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# Charter Schools and Students with Disabilities

## *Preliminary Analysis of the Legal Issues and Areas of Concern*



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## Introduction

This paper examines the extent to which students with disabilities are being served by the approximately 5000 publicly funded charter schools, which are predominantly, but not exclusively, located in urban, under-performing school districts, and 20 percent of which are operated by charter-school management organizations (CMOs) controlling multiple entities.

Part I of the paper provides a brief description of the rapid development of charter schools, including their purpose and intent as well as the characteristics that distinguish charter schools from traditional public schools.

Part II describes the overriding legal principles and current federal statutes governing the operation of charter schools.

Part III identifies an array of systemic issues and concerns that interfere with students with disabilities having meaningful access to charter schools that operate as part of an existing local education agency (LEA) and those that operate independently as their own LEA. For example, attention is paid to the under-representation in charter schools of students who have more significant disabilities with more resource intensive educational needs and the exclusion of these students through selectivity, controlled outreach, counseling out, and other push out practices. In this context, the paper examines the legal rights of students with disabilities to be free from discrimination, to receive a free appropriate public education, to be educated with students without disabilities in the regular education classroom to the maximum extent appropriate, and to be provided an equal opportunity to access publicly funded charter schools.

Despite a lack of evidence of their effectiveness, these schools are perceived as emblematic of school reform and educational excellence by state legislation and federal policy and funding priorities.

## Part I. Background and Development of Charter Schools

Charter schools represent one of a number of school choice initiatives, including magnet schools, pilot schools, school transfers, voluntary metropolitan desegregation programs, and vouchers that authorize use of government resources to allow parents to send their child to a school other than the one to which the child would be assigned. As publicly funded, non-sectarian “schools of choice,” charter schools operate under a charter or contract that typically defines their mission, program, goals, methods of assessment, and ways to measure success. Charter schools are granted greater autonomy to operate outside of traditional school frameworks -- an autonomy that is expected, in theory, to encourage innovation, higher achievement and competition – in exchange for greater accountability. This accountability is measured by student performance for meeting a higher level of achievement at the risk of revocation or non-renewal of the charter. A state-by-state review of charter legislation listing as its first purpose “to improve student learning” makes clear that the popularity of charter schools relates to a growing disappointment with the perceived performance of regular public schools.<sup>1</sup> Providing parents with a choice to seek out improved student performance was expected to make charter and traditional public schools more accountable to parents by increasing competition between the schools and creating incentives for developing and implementing innovations necessary to attract and retain students.<sup>2</sup> In his State of the Union address in 1997, President Clinton urged States to “give parents the power to choose the right public school

The research to date shows that charter schools have not been the models of innovation and competition anticipated.

<sup>1</sup> Bracey, G. (2005). *Policy Brief, Charter Schools Performance and Accountability: A Disconnect*. Retrieved from <http://www.asu.edu/educ/eps1/EPRU/documents/EPsl-0505-113-EPRU.pdf>; see also Fiore, T.A., Harwell, L.M., Blackorby, J., & Finnegan, K.S. (2000). *Charter Schools and Students with Disabilities: A National Study* (final report). Washington, D.C.: U.S. Department of Education (parents of students with disabilities enroll their child in a charter school for a combination of reasons related to attractive features of the charter school and negative experiences with the previously attended school); see also Gupta, N. (2010). Rationality & Results: Why School Choice Efforts Endure Despite a Lack of Improvement on Student Achievement, *John Marshall Law Journal*, 3, 199, 227.

<sup>2</sup> See, e.g., US Department of Education, Charter Schools Program: Non-Regulatory Guidance, at 2 (2004). Retrieved from <http://www2.ed.gov/policy/elsec/guid/cspguidance03.doc>. According to the Center on Educational Governance (2008), fifteen states identify the “opportunity for parent participation” as one of the purposes of their charter school law. Center on Educational Governance (2008). *Enhancing Charter Schools through Parent Involvement*, National Resource Center on Charter School Finance & Governance. Retrieved from [http://www.charterresource.org/promising\\_results.cfm?category=28](http://www.charterresource.org/promising_results.cfm?category=28); see also Zehr, M.A. (Nov. 10, 2010). Public Schools Taking Lessons from Charters, *Education Week*. Retrieved from [http://www.edweek.org/ew/articles/2010/11/10/11charter.h30.html?tkn=STPFEMmPIedSPmqZL/YHtKkVgK\\_EpCRCZl3AP&cmp=clp-edweek](http://www.edweek.org/ew/articles/2010/11/10/11charter.h30.html?tkn=STPFEMmPIedSPmqZL/YHtKkVgK_EpCRCZl3AP&cmp=clp-edweek)

for their children” because “[t]heir right to choose will foster competition and innovation that can make public schools better.”<sup>3</sup>

Yet, the research to date shows that charter schools have not been the models of innovation and competition anticipated. Larger scale studies show few innovations in charter classrooms with most practices tending toward traditional approaches.<sup>4</sup> The “charter schools’ competitive effects are mixed and tend to be quite small.”<sup>5</sup> Researchers find that parents do not make the kind of informed decisions to determine outcomes for either traditional public schools or charter schools. The evidence suggests that “many parents are pulling their children out of higher-performing public schools in order to send them to academically inferior schools” and that, too often, “there are waiting lists for bad schools.”<sup>6</sup> Nor, at least to date, have they been shown to be the efficacious models of scaled up success for all students,<sup>7</sup> or arguably, even for giving learning communities of parents and teachers more control over their children’s education.<sup>8</sup> Other questions may also be asked about their accountability – e.g., questions based on data indicating that a very low percentage of charter schools have closed despite evidence of non-performance.<sup>9</sup>

<sup>3</sup> William Clinton, President, 1997 State of the Union Address (Feb. 4, 1997). Retrieved from <http://www.cnn.com/2005/ALLPOLITICS/01/31/sotu.clinton1997.2/index.html>.

<sup>4</sup> See, e.g., Lubienski, C. (2008). *Educational Innovation and Diversification in School Choice Plans*. Boulder and Tempe: Education and the Public Interest Center & Commercialism in Education Research Unit. Retrieved from <http://epicpolicy.org/files/CHOICE-07-Lubienski2.pdf> (charter schools have embraced alternative employment practices such as merit pay and have taken the lead in using marketing to attract students); Gupta, *supra* note 1.

<sup>5</sup> Kahlenberg, R.D. (May 2, 2011). *Popular, Bipartisan, and Mediocre: Review of The Charter School Experiment: Expectations, Evidence, and Implications*. C.A. Lubienski and P.C. Weitzel (Eds.). Retrieved from <http://www.tnr.com/book/review/charter-school-experiment>; see also, e.g., Center for Research on Education Outcomes (CREDO) (2009). *Multiple Choice: Charter School Performance in 16 States*. Stanford, CA: (in the most comprehensive study of charter schools to date, charter schools come up short in meeting goals articulated by advocates; putting competitive pressures on public schools, reducing teacher turnover, and lowering levels of school segregation). Retrieved from [http://credo.stanford.edu/reports/MULTIPLE\\_CHOICE\\_CREDO.pdf](http://credo.stanford.edu/reports/MULTIPLE_CHOICE_CREDO.pdf).

<sup>6</sup> Kahlenberg, *supra* note 5.

<sup>7</sup> See, e.g., Carnoy, M. et al. (2006). *Charter School Dustup: Examining the Evidence on Enrollment and Achievement* (review of 19 studies of effectiveness of charter schools compared to traditional public schools found no evidence that charters outperformed traditional schools.); Weber, M. (2010). *Special Education from the (Damp) Ground Up: Children with Disabilities in a Charter School-Dependent Educational System*, *Loyola University New Orleans Journal of Public Interest Law*, 11 217, 237; Miron, G., Evergreen, S., & Urschel, J. (2008). *The Impact of School Choice Reforms on Student Achievement*, Boulder and Tempe: Education and Public Interest Center & Education Policy Research Unit. Retrieved from <http://epicpolicy.org/files/CHOICE-10-Miron-FINAL-withapp22.pdf>; Burkholder, Z. (Sept. 22, 2011). Why We Need Integrated Schools: A Critique of “Successful” Urban Charter Schools. *Teachers College Record*. Retrieved from <http://www.tcrecord.org>.

<sup>8</sup> See, e.g., Kahlenberg, *supra* note 5; also see Myron, G. & Applegate, B. (2007). *Teacher Attrition in Charter Schools*. Tempe and Boulder: Education Policy Research Unit & Education and the Public Interest Center. Retrieved from <http://epsl.asu.edu/epru/documents/EPSSL-0705-234-EPRU.pdf>

<sup>9</sup> National Alliance for Public Charter Schools (December 11, 2011). *Back to School Tallies: Estimated Number of Public Charter Schools & Students, 2011-2012* (Roughly 157 public charter schools that were open in 2010-2011 did not open their doors to students in the fall, 2011 for a variety of reasons, including low enrollment, financial concerns, and low academic performance). See also e.g., Hood, J. (Dec. 4, 2011).

## A. Expansion and Growth of Charter Enrollment

With strong bipartisan support charter schools have experienced significant growth since 1991 when Minnesota became the first state to adopt a law authorizing individuals and groups to seek State approval and State funds for the purpose of establishing “charter schools.”<sup>10</sup> Within five years, 19 more states had followed suit, and the federal Elementary and Secondary Education Act (ESEA), as amended in 1994, had established the Charter School Program (CSP)<sup>11</sup> under Title X, Part C of the Act.<sup>12</sup> Congress amended this subpart in 1998 with the passage of the Charter School Expansion Act, and in January 2002, with enactment of Title V, Part B of the ESEA, as amended by the No Child Left behind Act of 2001.<sup>13</sup> The legislation was for the express purpose of expanding the number of “high-quality charter schools” across the nation by providing start-up funding to support their planning, program design, and initial implementation.<sup>14</sup>

Between 1999 and 2009, charter school enrollments more than tripled and the number of these publicly funded “schools of choice” grew from 2 percent to 5 percent of all public schools.<sup>15</sup> Today 40 states and the District of Columbia and Puerto Rico have enacted charter school laws<sup>16</sup> and 2 million students are now enrolled in more than 5500 charter schools.<sup>17</sup> The National Alliance of Public Charter Schools report also indicated that more than 500 new charter schools opened in the 2011-12 school year, and about 200,000 more students are enrolled today than in the 2010-11 school year.<sup>18</sup> This growth, an increase of 13 percent nationally, represents the largest increase in enrollment in a single year since the inception of the charter school movement twenty years ago.<sup>19</sup> Despite the dramatic increase in student enrollment in charter schools, by 2010 these students

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Charter schools facing more scrutiny: CPS serving notice on poor performing campuses. *Chicago Tribune*. Retrieved from [http://chicagotribune.com/news/education/ct-met-charter-school-struggles-1204-20111204\\_0\\_3822770.story](http://chicagotribune.com/news/education/ct-met-charter-school-struggles-1204-20111204_0_3822770.story)

<sup>10</sup> [Laws of Minnesota 1991, chapter 265, article 9, section 3.](#)

<sup>11</sup> Elementary and Secondary Education Act of 1965 (ESEA), 20 U.S.C. §§ 8061-8067 (amended in 1998).

<sup>12</sup> 20 U.S.C. §§ 8061-8067.

<sup>13</sup> 20 U.S.C. §§ 7221-7225g (2010).

<sup>14</sup> 20 U.S.C. § 7221(3) (2010).

<sup>15</sup> National Center for Education Statistics, U.S. Department of Education (2011). *The Condition of Education 2011* (NCES 2011-033), Indicator 3, at 24. Retrieved from <http://nces.ed.gov/fastfacts/display.asp?id=30>.

<sup>16</sup> Education Commission of the States (ECS) (October 2010). *Does the state have a charter school law?* Retrieved from <http://ecs.force.com/ecsforum/mbcsquest?rep=CS01&Q=Q2259>. Only AL, KY, ME, MT, NE, ND, SD, VT, WA, and WV have yet to enact charter school legislation.

<sup>17</sup> See Associated Press. (Dec. 7, 2011). Number of charter school students soars to 2 million as states pass laws encouraging expansion. *Broadcast Newsroom*. Retrieved from <http://www.broadcastnewsroom.com/article/Number-of-students-attending-charter-schools-soars-1792768>.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

only represented less than three percent of all public school students.<sup>20</sup> By 2008-09, 55 percent of charter schools compared to 25 percent of traditional public schools were located in cities,<sup>21</sup> and the percentage of charter schools serving 75% or more students eligible for free or reduced-price lunch (FRPL) had more than doubled (from 13 percent to 30 percent) since the beginning of the decade.<sup>22</sup> During this same period the percentage of charters characterized as low poverty (serving less than 25 percent of students eligible for FRPL) decreased from 37 percent to 24 percent.<sup>23</sup> In certain cities serving a significant high-poverty population, the concentration of charter schools is pronounced. For example, today, almost 40 percent of public school students in the District of Columbia<sup>24</sup> and more than 70 percent of students in New Orleans are enrolled in a charter school.<sup>25</sup> With a charter school enrollment exceeding 79,000 for the 2010-11 school year, the Los Angeles School District serves the highest number of charter school students for any school district.<sup>26</sup>

## B. Federal Role Promoting Expansion of High-Quality Charter Schools

Federal support is available under Title V-B of the ESEA for: financing of charter school facilities; planning, design, and initial implementation of charter schools; costs of transporting students to charter schools; and, under Title I-A, support of students enrolled in a school identified for improvement who choose to transfer to a charter school.<sup>27</sup> SEAs (or charter school developers in very limited instances) that seek a competitive grant from the U.S. Department of Education (USED) under this part must ensure that the individual charter schools meet the federal statutory definition and comply with State accountability requirements consistent with ESEA Title V-B-1, Section 5210(1).<sup>28</sup>

As expressly defined under the statute, a charter school, consistent with its State chartering law, is exempt from significant State or local rules that inhibit the flexible operation and management of public schools; is created by a developer as a public school; or is adapted by a developer from an existing public school, and is operated under public supervision and direction to provide a program of

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<sup>20</sup>National Center for Education Statistics Common Core of Data (CCD), U.S. Department of Education. Table A-3-3. "Public Elementary/Secondary School Universe Survey." 1999-2000 (version 1b) and 2000-2009 (version 1b). Retrieved from <http://www.nces.ed.gov/programs/cor/tables/table-cse-3.asp>

<sup>21</sup> NCES, *supra* note 15, at 24; *see also* NCES, U.S. Department of Education (2011). *Fast Facts: What Are the Enrollment Trends in Public and Private Elementary and Secondary Schools?* Retrieved from <http://nces.ed.gov/fastfacts/display.asp?id=65> and [http://nces.ed.gov/programs/coe/indicator\\_cse.asp](http://nces.ed.gov/programs/coe/indicator_cse.asp)

<sup>22</sup> NCES, *supra* note 15, Indicator 3..

<sup>23</sup> *Id.*

<sup>24</sup> Bill Turque, *Forty percent of children in D.C. public schools now in charters*, Washington Post, Nov. 7, 2011.

<sup>25</sup> National Alliance for Public Charter Schools, *A Growing Movement: America's Largest Charter School Communities*, p.2, Sixth Edition, Oct. 2011.

<sup>26</sup> *Id.*, at 2-3.

<sup>27</sup> 20 U.S.C. § 6316(b)(1)(E) (2010).

<sup>28</sup> 20 U.S.C. § 7221(i)(I) (2010).



**A charter school, consistent with its State chartering law, is:**

- exempt from significant State or local rules that inhibit the flexible operation and management of public schools;
- is created by a developer as a public school; or is adapted by a developer from an existing public school, and is operated under public supervision and direction to provide a program of elementary or secondary education, or both;
- does not charge tuition;
- is nonsectarian and is not affiliated with a sectarian school or religious institution;
- is nondiscriminatory and complies with Title VI<sup>1</sup> (race, color, national origin), Title IX<sup>1</sup> (gender), Section 504<sup>1</sup> and Title II of the Americans with Disabilities Act (disability),<sup>1</sup> and with the Individuals with Disabilities Education Act (IDEA)<sup>1</sup>; and “is a school to which parents choose to send their children and that admits students on the basis of a lottery if more students apply for admission than can be accommodated.”

elementary or secondary education, or both; does not charge tuition; is nonsectarian and is not affiliated with a sectarian school or religious institution; is nondiscriminatory and complies with Title VI<sup>29</sup> (race, color, national origin), Title IX<sup>30</sup> (gender), Section 504<sup>31</sup> and Title II of the Americans with Disabilities Act (disability),<sup>32</sup> and with the Individuals with Disabilities Education Act (IDEA)<sup>33</sup>; and “is a school to which parents choose to send their children and that admits students on the basis of a lottery if more students apply for admission than can be accommodated.”<sup>34</sup> In addition, a charter school recipient is bound by certain other federal requirements, including that it “operates in pursuit of a specific set of educational objectives determined by the school’s developer and agreed to by the authorized public chartering agency; and \*\*\* has a written performance contract with the authorized public chartering agency in the State that includes a description of how student performance will be measured in charter schools pursuant to State assessments that are required of other schools...”<sup>35</sup>

Federal funds and funding priorities have further encouraged state charter school laws providing for high-quality charter schools and state funding formulas that authorize equitable support to charter schools. Nowhere has the federal influence been more evident than in the City of New Orleans where post Katrina, USED released \$20.9 million dollars in education funds specifically for charter

schools, and these funds were supplemented the following year (2006) by an earmarked \$24 million dollars.<sup>36</sup> The enactment of the American Recovery and

<sup>29</sup> Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d.

<sup>30</sup> Title IX of the Education Amendments of 1972, 20 U.S.C. §1681.

<sup>31</sup> Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794.

<sup>32</sup> Title II of the Americans with Disabilities Act of 1990, as amended, 42 U.S.C. § 12101 *et seq.*

<sup>33</sup> 20 U.S.C. §§ 1400 *et seq.* (2010).

<sup>34</sup> 20 U.S.C. § 7221i(H) (2010)

<sup>35</sup> 20 U.S.C. § 7221i(1) (2010).

<sup>36</sup> See Institute on Race & Poverty, University of Minnesota Law School (May 15, 2010). *The State of Public Schools in Post-Katrina New Orleans: The Challenge of Creating Equal Opportunity.*, 25-28.(Philanthropic funds followed, also with such conditions attached as to constitute charter school aid)..Retrieved from [http://www.irpumn.org/uls/resources/projects/NEW\\_ORLEANS\\_FULL\\_REPORT.pdf](http://www.irpumn.org/uls/resources/projects/NEW_ORLEANS_FULL_REPORT.pdf).



Reinvestment Act (ARRA) of 2009 signaled a clear direction and commitment by USED to support “school choice” by bringing charter schools to scale. From the \$650 million dollar Innovation Fund, Secretary of Education Arne Duncan awarded \$50 million dollars to the KIPP (Knowledge Is Power Program) Foundation, a national charter school management organization known for its structured behavioral approach to learning, to scale up its leadership model.<sup>37</sup> Through the ARRA, approximately four billion dollars were used as an incentive for states to compete for Race To the Top (RTT) grants to support innovation and education reform. The RTT competition enhanced the appeal of charter schools by identifying among the criteria to be met by state applicants, strategies for providing equitable per student funding and facilities support for charter schools,<sup>38</sup> including by lifting legislative caps on the number of charter schools.<sup>39</sup>

In September 2011, the Empowering Parents through Quality Charter Schools Act (H.R. 2218), passed the House of Representative by a vote of 365 – 54, and was sent to the Senate.<sup>40</sup> The House passed legislation, H.R. 2218, supports the expansion and replication of what are described as “high-quality” charter school models that, *inter alia*, show evidence of strong academic result.<sup>41</sup> An amendment to strike the requirement to have “demonstrated success in significantly increasing student academic achievement and attainment for all students” was soundly defeated by the bipartisan House membership.<sup>42</sup> The House passed bill also encourages States “to provide charter schools support for facilities financing in an amount more nearly commensurate to the amount the States have typically provided for traditional public schools.”<sup>43</sup> H.R. 2128 also expressly identifies as a new program purpose to “improve student services to increase opportunities for students with disabilities, English language learners, and other traditionally underserved students to attend charter schools and meet challenging State academic achievement standards...”<sup>44</sup> The House passed bill also expands the authority to seek federal funds under CSP beyond SEAs to other state entities.<sup>45</sup> Unlike current law, applicants seeking a sub-grant from the SEA or other state authorizing entity are not required to describe the educational program of the proposed charter school, how the program will enable all students to meet challenging State academic achievement standards, the grade levels or ages of

<sup>37</sup>Dillon, S., (March 31, 2011). Study Says Charter Network Has Financial Advantages Over Public Schools, N.Y. Times. Retrieved from <http://www.NYTimes.com/2011/03/31/education/31kipp.html>

<sup>38</sup> See also 76 Fed. Reg.16754 (Mar. 25, 2011) (soliciting public comment on proposed priorities and selection criteria for solicitation of applications for the Charter School Program-Replication and Expansion of High Quality Charter Schools grant competition).

<sup>39</sup> For example, the Commonwealth of Massachusetts, one of among 20 other states with legislation that capped the number of charter schools, had to lift the cap as a condition of receiving its RTT grant. A number of States moved to amend their charter school legislation to raise their existing cap on charter schools in advance of the January 19, 2010 deadline for State applications for the first phase of Race to the Top funding. See Dillon, E. (2010). Designing Smart Charter School Caps. *Journal of School Choice*, 4, 74-92.

<sup>40</sup> H.R. 2218, 112th Cong. (2011); Retrieved from <http://thomas.loc.gov/cgi-bin/query/z?c112:H.R.2218>

<sup>41</sup> Id. at Sec. 5203(a)(1)(B),

<sup>42</sup> Id., at ec. 5203(f)(2)(G)..

<sup>43</sup> Id. at Sec. 5204(a)(1)

<sup>44</sup> Id. at Sec. 5201(4).

<sup>45</sup> Id. at Sec. 5203(e)(1)(A)(iv).

students served, how the charter school will be managed, the objectives of the charter school, the methods for determining if the charter school is making progress toward those objectives, or how parents and other members of the community will be involved in the planning, program design and implementation of the charter school.<sup>46</sup>

### C. Characteristics of Charter Schools

As noted above, charter schools are primarily distinguished from traditional public schools by their governance, which, in most instances, is based on a charter granted for a specified period of time by an authorizing agency established by state law. In general, publicly funded charter schools are exempted by relevant state enabling statutes from many State and local regulations and rules that ordinarily apply to traditional public schools in the jurisdiction. The enabling legislation details the scope and extent of such exemptions that free charters from many of the constraints on traditional districts – e.g., union contracts requiring teacher assignments based on seniority, limits on the length of school days. However, as all other publicly funded schools, they must follow U.S. civil rights laws and federal statutory laws,<sup>47</sup> including Title I of the ESEA, IDEA, General Education Provisions Act, (GEPA)<sup>48</sup> and the Family Educational Rights and Privacy Act.<sup>49</sup>

Charter schools are primarily distinguished from traditional public schools by their governance, which, in most instances, is based on a charter granted for a specified period of time by an authorizing agency established by state law.

State laws providing for the creation of charter schools differ markedly based on the designated agency with chartering authority, the length of the charter, type of governance, nature and degree of autonomy from state regulation, as well as oversight, budgetary control, and whether they are subject to collective bargaining agreements.<sup>50</sup> Depending upon their respective state laws, charter schools are created and operated by existing school districts, schools, teachers, parents and other individuals, non-profit organizations, teachers' unions<sup>51</sup> or, in

<sup>46</sup> 20 U.S.C. §7221i (2010).

<sup>47</sup> 20 U.S.C. § 7221i(G), (I).

<sup>48</sup> 20 U.S.C. § 1221(2010).

<sup>49</sup> 20 U.S.C. §1232g (2010).

<sup>50</sup> Approximately 12% of all charter schools are unionized. National Alliance for Public Charter Schools (2011). *Unionized Charter Schools: Data from 2009-10*.

[http://www.publiccharters.org/data/files/publication\\_docs/NAPCS%20Charter%20Schools%20Dashboard%20Details\\_2011103T104815.pdf](http://www.publiccharters.org/data/files/publication_docs/NAPCS%20Charter%20Schools%20Dashboard%20Details_2011103T104815.pdf) Washington, DC. For insight about their collective bargaining agreements, see M. Price (Nov. 2011). *Are Charter School Unions Worth the Bargain?*, Seattle, WA: Center on Reinventing Public Education. See [http://www.crpe.org/cs/crpe/download/csr\\_files/CRPE\\_pub\\_Unions\\_Nov11-2.pdf](http://www.crpe.org/cs/crpe/download/csr_files/CRPE_pub_Unions_Nov11-2.pdf)

<sup>51</sup> In December 2011, it was announced that the Minneapolis Federation of Teachers had been approved as a charter school authorizer. MFT will become the first union in the nation to serve as a charter sponsor. See

some cases, for-profit entities.<sup>52</sup> Some charter schools are single entities run by small, local groups; others are part of growing regional or national networks operated by educational management organizations (EMOs) or charter management organizations (CMOs).<sup>53</sup> In general, charter schools give the governing board and/or administrator almost complete discretion over governance, teacher hiring, budget and budgetary decisions, curriculum, and a range of school policies pertaining to the operation of the charter school and its stakeholders. In exchange for this greater autonomy, charter school operators typically sign a contractual agreement with the authorizing entity, which may be a State educational agency (SEA), LEA, university or other designated entity. Under the terms of the charter, in exchange for greater autonomy, the charter recipient commits the school to a heightened level of accountability usually tied to improved academic performance outcomes by a designated time period of 3-5 years when the charter is subject to renewal or revocation. In general, the State chartering or authorizing entity, is required by state charter school law to approve a new charter school application, evaluate performance and ensure that a charter school adheres to the accountability requirements set forth in its charter. In a majority of states, multiple agencies share monitoring and oversight responsibilities.

Eight states plus the District of Columbia have already established statewide commissions or chartering bodies independent of the SEA, while another five states have legislation pending to create such state entities to approve and oversee charter schools.<sup>54</sup> This is not a matter that is without debate, as challenges against the creation of such state commissions have been successfully brought in Florida (2008) and most recently in Georgia (2011) on State constitutional grounds.<sup>55</sup> In May 2011, the Georgia State Supreme Court in a 4-3 ruling found that the statute creating the commission conflicted with a constitutional provision that gives local boards of education “exclusive control” of K-12 education.<sup>56</sup> In bringing the challenge, local school districts argued that charter schools were being created over their objections and were draining resources from the local districts. The State’s high court said that a different constitutional provision allowing the State to operate “special schools” encompassed vocational education schools, schools for students with disabilities and adult education, but did not authorize the State to control charter schools that

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Weber, T. (Dec. 2, 2011). Minneapolis teacher's union approved to authorize charter schools. *Minnesota Public Radio*. Retrieved from <http://www.minnesota.publicradio.org/display/web/2011/12/02/teachers-union-charter-school/>

<sup>52</sup> Some examples of for-profit charter schools include K12 and White Hat Management schools. See <http://www.k12.com/> (k12) and <http://www.whitehatmgmt.com/about/faq/> (White Hat Mountain).

<sup>53</sup> CMOs are sometimes distinguished from EMOs based on their receiving private foundation support for a particular program. Well-known CMOs include KIPP, SEED, and Green DOT schools. See <http://www.kipp.org/> (Kipp); <http://www.seedfoundation.com/> (SEED); <http://www.greendot.org/> (Green Dot)

<sup>54</sup> Robelen, E.W. (May 25, 2011). Georgia Ruling Leaves Charters' Fate Uncertain. *Education Week*. Retrieved from <http://www.edweek.org/ew/articles/2011/05/25/32ga-charter-2.h30.html?qs=Gwinnett>

<sup>55</sup> *Gwinnett County School District v. Cox, et al.*, 289 Ga. 265, 710 S.E.2d 773 (2011).

<sup>56</sup> *Id.*, 289 Ga. at 275.

Decisions governing the legal status of charter schools – i.e., the extent to which they are considered part of an LEA or an independent LEA as well as their respective relationships with the larger LEA of which they are a part, and with the SEA – have significant implications for the delivery of special education services to eligible students with disabilities enrolled in or seeking to enroll in charter schools.

Educational researchers have identified this relationship between the charter school and the LEA as the most important factor affecting a charter school's compliance with IDEA and Section 504 in providing special education and related services.

do not fall under the separate jurisdiction of local school boards.<sup>57</sup> Given the decisions in Georgia and Florida that have stymied efforts to expand charter authorizing power beyond the SEA, it is noteworthy that proposed federal legislation, House bill, H.R. 2128, which recently passed the U.S. House of Representatives, proposes to extend for the first time eligibility for federal grants under Title V-B, the Charter School Program, beyond the SEA to state entities, including a State charter school board or the governor.<sup>58</sup>

In 17 states, a charter school operates as its own school district or LEA, independent of district control with legal and fiscal autonomy.<sup>59</sup> In seven other states, including California, the District of Columbia, and Massachusetts, charter school applicants choose whether to be treated as an independent, free standing LEA or as an independent school within an existing LEA.<sup>60</sup> A third type, a virtual charter school, which is beyond the scope of this paper, functions through the electronic exchange of communication between student and teacher via the Internet and generally without a common education facility.<sup>61</sup> About 40 percent of all charter schools operate as autonomous

<sup>57</sup> *Id.*, at 275. The Chief Justice explained: “Labeling a commission charter school as ‘special’ does not make it so when the students who attend locally-controlled schools are no less special than those enrolled in commission charter schools and the subjects taught at commission charter schools are no more special than the subjects that may be available at locally-controlled schools.”

<sup>58</sup> Section 5203 of H.R. 2218, as introduced, *supra* note 40..

<sup>59</sup> Ryan, M. (March 2011). *What Policymakers Need to Know: Highlights of State Charter School Laws*. Retrieved from <http://www.ecs.org/clearinghouse/92/22/9222.pdf>.

<sup>60</sup> *Id.*

<sup>61</sup> See Dillon, S., (Feb. 1, 2008). Online schooling grows, setting off a debate. N.Y. Times. (Nationally about 90,000 children get their education from one of 185 virtual or fulltime online charter schools. These schools are publicly financed, mostly elementary and middle schools drawing increasingly on students who were previously homeschooled.) Retrieved from: <http://www.nytimes.com/2008/02/01/world/americas/01iht-01virtual.9663237.html?pagewanted=all>

schools that are part of an existing LEA, while the remaining 60 percent operate as independent or free standing LEAs.<sup>62</sup> Decisions governing the legal status of charter schools – i.e., the extent to which they are considered part of an LEA or an independent LEA as well as their respective relationships with the larger LEA of which they are a part, and with the SEA – have significant implications for the delivery of special education services to eligible students with disabilities enrolled in or seeking to enroll in charter schools. Educational researchers have identified this relationship between the charter school and the LEA as the most important factor affecting a charter school’s compliance with IDEA and Section 504 in providing special education and related services.<sup>63</sup> The researchers found that “charter schools that were operating special education programs as autonomous LEAs often had limited understanding of their responsibilities and how they shared responsibility with states and district leaders. Charter operators did not know or resisted reporting requirements and other monitoring and compliance activities.”<sup>64</sup>

Despite being privately managed, charter schools, as publicly funded schools, must comply with the same requirements as traditional public schools with respect to non-discrimination in admission, and compliance with federal education laws.

With few exceptions, e.g., Colorado and Arizona, charter schools are required by their state laws and/or constitutions to be created as nonprofit entities.<sup>65</sup> These publicly funded non-profit entities are, nonetheless, free to contract with a ‘for-profit’ or private non-profit educational management organization (EMO) to oversee school operations and produce measureable outcomes. Despite being privately managed, charter schools, as publicly funded schools, must comply with the same requirements as traditional public schools with respect to non-discrimination in admission, and compliance with federal education laws. During the 2008-09 school year, 103 nonprofit EMOs operated 609 public schools in 25 states; 97 percent of those schools were charter schools.<sup>66</sup>

<sup>62</sup> Rhim, L.M., Lange, L.M., Ahearn, E.M., & McLaughlin, M.J. (2007). *Research Report 6: Survey of Charter School Authorizers*. College Park, MD: Project Intersect at the University of Maryland, College Park, MD.

<sup>63</sup> Rhim, L.M. & McLaughlin (2007). Students with Disabilities in Charter Schools: What We Now Know. *Focus on Exceptional Children*, 39, 1,6.

<sup>64</sup> *Id.*, 6. See also Weber, M.C. (2010). Special Education from the (Damp) Ground Up: Children with Disabilities in a Charter School-Dependent Educational System. *Loyola Journal of Public Interest Law*, 11, 217, 229-30 (discussion of evidence of New Orleans charter schools’ failure to comply with evaluation requirements of special education law; failure to report number of initial student referrals for special education)..

<sup>65</sup> See e.g., [N.Y. Educ. Law § 2851\(1\)](#) (For-profit education partners are prohibited from both applying for and operating charters.); also [N.Y. Educ. Law §§ 2851\(2\)\(v\)](#), [2853\(2\)-\(2-a\)](#) (provisions providing for greater transparency and ethics oversight of potential conflicts of interest that trustees, founders, and leaders may have.)

<sup>66</sup> Miron, G.. & Urschel, J. (2009). *Profiles of nonprofit education management organizations: 2008-2009* Boulder and Tempe: Education and the Public Interest Center & Education Policy Research Unit. Retrieved [date] from <http://epicpolicy.org/publication/profiles-nonprofit-emos-2008-09>



Arizona has the largest number of nonprofit EMOs,<sup>67</sup> with 23 organizations operating a total of approximately 100 public charter schools, followed by Texas, California, and Illinois, which has the highest proportion of charters under EMO management (72 percent).<sup>68</sup> During the same school year, 95 for-profit EMOs managed 733 public schools in 31 states.<sup>69</sup> Compared to non-profit EMOs, since 2006, the rate of growth of for-profit EMOs has waned.<sup>70</sup>

Once granted a charter by its respective legislatively designated state charter authorizer, the new charter school receives public funding that would otherwise have been allocated for use in traditional public schools.<sup>71</sup> Charter schools receive funding through a myriad of possibilities: In 17 states they are funded by the local school district, in six states they are state funded, in one state, the authorizing agency provides funding, and in 16 states, a charter school receives funding from both the local district and the state.<sup>72</sup> Whatever the method used by states to fund charter schools, federal funds are available to nonprofit charter schools to provide for the excess costs of educating students with disabilities under IDEA and under Title I of the ESEA to support the teaching and instruction of economically disadvantaged students. Consistent with USED policy, only schools that are nonprofit entities are eligible to receive IDEA and ESEA funding, and this includes charter schools.<sup>73</sup>

<sup>67</sup> A recent report on 40 non-profit EMOs examines the performance of AZ student subgroups in reading and math in public schools – including disaggregated data for charter schools. Students with disabilities outperform ELLs in both reading and math at all levels in both traditional and EMO operated non-profits. The data shows very little difference between the performance of students with disabilities enrolled in charter schools and in regular public schools – an important point since AZ has the highest proportion of charters of any state. Crane, E.W., Huang, M., and Barrat, V.X. (2011). *Comparing achievement trends in reading and math across Arizona public school student subgroups* (REL Technical Brief, REL 2012–019). Washington, DC: U.S. Department of Education, Institute of Education Sciences, National Center for Education Evaluation and Regional Assistance, Regional Educational Laboratory West. Retrieved from <http://ies.ed.gov/ncee/edlabs> and [http://ies.ed.gov/ncee/edlabs/regions/west/pdf/REL\\_2012019.pdf](http://ies.ed.gov/ncee/edlabs/regions/west/pdf/REL_2012019.pdf)

<sup>68</sup> Miron, G., & Urschel, J., *supra* note 66.

<sup>69</sup> *Id.*, *supra* note 66, at 6.

<sup>70</sup> *Id.*, *supra* note 66 at 26; also see Miron, G., Urschel, J.L., Mathis, W.J., & Tornquist, E. (2010). *Schools without Diversity: Education Management Organizations, Charter Schools and the Demographic Stratification of the American School System*. Boulder and Tempe: Education Policy Interest Center & Education Policy Research Unit. Retrieved from <http://epicpolicy.org/publication/schools-without-diversity>

<sup>71</sup> It has been estimated that the average charter school receives about 81 percent of the funding enjoyed by school districts in the same state. In large cities, the funding difference is greater with charter schools receiving about 72 percent of district funding. Batdorff, M., Maloney, L. and May, J. (2010). *Charter School Funding: Inequity Persists*. Muncie, IN: Ball State University.

<sup>72</sup> Ryan, *supra* note 39.

<sup>73</sup> *Arizona State Board for Charter Schools v. U.S. Department of Education*, 464 F.3d 1003, 1010 (9<sup>th</sup> Cir. 2006).



Students enrolled in any charter school have a clear expectation that:

- They will be taught a curriculum aligned with their State’s challenging academic content and academic achievement standards by highly qualified teachers,
- They will participate in the State’s assessments that are used to measure the progress of the schools and school districts and,
- Their performance outcomes will be reported in the aggregate and disaggregated by the required subpopulation groups.

What is different for charter schools and traditional public schools is that enforcement of the ESEA accountability requirements as applied to charter schools is based on each State’s charter school law.

While a more detailed discussion of funding issues is beyond the scope of this paper, the Court of Appeals for the Ninth Circuit in the first appellate ruling to address USED’s funding policy limiting eligibility for federal funds under the two major federal education statutes to nonprofits, validated the policy based on its finding that “a natural reading of the [statutory] text conveys clear congressional intent that all schools, including charter schools, must be nonprofit to receive IDEA and ESEA funds.”<sup>74</sup> In finding that only schools within the statutory definitions of IDEA and ESEA are eligible to receive federal funds,<sup>75</sup> the court took note that both federal statutes defined an “elementary school” and “secondary school” as “a nonprofit institutional day or residential school, including a public elementary [secondary] charter school that provides elementary [secondary] education.”<sup>76</sup> The ruling is limited; it does not preclude recipients of federal charter funding to subcontract with for-profit organizations that manage charter schools.

<sup>74</sup> *Id.*, at 1010.. For a discussion of this case and the use of IDEA funds for charter schools see Evans, M.D. (2008). An End to Funding of For-Profit Charter Schools? *University of Colorado Law Review*, 70, 617.

<sup>75</sup> The decision on its face restricts for-profit charter schools from eligibility for federal funds under IDEA and ESEA; it does not restrict schools from contracting with for-profit management organizations to run their programs.

<sup>76</sup> 20 U.S.C. § 1401(6),(27); 20 U.S.C. §6333(a), (c); 20 U.S.C. §7801(18), (38).

## II. Federal Statutes Governing the Operation of Charter Schools

### A. Application of Title I-Part A to Charter Schools

The ESEA, as amended by NCLB, makes no distinction between traditional public schools and public charter schools with respect to the accountability provisions of Title I, Part A. As all public schools, charter schools are subject to the accountability requirements of the law though only recipients of Title I-A funds are subject to the range of interventions for improvement, corrective action and restructuring.<sup>77</sup> Accordingly, students enrolled in any charter school have a clear expectation that they will be taught a curriculum aligned with their State’s challenging academic content and academic achievement standards by highly qualified teachers,<sup>78</sup> will participate in the State’s assessments that are used to measure the progress of the schools and school districts and that their performance outcomes will be reported in the aggregate and disaggregated by the required subpopulation groups.<sup>79</sup>

What is different for charter schools and traditional public schools is that enforcement of the ESEA accountability requirements as applied to charter schools is based on each State’s charter school law. Although charter schools that are not part of a traditional LEA are treated as separate LEAs, and, as recipients of Title I ESEA funds, are subject to SEA oversight of their progress in meeting State academic performance standards and on statewide assessments, the ESEA explicitly states that “[t]he accountability provisions under this Act shall be overseen for charter schools in accordance with State charter school law.”<sup>80</sup> Any ambiguity was eliminated by the Conference Committee Report [Rept. 107-334] accompanying H.R. 1 [No Child Left Behind Act, 12/13/2001] which incorporated the following clarifying statement:

“Charter schools are public schools and therefore subject to the same accountability requirements of this Act as they apply to other public schools, including Sections 1111 and 1116, as developed in each state. However, there is no intent to replace or duplicate the role of the authorized chartering agencies, as established under each state’s charter

<sup>77</sup> 20 U.S.C. § 6311(b)(2)(A); 34 C.F.R. § 200.12(b)(4).

<sup>78</sup> Under the ESEA teachers teaching in charter schools are required to meet the certification and licensure requirements, if any, contained in their respective State’s charter school law. [34 C.F.R. §200.56(a)(3)]. However, charter school teachers are not exempt from all other ESEA “highly qualified teacher” requirements – i.e., having a bachelor’s degree with demonstrated subject matter competency in each academic subject area taught. 34 C.F.R. §200.56(b), (c), (d).

<sup>79</sup> 20 U.S.C. § 6311(b)(3); 34 C.F.R. § 200.6, §200.7.

<sup>80</sup> 20 U.S.C. § 6311(b)(2)(K).

school law, in overseeing the Act’s accountability requirements for the charter schools that they authorize. Authorized chartering agencies should be held accountable for carrying out their oversight responsibilities as determined by each state through its charter school law and other applicable state laws. This should be done in ways that do not inhibit or discourage the approval or oversight of innovative, high quality charter schools.”<sup>81</sup>

## B. Application of IDEA, Section 504, and the ADA to Charter Schools

Charter schools must meet the same legal requirements applicable to students with disabilities as traditional public schools. Although state laws grant charter schools some flexibility and freedom from meeting certain state and local regulations, rules, and policies, charter schools, as public schools, must meet the requirements of the federal Individuals with Disabilities Education Act (IDEA), Section 504, to the extent the charter school receives any federal funding, and Title II of the ADA, regardless whether it receives federal funds. Two provisions that were added to IDEA in 1997 explicitly address charter schools. The first describes charter schools that are part of an LEA, stating that the LEA: (a) must serve children with disabilities attending such schools in the same manner that it serves children with disabilities in its other schools, and (b) must provide IDEA funds to such schools in the same manner as it does to its other schools.<sup>82</sup> Under the second provision an SEA cannot, unless authorized by its state charter school statute, require a charter school that is acting as its own LEA “to jointly establish its eligibility” with another LEA because alone it will be unable to maintain a special education program of sufficient size and scope to effectively meet the needs of children with disabilities.<sup>83</sup> While the statute is silent about a charter school that is neither part of an LEA nor a freestanding LEA, the IDEA regulations clarify that the statutory requirements apply to public charter schools regardless of their

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<sup>81</sup> H.R. Rep. No. 107-334, at 702 (2001)(Conf. Rep.).

<sup>82</sup> 20 U.S.C. §1413(a)(5).

<sup>83</sup> 20 U.S.C. § 1413(e)(B).

type of organizational structure.<sup>84</sup>

Furthermore, the legal requirements of IDEA are “binding on each public agency that has district or delegated authority to provide special education and related services to children with disabilities, regardless of whether that agency is receiving funds under Part B of the Act.”<sup>85</sup> The term public agency includes the SEA, LEAs, and “nonprofit public charter schools” that are not otherwise included as LEAs and are not a school of an LEA, other state agencies and state and local juvenile and adult correctional facilities.<sup>86</sup> Publicly funded charter schools

Publicly funded charter schools (regardless of type) must, therefore, provide or otherwise ensure that their students with disabilities receive a free and appropriate public education (FAPE) based on their unique individual needs through the development of an Individualized Education Program (IEP), and that they are educated to the maximum extent appropriate in the general education classroom with students without disabilities in accordance with their procedural rights.

(regardless of type) must, therefore, provide or otherwise ensure that their students with disabilities receive a free and appropriate public education (FAPE) based on their unique individual needs through the development of an Individualized Education Program (IEP), and that they are educated to the maximum extent appropriate in the general education classroom with students without disabilities in accordance with their procedural rights.<sup>87</sup>

Moreover, IDEA regulations specifically regarding charter schools begin with the clear statement that “[c]hildren with disabilities who attend public charter schools and their parents retain all rights under this part.”<sup>88</sup>

The term “charter school” in Title V-B of the ESEA is defined, in part, by a reference to being “a public school that...complies with...Section 504 of the Rehabilitation Act of 1973, and Part B of the Individuals with Disabilities Education Act.”<sup>89</sup> Section 504<sup>90</sup> as well as the ADA<sup>91</sup> and the Equal Protection clause of the Fourteenth Amendment to the U.S. Constitution ban discrimination on the basis of disability, and IDEA provides funds to implement procedures to ensure non-discrimination in educational programs and institutions.<sup>92</sup> Section 504 guarantees

<sup>84</sup> 34 C.F.R. § 300.2(b)(1)(ii).

<sup>85</sup> 34 C.F.R. § 300.2(b)(2).

<sup>86</sup> 34 C.F.R. § 300.33.

<sup>87</sup> 20 U.S.C. § 1412(a)(1)(A), 1412(a)(5)(A).

<sup>88</sup> 34 C.F.R. § 300.209(a).

<sup>89</sup> 20 U.S.C. §7221i(1)(G) (2002) (internal references omitted; amendments not affecting quoted language proposed in H.R. 2218 § 9 (2011). Retrieved from <http://thomas.loc.gov/cgi-bin/bdquery/z?d112:h.r.2218>).

<sup>90</sup> 29 U.S.C. §794 (2010).

<sup>91</sup> 42 U.S.C. §12132 (2010); 28 C.F.R. §35.104 (2010).

<sup>92</sup> Mead, J.F. (Jan. 2008). *Primers on Special Education in Charter Schools, Charter Schools Designed for Children with Disabilities: An Initial Examination of Issues and Questions Raised*, at 2., Retrieved from [http://www.edgateway.net/specialedprimers/download/special\\_report\\_mead.pdf](http://www.edgateway.net/specialedprimers/download/special_report_mead.pdf).

individuals with a mental or physical impairment that interferes with participation in a major activity but who do not need specialized instruction, a free appropriate public education that is “comparable to that provided to students without disabilities.”<sup>93</sup>

Charter schools as recipients of federal funds under Section 504 and as state or governmental entities under Title II of the ADA, cannot discriminate against individuals with disabilities, and have an affirmative obligation under both statutes to provide meaningful and accessible outreach to ensure the fair recruitment of school-age children with disabilities and an equal opportunity for admission.<sup>94</sup> Children with disabilities must be provided an opportunity to participate in and benefit from comparable aids, benefits and services afforded others.<sup>95</sup> They cannot be excluded from “school choice” programs as a result of their disability.<sup>96</sup> Nor can they be required to waive services to which they are entitled under IDEA or, for which they are otherwise qualified as a school-age child under Section 504, as a condition of participation in any choice program.<sup>97</sup> Charter schools may not directly or through contractual or other arrangements, utilize criteria or methods of administration –i.e., policies and practices -- that have the effect of discriminating in outreach, recruitment, or admissions against students with disabilities on the basis of disability, specific need or prior academic achievement.<sup>98</sup>

Charter schools as recipients of federal funds under Section 504 and as state or governmental entities under Title II of the ADA, cannot discriminate against individuals with disabilities, and have an affirmative obligation under both statutes to provide meaningful and accessible outreach to ensure the fair recruitment of school-age children with disabilities and an equal opportunity for admission.

<sup>93</sup> 34 C.F.R. § 104.33.

<sup>94</sup> 34 C.F.R. § 104.4(b)(1)(i), (3), (4); 42 U.S.C. § 12132, 28 C.F.R. § 35.104, 28 C.F.R. 35.130(b)(1)(i), (b)(7).

<sup>95</sup> 34 C.F.R. § 104.4(b)(1)(ii);

<sup>96</sup> 29 U.S.C. § 794(a); 34 C.F.R. § 104.4(a),(b)(1)(v), (vii), (3), (4); 42 U.S.C. § 12132.

<sup>97</sup> 20 U.S.C. § 1412(a)(1)(A); 34 C.F.R. § 104.4(a), (b)(4), § 104.33. See also Mead, *supra* note 92, at 4; see also Decker, J. et al (2010). Charter Schools Designed for Gifted and Talented Students: Legal and Policy Issues and Considerations, *Education Law Reporter*, 259, 1, 9 (Discussing requirements on charter schools designed for gifted students to use non-discriminatory admissions policies and provide services for students with disabilities who may also be gifted. Participation in school choice programs may still be limited by the determination of the IEP team if the school of choice is not able to provide appropriate services that are offered at another available school placement or if the school does not comport with the requirements of education in the least restrictive environment).

<sup>98</sup> 34 C.F.R. § 104.4(b)(4)(b)(1)(i); and similarly under the ADA, 28 C.F.R § 35.130(b)(8).. See Mead, *supra* note 92, at 11-12, 14-17.

Charter schools, as all public schools, are required by IDEA to provide each eligible student a FAPE that meets the standards of the SEA and is consistent with the student’s IEP.<sup>99</sup> The right to FAPE ensures these students full and meaningful opportunities to participate in the same curriculum that is being taught to students without disabilities and to meet the same high academic standards that are set for all students.<sup>100</sup> Multiple provisions, including those regarding IEP

In the context of charter school education, the right to be educated in the LRE is one of the most pertinent provisions of federal law.

development and implementation, ensure that each student shall be involved and make progress in the general education curriculum – i.e., the same curriculum as that provided to students without disabilities.<sup>101</sup> Moreover, consistent with IDEA’s least restrictive environment (“LRE”) requirement, students with disabilities are to be educated to the maximum extent appropriate with students without disabilities; removal from the

regular education environment is to occur “only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.”<sup>102</sup>

In the context of charter school education, the right to be educated in the LRE is one of the most pertinent provisions of federal law.<sup>103</sup> Every school district (including each charter school that acts as an LEA, in and of itself) has an obligation to ensure that each child with a disability is educated in the LRE to the maximum extent appropriate to the child’s needs, and must make available a “continuum of alternative placements” to meet the diverse learning needs of students with disabilities.<sup>104</sup> The IEP team determines the placement that the student needs to receive the specialized instruction and related services set forth in in the student’s IEP.<sup>105</sup> The team’s first consideration is whether the school

<sup>99</sup> 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17. FAPE consists of “specially designed instruction” that adapts the content, methodology, or delivery of instruction “[t]o address the unique needs of the child that result from the child’s disability; and ... [t]o ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children.” 34 C.F.R. § 300.39(b)(3).

<sup>100</sup> 20 U.S.C. § 1412(a)(1)(A); 34 C.F.R. § 300.17(b), (c); 20 U.S.C. § 6311(b)(1), 34 C.F.R. § 200.1(a), (b), (c). Also see 34 C.F.R. § 104.33(a).

<sup>101</sup> 34 C.F.R. § 300.320(a)(1)(i), (a)(4).

<sup>102</sup> 20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a).

<sup>103</sup> 20 U.S.C. § 1412(a)(5)(A).

<sup>104</sup> 34 C.F.R. § 300.115. Note, in one major inclusion case, an appellate court defined a “continuum of placements to meet the needs of [ ] children [with disabilities] as resource rooms, itinerant instruction, speech and language therapy, special education training for the regular teacher, behavior modification programs, or any other available aids or services appropriate to the child’s particular disabilities.” *Oberti v. Clementon School District*, 995 F.2d 1204, 1216 (3<sup>rd</sup> Cir. 1993). alternatives refers to the range of potential placements in which a district can implement a student's IEP, with the regular classroom being the least restrictive to meet the needs of students with disabilities.

<sup>105</sup> 20 U.S.C. § 1414(d), 34 C.F.R. § 300.114-300.116.



district can provide supplemental aids and services<sup>106</sup> to make it possible for a student to be educated with his or her non-disabled peers in the regular education classroom.<sup>107</sup> If services can be appropriately provided in a less restrictive setting, the members of the team, including the parent, must choose that type of program and setting.<sup>108</sup> On the other hand, if the student's program of specialized instruction and related services designed to meet the student's individualized needs,<sup>109</sup> requires a more restrictive setting to be effective and to enable the student to make meaningful progress toward learning what all students are expected to learn consistent with his or her IEP, the IEP team is permitted to consider a more restrictive setting.<sup>110</sup> The determination of LRE must be based on a student's IEP, not on a diagnosis or specific disability label. Students cannot be placed in separate or more restrictive environments solely because they require modifications in the curriculum.<sup>111</sup> Moreover, only after the team has developed the student's IEP, may it determine the appropriate setting for delivering such services.<sup>112</sup>

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<sup>106</sup> 34 C.F.R. § 300.42 (2010) (“*Supplementary aids and services* means aids, services, and other supports that are provided in regular education classes, other education-related settings, and in extracurricular and nonacademic settings, to enable children with disabilities to be educated with nondisabled children to the maximum extent appropriate in accordance with §§300.114 through 300.116”).

<sup>107</sup> See *Oberti v. Clementon Sch. District*, 995 F.2d 1204,1216 (3<sup>rd</sup> Cir.1993).

<sup>108</sup> 34 C.F.R. § 300.114

<sup>109</sup> IDEA, consistent with its FAPE obligation, requires that all education placement decisions be considered on an individual basis considering each child's unique needs. Each placement decision should be uniquely tailored to reasonably promote the child's educational success. 64 Fed. Reg. 12,471 (1999).

<sup>110</sup> See, e.g., *P. v. Newington Board of Education*, 546 F.3<sup>rd</sup> 111 (2d Cir. 2008.); *Letter to Wohle*, [50 IDELR 13850](#) (OSEP 2008)(IDEA does not require a set percentage of students to be educated in a general education environment).

<sup>111</sup> 34 C.F.R. § 300.116(e).

<sup>112</sup> 65 Fed. Reg. 36,591 (2000); see, e.g., *Spielberg v. Henrico County Public Schools*, 853 F.2d 256, 259 (4<sup>th</sup> Cir. 1988)(school board may not predetermine what school a student may be placed in before creating the student's IEP and engaging in discussion over what schools are suitable under the IEP).

### III. Issues and Concerns for Students with Disabilities

#### A. Relationship of Charter School to the LEA and the Delivery of Special Education

Whether a charter school is considered under its State chartering law to be part of a larger existing LEA, an independent LEA, or to fall into neither category,<sup>113</sup> students with disabilities enrolled in charter schools have the same

Students with disabilities enrolled in charter schools have the same legal rights as those enrolled in traditional public schools. Only the manner in which students with disabilities are located, evaluated, identified and provided special education may differ depending upon the school's legal status as determined by State charter law and each school's respective charter.

legal rights as those enrolled in traditional public schools.<sup>114</sup> Only the manner in which students with disabilities are located, evaluated, identified and provided special education may differ depending upon the school's legal status as determined by State charter law and each school's respective charter.<sup>115</sup> While it may as a matter of law and policy seem counter-intuitive given the enormity of the obligations, a single charter school operating as a stand-alone LEA has the same responsibilities under IDEA as any other LEA in the State<sup>116</sup> "unless State law assigns that responsibility to some other entity."<sup>117</sup> While IDEA provides that the SEA retains ultimate responsibility and oversight for ensuring provision of FAPE to all eligible children with disabilities in the State,<sup>118</sup> each LEA is obligated directly, through cooperative agreement, or contracts with

other agencies or schools/districts: to identify, locate, and evaluate all eligible children; to ensure each such child is provided FAPE, including specialized instruction and related services based on his/her unique needs and as set forth in the child's IEP, and educated with students without disabilities to the maximum extent appropriate; to include all eligible students in State and district

<sup>113</sup> Primers on Implementing Special Education in Charter Schools. *State Matrix* [hereinafter *State Matrix*]. Retrieved from <http://www.edgateway.net/cs/spedp/query/q/2057> (last visited Sept. 29, 2011).

<sup>114</sup> 20 U.S.C. § 1413(a)(5).

<sup>115</sup> *State Matrix*, *supra* note 113.

<sup>116</sup> 20 U.S.C. § 1413(a).

<sup>117</sup> 34 C.F.R. § 300.209(c). Note that, effective with funds available on July 1, 2009, "each State must distribute funds to eligible LEAs, including public charter schools that operate as LEAs, *even if the LEA is not serving any children with disabilities.*" (emphasis added). 34 C.F.R. § 300.705(a).

<sup>118</sup> 20 U.S.C. § 1412(a)(11).

assessments and publicly report such data to the SEA; and to ensure compliance with all procedural safeguards under IDEA.<sup>119</sup>

1. Charter schools operating as their own independent LEA

If the charter school is defined as its own LEA, independent and separate from any other schools or district, the charter school is responsible for providing the specialized instruction and related services necessary to meet the individualized needs of its enrolled students with disabilities.<sup>120</sup> Even though traditional public schools receive state and federal funds for educating children with disabilities, LEAs frequently incur significant additional costs as part of their operating expenses that relate to particular children’s more resource-laden special education needs. Unlike a traditional public school, however, which is part of an LEA and able to draw upon the district’s resources – including financial support, an array of special education programs, supplementary aids and services, and the continuum of alternative placements – the charter school that is its own LEA must provide students with disabilities FAPE consistent with their IEPs solely through its own resources or through contractual arrangements.<sup>121</sup> All charter schools in Delaware, for example, are this type, and each charter in the State is responsible for identifying, locating and evaluating children and providing the array of specialized instructional programming and services needed for the diverse students it enrolls.<sup>122</sup> In the City of New Orleans the public school system is completely decentralized with 51 LEAs, including 49 independent charter schools operating as standalone LEAs, operating the city’s 88 schools.<sup>123</sup>

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<sup>119</sup> 20 U.S.C. §1413(a).

<sup>120</sup> 34 C.F.R. § 300.209(c) (This provision can be overridden by state law placing the responsibility for providing special education services to students in charter schools on a different entity, such as the local LEA or the SEA); *See also R.B. ex rel Parent v. Mastery Charter School*, 762 F. Supp. 2d 745, 752-53 (E.D. Pa. 2010) (“Under Pennsylvania’s statutory scheme, charter schools are independent LEAs and assume the duty to ensure that a FAPE is available to a child with a disability in compliance with IDEA and its implementing regulations. Under this scheme, Mastery Charter School bears full responsibility for providing special education services to students with disabilities”) (internal quotations and citations omitted).

<sup>121</sup> *See* Bordelon, S.J. (2010). Making the Grade? A Report Card on Special Education, New Orleans Charter Schools, and the Louisiana Charter Schools Law. *Loyola University New Orleans Journal of Public Interest Law* 11, 441, 449.

<sup>122</sup> *State Matrix*, *supra* note 113.

<sup>123</sup> *See* Garda, R. (2011). *The Politics of Education Reform: Lessons from New Orleans*, 40 *J.L. & Educ.* 57, 76-81.

Not surprisingly some studies have found that charter school administrators who operate charter schools as autonomous LEAs incur more difficulty in administering special education programs than administrators in schools that are part of an LEA who can draw upon readily available personnel with more knowledge, expertise, options and resources.<sup>124</sup> There is also evidence

Nonetheless, by virtue of having sole responsibility for providing FAPE to each eligible child, a charter school operating as an independent, stand-alone LEA will realistically be challenged to “provide a full range of special education services simply because [it] cannot afford to do so.”

that as the charter school movement has matured, charter school personnel have become more “knowledgeable about their legal responsibilities and public authorizing agencies have become more sophisticated about proper accountability and oversight roles.”<sup>125</sup> Nonetheless, by virtue of having sole responsibility for providing FAPE to each eligible child, a charter school operating as an independent, stand-alone LEA will realistically be challenged to “provide a full range of special education services simply because [it] cannot afford to do so.”<sup>126</sup> This burden is not insignificant, especially considered in the context of reported findings that urban charter schools

receive an estimated 72 percent of district funding.<sup>127</sup> As previously described, these schools also serve disproportionately poor students.<sup>128</sup> Unlike traditional public school districts that can tap into shared resources, staff expertise, specialized programming and services from different schools throughout their respective district, the charter school-LEA is essentially dependent upon itself. Yet, just as traditional public school districts, charter school-LEAs are responsible under IDEA for providing what is appropriate not merely what is available consistent with the students’ IEPs, implementing students’ specialized instruction and related services, and improving students’ achievement so they may learn to their State standards as required by IDEA and Title I of the ESEA. To attain these objectives and to comply with IDEA, any charter school operating as an LEA may, and likely will have to, explore such options as creating collaborative partnerships and entering contractual relationships with traditional public schools and LEAs, or with other charters that are part of an LEA or are stand-alone LEAs. A one-size-fits-all inclusion program is not permitted under IDEA; a charter school

<sup>124</sup> Bordelon, *supra* note 121 at 450.

<sup>125</sup> R.J. Lake, ed., National Charter School Research Project, *Unique Schools Serving Unique Students: Charter Schools and Students with Special Needs – Brief 2* (2010). Retrieved from [http://www.crpe.org/cs/crpe/view/csr\\_pubs/338](http://www.crpe.org/cs/crpe/view/csr_pubs/338). *But see* *See E.A. et. al., v. Louisiana Department of Education, Louisiana Board of Education, Due Process Complaint*, p. 39, n.23 (Louisiana Department of Education, July 28, 2010). Retrieved from <http://www.splcenter.org/sites/default/files/downloads/case/NOLAschools072810.pdf> [Hereinafter Louisiana Dept. of Educ.] (describing failure to report number of students with suspected disabilities referred for initial evaluation). <http://www.splcenter.org/sites/default/files/downloads/case/NOLAschools072810.pdf>

<sup>126</sup> Bordelon, *supra* note 121 at 457.

<sup>127</sup> Batdorff, *supra* note 71.

<sup>128</sup> See *supra* notes 21-26 and accompanying text.

operating as an independent LEA must be able to offer students with disabilities FAPE consistent with IEPs tailored to meet their individualized needs through a continuum of alternative placements.<sup>129</sup>

## 2. Charter schools operating as part of a larger LEA

For a charter school that is part of an existing LEA, unless State law assigns the responsibility to some other entity, the LEA must serve students with disabilities “attending those charter schools in the same manner as the [LEA] serves children with disabilities in its other schools, including providing supplementary and related services on site at the charter school to the same extent to which the [LEA] has a policy or practice of providing such services on the site to its other public schools...”<sup>130</sup> In some instances, the LEA retains full responsibility for identifying, evaluating, and providing services for students with disabilities enrolled in the charter school, and in others, the charter school and the LEA share responsibility for those tasks. The precise relationship is dependent on State law and policy, which must, nonetheless, be consistent with IDEA, as well as the relationship negotiated between the charter school and the LEA.<sup>131</sup> For example, in Alaska, all charter schools are part of an LEA but retain full responsibility for special education evaluation and services, unless they negotiate an insurance agreement with their LEA.<sup>132</sup> Alternatively, in Oregon, all charter schools are part of an LEA and the LEA retains all responsibility for evaluation and provision of special education services.<sup>133</sup> Unless a traditional public school in the LEA could assign a similarly situated student with a disability elsewhere – e.g., a particular school is identified to provide centralized services to students with similar low-incidence disabilities and the student’s IEP Team concurs<sup>134</sup> – a charter school within the LEA may not refuse to accept a student on the basis of a disability.<sup>135</sup> A charter school that is part of an LEA is assured of being provided funds received by the LEA through IDEA: “(i) on the same basis as the other public schools [within the LEA], including proportional distribution based on relative enrollment of children with disabilities; and (ii) at the same time as the agency distributes other Federal funds to the agency’s other public schools, consistent with the State’s charter school law.”<sup>136</sup>

<sup>129</sup> Bordelon, *supra* note 121 at 449-50.

<sup>130</sup> 20 U.S.C. §1413(a)(5)(A); 34 C.F.R. §300.209(b).

<sup>131</sup> *State Matrix*, *supra* note 113.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> See e.g., *Hartmann v. Loudoun County Bd. of Educ.*, 118 F.3d 996 (4th Cir. 1997), *cert. denied*, 522 U.S. 1046 (1998).

<sup>135</sup> 20 U.S.C. § 1413(a)(5); 34 C.F.R. §300.209(b); Section 504, 29 U.S.C. §794; 34 C.F.R. § 104.4(a), (b). See also Weber, *supra* note 64, at 234-238.

<sup>136</sup> 20 U.S.C. §1413(a)(5)(B), 34 C.F.R. §300.209(b)(ii).

3. Charter schools that are neither an independent LEA nor part of an LEA

Finally, for charter schools that are *not* independent, stand-alone LEAs receiving IDEA funds under 34 C.F.R. §300.705, or part of a larger school district/LEA that is receiving funds under 34 C.F.R. §300.705, the SEA is responsible for ensuring that all the requirements of Part B of IDEA are met.<sup>137</sup> The SEA may assign initial responsibility for meeting these requirements to another entity;<sup>138</sup> however, under IDEA the SEA retains ultimate responsibility.<sup>139</sup> This provision is especially relevant to the states of New York, New Hampshire, and Oregon where their legislatures have chosen not to identify the charter school as an independent LEA or to make charter schools part of a larger LEA, instead designating the eligible student’s resident district as the responsible agency for ensuring that the student’s special education needs are met.<sup>140</sup> The SEA’s oversight role may also be more visible in Connecticut where charter schools, as independent LEAs, divide responsibilities with the student’s resident district; the latter convenes IEP meetings and pays for the costs of services that the charter schools are responsible for making certain are provided.<sup>141</sup>

Charter schools that are *not* independent, stand-alone LEAs receiving IDEA funds under 34 C.F.R. §300.705, or part of a larger school district/LEA that is receiving funds under 34 C.F.R. §300.705, the SEA is responsible for ensuring that all the requirements of Part B of IDEA are met.

<sup>137</sup> 34 C.F.R. §300.209(d)(1).

<sup>138</sup> 34 C.F.R. § 300.209(d)(2).

<sup>139</sup> 20 U.S.C. §1412(a)(11); 34 C.F.R. §300.149..

<sup>140</sup> N.Y. EDUC. LAW §2853(4); N.H. REV. STAT. ANN. § 194-B; OR. REV. STAT. § 338.165.

<sup>141</sup> CONN. GEN. STAT. § 10-66ee.



#### 4. State Education Agency Responsibility

Regardless of state charter school laws, and the possible of assignment by the SEA of initial responsibility for implementing the requirements of Part B to another state entity when a charter school is neither a standalone LEA or part of an LEA, each SEA recipient of a federal IDEA grant remains ultimately responsible for ensuring that the requirements of IDEA are met by each publicly

This responsibility [of the SEA] is not to be taken lightly - especially in the context of the expansion of charter schools, the importance of planning so as to ensure that these public “schools of choice”, in fact, are not only accessible to all students but that they are prepared and able to educate effectively all children, including those with significant disabilities.

funded educational program in the State.<sup>142</sup> This responsibility is not to be taken lightly - especially in the context of the expansion of charter schools, the importance of planning so as to ensure that these public “schools of choice”, in fact, are not only accessible to all students but that they are prepared and able to educate effectively all children, including those with significant disabilities. For example, having failed to resolve serious allegations of systemic violations through a state administrative complaint against the State Superintendent of Education, Department of Education of Louisiana (LDE) and the Board of Elementary and Secondary Education (BESE), a coalition of advocacy groups led by the Southern Poverty Law Center filed a federal class

action under IDEA, Section 504 and the ADA on behalf of approximately 4500 eligible children with disabilities in New Orleans alleging systemic violations of their rights by at least 30 separate charter and traditional schools within the Recovery School District.<sup>143</sup> As a result of the State defendants’ abdication of their general supervisory responsibilities to provide effective oversight, monitoring and supervision, the complaint alleges that the student class members are discriminated against on the basis of disability and denied access to “school choice,” because, *inter alia*, the charter schools operating as stand-alone LEAs do not provide supportive services and necessary accommodations for these students to succeed; counsel out enrollees once their disabilities are manifest; lack policies and practices to identify, locate and refer for evaluation students in need of special education; lack highly qualified special education personnel who are trained to provide effective special education; deny students the range of specialized instruction and related services, e.g., mental health support services, necessary to

<sup>142</sup>20 U.S.C. § 1412(a)(11)(A); 34 C.F.R. § 300.149(a).

<sup>143</sup> See *P.B. v. Pastorek*, Case 2:10-cv-04049, E.D. La. (Complaint, 10/26/2010). Retrieved from [http://www.splcenter.org/sites/default/files/downloads/case/pb\\_v\\_pastorek.pdf](http://www.splcenter.org/sites/default/files/downloads/case/pb_v_pastorek.pdf) (Defendants’ motion to dismiss was denied and the parties’ motions for judgment on the pleadings and for class certification have been stayed pending settlement discussions).

learn and to prepare to meet their post secondary education goals.<sup>144</sup> In addition, the federal complaint alleges that as a result of the State defendants' failure to implement and enforce required policies and practices under IDEA, section 504 and the ADA, the class members are disproportionately subject to disciplinary exclusions, denied procedural safeguards, including a manifestation determination review prior to being suspended or otherwise excluded from school, to stay-put and to receive their substantive right to FAPE during the period of any exclusion in excess of ten school days.<sup>145</sup>

It should be noted that the SEA's responsibilities, as well as other State entities empowered to grant school charters, are likely to increase under the proposed amendments to Title V of the ESEA, titled the "Empowering Parents through Quality Charter Schools Act."<sup>146</sup> Grantees under the proposed House passed legislation would be required to "work with charter schools to promote inclusion of all students and support of all students once they are enrolled."<sup>147</sup> State entities receiving grants would need to "ensure that charter schools they support can meet the educational needs of their students, including students with disabilities."<sup>148</sup> Requiring State grant recipients to ensure that the charter school applicants plan for and anticipate the needs of diverse learners, might constitute a first step toward changing the perspective of students with disabilities as an "afterthought"<sup>149</sup> of the charter school initiative.

## B. Discrimination in Admission, Enrollment, and Retention

Since the early stages of the charter school movement that evidenced minimal inclusion of students with disabilities,<sup>150</sup> there has been a healthy skepticism of the willingness and capability of charter schools to serve students with diverse learning needs.<sup>151</sup> There is no doubt that over the last decade the number of students with disabilities enrolled in charter schools nationally has continued to grow with 11.9 percent of the charter school enrollment comprised of students with disabilities, compared to 12.4 percent of students with IEPs enrolled

<sup>144</sup> *Id.* at 17-29.

<sup>145</sup> *Id.* at 29-35,

<sup>146</sup> H.R. 2218, *supra* note 40.

<sup>147</sup> *Id.* *supra* note 40, at sec.5203(e)(1)(A)(vii)..

<sup>148</sup> *Id.* *supra* note 40, at sec. 5203€(1)(A)(x).

<sup>149</sup> Weber, M. , *supra* note 64, at 219 ("...it appears that children with disabilities and their educational needs were at most an afterthought in the educational planning for a rebuilt New Orleans.")

<sup>150</sup> See Ysseldyke, J.E., Lange, C.M., & Algozzine, R. (1992). *Research Report 7: School Choice Programs in the Fifty States*; Szabo, J.M. & Gerber, M.M. (1996) Special education and the charter school movement. *Special Education Leadership Review*, 3, 135-48 (In April 1995, only four of twelve state charter laws specifically mentioned special education).

<sup>151</sup> See Rhim, L.M. (Feb. 2008). National Charter School Research Project. *Special Education Challenges and Opportunities in the Charter School Sector 7*. Retrieved from [http://www.crpe.org/cs/crpe/download/csr\\_files/wp\\_ncsrp12\\_speced\\_feb08.pdf](http://www.crpe.org/cs/crpe/download/csr_files/wp_ncsrp12_speced_feb08.pdf).

nationally in traditional public schools.<sup>152</sup> The fact remains, however, that New Orleans, Los Angeles, and Washington, DC – three districts that rely heavily on charter schools – currently face claims of systemic discrimination based on

New Orleans, Los Angeles, and Washington, DC – three districts that rely heavily on charter schools – currently face claims of systemic discrimination based on administrative and judicial actions brought under the IDEA and Section 504.

administrative and judicial actions brought under the IDEA and Section 504. For example, according to the State administrative due process complaint filed in January 2010, on behalf of a class of all New Orleans public school students with disabilities, although the average percentage of students with disabilities in the New Orleans Recovery School District [RSD] traditional public schools is 12.6 percent, charter schools in the RSD enroll significantly fewer students with disabilities—on average 7.8 percent of charter school students have disabilities.<sup>153</sup> Based on Louisiana

Department of Education data,<sup>154</sup> 27 charter schools in New Orleans reported enrolling less than 10 percent of students with disabilities, and 11 charter schools reported an enrollment of five percent or less of students with disabilities.<sup>155</sup> Data from Los Angeles and Washington, DC reflect a similar pattern.<sup>156</sup>

Furthermore, as compared to their traditional public school counterparts, there is evidence that charter schools in large urban districts and throughout the country tend to enroll disproportionately greater numbers of students with high incidence disabilities – such as specific learning disabilities – and lower numbers of students with low incidence, more significant disabilities (e.g., intellectual disabilities and autism) with more educationally intensive and costly needs.<sup>157</sup> In general, charter schools are more likely to serve students with disabilities who are educated in general education classrooms, suggesting that these schools enroll higher percentages of students with mild to moderate disabilities who are more typically educated in inclusive settings.<sup>158</sup> In the alternative, this may indicate that

<sup>152</sup> *Id.* at 8 (“[C]hildren with disabilities represent approximately 12.5% in the total enrollment in public schools nationwide... [while only] 10.6% of charter school students had an IEP during 2003-2004 school year.”).

<sup>153</sup> See Louisiana Dept. of Educ., *supra* note 125, at 45-46.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at 46.

<sup>156</sup> See *infra* notes 163-164 and accompanying text.

<sup>157</sup> Rhim, *supra* note 151 (“[C]harter schools enrolled more students with specific learning disabilities (61% compared to 55%) and fewer students with mental retardation (2% compared to 6%) than traditional public schools”). See also Miron *et al.*, *supra*, note 70, at 16-17.; Howe, K.R. & Welner, K. (2002). School choice and the pressure to perform: Déjà vu for children with disabilities? *Remedial and Special Education*, 23(4). 212-222; Fiore, *et al.*, *supra* note 1.

<sup>158</sup> See also Rhim & McLaughlin, *supra* note 63 at 7.

charter schools are only providing services through an unlawful one-size-fits-all inclusion model.<sup>159</sup>

Another exclusionary policy or practice is reflected in a survey evaluating special education programs and services of 23 charter schools in New Orleans that found “an astonishing number of 504 plans.”<sup>160</sup> As alleged in the administrative complaint filed against the SEA and Louisiana Board of Education, several of the surveyed special education coordinators acknowledged that the Section 504 plans were developed to avoid referring students for special education evaluations.<sup>161</sup> The New Orleans complaint also described how a number of the charter schools surveyed were providing specialized instruction and related services based on staff availability not students’ individual needs. Despite acknowledging a significant need for assistance for students with emotional disabilities, many who experienced exposure to Katrina related trauma, only 15 of the 23 charter schools surveyed provided social work or counseling as a related service, one school provided no related services, and six of the charter schools that rely on the district for provision of related services, reported infrequent communication and collaboration with district clinicians and no communication with teachers to connect the support services with student learning.<sup>162</sup>

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In 2010, in testimony before the Education and Labor Committee of the U.S. House of Representatives, Dr. Thomas Hehir, former director of the Office of Special Education Programs (OSEP) under President Clinton and Professor at the Harvard Graduate School of Education, shared his research findings that underscored the exclusion and selective enrollment of students with disabilities in charter schools. Dr. Hehir’s testimony focused on charter schools serving urban school districts in California and Massachusetts:

<sup>159</sup> Rhim, *supra* note 151; see also Weber, *supra* note 64, at 226.

<sup>160</sup> Louisiana Dept. of Educ., *supra* note 125, at 39 citing Educational Support Systems Inc. (2008). *The Special Education Project: A Survey of 23 Charter Schools in the Recovery School District*.

<sup>161</sup> Louisiana Dept. of Educ., *supra* note 125. See also P.B. v Pastorek, *supra* note 143.

<sup>162</sup> Louisiana Dept of Educ., *supra* note 125; see also Rhim, *supra* note 151.

In San Diego, close to 10% of all students now attend charter schools. Though the enrollment of students with disabilities in traditional public schools overall approaches 12%, the average enrollment of students with disabilities in non-conversion (from scratch) charter schools during the 2005-2006 school year was 5.8%.

With respect to students requiring extensive special education services, the imbalance is even more dismal. For example, during the 2005-2006 school year, there were only three children with mental retardation in all San Diego non-conversion charter schools *combined*; traditional schools across the district, meanwhile, educated almost one thousand students with mental retardation. That same year, non-conversion charter schools in San Diego educated just two students with autism.

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The picture is quite similar in Los Angeles. The enrollment of students in charter schools throughout the city is large (approximately 8%). The enrollment of students with disabilities across the district averages over 11%, while the enrollment of students with disabilities in independent charter schools averages fewer than 7% (Independent Monitors Office, 2009).<sup>163</sup> As in San Diego, the distribution of disability types within independent Los Angeles charter schools is skewed; for students with disabilities requiring extensive special education services, the likelihood they will be enrolled in independent charter schools is one-fourth that of traditional public schools.<sup>164</sup>

Similar data emerges for charters serving urban areas in Massachusetts. For the 2006-2007 school year, the percentage of enrolled students with disabilities in traditional urban schools was 19.9%, while the percentage of enrolled students with disabilities enrolled in urban charter schools was significantly lower, 10.8%. As is the case in Los Angeles and San Diego, significantly fewer students who had more substantial needs, such as mental retardation, emotional disturbance, and autism, were enrolled in

<sup>163</sup> Report on the Progress and Effectiveness of the Los Angeles Unified School District's Implementation of the Modified Consent Decree During the 2010-2011 School Year - Part I, Appendix E, Findings of the Review of Charter Applications and Enrollment Forms (June 13, 2011). Retrieved from [http://oimla.com/pdf/20111005/AppendixE\\_CharterSchoolApplicationReviewFindings\\_Final.pdf](http://oimla.com/pdf/20111005/AppendixE_CharterSchoolApplicationReviewFindings_Final.pdf).

<sup>164</sup> *Id.*, App. E



urban charter schools. Several cities' charter schools enrolled none of these students.<sup>165</sup>

Having the ability to choose assumes parents of all children have available school options, yet research suggests that families' access to the educational marketplace is unequally constrained by such factors as connection with social media or other influential networks through which knowledge about particular school choices and the process is shared; language barriers; socioeconomic status; and the ability of parents to arrange transportation for their school-age children.<sup>166</sup> The data also may suggest that this type of selection bias is used to cull out those families of children with disabilities who fail to request that their IEP Teams reconvene to consider a change in educational placement.

Having the ability to choose assumes parents of all children have available school options, yet research suggests that families' access to the educational marketplace is unequally constrained by such factors as connection with social media or other influential networks through which knowledge about particular school choices and the process is shared; language barriers; socioeconomic status; and the ability of parents to arrange transportation for their school-age children.

Independent Monitor Frederick Weintraub, who oversees the Los Angeles School District, reported other exclusionary practices. He found that of the 183 charter schools in the LEA, which serve only 7 percent of students with disabilities compared to 11 percent of students with disabilities enrolled in traditional public schools in LA, a substantial percentage of the charters sought additional information *prior to* the lottery process about a student's special education status.<sup>167</sup> The findings indicated that almost half the applications required parents to indicate if their child received special education or had an IEP, and 65 percent of these asked that the student's IEP be enclosed with the application; parents were also asked about the type of specialized instruction and related services their children received. Such blatant uses of "criteria or methods of administration" that have the effect of

discriminating against qualified students with disabilities on the basis of disability or the effect of impeding students with disabilities from an equal opportunity to

<sup>165</sup> Thomas Hehir, Ed. D., Testimony before the U.S. House of Representatives, Education and Labor Committee (Feb. 24, 2010).

<sup>166</sup> Fuller, B., Elmore, R.F. & Orfield, G. Eds. (1996). *Who Chooses? Who Loses? Culture, Institutions, and the Unequal Effects of School Choice* 25-49. New York: Teachers College Press; Koedel, C. *et al.* (2009-10). *The Social Cost of Open Enrollment as a School Choice Policy* (University of Missouri, working paper 2009-2010). Retrieved from [http://economics.missouri.edu/working-papers/2009/WP0910\\_koedel.pdf](http://economics.missouri.edu/working-papers/2009/WP0910_koedel.pdf).

<sup>167</sup> Innovation and Charter Schools Division, Los Angeles Unified School District, *Charter Schools' Pre- and Post- Lottery Enrollment Forms, Admissions Requirements and Materials* (Aug. 30, 2011).



participate in the “choice” program to receive a high-quality education would seem especially vulnerable to a challenge based on Section 504 and the ADA.

Furthermore, almost a quarter of the 178 charter schools that included enrollment forms required the parents to sign a contract and agree to specific conditions, including, for example, if their child needed special education services, that the child would receive the specialized instruction and services in a full inclusion classroom.<sup>168</sup> As discussed above, eligible students with disabilities have a right to FAPE and cannot be excluded from “choice” programs as a result of their disability,<sup>169</sup> nor can they be required to waive services as a condition of participation in any publicly funded choice program.<sup>170</sup>

Even among families who request that their child with a disability be admitted to a charter school as their “school of choice,” researchers have found that students are “counseled out” and encouraged to leave the school during and subsequent to the enrollment stage.<sup>171</sup> “Counseling out” often occurs as a result of students’ challenging behavior.<sup>172</sup> The practice of “counseling out” students makes it difficult to calculate meaningful charter school enrollment data for

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students with disabilities or to assess the academic outcomes of the full cohort of students with disabilities attending charter schools. For example, “[t]here is... some evidence that charter schools are less likely than district schools to identify incoming students with special needs labels and are more likely to move students off of IEPs....[Some] charter schools create individualized instruction plans for all students, so parents of special needs students are less inclined to require formalized IEPs.”<sup>173</sup> Lacking identification as a student with a disability in need of specialized instruction and supportive services provided under an IEP, students whose eligibility is dropped, often without the informed consent of their parents,

<sup>168</sup> *Id.*

<sup>169</sup> 29 U.S.C. § 794; 34 C.F.R. § 104.4.

<sup>170</sup> See Decker, *supra* note 97, at 9.

<sup>171</sup> See Rhim, *supra* note 151, at 8 (“Counseling out children with disabilities; whether due to lack of awareness of their responsibilities related to IDEA or an intentional desire to limit the number of children in special education; remains a concern in the charter sector”); Zollers, N.J. & Ramanathan, A.K. (1998). For-Profit Charter Schools and Students with Disabilities: The Sordid Side of the Business of Schooling, *Phi Delta Kappan*, 80, 297, 299 (“All the special education directors in districts with for-profits reported that charter school personnel were informing parents of students with disabilities that they would be better served in the public schools -- a practice known as ‘counseling out.’ According to their reports and those of parents, for-profits begin counseling out during the enrollment phase.”).

<sup>172</sup> See Rhim, *supra* note 151, at 8.

<sup>173</sup> Lake, R. & Gross, B. (Feb. 2011). *Special Needs and Choice Districts*, at 2. Retrieved from [http://www.crpe.org/cs/crpe/download/csr\\_files/res\\_portf\\_specialneeds\\_lake\\_gross\\_feb11.pdf](http://www.crpe.org/cs/crpe/download/csr_files/res_portf_specialneeds_lake_gross_feb11.pdf).

may not only be denied specialized instruction to enable them to learn effectively but support services to address behavioral manifestations as an education issue, and as significantly, the procedural safeguards (e.g., stay-put) necessary for these vulnerable students to be protected from disciplinary and other inappropriate exclusions and the right to non-cessation of FAPE during the period of any exclusion in excess of ten school days.

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Some charter schools' actions are more overtly discriminatory toward students with disabilities after they are enrolled; data indicate that students with disabilities are disproportionately suspended from charter schools. In New Orleans, according to the class action administrative complaint filed on behalf of children with disabilities, during the 2008-2009 school year, the Recovery School District, which includes traditional

public schools and charter schools, "suspended 26.8 percent of all students with disabilities—a rate 63 percent higher than the statewide average." Among these schools, many of the charter schools "posted some of the highest discipline rates for students with disabilities in the State. Sojourner Truth Academy suspended 53.8 percent of all students with disabilities—a staggering 228 percent higher than the statewide average; New Orleans College Prep Charter School suspended 52.2 percent of all students with disabilities—218 percent higher than the statewide average; and First Line Schools, which operates Samuel J. Green Charter School and Arthur Ashe Charter School, suspended 41.5 percent of all students with disabilities—153 percent higher than the state average."<sup>174</sup>

Although charter schools, in general, have the potential to create innovative models with highly successful publicly funded school programs, and are required by federal and State laws to serve *all* students, there is little doubt that charter schools have fallen short in seeking and attaining goals for meeting the needs of an integrated diverse student population.<sup>175</sup> Recent studies report that charter schools currently isolate students by race and class either in minority or white segregated schools.<sup>176</sup> Data show that in virtually every State and large metropolitan area across the country, charter schools are more racially isolated

<sup>174</sup> See Louisiana Dept. of Education, *supra* note 125, at 42.

<sup>175</sup> Because of concerns about charter schools accelerating segregation of public schools, 16 states have regulations pressing charter schools to take steps toward ensuring diversity. Connecticut requires charter schools to recruit from all segments of the district, and in South Carolina, the racial composition of charter schools cannot differ by more than 20% from that of the traditional school district. See Miron *et al.*, *supra* note 70 at 8-10.

<sup>176</sup> *Id.* at 19-22.

than traditional public schools.<sup>177</sup> These findings support research that identifies many charter schools as racially segregated learning environments,<sup>178</sup> regardless of whether this is being measured at the national, State, or district level.<sup>179</sup> Moreover, it has been reported that charter schools that enroll “economically distinct (either more advantaged or less) students in White-segregated or minority-segregated schools” serve fewer students with disabilities than traditional public schools.<sup>180</sup> Evidence suggests that as charter schools are rapidly becoming the exclusive instrument of school choice in racially and economically segregated New Orleans,<sup>181</sup> school choice leads to substantial inequalities among public students as white students and a small minority of students of color are channeled into better performing predominantly white schools operated by the Orleans Public School Board and Board of Elementary and Secondary Education, while confining the majority of low-income students of color to the lower performing traditional and charter Recovery School District schools.<sup>182</sup> Louisiana is the only state that permits admission prerequisites for charter schools.<sup>183</sup> Disparities in poverty, academic performance, disability type, disciplinary exclusion, retention and graduation are evident between the racially identifiable charter schools in New Orleans that employ prerequisites and serve predominantly white students<sup>184</sup> and the traditional and charter schools in the Recovery School District that have open enrollment policies and serve disproportionately students of color.<sup>185</sup>

<sup>177</sup> Frankenberg, E., Siegel-Hawley, G., and Wang, J. (2011). Choice without equity: Charter school segregation, *Educational Policy Analysis Archives*, 19(1), 1. Retrieved from <http://epaa.asu.edu/ojs/article/view/779>.

<sup>178</sup> Recent NY state legislation seeks to address such serious charges by requiring that authorizers of charters “shall ensure (1) that such enrollment targets are comparable to the enrollment figures of such students attending public schools within the school district . . . and (2) that such retention targets are comparable to the rate of retention of such categories of student . . . .” *N.Y. EDUC. LAW §§ 2852(9-A)(B)(1)(1)-(2)* (McKinney Supp. 2011). Comparability targets are based on the school district or community school district within which the charter school is located. *N.Y. EDUC. LAW §2851(4)(E)*.

<sup>179</sup> Carnoy, M. *et al.* (2005). *The Charter School Dust-up: Examining The Evidence On Enrollment And Achievement*; Finnigan, K. *et al.* (2004). *Policy and Programs Study Service, U.S. Department of Education, Evaluation of the Public Charter Schools Program: Final Report*. Retrieved from <http://www2.ed.gov/rschstat/eval/choice/pcsp-final/finalreport.pdf>; Frankenberg, E. & Lee, C. (2003). Charter Schools and Race: A Lost Opportunity for Integrated Education, *Educational Policy Analysis Archives*, 11(32), 1. Retrieved from <http://epaa.asu.edu/ojs/article/download/260/386>; Garcia, D. (2007). The impact of school choice on racial segregation in charter schools, *EDUCATIONAL POLICY*, 22(6), 805; Miron, G. & Nelson, C. (2000). *Autonomy in Exchange for Accountability: An Initial Study of Pennsylvania Charter Schools* (The Evaluation Center at Western Michigan University, Kalamazoo, MI); Renzulli, L. & Evans, L. (2005). School Choice, Charter Schools and White Flight, *52 Social Problems*, 52, 298.

<sup>180</sup> See Frankenberg, *supra* note 172, at 9.

<sup>181</sup> Institute on Race & Poverty, *supra* note 36, at 37-41.

<sup>182</sup> *Id.* at 4-5, 53.

<sup>183</sup> LA. REV. STAT. ANN. §17:199

<sup>184</sup> For a description of how New Orleans became the laboratory for a majority charter school district, see Bordelon, *supra* note 121.

<sup>185</sup> Institute on Race & Poverty, *supra* note 36, at 29. See also LA. REV. STAT. ANN. §17:1990(F)(1)(2010) (open enrollment RSD).

As Dr. Hehir emphasized in his study of under-enrollment of students with disabilities in the charter schools of San Diego, the effect of the uneven distribution of students with disabilities is not limited to the charter schools; it also has an adverse impact on the education of students with disabilities who are over-represented in traditional public schools which must bear the associated attendant costs and administrative burdens.<sup>186</sup>

### C. Choosing Charters Identifiable as Schools for Students with Disabilities; Tension between Parental Choice and the IEP Team

The procedural safeguards built into IDEA give both parents and schools the ability to contribute to decisions about the education of students with disabilities and the ability to check the authority of the other to make unilateral decisions about programming appropriate for a child.<sup>187</sup> This dual system of decision-making can create a policy tension with the parental choice emphasis central to the charter school movement.<sup>188</sup> “[T]he consistent message from the U.S. Department of Education has been that those parental choices that are consistent with federal disability law can and should be honored and that conversely, a parental choice may not be implemented if it does not meet those requirements.”<sup>189</sup> This suggests that for a student in need of special education, a parent’s choice of placement, including a charter school specifically for educating students with disabilities, should be honored only to the extent it complies with the decision of the student’s IEP team to provide FAPE in the regular education setting with non-disabled peers to the maximum extent appropriate.<sup>190</sup> This interpretation is consistent with the student’s and parent’s rights under IDEA and the child’s rights under Section 504.

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<sup>186</sup> For example, because even New Orleans RSD charters can cap their enrollment to maintain a student-teacher ratio of 20-1 and have greater flexibility in discipline, transportation, marketing and recruitment, it is the open enrollment RSD traditional schools that are the “schools of last resort.” They “do not have selective admissions; can operate on double shifts; can expand capacity by adding mobile classrooms; can raise class sizes; can enroll students who do not find spaces in charter schools; and can enroll special needs students who may be turned down by charter and/or selective admissions schools.” Institute on Race & Poverty, *supra* note 36, at 29-33, 33, citing United Teachers of New Orleans (UTNO), Louisiana Federation of Teachers (LFT) and the American Federation of Teachers (AFT) (2006). “National Model” of Flawed Approach? *The Post-Katrina New Orleans Public Schools*.

<sup>187</sup> Mead, *supra* note 92, at 4.

<sup>188</sup> *Id.* at 3 (citing Ahearn, E., Lange, C., Rhim, L., & McLaughlin, M. (2001). *National Association of State Directors of Special Education, Project Search: Special Education as Requirements in Charter Schools, Final Report of a Research Study*).

<sup>189</sup> *Id.* at 5.

<sup>190</sup> *Id.*

Based on data reflecting the underrepresentation of students with disabilities enrolled in inclusive, diverse charter schools, it is evident that serious issues of unfairness and discrimination still need to be addressed in order to provide parents of children with disabilities an equal opportunity to exercise the same choice to enroll their children with disabilities in an inclusive and diverse charter school. As discussed above, it is critical to ensure that IEP teams lawfully determine each student's LRE based on the student's unique disability related needs as set forth in her IEP, not based on a diagnosis, a specific disability label, or because the student requires needed modifications in the general education curriculum.<sup>191</sup> Placement decisions by IEP teams cannot be an impediment to parents of children with disabilities exercising the right to choose, provided the choice enables the student to receive a FAPE consistent with LRE. Such placement decisions cannot be based on the availability of placement options, administrative convenience, institutional barriers to providing supportive, related services in charter school settings, or based on the nature of students' particular disabilities rather than their individual needs.<sup>192</sup> Only after the team has developed the student's IEP, may it determine the appropriate setting for delivering such services; LRE is an integral part of the placement determination. That decision must be as legally rigorous for IEP teams as for parents who are seeking to place their child with a disability in a separate charter school that is identifiable as a school for students with disabilities.<sup>193</sup>

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Charter schools designed to serve exclusively students with disabilities currently represent only two percent of the charter schools in operation nationally, but their growth has been rapid. In 2008, of 3632 charter schools across the country, 71 schools were designed specifically for students with disabilities, and 33

<sup>191</sup> 34 C.F.R. § 300.116(e).

<sup>192</sup> See Office of Special Education and Rehabilitative Services, U.S. Department of Education, *Letter to Johnson*, 213 IDELR 182 (1988); Office of Special Education Programs, U.S. Department of Education, *Letter to Van Wart*, 20 IDELR 1217 (1993).

<sup>193</sup> But note the importance of State law. Under NY law, charter schools that are stand-alone LEAs are not public schools/LEAs for purposes of providing special education or transportation. The district of residence remains responsible for childfind and ensuring FAPE to students living within the district who attend charter schools. Therefore, even if a student with a disability wins the lottery to attend the charter school, barring consensus by the Committee on Education for the district of residence to place the child at the charter school, the charter school has no choice but to discharge the student to the district of residence, thus obviating or at least limiting parental choice. NY EDUC. LAW 2853(4).



of them were chartered in just two years.<sup>194</sup> These “niche charter schools” must still adhere to the requirements of IDEA and Section 504 that all students be provided FAPE through a continuum of alternative placements and be educated in the LRE.<sup>195</sup>

Although schools with special identities for serving students with disabilities may offer valuable accommodation for some students, such schools “also depart from the legal presumption in favor of assuring students learn alongside those without disabilities.”<sup>196</sup> Some states apparently allow a programmatic focus on disability inclusion, provided interested students without

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disabilities are eligible for admission. Yet, even if charter schools designed specifically for students with disabilities are open to admit students without disabilities, such schools are not likely to attract a critical mass of students without disabilities.<sup>197</sup> If a student’s IEP team determines that the student’s appropriate placement is in an educational environment that would encourage interaction with peers without disabilities, that goal may not be achievable in the context of a niche charter school.<sup>198</sup> Since very few students with disabilities require educational placements completely separate from their peers without disabilities,<sup>199</sup> school officials must

consistently monitor and ensure that every child enrolled in such a separate publicly funded, identifiable school could not receive an appropriate education in a less restrictive classroom, and that students’ instructional placements are changed as they progress and demonstrate that the separate school placement is no longer necessary.<sup>200</sup>

<sup>194</sup> Mead, *supra* note 92, at 10.

<sup>195</sup> See Decker et al, *supra* note 97, at 1.

<sup>196</sup> Minow, M. (2011). Confronting the Seduction of Choice: Law, Education and American Pluralism. *Yale Law Journal*, 120, 814, 839-40.

<sup>197</sup> Mead, *supra* note 92, at 11, 15-16.

<sup>198</sup> *Id.*

<sup>199</sup> *Id.* at 6 (“[O]nly four (4) percent of children are educated in educational environments completely separate from their non-disabled peers”).

<sup>200</sup> *Id.* at 14-15.



Although some disability specific charter schools may be a more appropriate educational option for some students with disabilities,<sup>201</sup> there is also the possibility that “local school choice programs can give parents of students without disabilities an end-run option and draw parents of students with disabilities into specialized schools without a inclusive mission.”<sup>202</sup> As the charter school movement continues to expand nationwide, disability advocates are likely to find themselves positioned on both sides of the debate surrounding the efficacy of educating students with disabilities in charter schools. Regardless of the policy opinions driving the debate, the law is clear. Students with disabilities who are educated in public schools, either traditional or charter, must be provided FAPE in the LRE. Although charter schools may be freed from some of the restraints placed on traditional educational institutions, they are not free from the requirements of IDEA or Section 504. Charter school administrators, LEA officials, and State education officials must be vigilant in the presence of competing incentives to ensure that each student with a disability is provided with an education consistent with their rights under the law.

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#### D. Effectiveness of Charter Schools and Accountability

Despite the increasing impetus to expand charter schools, the research remains limited, inconsistent, and for the most part, inconclusive as to whether charter school students are actually more effectively learning and performing than students of similar backgrounds enrolled in traditional public schools. This is especially true for students with disabilities for whom enrollment data is limited. Charter schools are generally small in size compared to traditional public schools, and, as discussed above, typically enroll a small number of students with high incident disabilities. Not only is the data not disaggregated by type of disability, but under Title I Part A of the ESEA reporting on the disability subgroup, itself, is often omitted based on the minimum group size (“n”) required to ensure statistical reliability set by the states. Accurate data on disability is also elusive because of variables related to “counseling out” or other “push-out” policies and practices affecting students being present to receive meaningful opportunities to learn.

There is a tension and even a disincentive for charter schools seeking to meet their performance objectives – all too often limited to outcomes based on test scores within the period of their charter (usually 3-5 years) – to fulfill their legal obligations by enrolling and providing FAPE to all students who seek

<sup>201</sup> Rhim, *supra* note 151 at 3.

<sup>202</sup> Minow, *supra* note 196, at 843.

admission in undersubscribed schools or are selected through the single lottery, including students with more significant disabilities with resource-intensive learning needs. Charter schools that are their own LEAs by definition may lack capacity with neither adequate resources nor a support network to meet the needs of students with disabilities.

A national study of charter schools by the National Center on Educational Statistics (NCES), U. S. Department of Education, using the National Assessment of Educational Progress (NAEP), found charter schools underperforming traditional public schools—20 of 22 outcomes favored the public schools.<sup>203</sup> Other studies criticized the methodology and analysis, finding more positive achievement results for students attending charter schools.<sup>204</sup> The authors of *The Charter School Dust-Up* affirmed the NCES report’s findings, and underscored that despite poor academic outcomes, only an estimated 0.6 % of charters had been closed for academic reasons.<sup>205</sup>

More recent studies examining the effectiveness of charter schools for the general student population continue to show mixed results. In the Nation’s most comprehensive study of charters, the Center for Research on Education Outcomes (CREDO) at Stanford University used 2003-2008 state longitudinal student performance data to compare the academic performance of charter schools student to “virtual twins” in traditional public schools.<sup>206</sup> The researchers found in math that 17 percent of charters performed better than traditional public schools, 46 percent showed indistinguishable growth, and 37 percent showed growth below their traditional public school peers.<sup>207</sup> The study also found, however, that low-income students at charter schools significantly outperform their public school peers, and a wide variance in the quality and performance of the nation’s several thousand charter schools.<sup>208</sup>

Research conducted by the RAND Corporation concluded that “[o]n average, across varying communities and policy environments, charter middle and

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<sup>203</sup> U.S. Department of Education, Institute of Education Sciences, National Center for Education Statistics (2003). *America's Charter Schools: Results From the NAEP 2003 Pilot Study*, NCES 2005-456. Washington, DC: National Center for Education Statistics. Retrieved from <http://nces.ed.gov/nationsreportcard/studies/charter/2005456.asp>.

<sup>204</sup> See Hoxby, C.M., and Rockoff, J.E. (2005). *The Impact of Charter Schools on Student Achievement* 33. Retrieved from <http://www.ccpr.ucla.edu:8080/CCPRWebsite/events/ccpr-seminars-previous-years/Sem05W%20Hoxby%20Impact%20of%20Charter%20Schools.pdf>.

<sup>205</sup> Carnoy *et al.* (2005). In addition to finding that charter schools do not outperform public schools, the authors concluded that the low performance of charter schools could not be ascribed to their enrolling the “disadvantaged of the disadvantaged.” Interviews with teachers of KIPP Academies indicated that they recruited mostly able students who came from intact families and whose parents were unusually involved in the school. *Id.* at 58.

<sup>206</sup> Center for Research on Education Outcomes (CREDO) (2009). *Multiple Choice: Charter School Performance in 16 States*. Stanford, CA: retrieved from [http://credo.stanford.edu/reports/MULTIPLE\\_CHOICE\\_CREDO.pdf](http://credo.stanford.edu/reports/MULTIPLE_CHOICE_CREDO.pdf).

<sup>207</sup> *Id.*, at 3, 44.

<sup>208</sup> *Id.*, at 3, 10, 13, 35, 44.

high schools produce achievement gains that are about the same as those in traditional public schools.”<sup>209</sup> The Rand report followed the test scores of thousands of middle- and high school students who transferred in or out of charter schools in Chicago, Denver, Milwaukee, Philadelphia, San Diego, Ohio and Texas, comparing the progress of students in charters to the progress of the same students in regular public schools.<sup>210</sup> Charter schools in Ohio and four of the cities produced the same achievement gains in math and reading as regular public schools, while in Chicago and Texas, they fell short of those in regular public schools.<sup>211</sup>

On the other hand, a study led by Stanford researcher Caroline Hoxby concluded based on a review of 8 years’ data, comparing “lotteried in” to “lotteried out” students enrolled in test-taking grades in charter schools in New York City, that charter schools would close the achievement gap between those in the poorest and the wealthiest districts.<sup>212</sup> The study, which was specific to charter schools in NYC that are disproportionately attended by low-income and African American students, is of particular interest in that it identified policies associated with a charter school’s having better effects on achievement based on test scores in reading and math. The policies that the researchers did not contend *cause* achievement to improve include:

- A long school year;
- A greater number of minutes devoted to English during each school day;
- A small rewards/small penalties disciplinary policy;
- Teacher pay based somewhat on performance or duties, as opposed to a traditional pay scale based strictly on seniority and credentials;
- A mission statement that emphasizes academic performance, as opposed to other goals.<sup>213</sup>

A second major study of NYC charter schools by Margaret Raymond reflected more modest outcomes than the Hoxby study, but similarly showed that charter schools in NYC perform at a significantly higher level than charter schools

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<sup>209</sup> RAND Education (2009). *Research Brief: Are Charter School Making a Difference? A Study of Student Outcomes in Eight States 2*. See also National Center for Education Evaluation and Regional Assistance (NCEE). (June 2010). *The Evaluation of Charter School Impacts – Final Report 78* (“Studies that covered a wide span of states and/or districts...found nonpositive average impacts.”).

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> New York City Charter Schools Evaluation Project (Sept. 2009) (principal investigators Caroline M. Hoxby, Sonali Murarka, Jenny Kang), *How New York City’s Charter Schools Affect Achievement* IV-1. Retrieved from

[http://www.nber.org/~schools/charterschoolseval/how\\_NYC\\_charter\\_schools\\_affect\\_achievement\\_sept2009](http://www.nber.org/~schools/charterschoolseval/how_NYC_charter_schools_affect_achievement_sept2009).

<sup>213</sup> *Id.* at V-3. See also Viadaro, D. (2009). NYC Charters Found to Close Gaps. *Education Week*. Retrieved from

<http://www.edweek.org/ew/articles/2009/09/22/05charter.h29.html?tkn=PNOFL6O3EutDM1KkM0LoKCxpsk tYYm1CIUdV>.

nationally as reflected by the CREDO national study.<sup>214</sup> Raymond found that 51 percent of NYC charters produced significant gains in math, but only 29 percent did so in reading.<sup>215</sup> In addition to showing that 71 percent of NYC charters produced no significant gains in reading, this study – one of the few that tracked students with disabilities – reported that students who were in special education as well as students who were English-language learners experienced no significant gains or losses in charters.<sup>216</sup> Charter students who had been retained in grade also made no gains in reading and were outperformed in math by their peers in traditional public schools.<sup>217</sup> In reporting its finding about students receiving special education, the study expressly noted that “Of all the facets of the study, this one deserves the greatest degree of skepticism.”<sup>218</sup> The study explains that it is difficult to compare outcomes of students receiving special education regardless of where they enroll because of the “small numbers and diverse typologies in use across states; the result is that there is tremendous variation when all categories are aggregated, a necessary and messy requirement.”<sup>219</sup>

In the fall of 2011, the National Center for Education Evaluation released results of a large-scale randomized trial of the effectiveness of charter schools.<sup>220</sup> The report that covers 36 charter middle schools in 15 states compares outcomes of students who applied and were admitted to these schools through randomized admissions lotteries (lottery winners) with the outcomes of students who were not selected through the lottery (lottery losers).<sup>221</sup> Among the key findings are that on average, charter middle schools that hold lotteries are neither more nor less successful than traditional public schools in improving student achievement, behavior, and school progress; being admitted to a charter school significantly improved both students’ and parents’ satisfaction with school; consistent with prior studies, the impact of charter middle schools on student achievement varies significantly across schools; charter schools serving more low income or low achieving students had statistically significant positive effects on math test scores, while charter schools serving more advantaged students—those with higher income and prior achievement—had significant negative effects on math test scores.<sup>222</sup>

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<sup>214</sup> Center for Research on Education Outcomes (CREDO) (Jan. 2010) (principal investigator Margaret Raymond). *Charter School Performance in New York City*. Retrieved from <http://credo.stanford.edu>

<sup>215</sup> *Id.* at 5-6.

<sup>216</sup> *Id.* at 8-9.

<sup>217</sup> *Id.* at 11.

<sup>218</sup> *Id.* at 8.

<sup>219</sup> *Id.*

<sup>220</sup> Gleason, P., Clark, M., Tuttle, C., & Dwoyer, E. (2010). *The Evaluation of Charter School Impacts: Final Report* (NCEE 2010-4029). Washington, DC: National Center for Education Evaluation and Regional Assistance, Institute of Education Sciences, U.S. Department of Education. Retrieved from <http://ies.ed.gov/ncee>.

<sup>221</sup> *Id.*

<sup>222</sup> *Id.* at xvii-xviii, 81-85, Table VI.1. *Summary of Charter School Impacts on Achievement from Selected Research Studies*.

Preliminary findings from another national longitudinal study on the effect that nonprofit CMOs have on student achievement indicate that middle school students' test scores in reading, mathematics, science and social studies are not significantly better than students enrolled in traditional public schools.<sup>223</sup> The research focused on the viability of using the CMO model as a means of addressing the unevenness among individual charter schools and for scaling up successful charter schools.<sup>224</sup> CMOs serve a disproportionately large percentage of Black, Hispanic, and low-income students, but significantly fewer students with disabilities and English language learners than the comparison group of students enrolled in near-by district-run schools.<sup>225</sup>

## Conclusion

This paper has examined an array of issues associated with the education of students with disabilities in charter schools, including those that are autonomous schools functioning as part of an LEA, as an LEA in and of themselves, or as a school belonging to a network operated by an overriding management organization (CMO or EMO). We know from the evidence that the quality and performance of charter schools is very mixed and varies significantly from state to state. Generally speaking, despite the impetus and national support for their expansion, charter schools have failed to produce sustained evidence of innovative policies and practices associated with improved teaching and instruction and presumably associated with enhanced levels of proficiency and growth compared to traditional public schools.

It is not legally or morally acceptable that these so-called “schools of choice” that are concentrated in urban communities and supported with public funds, should be permitted to operate as segregated learning environments where students are more isolated by race, socioeconomic class, disability, and language than the public school district from which they were drawn.

Yet, despite what can only be described as underwhelming evidence of academic improvement (primarily based on test score data), charter school enrollment has

<sup>223</sup> Nirvi Shah, Academic Gains Vary Widely for Charter Networks. *Education Week*. Retrieved from <http://www.edweek.org/ew/articles/2011/11/04/11charter.h31.html?tkn=YL> (citing The National Study of Charter Management Organization (CMO) Effectiveness (Nov. 2011). Charter School Management Organizations: Diverse Strategies and Diverse Student Impacts, Ferguson, J. et al., Mathematica Policy Research & Bowen, M. et al., Center on Reinventing Public Education).

<sup>224</sup> *Id.*

<sup>225</sup> *Id.*

dramatically increased to more than two million students. It is essential to the degree that such schools of choice continue to exist that they are held accountable for ensuring access to all students, for providing meaningful teaching and instruction designed to improve educational outcomes that are not limited to test scores but the kind of knowledge and skills all students need to be college and career ready. It is not legally or morally acceptable that these so-called “schools of choice” that are concentrated in urban communities and supported with public funds, should be permitted to operate as segregated learning environments where students are more isolated by race, socioeconomic class, disability, and language than the public school district from which they were drawn. Moreover, to the extent these charter schools and charter school networks are valued and held to high standards, they must be held accountable under Section 504 and the ADA for ensuring equal educational opportunities to all students with disabilities and required to plan, develop and implement policies and practices to break down and eliminate systemic barriers to learning through innovative strategies and collaboration with other charters as well as traditional public schools. Finally, it is essential to focus on those individual charters or CMOs where particular subgroups of students appear to be more effectively learning (e.g., Arizona) and to ask what is working and how such instruction can be replicated so as to benefit other students with disabilities. The last time that IDEA was reauthorized in 2004, one of the options that received significant attention related to increasing parental choice under the Act.<sup>226</sup> Despite limited evidence of improved educational outcomes, in particular for the limited population of students with disabilities enrolled in charter schools, we should expect no less and be prepared to discuss using these schools and networks, to the extent they are of value to all students, as laboratories for exploring effective teaching and instruction for diverse learners.

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<sup>226</sup> See, e.g., Finn, C.E., Rotherham, A.J., & Hokanson, C.R. (2001). Conclusions and Principles for Reform. In C.E. Finn, A.J. Rotherham, & C.R. Hokanson, Jr. (eds.) *Rethinking Special Education for a New Century*. Washington, D.C., Thomas B. Fordham Foundation and Progressive Policy Institute.