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# Culture Clash: Special Education in Charter Schools

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# CULTURE CLASH: SPECIAL EDUCATION IN CHARTER SCHOOLS\*

ROBERT A. GARDA, JR.\*\*

*Charter schools and special education for disabled students are based on conflicting education reforms and agency oversight principles. Charter schools operate in a culture of regulatory freedom and flexibility. They arose out of the modern era of accountability reform, in which student outcomes are the primary measure of school success and the driving engine of agency oversight. In stark contrast, special education laws were conceived in the civil rights era of education reform, which emphasized process and paid little attention to outcomes. The education of disabled students is steeped in a culture of regulatory oversight focused on rigid compliance with complex procedures. Special education and charter schools stand on competing foundations in the same schoolhouse. The Article discusses this culture clash and the consequences to disabled students. The uncomfortable fit between charter schools and special education often leads to violations of disabled students' civil rights. The Article suggests how the three primary sources of law affecting charter schools—federal law, state law, and charter agreements—should be changed to achieve a seamless fit of charter schools' square peg into special education's round hole for the benefit of disabled students.*

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## INTRODUCTION

Blanca Diaz tensely sits in the school gymnasium with her three grandsons waiting to hear the outcome of the lottery. Not the state lottery for monetary riches, but a much more important one to determine the educational fate of the three boys: the charter school lottery. It is the type of life-altering moment documented in the controversial film *Waiting for "Superman,"*<sup>1</sup> and Blanca Diaz is a joyous winner on this day, securing a spot for her grandsons in the Seven Hills Charter School. But the elation is later crushed when

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1. WAITING FOR "SUPERMAN" (Electric Kinney Films, Participant Media & Walden Media 2010).

Seven Hills refuses to enroll two of the boys because they are disabled. The lottery winners become lottery losers simply because of their disabilities. This story of dashed hopes repeats itself across the country for many disabled children.<sup>2</sup> Parents are told that the charter school to which they just won precious admission either will not, or cannot, properly serve their children. This is but one example of how charter schools violate federal statutes protecting the rights of disabled students. This Article discusses how, and why, charter schools often do not properly admit or serve disabled students, and what changes should be made to state and federal law to solve the problem.

Charter schools are the “kudzu of school choice” and their spread is inevitable.<sup>3</sup> More than two million public school students attend the over 5,000 public charter schools in forty states and the District of Columbia,<sup>4</sup> but these figures understate the impact of charter schools. In eighteen school districts, charter schools serve more than 20% of students, and in nearly 100 school districts they educate more than 10%.<sup>5</sup> Furthermore, the number of students enrolled in charter schools is growing exponentially, more than tripling in the last decade.<sup>6</sup> The number of charter schools will

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2. This story is based on personal accounts in Nancy J. Zollers & Arun K. Ramanathan, *For-Profit Charter Schools and Students with Disabilities: The Sordid Side of the Business of Schooling*, 80 PHI DELTA KAPPAN 297, 299 (1998). Similar stories abound around the country. See, e.g., S. POVERTY LAW CTR., ACCESS DENIED: NEW ORLEANS STUDENTS AND PARENTS IDENTIFY BARRIERS TO PUBLIC EDUCATION 10–13 (2010), available at [http://www.splcenter.org/sites/default/files/downloads/publication/SPLC\\_report\\_Access\\_Denied.pdf](http://www.splcenter.org/sites/default/files/downloads/publication/SPLC_report_Access_Denied.pdf).

3. James E. Ryan, *The Political Economy of School Choice*, 111 YALE L.J. 2043, 2074 (2002); see CTR. FOR RESEARCH ON EDUC. OUTCOMES, STANFORD UNIV., MULTIPLE CHOICE: CHARTER SCHOOL PERFORMANCE IN 16 STATES 6, 9 (2009) [hereinafter CREDO STUDY].

4. Christine Armario, *Number of Students Attending Charter Schools Soars*, BOSTON.COM (Dec. 7, 2011), [http://articles.boston.com/2011-12-07/news/30486920\\_1\\_public-charter-schools-lynn-norman-teck-florida-consortium](http://articles.boston.com/2011-12-07/news/30486920_1_public-charter-schools-lynn-norman-teck-florida-consortium); *The Public Charter Schools Dashboard—Schools Overview*, NAT’L ALLIANCE FOR PUB. CHARTER SCHS., <http://www.publiccharters.org/dashboard/schools/page/overview/year/2011> (last visited Feb. 22, 2012) [hereinafter *National Schools Overview*].

5. NAT’L ALLIANCE FOR PUB. CHARTER SCHS., A GROWING MOVEMENT: AMERICA’S LARGEST CHARTER SCHOOL COMMUNITIES 1 (6th ed. 2011), available at [http://www.publiccharters.org/data/files/Publication\\_docs/2011%20NAPCS%20Market%20Share%20Report\\_20111013T104601.pdf](http://www.publiccharters.org/data/files/Publication_docs/2011%20NAPCS%20Market%20Share%20Report_20111013T104601.pdf). Charter schools are becoming the “new normal” in urban school districts, such as Detroit, Philadelphia, Los Angeles, and Chicago. Mary Ann Zehr, *New Urban Playbook: Hand Over Schools to Charter Operators*, EDUC. WK. (Dec. 13, 2011), <http://www.edweek.org/ew/articles/2011/03/21/26detroit.h30.html?tkn=SSXFAT%2FPAdH47bWdKCrluVzZqnMgo87K6kl%2B&intc=es>.

6. NAT’L CTR. FOR EDUC. STATISTICS, U.S. DEP’T OF EDUC., NCES 2011-033, THE CONDITION OF EDUCATION 2011, at 24 (2011), available at <http://nces.ed.gov/pubs2011>

continue to increase because they enjoy bipartisan support on the state and federal level;<sup>7</sup> are backed by powerful business interests, charitable foundations, and heavyweights in education leadership positions;<sup>8</sup> are supported by federal grants and institutionalized by federal legislation, including President Obama's recent Race to the Top Fund;<sup>9</sup> and are increasingly demanded by parents.<sup>10</sup> There is, in

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/2011033.pdf. Between 1999 and 2009, the number of charter schools, and the number of students they served, more than tripled. *Id.*; see *National Schools Overview*, *supra* note 4.

7. Nina Gupta, *Rationality & Results: Why School Choice Efforts Endure Despite a Lack of Improvement on Student Achievement*, 3 J. MARSHALL L.J. 199, 206–07 (2010); see PAUL E. PETERSON, *SAVING SCHOOLS: FROM HORACE MANN TO VIRTUAL LEARNING* 215 (2010) (noting that bipartisan support for charter schools contributed significantly to the rapid advancement of charter legislation on the state and national level); Thomas Hehir, *Charters: Students with Disabilities Need Not Apply?*, EDUC. WK., Jan. 27, 2010, at 18 (noting bipartisan support for increasing charter school numbers).

8. See, e.g., Nancy Hass, *Scholarly Investments*, N.Y. TIMES, Dec. 6, 2009, at ST1 (calling charter schools a “hot cause” for New York hedge fund managers); Joel Klein et al., Editorial, *How To Fix Our Schools: A Manifesto*, WASH. POST, Oct. 10, 2010, at B1 (arguing that educators, superintendents, chief executives, and chancellors “must make charter schools a truly viable option”). *But see* James Forman, Jr., *Do Charter Schools Threaten Public Education? Emerging Evidence from Fifteen Years of a Quasi-Market for Schooling*, 2007 U. ILL. L. REV. 839, 869–73 (arguing that charter schools’ reliance on private funding makes them financially vulnerable).

9. The federal government granted more than \$250 million to charter schools in fiscal year 2011 and proposed increasing that number in 2012 pursuant to the Charter School Program, 20 U.S.C. §§ 7221–7223j (2006). Press Release, U.S. Dep’t of Educ., U.S. Department of Education Awards Nearly \$5 Million in Charter School Grants for Planning, Program Design, Implementation and Dissemination (Oct. 5, 2011), *available at* <http://www.ed.gov/news/press-releases/us-department-education-awards-nearly-5-million-charter-school-grants-planning-p>. Charter schools are institutionalized by the No Child Left Behind Act, 20 U.S.C. § 6316(b)(8)(A)–(B)(i) (2006), which permits failing conventional schools to restructure themselves as charter schools; *see also* Margaret J. McLaughlin & Lauren Morando Rhim, *Accountability Frameworks and Children with Disabilities: A Test of Assumptions About Improving Public Education for All Students*, 54 INT’L J. DISABILITY, DEV. & EDUC. 25, 28 (2007) (claiming charter schools will likely grow because they are institutionalized by No Child Left Behind (“NCLB”)).

The Race to the Top Fund, established under the American Recovery and Reinvestment Act of 2009, listed as one criteria for aid receipt, the extent to which a given state’s laws do “not prohibit or effectively inhibit increasing the number of charter schools . . . or otherwise restrict student enrollment in charter schools.” Race to the Top Fund, 74 Fed. Reg. 37,804, 37,804, 37,809 (July 29, 2009); *see also* U.S. DEP’T OF EDUC., NCEE 2010-4029, *THE EVALUATION OF CHARTER SCHOOL IMPACTS: FINAL REPORT 1* (2010) [hereinafter U.S. DEP’T OF EDUC., FINAL REPORT], *available at* <http://ies.ed.gov/ncee/pubs/20104029/pdf/20104029.pdf> (noting that charter schools are poised for “another period of significant growth” because of the Race to the Top Fund); *Race to the Top Fund*, U.S. DEP’T EDUC., <http://www.ed.gov/programs/racetothetop/index.html> (last visited Feb. 22, 2012) (providing an overview and proposed priorities of the program).

10. CTR. FOR EDUC. REFORM, *ANNUAL SURVEY OF AMERICA’S CHARTER SCHOOLS* 9 (Jeanne Allen & Alison Consoletti eds., 2010).

short, a “perfect storm of political and economic circumstance leading to a new era in charter school policy.”<sup>11</sup>

The proliferation of charter schools suggests that they are superior to traditional public schools, but debate rages on that issue.<sup>12</sup> One thing is certain—charter schools struggle to enroll and appropriately serve students with disabilities such as mental retardation; serious emotional disturbance; autism; specific learning disabilities; and hearing, speech, language, or orthopedic or visual impairments.<sup>13</sup> The harm to disabled students is obvious: they are denied equal educational choices and opportunities in violation of their civil rights. The harm to the charter movement is more subtle. Chester Finn, a staunch charter advocate, predicted early in the movement that “special education may turn out to be the most dangerous land-mine buried on the charter school’s property.”<sup>14</sup> This premonition is proving to be correct. Charter schools’ violation of disabled students’ civil rights undermines their viability as a widespread alternative to traditional schools. Charter schools’ treatment of disabled students has been overlooked for far too long.

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11. CREDO STUDY, *supra* note 3, at 9.

12. See BRIAN GILL ET AL., RHETORIC VERSUS REALITY: WHAT WE KNOW AND WHAT WE NEED TO KNOW ABOUT VOUCHERS AND CHARTER SCHOOLS 105 (RAND Corp. 2d ed. 2007) (concluding that charter school achievement results are mixed); DIANE RAVITCH, THE DEATH AND LIFE OF THE GREAT AMERICAN SCHOOL SYSTEM 138–44 (2010) (giving a concise summary of studies regarding charter school efficacy); U.S. DEP’T OF EDUC., FINAL REPORT, *supra* note 9, at 3, 75–77 (summarizing research regarding charter schools’ effect on student achievement); see, e.g., THE CENTURY FOUND., CHARTER SCHOOLS THAT WORK: ECONOMICALLY INTEGRATED SCHOOLS WITH TEACHER VOICE 2–8 (2010) (“[T]he general performance of charter schools nationally has been largely disappointing.”).

13. See *infra* Part II. This Article uses the legal definitions of “child with a disability” from the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1401(3)(A) (2006), and “an individual with a disability” from section 705 of the Rehabilitation Act, 29 U.S.C. § 705(20)(B) (2006). See Robert J. Martin, *Charter School Accessibility for Historically Disadvantaged Students: The Experience in New Jersey*, 78 ST. JOHN’S L. REV. 327, 368 (2004) (noting the implication that some charter schools fail to meet federal disability law requirements); Timothy E. Morse, *New Orleans’s Unique School Reform and Its Potential Implications for Special Education*, 42 EDUC. & URB. SOC’Y 168, 172 (2010) (stating that charter schools struggle with addressing the needs of students protected by IDEA); Lan Hue Quach, *A Paradox of Care: [Re]-Examining Education for Students with Diverse Needs*, 19 EDUC. FOUND. 67, 69 (2005) (noting that charter schools often fail to meet disabled children’s needs); Sarah Carr, *Charter Schools Struggle To Meet Special Education Needs*, TIMES-PICAYUNE (New Orleans, La.) (Jan. 5, 2008), [http://www.nola.com/news/index.ssf/2008/01/charter\\_schools\\_struggle\\_to\\_me.html](http://www.nola.com/news/index.ssf/2008/01/charter_schools_struggle_to_me.html) (noting that New Orleans’s charter schools serve “significantly fewer” disabled students than their traditional counterparts).

14. Joseph R. McKinney, *Charter Schools’ Legal Responsibilities Toward Children with Disabilities*, 126 EDUC. L. REP. 565, 576 (1998).

Solutions must be considered during the impending reauthorizations of the Individuals with Disabilities in Education Act (“IDEA”)<sup>15</sup> and the No Child Left Behind Act (“NCLB”).<sup>16</sup>

Part I of this Article describes how the cultures of special education and charter schools are different “[a]t their core.”<sup>17</sup> The charter movement is rooted in the exchange of autonomy and independence for educational results. Regulators judge charter schools by the performance of their students, not adherence to mandatory processes. As famously stated by President Clinton, they are “schools that have no rules.”<sup>18</sup> But charter schools must comply with the laws governing disabled students—IDEA, Section 504 of the Rehabilitation Act, and the Americans with Disabilities Act.<sup>19</sup> These civil-rights era laws emphasize strict adherence to intricate procedures more than educational results and presume the existence

15. 20 U.S.C. § 1400. “[IDEA is] scheduled to be reauthorized in 2011, [but] could be delayed until 2013 or later.” NAT’L SCH. BDS. ASS’N, ISSUE BRIEF: INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA): EARLY PREPARATION FOR REAUTHORIZATION 12 (2011), available at <http://www.nsba.org/Advocacy/Key-Issues/SpecialEducation/NSBA-Issue-Brief-Individuals-with-Disabilities-Education-Act-IDEA.pdf>.

16. No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (codified as amended in scattered sections of 20 U.S.C.). Charter schools’ treatment of disabled students dominated committee discussion regarding legislation rewriting NCLB. Sam Dillon, *As U.S. Aid Grows, Oversight Is Urged for Charter Schools*, N.Y. TIMES, Feb. 25, 2010, at A16.

17. *The All Students Achieving Through Reform Act of 2009: Hearing on H.R. 4330 Before the H. Comm. on Educ. and Labor*, 111th Cong. 27–30 (2010) (statement of Eileen Ahearn, Director, Nat’l Ass’n of State Dirs. of Special Educ.) [hereinafter *Ahearn Testimony*], available at <http://www.gpo.gov:80/fdsys/pkg/CHRG-111hhrg54829/pdf/CHRG-111hhrg54829.pdf>; see also TERRY L. JACKSON, PROJECT FORUM, NAT’L ASS’N OF STATE DIRS. OF SPECIAL EDUC., CHARTER SCHOOLS: RESEARCH ON SPECIAL EDUCATION 15 (2003) (noting “policy tension between charter schools and special education”); Rebekah Gleason, *Charter Schools and Special Education: Part of the Solution or Part of the Problem?*, 9 D.C. L. REV. 145, 146 (2007) (noting “inherent[] conflict” between special education and charter schools); Margaret J. McLaughlin, *Evolving Interpretations of Educational Equity and Students with Disabilities*, 76 EXCEPTIONAL CHILD. 265, 265 (2010) (identifying tension between special education and standards-driven reform); McLaughlin & Rhim, *supra* note 9, at 38–42 (identifying “inherent tension[]”); Morse, *supra* note 13, at 171 (stating that the IDEA is “[c]ounter to” the autonomy granted to charter schools).

18. *October 6, 1996: The First Clinton-Dole Presidential Debate*, COMM’N ON PRESIDENTIAL DEBATES (Oct. 6, 1996), <http://www.debates.org/index.php?page=october-6-1996-debate-transcript>.

19. Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (2006); Americans with Disabilities Act (ADA) of 1990, 42 U.S.C. § 12101 (2006). For discussion of the applicability of these statutes to charter schools in general, see Jay P. Heubert, *Schools Without Rules? Charter Schools, Federal Disability Law, and the Paradoxes of Deregulation*, 32 HARV. C.R.-C.L. L. REV. 301, 303, 315, 343–45 (1997); Martin, *supra* note 13, at 345.

of a large and established bureaucracy overseeing numerous schools working collectively. These foundations contrast starkly with the fundamental nature and culture of charter schools and pit regulation against autonomy, procedures against results, rigid bureaucracy against flexibility, and collective action against independence—all in the same school house.

Part II explains how this clash of cultures results in charter schools constantly struggling to properly serve disabled students, often in violation of their civil rights. The clash manifests itself by charter schools failing to enroll disabled students, particularly severely disabled students. It also results in charter schools failing to fulfill basic federally mandated obligations such as identifying and evaluating all disabled students and educating them in the least restrictive environment. While not all charter schools are guilty of these civil rights violations, and not all traditional schools are innocent, the inherent tension between special education law and charter schools makes compliance challenging.<sup>20</sup>

The competing principles of special education and charter schools—and the resulting problems—raise fundamental questions about both the charter movement and special education law. Should the law change to force charter schools to adapt to the culture of special education or should special education adapt to the accountability principles embodied in charter schools? The answer is probably a little of both. In the long run, disability law can and should adopt the accountability principles that have dominated education reform over the last two decades. But in the short term, the autonomy of charter schools should yield to the prescriptive nature of special education. Part III discusses how federal law, state law, and charter agreements should be changed to better ensure that charter schools properly serve disabled students. IDEA should be amended to prohibit charter schools from being independent local educational agencies for purposes of special education. State law should demand that charters become part of educational service agencies, made up

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20. See, e.g., PRESIDENT'S COMM'N ON EXCELLENCE IN SPECIAL EDUC., A NEW ERA: REVITALIZING SPECIAL EDUCATION FOR CHILDREN AND THEIR FAMILIES 39 (2002), available at [http://www2.ed.gov/inits/commissionsboards/whspecialeducation/reports/images/Pres\\_Rep.pdf](http://www2.ed.gov/inits/commissionsboards/whspecialeducation/reports/images/Pres_Rep.pdf) (commenting that in order for charter schools to meet the needs of students with disabilities, states need to provide equitable access to special education funding). But see Lauren Morando Rhim, Eileen M. Ahearn & Cheryl M. Lange, *Charter School Statutes and Special Education: Policy Answers or Policy Ambiguity?*, 41 J. SPECIAL EDUC. 50, 51 (2007) (arguing that the core differences between charter schools and special education regulations could give rise to a “harmonious merger”).



exclusively of charter schools, for the provision of special education. State law should also require charter applicants to develop detailed plans and budgets for special education provisions and should also remove enrollment decisions from charter operators. Finally, charter authorizers should execute charter agreements with concrete goals for disabled students, more rigorously review charter school compliance with laws protecting disabled students, and punish schools for violations. These changes re-align the culture of charter schools with special education for the benefit of disabled students.

## I. THE CULTURE CLASH BETWEEN CHARTER SCHOOLS & SPECIAL EDUCATION

### A. *The Charter School Culture*

Charter schools were conceived in the early stages of the accountability era of education reform. In the 1980s, education reform shifted from focusing on inputs, such as procedural compliance and racial compositions, to outcomes, such as graduation rates and student performance on standardized tests.<sup>21</sup> The movement was founded on the idea that schools would improve if they were held accountable either through sanctions if their students failed to meet educational benchmarks or from market pressures exerted by parents choosing schools. Charter schools advance both the market and standards-based accountability ideals.

Charter schools are public schools that operate with freedom from many of the local and state regulations that apply to traditional public schools. They exist by charter, or contract, with authorizers such as school districts, state school boards, or universities. The charter authorizers monitor charter school quality and hold schools accountable for fiscal practices and the academic results promised in the charter.<sup>22</sup> Charters are also schools of choice, meaning no student

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21. Heubert, *supra* note 19, at 303 n.10; McLaughlin & Rhim, *supra* note 9, at 26–28; see Robert A. Garda, Jr., *Coming Full Circle: The Journey from Separate but Equal to Separate and Unequal*, 2 DUKE J. CONST. L. & PUB. POL'Y 1, 22–32 (2007) (chronicling the rise of the school choice and accountability movement). For a discussion of the general move in government from a focus on procedures to an emphasis on outcomes and how it impacted education reform, see Elaine Ciulla Kamarck, *The End of Government as We Know It*, in MARKET-BASED GOVERNANCE: SUPPLY SIDE, DEMAND SIDE, UPSIDE, AND DOWNSIDE 227, 251 (John D. Donahue & Joseph S. Nye, Jr. eds., 2002); ROBIN J. LAKE & PAUL T. HILL, CTR. ON REINVENTING PUB. EDUC., PERFORMANCE MANAGEMENT IN PORTFOLIO SCHOOL DISTRICTS 12–16 (2009).

22. There are numerous definitions of “charter schools” because of significant variations among the states. For general definitions, see 20 U.S.C. § 7221i(1) (2006)

is compelled to attend. The basic principles of charter schools—autonomy, accountability, and choice—perfectly matched the goals of the accountability movement.

### 1. Autonomy & Independence

The foundation of the charter movement is autonomy and independence: freedom from rules and regulations that govern traditional schools.<sup>23</sup> The national mood at the time charters arose was that government and bureaucracy were part of the problem with education, and that schools needed to be deregulated to act more like businesses.<sup>24</sup> Albert Shanker, an early proponent of charter schools, argued that they needed to be “totally autonomous”<sup>25</sup> to decide budget, hiring, and curriculum. Chester Finn also noted early in the charter movement that the best charter schools “have near total independence to decide what to teach and how to teach it, whom to hire and how to use their resources, what hours to operate and how best to meet students’ needs.”<sup>26</sup> This freedom from regulation, it was urged, would provide the flexibility that is necessary for school innovation and improvement.<sup>27</sup>

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(defining charter schools for purposes of eligibility for federal grants); *About Charter Schools*, NAT’L ALLIANCE FOR PUB. CHARTER SCHS., <http://www.publiccharters.org/about-charter-schools.aspx> (last visited Feb. 22, 2012); *Issues*, CTR. FOR EDUC. REFORM, <http://www.edreform.com/issues/choice-charter-schools/facts/> (last visited Feb. 22, 2012); *School Choices for Parents*, U.S. DEP’T EDUC., <http://www2.ed.gov/parents/schools/choice/definitions.html> (last modified Jan. 14, 2009).

23. EILEEN M. AHEARN ET AL., PROJECT SEARCH, NAT’L ASS’N OF STATE DIRS. OF SPECIAL EDUC., SPECIAL EDUCATION AS REQUIREMENTS IN CHARTER SCHOOLS: FINAL REPORT OF A RESEARCH STUDY 4 (2001), available at <http://www.nasds.org/Portals/0/Documents/ProjectSearch.pdf> (stating that charter schools are grounded in the proposition that deregulation can improve public education); Lauren Morando Rhim & Margaret McLaughlin, *Students with Disabilities in Charter Schools: What We Now Know*, FOCUS ON EXCEPTIONAL CHILD., Jan. 2007, at 1, 2 (“The core principles underlying charter schools are *autonomy* and *choice*.”).

24. LARRY CUBAN, THE BLACKBOARD AND THE BOTTOM LINE: WHY SCHOOLS CAN’T BE BUSINESSES 142 (2004); Forman, Jr., *supra* note 8, at 843, 848, 851.

25. DANA BRINSON & JACOB ROSCH, THOMAS B. FORDHAM INST., CHARTER SCHOOL AUTONOMY: A HALF-BROKEN PROMISE 6 (2010), available at [http://www.coweninstitute.com/wp-content/uploads/2010/04/201004\\_CharterAutonomyReport.pdf](http://www.coweninstitute.com/wp-content/uploads/2010/04/201004_CharterAutonomyReport.pdf).

26. Chester E. Finn, Jr., Op-Ed., *Beating Up on Charter Schools*, N.Y. TIMES, Aug. 24, 1996, at 23.

27. See Heubert, *supra* note 19, at 307 n.25 (noting that most state charter statutes cite promoting innovation through deregulation as a goal of charter schools). For examples of state statutes that specifically mention flexibility and innovation as legislative purposes for creating charter schools, see, for example, CAL. EDUC. CODE § 47605(l) (West 2006); FLA. STAT. ANN. § 1002.33(6)(i) (West 2009); HAW. REV. STAT. ANN. § 302B-1 (LexisNexis 2010); 105 ILL. COMP. STAT. ANN. 5/27A-2(a)(2) (West 2006); IND. CODE ANN. § 20-24-2-1(4) (LexisNexis 2005); N.M. STAT. ANN. § 22-8B-3 (West 2011); OR. REV. STAT.

The importance of autonomy to charter schools is evident in state and federal statutes. State charter enabling statutes typically mention the principle of autonomy or independence for charter schools<sup>28</sup> and grant them significant freedom from state and local laws and regulations.<sup>29</sup> The Federal Charter School Program grants money to states to develop charter schools, but the statute gives priority to states if state legislation provides charter schools autonomy over their finances and expenditures.<sup>30</sup>

Despite the autonomy granted by statute, charter advocates vociferously push for even more independence. Advocates grade state charter enabling statutes based in large part on the amount of freedom charter schools have from state and local regulation<sup>31</sup> and criticize any legislation that decreases school autonomy.<sup>32</sup> Charter

§ 338.015 (2007); S.C. CODE ANN. § 59-40-30(A) (2004); TENN. CODE ANN. § 49-13-102(b) (2009).

28. See, e.g., ARK. CODE ANN. § 6-23-102(6) (2007); CAL. EDUC. CODE § 47601; COLO. REV. STAT. § 22-30.5-301(2) (2011); CONN. GEN. STAT. ANN. § 10-66aa(1)(D) (West 2010); DEL. CODE ANN. tit. 14, §§ 501, 503 (2007); IDAHO CODE ANN. § 33-5202 (2008); LA. REV. STAT. ANN. § 17:3972(A) (2001); MO. ANN. STAT. § 160.400(1) (West 2010); N.H. REV. STAT. ANN. § 194-B:1(III) (LexisNexis 2011); N.J. STAT. ANN. § 18A:36A-3(a) (West 1999); N.Y. EDUC. LAW §§ 2850(2), 2853(c) (McKinney 2009); N.C. GEN. STAT. § 115C-238.29A (2011); 24 PA. STAT. ANN. § 17-1702-A (West 2006); WYO. STAT. ANN. § 21-3-301 (2011); see also *Denver Bd. v. Booth*, 984 P.2d 639, 650 (Colo. 1999) (“The General Assembly intended the Charter Schools Act to create opportunities for innovation, autonomy, and reform in public schools.”); *Cnty. of Haw. v. ALA Loop Homeowners*, 235 P.3d 1103, 1159 (Haw. 2010) (holding that charter enabling legislation was designed to provide charter schools with autonomy); *Abbott v. Burke Implementing Regulations*, 792 A.2d 412, 447 (N.J. Super. Ct. App. Div. 2002) (holding that the Charter School Act codified the goal of autonomy).

29. For typical statutes exempting charter schools from state law, local regulations, and school board policies, see ALASKA STAT. § 14.03.255 (a)(1) (2010); ARIZ. REV. STAT. ANN. § 15-183(E)(5) (2009); ARK. CODE ANN. § 6-23-103(2) (2003); CAL. EDUC. CODE § 47610; COLO. REV. STAT. § 22-30.5-104(6); HAW. REV. STAT. ANN. § 302B-9; LA. REV. STAT. ANN. § 17:3996; UTAH CODE ANN. § 53A-1a-511 (LexisNexis 2009).

30. 20 U.S.C. § 7221a(e)(1)–(3) (2006).

31. See, e.g., THE CTR. FOR EDUC. REFORM, CHARTER SCHOOL LAWS ACROSS THE STATES: RANKINGS AND SCORECARD 7 (Alison Consoletti ed., 12th ed. 2011); *Measuring Up to the Model: A Tool for Comparing State Charter School Laws*, NAT’L ALLIANCE FOR PUB. CHARTER SCHS., <http://www.publiccharters.org/charterlaws> (last visited Feb. 22, 2012).

32. See Chester E. Finn & Amber M. Winkler, *Foreward* to BRINSON & ROSCH, *supra* note 25, at 4–5; see also SARAH MEAD & ANDREW J. ROTHERHAM, EDUC. SECTOR, A SUM GREATER THAN THE PARTS: WHAT STATES CAN TEACH EACH OTHER ABOUT CHARTER SCHOOLING 7–9, 17–18 (2007) (“[I]t is also clear that the autonomy/freedom side of the charter school bargain is not being realized in many states.”); Kara S. Finnigan, *Charter School Autonomy: The Mismatch Between Theory and Practice*, 21 EDUC. POL’Y 503, 523 (2007) (examining the degree of autonomy charter schools hold and the factors limiting their autonomy); Jeanne Allen, *Commentary, Charter Laws and Flawed Research*, EDUC. WK. (Sept. 8, 2009), <http://www.edweek.org/ew/articles/2009/09/08/03allen.h29.html>

schools often resort to the courts to maintain their autonomy from state control over curriculum, budgeting, and hiring practices.<sup>33</sup>

The autonomy ideal extends so far that in many states individual charter schools are considered their own free-standing school districts, or in technical jargon, local educational agencies (“LEAs”). LEAs, typically school districts overseeing numerous schools, are the primary government unit responsible for education in state and federal law. It is the LEA, not individual schools within the LEA, that bears final responsibility for compliance with most state and federal laws. The charter schools that are their own one-school LEAs, or what I will refer to as independent charter schools, are treated the same under state and federal law as school districts that usually contain numerous schools.<sup>34</sup> LEA status for a charter school is the ultimate in autonomy—it elevates an individual charter school to the same level of independence as an entire school district and entitles them to the same state and federal funding streams. More than half of the states that authorize charter schools allow them to exist as independent LEAs. Only sixteen states require that charter schools be part of an existing LEA, similar to the way traditional schools are part of a school district.<sup>35</sup>

The number of independent charters—schools that are LEAs—has dramatically increased the number of LEAs in the United States. In the 2000–2001 school year, there were 13,681 LEAs, almost all of which were traditional school districts.<sup>36</sup> By the 2009–2010 school

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?qs=charter+laws+and+flawed+research&intc=es (“Political compromises have given us instead a panoply of laws that yield varying results, not the lack of state and regulatory oversight that’s needed.”).

33. See, e.g., Amended Complaint at 1–2, *Basis Sch., Inc. v. Horne*, No. CV2007-0011100 (Ariz. Super. Ct. Aug. 7, 2007), 2007 WL 4176583 (challenging the applicability of state curriculum standards to charter schools); *N.Y. Charter Schs. Ass’n v. DiNapoli*, 857 N.Y.S.2d 450, 459 n.4 (App. Div. 2008) (challenging the constitutionality of state audits that impacted the autonomy of charter schools).

34. See, e.g., *Ariz. State Bd. for Charter Schs. v. U.S. Dep’t of Educ.*, 464 F.3d 1003, 1009–10 (9th Cir. 2006); *Thompson v. Bd. of Special Sch. Dist.*, 144 F.3d 574, 578–79 (8th Cir. 1998); *Friendship Edison Pub. Charter Sch. v. Smith*, 561 F. Supp. 2d 74, 75–76 (D.D.C. 2008).

35. See *State Matrix*, PRIMERS ON IMPLEMENTING SPECIAL EDUC. CHARTER SCHS., <http://www.edgateway.net/cs/spedp/query/q/2057> (last visited Feb. 22, 2012). Twenty-two states and the District of Columbia permit charters to form as LEAs. *Id.*; see also Rhim et al., *supra* note 20, at 56 (describing the legal status of charter schools in forty-one states).

36. BETH SINCLAIR, STATE ESEA TITLE I PARTICIPATION INFORMATION FOR 2000–2001: FINAL SUMMARY REPORT 14 (2004).

year, the number of LEAs swelled to 17,807, with virtually all of the growth coming from an increase in independent charter schools.<sup>37</sup>

## 2. Outcome Accountability

The autonomy charter schools receive is given in exchange for accountability.<sup>38</sup> The deal struck between charter schools and their authorizers is simple: charter schools are freed from rules and regulations, but only if they improve student academic outcomes, typically determined by a combination of student performance on standardized tests and graduation rates.<sup>39</sup> If the measurable educational benchmarks identified in the charter agreement are not met, the charter is either revoked during the charter term or not renewed at its end, and the school must close.<sup>40</sup> This outcome accountability combined with a “schools without rules” mentality puts the emphasis in charter schools almost exclusively on the educational outcomes of students instead of adherence to procedures and regulations,<sup>41</sup> which is the point of the accountability movement.

37. PATRICK KEATON, NAT'L CTR. FOR EDUC. STATISTICS, NUMBERS AND TYPES OF PUBLIC ELEMENTARY AND SECONDARY LOCAL EDUCATION AGENCIES FROM THE COMMON CORE OF DATA, SCHOOL YEAR 2009–10, at 7 (2011). The number of traditional school districts has declined over the past decade. PETERSON, *supra* note 7, at 274.

38. *See, e.g.*, IND. CODE ANN. § 20-24-2-1(4) (LexisNexis 2005) (describing that charter schools are designed to allow “freedom and flexibility in exchange for exceptional levels of accountability”); R.I. GEN. LAWS § 16-77-3.1(a) (2001) (“The key appeal of the charter school concept is its promise of increased accountability for student achievement in exchange for increased school autonomy.”); BRINSON & ROSCH, *supra* note 25, at 7, 9; PAUL T. O’NEILL & TODD ZIEBARTH, CHARTER SCHOOL LAW DESKBOOK 5 (2009).

39. *See, e.g.*, LA. REV. STAT. ANN. § 17:3992(a)(2) (2001); MD. STATE BD. OF EDUC., MARYLAND CHARTER SCHOOLS: CHARTERING A COURSE TOWARDS EXCELLENCE, MODEL PERFORMANCE CONTRACT 45–69 (2009), *available at* [http://www.msde.maryland.gov/NR/rdonlyres/15D2BCE6-9869-43B6-8E4F-D37A7FFCBC5F/22113/Model\\_Contract\\_082809.pdf](http://www.msde.maryland.gov/NR/rdonlyres/15D2BCE6-9869-43B6-8E4F-D37A7FFCBC5F/22113/Model_Contract_082809.pdf); NAT’L ASS’N OF CHARTER SCH. AUTHORIZERS (NACSA), PRINCIPLES & STANDARDS FOR QUALITY CHARTER SCHOOL AUTHORIZING 15, 21 (2010), *available at* [http://www.qualitycharters.org/images/stories/publications/Principles\\_and\\_Standards\\_2010.pdf](http://www.qualitycharters.org/images/stories/publications/Principles_and_Standards_2010.pdf); *Charter School Contract: Exhibit 1—Framework for the Evaluation of Louisiana Charter Schools* 3, in *Charter School Contract for Type 5 Charter Schools in the Louisiana Recovery School District* (2007), *available at* <http://www.coweninstitute.com/wp-content/uploads/2010/05/AbramsonWeb.pdf>.

40. *See, e.g.*, ARK. CODE ANN. § 6-23-105(a)(4) (2003); HAW. REV. STAT. ANN. §§ 302A-1186, 302B-14 (LexisNexis 2010); O’NEILL & ZIEBARTH, *supra* note 38, at 5 (explaining revocation and nonrenewal procedures).

41. *See, e.g.*, ARK. CODE ANN. § 6-23-102(6); CAL. EDUC. CODE § 47601(f) (West 2006); COLO. REV. STAT. § 22-30.5-102(2)(h) (2011); FLA. STAT. ANN. § 1002.33(2)(a)(2) (West 2009); IDAHO CODE ANN. § 33-5202(7) (2008); 105 ILL. COMP. STAT. ANN. 5/27A-2(8) (West 2006); IND. CODE ANN. § 20-24-2-1(4); IOWA CODE ANN. § 256F.1(3)(e) (West 2003); MASS. ANN. LAWS ch. 71, § 89(d)(6) (LexisNexis 2002); MINN. STAT. ANN. § 124D.10(a)(5) (West 2008); N.J. STAT. ANN. § 18A:36A-2 (West 1999); N.C. GEN. STAT. § 115C-238.29A(6) (2011); OKLA. STAT. tit. 70, § 3-131(A)(6) (2005); OR. REV. STAT.

Charter schools can be closed for budgetary improprieties, civil rights violations, and a host of other factors,<sup>42</sup> but outcome accountability is the guiding principle of charter schools.

### 3. Choice

Most state charter-authorizing statutes specifically identify expanding choice options as a reason for creating charter schools.<sup>43</sup> Charters, as schools of choice, provide students alternatives to their assigned schools and create market accountability. Charter schools do not have students assigned to them from a geographic region like a traditional school. Rather, students from across a school district, or in some cases across the entire state, apply to the charter school. Charter schools compete with traditional schools and other charter schools to enroll these students. Charter proponents argue that by providing educational options for parents, market pressure is applied to traditional public schools (and other charter schools) to gain or lose students and funding.<sup>44</sup>

Because charter schools are schools of choice, they were never intended to address every need of all the possible students.<sup>45</sup> In fact, charter schools are by their nature not designed to be all things to all students. They are often permitted to have a specialized academic or

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§ 338.005(8) (2007); 24 PA. STAT. ANN. § 17-1702-A(6) (West 2006); S.C. CODE ANN. § 59-40-20 (4) (2004).

42. Julie F. Mead, *Devilish Details: Exploring Features of Charter School Statutes That Blur the Public/Private Distinction*, 40 HARV. J. ON LEGIS. 349, 370 (2003). See generally Suzanne E. Eckes et al., *Charter School Accountability: Legal Considerations Concerning Nonrenewal and Revocation Procedures*, 2006 BYU EDUC. & L.J. 551 (considering various reasons for revocation of school charters).

43. See, e.g., 105 ILL. COMP. STAT. ANN. 5/27A-2(b)(6); IND. CODE ANN. § 20-24-2-1(2); N.J. STAT. ANN. § 18A:36A-2; N.Y. EDUC. LAW § 2850(2)(e) (McKinney 2009); N.C. GEN. STAT. § 115C-238.29A(5) (2011); OKLA. STAT. tit. 70, § 3-131(A)(4); OR. REV. STAT. § 338.015(2); 24 PA. STAT. ANN. § 17-1702-A(6); R.I. GEN. LAWS § 16-77-2(c)(5); TEX. EDUC. CODE ANN. § 12.001(a)(2) (West 2006); UTAH CODE ANN. § 53A-1a-503(4) (LexisNexis 2009); WYO. STAT. ANN. § 21-3-301(v) (West 2011).

44. For an in-depth discussion of the early charter and choice movement, see CUBAN, *supra* note 24, at 138-44; RICHARD D. KAHLENBERG, TOUGH LIBERAL: ALBERT SHANKER AND THE BATTLES OVER SCHOOLS, UNIONS, RACE, AND DEMOCRACY 308-18 (2007); GARY MIRON & CHRISTOPHER NELSON, WHAT'S PUBLIC ABOUT CHARTER SCHOOLS? LESSONS LEARNED ABOUT CHOICE AND ACCOUNTABILITY 1-4 (2002).

45. See, e.g., Julie Jargon, *One for All: Charter Schools Are Perfect for Special-Education Kids. That's the Problem*, DENVER WESTWORD (Feb. 22, 2001), <http://www.westword.com/content/printVersion/216212/> ("For a student who needs a very structured, orderly environment, this [charter school] is not a good school."); *Parental Choice Doesn't Guarantee Unlimited Access*, ST. PAUL PIONEER PRESS (Minn.), June 13, 2007, at B10 ("Accepting all students ought not to be the objective; educating all students should be." (internal quotation marks omitted)).

operational focus, such as a specific curriculum like Montessori or a focused subject like math and science, catering to narrow classes of students.<sup>46</sup>

Many states allow charter schools to admit students based on these specializations. For example, in Pennsylvania “[a] charter school may limit admission to . . . a targeted population group composed of at-risk students, or areas of concentration of the school such as mathematics, science, or the arts. A charter school may establish reasonable criteria to evaluate prospective students . . . .”<sup>47</sup> Charter schools are often permitted to cater exclusively to disabled students, males, at-risk students, or minorities.<sup>48</sup>

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46. See, e.g., ALASKA STAT. § 14.03.265(a)(2) (2010) (“The program of a charter school may be designed to serve . . . students who will benefit from a particular teaching method or curriculum . . . .”); COLO. REV. STAT. § 22-30.5-102(1)(c) (“Different pupils learn differently and public school programs should be designed to fit the needs of individual pupils . . . .”); MASS. ANN. LAWS ch. 71, § 89(l) (“Charter schools . . . may structure curriculum around particular areas of focus such as mathematics, science, or the arts.”); see also O’NEILL & ZIEBARTH, *supra* note 38, at 4–5, 7 (noting that many charter schools employ specialized curricula); LAUREN M. RHIM & MARGARET J. MCLAUGHLIN, CHARTER SCHOOLS AND SPECIAL EDUCATION: BALANCING DISPARATE VISIONS: AN INVESTIGATION OF CHARTER SCHOOLS AND SPECIAL EDUCATION IN FIFTEEN STATES 22–23 (2000), available at [http://www.eric.ed.gov/ERICWebPortal/search/detailmini.jsp?\\_nfpb=true&\\_ERICExtSearch\\_SearchValue\\_0=ED444297&ERICExtSearch\\_SearchType\\_0=no&accno=ED444297](http://www.eric.ed.gov/ERICWebPortal/search/detailmini.jsp?_nfpb=true&_ERICExtSearch_SearchValue_0=ED444297&ERICExtSearch_SearchType_0=no&accno=ED444297) (noting that many charter schools employ specialized curricula).

47. 24 PA. STAT. ANN. § 17-1723-A(b)(2); see also, e.g., FLA. STAT. ANN. § 1002.33(10)(e)(2), (5) (West 2009) (allowing charter schools to limit enrollment to “at risk” students and “[s]tudents who meet reasonable academic, artistic, or other eligibility standards”); N.H. REV. STAT. ANN. § 194-B:9(I)(b) (LexisNexis 2011) (permitting charter schools to limit enrollment to “pupil needs, or areas of academic focus [such as] . . . at-risk pupils, vocational education pupils, mathematics, science, the arts, history, or languages”); N.Y. EDUC. LAW § 2854(2)(a) (permitting single-sex charter schools and schools designed for at-risk students); OHIO REV. CODE ANN. § 3314.06(B)(1), (D)(1)(a) (LexisNexis 2009) (permitting targeted admission for at-risk, disabled students and allowing single-gender schools); R.I. GEN. LAWS § 16-77-9(d) (stating that a charter public school can create “reasonable academic standards as a condition for eligibility”); TEX. EDUC. CODE ANN. § 12.1171 (allowing charter schools specializing in performing arts to “require an applicant to audition” in order to gain admission).

48. See, e.g., DEL. CODE ANN. tit. 14, § 506(3)(c) (Supp. 2010) (authorizing single-sex charter schools); 105 ILL. COMP. STAT. ANN. 5/27A–2(b)(2) (explaining that charter schools can be created “[t]o increase learning opportunities . . . for at-risk pupils”); LA. REV. STAT. ANN. §§ 17:3972(A), 17:3991(B) (2001) (stating that “it is the intention of the legislature that the best interests of at-risk pupils shall be the overriding consideration in implementing” charter schools); NEV. REV. STAT. ANN. § 386.580 (LexisNexis 2008) (permitting formation of charter schools dedicated to provide educational services exclusively to pupils with disabilities, disciplinary problems, and who are “at risk”); Quach, *supra* note 13, at 68 (describing how charter schools have developed to meet the various needs of students).

Charter schools are fulfilling their intended role in school choice by creating an array of specialized curricula, pedagogy, and populations. From the choice perspective, a student will select a school because it is a good “fit.” If it is not, the student is not compelled to attend. When schools specialize and students select them, an attitude arises that the student must adjust to the school, not vice-versa. Adjusting specialized schools to meet every student’s needs is not part of this culture.

The foundations of charter schools—autonomy, independence, outcome accountability, and specialization resulting from choice—run directly counter to the guiding principles of special education.

### *B. The Culture of Special Education*

IDEA and Section 504, the primary statutes governing the education of disabled students, were enacted before the accountability, choice, and charter school movements were even imagined. The predecessor to IDEA, the Education for All Handicapped Childrens Act (“EAHCA”), enacted in 1975,<sup>49</sup> was the first comprehensive law imposing affirmative obligations on states and school districts regarding the education of students with disabilities. It is a funding statute under which the federal government covers a portion of states’ costs to educate disabled children. In exchange for promises to appropriately identify, evaluate, and educate disabled students, the federal government provides funds to states that the states then distribute to LEAs.<sup>50</sup> Section 504 of the Rehabilitation Act, passed in 1973,<sup>51</sup> is an antidiscrimination statute that works in conjunction with IDEA.<sup>52</sup> These two statutes form the backbone of special education law.<sup>53</sup> They were born into a civil rights landscape where centralized bureaucracy was valued over

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49. Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (codified as amended at 20 U.S.C. §§ 1400–1482 (2006)).

50. 20 U.S.C. § 1411(a)–(f) (2006).

51. Rehabilitation Act of 1973, Pub. L. No. 93-112, § 504, 87 Stat. 355, 394 (codified as amended at 29 U.S.C. § 794 (1982)).

52. For a discussion of Section 504 protections and the overlap with IDEA, see LAURA F. ROTHSTEIN, *RIGHTS OF PHYSICALLY HANDICAPPED PERSONS* 85–86 (1984); Judith Welch Wegner, *Educational Rights of Handicapped Children: Three Federal Statutes and an Evolving Jurisprudence, Part I: The Statutory Maze*, 17 J.L. & EDUC. 387, 395–404 (1988).

53. Title II of the Americans with Disabilities Act, 42 U.S.C. § 12132 (2006), was passed in 1990, but it does not impose any different obligations on schools than does Section 504 of the Rehabilitation Act. See Heubert, *supra* note 19, at 313–41 (explaining the interaction of Title II of ADA and Section 504 in charter schools).



independence, adherence to procedures was emphasized over educational outcomes, and collective responsibility was favored over autonomy. These qualities continue to dominate special education law today.

### 1. Centralized Bureaucracy Overseeing Numerous Schools

Special education law is rooted in the traditional educational governance model that places the school district as the primary administrative, bureaucratic, policy-making, and legal unit. When the EAHCA was enacted in 1975, the locus of authority for decision making resided in a centralized administrative office overseeing numerous schools. It was school districts, not individual schools, that were responsible for implementing policies, overseeing programs, making human capital decisions, controlling budgeting and financing, and providing services to schools such as meals and transportation.<sup>54</sup>

Special education law relied on this governance framework. It presumed the existence of a district with a bureaucracy of sufficient size to handle burdensome procedural requirements and to capitalize on economies of scale for service provision to disabled students.<sup>55</sup> The EAHCA made LEAs rather than individual schools primarily responsible for providing education for all disabled students.<sup>56</sup> The LEA is still the primary entity charged with fulfilling IDEA's obligations toward disabled students.<sup>57</sup>

An LEA is "a public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public elementary or secondary schools in a city, county, township, school district, or other political subdivision of a State."<sup>58</sup> The definition

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54. Aaron Jay Saiger, *The Last Waive: The Rise of the Contingent School District*, 84 N.C. L. REV. 857, 862–65 (2006). For a thorough discussion about the genesis of the traditional school district model of educational governance, see JOHN L. RURY, EDUCATION AND SOCIAL CHANGE: THEMES IN THE HISTORY OF AMERICAN SCHOOLING 204–05 (2d ed. 2005); Larry Cuban, *Reforming Again, Again, and Again*, 19 EDUC. RESEARCHER 3, 3–13 (1990).

55. LISA SNELL, REASON PUB. POLICY INST., SPECIAL EDUCATION ACCOUNTABILITY: STRUCTURAL REFORM TO HELP CHARTER SCHOOLS MAKE THE GRADE 12 (2004), available at <http://reason.org/files/3c2966c9e879c1ee0a025e21ece535d4.pdf>.

56. Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, § 3(b)(8), 89 Stat. 773, 775 (codified as amended at 20 U.S.C. § 1401 (2006)).

57. 20 U.S.C. § 1413(a)(1) (2006).

58. Education of the Handicapped Act, Pub. L. No. 91-230, § 602(8), 84 Stat. 121, 175–76 (1970). The definition has remained relatively unchanged over three decades. See 20 U.S.C. § 1401(19)(A).

presumes that the LEA controls schools in a specific geographic area, such as a school district. States are also responsible for compliance, but they act as more of a backstop and monitor of LEA compliance with the law.<sup>59</sup>

In the charter context, this means that independent charter schools that are LEAs have sole responsibility for compliance with IDEA. Unless state law or charter agreements say otherwise, school districts have no responsibility to provide independent charter school students with special education or ensure the charter school's compliance with IDEA.<sup>60</sup> Independent charter schools are islands with no connection to a centralized bureaucracy or network of schools.

When passing the EAHCA Congress explicitly recognized that small LEAs—at the time rural districts with only a few schools—would struggle to fulfill the Act's mandates. It categorically precluded states from distributing funds directly to LEAs that were entitled to less than \$7,500 under the Act's funding formula.<sup>61</sup> The only way these small LEAs could receive funding was to file consolidated applications with other LEAs to create programs of sufficient size to properly comply with the Act. The EAHCA also recognized that small LEAs that were entitled to more than a \$7,500 disbursement still might not be able to create programs of "sufficient size and scope to effectively meet the educational needs of handicapped children."<sup>62</sup> These LEAs were also required to establish joint eligibility with other LEAs even though they exceeded the categorical \$7,500 cut-off.<sup>63</sup> In short, Congress knew from the beginning that small or one-school LEAs would not be able to fulfill the Act's mandates.

These provisions changed in the 1997 reauthorization of IDEA—the first iteration of IDEA to account for charter schools. Congress first removed the categorical exclusion prohibiting states from

59. 20 U.S.C. § 1412.

60. *Friendship Edison Pub. Charter Sch. Collegiate Campus v. Murphy ex rel. D.W.*, 448 F. Supp. 2d 166, 169–70 (D.D.C. 2006); *Hyde Leadership Pub. Charter Sch. v. Clark*, 424 F. Supp. 2d 58, 59 (D.D.C. 2006).

61. Education for All Handicapped Children Act of 1975 § 611(c)(4)(A)(i).

62. 20 U.S.C. § 1413(e)(1)(A); Education for All Handicapped Children Act of 1975 § 614(c)(1).

63. The consolidated LEAs would form a new entity, an "intermediate educational unit," that would oversee and be responsible for the provision of special education in the consolidated LEAs. Education for All Handicapped Children Act of 1975 § 614(c)(2)(C).

funding small LEAs that would receive less than \$7,500.<sup>64</sup> Congress next permitted charter schools to exist as independent, one-school LEAs and exempted them from the joint eligibility mandate for LEAs without "sufficient size and scope." The 1997 reauthorization provided that a state "may not require a charter school that is a local educational agency to jointly establish its eligibility" unless state law allows it.<sup>65</sup> This small but significant change may have been a nod to state sovereignty over education, but the message was clear. Unlike small traditional LEAs that state special education offices were compelled to force together, they had to leave independent charter schools alone even though they are not "of sufficient size and scope to effectively meet the needs of children with disabilities."<sup>66</sup>

The promised results from charter school autonomy and independence blinded Congress to its decades-long acknowledgment of the significant capacity and administrative barriers one-school LEAs face in serving disabled students.<sup>67</sup> Special education law was changed to accommodate charter principles. This was done without any evidence or history of independent charter schools successfully complying with IDEA. In fact, the only government study conducted before this change identified significant problems with charter schools and special education.<sup>68</sup> Congressional faith in autonomy and choice, more than reasoned analysis and evidence, led to these significant changes in IDEA.

IDEA was also amended in 1997 to deal with charter schools that were part of existing LEAs. These schools were not individually responsible for fulfilling IDEA, but like traditional schools were merely part of an LEA for special education purposes. Charter schools that are part of an existing LEA retain autonomy over many aspects of their school—such as hiring and budget—but must work with the LEA for special education. The confusing roles of charters and LEAs were addressed in the 1997 reauthorization, which

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64. Individuals with Disabilities Education Act Amendments of 1997, Pub. L. No. 105-17, § 613(e)(2), 111 Stat. 37, 76 (1997) (codified as amended at 20 U.S.C. § 1413 (2006)).

65. *Id.* § 613(e)(1)(B); see S. REP. NO. 105-17, at 48 (1997); H.R. REP. NO. 105-95, at 302 (1997).

66. Individuals with Disabilities Education Act Amendments of 1997 § 613(e)(1)(A).

67. Both the House and Senate reports regarding the 1997 reauthorization noted that "[t]he committee expects that charter schools will be in full compliance with Part B." S. REP. NO. 105-17, at 17; H.R. REP. NO. 105-95, at 97.

68. MARGARET J. McLAUGHLIN ET AL., CTR. FOR POLICY RESEARCH, CHARTER SCHOOLS AND STUDENTS WITH DISABILITIES 9 (1996).

required LEAs to serve disabled students in their charter schools and fund their charter schools, the same as their traditional schools.<sup>69</sup>

The last significant change in the 1997 reauthorization with respect to charter schools was the creation of a new type of oversight entity—the educational service agency (“ESA”). An ESA is a type of LEA and is a regional agency “authorized by State law to develop, manage, and provide services . . . to local educational agencies; and [is] recognized as an administrative agency for purposes of the provision of special education.”<sup>70</sup> Unlike an LEA, an ESA has no geographic boundaries and oversees LEAs rather than schools that are part of an LEA. In other words, Congress permitted states to create ESAs to oversee and be responsible for cooperatives comprised of charter schools that are independent LEAs.<sup>71</sup> So while the 1997 IDEA exempted independent charter schools from the long-standing capacity requirements, it provided states an avenue to compel independent charter schools to join together for special education purposes and be overseen by one responsible entity, an ESA. These provisions have remained unchanged in IDEA, but states do not utilize the ESA governance structure exclusively for charter schools.<sup>72</sup>

## 2. Equality Through Process

IDEA and Section 504 were passed during the civil rights era, when the goal of education reform was to achieve equal access to schools rather than equal educational outcomes. Reform efforts were focused on educational inputs, such as funding and student/teacher racial compositions, not educational outputs like graduation rates and

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69. Individuals with Disabilities Education Act Amendments of 1997 § 613(a)(5).

70. *Id.* § 602(4) (codified as amended at 20 U.S.C. § 1401(5)). The ESA replaced the prior term “intermediate educational unit” to “reflect the more contemporary understanding of the broad and varied functions of such agencies.” S. REP. NO. 105-17, at 6. An ESA has the same obligations and responsibilities as an LEA. Individuals with Disabilities Education Act Amendments of 1997 § 602(15)(b)(i); Education for All Handicapped Children Act of 1975, Pub. L. No. 94-102, § 4(a)(22), 89 Stat. 773, 776 (codified as amended at 20 U.S.C. § 1401 (2006)).

71. For a general discussion of ESAs, see Rhim & McLaughlin, *supra* note 23, at 3.

72. States often utilize ESAs as regional centers to oversee rural or small LEAs that are compelled under IDEA to consolidate with other LEAs to receive funding. *See, e.g.*, GA. CODE ANN. § 20-2-270 (2009); MISS. CODE ANN. §§ 37-7-301, 37-7-345 (West 2010); MO. ANN. STAT. § 162.1180 (West 2010); W. VA. CODE ANN. § 18-2-26 (LexisNexis 2008). ESAs are also utilized to oversee state run schools for preschoolers, incarcerated youth, the deaf or the blind. E. ROBERT STEPHENS & WILLIAM G. KEANE, THE EDUCATIONAL SERVICE AGENCY: AMERICAN EDUCATION’S INVISIBLE PARTNER xviii, 120–21, 126–27 (2005); *see, e.g.*, LA. REV. STAT. ANN. § 17:1987 (2001).

test scores. “The compliance view of accountability is deeply entrenched in the history, theory, and practice of government involvement in special education in the United States despite recent efforts to ‘reinvent’ special education by focusing more on educational results.”<sup>73</sup> The EAHCA meticulously identified the “policies and procedures” states and local educational agencies had to create and implement to be eligible for federal funding earmarked for disabled students.<sup>74</sup> It was “purposefully designed to be rigid in its requirements.”<sup>75</sup> These procedures persist today and are “as detailed and far-reaching as any set of rules to which public schools are subject.”<sup>76</sup>

The only substantive requirement of the EAHCA was that public schools provide children a “free appropriate public education” (“FAPE”).<sup>77</sup> But the Supreme Court quickly made clear in *Board of Education v. Rowley*<sup>78</sup> that the law was about “access to public education” and “was more to open the door of public education . . . than to guarantee any particular level of education once inside.”<sup>79</sup> The Court held that the Act placed “emphasis upon” compliance with procedures, and that “adequate compliance with the procedures

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73. Patrick J. Wolf & Bryan C. Hassel, *Effectiveness and Accountability (Part 1): The Compliance Model*, in RETHINKING SPECIAL EDUCATION FOR A NEW CENTURY 53, 54, 62 (Chester E. Finn, Jr. et al. eds., 2001) (“A compliance regulatory system has dominated the oversight of special education programs since responsibility for such programs became increasingly federalized in the 1960s.”); McLaughlin & Rhim, *supra* note 9, at 25, 30 (stating that accountability in special education has historically emphasized compliance with procedures); Patrick J. Wolf, *Sisyphian Tasks*, 3 EDUC. NEXT 24, 24 (2003), available at <http://educationnext.org/sisyphiantasks/> (noting that special education is premised on “process-based accountability”).

74. See generally Education for All Handicapped Children Act of 1975 §§ 612–615 (mentioning “procedure” over 100 times). The specific “policies and procedures” that states and LEAs must create to be eligible for funding are set forth in sections 612–614 of the Education for All Handicapped Children Act of 1975. *Id.* § 613(a)(1).

75. *Charter Schools and Special E. Law: An Imperfect Union*, 12 SPECIAL EDUCATOR 1, 1 (1996).

76. Heubert, *supra* note 19, at 302; see also PRESIDENT’S COMM’N ON EXCELLENCE IN SPECIAL EDUC., *supra* note 20, at 7 (“The system is driven by complex regulations, excessive paperwork and ever-increasing administrative demands . . .”); Anna B. Duff, *How Special Education Policy Affects Districts*, in RETHINKING SPECIAL EDUCATION FOR A NEW CENTURY, *supra* note 73, at 135, 135 (stating that special education law has created “a massive procedural maze”).

77. Education for All Handicapped Children Act of 1975 §§ 612(1), 614(a)(1)(C)(ii). While a FAPE was required to “meet state standards,” the only state educational standards at the time were procedural in nature, for example: teaching credentials, class size limits, and graduation requirements. Scott F. Johnson, *Reexamining Rowley: A New Focus in Special Education Law*, 2003 BYU EDUC. & L.J. 561, 573 & n.52.

78. 458 U.S. 176 (1982).

79. *Id.* at 192.

prescribed would in most cases assure much if not all of what Congress wished.”<sup>80</sup> The Court emphasized that Congress intended to implement procedural requirements rather than to impose a substantive educational standard, stating “the process of providing special education and related services to handicapped children is not guaranteed to produce any particular outcome.”<sup>81</sup> The Court did find that the “free appropriate public education language” mandated a minimal substantive standard and concluded that if personalized instruction provided “some benefit” to the student “and the other items on the definitional checklist are satisfied, the child is receiving a ‘free and appropriate public education’ as defined by the Act.”<sup>82</sup>

The EAHCA was reauthorized and renamed numerous times into its current iteration as IDEA, but the Supreme Court and lower courts remain steadfast in their view that the law is more about process and procedural compliance than educational outcomes.<sup>83</sup> Indeed, many lower courts find that noncompliance with IDEA’s procedural aspects is sufficient to find a denial of a FAPE, irrespective of the educational outcomes achieved by the disabled student.<sup>84</sup>

As education reform shifted from process and inputs to accountability and outcomes, special education law remained virtually static.<sup>85</sup> As stated by the President’s Commission on Excellence in Special Education in 2002, IDEA “places process over results, and

80. *Id.* at 206.

81. *Id.* at 192 (citing S. REP. NO. 94-168, at 11 (1975)).

82. *Id.* at 189, 214.

83. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 60 (2005) (“Congress appears to have presumed instead that, if the Act’s procedural requirements are respected, parents will prevail when they have legitimate grievances.”). For a thorough discussion of the FAPE standard, the substantive standard Congress intended, and lower courts’ treatment, see generally Mark C. Weber, *The Transformation of the Education of Handicapped Act: A Study in the Interpretation of Radical Statutes*, 24 U.C. DAVIS L. REV. 349 (1990).

84. See, e.g., *Babb v. Knox Cnty. Sch. Sys.*, 965 F.2d 104, 108 (6th Cir. 1992); *W.G. v. Bd. of Trs. of Target Range Sch. Dist.*, 960 F.2d 1479, 1485 (9th Cir. 1992); *Spielberg ex rel. Spielberg v. Henrico Cnty. Pub. Sch.*, 853 F.2d 256, 259 (4th Cir. 1988); *Bd. of Educ. of Cnty. of Cabell v. Dienelt*, 843 F.2d 813, 814–15 (4th Cir. 1988); *Jackson v. Franklin Cnty. Sch. Bd.*, 806 F.2d 623, 628–29 (5th Cir. 1986); *Hall v. Vance Cnty. Bd. of Educ.*, 774 F.2d 629, 635 (4th Cir. 1985); see also Terry Jean Seligmann, *Rowley Comes Home To Roost: Judicial Review of Autism Special Education Disputes*, 9 U.C. DAVIS J. JUV. L. & POL’Y 217, 267–70 (2005) (arguing that courts in autism cases focus on process violations in order to get around the low *Rowley* standard).

85. Chester E. Finn et al., *Conclusions and Principles for Reform*, in *RETHINKING SPECIAL EDUCATION FOR A NEW CENTURY*, *supra* note 73, at 335, 338 (“Special education simply hasn’t kept up [with modern accountability reforms]. It’s still an access-and-services program enveloped by a civil rights orientation.”); Wolf, *supra* note 73, at 31.

bureaucratic compliance above student achievement, excellence and outcomes.”<sup>86</sup> This has been true since IDEA’s predecessor was passed in 1975 and remains true today despite changes designed to introduce accountability into special education.

While attempts were made in the 1997 and 2004 reauthorizations of IDEA to introduce accountability, the procedural compliance model still reigns supreme in special education.<sup>87</sup> Nothing in the accountability reauthorizations of IDEA changed the FAPE standard, or how states and LEAs would be deemed in compliance with IDEA. Federal compliance monitoring continues to focus “more on procedural compliance than on either the appropriateness or effectiveness of the education being delivered.”<sup>88</sup> Indeed, “despite the law’s attempt to shift the focus away from compliance . . . [states’] ratings are all based on compliance, such as meeting deadlines and providing timely due process hearings.”<sup>89</sup> The language and structure of IDEA simply do not allow the federal government to assess states’ compliance with outcome measures, such as disabled students’ graduation rates or performance on standardized assessments.<sup>90</sup>

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86. PRESIDENT’S COMM’N ON EXCELLENCE IN SPECIAL EDUC., *supra* note 20, at 7, 11 (noting that IDEA is a “culture of process compliance”); *see also* Frederick M. Hess & Frederick J. Brigham, *How Federal Special Education Policy Affects Schooling in Virginia*, in RETHINKING SPECIAL EDUCATION FOR A NEW CENTURY, *supra* note 73, at 161, 161–62 (stating that special education “focuses less on education attainment and more on procedural civil rights” and that “[u]nder the IDEA, a satisfactory program is defined as one that adheres to due process, regardless of its results”); Wade F. Horn & Douglas Tynan, *Time To Make Special Education “Special” Again*, in RETHINKING SPECIAL EDUCATION FOR A NEW CENTURY, *supra* note 73, at 23, 37 (commenting that special education “focus[es] on process[es] rather than outcome[s]”); Rhim & McLaughlin, *supra* note 23, at 4–5 (explaining that special education is “highly regulated” and accountability focuses on compliance with procedures and rules).

87. PRESIDENT’S COMM’N ON EXCELLENCE IN SPECIAL EDUC., *supra* note 20, at 36 (concluding that special education law remains a “process-focused law under which states and LEAs can fail to achieve results without consequences”); Horn & Tynan, *supra* note 86, at 34; Wolf & Hassel, *supra* note 73, at 65; *see also* Wolf & Hassel, *supra* note 73, at 69–71 (explaining how the compliance model persisted after the 1997 amendments).

88. Hess & Brigham, *supra* note 86, at 171, 178–79; Wolf, *supra* note 73, at 24; Christina A. Samuels, *Value of IDEA Ratings Questioned*, EDUC. WK., July 14, 2010, at 1 (explaining how federal compliance monitoring is not concerned with educational outcomes).

89. Samuels, *supra* note 88; *see also* PRESIDENT’S COMM’N ON EXCELLENCE IN SPECIAL EDUC., *supra* note 20, at 11 (claiming that state and local monitoring methods “place too much emphasis on compliance for process rather than . . . on compliance for performance and results”); Horn & Tynan, *supra* note 86, at 34 (writing that the changes to special education law did not change the procedural compliance model).

90. In order to attain funding under IDEA, states must certify to the Secretary of Education that they have “policies and procedures” that will effectively meet the Act’s conditions. 20 U.S.C. § 1412(a) (2006); *see also* PRESIDENT’S COMM’N ON EXCELLENCE

Not only is procedural compliance king, it is a burdensome and time-consuming ruler. Special education is the most heavily regulated area of education.<sup>91</sup> The “paper-work and administrative entanglements” are “onerous.”<sup>92</sup> Special education has always been a complex maze of procedures and paperwork that is difficult to navigate and implement, and it continues to be that way today.<sup>93</sup>

### 3. Collective Action

Finally, special education law presumes that public schools must be all things to all students.<sup>94</sup> The LEA must accommodate a child whether he “fits” or not. As bluntly stated by the Third Circuit, under IDEA “schools are required to provide a comprehensive range of services to accommodate a handicapped child’s educational needs, regardless of financial and administrative burdens, and if necessary, to resort to residential placement.”<sup>95</sup> This is known as the “zero-reject” policy and is “at the core” of IDEA.<sup>96</sup>

Even though individual schools comply with this policy, the law makes it a collective responsibility shared between schools of the LEA. IDEA prefers that a child be educated “as close as possible to the child’s home” and “in the school that he or she would attend if nondisabled.”<sup>97</sup> Circuit courts unanimously agree that this language

IN SPECIAL EDUC., *supra* note 20, at 12 (stating that federal law constrains changes to the monitoring process).

91. GARY MIRON ET AL., GREAT LAKES CTR. FOR EDUC. RESEARCH & PRACTICE, SCHOOLS WITHOUT DIVERSITY: EDUCATION MANAGEMENT ORGANIZATIONS, CHARTER SCHOOLS, AND THE DEMOGRAPHIC STRATIFICATION OF THE AMERICAN SCHOOL SYSTEM 16 (2010), available at [http://greatlakescenter.org/docs/Policy\\_Briefs/Miron\\_Diversity.pdf](http://greatlakescenter.org/docs/Policy_Briefs/Miron_Diversity.pdf).

92. PRESIDENT’S COMM’N ON EXCELLENCE IN SPECIAL EDUC., *supra* note 20, at 11–14, 17–18 (noting that federal monitoring is inefficient and time consuming for states).

93. *Id.* at 21; Cheryl M. Lange, Lauren Morando Rhim & Eileen M. Ahearn, *Special Education in Charter Schools: The View from State Education Agencies*, 21 J. SPECIAL EDUC. LEADERSHIP 12, 12 (2008); McLaughlin & Rhim, *supra* note 9, at 38; Wolf, *supra* note 73, at 24.

94. RHIM & MCLAUGHLIN, *supra* note 46, at 21–22.

95. *Kruelle v. New Castle Cnty. Sch. Dist.*, 642 F.2d 687, 695–96 (3d Cir. 1981); see also *Clevenger v. Oak Ridge Sch. Bd.*, 744 F.2d 514, 517 (6th Cir. 1984) (holding that cost is not a valid reason to deny a disabled student a particular program).

96. *Timothy W. v. Rochester Sch. Dist.*, 875 F.2d 954, 960 (1st Cir. 1989); see also *Thomas v. Cincinnati Bd. of Educ.*, 918 F.2d 618, 620 (6th Cir. 1990) (explaining that the EAHCA adopted the “zero reject” principle). For a general discussion of the “zero reject” principle, see Mitchell L. Yell et al., *Contemporary Legal Issues in Special Education, in CRITICAL ISSUES IN SPECIAL EDUCATION: ACCESS, DIVERSITY, AND ACCOUNTABILITY* 16, 21 (Audrey McCray Sorrells et al. eds., 2004); H. Rutherford Turnbull, III et al., *IDEA, Positive Behavioral Supports, and School Safety*, 30 J.L. & EDUC. 445, 447 (2001).

97. 34 C.F.R. § 300.116(b)(3), (c) (2010).



does not create a right for a disabled student to attend a specific school, usually the neighborhood school where the student lives, within an LEA.<sup>98</sup> Districts do not have to modify particular schools to accommodate disabled children already receiving appropriate public education in another facility within the LEA.<sup>99</sup> IDEA treats schools as practically interchangeable parts of the LEA. Districts can concentrate resources for particular disabilities at a limited number of schools and compel attendance at those schools because

there are a limited number of [special education teachers, paraprofessionals, and resources]; and by allocating these

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98. See *White ex rel. White v. Ascension Parish Sch. Bd.*, 343 F.3d 373, 381 (5th Cir. 2003) ("All of our sister circuits that have addressed the issue agree that, for provision of services to an IDEA student, a school system may designate a school other than a neighborhood school."); see, e.g., *McLaughlin ex rel. McLaughlin v. Holt Pub. Sch. Bd. of Educ.*, 320 F.3d 663, 672 (6th Cir. 2003) (stating that there is no right under IDEA to attend neighborhood school); *Kevin G. ex rel. Robert G. v. Cranston Sch. Comm.*, 130 F.3d 481, 482 (1st Cir. 1997) ("[W]hile it may be preferable for Kevin G. to attend a school located minutes from his home, placement [where a nurse is on duty full-time] satisfies [the IDEA]."); *Hudson ex rel. Hudson v. Bloomfield Hills Pub. Sch.*, 108 F.3d 112, 113 (6th Cir. 1997) (finding that the IDEA does not require placement in a neighborhood school); *Urban ex rel. Urban v. Jefferson Cnty. Sch. Dist. R-1*, 89 F.3d 720, 727 (10th Cir. 1996) (stating that the court has previously held that the IDEA does not give a student the right to placement at a neighborhood school); *Murray ex rel. Murray v. Montrose Cnty. Sch. Dist. Re-1J*, 51 F.3d 921, 928–29 (10th Cir. 1995) (stating there is no presumption in the IDEA that a child must attend his or her neighborhood school); *Schuldt ex rel. Schuldt v. Mankato Indep. Sch. Dist. No. 77*, 937 F.2d 1357, 1361–63 (8th Cir. 1991) (reiterating that a school may place students in non-neighborhood schools rather than require physical modification of the neighborhood school to accommodate the child's disability); *Barnett ex rel. Barnett v. Fairfax Cnty. Sch. Bd.*, 927 F.2d 146, 152 (4th Cir. 1991) (finding that the school district complied with IDEA by providing deaf student with "cued speech" program in a centralized school approximately five miles farther than neighborhood school); *Wilson ex rel. Wilson v. Marana Unified Sch. Dist. No. 6 of Pima Cnty.*, 735 F.2d 1178, 1180, 1184 (9th Cir. 1984) (finding that a school district may assign a child to school thirty minutes away because a teacher certified in child's disability was assigned at that school, rather than move the service to the neighborhood school); see also *Lebron v. N. Penn. Sch. Dist.*, 769 F. Supp. 2d 788, 800 (E.D. Pa. 2011) (holding that a disabled student does not have a right to attend a particular school); Letter from Thomas Hehir, Dir., Office of Special Educ. Programs (OSEP), to Anonymous (Apr. 20, 1994), in 21 INDIVIDUALS WITH DISABILITIES EDUC. L. REP. 674, 674–76 (1994) (stating that it is permissible for a student with a disability to be transferred to a school other than the school closest to home if the transfer school continues to be appropriate to meet the individual needs of the student); Letter from Patricia J. Guard, Acting Dir., Office of Special Educ. Programs, to Paul Veazey, Esq., Stockwell, Sievert, Viccellio, Clements & Shaddock, L.L.P. (Nov. 26, 2001), available at <http://www2.ed.gov/policy/speced/guid/idea/letters/2001-4/veazey112601place.pdf> ("[I]f the public agency . . . has two or more equally appropriate locations that meet the child's special education and related services needs, the assignment of a particular school . . . may be an administrative determination, provided that determination is consistent with the placement team's decision.").

99. *Schuldt*, 937 F.2d at 1361, 1363.

limited resources to regional programs, the state is better able to provide for its disabled children. Additionally, by placing these educators at regional centers, those centers are better able to provide further training for those educators and make substitutions for absent educators.<sup>100</sup>

Special education law is founded on the notion that collective responsibility shared by a range of schools is best for students and educators. This directly clashes with the independence and autonomy foundations undergirding charter schools, particular charter schools that are LEAs.

Despite the shared responsibility, most schools adhere to the zero reject principle and serve a full range of disabled students with significant help from the LEA.<sup>101</sup> The LEA provides an array of services, personnel, and expertise to its schools and unified planning for the system.<sup>102</sup> This support allows individual schools to enroll a wide range of disabled students and adjust curriculum, pedagogy, and services to meet their needs. This contrasts directly with the charter choice model founded on the child choosing the school that fits best. Special education law compels the school to adjust to the child; the choice model compels the child to adjust to the school. Of course the “take all comers” approach underlying special education demands a generic, basic educational model that can be easily altered to meet the individual needs of disabled students.<sup>103</sup>

### C. *The Clash*

The clash between the principles of charter schools and special education is stark, and the single greatest challenge facing charter school operators today is comingling disparate visions of special education and the charter movement.<sup>104</sup> The two cultures could not be more diametrically opposed and this “set[s] up barriers to a harmonious merger.”<sup>105</sup>

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100. *Flour Bluff Indep. Sch. Dist. v. Katherine M.*, 91 F.3d 689, 694 (5th Cir. 1996); *see also White*, 343 F.3d at 382 (reasoning that the district’s centralization policy was backed by “sound reasons . . . including: (1) ability to cover absences and scheduling difficulties; (2) training and staff development; (3) effective use of limited resources; and (4) educational and social advantages”).

101. *See supra* note 98 and accompanying text.

102. *See supra* note 98 and accompanying text.

103. *See supra* note 96 and accompanying text.

104. *See RHIM & MCLAUGHLIN, supra* note 46, at 42 (noting the competing objectives between charter school success and special education needs).

105. *Ahearn Testimony, supra* note 17, at 27 (“[F]ederal laws and regulations related to students with disabilities . . . can pose problems for charter schools that are also mandated

The charter focus on outcomes and autonomy directly collides with the process orientation of IDEA.<sup>106</sup> Special education law significantly undercuts charter school independence and autonomy on core educational issues.<sup>107</sup> The autonomy impulse also conflicts with the collective responsibility underpinnings of special education. This collective action ideal, where the IEP team selects where a student is placed within a network of schools to achieve program efficiency, directly conflicts with the charter ideal of respecting parental choice of a particular school.

Finally, special education's premise that schools should be all things for all students is contrary to the specialization culture of school choice. In the words of state charter school directors: "[W]e have allowed charters to focus their program and not be all things to all people. . . . [C]harter [schools] and special education . . . are like 'yin and yang'. . . . [S]pecial education is driven by the belief that all public schools should provide access to all students. All charters can't

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by state law to fulfill the mission for which they were approved when they were authorized to operate."); Rhim et al., *supra* note 20, at 51. See generally Rhim & McLaughlin, *supra* note 23, at 4 (stating that the IDEA has "created some unique tensions between charter schools and the traditional educational sector").

106. See Heubert, *supra* note 19, at 309 (noting "conflicts between policies that protect the rights of students with disabilities and policies that seek to maximize charter school autonomy and innovation"); see also AHEARN ET AL., *supra* note 23, at 43–45 (discussing the tension between special education and the value of autonomy and parental choice); RHIM & MCLAUGHLIN, *supra* note 46, at 2–3, 41 (noting that "[a] question increasingly arising . . . is how to balance the autonomous and individualized nature of charter schools with the highly regulated nature of special education" and that "there is a philosophical gap between the individualized, autonomous nature of charter schools and highly regulated special education programs"); Lange et al., *supra* note 93, at 13 (noting the "conflicts between charter laws (which often reduce regulations) and disability laws (highly regulatory in nature)"); Rhim et al., *supra* note 20, at 51–52, 62 ("[P]olicy tension associated with providing regulated special education programs in deregulated charter schools is arguably a permanent part of the charter school environment."); Lauren Morando Rhim & Margaret J. McLaughlin, *Special Education in American Charter Schools: State Level Policy, Practices and Tension*, 31 CAMBRIDGE J. EDUC. 373, 381 (2001) ("[T]here is a fundamental philosophical gap between the individualised, autonomous nature of charter schools and highly regulated nature of special education programmes."); Rhim & McLaughlin, *supra* note 23, at 4–5 (stating that "[t]he highly regulated special education practices and policies come into conflict with charter school laws designed to maximize autonomy and flexibility within schools" and that the "policy tension between charter schools and IDEA is the emphasis on procedural compliance associated with special education and the principles of autonomy and regulatory flexibility that are central to the charter school concept").

107. See Heubert, *supra* note 19, at 308–09, 311–12, 319, 344; see also AHEARN ET AL., *supra* note 23, at 13, 43 (discussing the tensions between highly regulated special education and autonomous charter schools); RHIM & MCLAUGHLIN, *supra* note 46, at 42 ("[T]here is a philosophical gap between the individualized, autonomous nature of charter schools and highly regulated special education programs.").

really be all things to all students . . . .”<sup>108</sup> It creates significant tension when charter schools have to modify their mission for disabled students.<sup>109</sup>

## II. MANIFESTATIONS OF THE CULTURE CLASH

The conflicting fundamental principles result in charter schools struggling to serve disabled students. Charter schools often do not properly identify, assess, and enroll disabled students, particularly severely disabled students; provide students a continuum of alternative educational placements under the Least Restrictive Environment obligation; or comply with the “child find” requirements of IDEA.

### A. *The Under-Enrollment of Disabled Students in Charter Schools*

Charter schools’ largest transgression is noncompliance with the access rights granted to disabled students under IDEA and Section 504. From the beginning of the charter movement, there were concerns that charter schools were not educating their fair share of disabled students. Early studies funded by the Department of Education found that disabled students were not receiving equal access to charter schools in violation of the law.<sup>110</sup> National reports continue to show that charter schools are serving a lower proportion of disabled students than traditional schools.<sup>111</sup> Local reports from

108. RHIM & MCLAUGHLIN, *supra* note 46, at 21–22.

109. Rhim & McLaughlin, *supra* note 23, at 5.

110. AHEARN ET AL., *supra* note 23, at 4 (summarizing a 2000 study of IDEA noncompliance among certain charter schools); MCLAUGHLIN ET AL., *supra* note 68, at 9 (summarizing early research); see JACKSON, *supra* note 17, at 9; F. HOWARD NELSON ET AL., FINANCING AUTONOMY: THE IMPACT OF MISSION AND SCALE ON CHARTER SCHOOL FINANCE 41 (2003); SNELL, *supra* note 55, at 1; Mary Bailey Estes, *Choice for All?: Charter Schools and Students with Special Needs*, 37 J. SPECIAL EDUC. 257, 258 (2004); Heubert, *supra* note 19, at 309–10; Joseph R. McKinney, *Charter Schools: A New Barrier for Children with Disabilities*, 54 EDUC. LEADERSHIP No. 2, 22, 24–25 (1996) [hereinafter McKinney, *Charter Schools*] (noting that some disabled students are denied equal access to charter schools); McKinney, *supra* note 14, at 565–67; Elizabeth A. Swanson, *Special Education in Charter Schools*, 69 EDUC. F. 34, 38–41 (2004); Debra Viadero, *Federal Report Examines Charter Schools*, EDUC. WK., Dec. 1, 2004, at 3.

111. See, e.g., *The All Students Achieving Through Reform Act of 2009: Hearing on H.R. 4330 Before the H. Comm. on Educ. & Labor*, 111th Cong. 18, 19 (2010) (statement of Thomas Hehir, Ed.D., Professor, Harvard Graduate Sch. of Educ.) [hereinafter *Hehir Testimony*], available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111\\_house\\_hearings&docid=f:54829.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_house_hearings&docid=f:54829.pdf) (“[I]f you look at charters in many places, the number of kids with disabilities who are enrolled in those charters is significantly below what exists in traditional schools.”); GARY MIRON ET AL., WHAT MAKES KIPP WORK? A STUDY OF STUDENT CHARACTERISTICS, ATTRITION, AND SCHOOL FINANCE i (2011),

Arizona, Michigan and Minnesota,<sup>112</sup> California,<sup>113</sup> Colorado,<sup>114</sup> Delaware,<sup>115</sup> the District of Columbia,<sup>116</sup> Massachusetts,<sup>117</sup> New

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available at <http://www.edweek.org/media/kipstudy.pdf> (“KIPP schools enrolled a lower percentage of students with disabilities (5.9%) than did their local school districts (12.1%).”); MIRON ET AL., *supra* note 91, at 7, 16–17 (discussing varying disparities between special education populations in charter schools vis-à-vis public school counterparts); OFFICE OF THE INDEP. MONITOR, RE: REPORT ON THE PROGRESS AND EFFECTIVENESS OF THE LOS ANGELES UNIFIED SCHOOL DISTRICT’S IMPLEMENTATION OF THE MODIFIED CONSENT DECREE DURING THE 2009–2010 SCHOOL YEAR—PART I, at 18 (2010), available at [http://oimla.com/pdf/20100929/OIM\\_Report1\\_Final.pdf](http://oimla.com/pdf/20100929/OIM_Report1_Final.pdf) (“In the past two years, issues related to the equitable access of students with disabilities at charter schools have emerged nationally.”); CHRISTINA CLARK TUTTLE ET AL., MATHEMATICA POLICY RESEARCH, INC., STUDENT CHARACTERISTICS AND ACHIEVEMENT IN 22 KIPP MIDDLE SCHOOLS xii (2010), available at [http://www.mathematica-mpr.com/publications/pdfs/education/KIPP\\_fnlrpt.pdf](http://www.mathematica-mpr.com/publications/pdfs/education/KIPP_fnlrpt.pdf) (“On average, KIPP middle schools have . . . lower concentrations of special education and limited English proficiency (“LEP”) students, than the public schools from which they draw.”); Elizabeth R. Drame, *Measuring Academic Growth in Students with Disabilities in Charter Schools*, 42 EDUC. & URB. SOC’Y 379, 381 (2010) (noting a concern that “charter schools can ‘select’ their students with disabilities and therefore avoid facing the same level of challenges experienced by the larger public school district”); Christopher Lubienski & Peter Weitzel, *Choice, Integration, and Educational Opportunity: Evidence on Competitive Incentives for Student Sorting in Charter Schools*, 12 J. GENDER RACE & JUST. 351, 356 (2009) (noting that in-depth study indicates that “charter schools serve a lower proportion of special needs students”); McLaughlin & Rhim, *supra* note 9, at 39 (discussing various attempts by charter schools to meet special education needs, but noting that “one-size-fits-all” practices would “be likely to restrict access to meaningful curriculum [] for students with disabilities”); Hehir, *supra* note 7.

112. Rhim & McLaughlin, *supra* note 106, at 375.

113. See Cassandra Guarino & Derrick Chau, *Special Education in Charter and Conventional Public Schools*, in CHARTER SCHOOL OPERATIONS AND PERFORMANCE: EVIDENCE FROM CALIFORNIA 161, 172 (2002), available at [http://www.rand.org/content/dam/rand/pubs/monograph\\_reports/2011/RAND\\_MR1700.pdf](http://www.rand.org/content/dam/rand/pubs/monograph_reports/2011/RAND_MR1700.pdf).

114. Jeremy P. Meyer, *Charters Challenged—DPS Wants Them To Serve More Special-Needs Kids*, DENV. POST, Oct. 26, 2009, at 1A; Jeremy P. Meyer & Burt Hubbard, *Imbalance in Special Education—Charter Schools Enroll Fewer with Needs*, DENV. POST, June 13, 2009, at 1A.

115. MIRON ET AL., *supra* note 91, at 25.

116. See, e.g., Report of the Evaluation Team for the 2009–10 School Year at 65, *Blackman v. District of Columbia*, No. 97-1629 (D.D.C. Dec. 10, 2010), available at <http://www.bazelon.org/LinkClick.aspx?fileticket=3b-mFa0ePCc%3D&tabid=190> (reporting on the compliance and performance in District of Columbia schools); see also Michael Birnbaum, *Special-Ed Problems Continue in District*, WASH. POST, June 27, 2009, at B1 (reporting on criticisms of D.C. public charter schools in their “selective admissions” that “discourage special-needs students from enrolling”); Complaint Letter from Ira A. Burnim, Legal Dir., & Lewis Bossing, Senior Att’y, Judge David L. Bazelon Ctr. for Mental Health Law, to Anurima Bhargava, Chief Educ. Opportunities Section, U.S. Dep’t of Justice, Civil Rights Div. 3 (May 12, 2011) [hereinafter Bazelon Center for Mental Health Law], available at <http://www.bazelon.org/LinkClick.aspx?fileticket=ZHSqwTj8U78%3d&tabid=77> (alleging “discrimination by the District of Columbia . . . against students with disabilities in violation of the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act”).

Jersey,<sup>118</sup> Texas,<sup>119</sup> Albany,<sup>120</sup> Boston,<sup>121</sup> Buffalo,<sup>122</sup> New York City,<sup>123</sup> and San Diego,<sup>124</sup> show that charter schools serve a significantly lower percentage of special needs children than traditional schools.

The reports from New Orleans and Los Angeles are most telling because the former has the highest percentage of students attending charter schools,<sup>125</sup> and the latter has the largest overall number of charter schools.<sup>126</sup> In New Orleans, considered the proving ground for

117. See Anne E. Trotter et al., *Educational Management Organizations and Charter Schools: Serving All Students*, 213 EDUC. L. REP. 935, 944 (2006); James Vaznis, *Charter Schools Lag in Serving the Neediest*, BOS. GLOBE, Aug. 12, 2009, at B1; William Blackwell, *Preparing for an Era of Charter School Expansion: An Examination of Special Education in Massachusetts' Charter Schools* 31 (Mar. 5, 2011) (unpublished manuscript) (on file with the North Carolina Law Review) (presenting information at a AERA Annual Meeting).

118. See Martin, *supra* note 13, at 358–59, 375 (surveying research data suggesting disparately low special needs enrollment in New Jersey charter schools).

119. Mary Bailey Estes, *Zero Reject and School Choice: Students with Disabilities in Texas' Charter Schools*, 2 LEADERSHIP & POL'Y SCHS. 213, 228 (2003).

120. See Scott Waldman, *A Skewed Measure of Test Success?*, TIMES UNION (Albany, N.Y.) (Sept. 6, 2009), <http://www.timesunion.com/local/article/A-skewed-measure-of-test-success-547295.php>.

121. See *Hehir Testimony*, *supra* note 111, at 19 (“[I]n Boston, for instance, where 20 percent of children are English language learners, there is only one charter that exceeds 4 percent in its enrollment of English language learners.”); see also Vaznis, *supra* note 117 (“[M]ore than half [of the charter schools in the Boston area] still lagged at least 6 percentage points below the school district’s average of 21 percent. In urban districts statewide, special education enrollment was 10 percent or lower at about a third of the charter schools.”).

122. See Peter Simon, *Charter Schools Lag in Special-Education Enrollment*, BUFF. NEWS, Nov. 7, 2002, at B3.

123. See UNITED FED’N OF TEACHERS, *SEPARATE AND UNEQUAL: THE FAILURE OF NEW YORK CITY CHARTER SCHOOLS TO SERVE THE CITY’S NEEDIEST STUDENTS* 2, 6 (2010), available at <http://www.uft.org/files/attachments/uft-report-2010-01-separate-and-unequal.pdf> (“Less than 10 percent of charter pupils are categorized as special education students versus a citywide average of more than 16 percent in the district public schools.”); see also Carl Campanile, *Charter Ultimatum: Pol Seeks Quota on Special-Needs Kids*, N.Y. POST (Apr. 26, 2010), [http://www.nypost.com/p/news/local/charter\\_ultimatum\\_bTPsw02N8VPIMxkwZ4EG3H](http://www.nypost.com/p/news/local/charter_ultimatum_bTPsw02N8VPIMxkwZ4EG3H) (discussing legislative reaction to New York’s charter disparities).

124. See *Hehir Testimony*, *supra* note 111, at 21 (noting that “there were only three children with mental retardation in all San Diego non-conversion charter schools combined”).

125. See SCOTT S. COWEN INST. FOR PUB. EDUC. INITIATIVES, *THE 2011 STATE OF PUBLIC EDUCATION IN NEW ORLEANS* 7 (2011), available at <http://www.coweninstitute.com/wp-content/uploads/2011/07/2011-SPENO-report.pdf> (comparing the percentage of New Orleans public school attendees with those of other major U.S. cities, such as Washington, D.C., and Detroit).

126. *L.A. Unified Leads Nation by Far in Number of Charter School Students*, L.A. TIMES (Dec. 30, 2010), <http://latimesblogs.latimes.com/lanow/2010/12/la-unified-leads-nation-by-far-in-number-of-charter-school-students.html>.

charter schools,<sup>127</sup> students with disabilities comprise 12.6% of the student population in traditional schools but only 7.8% of the population in charter schools. Eleven charter schools in New Orleans reported that 5% or less of their students are disabled.<sup>128</sup> Los Angeles Unified School District, which has been under federal court oversight since 1996 for systemic noncompliance with special education law, has similar disparities in disabled student enrollment.<sup>129</sup> The Office of the Independent Monitor (“OIM”) found that the enrollment of disabled students in charter schools was “disproportionately low”: disabled students comprised 7.6% of the population in charter schools compared to 11.3% in traditional public schools.<sup>130</sup>

The problem of underrepresentation has become so acute that states and districts are considering legislation requiring charter schools to enroll the same percentage of disabled students as traditional schools or to set minimum enrollment percentages.<sup>131</sup> In New Orleans, for example, when it became apparent that charter

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127. Walter Isaacson, *The Greatest Education Lab*, TIME, Sept. 17, 2007, at 47, 49 (“New Orleans will be the nation’s most visible test of the charter-school movement.”); Patrik Jonsson, *As New Orleans Restarts Its Schools, Most Are Now Charter Schools*, CHRISTIAN SCI. MONITOR (Sept. 4, 2007), <http://www.csmonitor.com/2007/0904/p01s08-ussc.html>; Greg Toppo, *In New Orleans Schools, It’s Like Starting Over*, USA TODAY (June 7, 2007), <http://www.usatoday.com/educate/college/arts/articles/20070617.htm>.

128. PAUL G. PASTOREK, LA. DEP’T OF EDUC., STATE SPECIAL EDUCATIONAL DATA PROFILE 2008–2009, at 3–4, available at <http://www.doe.state.la.us/lde/uploads/17133.pdf>; see also INST. ON RACE & POVERTY, THE STATE OF PUBLIC SCHOOLS IN POST-KATRINA NEW ORLEANS: THE CHALLENGE OF CREATING EQUAL OPPORTUNITY 37, 38 (2010), available at [http://www.irpumn.org/uls/resources/projects/THE\\_STATE\\_OF\\_SCHOOLS\\_IN\\_NEW\\_ORLEANS.pdf](http://www.irpumn.org/uls/resources/projects/THE_STATE_OF_SCHOOLS_IN_NEW_ORLEANS.pdf) (discussing the incongruity of demographics between charter schools and traditional schools); SCOTT S. COWEN INST. FOR PUB. EDUC. INITIATIVES, RESEARCH UPDATE 4 (2010), available at <http://www.coweninstitute.com/wp-content/uploads/2010/01/research.update.1-10.v8.pdf> (identifying demographic data showing disabled students underserved in charter schools compared to traditional schools); Sarah Carr, *Equal Treatment for Special-Needs Students in Short Supply at New Orleans Public Schools*, TIMES-PICAYUNE (New Orleans, La.) (Feb. 1, 2010), [http://www.nola.com/education/index.ssf/2010/02/post\\_75.html](http://www.nola.com/education/index.ssf/2010/02/post_75.html) (showing that on average, roughly eight percent of charter school students are “classified as special needs, while twelve percent” are classified as such in non-charter schools).

129. See *infra* note 132.

130. OFFICE OF THE INDEP. MONITOR, PILOT STUDY OF CHARTER SCHOOLS’ COMPLIANCE WITH THE MODIFIED CONSENT DECREE AND THE LAUSD SPECIAL EDUCATION POLICIES AND PROCEDURES ii, 11–14 (2009), available at <http://oimla.com/pdf/20090605/PilotCharterSchool.pdf>; see also *Hehir Testimony*, *supra* note 111 (stating that disabled students are underrepresented in Los Angeles charter schools).

131. See, e.g., Dave Breitenstein, *Disabled Student Denied*, NEWS-PRESS (Fort Myers, Fla.) (May 10, 2007), [http://pqasb.pqarchiver.com/news\\_press/access/1729477791.html?FMT=ABS&FMTS=ABS:FT&date=May+10%2C+2007&author=Dave+Breitenstein&pub=The+News+Press&edition=&startpage=n%2Fa&desc=Disabled+student+denied;Campanile](http://pqasb.pqarchiver.com/news_press/access/1729477791.html?FMT=ABS&FMTS=ABS:FT&date=May+10%2C+2007&author=Dave+Breitenstein&pub=The+News+Press&edition=&startpage=n%2Fa&desc=Disabled+student+denied;Campanile), *supra* note 123.

schools were under-enrolling disabled students, the state board mandated that charter school enrollment must be ten percent disabled students.<sup>132</sup> The mandate, however, has done little to curb the underrepresentation of disabled students in New Orleans' charter schools.

There are many explanations why charter schools serve a significantly lower percentage of disabled students than traditional schools. Charter schools argue that their teaching methods prevent students from being identified as disabled and hasten declassification.<sup>133</sup> If true, this should be hailed as a major success, but no empirical or national studies support this conclusion.

Another reason for the underrepresentation may be that parents do not want to enroll their disabled children at charter schools.<sup>134</sup> This is not troubling if parents are exercising genuine choice, but experience indicates they are not. Parents of disabled students are not applying to charter schools because they know that the schools cannot provide sufficient support for their children.<sup>135</sup> This effective elimination of charter schools as a viable choice for disabled students violates the law. Special education law requires that "students with disabilities must be provided a range of choices in programs and activities that is comparable to that offered to students without disabilities" and that schools cannot "deny admission to a student with a disability solely because of that student's need for special education or related aids and services."<sup>136</sup> Schools must modify their programs and provide a range of services to accommodate each child, not only the children that "fit."<sup>137</sup> When charter schools fail in these

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132. Carr, *supra* note 13; Sam Winston, *The New Paradigm*, GAMBIT WKLY. (New Orleans, La.) (July 18, 2006), <http://www.bestofneworleans.com/gambit/the-new-paradigm/Content?oid=1246081>.

133. *Hehir Testimony*, *supra* note 111, at 21; THOMAS A. FIORE ET AL., CHARTER SCHOOLS AND STUDENTS WITH DISABILITIES: A NATIONAL STUDY 41 (2000); SNELL, *supra* note 55, at 1, 7-9; Trotter et al., *supra* note 117, at 945 (identifying charter advocate argument that charters prevent classification in the first place); Zollers & Ramanathan, *supra* note 2, at 297; see Breitenstein, *supra* note 131.

134. RHIM & MCLAUGHLIN, *supra* note 46, at 25 ("Parents look at the charters and see that the district offers their severely disabled child more services." (internal quotation marks omitted)).

135. FIORE ET AL., *supra* note 133, at 40; Meyer & Hubbard, *supra* note 114; Simon, *supra* note 122; Waldman, *supra* note 120; Bazelon Center for Mental Health Law, *supra* note 116, at 7.

136. U.S. DEP'T OF EDUC. OFFICE FOR CIVIL RIGHTS, APPLYING FEDERAL CIVIL RIGHTS LAWS TO PUBLIC CHARTER SCHOOLS 7, 17 (2000).

137. For a detailed explanation of how limiting parental choice by failing to provide services is a violation of IDEA and Section 504, see Mark C. Weber, *Special Education*



obligations, they also fail to serve as a realistic choice for disabled students.

While genuine parental choice and successful teaching methods may contribute to the under-enrollment of disabled students in charter schools, the largest factor is charter schools' practice of denying admission to disabled students or counseling parents out of enrolling their disabled children in the school. "Counseling out" occurs when a charter school dissuades a disabled student from enrolling by stating that the school has insufficient services or resources, that the child is not a good "fit" for the curriculum, or that the public school could serve the child better. This practice clearly violates the law.<sup>138</sup> Early national studies funded by the Department of Education indicated that one-quarter of charter schools counseled disabled students out of attending, and many others required parents to sign invalid waivers of their federal rights.<sup>139</sup> In Massachusetts, the state charter office actually provided its charter schools a blueprint for how to counsel out disabled students.<sup>140</sup>

Strong evidence of charter schools counseling out disabled students exists today.<sup>141</sup> In New Orleans, reports of charter schools telling disabled students they should attend traditional public schools because the charter schools lacked the necessary resources surfaced in 2006 and continue unabated.<sup>142</sup> The Southern Poverty Law Center

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from the (*Damp*) Ground Up: *Children with Disabilities in a Charter School-Dependent Educational System*, 11 LOY. J. PUB. INT. L. 217, 236–41 (2010).

138. U.S. DEP'T OF EDUC. OFFICE FOR CIVIL RIGHTS, *supra* note 136, at 7.

139. AHEARN ET AL., *supra* note 23, at 4 (noting that significant counseling out was occurring in charter schools); FIORE ET AL., *supra* note 133, at 20–21; JACKSON, *supra* note 17, at 9 (explaining that the discrepancies between public schools and charter schools concerning the prevalence of students with disabilities is due, in part, to counseling out); see also RHIM & MCLAUGHLIN, *supra* note 46, at 23 (identifying that half of the states in a national study reported incidents of counseling out).

140. Zollers & Ramanathan, *supra* note 2, at 297.

141. See Hehir Testimony, *supra* note 111, at 19; SNELL, *supra* note 55, at 17; Kevin G. Welner & Kenneth R. Howe, *Steering Towards Separation: The Policy and Legal Implications of "Counseling" Special Education Students Away from Charter Schools*, in SCHOOL CHOICE AND DIVERSITY: WHAT THE EVIDENCE SAYS 93, 93–111 (Janelle T. Scott ed., 2005); Estes, *supra* note 110, at 258; McLaughlin & Rhim, *supra* note 9, at 39, 40; Hehir, *supra* note 7.

142. BOS. CONSULTING GRP., THE STATE OF PUBLIC EDUCATION IN NEW ORLEANS 33 (2007), available at <http://www.bcg.com/documents/file15048.pdf>; SCOTT S. COWEN INST., THE STATE OF PUBLIC EDUCATION IN NEW ORLEANS 2008 REPORT 24 (2008), available at <http://www.coweninstitute.com/wp-content/uploads/2010/03/SPENO2008.pdf>; Morse, *supra* note 13, at 176; Weber, *supra* note 137, at 219–20, 240; Sarah Carr, *Charter Schools Face Unique Challenges Educating Children with Special Needs*, TIMES-PICAYUNE (New Orleans, La.) (Apr. 18, 2010), <http://www.nola.com/education/index.ssf/2010/04>

recently filed a class action lawsuit alleging that charter schools in New Orleans are denying disabled students admission or are counseling them out after it is discovered the child has a disabling condition.<sup>143</sup> Parents raise similar allegations in lawsuits throughout the country, most recently in the District of Columbia.<sup>144</sup> Reports of charter schools screening or counseling out disabled students also exist in Arizona,<sup>145</sup> Florida,<sup>146</sup> Massachusetts,<sup>147</sup> Michigan,<sup>148</sup> Texas,<sup>149</sup> Denver,<sup>150</sup> and Los Angeles.<sup>151</sup>

Charter schools underserve disabled students in general, but they particularly under-enroll severely disabled students, or students with low-incidence disabilities such as autism, traumatic brain injury, or hearing, visual, or orthopedic impairments.<sup>152</sup> New Orleans and Los Angeles are again emblematic of the larger problem. In Los Angeles, the OIM concluded that students with severe low-incidence disabilities (such as blind, deaf, autistic, or severely emotionally impaired) are “disproportionately under-enrolled at charter schools,” “significantly under-represented,” and constitute 1.11% of the total charter enrollment compared to 3.09% of the traditional school population.<sup>153</sup> Similar conclusions are being drawn in New Orleans

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/charter\_schools\_face\_unique\_ch.html; Carr, *supra* note 128; Katy Reckdahl, *Parents, Advocates Fear that New Orleans Charter Schools Have Rejected Students with Disabilities*, TIMES-PICAYUNE (New Orleans, La.) (June 5, 2010), [http://www.nola.com/education/index.ssf/2010/06/parents\\_advocates\\_fear\\_that\\_ne.html](http://www.nola.com/education/index.ssf/2010/06/parents_advocates_fear_that_ne.html).

143. Complaint at 17–19, P.B. v. Pastorek, No. 2:10-cv-04049 (E.D. La. Oct. 26, 2010).

144. See Report of the Evaluation Team for the 2008–09 School Year at 73–74, *Blackman v. Dist. of Colum.*, No. 97-1629 (D.D.C. Sept. 25, 2009); Bazelon Center for Mental Health Law, *supra* note 116, at 5–7. See generally *United States v. Nobel Learning Communities, Inc.*, No. 09-1818, 2010 WL 1047730 (E.D. Pa. Mar. 24, 2010) (alleging that the defendant, a for-profit private school network, illegally discriminates against children with disabilities in enrollment decisions); Breitenstein, *supra* note 131 (reporting that charter schools denied admission to wheelchair-bound students).

145. McKinney, *Charter Schools*, *supra* note 110, at 24–25.

146. Breitenstein, *supra* note 131.

147. Trotter et al., *supra* note 117, at 944; Zollers & Ramanathan, *supra* note 2, at 297.

148. Trotter et al., *supra* note 117, at 944.

149. Estes, *supra* note 119, at 230.

150. Editorial, *Equal Access to Charter Schools*, DENV. POST, June 16, 2009, at 10B; Meyer, *supra* note 114.

151. OFFICE OF THE INDEP. MONITOR, *supra* note 130, at 19; Nirvi Shah, *The \$68,000 Bus Ride*, EDUC. WK. (Apr. 26, 2011), [http://blogs.edweek.org/edweek/speced/2011/04/the\\_68000\\_school\\_bus\\_ride.html?cmp=ENL-EU-NEWS2](http://blogs.edweek.org/edweek/speced/2011/04/the_68000_school_bus_ride.html?cmp=ENL-EU-NEWS2).

152. AHEARN ET AL., *supra* note 23, at 4; JACKSON, *supra* note 17, at 9; MCLAUGHLIN ET AL., *supra* note 68, at 8; RHIM & MCLAUGHLIN, *supra* note 46, at 25; SNELL, *supra* note 55, at 1; Hehir, *supra* note 7; Blackwell, *supra* note 117, at 31–32.

153. OFFICE OF THE INDEP. MONITOR, *supra* note 130, at ii, 11–14.

and the District of Columbia.<sup>154</sup> This “cherry-picking” of students with high-incidence, less expensive disabilities (such as learning disabilities or speech/language issues) occurs throughout the country.<sup>155</sup>

There are strong incentives for charter schools to counsel out students with disabilities or cherry-pick students with mild disabilities. The most significant are cost and accountability concerns.<sup>156</sup> Disabled students are expensive to educate. They put a large strain on the budgets of charter schools, particularly independent charter schools, and can threaten their viability.<sup>157</sup> The easiest way for charter schools to deliver on their promise to provide better educational outcomes for the same amount of money is by weeding out the expensive and difficult-to-educate students.<sup>158</sup> This creates powerful financial incentives to avoid enrolling disabled students.

Market and outcome accountability provide equally compelling reasons for charters to avoid enrolling disabled students.<sup>159</sup> Disabled students do not perform as well as general education students on statewide assessment systems, which means it becomes harder for charter schools to meet their academic performance goals as more disabled students participate in assessments.<sup>160</sup> This increases the

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154. See Report of the Evaluation Team for the 2008–09 School Year, *supra* note 144, at 73–75; Weber, *supra* note 137, at 220; Sarah Carr, *Charters Still Show Disparities in Special-Needs*, TIMES-PICAYUNE (New Orleans, La.) (Dec. 27, 2008), <http://www.nola.com/timespic/stories/index.ssf?/base/news-1/1230358945206980.xml&coll=1>; Steve Ritea, *Left Behind? Some Accuse New Orleans' East Bank Charters Schools of Turning Away Students with Special Needs*, TIMES-PICAYUNE (New Orleans, La.) (Apr. 30, 1997), <http://www.nola.com/timespic/stories/index.ssf?/base/news-3/1177911859154840.xml&coll=1>; Bazelon Center for Mental Health Law, *supra* note 116, at 5–7.

155. See, e.g., *Hehir Testimony*, *supra* note 111, at 19; MIRON ET AL., *supra* note 91, at 7, 16; Trotter et al., *supra* note 117, at 944; Weber, *supra* note 137, at 219–20; Zollers & Ramanathan, *supra* note 2, at 297; Birnbaum, *supra* note 116; Dan Hardy, *Charter Raises Scores—Finances Raise Questions*, PHILA. INQUIRER (Dec. 28, 2008), [http://articles.philly.com/2008-12-28/news/24993154\\_1\\_students-school-year-chester-upland-school-district](http://articles.philly.com/2008-12-28/news/24993154_1_students-school-year-chester-upland-school-district); Connie Llanos, *Charters Flunk in Disabled Access*, DAILY NEWS L.A., Feb. 23, 2010, at A1; Meyer & Hubbard, *supra* note 114; Simon, *supra* note 122.

156. Rhim et al., *supra* note 20, at 53.

157. *Hehir Testimony*, *supra* note 111, at 22.

158. *Id.*; AHEARN ET AL., *supra* note 23, at 27–28, 33; MIRON ET AL., *supra* note 91, at 16; RHIM & MCLAUGHLIN, *supra* note 46, at 23; Lubienski & Weitzel, *supra* note 111, at 374; Swanson, *supra* note 110, at 40; Trotter et al., *supra* note 117, at 943–44; Zollers & Ramanathan, *supra* note 2, at 297 (noting charters have a profit motive to exclude disabled students, particularly for-profit charters).

159. McLaughlin & Rhim, *supra* note 9, at 28; Swanson, *supra* note 110, at 40.

160. See J. LEE ET AL., NAT'L CTR. FOR EDUC. STATISTICS, INST. OF EDUC. SCIS., U.S. DEP'T OF EDUC., *THE NATION'S REPORT CARD: MATHEMATICS 2007*, 54 tbl.A-12, 62 tbl.A-19 (2007), available at <http://nces.ed.gov/nationsreportcard/pdf/main2007/2007494>

chance of sanction or non-renewal from the charter authorizer and makes the schools a less attractive choice to all parents. Choice and outcome accountability create perverse incentives for charters to counsel out all disabled students or cherry-pick the least disabled students.<sup>161</sup>

Charters also avoid enrolling disabled students because they infringe on charter school autonomy and specialized curricula. Disabled students are accompanied into school by a slew of regulatory burdens. Their accommodations often require adjustment to teaching styles and curricula and are unwanted intrusions into the educational structure of charter schools.<sup>162</sup> Enrolling an autistic child who needs a structured educational setting into a non-structured Waldorf or Montessori charter school, for example, would cause a significant upheaval in the charter's teaching styles and methods. The specialized nature of charter school missions adds additional incentives to avoid this intrusion. Counseling out often occurs because charter schools honestly believe the disabled student is a bad fit with the school's specialized curriculum.<sup>163</sup> They simply do not understand that the law requires that the school must modify its program to accommodate the child.<sup>164</sup> The "zero reject" culture<sup>165</sup> of special education conflicts with the foundations of charter programs.

The fewer disabled students a charter school enrolls, the greater its autonomy, the lower its costs, the higher its performance on statewide assessments, and the less bureaucratic red-tape it must deal with. These perverse incentives to counsel out and cherry-pick significantly contribute to the under-enrollment of disabled students, especially severely disabled students, in charter schools.

### B. *The Least Restrictive Environment*

When charter schools do enroll disabled students, they struggle to comply with the least restrictive environment requirement in

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.pdf; J. LEE ET AL., NAT'L CTR. FOR EDUC. STATISTICS, INST. OF EDUC. SCIS., U.S. DEP'T OF EDUC., *THE NATION'S REPORT CARD: READING 2007*, 53 tbl.A-8 (2007), available at <http://nces.ed.gov/nationsreportcard/pdf/main2007/2007496.pdf>.

161. Drame, *supra* note 111, at 388–91; McLaughlin & Rhim, *supra* note 9, at 44–45; see also James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U. L. REV. 932, 961–66 (2004) (explaining how NCLB accountability measures create incentives to deny admission to low-performing students).

162. RHIM & MCLAUGHLIN, *supra* note 46, at 25.

163. AHEARN ET AL., *supra* note 23, at 27–28, 33; FIORE ET AL., *supra* note 133, at 40; Rhim et al., *supra* note 20, at 53.

164. AHEARN ET AL., *supra* note 23, at 28; MCLAUGHLIN ET AL., *supra* note 68, at 9.

165. See *supra* Part I.B.3.

IDEA, which requires that disabled students be educated in the least restrictive environment (“LRE”). This means that, “[t]o the maximum extent appropriate, children with disabilities . . . are educated with children who are not disabled; and . . . removal of children with disabilities from the regular educational environment occurs only if . . . education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.”<sup>166</sup> The LRE requirement is commonly referred to as “inclusion” or “mainstreaming,” but these terms do not fully capture the obligation. LRE also requires LEAs to provide a “continuum of alternative placements” such as regular classes, special classes, and home instruction and to make “provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement.”<sup>167</sup> While scholars disagree whether full inclusion is the best educational method,<sup>168</sup> there is no debate that exclusively employing a full mainstreaming model does not comply with IDEA.

Charter schools struggle to fulfill the “continuum of services” obligation. Most charter schools utilize a full inclusion placement for their disabled students and incorrectly believe this alone fulfills their LRE duties.<sup>169</sup> Charter schools often adopt a school-wide inclusion policy for special education students—that is not tailored to their unique needs—instead of offering a full continuum of placement options.<sup>170</sup> One reason for this practice is that charter schools, especially independent charter schools, do not have the capacity or resources to offer anything other than a full-inclusion setting.<sup>171</sup> In

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166. 20 U.S.C. § 1412(a)(5)(A) (2006); 34 C.F.R. § 300.114(a)(2)(i), (ii) (2010).

167. 34 C.F.R. § 300.115. “LRE is designed to individually determine the most appropriate educational setting for each student.” PRESIDENT’S COMM’N ON EXCELLENCE IN SPECIAL EDUC., *supra* note 20, at 39; Guarino & Chau, *supra* note 113, at 167 (“[I]nclusion, in and of itself, may not create optimal learning conditions.”).

168. Compare Ruth Colker, *The Disability Integration Presumption: Thirty Years Later*, 154 U. PA. L. REV. 789, 790 (2006) (arguing against a presumption of full inclusion), with Mark C. Weber, Response, *A Nuanced Approach to the Disability Integration Presumption*, 156 U. PA. L. REV. PENNUMBRA 174, 174 (2007), <http://www.pennumbra.com/responses/10-2007/Weber.pdf> (arguing in favor of full inclusion).

169. FIORE ET AL., *supra* note 133, at 41; OFFICE OF THE INDEP. MONITOR, *supra* note 130, at 20; SNELL, *supra* note 55, at 2, 9 (writing that charter schools meet the LRE requirement by adopting an inclusive teaching approach); Estes, *supra* note 110, at 265; Rhim et al., *supra* note 20, at 53; Rhim & McLaughlin, *supra* note 23, at 9; Swanson, *supra* note 110, at 37; Zollers & Ramanathan, *supra* note 2, at 298; Blackwell, *supra* note 117, at 33.

170. AHEARN ET AL., *supra* note 23, at 33; Rhim & McLaughlin, *supra* note 23, at 9–10.

171. AHEARN ET AL., *supra* note 23, at 31, 33–34; FIORE ET AL., *supra* note 133, at 23, 41 (finding that many charters use full inclusion model only because of financial or

Los Angeles, for example, the OIM found that most charter schools violated the LRE requirement because they offered only a resource specialist and not a full continuum of alternative educational placements.<sup>172</sup> The OIM concluded that charter schools do not have the “expertise and resources” to create full service special education programs that comply with the “continuum of services” requirement.<sup>173</sup> Compounding the problem is the fact that few charters use proper inclusion; they do not provide the required supplementary aides and services for students in the general education classroom.<sup>174</sup>

As noted above, the failure to provide a continuum of alternative educational placements contributes to the underrepresentation of special needs students in charter schools. Charter schools frequently tell parents that their services are limited to what they have available, which is often insufficient; this effectively counsels out disabled students.<sup>175</sup> Parents of disabled students will not select a charter school if there are insufficient resources or placement options. In Los Angeles, for example, only 8.1% of charter schools offered a special day program as an option for disabled students, whereas 87% of traditional schools provided this program option.<sup>176</sup> Lacking such basic services for disabled students precludes charter schools from being a viable school option for most disabled students. As stated by the OIM, the “disproportionate availability of special education

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personnel restraints); Guarino & Chau, *supra* note 113, at 165–66 (showing that in California “charter schools reported serving a significantly higher percentage of students exclusively in the general education classroom than did conventional public schools. . . . [A] service delivery choice that may be related to constraints on finances or facilities”); OFFICE OF THE INDEP. MONITOR, *supra* note 130, at 20; Mary Bailey Estes, *Charting the Course of Special Education in Texas’ Charter Schools*, 26 EDUC. & TREATMENT CHILD. 452, 463 (2003) (explaining that studied Texas charter schools utilize full inclusion model without offering a full continuum of alternative educational placements); Estes, *supra* note 110, at 265; McLaughlin & Rhim, *supra* note 9, at 39; Morse, *supra* note 13, at 176 (finding that New Orleans charter schools utilize a one-size-fits-all inclusion model); Rhim & McLaughlin, *supra* note 23, at 9; Report of the Evaluation Team for the 2008–09 School Year, *supra* note 144, at 74–78; Bazelon Center for Mental Health Law, *supra* note 116, at 7–8.

172. OFFICE OF THE INDEP. MONITOR, *supra* note 130, at 19–20.

173. *Id.* at 20; *see also* Rhim & McLaughlin, *supra* note 23, at 8 (stating that charter schools provide related services based on availability, not child necessity, because of limited capacity).

174. Gleason, *supra* note 17, at 163; Guarino & Chau, *supra* note 113, at 168; Weber, *supra* note 137, at 228–29; Zollers & Ramanathan, *supra* note 2, at 298–99.

175. Estes, *supra* note 110, at 262–63; Report of the Evaluation Team for the 2008–09 School Year, *supra* note 144, at 77–78; Bazelon Center for Mental Health Law, *supra* note 116, at 7–8.

176. OFFICE OF THE INDEP. MONITOR, *supra* note 130, at iii.

services . . . may present barriers for promoting equitable access to schools of choice.”<sup>177</sup>

### C. *Child Find*

Finally, charter schools struggle to fulfill IDEA’s child find obligation. IDEA mandates that LEAs identify, locate, and evaluate children suspected of having a disability.<sup>178</sup> Charter schools often intentionally violate this child find obligation because they believe they “do a good job with all students” and “testing and labeling would not improve a student’s education in any way.”<sup>179</sup> Individualized Education Plans (“IEPs”) required under IDEA<sup>180</sup> are de-emphasized at some charter schools, and special education programs are not created in others because of the belief that disabled students are being properly served, in an informal manner, without a stigmatizing label.<sup>181</sup> This contributes to the underrepresentation of disabled students in charter schools. With a culture focused on results, and not on adherence to procedures, it is easy to see how charter schools develop the attitude that labeling a child is unnecessary if special supports and an appropriate education are already being provided.<sup>182</sup>

The practice of not evaluating and classifying children as disabled violates IDEA—for good reasons. If a child is not evaluated for special education, there is simply no way to know if the child is receiving the free appropriate public education (“FAPE”) mandated by IDEA, or what services are even needed to provide an appropriate education. In fact, by only informally serving disabled students with support services, but not crafting the mandatory IEP, the school is

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177. *Id.* at 20.

178. 20 U.S.C. § 1412(a)(3) (2006); 34 C.F.R. § 300.111 (2010).

179. FIORE ET AL., *supra* note 133, at 41; *see also* RHIM & MCLAUGHLIN, *supra* note 46, at 26 (noting that charter schools enroll disabled students without identifying them because they feel small classes will be sufficient support); Rhim & McLaughlin, *supra* note 106, at 380–81 (same).

180. 20 U.S.C. § 1414(d).

181. Scaggs v. N.Y. Dep’t of Educ., No. 06-CV-0799, 2007 WL 1456221, at \*1 (E.D.N.Y. May 16, 2007) (stating the facts of a class action alleging that a New York charter school fails to identify children with disabilities and create IEPs); Complaint, *supra* note 143, at 19–21; Swanson, *supra* note 110, at 37–39 (stating that from 1997 to 1998, 75% of Michigan charters offered no special education services). Charter schools in Ohio and Los Angeles have been cited for failing to create and implement IEPs, among other violations. OFFICE OF THE INDEP. MONITOR, *supra* note 111, at 10.

182. SNELL, *supra* note 55, at 1; Zollers & Ramanathan, *supra* note 2, at 297; Hehir, *supra* note 7.

depriving the child of a FAPE, which requires that services be provided pursuant to an IEP.<sup>183</sup>

Child find also ensures that disabled students receive all appropriate services and not just the services available at the school. The eligibility evaluation components of child find is the key tool for identifying disabled students' deficits and the support services and special education necessary to address those needs.<sup>184</sup> Child find prevents schools from merely providing what is available and compels them to create and provide adequate programs and services.

Evaluation and identification for IDEA eligibility are also critical to parents of disabled students. A formal finding of eligibility for special education entitles parents to "meaningful input into all decisions affecting their child's education and the right to seek review of any decisions they think inappropriate."<sup>185</sup> Parental involvement, according the Supreme Court, is one of the key protections afforded disabled students under IDEA and is essential to ensuring disabled students are provided an appropriate education.<sup>186</sup> When charter schools provide services only informally, and refuse to evaluate and identify students as IDEA eligible, they are effectively cutting one of the most important factors in a child's education—the parents—out of the equation.

### III. MINIMIZING THE CLASH

The culture clash between charter schools and special education must be minimized to avoid continued harm to disabled students. But should charter school principles yield to special education values? Or

183. See 20 U.S.C. § 1401(9)(D).

184. 20 U.S.C. § 1414(a), (d) (setting forth requirements for evaluations and IEPs); *Honig v. Doe*, 484 U.S. 305, 311 (1988) (noting that an IEP is the centerpiece of IDEA's educational delivery system); *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 368 (1985) ("The *modus operandi* of the Act is the [IEP].").

185. *Honig*, 484 U.S. at 311–12; see also *Sch. Comm. of Burlington*, 471 U.S. at 368 (holding that parents help develop eligible child's educational program and assess its effectiveness); *Bd. of Educ. v. Rowley ex rel. Rowley*, 458 U.S. 176, 207 (1982) (finding that parents and educators are primarily responsible for formulating the educational goals and methods for eligible children). For a discussion of the critical role parents play for formally identified students, see Robert A. Garda, Jr., *Untangling Eligibility Requirements Under the Individuals with Disabilities in Education Act*, 69 MO. L. REV. 441, 444–45 (2004).

186. *Honig*, 484 U.S. at 311 ("Congress repeatedly emphasized throughout the Act the importance and indeed the necessity of parental participation in both the development of the IEP and any subsequent assessments of its effectiveness."); *Rowley*, 458 U.S. at 208 ("Congress sought to protect individual children by providing for parental involvement . . . in the formulation of the child's individual educational program.").



should special education law adopt the new education reforms underpinning charter schools? Which culture should prevail—process or outcomes, procedures or autonomy, independence or collective action? Movement on both sides needs to occur, but until charter schools properly enroll and serve disabled students, the special education model should prevail.

Special education, which has remained static despite three decades of reform dramatically reshaping general education, could move toward outcome accountability for individual students. Instead of requiring only procedural compliance in serving disabled students—a foreign concept to charter schools—IDEA could instead demand outcome accountability. Charter schools are the best place to begin a measured transformation of special education law, fitting it into the accountability and choice culture. But barring this dramatic change in special education law, which is unlikely to occur, charter schools must adapt to the special education culture. The difficulty here is figuring out how to bend charter school principles without breaking them. This Part considers how the three areas of law that affect charter schools—federal law, state law, and chartering agreements—should be modified to make special education fit more seamlessly into charter schools.

#### A. Federal Law

Special education law presumes the existence of centralized bureaucracy overseeing numerous schools to implement complex procedures and capitalize on economies of scale. Charter schools that are independent LEAs do not fit this model. The first step, therefore, is to compel charter schools to link with other charter schools or existing LEAs for the provision of special education. Before explaining how IDEA can be modified to accomplish this goal, it is important to understand why prohibiting charter schools from being single-school LEAs is critical.

##### 1. Prohibit Charters from Being Independent LEAs

Every major study conducted on charter schools, most of them funded by the Department of Education, concludes that charter schools that are linked with a special education infrastructure better serve disabled students.<sup>187</sup> The preeminent researchers in the field,

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187. AHEARN ET AL., *supra* note 23, at 13–14, 50; JACKSON, *supra* note 17, at 13–15; RHIM & MCLAUGHLIN, *supra* note 46, at 41; Lange et al., *supra* note 93, at 12, 14 (summarizing research); Morse, *supra* note 13, at 175; Paul T. O'Neill, Richard J. Wenning

Lauren Rhim and Margaret McLaughlin, conclude that “[o]ne clear finding from our research is that charter schools benefit from affiliation with a special education ‘infrastructure’ that supports the provision of special education and related services in individual schools.”<sup>188</sup> The reason is simple: linkages enable capacity building through the sharing of resources and knowledge.<sup>189</sup> Lack of money and knowledge are the two of the most significant barriers to independent charter schools building programs of sufficient capacity to serve disabled students.<sup>190</sup>

Special education is costly for all schools, but the cost can be prohibitive for charter schools that are LEAs.<sup>191</sup> This is because independent charter schools cannot benefit from the economies of scale found in large school districts.<sup>192</sup> Single-school LEAs need to hire a special education director for one site, while larger districts can employ a special education director that oversees numerous sites.<sup>193</sup> The same is true for other personnel necessary to make a viable special education program, such as occupational, speech, and physical therapists.<sup>194</sup> In a traditional school district—the one contemplated by IDEA—a centralized bureaucracy can efficiently deploy all these people, resources, and technology across numerous schools. Charter schools that are LEAs cannot capitalize on these money-saving efficiencies.<sup>195</sup>

The resource strain is so severe that a single lawsuit or a child requiring intensive and expensive programming can bankrupt an independent charter school. Independent charter schools are less

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& Elizabeth Giovannetti, *Serving Students with Disabilities in Charter Schools: Legal Obligations and Policy Options*, 169 EDUC. L. REP. 1, 7 (2002) (summarizing research).

188. Rhim & McLaughlin, *supra* note 23, at 9.

189. AHEARN ET AL., *supra* note 23, at 15 (reporting that properly implementing special education programs hinges on capacity); JACKSON, *supra* note 17, at 13 (arguing that charters perform better when linked to an LEA because these increase capacity).

190. AHEARN ET AL., *supra* note 23, at 53 (stating that charter schools struggle to create capacity to provide special education); Lange et al., *supra* note 93, at 12, 19; McLaughlin & Rhim, *supra* note 9, at 39 (stating that charters fail to properly serve special education students because of capacity issues); Rhim & McLaughlin, *supra* note 106, at 374 (concluding that charters that are LEAs do not have sufficient “depth and breadth of human and fiscal resources”); Rhim & McLaughlin, *supra* note 23, at 8.

191. Estes, *supra* note 110, at 258; Gleason, *supra* note 17, at 158; McKinney, *supra* note 14, at 169.

192. Rhim & McLaughlin, *supra* note 23, at 7.

193. See Gleason, *supra* note 17, at 171.

194. *Id.*

195. MIRON ET AL., *supra* note 91, at 16; SNELL, *supra* note 55, at 2, 12; Heubert, *supra* note 19, at 320–21; Morse, *supra* note 13, at 178; O’Neill et al., *supra* note 187, at 3–4; Rhim & McLaughlin, *supra* note 23, at 7.

likely to have a budgetary cushion for private school placements, litigation, or expensive treatments. Indeed, special education creates the biggest threat to charter school solvency.<sup>196</sup> Despite congressional recognition that independent charter schools are “more exposed to varying and unforeseen costs than most traditional LEAs,” Congress exempted these schools from joint eligibility requirements that would help defray costs, spread risks, and provide more financial security.<sup>197</sup> Prohibiting charter schools from being single-school LEAs is the best means to solve the economic inefficiencies that limit capacity building.<sup>198</sup>

The lack of knowledge of special education law, practices, and procedures also prevents independent charters from properly serving disabled students. Charter school personnel are often ignorant of their obligations to disabled students under complex federal laws and are unfamiliar with special education services in general.<sup>199</sup> This ignorance of special education obligations translates into poor service for disabled students.<sup>200</sup>

Compelling charter schools to link with an existing LEA or other charter schools will help them build both their knowledge and experience capacity. Charters cannot succeed unless given access to

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196. Heubert, *supra* note 19, at 319–20; O'Neill et al., *supra* note 187, at 3; Weber, *supra* note 137, at 244; Zollers & Ramanathan, *supra* note 2, at 297.

197. S. REP. NO. 108-185, at 22 (2003); *see also* RHIM & MCLAUGHLIN, *supra* note 46, at 3 (stating that charters are disproportionately affected by special education costs because they are small); Gleason, *supra* note 17, at 170 (noting that traditional charter schools “are less affected by the fiscal isolation that independent LEA charter schools face”).

198. O'Neill et al., *supra* note 187, at 19.

199. AHEARN ET AL., *supra* note 23, at 28–29 (“[T]he overriding characteristic is a lack of knowledge of IDEA and what it means to a charter school, the state department of education, or a sponsoring or local education agency. The lack of knowledge impacts implementation for all parties.”); MCLAUGHLIN ET AL., *supra* note 68, at 10; RHIM & MCLAUGHLIN, *supra* note 46, at 10–11, 31; Heubert, *supra* note 19, at 322; McLaughlin & Rhim, *supra* note 9, at 38 (summarizing the studies); *see also* Estes, *supra* note 171, at 463 (noting that Texas charter operators lack knowledge of special education obligations); Estes, *supra* note 110, at 258 (providing an overview of personal accounts and statistics that show discrimination against disabled students in charter schools); Lange et al., *supra* note 93, at 12, 13 (noting that there is a “lack of attention to specific legal issues regarding educating students with disabilities in charter schools”); McKinney, *Charter Schools*, *supra* note 110, at 24–25 (“Charter schools are totally out of it when it comes to special ed.” (quoting an unnamed state official)); Rhim et al., *supra* note 20, at 53–54 (“A study conducted relatively early in the evolution of the charter sector documented problems associated with simply providing students with disabilities access to charter schools.”); Rhim & McLaughlin, *supra* note 106, at 374, 378–79 (explaining why charter schools are not meeting their legal obligation to educate disabled students who enroll).

200. Estes, *supra* note 110, at 264; Rhim et al., *supra* note 20, at 9–10.

strategies for managing the procedural and administrative aspects of special education law and mechanisms the existing system has devised for compliance with the legal mandates.<sup>201</sup> Compelling charters to partner with existing LEAs or each other provides charters with this necessary access and will help them overcome their knowledge gap.<sup>202</sup>

While charters may reap significant advantages from autonomy in general education,<sup>203</sup> it is not beneficial for charter schools to be independent and autonomous when it comes to providing special education.<sup>204</sup> Independent charter schools cannot do it alone; they require help to create sufficient capacity—in program offerings, procedural structures, and legal knowledge. Many independent charter schools recognize these inherent limitations and form cooperatives to pool resources and knowledge.<sup>205</sup> But cooperatives are voluntary and do not include all charter schools.<sup>206</sup> More is needed to protect disabled students than simply the hope that charters will forego their treasured autonomy and link themselves to large bureaucracies for special education purposes.

## 2. Compel Charter Schools To Link with Larger Service Organizations

IDEA can be changed in several ways to compel charter schools to be part of a larger collective whole. The easiest and least intrusive step is to reinstate the pre-1997 provision in IDEA that required small LEAs to create joint programs with other LEAs to establish eligibility for IDEA funding. Congress could reinstate the provision prohibiting distribution of IDEA funds to LEAs entitled to less than \$7,500 (which should be adjusted to today's dollars), unless they

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201. Lange et al., *supra* note 93, at 12, 19; *see also* Rhim & McLaughlin, *supra* note 23, at 8 (stating that charters do not meet the needs of disabled students because they lack expertise and experience).

202. RHIM & MCLAUGHLIN, *supra* note 46, at 35.

203. It is questionable whether increased autonomy results in better learning outcomes for any students. *See* U.S. DEP'T OF EDUC., FINAL REPORT, *supra* note 9, at 1–2 (finding no relationship between achievement impacts and level of autonomy).

204. Rhim & McLaughlin, *supra* note 23, at 9.

205. AHEARN ET AL., *supra* note 23, at 31–33; RHIM & MCLAUGHLIN, *supra* note 46, at 37; SNELL, *supra* note 55, at 19–20; Jeremy P. Meyer, *DPS Aims To Make Charter Schools More Diverse*, DENV. POST (Oct. 26, 2009), [http://www.denverpost.com/news/ci\\_13641344](http://www.denverpost.com/news/ci_13641344).

206. Rhim & McLaughlin, *supra* note 106, at 378; *see also, e.g.*, CAL. EDUC. CODE § 56195.1(f) (West Supp. 2011) (permitting charter schools that are LEAs to submit joint service plans); COLO. REV. STAT. ANN. § 22-30.5-603 (West 2011) (permitting, but not requiring, charter schools to form collaboratives); TEX. EDUC. CODE ANN. § 29.007 (West 2006) (permitting charter schools to enter into joint operation agreements).

created joint special education programs with other entities. This small measure alone would compel independent charter schools to join with existing LEAs or other charter schools to receive IDEA funding.

Congress could also remove the charter school exemption from the rule that state educational agencies can compel small LEAs to create joint programs if they are not of "sufficient size and scope to effectively meet the needs of children with disabilities."<sup>207</sup> This exception prohibits those most knowledgeable of charter school capacity—state special education departments—from compelling independent charter schools to combine forces unless state legislation permits it.<sup>208</sup> The troubled history of disabled students in charter schools shows that this exemption is unwarranted. There is no reason to treat charter schools differently than any other small LEA with only one or two schools. The \$7,500 minimum requirement was removed and the special exemption for charter schools was created because Congress had faith in charter schools to properly serve disabled students.<sup>209</sup> More than a decade of actual practice shows this faith was misplaced.

A more dramatic and effective measure would be for Congress to require charter schools be part of an LEA or educational service agency ("ESA").<sup>210</sup> IDEA should categorically prohibit charter schools from being independent LEAs. Congress has not taken this step for charter schools because it wants to allow states the flexibility to define their charter schools' LEA status.<sup>211</sup> But there is no justification for the disparate treatment of charter schools and other small LEAs, particularly in light of their documented record of poorly serving disabled students. For two decades, IDEA has limited the autonomy of small school districts—by mandating that they combine for purposes of special education—because it was recognized they were incapable of implementing IDEA.<sup>212</sup> This same reasoning justifies stripping charter schools of independent LEA status.

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207. 20 U.S.C. § 1413(e)(1)(A) (2006).

208. § 1413(e)(1)(B) (creating an exception to subpart (A) for charter schools).

209. See *supra* notes 61–68 and accompanying text.

210. See, e.g., AHEARN ET AL., *supra* note 23, at 48; Heubert, *supra* note 19, at 351; McKinney, *Charter Schools*, *supra* note 110, at 25; O'Neill et al., *supra* note 187, at 18.

211. PRESIDENT'S COMM'N ON EXCELLENCE IN SPECIAL EDUC., *supra* note 20, at 39.

212. See *supra* notes 61–68 and accompanying text.

*a. Advantages to Compelling Linkage*

Prohibiting charters from being LEAs will go a long way toward addressing charter schools' major failures under special education law—access, LRE, and child find—by ensuring they are connected to an organized and knowledgeable bureaucracy and network of schools with sufficient capacity to serve disabled students. Compelling charter schools to link with existing LEAs or ESAs addresses several of the underlying causes of the underrepresentation of disabled students in charter schools.

First, it reduces the financial incentives to counsel-out or cherry-pick disabled students. With the ability to spread costs for educating disabled students, particularly severely disabled students, across numerous schools, the financial burden is lessened. Instead of bearing the sole responsibility and cost alone as independent charter schools, a network of schools with one central special education office can efficiently allocate resources and reduce the financial incentive to deny enrollment to disabled students.<sup>213</sup> It is unsurprising that an early federal study found that charter schools that were part of LEAs had higher prevalence rates of disabled students than independent charter schools.<sup>214</sup>

Second, charter schools that are linked to larger special education structures are more likely to have the capacity to offer the full range of services for each disabled student required by IDEA. Independent charter schools lack the resources and knowledge to create the mandatory full continuum of alternative educational placements.<sup>215</sup> Economies of scale and knowledge can be attained by compelling partnerships, which help charter schools fulfill their LRE obligations under IDEA.<sup>216</sup> This makes charter schools a viable choice for parents of disabled students and should increase their enrollment.

Finally, requiring charters to be part of an LEA or ESA will advance their child find activities. The primary reason charter schools fail at child find is their focus on outcomes without any understanding of the importance of identification, assessment, and IEP creation.<sup>217</sup> An experienced bureaucracy can train charter schools and teachers

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213. Heubert, *supra* note 19, at 350.

214. JACKSON, *supra* note 17, at 9.

215. Rhim & McLaughlin, *supra* note 23, at 8.

216. *Cf.* AHEARN ET AL., *supra* note 23, at 31 ("To solve the problem of capacity, many smaller school districts join cooperatives where they can share costs and resources with other small school districts.").

217. *See supra* notes 172–76 and accompanying text.

on identification and referral obligations under IDEA. It can also conduct assessments and IEP meetings more efficiently on a scaled basis. A centralized assessment center combined with a consistent set of IEP meeting personnel greatly reduces the cost of these expensive procedures for each individual school.

Prohibiting charter schools from being independent LEAs will help them fulfill their access, LRE, and child find obligations and will result in two additional benefits. First, compelled linkages would relieve states of overly burdensome monitoring responsibilities. State education agencies ("SEAs") have the ultimate responsibility for ensuring all LEAs in a state comply with IDEA and thus have significant monitoring, training, and enforcement obligations.<sup>218</sup> There are more than 2,300 new LEAs for SEAs to monitor due exclusively to the creation of independent charter schools.<sup>219</sup> In states that permit charters to be LEAs, the special education offices do not have the capacity to monitor and train each of these new LEAs. In Louisiana, for example, the state has experienced a doubling in the number of LEAs since Hurricane Katrina.<sup>220</sup> This doubled the SEA's monitoring obligation without a commensurate increase in the SEA's monitoring capacity. As a result, the state has conducted only two cursory monitoring visits, reviewed only ten of the fifty-nine LEAs, and is the subject of a class action lawsuit for failing to properly monitor LEAs.<sup>221</sup> Similar allegations have been raised on a lawsuit in the District of Columbia.<sup>222</sup> SEAs also lack capacity to provide technical assistance to the growing number of LEAs, meaning independent charter schools are not receiving enough state level support.<sup>223</sup> If charters are prohibited from attaining LEA status, SEAs can more effectively train and monitor the reduced number of LEAs.

The second added benefit of requiring charters to be part of LEAs or ESAs is that it creates a more consistent legal status for

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218. See, e.g., 20 U.S.C. § 1412(a) (2006); 34 C.F.R. §§ 300.100-170, 300.600 (2011).

219. PATRICK KEATON, NAT'L CTR. FOR EDUC. STATISTICS, NUMBERS AND TYPES OF PUBLIC ELEMENTARY & SECONDARY LOCAL EDUCATION AGENCIES FROM THE COMMON CORE OF DATA: SCHOOL YEAR 2009-10, at 6 tbl.1 (2011), available at <http://nces.ed.gov/pubs2011/2011346.pdf> (reporting 17,807 operating LEAs of which 2,236 are charter agencies).

220. EILEEN M. AHEARN, PROJECT FORUM, NAT'L ASS'N OF STATE DIRS. OF SPECIAL EDUC., CHARTER SCHOOLS AND SPECIAL EDUCATION: A REPORT ON STATE POLICIES 19 (1999); AHEARN ET AL., *supra* note 23, at 35, 53.

221. Complaint, *supra* note 143, at 16-17.

222. Report of the Evaluation Team for the 2008-09 School Year, *supra* note 144, at 65-71.

223. AHEARN ET AL., *supra* note 23, at 39-40.

charter schools across states and within states. Variability in legal status of charter schools between states and within states poses “unique challenges for stakeholders (e.g., policymakers, analysts, and parents) involved with developing or navigating state charter school policies.”<sup>224</sup> The wide range of special education structures also makes technical assistance and professional development from the states difficult.<sup>225</sup> Certainty regarding lines of authority, oversight, and service provision is critical to successful implementation of special education in charter schools, and this certainty is currently lacking.<sup>226</sup> Compelling charter schools to be linked to an LEA or ESA provides consistency and stability.

*b. The Perceived Disadvantages of Compelling Linkage*

This proposal will certainly have detractors, particularly among the charter movement, because it reduces charter school autonomy.<sup>227</sup> Many charter schools demand independence in providing special education, but only because they misunderstand the onerous obligations it entails and simply default to the autonomy mantra.<sup>228</sup> Charter schools that understand the obligations of special education yet still desire LEA status advance both normative and practical arguments.

Charter advocates first contend that forcing charter schools into LEAs or ESAs will limit innovation and flexibility in providing special education.<sup>229</sup> Forcing educational partnerships, particularly with an existing LEA, will foist the school district’s special education program on the charter schools and stymie the creation of new curricula and educational techniques.<sup>230</sup> This argument makes two false assumptions: first, that the purpose of charter schools continues to be innovation; and second, that charter schools are in fact devising new and creative methods to educate disabled students.

Charter schools were conceived of as laboratories for innovation that would develop successful new methods with traditional schools. But as Professor Holley-Walker explains, charters are increasingly

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224. Rhim et al., *supra* note 20, at 60; *see, e.g.*, Report of the Evaluation Team for the 2008–09 School Year, *supra* note 144, at 77–78.

225. Lange et al., *supra* note 93, at 18–20.

226. *Id.* at 20.

227. O’Neill et al., *supra* note 187, at 19 (requiring charters to link with existing LEAs reduces their autonomy).

228. BRINSON & ROSCH, *supra* note 25, at 24.

229. MEAD & ROTHERHAM, *supra* note 32, at 7.

230. Rhim et al., *supra* note 20, at 60; *see, e.g.*, Report of the Evaluation Team for the 2008–09 School Year, *supra* note 144, at 77–78.



serving the purpose of an accountability reform mechanism—a means to restructure failed schools—and not an innovation function.<sup>231</sup> When the primary purpose of charter schools was innovation, granting them LEA status made sense because special education, maybe more than any other type of education, would benefit greatly from new and creative educational methods. But as charter schools become merely a substitute governance arrangement for failing schools, the innovation justification for LEA status evaporates.

The practical justification has also dissolved because charter schools are simply not developing new and innovative special education programs or techniques.<sup>232</sup> In the field of special education, charter schools have not proven to be hotbeds of pedagogical innovation that are “unique, original, or cutting edge.”<sup>233</sup> The primary innovations charter schools have introduced deal with staffing (e.g. hiring differently qualified teachers), scheduling (e.g. longer school days), and program focus (e.g. Montessori, arts, or music-based schools).<sup>234</sup> Charter advocates claim they are innovating new and unique methods of instruction, but even their examples show that their innovations are not curricular.<sup>235</sup> It is time to stop waiting for autonomous charter schools to create breakthrough special education methods at the expense of disabled students.

Charter advocates will also oppose mandatory linkage on the grounds that charter schools cannot attain the same benefits from collective action as traditional schools. The paradox that charter schools may have *more* obligations to disabled students than traditional schools derives from the clustering dilemma. One source of financial strain on independent charter schools is their inability to capitalize on the efficiencies of clustering students with similar

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231. Danielle Holley-Walker, *The Accountability Cycle: The Recovery School District Act and New Orleans' Charter Schools*, 40 CONN. L. REV. 125, 142–47, 155–57 (2007).

232. AHEARN ET AL., *supra* note 23, at 30; MCLAUGHLIN ET AL., *supra* note 68, at 10; JACKSON, *supra* note 17, at 8 (noting that curriculum and instructional methods are the same in charters as traditional schools); MIRON ET AL., *supra* note 91, at 26; Lange et al., *supra* note 93, at 19.

233. FIORE ET AL., *supra* note 133, at 39; *see also* Rhim & McLaughlin, *supra* note 23, at 3 (“[T]here has been little evidence that charter schools are particularly innovative in terms of using new instructional technologies or ‘breaking the mold’ in organization or curricula.” (quoting Christopher Lubienski, *Charter School Innovation in Theory and Practice: Autonomy, R&D, and Curricular Conformity*, in *TAKING ACCOUNT OF CHARTER SCHOOLS: WHAT’S HAPPENED AND WHAT’S NEXT?* 72, 80 (Katrina E. Bulkley & Priscilla Wohlstetter eds., 2004))).

234. *See* BRINSON & ROSCH, *supra* note 25, at 9 (describing the “stellar student achievement[s]” of some charter schools).

235. MEAD & ROTHERHAM, *supra* note 32, at 7, 8.

disabilities. Traditional school districts, acting collectively, often group students with similar disabilities in particular schools within the district.<sup>236</sup> For example, a district may concentrate the services and personnel to educate autistic children at one school and transport all autistic children in the district to that school. The clustering school contains all of the autistic students in the district, but they make up only a small percentage of the student population in the school. Not every school in the district must have personnel, programs, and equipment at each school to properly educate every type of disabled student.<sup>237</sup>

Charter schools that are LEAs cannot benefit from this efficiency. They must create programs and hire personnel to educate every category of disability, and they do not have the capacity to do so.<sup>238</sup> IDEA compels independent charter schools to accommodate every type of disabled student, no matter the cost or effort.<sup>239</sup> Special education law compels LEAs, including independent charter schools, to be all things to all children—an obligation contrary to charter culture and more onerous than that placed on traditional individual schools within an LEA. Creating capacity to serve every type of disability at an individual school is not only difficult, it may be financially impossible.

Compelling charters to join LEAs or ESAs relieves them from this onerous burden and better permits them to retain their unique character and curricula. A Waldorf school that relies on little structure and is an independent LEA, for example, would have to hire personnel and rearrange its curriculum and teaching methodology to properly serve an autistic child. If the same school were part of an LEA or ESA that clustered autistic students at a

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236. Gleason, *supra* note 17, at 158.

237. Heubert, *supra* note 19, at 321.

238. Rhim & McLaughlin, *supra* note 23, at 8; Breitenstein, *supra* note 131.

239. See *supra* notes 91–92 and accompanying text. While Section 504 and the ADA do not compel covered entities to make modifications that “fundamentally alter the nature of the service” or “impose an undue hardship on the operation of [an entity’s] program,” 28 C.F.R. § 35.130(b)(7) (2010) (regulating the ADA); 28 C.F.R. § 41.53 (2010) (regulating Section 504), the Office of Civil Rights of the United States Department of Education states that in the K-12 education context these provisions do not incorporate any cost or other limit. See *Digest of Response to Zirkel Inquiry* (August 23, 1993), in 20 INDIVIDUALS WITH DISABILITIES EDUC. L. REP. 134, 134–35 (1993); see also Mark C. Weber, *A New Look at Section 504 and the ADA in Special Education Cases*, 16 TEX. J. C.L. & C.R. 1, 10–13 (explaining Section 504 obligations to disabled students in K-12 education). But see Editorial, *Parental Choice Doesn’t Guarantee Unlimited Access*, ST. PAUL PIONEER PRESS (Minn.), June 13, 2007, at B10 (holding that a charter school could deny admission to a severely disabled student without violating Section 504).

central location, it could retain its unique character and reduce its expenses. The school itself could become a clustering location for students with another disability that may best be served by the Waldorf teaching style and curriculum.

There is concern that special education law may prevent charter schools from realizing the efficiencies of clustering. As discussed above, IDEA certainly does not create a barrier, but Section 504 might. Section 504 and Title II of the Americans with Disabilities Act (“ADA”) prohibit public schools from excluding students based on their disabilities.<sup>240</sup> Disabled students must be provided “a range of choices in programs and activities that is comparable to that offered to students without disabilities.”<sup>241</sup>

Scholars believe that these provisions may prohibit charter schools that are part of LEAs or ESAs from utilizing clustering.<sup>242</sup> Disabled students, it is argued, are denied a comparable school choice to nondisabled students when a charter school denies them admission to place them at a clustering school. This is permissible in traditional schools because schools within a district are looked at as interchangeable parts of a collective whole. These schools share the same governing board, policies, procedures, textbooks, personnel policies, school hours, and curriculum, as well as many other traits.<sup>243</sup> But charter schools, it is urged, are not interchangeable because they are each unique and do not share curriculum, governing boards or policies.<sup>244</sup> So while clustering is permissible in traditional schools because they are interchangeable parts, Section 504 and the ADA may prohibit the same practice in charter schools because of their uniqueness.

This concern is unfounded for several reasons. First, it elevates the ideal of school choice over an appropriate education for disabled students. While choice is a foundation of modern education reform

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240. Rehabilitation Act of 1973, 29 U.S.C. § 794(a) (2006); Americans with Disabilities Act of 1990, 42 U.S.C. § 12132 (2006). Section 504 and Title II of the ADA contain identical substantive standards. *See, e.g.,* Urban *ex rel.* Urban v. Jefferson Cnty. Sch. Dist. R-1, 89 F.3d 720, 727–28 (10th Cir. 1996).

241. OFFICE FOR CIVIL RIGHTS, U.S. DEP’T OF EDUC., APPLYING FEDERAL CIVIL RIGHTS LAWS TO PUBLIC CHARTER SCHOOLS: QUESTIONS AND ANSWERS 17 (2000), available at [http://www.sde.idaho.gov/site/charter\\_schools/law\\_regs\\_docs/FederalCivilRightsLaws.pdf](http://www.sde.idaho.gov/site/charter_schools/law_regs_docs/FederalCivilRightsLaws.pdf).

242. *See, e.g.,* Gleason, *supra* note 17, at 160; Heubert, *supra* note 19, at 321 n.98, 332–33, 340; O’Neill et al., *supra* note 187, at 12–13. New York law prohibits the forming of cooperatives among charter schools for clustering purposes. Waldman, *supra* note 120.

243. Saiger, *supra* note 54, at 862–65.

244. Quach, *supra* note 13, at 68 (citation omitted) (summarizing studies showing that charter schools “are more different than they are alike”).

and charter schools, it should not trump provision of an appropriate education. In a perfect system every school may be able to offer appropriate programs for every type of student, but courts recognize that this is an unrealistic expectation and that clustering benefits the child and the LEA.

Second, courts do not focus on the uniqueness of a school when deciding if the denial of admission violates Section 504 or the ADA. Each school is unique for at least its location (which is important to parents), but courts are concerned only with whether the student is offered access to an appropriate program elsewhere. They consistently hold that individual schools do not need to accommodate all students under Section 504 by creating programs and services that cater to all types of disabilities so long as the LEA offers an appropriate program.<sup>245</sup> The emphasis on appropriate alternatives—rather than program uniqueness—should not change simply because charter schools are involved. Denying a disabled student access to a unique curriculum may not be any more or less harmful than denying a disabled student access to a unique location or unique student body, for example, the neighbors and family members at the neighborhood school. Charter schools that are part of an LEA or ESA, just like traditional schools, should not be compelled to accommodate every type of disability. In short, the concern that charter schools, which are part of LEAs, cannot take advantage of the efficiencies of clustering is unfounded. Compelling charter schools to be part of LEAs or ESAs reduces the culture clash and allows charter schools to better serve disabled students.

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245. See, e.g., *Urban*, 89 F.3d at 728 (“[S]ection 504 does not require school districts to modify school programs in order to ensure neighborhood placements.”); *Schuldt ex rel. Schuldt v. Mankato Indep. Sch. Dist. No. 77*, 937 F.2d 1357, 1362 (8th Cir. 1991) (rejecting the underlying premise that the neighborhood school “is the only school to which the school district can assign Erika and still be in compliance with the law”); *Barnett ex rel. Barnett v. Fairfax Cnty. Sch. Bd.*, 927 F.2d 146, 155 (4th Cir. 1991) (“Requiring the Board to provide every hearing-impaired student with [an interpreter] at his base school, instead of at mainstreamed but centralized locations . . . would constitute a ‘substantial modification’ of the Board’s educational programs” under Section 504); *B.M. ex rel. S.M. v. Bd. of Educ. of Scott Cnty., Ky.*, No. 5:07-153-JMH, 2008 WL 4073855, at \*8 (E.D. Ky. 2008) (“The Court is not persuaded that either the ADA [or] § 504 . . . require school districts to modify school programs in order to ensure neighborhood placements when necessary services and a free and appropriate education are available at another site within the district.”); *Eva N. v. Brock*, 741 F. Supp. 626, 632 (E.D. Ky. 1990), *aff’d*, 943 F.2d 51 (6th Cir. 1991) (stating that Section 504 does not require school to hire staff and modify the mission of the institution as reasonable accommodations).

### B. *The State Level*

State law plays a major role in regulating special education and charter schools. State law, not federal law, governs creation, oversight, legal status, and governance of charter schools.<sup>246</sup> States should consider changing their laws in three significant areas to reduce the culture clash between charter schools and special education. First, state law should compel charter schools to be part of an ESA for special education purposes. Second, states should remove student enrollment from the control of charter schools and utilize a centralized and universal enrollment system. Finally, states should require detailed special education plans in charter applications.

#### 1. Compel Formation of Educational Service Agencies

Federal law should be changed to prohibit charter schools from existing as independent LEAs, but should leave to states control over the substance and form of the mandated linkage. The two possibilities are to require charter schools to be legally part of an existing LEA, or school district; or to have charter schools be legally part of an independent “district” made up entirely of charter schools, in the form of an ESA. The first strategy ensures that charter schools are part of a longstanding special education bureaucracy with sufficient expertise and size to capitalize on economies of scale and the benefits of clustering. But there are many downsides to requiring charter schools to be part of an existing LEA.

The first is the complex layer of governance structure and oversight inserted into charter schools if they are compelled to join an existing LEA. For example, if a charter school is part of an LEA, which entity hires the special education staff or is legally liable for violations of the law? Which entity supervises the staff, conducts evaluations, or drafts the IEPs? Which entity determines when, where, and how many services will be provided?<sup>247</sup> It is difficult to delineate clear lines of responsibility between autonomous charter schools and the bureaucratic service provision provided by the LEA. There is already significant confusion within states, LEAs, and charter schools about the locus of responsibility and funding, and it leads to poor provision of special education and expensive

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246. Benjamin Michael Superfine, *Stimulating School Reform: The American Recovery and Reinvestment Act and the Shifting Federal Role in Education*, 76 MO. L. REV. 81, 116 (2011).

247. RHIM & MCLAUGHLIN, *supra* note 46, at 15.

litigation.<sup>248</sup> In Chicago, for example, the district failed to provide adequate special education services to charter schools that were part of the LEA.<sup>249</sup>

But the bigger problem with requiring charters to be part of an LEA is the well-documented poor relationships between the two entities.<sup>250</sup> School boards and district administrators are at best lukewarm about charter schools because they are direct competitors for students and the state funding that follows them.<sup>251</sup> Every child that leaves a traditional school and enrolls in a charter school means fewer resources for the school district and less control over pedagogy and teacher hiring and firing. The resulting forced relationship often results in hostility and lawsuits.<sup>252</sup>

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248. MCLAUGHLIN ET AL., *supra* note 68, at 9; Lange et al., *supra* note 93, at 13–17; Rhim & McLaughlin, *supra* note 23, at 6 (writing that charters that are part of LEAs have “limited understanding of their responsibilities and how they share[] responsibility with states and districts leaders”); Rhim & McLaughlin, *supra* note 106, at 377; *see, e.g.*, Friendship Edison Pub. Charter Sch. v. Smith *ex rel.* L.S., 561 F. Supp. 2d 74, 76 (D.D.C. 2008) (stating that defendant filed an administrative due process complaint against charter school for alleged failure to evaluate student for special education); Hyde Leadership Pub. Charter Sch. v. Clark, 424 F. Supp. 2d 58, 58 (D.D.C. 2006) (seeking review of determination that charter school failed to provide specialized instruction to one of its special education students).

249. SNELL, *supra* note 55, at 13.

250. AHEARN ET AL., *supra* note 23, at 4; McLaughlin & Rhim, *supra* note 9, at 38–39.

251. PETERSON, *supra* note 7, at 218; McLaughlin & Rhim, *supra* note 9, at 38 (forcing collaboration with LEAs is difficult because they are competitors).

252. *See, e.g.*, Catapult Learning, LLC v. Bd. of Educ. of St. Louis, No. 4:07CV936-DJS, 2008 WL 1349646, at \*1 (E.D. Mo. 2008) (dealing with an allegation by the school board that it was owed over \$200,000 for educational services provided to a charter school); Wilbesan Charter Sch., Inc. v. Sch. Bd. of Hillsborough Cnty., 447 F. Supp. 2d 1292, 1298 (M.D. Fla. 2006) (dealing with an allegation that the School Board of Hillsborough County committed due process and equal protection violations in its termination of a contract for a charter school operated by an African American); Ridgecrest Charter Sch. v. Sierra Sands Unified Sch. Dist., 30 Cal. Rptr. 3d 648, 653 (Cal. Dist. Ct. App. 2005) (dealing with a charter school suing the school district for failing to accommodate the charter school’s request for classroom and nonteaching space under Proposition 39); Sch. Dist. of Kans. City v. State, 317 S.W.3d 599, 603 (Mo. 2010) (en banc) (dealing with an allegation that charters with LEA status violated funding provisions of the state constitution); Golden Door Charter Sch. v. State-Operated Sch. Dist. of Jersey City, 948 A.2d 716, 716 (N.J. Super. Ct. App. Div. 2008) (per curiam) (dealing with a charter school allegation that the school district was responsible for paying the cost of home instruction offered to a handicapped student enrolled in a charter school); Slippery Rock Area Sch. Dist. v. Pa. Cyber Charter Sch., 2 A.3d 471, 471 (Pa. 2010) (per curiam) (granting appeal on question of whether school district must fund charter school’s program for four year-old student); Chester Cmty. Charter Sch. v. Commonwealth of Pa. Dep’t of Educ., 996 A.2d 68, 72 (Pa. Commw. Ct. 2010) (alleging that the school district did not fund a charter school the amounts required by law); Ronald H. Brown Charter Sch. v. Harrisburg City Sch. Dist., 928 A.2d 1145, 1146 (Pa. Commw. Ct. 2007) (appealing from a decision affirming school board’s denial of the renewal of the school’s charter).

This tension is exacerbated when charter schools are part of existing LEAs for special education purposes.<sup>253</sup> Local districts are hostile to charter schools.<sup>254</sup> They do not believe charter schools can appropriately provide special education.<sup>255</sup> This distrust leads many LEAs, who are ultimately responsible for ensuring compliance with IDEA, to control the delivery of special education in its charter schools—from staffing to pedagogy to timing. LEAs impose their existing programs and personnel on charter schools, rather than provide charter schools resources and “hope” their programs are IDEA compliant.<sup>256</sup> This often results in a mismatch between the charter model and the district services.<sup>257</sup> In these relationships charter schools are chartered for everything except special education students.<sup>258</sup> This means that charter schools have little to no say over the special education staff provided by the LEA or how and when services will be provided, which exacerbates tensions between the entities.<sup>259</sup> This acts to reduce any innovation in special education that may be occurring within charter schools.<sup>260</sup>

LEAs also do not provide special education funding to their charter schools in the same manner that they fund their traditional schools. Special education funding, at the school level, is almost entirely discretionary in most states, and districts often favor their traditional schools.<sup>261</sup> Considering the favoritism districts show traditional schools over charter schools, it is no surprise that the schools are often funded disparately. Charter schools and their LEAs often litigate the equitable allocation of special education funds.<sup>262</sup> The Inspector General for the U.S. Department of Education

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253. AHEARN ET AL., *supra* note 23, at 35.

254. MEAD & ROTHERHAM, *supra* note 32, at 3.

255. Rhim & McLaughlin, *supra* note 23, at 4.

256. AHEARN ET AL., *supra* note 23, at 16 (noting that LEAs do not like to provide their charter schools autonomy).

257. BRINSON & ROSCH, *supra* note 25, at 25.

258. SNELL, *supra* note 55, at 13.

259. AHEARN ET AL., *supra* note 23, at 32.

260. SNELL, *supra* note 55, at 13 (arguing that making a charter part of an LEA inhibits innovation).

261. AHEARN ET AL., *supra* note 23, at 23; SNELL, *supra* note 55, at 12–14.

262. Rhim et al., *supra* note 20, at 60; *see, e.g.*, IDEA Pub. Charter Sch. v. Dist. of Columbia, 374 F. Supp. 2d 158, 160 (D.D.C. 2005) (dealing with a charter school suing the school district for the cost of special education evaluations); Asbury Park Bd. of Educ. v. Hope Acad. Charter Sch., 278 F. Supp. 2d 417, 420 (D.N.J. 2003) (dealing with a school district suit of charter schools and the New Jersey Department of Education regarding funding for private placements).

concluded that LEAs in New York often cheated their charter schools out of special education funding.<sup>263</sup>

It is for these reasons—uncertain lines of responsibility, distrust between charter schools and their districts, limiting innovation, and inequitable special education funding and service provision—that in an early national study one-third of charter schools felt that their relationship with the LEA was a barrier to the successful provision of special education.<sup>264</sup> Congress recognized that traditional school districts were not treating their charter schools the same as their traditional schools when it came to special education. In 2004, Congress clarified LEA obligations to charter schools in their control because school districts were refusing to provide charter schools with timely special education funding or on-site services.<sup>265</sup> Congressional reports found that relationships were between LEAs and their charter schools when it came to special education polarizing.<sup>266</sup> In the 2004 reauthorization of IDEA, Congress expressly spelled out that LEAs must treat charter schools the same as they treat the traditional schools within their control for purposes of funding and special education provision.<sup>267</sup>

Charter schools should not be independent, but they should not be compelled to link with an existing LEA either. To ensure charter schools are part of a large centralized bureaucracy and a collective of schools, which is critical for their success,<sup>268</sup> states should create ESAs exclusively for charter schools and compel charters to be part of ESAs. ESAs would essentially be “districts” for charter schools for the purposes of serving disabled students. They could be organized in any number of ways, such as geographically or by charter type. For example, all of the charter schools in Los Angeles could be part of a centralized ESA, or ESAs based on smaller geographic regions could be created for fewer charter schools. Alternatively, various ESAs

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263. OFFICE OF INSPECTOR GEN., U.S. DEP'T OF EDUC., CHARTER SCHOOLS ACCESS TO IDEA, PART B FUNDS IN THE STATE OF NEW YORK 3 (2003), *available at* <http://www2.ed.gov/about/offices/list/oig/auditreports/a09c0025.pdf>.

264. FIORE ET AL., *supra* note 133, at 36.

265. H.R. REP. NO. 108-77, at 2–3 (2003); Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, § 613(a)(5), 118 Stat. 2647, 2696 (codified at 20 U.S.C. § 1413 (a)(5) (2006)); S. REP. NO. 108-185, at 2 (2003). The 2004 reauthorization also clarified that states have to distribute funds directly to charter schools that are independent LEAs. *See* Individuals with Disabilities Education Improvement Act of 2004 § 611(f)(1), 118 Stat. at 2671 (codified at 20 U.S.C. § 1411 (f)(1) (2006)); S. REP. NO. 108-185, at 21–22 (2003).

266. H.R. REP. NO. 108-77, at 102.

267. 20 U.S.C. § 1413(a)(5)(A) (2006).

268. AHEARN ET AL., *supra* note 23, at 17.



could be created based on charter type, such as an ESA for college preparatory charter schools or Montessori charters, without regard to geography. The form, composition, and structure of the ESA would be determined by state law.

Significant benefits flow from this governance structure. First, the inherent tension between LEAs and charters is eliminated. Because the ESA is a cooperative comprised exclusively of charter schools, there is no concern of funding and service favoritism for traditional schools that pervades LEAs. Second, ESAs can cater to the unique needs of charter schools when serving disabled students. Because the ESA will serve exclusively charter schools, it will be more attuned to providing services in a way that is compatible with the pedagogy of the charter schools. Mandating linkages to ESAs allows charter schools to retain more autonomy than linking to a traditional LEA. ESA's programs will be tailored specifically for charter schools and will likely not employ a one-size-fits-all approach because of the uniqueness of each of their schools. Finally, ESAs made up exclusively of charter schools can allocate resources more effectively, such as those devoted to the start-up training necessary in charter schools to create special education programs—an unnecessary cost in traditional schools.

In sum, ESAs made up exclusively of charter schools remove many of the barriers created by the inherent conflict between charter schools and traditional schools that are both served in traditional LEAs, yet still achieving all of the benefits of collective action.

## 2. Utilize Universal Enrollment Procedures

All states expressly prohibit charter schools from denying admission to disabled students.<sup>269</sup> This prohibition is clearly insufficient to prevent charter schools from counseling out disabled students or cherry-picking students with mild disabilities. While the financial pressures can be relieved, the accountability incentives are simply too strong to merely hope that statutory prohibitions will prevent these illegal practices. To ensure these practices cease it is either necessary to remove the power over admission decisions from individual charter schools or better enforce compliance, which is discussed below.

Nearly all states leave admission procedures up to individual charter schools. Parents must apply to individual charter schools and

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269. Rhim et al., *supra* note 20, at 55.

a lottery must be held if the school is oversubscribed.<sup>270</sup> This practice opens the door to individual schools massaging student enrollment *after* the lottery through counseling out and cherry-picking. The OIM in Los Angeles blamed much of the significant under-enrollment of disabled students on charter schools controlling enrollment decisions. It recommended a unified application process among all charter schools.<sup>271</sup> It concluded that district oversight of the application process is instrumental in ensuring that charter schools are not deterred from selecting disabled students.<sup>272</sup> There is also growing concern in New Orleans that leaving enrollment decisions in the hands of individual schools is leading to counseling out and cherry-picking. As a result, New Orleans is moving toward a centralized enrollment system.<sup>273</sup>

An effective centralized enrollment system would still utilize a lottery at the district level but would compel charter schools to enroll the students who are assigned to them. Parents would still select the charter school or schools where they want to enroll, but the lottery and final placement would be determined by the centralized enrolling authority. Once a disabled student makes a choice, wins the lottery, and is assigned to a school, the student's IEP team could determine that another school in the LEA (or hopefully ESA) is an appropriate placement and transfer the student. This decision cannot be based on whether the assigned school has proper resources, training, or accommodations for the child because those are required by law. The only legitimate reason a child may be switched to a non-assigned school is if the LEA or ESA employs clustering at the non-assigned school.

This process ensures two rights of disabled students in charter schools. First, it guarantees that the decision-making authority for placement of disabled students remains with the proper authority—the IEP team and the parents—not the charter school.<sup>274</sup> Second, it

270. O'NEILL & ZIEBARTH, *supra* note 38, at 5.

271. OFFICE OF THE INDEP. MONITOR, *supra* note 130, at ii, 4.

272. *Id.* at 17–19.

273. Brentin Mock, *The Problem with New Orleans's Charter Schools*, DAILY BEAST (Oct. 6, 2010, 4:00 PM), <http://www.thedailybeast.com/newsweek/2010/10/06/new-orleans-accused-of-failing-disabled-students.html>; Andrew Vanacore, *In a Remade New Orleans School System, Frustration Lingers over Finding a Place for Every Student*, TIMES-PICAYUNE (New Orleans, La.) (May 9, 2011), [http://www.nola.com/education/index.ssf/2011/05/in\\_a\\_remade\\_school\\_system\\_frus.html](http://www.nola.com/education/index.ssf/2011/05/in_a_remade_school_system_frus.html).

274. 20 U.S.C. § 1414(d)(1)(A)(iv), (e) (2006); 34 C.F.R. § 300.116 (2010); Office for Civil Rights (OCR) Staff Memorandum from Richard D. Komer, Deputy Assistant Sec'y for Policy (July 27, 1990), in 22 INDIVIDUALS WITH DISABILITIES EDUC. L. REP. 669, 670

treats the charter school choice the same as the neighborhood school choice in traditional schools. IDEA provides that placement should be “as close as possible to the child’s home,” and, unless the IEP requires otherwise, “in the school that he or she would attend if nondisabled.”<sup>275</sup> Combined, these provisions give a preference for children to be placed in their neighborhood school—the school the parents selected through their residential choice.<sup>276</sup> This presumption should apply with equal force to the charter school choice. Disabled students’ rights are best protected if a centralized admission system places disabled students and demands that only an IEP team, utilizing a preference for the assigned school, can change the placement.

### 3. Require Detailed Special Education Plans in Charter Applications

As noted above, charter schools are often ignorant of their special education obligations.<sup>277</sup> This is particularly true at the start-up phase, when many charter schools do not have developed budgets, plans, or capacity to serve disabled students.<sup>278</sup> As a result, charters build knowledge, procedures, and capacity for special education as they go.<sup>279</sup> They focus on disabled students only *after* they begin operation.

The primary reason for this is that disabled students are an afterthought in the charter authorization process.<sup>280</sup> Authorizers, when approving new charter schools, do not expect or demand applicants to establish their ability to serve disabled students. The gold standard in authorization practices and standards—*Principles and Standards for Charter School Authorizing*, promulgated by the National Association of Charter School Authorizers (“NACSA”)—

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(1990). For a thorough discussion of legal obligations surrounding IEP placement decisions, see Allan G. Osborne, Jr., Commentary, *Are School Districts Required To Identify Placement Locations for the Delivery of Services in Proposed IEPs?*, 261 W. EDUC. L. REP. 497, 504–14 (2010).

275. 34 C.F.R. § 300.116(b)(3), (c) (2010).

276. See sources cited *supra* note 93.

277. See sources cited *supra* note 190.

278. Estes, *supra* note 110, at 258; Swanson, *supra* note 110, at 39.

279. AHEARN ET AL., *supra* note 23, at 28; FIORE ET AL., *supra* note 133, at 21 (stating that charter schools often do not even develop a special education program until their second or third year of operation and some have no program at all); Lange et al., *supra* note 93, at 20; Swanson, *supra* note 110, at 39; Karl Turner, *Cleveland Charter School Greater Heights Academy Abruptly Closes*, CLEV. PLAIN DEALER (Nov. 18, 2008, 2:30 PM), [http://blog.cleveland.com/metro/2008/11/greater\\_heights\\_academy\\_shuts.html](http://blog.cleveland.com/metro/2008/11/greater_heights_academy_shuts.html).

280. Rhim et al., *supra* note 20, at 53; Rhim & McLaughlin, *supra* note 23, at 10.

does not even mention disabled students in the application process.<sup>281</sup> Most states only require applicants to include a statement that they will not discriminate against disabled students.<sup>282</sup> Only a handful require charter applicants to submit special education plans, and even those plans are brief and rarely contain adequate information for the authorizer to determine if an applicant can fulfill its legal obligations.<sup>283</sup>

This lack of pre-planning leaves many charters unable, and unwilling, to fulfill their special education obligations.<sup>284</sup> The experience in Los Angeles illustrates one way in which ignorance and lack of preparation negatively impacts disabled students. The OIM found that a contributing factor to the disproportional under-enrollment of disabled students in charter schools resulted from the fact that charter applications did not require any reference to students with disabilities or any recruitment plan.<sup>285</sup> Many charter schools exemplify the maxim that discrimination against disabled students is often the result “not of invidious animus, but rather of thoughtlessness and indifference—of benign neglect.”<sup>286</sup> Because charter applicants are not compelled by state law to plan for or create capacity for special education, disabled students are forgotten and fall prey to discriminatory practices once the charter is approved.

Instead of assuming charters can appropriately create plans and build capacity once they open their doors, state law should demand proof that applicants can appropriately serve disabled students from day one. States should compel charter applicants to produce detailed plans and budgets for serving disabled students as a precondition for authorization. Charter applications should explain how the needs of

281. NAT'L ASS'N OF CHARTER SCH. AUTHORIZERS (NACSA), *supra* note 39, at 17, 21. The *Principles and Standards* make one mention of disabled students in the compliance monitoring context and another mention for online charter schools. Two states demand that their authorizers utilize NACSA's *Principles and Standards*. See LA. REV. STAT. ANN. §§ 3981–3982 (Supp. 2011); WIS. STAT. ANN. § 118.40 (West Supp. 2011).

282. AHEARN ET AL., *supra* note 23, at 18–19, 25; RHIM & MCLAUGHLIN, *supra* note 46, at 12, 15; Lange et al., *supra* note 93, at 17; Rhim et al., *supra* note 20, at 52–55; Julie Jargon, *One for All*, DENV. WESTWORD (Feb. 22, 2001), <http://www.westword.com/2001-02-22/news/one-for-all>.

283. *Ahearn Testimony*, *supra* note 17, at 30 (testifying that the application process of most authorizers pays little to no attention to how charter schools will amass capacity to serve disabled students); AHEARN ET AL., *supra* note 23, at 19–20.

284. Lange et al., *supra* note 93, at 17 (noting that the lack of attention during authorization means charters are not prepared to serve disabled students when they initially open).

285. OFFICE OF THE INDEP. MONITOR, *supra* note 130, at iii, 15–16.

286. *Alexander v. Choate*, 469 U.S. 287, 295 (1985).

special education students will be met once the school opens.<sup>287</sup> The plan should include at least a special education budget, staffing information, oversight details, and a plan for how a full continuum of alternative educational placements will be provided. This requirement ensures, at the very least, that charter applicants enter the process with eyes wide open and are not surprised by the tremendous burden special education imposes once they open their schools. It prevents authorizers and charter schools from treating disabled students as an afterthought in the authorizing process.<sup>288</sup> At the very least, detailed plans should be required for charter schools that will be LEAs.

Charter applicants should also be trained on special education policies, procedures, and laws as a precondition to receiving a charter.<sup>289</sup> Building capacity and knowledge are tasks too large for many charter applicants to undertake alone; they require significant assistance.<sup>290</sup> But few states require training and technical assistance for potential operators prior to granting charters.<sup>291</sup> This training is often optional, not mandatory.<sup>292</sup> Charter applicants need help formulating special education plans, and states should demand that they receive it either from their authorizer or the state special education office.

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287. COLO. DEP'T OF EDUC., 2006 SPECIAL EDUCATION SERVICES IN CHARTER SCHOOLS: SURVEYING PERCEPTIONS OF CHARTER SCHOOL ADMINISTRATORS AND SPECIAL EDUCATION DIRECTORS 60 (2007), available at <http://www.eric.ed.gov/PDFS/ED498195.pdf> ("School founders should engage in comprehensive planning for special education before the school opens its doors."); see also AHEARN ET AL., *supra* note 23, at 49 ("[M]ere written assurances to address special education do not necessarily translate into charter schools having the capacity to deliver special education."); Rhim et al., *supra* note 20, at 53, 61 (proposing that charter schools will be better prepared to handle legal and operational challenges by developing detailed, written plans for handling disabled student education).

288. RHIM & MCLAUGHLIN, *supra* note 46, at 13; Julie F. Mead, *Determining Charter Schools' Responsibilities for Children with Disabilities: A Guide Through the Legal Labyrinth*, 31 J.L. & EDUC. 305, 311 (2002); Weber, *supra* note 137, at 225. See generally CHERYL M. LANGE, NAT'L ASS'N OF STATE DIRS. OF SPECIAL EDUC., CHARTER SCHOOLS AND SPECIAL EDUCATION: A HANDBOOK (1997) (discussing various approaches charter schools should consider in order to ensure that they are adequately prepared to handle disabled students).

289. AHEARN ET AL., *supra* note 23, at 18, 39; COLO. DEP'T OF EDUC., *supra* note 287, at 57; ELIZABETH GIOVANNETTI, EILEEN AHEARN & CHERYL LANGE, NAT'L ASS'N OF STATE DIRS. OF SPECIAL EDUC., CHARTER SCHOOLS AND THE EDUCATION OF CHILDREN WITH DISABILITIES 26 (2d ed. 2001).

290. RHIM & MCLAUGHLIN, *supra* note 46, at 32.

291. Rhim & McLaughlin, *supra* note 23, at 9.

292. AHEARN ET AL., *supra* note 23, at 40.

Charter schools resist state legislation demanding detailed special education plans and training. They view these preconditions as barriers in the authorization process that are inimical to their autonomy.<sup>293</sup> But demanding a plan and training are only hurdles, not barriers, and necessary ones at that. It is not outrageous for states to demand that applicants prove their ability to adequately educate the roughly ten percent of their student population that needs the most help and arrives with the most complex legal obligations. As for autonomy, if its price is ignorance and unpreparedness, then it is not worth pursuing, particularly at the expense of the civil rights of disabled students.

### C. Authorizer Level

Charter authorizers, and charter agreements, are the final source of law affecting charter schools. The autonomy-for-accountability tradeoff underlying the charter movement only works if charter schools are held accountable by their authorizers when they fail to fulfill their obligations to disabled students. If charter authorizers and monitors would close down charter schools that violate the rights of disabled students, many of the problems identified in this Article could be avoided. If their very existence were at stake, charter schools would better prepare for and create capacity to serve disabled students.

But charter schools are rarely held accountable for violations of special education law. In fact, more than one-third of charter authorizers do not even consider special education compliance when renewing charter schools.<sup>294</sup> Even when charter schools are monitored for compliance with disability laws, many are given passing marks despite being found in violation.<sup>295</sup> For example, in New Orleans the state renewed a charter despite acknowledging that it did not meet special education standards. These renewals were granted because each school merely “provided assurance that all applicable laws . . . were adhered to.”<sup>296</sup> Nationwide, very few charter schools have been

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293. Rhim & McLaughlin, *supra* note 23, at 9.

294. Lange et al., *supra* note 93, at 17 (discussing how states disagree over whether special education compliance is needed for renewal of charter schools); McLaughlin & Rhim, *supra* note 9, at 40; *see also* Rhim & McLaughlin, *supra* note 23, at 6 (“Few charter authorizers incorporate any special education indicators in their evaluation of charter schools for renewal.” (citation omitted)).

295. Zollers & Ramanathan, *supra* note 2, at 303.

296. LA. BD. OF ELEMENTARY & SECONDARY EDUC., REPORT ON CHARTER SCHOOL RENEWAL 14–15, 19 (2010) (on file with the North Carolina Law Review).

closed, or not renewed, because of failure to comply with special education obligations.<sup>297</sup> The accountability model collapses without stern monitoring and penalties, which seems to have occurred in special education.<sup>298</sup>

There are several reasons authorizers do not uphold their end of the accountability bargain and close schools that violate disability laws. The first is political. It is difficult to close down charter schools that are not meeting their benchmarks because once they become entrenched, strong interests, such as parents and teachers, fight for their continued existence.<sup>299</sup> This is the main reason only nine percent of charter schools have been closed.<sup>300</sup> While it is politically unpopular to close down a school that is failing its general education students, it is even more difficult to close down a school because it is improperly serving its small population of disabled students.<sup>301</sup> Failing to punish or close down the violating schools empowers more charter schools to ignore the rights of disabled students. These tough closure and non-renewal decisions must be made for the protection of disabled students and can likely be accomplished only if concrete closure standards exist.

The second reason authorizers fail to punish charters that violate special education law is that state law and charter agreements do not contain specific accountability standards for disabled students.<sup>302</sup> Charter agreements between authorizers and charter schools rarely include detailed responsibilities for special education administration and programs. Instead, they typically contain only general antidiscrimination provisions, much like charter applications.<sup>303</sup> The lack of concrete accountability standards in charter agreements means authorizers do not have the means to assess whether students with disabilities are accessing charter schools, receiving a free appropriate public education, or experiencing academic success. Monitoring is left almost exclusively up to formal parent complaints or state monitoring visits.<sup>304</sup>

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297. SNELL, *supra* note 55, at 2.

298. AHEARN ET AL., *supra* note 23, at 50–51.

299. CREDO STUDY, *supra* note 3, at 7–8, 50–51; ROBIN J. LAKE & PAUL T. HILL, CTR. ON REINVENTING PUB. EDUC., PERFORMANCE MANAGEMENT IN PORTFOLIO SCHOOL DISTRICTS 19–20 (2009).

300. MEAD & ROTHERHAM, *supra* note 32, at 6.

301. Viadero, *supra* note 110.

302. Lange et al., *supra* note 93, at 17–18; Rhim et al., *supra* note 20, at 57.

303. COLO. DEP'T OF EDUC., *supra* note 287, at 57; Swanson, *supra* note 110, at 39.

304. Rhim et al., *supra* note 20, at 60.

To alleviate this problem, charter agreements should contain specific benchmarks for disabled students, similar to those already included for general education students.<sup>305</sup> The benchmarks could be based on educational outcomes for disabled students, but because procedural compliance reigns in special education law, the benchmarks should be procedural in nature. The federal government monitors state compliance with special education law through procedural checklists, and states similarly monitor their LEAs. Charter authorizers should also create procedural benchmarks for their charter schools that, if not attained, result in automatic closure. While sporadic or singular violations of special education law should not subject a charter school to closure, there should be some level of violations that triggers automatic penalties.

### CONCLUSION

Charter schools' failure to enroll and properly serve disabled students threatens the students and the entire charter reform effort. "[T]he charter school experiment will be valid only if charter schools serve the same student populations as do traditional public schools."<sup>306</sup> The law-driven equity movement that underlies the push for charter schools demands that the reform create equal opportunities for disabled students. Equality is as important as quality for the viability of any education reform, and it is not being achieved for disabled students in charter schools.<sup>307</sup> Charter authorizers in Boston and Los Angeles are already skeptical about issuing more charters until the special needs issues are resolved in charter schools.<sup>308</sup>

Charter schools' violations of disabled students' civil rights undermine not only their viability and validity, but also that of entire public education system. If charter schools continue to grow and under-enroll and underserve disabled students, traditional public

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305. Rhim & McLaughlin, *supra* note 23, at 6.

306. Heubert, *supra* note 19, at 344; *see also* RAVITCH, *supra* note 12, at 145 (discussing the danger of allowing charter schools to continue expanding without requiring them to educate disabled students on a rate par with public schools); Weber, *supra* note 137, at 225 ("If the reform of the hour for general education is to be school choice, methods must be found to make that reform work for everyone.")

307. Martha Minow, Lecture, *Reforming School Reform*, 68 FORDHAM L. REV. 257, 258 (1999).

308. Editorial, *Advice and Dissent—Challenge to Charters*, BOS. GLOBE, Feb. 7, 2009, at A10; Connie Llanos, *LAUSD Charter Schools Fail To Make the Grade in Area of Disabilities*, DAILY NEWS (L.A.) (Feb. 22, 2010), [http://www.dailynews.com/ci\\_14449718?IADID](http://www.dailynews.com/ci_14449718?IADID); Vaznis, *supra* note 117.



schools will be saddled with a disproportionate number of disabled students, along with disproportionate expenses.<sup>309</sup> The true threat of charter schools to traditional public education is not their creaming effect—luring the best and brightest students away from public schools—but their sedimentary effect, leaving the most difficult and most expensive disabled students behind in public schools.

A number of changes in the law could reduce the culture clash between charter schools and special education. More empirical research could advance these changes in the law.<sup>310</sup> The Department of Education has not funded any national studies on special education in charter schools since 2002.<sup>311</sup> Additionally, even though early studies uncovered numerous problems, most states and the federal government never acted on these findings by altering special education law, charter school laws, or charter agreements. While more research on these issues would be helpful, changes to federal, state, and charter agreements should be made immediately to ensure the civil rights of disabled students are protected. Charter schools are an integral and growing part of the education reform movement, but they will struggle to appropriately serve disabled students until changes are made in the law that reduce the direct and profound clash between charter culture and special education culture.

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309. *Hehir Testimony*, *supra* note 111, at 18.

310. *Id.* (discussing how research studies on charter schools and disabled student education show varying results).

311. MIRON ET AL., *supra* note 91, at 7; see *Ahearn Testimony*, *supra* note 17, at 29 (noting that no full study of counseling out phenomenon has occurred).