H.3843)*, THE SCEA (Feb. 14, 2023), <https://www.thescea.org/advocating-for-change/action-center/letters-testimony/scea-testimony-statewide-open-enrollment-h3843> [<https://perma.cc/C39A-7WWW>] [hereinafter *SCEA*].

135. Sarah Kemp, *Wisconsin’s Rural Schools Are Getting Squeezed By Student Loss*, WISCONTEXT, <https://wiscontext.org/wisconsins-rural-schools-are-getting-squeezed-student-loss> [<https://perma.cc/W62Z-6AED>].

136. *SCEA*, *supra* note 134.

137. Lauren Mittman et al., *State Support for Local School Construction: Leveraging Equity and Diversity*, POVERTY & RACE RSCH. ACTION COUNCIL 1, 5 (Aug. 2020).

138. Tegeler & Hilton, *supra* note 47, at 440.

139. Robson et al., *supra* note 9, at 12.

140. Roger Hatch, *Inter-district School Choice in Massachusetts*, *Pioneer Educ.* 6 (May 2018), <https://files.eric.ed.gov/fulltext/ED589538.pdf> [<https://perma.cc/64AW-M8SG>].

141. Daarel Burnette II, *Open Enrollment Has Drained One District. It’s Looking to Dissolve*, *EDUCATIONWEEK* (Dec. 10, 2019), <https://www.edweek.org/leadership/open-enrollment-has-drained-one-district-its-looking-to-dissolve/2019/12> [<https://perma.cc/43PY-F329>].

142. *Open Enrollment Draws Rural Kids to City*, *ATHENS NEWS* (Sept. 9, 1999), [https://www.athensnews.com/news/local/open-enrollment-draws-rural-kids-to-city/article\\_f1e0b1fe-3c97-5426-8ae6-2a955d91f774.html](https://www.athensnews.com/news/local/open-enrollment-draws-rural-kids-to-city/article_f1e0b1fe-3c97-5426-8ae6-2a955d91f774.html) [<https://perma.cc/54GF-FT5F>].

A 2011 AERA study on Colorado and Minnesota’s mandatory inter-district policies revealed that “students leave high-spending districts at lower rates than they leave low-spending districts,” and “students in districts with large enrollments transfer at lower rates than students in districts with lower enrollments.”<sup>143</sup> Likewise, results indicated that low-achieving districts lost a “disproportionately large number of students and receive[d] a relatively small number of students,” resulting in a “significant net loss” in the number of students, and hence, a significant loss in the amount of funding for many districts.<sup>144</sup> For example, Minnesota school districts lost \$4,000 to \$5,000 in funding for each student who transferred out of their district via open enrollment in the 2003–2004 school year.<sup>145</sup> Minneapolis School District lost 6,359 students from inter-district open enrollment, resulting in a loss of more than \$28 million in revenue.<sup>146</sup> Although the significant losses in enrollment and funding in Minnesota may be attributed to the state’s charter school policies, in which charter schools operate as independent school districts, Colorado operates charter schools under local school districts and still experienced significant losses in enrollment, notably in St. Paul and Denver school districts with 5,052 and 1,094 students transferring out respectively.<sup>147</sup>

Further, research has suggested that in some instances, families with students attending a choice school may move into the choice district, thereby becoming residential students.<sup>148</sup> Tying this to the suggestion that higher income students typically take the most advantage of open enrollment policies, a unique problem with funding exists because if “higher income homebuyers leave ‘lower performing’ districts, the local tax base declines at the same time as the district struggles with greater levels of need.”<sup>149</sup> Thus, districts losing students and remaining students in those net-loss districts could experience losses in local per-pupil funding.

Given South Carolina’s large rural population and the outcomes in some states, the legislature must be cognizant of the effect open enrollment can have on lower income and rural school districts. While proponents of House Bill 3843 argue that schools and districts losing students will be incentivized to offer new programs and improve overall education in order to attract students,<sup>150</sup> the loss of revenue from declining enrollment can instead lead to

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143. Carlson et al., *supra* note 73, at 88.

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.* at 89–90.

148. See Edwards & Cowen, *supra* note 118, at 7.

149. Tegeler & Hilton, *supra* note 47, at 440.

150. See Peyton Furtado, *SC Bill Would Allow Families to Choose the School Their Child Attends, No Matter Where They Live*, WYFF4, (Mar. 30, 2023, 6:27 PM)

“districts cutting programs, such as sports, the arts, extracurriculars, or even specialized or advanced academic course offerings that may have lower demand, but provide breadth and depth of opportunity to rural students.”<sup>151</sup> Consequently, the loss of such programs can create a “vicious cycle” of enrollment declines.<sup>152</sup>

### C. *Student Achievement*

Even though, in theory, House Bill 3843 enables parents to contribute to their child’s academic success by choosing a fit school, there is conflicting evidence about open enrollment’s impact on individual and overall student achievement. For example, in a study on Minnesota’s open enrollment policy, the interaction between open enrollment and annual growth in achievement tests was significantly positive for the third-grade cohorts’ math results, but open enrollment had an insignificant effect on the reading scores of the third-grade cohorts and the math and reading scores of the sixth-grade cohorts.<sup>153</sup>

A study on Ohio’s open enrollment policy demonstrated that students who consistently participate in public inter-district open enrollment programs had higher achievement gains than students who did not, and “these gains [were] driven primarily by open enrollers who are black and/or residing in high-poverty urban areas.”<sup>154</sup> However, the study noted that students who transitioned in and out of open enrollment attended residential and choice schools that had little differences in characteristics.<sup>155</sup> In a study on students participating in Colorado’s open enrollment policy, researchers differentiated students between consistent users and students who exhibited less stability in their participation.<sup>156</sup> Findings indicated that students with consistent open enrollment participation eventually exhibited modest gains in math and reading scores, but students who discontinued open enrollment experienced long-term achievement losses likely from “the disruption initiated via increased mobility.”<sup>157</sup> Thus, the Ohio and Colorado studies suggest that

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<https://www.wyff4.com/article/south-carolina-bill-allow-families-choice-school-location/43471468#> [<https://perma.cc/5VQ4-2A57>].

151. Robson et al., *supra* note 9, at 13.

152. *Id.*

153. See Saahoon Hong & Wonseok Choi, *A Longitudinal Analysis of the Effects of Open Enrollment on Equity and Academic Achievement: Evidence from Minneapolis, Minnesota*, 49 CHILD. & YOUTH SERV. REV. 62, 68 (2015).

154. Deven Carlson & Stéphane Lavertu, *Interdistrict Open Enrollment in Ohio: Participation and Student Outcomes*, THOMAS FORDHAM INST. 40 (June 2017).

155. *Id.* at 7.

156. See Deven Carlson et al., *Should I Stay or Should I Go? Open Enrollment Decisions and Student Achievement Trajectories*, 99 SOC. SCI. Q. 1089, 1090 (2018).

157. *Id.* at 1102.

student achievement largely depends on a student's ability to access a choice school for an extended period.

Additionally, the findings of other studies indicate that "open enrollment programs fail to improve the achievement levels of those who exercise this form of choice" because the constrained choice environment inhibits students' access to "high quality" schools.<sup>158</sup> This may be attributed to the fact that "the high rate of mobility among districts coupled with a disproportionately at-risk population of choosers—high-minority, low-income, and relatively low-achieving—more closely resembles the sort of natural student attrition among schools found in large districts," where "mobility rarely if ever results in net gains and often results instead in net losses to student outcomes even when students are sorting into better schools."<sup>159</sup> Referring back to the idea of a "parenting tax" and access barriers, if students are constrained to nearby choices comprised of similarly situated schools, their academic achievement may likewise be, at best, similarly situated, if not worse, due to the individual effects of student turnover.

Although some studies show competition leads to small, positive impacts on student achievement, there are significant variations in these effects depending on the kind of choice policy and the population served.<sup>160</sup> In one study, researchers reasoned that evidence of a district that lost students but had higher test scores the following year was a result of the "competitive pressures from open enrollment" to improve reading test scores.<sup>161</sup> However, empirical evidence is highly mixed as to whether the competition spurred by open enrollment policies actually lead to overall improved student outcomes.<sup>162</sup>

## V. SOLUTIONS

### A. *State-Specific Data Collection on Student Achievement*

Given the conflicting evidence on open enrollment's impact on student achievement, South Carolina should use data from districts already exercising

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158. Umut Özek, *The Effects of Open Enrollment on School Choice and Student Outcomes* 32 (Nat'l Ctr. for Analysis of Longitudinal Data in Educ. Rsch., Working Paper No. 26, 2009).

159. Joshua M. Cowen & Benjamin Creed, *Public School Choice and Student Achievement: Evidence From Michigan's Interdistrict Open Enrollment System*, AERA OPEN, July–Sept. 2017, at 1, 8.

160. Jabbar et al., *supra* note 76, at 271.

161. Michael Babington & David M. Welsch, *Open Enrollment, Competition, and Student Performance*, 42 J. EDUC. FIN. 414, 432 (2017).

162. Jabbar et al., *supra* note 76, at 248.

intra-district enrollment<sup>163</sup> to gauge how school choice has or has not improved student achievement. Additionally, South Carolina should not only look at the average achievement levels among students in a choice school or choice program but should also “examin[e] academic performance among students from all social classes or from all racial groups in the greater system,” as choice “affects not just those who participate but nonchoosers as well.”<sup>164</sup> Further, South Carolina must remember that “schools of concentrated poverty almost always perform poorly,” even when they receive substantial resources.<sup>165</sup> If school choice plans such as House Bill 3843 “do little to alter the demographics of schools or to break apart and preclude schools of concentrated poverty, it follows that those plans will likely do little to alter the student achievement levels within those schools.”<sup>166</sup> Thus, the legislature should focus on how effective open enrollment would be in the districts that make up the “Corridor of Shame.”

#### A. *Providing Transportation Is Essential*

South Carolina must ensure all families are provided transportation assistance for House Bill 3843 to truly be equitable. The National Comprehensive Center (NCC), a technical assistance center supported under the US Department of Education’s Comprehensive Centers program from 2019 to 2024, recommends that legislatures “[e]nsure transfer students have access to transportation.”<sup>167</sup> The NCC states that, “[a]t a minimum, policymakers must ensure that students from low-income families have access to state- or district-funded transportation to and from their school of choice” to ensure open-enrollment policies are “accessible to underserved students.”<sup>168</sup>

One potential solution could be revisiting South Carolina laws to “allow rural districts to use vehicles other than yellow school buses, such as passenger vans.”<sup>169</sup> This could be a particularly beneficial solution for rural districts, given smaller vehicles could “allow rural schools to transport small

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163. See generally Mary Green, *Open-Enrollment Bill Would Allow Students to Attend Any Public School Across SC*, LIVE 5 NEWS (Feb. 17, 2023, 7:26 PM), <https://www.live5news.com/2023/02/18/open-enrollment-bill-would-allow-students-attend-any-public-school-across-sc/> [<https://perma.cc/23GD-N46J>] (confirming that some school districts across the state offer intradistrict open enrollment).

164. Casey D. Cobb & Gene V. Glass, *School Choice in a Post-Desegregation World*, 84 PEABODY J. EDUC. 262, 275 (2009).

165. J. James E. Ryan & Michael Heise, *The Political Economy of School Choice*, 111 YALE L.J. 2043, 2103 (2002).

166. *Id.*

167. Robson, *supra*, note 9, at 13.

168. *Id.*

169. *Id.* at 20.

groups of students with fewer empty seats, resulting in lower costs per student per ride.”<sup>170</sup>

Other solutions may follow from other states approaches to open enrollment programs, in which the state either requires nonresidential districts to pay for inter-district busing or provides parents with transportation subsidies. In Minnesota, if the parent of a pupil requests, the nonresident district must provide transportation within the nonresident district.<sup>171</sup> However, the receiving district is not required to pay for the transportation in a student’s residential district instead, parents are responsible for the transportation between the student’s residence and the border of the nonresident district.<sup>172</sup> This seems like a viable option under House Bill 3843 given its mandatory nature, which would prevent districts from denying students based solely on transportation costs. However, this policy may not be an optimal solution as parents would still be responsible for the transportation costs within their residential district.

Minnesota attempts to ameliorate the residential district transportation costs for parents “whose income is at or below poverty level” by permitting them to request reimbursement from the nonresident district for the costs associated with transportation within the residential district.<sup>173</sup> Wisconsin has a similar program in place that provides transportation reimbursements for low-income families.<sup>174</sup> While these reimbursements pose a better solution, given the retroactive nature of subsidies, the legislature must consider parents’ financial ability to transport their children in the first place.

The legislature could also afford families with “some sort of financial ability to pay for private transportation.”<sup>175</sup> One mechanism that could work in tandem with House Bill 3843 is the Education Scholarship Trust Fund Program (ESTF), which was signed into law by Governor Henry McMaster on May 5, 2023.<sup>176</sup> The ESTF is another form of school choice functioning as an educational savings account program.<sup>177</sup> Educational savings accounts enable parents to “withdraw their children from public district or charter schools and receive a deposit of public funds into government-authorized

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170. *Id.*

171. Minn. Stat. § 124D.03 (2023).

172. *Id.*

173. *Id.*

174. Wis. Stat. § 118.51(14)(b) (2021).

175. Green, *supra* note 163 (quoting State Rep. Shannon Erickson, the lead sponsor of House Bill 3843).

176. *See Educational Scholarship Trust Fund Program*, S.C. DEP’T OF EDUC., <https://ed.sc.gov/newsroom/strategic-engagement/education-scholarship-trust-fund-program/> [<https://perma.cc/5DZL-H2MY>] (last visited Nov. 27, 2023) (describing the Education Scholarship Trust Fund Program, intended for parents “to create a customized, flexible education for their child”).

177. *See id.*



savings accounts with restricted, but multiple, uses.”<sup>178</sup> The accounts operate like a debit card<sup>179</sup> that parents can use for approved educational expenses, such as paying for textbooks, tutoring, and—usually private school—tuition and fees.<sup>180</sup>

Under the ESTF, qualifying South Carolina parents can apply for a scholarship worth up to \$6,000 “to create a customized, flexible education for their child.”<sup>181</sup> In order for students to be eligible for ESTF, the student must (1) be a resident of South Carolina, that (2) either has attended a South Carolina public school during the previous school year, has received a scholarship for the previous school year, or was not of age to enroll in the previous school year, and (3) has a household income that does not exceed 200% of the federal poverty guidelines for the 2024–2025 school year, 300% of the federal poverty guidelines for the 2025–2026 school year, or 400% of the federal poverty guidelines for the 2026–2027 and subsequent school years.<sup>182</sup>

Under the ESTF, the provided funds seem sufficient to cover the costs of transporting students via busing.<sup>183</sup> However, the ESTF may not be a viable solution given the program has its own concerns over worsening segregative effects and its constitutionality. In July 2020, South Carolina Governor Henry McMaster announced a program similar to the ESTF called the Safe Access to Flexible Education (SAFE) Grants Program.<sup>184</sup> The SAFE Grants Program functioned as a voucher program, providing “one-time, need-based grants of up to \$6,500 per student to cover the cost of tuition for eligible students to attend participating private or independent schools in South Carolina.”<sup>185</sup> However, in *Adams v. McMaster*, the South Carolina Supreme Court held that because the SAFE tuition grants were “directly transferred from the State Treasury to the selected school,”<sup>186</sup> the grants violated Article XI, Section 4 of the South Carolina constitution, which provides, “[n]o money shall be paid from public funds nor shall the credit of the State or any of its political

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178. *Education Savings Accounts, THE POL’Y CIRCLE*, <https://www.thepolicycircle.org/minibrief/education-savings-accounts/> [<https://perma.cc/F9AJ-CKM5>].

179. *Id.*

180. *Id.*; see also *2020 School Choice Guidebook*, AM. FED’N FOR CHILD. 5 (2020), <https://federationfstg.wpengine.com/wp-content/uploads/2022/04/Guidebook-20Nov13singles-1.pdf> [<https://perma.cc/7Q6Y-3WBM>].

181. *Educational Scholarship Trust Fund Program*, *supra* note 176.

182. S.C. CODE ANN. § 59-8-110(4) (West 2024).

183. The average expenditure per student transported in constant 2020–2021 dollars was \$1,197. See *Fast Facts: Transportation*, NAT’L CTR. FOR EDUC. STATS., <https://nces.ed.gov/fastfacts/display.asp?id=67> [<https://perma.cc/2YN5-A2ZT>].

184. See *Adams v. McMaster*, 432 S.C. 224, 232–33, 851 S.E.2d 703, 706–07 (2020).

185. *Id.* at 232–33, 851 S.E.2d at 707.

186. *Id.* at 241, 851 S.E.2d at 711.

subdivisions be used for the direct benefit of any religious or other private educational institution.”<sup>187</sup> In a related suit, known as *Bishop of Charleston v. Adams*,<sup>188</sup> an amicus curiae brief urged that private school voucher programs were “born directly of racial animus” and “continue to foster and exacerbate racial segregation.”<sup>189</sup>

Although the ESTF skirts around the *Adams v. McMaster* ruling because “the money comes out of the general fund instead of money assigned to schools” and goes “into education savings accounts instead of *directly* to private schools,”<sup>190</sup> on October 26, 2023, the South Carolina Education Association, the South Carolina NAACP, and six parents filed a lawsuit challenging the constitutionality of the ESTF.<sup>191</sup> Therefore, if a program like the ESTF is determined to be the best solution for enabling equitable transportation, the legislature should tailor the program towards transportation funds and embed such a provision in the text of House Bill 3843 to safeguard its constitutionality.

#### B. *Inter-District Funding Solutions Come with Their Own Risks*

For inter-district transfers, no optimal solution for the potentially adverse effects of competition regarding per-pupil funding exists. However, states can traditionally take three different pathways to improve the portability of per-pupil funding “[1)] comprehensive school finance reform, [(2)] targeted solutions, and [(3)] creating a distinct funding mechanism that supports open enrollment.”<sup>192</sup> According to the Reason Foundation, a stand-alone funding allotment is the best option for improving portability of per-pupil funding under open enrollment policies.<sup>193</sup>

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187. *Id.* at 244, 851 S.E.2d at 712–13; S.C. CONST. art. XI, § 4.

188. *Bishop of Charleston v. Adams*, 584 F. Supp. 3d 131 (D.S.C. 2022) (analyzing the constitutionality of CARES Act funding expenditures).

189. Brief for Public Funds Public Schools et al. as Amici Curiae Supporting Appellees and Affirmance at 2, *Bishop of Charleston v. Adams*, 584 F.Supp.3d 131 (D.S.C. 2022) (No. 22-1175), 2022 WL 1747566.

190. Jeffrey Collins, *South Carolina Governor Signs Private School Voucher Bill*, AP NEWS (May 4, 2023, 1:45 PM) (emphasis added), <https://apnews.com/article/education-vouchers-south-carolina-bill-signing-cf089d5b3fc42bd74a54f93abb1bf131> [<https://perma.cc/9F4C-PADZ>].

191. Zoie Henry, *Schools Voucher Law Gets Challenged with Lawsuit*, WLTX (Oct. 27, 2023, 8:37 PM), <https://www.wltx.com/article/news/local/controversial-school-voucher-law-sc-supreme-court/101-6f482b5f-5780-4053-8b29-9ca57408753f> [<https://perma.cc/LG7X-LT9U>].

192. Aaron Garth Smith et al., *Public Education Funding Without Boundaries: How to Get K–12 Dollars to Follow Open Enrollment Student*, REASON FOUND. (Jan. 24, 2023), <https://reason.org/policy-brief/public-education-funding-without-boundaries-how-to-get-k-12-dollars-to-follow-open-enrollment-students/> [<https://perma.cc/CTP4-L23B>].

193. *Id.*

Wisconsin's open enrollment policy uses such a mechanism, under which parents do not pay for the cost of attending a nonresident district.<sup>194</sup> Rather, Wisconsin's open enrollment policy is funded by statewide per-pupil base amounts for regular program students and students with disabilities, which were \$8,618 and \$13,470 respectively for the 2023–2024 school year.<sup>195</sup> Transfer students are counted in their residential districts' enrollment for funding purposes, and the statewide per-pupil is transferred from the resident district to the receiving district in the final state aid payment for that year.<sup>196</sup> According to the Reason Foundation, this scheme “ensures revenue neutrality for the state and allows students' home districts to retain a portion of funding”—the local funds based upon property taxes—for students transferring to nonresidential schools.<sup>197</sup>

However, many school districts in Wisconsin have experienced declines in enrollment, “translat[ing] to less funding from the state and a lower cap on how much . . . district[s] can raise from taxpayers.”<sup>198</sup> In the 2022–2023 school year, Racine Unified School District lost 1,889 students amounting to a net loss of \$15,484,236.<sup>199</sup> Wausau School District lost 257 students, amounting to a net loss of \$2,051,793.<sup>200</sup> Superior School District lost 148 students, amounting to a net loss of \$1,111,508.<sup>201</sup> La Crosse School District

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194. See Wis. Stat. § 118.51(16) (2021).

195. *Open Enrollment Funding*, WIS. DEP'T OF PUB. INSTRUCTION, <https://dpi.wi.gov/open-enrollment/funding> [<https://perma.cc/CK6W-ZK6E>].

196. Aaron Garth Smith, *Wisconsin's Open Enrollment Policy Success Is a Model for States Looking to Increase Educational Opportunities*, REASON FOUND. (July 25, 2022), <https://reason.org/commentary/wisconsin-leads-the-nation-in-open-enrollment-policy/> [<https://perma.cc/7M44-ZZQJ>].

197. *Id.*

198. Corrinne Hess, *Wisconsin Schools Consider Closure, Consolidation as Enrollment Drops*, WAUSAU PILOT & REV. (Apr. 25, 2023), <https://wausaupilotandreview.com/2023/04/25/wisconsin-schools-consider-closure-consolidation-as-enrollment-drops/> [<https://perma.cc/B8FT-DNBT>].

199. *Open Enrollment Pupil Transfers and Aid Adjustments*, WIS. DEP'T OF PUB. INSTRUCTION, <https://dpi.wi.gov/open-enrollment/data/aid-adjustments> [<https://perma.cc/49ZE-KHBG>] (locate “2022–2023 Open Enrollment Transfers and Aid Adjustments” hyperlink, click and download the hyperlink, scroll down to find “Racine Unified,” scroll right to view “Net Aid Transfers” (column I)).

200. *Id.* (locate “2022–2023 Open Enrollment Transfers and Aid Adjustments” hyperlink, click and download the hyperlink, scroll down to find “Wausau,” scroll right to view “Net Aid Transfers” (column I)).

201. *Id.* (locate “2022–2023 Open Enrollment Transfers and Aid Adjustments” hyperlink, click and download the hyperlink, scroll down to find “Superior,” scroll right to view “Net Aid Transfers” (column I)).

lost 51 students, amount in a net loss of \$442,550.<sup>202</sup> As a result, all of these districts are facing closure or consolidation.<sup>203</sup>

House Bill 3843 partially mirrors Wisconsin's funding scheme, as the Bill allows residential districts to hold on to their local funds.<sup>204</sup> Thus, if the funding scheme under Wisconsin's open enrollment policy is one of the most equitable and viable options, yet Wisconsin schools are still experiencing net losses that trigger school closures and consolidations, the same results will likely occur in South Carolina. In this sense, House Bill 3843 is inadequate as any proposed funding solution to House Bill 3843 will nonetheless result in some loss for rural and lower income South Carolina schools.

## VI. CONCLUSION

House Bill 3843 fails to address access concerns for exercising school choice and the potential implications rural and low-income schools may face. Additionally, the foundation of the goal of improving student achievement is weak given the conflicting existing literature. Instead of offering a plan that allows low-income and Black families to truly take advantage of tailored school matches, in its current state, House Bill 3843 primarily provides those opportunities to already advantaged families. While solutions pertaining to transportation and student achievement data collection are offered, the unfavorable implications facing rural schools remain. Thus, this begs the question of whether House Bill 3843 is an optimal solution for improving public education in South Carolina if it places additional burdens on the schools that are already struggling the most. Ultimately, the legislature's time and resources could be put to better use by working on solutions that target the root causes of South Carolina's failing public schools, such as geography, poverty, and teacher retention, rather than proposing a school choice program that only allows the most advantaged students to escape failing schools.

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202. *Id.* (locate "2022–2023 Open Enrollment Transfers and Aid Adjustments" hyperlink, click and download the hyperlink, scroll down to find "La Crosse," scroll right to view "Net Aid Transfers" (column I)).

203. Hess, *supra* note 198.

204. *Compare* H.R. 3843, 2023–2024 Gen. Assemb., 125th Sess. (S.C. 2023), *with* Wis. Stat. § 118.51(14)(b) (2021).