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By Jennifer T. Wall*

I. INTRODUCTION TO CHARTER SCHOOLS[1]

The newest concept in education reform is the charter school.[2] Charter schools operate by charter or contract, between those responsible for making educational choices at the school level and the governmental entity designated by statute to approve charters. These schools seek greater autonomy in exchange for greater accountability to the local or state entity responsible for public education. The creation of charter schools is a varied process and each state has approached the challenge somewhat differently.[3] As of November 1996, twenty-five states had passed legislation providing for the establishment of charter schools within the public school system,[4] and estimates are that

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1. The term "charter schools" is the most widely-used and accepted term to describe this type of education reform founded on the principles of choice and autonomy. Charter schools are but one variety of choice reform efforts. They have been characterized as the "heart" of the choice reform theory because they make it possible for "someone other than school boards to set up and run public schools." *Charter Schools Free at Last*, THE ECONOMIST, July 2, 1994, at 26. For a detailed discussion of the various other "choice" reforms, see Philip T.K. Daniel, *A Comprehensive Analysis of Educational Choice: Can the Polemic of Legal Problems Be Overcome?* 43 DEPAUL L. REV. 1, 10-25 (1993).

2. Charter schools are part of a larger educational reform movement spurred by the 1983 National Commission on Excellence in Education report to Congress and the Secretary of Education, which served as an omen to the American people of a "rising tide of mediocrity that threatens our very future as a Nation and a people." *See* Nat'l Comm. on Excellence in Educ., A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM 5 (1983). As a result, legislators, educators, and parents began to explore alternative methods of education to salvage the failing public school system.

3. *Charter Schools*, ECS Clearinghouse Issue Brief, Jan. 1996, at 1.

4. *The National Charter School Directory*, The Center for Education Reform, ECS Information Clearinghouse, (November 1996); According to the latest figures, the following states have charter legislation and schools in existence: Alaska, Arizona, Arkansas, California, Colorado, Delaware, District of Columbia, Florida, Georgia,

nearly 300 schools have been established nationwide.[5] Charter schools are traditionally classified as "strong" or "weak," depending on the amount of autonomy granted to the schools, with strong laws allowing for greater autonomy and weak laws allowing for little autonomy. Most charter schools have been established under strong laws.[6]

The purpose of this paper is to identify and examine the pertinent legal issues associated with the establishment of charter schools. Compared with the vast range of information in existence, generally about charter schools, information on the legal issues is sparsely scattered throughout various policy briefs and reports by research institutes and other organizations. As state legislatures explore the possibility of drafting charter school legislation, they should be aware that the establishment of charter schools involves legal issues which must be addressed by express statutory language. These statutory provisions require the school and the sponsoring entity to address the issues themselves in their individual contract with the charter school.

Part II of this paper discusses issues of control, such as who has control over the educational process, and how the school is legally classified. Part III will then touch on several constitutional issues that need to be addressed in state legislation. Part IV will address the issue of liability, including how liability has been allocated among the various suppliers in the charter school marketplace—the state, the school sponsors, the school directors, school employees and volunteers. Part V will discuss charter revocation, including what responsibilities the school and state may have in the event that a charter is revoked mid-year. Part VI will examine whether the contractual nature of charter schools will lead to the development of litigation theories based on state constitution education clauses or contract law. Part VII concludes that the legal issues involved in the establishment of

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Hawaii, Illinois, Louisiana, Massachusetts, Michigan, Minnesota, New Mexico, Texas, and Wisconsin. Those states with charter legislation but with no charter schools in operation include: Arkansas, Connecticut, Kansas, New Hampshire, New Jersey, North Carolina, Rhode Island, South Carolina, and Wyoming. *See also* Connie L. Koprowicz, *Charter School Update*, 4 NCSL Legisbrief no. 30 (June/July 1996).

5. *Charter Schools*, ECS Clearinghouse Issue Brief, Jan. 1996, at 1.

6. *Id.* at 3.

charter schools should be carefully considered by state legislatures in drafting or revising charter school laws.

II. ISSUES OF CONTROL AND DEFINITION

A. Divesting the State Board of Education of Control

One of the most apparent issues involved in the establishment of charter schools is the question of control: who or what is in control of the educational system. This question often stems from whether a charter school in a particular state is organized as a legally autonomous entity, or whether it remains under the control of a specific state entity. In general, states with strong laws tend to permit their charter schools to be legally autonomous, while states with weak laws tend to place their charter schools directly under the authority of a school board.[7] If a state constitution contains a provision granting general control and supervision of education to the state board of education, the issue of control takes on constitutional dimensions. The state board's constitutional right to supervise and control education needs to be reconciled with the allocation of control in the statutory language creating charter schools. For example, if a state constitution dictates that the state board of education is to exercise general control and supervision of the public education system, then is charter school legislation unconstitutional if it transfers control and supervision to local school directors and teachers? In order to make charter school legislation constitutional, how can the issue of the transfer of control and supervision from the states to the local school directors and teachers be addressed?

The essence of the charter school reform effort is to place control over such decisions as curriculum, supplies, and teaching methods, in the hands of teachers, parents, and local school directors. In exchange, these individuals are required to account for the success of their school, as outlined by the specific terms

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7. Louann A. Bierlein & Lori A. Mulholland, *Comparing Charter School Laws: The Issue of Autonomy,* Policy Brief, The Morrison Institute for Public Policy, Arizona State University, (1994). Interestingly, the statistics show a definite correlation between the number of schools organized under a charter law and the amount of autonomy granted. States that grant broad authority are much more likely to have more charter schools operating under their laws. *Education Reform: A Charter for Success?*, STATE TRENDS—CRITICAL ISSUES, EMERGING TRENDS AND BEST PRACTICES IN STATE GOVERNMENTS, (The Council of State Governments, Lexington, Ky.) Winter 1997, at 1.

of their charter. If too much control is relinquished to the local school, then the state board or other constitutionally-vested entity will no longer be exercising any control or supervision over public education. This relinquishment of control arguably violates the framework set out by the constitution.

Already, several states have been compelled to defend their charter school legislation against challenges of unconstitutionality. In Michigan, for example, a group of plaintiffs filed a lawsuit against the State of Michigan, various department heads, the board of education of a school district, and a proposed charter school, seeking to have the state's charter school legislation declared unconstitutional.[8] One of the three issues raised in the litigation dealt with whether the act improperly divested the Michigan State Board of Education of its right and responsibility to lead and supervise public education. The plaintiffs argued that, by placing control in the hands of the school leaders, the legislation divested the state board of education of its constitutional mandate to regulate the day to day operation of public schools.

The Michigan Constitution, Article 8, Section 3,[9] states: "Leadership and general supervision over all public education . . . is vested in a state board of education. It shall serve as the general planning and coordinating body for all public education . . . and shall advise the legislature as to the financial requirements in connection therewith." Although the court recognized that Article 8, Section 3 is not an exclusive grant of all power of control over public education to the Michigan State Board of Education, it held that the act "usurps the authority of the state board of education to oversee and supervise public education in Michigan and places that authority in the hands of other institutions. This violates Article 8, Section 3, and makes this Act unconstitutional on its face."[10] The court held that Michigan's charter school law violated the Michigan Constitution because "academy" schools were not "public schools" under Michigan law and because the power of the Michigan State Board of Education to supervise public education had been

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8. *Council of Organizations and Others for Education about Parochiaid, Inc., v. John Engler*, No. 94-78461-AW (Mich. Cir. Ct. Nov. 1, 1994).

9. MICH. CONST. Art. VIII, § 3.

10. *Id.*

usurped by other institutions.[11] Key to the court's holding was its determination that Section 3 meant that the state was to have exclusive control over education. On appeal, this conclusion was upheld in a rather short opinion.[12] Michigan's constitutional provision is not unique in granting control to a state board of education.[13] As of 1997, Michigan was the only state to have faced a constitutional challenge on this particular issue. Other states have managed to side-step this issue through careful drafting.[14]

Related to the issue of control are the issues of accountability and evaluation. Once control has been delegated, a state must be able to monitor the quality of education delivered and take appropriate steps against accountable parties should it become necessary. In a draft report by the Hudson Institute, which began an extensive research project on charter schools in the summer of 1995, experts on charter schools gave their tentative impressions after having completed one-third of their first year's research. Regarding the issue of accountability, they noted:

> We have yet to see a single state with a thoughtful and well-formulated plan for evaluating its charter school program. Perhaps this is not surprising, given the sorry condition of most state standards-assessment-accountability-evaluation systems generally. The problem, however, is apt to be particularly acute for charter schools, where the whole point is to

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11. MICH.CONST. Art. VIII, § 3.

12. Council of Organizations and Others for Education About Parochiaid v. Governor of Michigan, 548 N.W.2d 909 (Mich. Ct. App. 1996) (O'Connell, J., dissenting).

13. For example, Utah's Constitution reads: "The general control and supervision of the public education system shall be vested in a State Board of Education." UTAH CONST. art. X § 3. This provision clearly places the general authority to control and oversee state education with the State Board. Charter school legislation in this state would need to be drafted carefully, allowing the state board to exercise its constitutional right to general control and supervision, while also allowing for the requisite autonomy that characterizes and empowers the charter school reform movement.

14. *See e.g.*, N.J. STAT. ANN. § 18A:36A-3(a) (West 1989) ("The board of trustees, upon receiving a charter from the commissioner [of Education], shall be deemed to be public agents authorized by the State Board of Education to supervise and control the charter school."); MINN. STAT. § 120.064(Subd. 7) (Supp. 1995) ("A charter school is a public school and is part of the state's system of public education."); KAN. STAT. ANN. § 72-1903 (Supp. 1995) ("It is the intention of this act to provide an alternative means within the public school system for ensuring accomplishment of the necessary outcomes of education by offering opportunities . . . to establish and maintain charter school programs that operate within a school district structure, but independently from other school programs of the district.").

> deliver better results in return for greater freedom. Policy makers will want to know whether this is actually happening[.][15]

In their later report entitled "Charter Schools in Action: What Have We Learned?", the researchers conclude that "[s]tate charter laws are stronger on theory than practice when it comes to accountability and evaluation. No state yet has in place a fully satisfactory plan, though several are making good progress."[16] In the researchers' opinion, a well-functioning accountability system includes "clearly delineated content and performance standards; exams that mirror those standards; timely, understandable, and comparable results, including academic and nonacademic indicators of success; and real stakes for all."[17] Nearly every state has accountability procedures in place, yet these are usually described as procedures to be followed should revocation of a charter be necessary. The various aspects of charter school laws, including revocation procedures, are summarized in a report entitled "Charter Schools Laws Across the United States."[18] It appears that more work needs to be done regarding the issue of accountability to the sponsoring state entity.

B. Classification of Charter Schools as Public Schools

Another issue involved in the establishment of charter schools is their legal classification. Some statutes expressly categorize charter schools as public schools, while others characterize them as nonprofit organizations. Still others have used the

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15. Chester E. Finn, Jr. et al., *Charter Schools in Action: A First Look*, DRAFT REPORT, Hudson Institute, January 1996.

16. Chester E. Finn, Jr. et al, *Charter Schools in Action: What Have We Learned,* EXECUTIVE SUMMARY, The Hudson Institute, July 1996. While the authors do not cite which states are making progress nor the nature of their progress, one state in particular, New Jersey, contains a provision which has the effect of increasing accountability to parents and other concerned individuals. The law allows individuals or groups to bring a complaint to the board of trustees alleging a violation of the Charter Schools Act. If dissatisfied with the board's decision, they may appeal to the education commissioner, who is to investigate and respond to the complaint. In addition, an advisory grievance committee comprised of teachers and parents (who have been selected by the teachers and parents) may make non-binding recommendations to the board concerning the resolution of the complaint. N.J. Rev. Stat. § 18A:36A-15 (Supp. 1995).

17. *Id.*

18. Sandra Vergari & Dr. Michael Mintrom, *Charter Schools Laws Across the United States*, INST. FOR PUB. POL'Y & SOC. RES., Mich. St. U., 1995.

title "school district" in order to allow the schools certain benefits under the law, such as state funding. The various options represent the efforts of state legislatures to classify the schools so that they can exist both legally and functionally. However, legislatures should realize that it is not enough to merely categorize charter schools correctly in order to avoid a constitutional violation. The classification of charter schools must satisfy constitutional requirements as a matter of fact. In other words, the charter school must, in fact, function as a public school in order to withstand a state constitutional challenge.

Several states have already confronted this issue. In the Michigan lawsuit *Council of Organizations and Others for Education about Parochiaid Inc., v. Engler* discussed *supra*,[19] the first legal question raised was whether charter schools were public schools for which state funding was available. Michigan's Constitution Article 8, Section 2 prohibits the funding of private schools by the State.[20] The Legislature had labeled the schools "public," but the Court recognized that "the fact that the Legislature attempts to define terms to meet constitutional muster will not, in and of itself, save a statute from being constitutionally unsound."[21] In ruling on this issue, the Michigan court relied on previous case law and on an attorney general opinion that together provided a test for determining whether a school is public or private. Going beyond the determination of whether the schools were more public than private, the court determined that the rule in Michigan for a public school is that it must be "under the immediate, exclusive control of the state to pass constitutional muster, as well as being open to all students that care to attend."[22] In its application of this test, the court considered various characteristics of the Michigan charter school.[23] In determining that charter schools, as organized, were more private in nature, the court explained its foremost concern:

> Who or what entity controls the operation of the school? Where the ultimate control of the school lays partially in private hands and partially with the public, it is this Court's opinion

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19. 548 N.W.2d at 911.

20. Mich. Const. art. VIII § 2.

21. Council of Orgs. and Others for Educ. about Parochiaid, Inc., v. John Engler, No. 94-78461-AW, at 4 (Cir. Ct. County of Ingham 1994) (order granting injunction).

22. *Id.*

23. *Id.* at 6-9.

> that the school violates Article 8, Section 2. Where as here, substantial, if not most, of the control of the academy is placed beyond the hands of the public, the Constitution has been violated.[24]

From the Michigan case we learn that depending on how the constitutional powers of a state board are construed and interpreted, statutory classification of a charter school as "public," combined with general oversight, may not be enough to meet constitutional muster.

Michigan's experience highlights potential concerns for other states. To avoid potential legal problems relating to issues of control, drafters of charter legislation need to make charter schools part of the public education system, both in the language of the legislation and in the substance of the statutory scheme. Drafters must also make it clear in the legislation, by express language and in substance, that charter schools fall under the supervision and general control of the state board of education (or other constitutionally mandated body vested with the authority to supervise and control public education). To ensure the legislation's constitutionality, the careful drafter should include procedures which ensure the charter schools' accountability to the state board of education. It is difficult to say what liability the state may incur if the legislation lacks such language. But one thing is certain, if a constitutional provision grants general control and supervision to the state board of education, the structure of charter schools as set up by the legislature cannot undermine that authority, or a constitutional challenge to the act would be appropriate. The drafters of legislation providing for charter schools need to be careful that the rhetoric used is consistent with state educational policy and state constitutional interpretation.[25]

Massachusetts has also dealt with the question of how to classify its charter schools. In a complaint filed with the Superior Court Department of the Trial Court, residents and taxpay-

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24. *Council of Orgs. and Others for Educ.*, at 9; *aff'd*, 548 N.W.2d 909 (1996).

25. Peter J. Perla, *The Colorado Charter Schools Act and the Potential for Unconstitutional Applications Under Article IX, Section 15 of the State Constitution*, 67 U. COLO. L. REV. 171, 188 (1996) (discussing possible unconstitutional aspects of Colorado's Charter Schools Act, including the divestment of the state board of education of its "constitutionally prescribed powers.").

ers of the Town of Marblehead alleged that the statutory scheme did not provide for the establishment of public schools, but instead set up a system of private schools funded by public monies. The plaintiffs urged that the statutory scheme was forbidden by the Anti-Aid Amendment to the Massachusetts Constitution.[26] Among other allegations, they alleged 1) that the statutory scheme did not provide for public accountability, which was a violation of Article V, Section 1 of the Massachusetts Constitution, 2) that the authority delegated to the Secretary of Education was "an improper delegation of legislative authority," and 3) and that the regulations thus promulgated by the secretary were invalid. At the crux of the complaint was the basic argument that these schools were labeled public by the legislature, but that they were in fact private schools that should not receive public monies. The complaint was dismissed at the trial court level,[27] yet the arguments raised suggest some of the issues that should be examined by a legislature in considering charter school legislation.

III. CONSTITUTIONAL CONCERNS

A. Establishment Clause Concerns

Another issue in the establishment of charter schools involves separation of church and state.[28] This issue is not new to charter schools, as is evidenced by the wealth of literature on the issue, and by the long string of litigation dealing with the appropriate relationship between state schools and religion.[29]

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26. MASS. CONST. amend. art. XVIII.

27. The trial court judge refused to issue an injunction against charter schools. In so doing, he balanced the likelihood that the plaintiffs would succeed in their lawsuit against the harm the defendants would suffer if he granted the request. His conclusion to deny the request for injunction was influenced by the judge's consideration of the public interest; had he granted it, approximately 3,000 students enrolled in various charter schools statewide would have been without schools the following autumn, and the teachers and staff would have been unemployed. The lawyer for the plaintiffs, Carl D. Goodman, insists that ultimately, the allegations in the complaint will reach the Supreme Judicial Court. *See Charting a Revolution: A Lawyer/Parent In Marblehead Takes On The New Charter School Concept*, MASS. LAW. WKLY., July 24, 1995 at B1. As of April, 1997, no further action has been taken on this issue in Massachusetts.

28. U.S. CONST. amend. I.

29. *See, e.g.*, Aguilar v. Felton, 473 U.S. 402 (1985); Mueller v. Allen, 463 U.S. 388 (1983); Meek v. Pittenger, 421 U.S. 349 (1975); Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756 (1973); Sloan v. Lemon, 413 U.S. 825 (1973); Lemon v. Kurtzman, 403 U.S. 602, 619 (1971); *See generally*, David Futterman, Note,

Charter schools which are created out of existing public schools pose little immediate threat of an establishment clause violation, yet even these schools should be required to remain nonsectarian. Schools formed by private organizations and individuals pose more of a concern to state legislatures,[30] and thus some states have allowed only existing public schools to convert to charter status.[31] Government entanglement with religion is an important issue in school law and policy. Fortunately this issue has been regularly and adequately addressed by charter school legislation.[32]

Until recently, it appeared that the threatened concern of educational litigation over establishment clause violations in the charter school context was more speculative worrying than

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School Choice and the Religion Clauses: The Law and Politics of Public Aid to Private Parochial Schools, 81 GEO. L.J. 711, 725-33 (1993); Jesse H. Choper, *The Establishment Clause and Aid to Parochial Schools—An Update,"* 75 CALIF. L. REV. 5 (1987); *Developments in the Law: Religion and State*, 100 HARV. L. REV. 1606 (1987); John E. Nowak, *The Supreme Court, the Religion Clauses and the Nationalization of Education*, 70 NW. L. REV. 883 (1976).

30. The scenario of a state "contracting with a religious group for the purposes of secular instruction in a secular school" raises a new "Establishment Clause dilemma: can a municipality contract with a religious organization for the delivery of secular education in the public schools?" William D. Anderson, Jr., Note, *Religious Groups in the Education Marketplace: Applying the Establishment Clause to School Privatization Programs*, 82 GEO. L.J. 1869, 1875 (1994).

31. While it appears that a number of states have chosen the option of limiting participation in charter school reform to existing public schools, other more progressive legislatures, like that in Wisconsin, have allowed private schools as well as public schools to join the charter reform movement. Wisconsin is the first state to have included parochial schools in its "choice" program. *See* WIS. STAT. § 119.23 (1996). Programs like the MPCP in Milwaukee are clearly susceptible to establishment clause violations. Wisconsin's effort to include parochial schools in school choice legislation has been followed by Ohio. PATHBREAKING SCHOOL CHOICE ENACTED IN TWO STATES, THE CENTER FOR EDUCATIONAL REFORM, PRESS RELEASE, June 6, 1995, at 1. Legal scholars and others closely following school reform efforts predict that these laws will eventually end up before the Supreme Court. *See* Joe Price, *Educational Reform: Making the Case for Choice*, 3 VA. J. SOC. POL'Y & L. 435, 467 (1996).

32. *See, e.g.*, CAL. EDUC. CODE § 47602 (West 1993) ("No charter shall be granted under this part that authorizes the conversion of any private school to a charter school."); COLO. REV. STAT. § 22-30.5-104(1) (1995) ("A charter school shall be a public, nonsectarian, nonreligious, non-home-based school which operates within a public school district."); MINN. STAT. § 120.064 (Subd. 8) (c) (Supp. 1995) ("A charter school must be nonsectarian in its programs, admission policies, employment practices, and all other operations. A sponsor may not authorize a charter school or program that is affiliated with a nonpublic sectarian school or a religious institution."); MASS. GEN. LAWS ANN. ch. 71 § 89 (West 1996) ("Private and parochial schools shall not be eligible for charter school status."). The push for private charter schools is real; school choice advocates strongly encourage the inclusion of private schools as a way to improve the overall effectiveness of the reform movement. See Price, *supra* note 32, at 462.

legitimate threat. However, in the case of *Stark v. Independent School District No. 640*,[33] the Establishment Clause was the central issue and the case poses interesting implications for the charter school movement.[34] In *Stark*, the plaintiff "taxpayers" sought a declaration that the creation and operation of the Vesta school, opened at the request of a religious order called the Brethren,[35] violated the Establishment Clause of the First Amendment and Article I, Section 16 of the Minnesota Constitution.[36] The defendant school district argued that the Vesta school was a public school that simply was accommodating the religious beliefs of the parents and students attending the school.[37] The district court held that both the decision to open and the manner of operation of the Vesta school violated the Establishment Clause.[38] In so holding, the court relied on *Lemon v. Kurtzman*[39] and its three-part test as a "guideline," although acknowledging that the status of the Lemon test "as a general purpose tool for administering the Establishment Clause is in doubt"[40] and that the test is not consistently nor regularly ap

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33. 938 F. Supp. 544 (D. Minn. 1996).

34. Perhaps fittingly, Minnesota is the first state to litigate this issue, since it is regarded as the trailblazer in the charter reform movement and was the first state to enact charter legislation in 1991. *The National Charter School Directory*, Rev. Ed., THE CENTER FOR EDUCATION REFORM, (Education Commission of the States), November 1, 1996, at 1.

35. The school was organized after a petition made by a leader of the Brethren to the school district, and an agreement was reached on October 12, 1993 in which Paskewitz, the leader of the Brethren, would provide and lease a building to the school district free of charge and all maintenance, and the school district in return would provide the teacher and the necessary classroom materials and establish the curriculum. Also pursuant to the agreement, the school district would limit the use of technology in the classroom. 938 F. Supp. at 547.

36. MINN. CONST. art. I, § 16 ("nor shall any man be compelled to attend, erect or support any place of worship, . . . or any preference be given by law to any religious establishment or mode of worship . . . ").

37. 938 F. Supp. at 546. According to the court's findings, the Brethren consist of a group of people "who possess similar beliefs, one such belief being the general objection to the use of technological devices, such as computers, television, films and other modern technology and media." Additionally, the group practices "separatist and anti-mixing beliefs" by not eating meals with persons who do not share their beliefs. Historically, Brethren children attending public school required a separate table at lunchtime to allow the children to practice their separatist beliefs. At 547.

38. *Id.* at 554 ("Based on the above, the Court finds that the creation and operation of the Vesta school violates the mandates of the First Amendment's Establishment Clause as well as the Article I, Section 16 of the Minnesota Constitution, by advancing religion.").

39. 403 U.S. 602 (1971).

40. 938 F. Supp. at 549, citing Sherman v. Community Consolidated School

plied.[41] The District Court found that the facts supported "a clear example of state sponsorship, or the advancement, of a religion which violates the mandates of the First Amendment. . . ."[42] The school district had crossed the line between accommodation[43] of religion and unlawful fostering of religion. The court agreed with the plaintiffs that a school district "cannot open a school nor modify its curriculum based solely on the request of a religious group."[44] In addition, the court found that the primary effect of the school district's decision to open the school per the Brethren's requests was that of promoting religion.[45] In sum the court found that the facts underlying the opening and operation of the Vesta school "'convey[] a message of government endorsement . . . of religion' that violates a core purpose of the Establishment Clause."[46]

On appeal, the United States Court of Appeals for the Eighth Circuit reversed the district court and held that the Vesta

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District 21 of Wheeling Township, 980 F.2d 437 (7th Cir. 1992) (citing U.S. Supreme Court cases in which Lemon called into doubt); Board of Education of Kiryas Joel Village School Dist. v. Grumet, 512 U.S. 687 (1994) (O'Connor, J. concurrence calling into doubt the use of a single test on a constitutional principle that operates differently in different contexts) (Scalia, J. joined by Rehnquist, C.J., and Thomas, J. dissenting, arguing that the Lemon test should be replaced).

41. *Stark*, 838 F. Supp. at 549. Lemon has not been overruled, yet the Supreme Court has decided many cases without using the test. *See, e.g.*, Lee v. Weisman, 505 U.S. 577 (1992) (finding government involvement with religious activity so pervasive to the point of creating a state-sponsored and state-directed religious activity, that it was unnecessary to apply, or reconsider Lemon).

42. 938 F. Supp. at 550.

43. The basic thrust of the accommodation argument is that "the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause." Corporation of the Presiding Bishop of the Church of Jesus Christ of the Latter-day Saints v. Amos, 483 U.S. 327, 334 (1987) (quoting Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136, 144-45 (1987).

44. 938 F. Supp. at 551, (citing Epperson v. Arkansas, 393 U.S. 97 (1968), Pratt v. Ind. School Dist. No. 831, 670 F.2d 771 (8th Cir. 1982), and Edwards v. Aguillard, 482 U.S. 578 (1987) as standing for the principle that "the School District cannot tailor its curriculum for the sole purpose of conforming to religious beliefs.").

45. 938 F. Supp. at 553 ("What the School District has done is create an impermissible identification of its powers and duties with the religious beliefs of the Brethren by agreeing to open the Vesta school in a building owned by a Brethren member, and in the manner expressed by the Brethren. The fact that no religion is taught at the school does not affect the constitutional violation in this case. Government promotes religion as effectively when it fosters a close identification of its powers and responsibilities with those of any—or—all religious denominations as when it attempts to inculcate specific religious doctrines. If this identification conveys a message of government endorsement or disapproval of religion, a core purpose of the Establishment Clause is violated.").

46. *Id.*

School violated neither the First Amendment of the U.S. Constitution nor Article I, Section 16 of the Minnesota Constitution.[47] The court identified the applicable test as the three-prong Lemon test.[48] By focusing on the facts present in the record, the court concluded that "neither the decision to open the Vesta school nor the district's application of the exemption policies fails the Lemon test. Both actions had a secular purpose and did not have the primary effect of advancing religion or endorsing the Brethren's religious beliefs."[49] The Eighth Circuit also evaluated the school district's actions under the "endorsement test"[50] and found no violation.[51] In a similar manner, the appellate court found no violation of the Establishment Clause of the Minnesota Constitution: "As shown above, no religious instruction takes place at the Vesta school, and there is no expenditure of public funds in support of the teaching or promulgating of religious beliefs."[52]

Although the case was reversed at the appellate court level, the reasoning employed by both courts is nevertheless instructive to educational lawyers and legislators. A careful reading of *Stark v. Independent School District* makes it clear that litigation over Establishment Clause violations can be extremely unpredictable and expensive for all parties, and that states should be prepared. Utah, for example, places tremendous importance on the separation of church and state as a result of its unique history.[53] Absent careful drafting, the establishment of charter schools in Utah could ignite a debate over the potential entanglement of religion in the public schools. Utah's Constitution Article X, Section 8, which prohibits public aid to church schools clearly states: "Neither the state of Utah nor its political

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47. 123 F. 3d 1068 (1997), *reh'g and reh'g en banc denied*, 1997 U.S. App. LEXIS 34122 (8th Cir, Nov. 24, 1997).

48. 123 F.3d at 1073.

49. *Id.* at 1075.

50. *See* Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 512 U.S. 687 (1994).

51. 123 F.3d at 1077.

52. *Id.*

53. Utah is well known for the large percentage of its population who are members of the Church of Jesus Christ of Latter-day Saints (Mormons). Having led the settlement and early government of the territory, the Church played an important role in Utah's bid for statehood. As a pre-condition for Utah's obtaining statehood, the Church was forced to relinquish its control of all aspects of state government, including the public education system.

subdivisions may make any appropriation for the direct support of any school or educational institution controlled by any religious organization." Given a constitutional provision like Utah's, if a state were to allow for the establishment of charter schools, drafters should include an express provision in the statutory language emphasizing that charter schools are not to be run or supported by any religious institutions or organizations. This is because charter schools, in order to receive funding from the state, must remain public and abide by the constitutional requirements of the state. This may influence the legislature's decision of whether to allow private schools with sectarian ties to apply for charter status.

To ensure compliance with a separation of church and state provision, the legislature should expressly declare that all charter schools shall be free from sectarian control, and then allow private schools to convert to charter status. In the alternative, the legislature may decide to limit the range of possible applicants to public schools already in existence at the time the charter legislation is passed. While this option may prevent some individuals who wish to gain charter status for their school from receiving state funds, it may protect the integrity of the state's policy of non-sectarian schools as well as prevent future constitutional challenges.

B. Other Constitutional Challenges

The establishment of charter schools may give rise to equal protection and due process challenges. A legislature would be wise to include in their legislation provisions which expressly require the school to abide by the laws of the state constitution and other federal statutory laws that cannot be waived, such as employment discrimination or sexual harassment. Most of these issues can be easily resolved by including in the statutory provisions language which requires charter schools to abide by the non-waivable laws of federal and state statutes and constitutions. This can either be done by listing the statutes outright in the charter school legislation, or by a clause in the legislation that encompasses the principle generally.

An interesting example of litigation involving these types of legal issues arose in Colorado, in *Villanueva v. Carere*.[54] In *Villanueva*, the plaintiffs challenged Colorado's Charter Schools Act on six different grounds, citing violations of various federal statutes, and constitutional provisions such as equal protection and due process. Specifically, the plaintiffs challenged the closing of two public elementary schools and opening of a charter school in their stead on six grounds:

> (1) the decisions violate Plaintiffs' rights to equal protection of the laws pursuant to the Fourteenth Amendment of the United States Constitution; (2) the Charter Schools Act, facially and as applied, violates the Equal Protection Clause of the United States Constitution; (3) the decisions violate Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*; (4) the school closures would deprive Plaintiffs' rights to due process of law pursuant to the Fourteenth Amendment by depriving them of (a) school wide Chapter I benefits, (b) the federally funded follow through program (PRAISE), and (c) school lunch and breakfast programs; (5) the opening of PSAS violates the Equal Education Opportunities Act, 20 U.S.C. § 1701 *et seq.*; and (6) the closure of the elementary schools violates the Elementary and Secondary School Improvement Act Amendments, 20 U.S.C. § 2726, by burdening parental involvement and endangering federal funds contingent upon such involvement.[55]

The district court found all the issues in the defendants' favor, denied the plaintiffs' motion for a permanent injunction, dismissed the complaint, and ordered that summary judgment be granted for the defendants.[56] The court found that the plaintiffs had not established the requisite intent to discriminate in closing the regular schools or in opening the charter school required to support its equal protection claim. The court also found that the state had a legitimate governmental interest in encouraging innovation in education and that the Charter Schools Act was rationally related to that interest, which satisfied the due process claim.[57]

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54. 873 F. Supp. 434 (D. Colo. 1994), *aff'd*, 85 F.3d 481 (10th Cir. 1996).
55. 873 F. Supp. 434, 437.
56. *Id.* at 452.
57. *Id.* at 446, 450-52.

IV. ALLOCATION OF LIABILITY

Any time a new organization, corporation or entity is set up, questions of liability arise. Charter schools are no exception. Traditionally, school districts, teachers, administrators and schools enjoy governmental immunity for their actions and decisions in the absence of a statute to the contrary.[58] A charter school differs from traditional public schools in that its directors and employees have been granted permission to make important decisions regarding the educational program and policies of the school. Thus, traditional notions of *respondeat superior* have been altered to the effect that these individuals appear much more like independent contractors than agents of the state.

How should liability be allocated between the school directors and the school sponsor? Do they retain the characteristics of current local school boards, or would they be held personally liable? Is the school to receive governmental immunity? In other words, to whom or how far does governmental immunity extend? When charter school legislation is drafted, legislators need to address the issue of liability in the legislation itself. If they so choose, they can leave the specifics up to the bargaining process between the state sponsoring entity and the petitioning school.[59]

States have dealt, to varying extents, with the issues of liability and accountability in their charter school statutes, yet treatment in statutory language has in no way been consistent. Also, because charter schools have only existed since 1991 and have met and exceeded expectations, there has been very little case law or litigation in the area.[60] Considering that charter

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58. 57 Am. Jur. 2d *Municipal, County, School, and State Tort Liability* § 42 (1988).

59. Regardless of how liability is allocated, the state and its board of education may feel compelled to intervene in a lawsuit, especially if constitutional issues are being litigated. Such was the case in Colorado, where both the State of Colorado and the Colorado State Board of Education intervened to defend the constitutionality of the Charter Schools Act, and thus ended up parties to the litigation, although the plaintiffs originally sued just the members of the local school board that voted to approve the closing of the two schools and the opening of the charter school. Villanueva v. Carere, 873 F. Supp. 434 (D. Colo. 1994), *aff'd*, 85 F.3d 481 (10th Cir. 1996). Sometimes even the threat of litigation may be enough to cause a state to think twice about the wisdom of changing the educational status quo.

60. Of the more than twenty states that have enacted legislation establishing charter schools, only two, Michigan and Colorado, have been obliged to litigate its constitutionality. A third state, Massachusetts, saw a complaint filed but it was

statutes vary considerably by state and the charters themselves vary from charter to charter, each individual contract may answer the questions of liability and accountability in a different way. Thus, uniform answers are not easily found. The answer to whether a state entity may face liability for the actions or failure of a charter school may ultimately depend on the terms of the contract between the government entity and the charter school itself.[61] This is because the legislature can choose to let the contracting parties—the sponsoring state entity and the petitioning school—make the choice. Alternatively, the legislature can make the choice by statute and require the parties to work out the details within those limits. A state can insulate itself from liability by requiring that the school and the sponsoring entity place terms to that effect in their contract, or the state may allocate liability for acts and omissions directly to the school directors by statute.

A. Statutory Solutions to Liability, Immunity, and Insurance Issues[62]

Legislation from the various states allowing charter schools show how legislatures have dealt with the issues of immunity and liability. Unfortunately, statutes which authorize the establishment of charter schools often incompletely address the liabil-

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dismissed.

61. Allowing each charter school to negotiate its own contract could create inconsistencies for the state as well as the educators in knowing for which decisions they may be liable, and for which ones they may claim immunity. Also, based on the very same conduct, one school may be held accountable and the other indemnified, which fosters inconsistencies in the law and frustrates parties' expectations. Arguably, however, the relative bargaining power between the state or local school board and the trustees of the various charter schools will remain relatively predictable, because the statute itself will determine to a great extent the content of the charters granted by the state board. Even if the statute allows room for negotiation, the district or state board is likely to deal evenhandedly and consistently with all schools and require that it be absolved from liability in all of its charter school contracts, or likewise, it may choose to grant governmental immunity to all of those schools it chooses to charter.

62. In examining statutory solutions, twelve states were selected—six granting broad autonomy to charter schools and six granting little autonomy. The following "broad autonomy" state statutes were examined (followed by the year charter legislation was adopted): Arizona (1994), California (1992), Colorado (1993), Michigan (1993), Minnesota (1991) and New Jersey (1996). Those statutes examined which granted little autonomy included: Georgia (1993), Hawaii (1994), Kansas (1994), New Mexico (1993), New Hampshire (1995), and Wyoming (1995).

ity issues that could be raised regarding these schools, especially the issue of liability insurance.

Some states grant varying degrees of immunity to sponsoring entities. For example, Arizona' statute contains a provision which immunizes the school district governing board from liability for acts and omissions of the charter schools it sponsors:

> A school district governing board and its agents and employees are not liable for any acts or omissions of a charter school that is sponsored by the school district, including acts or omissions relating to the application submitted by the charter school, the charter of the charter school, the operation of the charter school and the performance of the charter school.[63]

Another Arizona provision, equally as expansive, grants immunity to those sponsors of a charter school besides a school district governing board: "A sponsor other than a school district governing board, including members, officers and employees of the sponsor, are immune from personal liability for all acts done and actions taken in good faith within the scope of their authority during duly constituted regular and special meetings."[64] Instead of using a reasonableness standard or some kind of objective basis, the statute adopts a subjective good faith standard. As with any subjective standard, uncertainty is infused throughout the system. Upon review of a sponsor's or employee's actions, a court would have to inquire into the minds and intent of the actors. This standard essentially gives these individuals extremely wide latitude for error and misjudgment, since bad faith is very difficult to prove. Regarding insurance, Arizona's law requires that the charter of a school ensure "compliance with federal, state and local rules, regulations and statutes relating to health, safety, civil rights and insurance."[65]

A second option for dealing with the issue of liability is that a legislature could allocate the responsibility of acquiring insurance to the school directors or board of trustees of the school. In New Jersey, the legislature chose to allocate the responsibility for insurance to the board of trustees of each school. The statute first grants authority to the board of trustees of a charter school "to decide matters related to the operations of the school includ-

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63. ARIZ. REV. STAT. ANN. § 15-183(O) (Supp. 1997).
64. *Id.* at § 15-183(P).
65. ARIZ. REV. STAT. ANN. § 15-183(E)(1).

ing budgeting, curriculum, and operating procedures, subject to the school's charter."[66] Then the statute plainly states that the board must provide for the school to be properly insured: "the board shall provide for appropriate insurance against any loss or damage to its property or any liability resulting from the use of its property or from the acts or omissions of its officers and employees."[67] New Jersey's statute also deems the board of trustees of a charter school "public agents authorized by the State Board of Education to supervise and control the charter school,"[68] and provides that a charter school can "sue and be sued, but only to the same extent and upon the same conditions that a public entity can be sued."[69]

A third option is to adopt legislation that requires charter school applicants to provide specific insurance information to the district and to require the school to indemnify the district. For example, Wyoming's charter school statute requires that those who wish to start a charter school provide insurance information to the district board of trustees:

> The district board shall require the petitioner to provide information regarding the proposed operation and potential effects of the school, including but not limited to the facilities to be utilized by the school, the manner in which administrative services of the school are to be provided and a demonstration that the school is adequately insured for liability, including errors and omissions, and that the school district is indemnified to the fullest extent possible.[70]

Wyoming's approach is to place the burden on the school sponsors, not only adequately insuring the school and indemnifying the school district, but the additional burden of making sure the district board is provided with information concerning the operation and administration of the school.

A fourth option is to grant general governmental immunity to the school and extend tort immunity to those operating the school. This approach is seen in Massachusetts' law. First, the

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66. N.J. STAT. ANN. § 18A:36A-14(a) (West 1989).
67. *Id.* at § 18A:36A-14(a).
68. *Id.* at § 18A:36A-3(a).
69. *Id.* at § 18A:36A-6(b).
70. WYO. STAT. § 21-3-203(f) (Supp. 1996).

statute deems the board of trustees of a charter school to be "public agents authorized by the commonwealth to supervise and control the charter school."[71] Next, the statute defines a charter school as a "body politic and corporate" which can "sue and be sued, but only to the same extent and upon the same conditions that a town can be sued."[72] The law further provides that, for purposes of tort liability, employees of charter schools be considered public employees and that the board of trustees be considered the public employer for the same purpose.[73]

Yet another option, and perhaps the one most consistent with the policies behind charter schools, is for the legislature to let the parties decide how to allocate liability.[74] For example, Colorado's law leaves the determination of how to allocate liability up to an agreement between the charter school applicants and the local board of education. The law requires that charter school applicants enter into an agreement regarding their respective legal liability and applicable insurance coverage.[75] Thus, the allocation of liability will likely be the result of the relative bargaining power of each party to the contract.

It is worth mentioning that other states have pursued creative options in allocating liability. For instance, New Hampshire's Charter Schools and Open Enrollment Act contains a requirement that every charter include in its provisions certain elements, one of those elements being that of a "global hold-harmless clause protecting the local school board, school district, and all funding districts and sources, and their successors and assigns from liability for any action or inaction of the charter school, its successors or assigns, or its board of trustees, employ-

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71. MASS. GEN. LAWS ANN. ch. 71, § 89 (West 1996).

72. *Id.*

73. *Id.*

74. The fundamental philosophy behind the charter movement is to allow individual schools freedom from the bureaucratic red-tape of school districts in exchange for greater accountability for educational results. These schools are free to experiment with educational innovations, including techniques, materials, and approaches. Each school may determine its own particular educational focus, and may choose to cater its educational services to drop-outs, gifted students, physically disabled students, students with particular subject interests, or any number of particular interests. Thus, allowing those individuals wishing to start up a charter school to enter the bargaining process and craft their contract according to the particular philosophy and design of the school is consistent with the inherently individual school philosophy of the charter reform movement.

75. COLO. REV. STAT. § 22-30.5-106(1)(j) (1995).

ees, contractors, agents, or pupils."[76] Minnesota's law is likewise creative in how it deals with the issues of liability and insurance. In Minnesota, charter schools are known as "results-oriented schools," organized and operated either as a "cooperative" or as a "nonprofit corporation."[77] The contract for one of these schools must contain a provision for assumption of liability by the school,[78] and one that outlines the "types and amounts of insurance coverage to be obtained by the charter school. . . ."[79] For the purposes of tort liability, however, the school is deemed a school district.[80] The Minnesota statute also contains two interesting provisions regarding those in authority. First, the board of directors of a charter school may sue and be sued.[81] Second, nearly everyone involved with the schools cannot be sued:

> The state board of education, members of the state board, a sponsor, members of the board of a sponsor in their official capacity, and employees of a sponsor are immune from civil or criminal liability with respect to all activities related to a charter school they approve or sponsor. The board of directors shall obtain at least the amount of and types of insurance required by the contract, according to subdivision 5.[82]

The Minnesota Legislature allocated liability to those with direct control, and immunized those entities and individuals who have relinquished daily control over activities of the school.

Michigan's law is more detailed than other states' laws, which could be the result of already having faced a constitutional challenge. Michigan requires that a charter school have certain provisions in its contract, including "types and amounts of insurance coverage," and "legal remedies of the authorizing body and the state board, in addition to remedies under law, for substantial failure by the public school academy to meet its obligations under the contract."[83] This remedy provision appears

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76. N.H. REV. STAT. ANN. § 194-B:3(II)(x) (Supp. 1997).

77. MINN. STAT. § 120.064 (Subd. 4)(a) (Supp. 1998).

78. *Id.* at § 120.064 (Subd. 5)(7).

79. *Id.* at § 120.064 (Subd. 5)(8).

80. *Id.* at § 120.064 (Subd. 8)(j) ("The school is a school district for the purposes of tort liability under chapter 466.").

81. *Id.* at § 120.064 (Subd. 23).

82. MINN. STAT. at § 120.064 (Subd. 24).

83. MICH. STAT. ANN. §380.513 (6)(i)-(j) (West. 1996).

to be unique to Michigan's law. Equally noteworthy is Michigan's wide grant of immunity to those involved with a charter school on various levels:

> A public school academy and its incorporators, board members, officers, employees, and volunteers have governmental immunity as provided [by Michigan law]. An authorizing body and its board members, officers, and employees are immune from civil liability, both personally and professionally, for any acts or omissions in authorizing a public school academy if the authorizing body or the person acted or reasonably believed he or she acted within the authorizing body's or the person's scope of authority.[84]

Most notable perhaps, are those states which do not cover the issues of liability or insurance in their charter school statutes. Interestingly, California did not include a provision providing for the allocation of liability, nor one requiring the issue to be determined in the terms of a charter. Given the number of charter schools currently operating in California,[85] the absence of such a clause should be troubling. The charter school system, because it is based on principles of choice and autonomy, creates an educational framework in which mistakes can and will occasionally be made, and thus, provisions covering the issue of liability not only seem wise, but necessary. The statute does, however, provide that "the governing board *may* require that the petitioner or petitioners provide information regarding the proposed operation and potential effects of the school, including, but not limited to, the . . . potential civil liability effects upon the school and upon the school district."[86] Given the very real possibility that some schools will fail to meet the state's standards, a permissive rather than mandatory provision covering liability is inherently inadequate.

New Mexico's Charter Schools Act is also noteworthy for its lack of terms addressing liability or immunity. This may be because the statute provides that only individual schools within a

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84. MICH. STAT. ANN. §380.513(10).

85. As of early 1997, California had 109 charter schools operating. *Education Reform: A Charter For Success?*, STATE TRENDS, (The Council of State Governments), Winter 1997, at 1.

86. CAL. EDUC. CODE § 47605(g) (West Supp. 1998) (emphasis added).

school district may be authorized by the state board to implement an "alternative educational curriculum,"[87] which means that only existing public schools may apply for and receive charter status. Like New Mexico, Georgia's charter school law is silent on the entire issue of liability, immunity, and insurance.[88] This may be because the structure of Georgia's law, like New Mexico's, is characterized as a weak law, meaning that it grants little autonomy to charter schools. The statutory scheme supports the idea that the schools, for liability purposes, are to be treated just like public schools, and depending on how governmental immunity has developed in Georgia, these schools are probably immune. Hawaii's treatment of liability is the same as Georgia's—the enabling charter school legislation ("student-centered schools") includes nothing about liability, immunity, insurance or indemnification.[89]

V. REVOCATION PROCEDURES IN CHARTER SCHOOL LEGISLATION

An important issue involved in the establishment of charter schools is whether the provisions of the charter legislation provide for specific procedures in the case of a school's failure.[90] The question could be framed in this manner: if a charter school were to have its charter revoked and be subsequently shut down, what would happen to those students who were enrolled in the charter school? Supposedly, if the charter is revoked at the end of a school year (in the form of non-renewal), then the parents and students would have enough time to re-enroll in the regular public school system. Likewise, the school district would have advance notice of the returning students, and could structure class sizes and teacher work loads accordingly. On the other hand, if the charter has been revoked mid-year, what becomes of those students and teachers who are displaced as a result of the closure?

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87. N.M. STAT. ANN. § 22-8A-2(A) (Michie 1993).

88. GA. CODE ANN. § 20-2-255 (Harrison 1997).

89. HAW. REV. STAT. §§ 302A-101 (Supp. 1996).

90. Failure as a valid possibility is perhaps most logically inferred from the marketplace nature of school choice reform movements, of which the charter school is a subset. As one commentator has noted, "a true free market for education, like any other market, requires a threat of failure; otherwise, competition will not push schools to improve the quality of their educational services." *The Limits of Choice: School Choice Reform and State Constitutional Guarantees of Educational Quality*, 109 HARV. L. REV. 2002 (1996).

The statutes vary in how they address the grounds to revoke a charter mid-year. Some statutes, like Arizona's, indicate that the sponsor of a charter school (a school district governing board, the state board of education, or the state board for charter schools) "shall establish procedures to conduct administrative hearings upon determination by the sponsor that grounds exist to revoke a charter" and further provides for judicial review of final decisions.[91] However, the standard approach is to list the grounds for revocation in the statute. The grounds are essentially four-fold: 1) a material violation of provisions of the charter, 2) a failure to meet or make reasonable progress toward the educational objectives contained in the charter, 3) a failure to comply with fiscal accountability procedures or generally accepted standards of fiscal management, or 4) a violation of any laws that have not been expressly waived or exempted by the charter.[92] As a general rule, it appears that statutes do not differentiate between mid-year and end of the year revocation. At least one state, New Hampshire, has however, written into its law a provision that allows the state board to "immediately" revoke a school's charter "in circumstances posing extraordinary risk of harm to pupils."[93]

If the charter school were previously a regular public school, it seems likely that the school, after losing its charter, could continue to operate as a school within the district, and without closing its doors, be subjected once again to all of the rules and

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91. ARIZ. REV. STAT. ANN. § 15-183(R) (1991). Similarly, Massachusetts' statute provides that the "secretary of education may revoke a school's charter if the school has not fulfilled any conditions imposed by the secretary of education in connection with the grant of the charter or the school has violated any provision of its charter." MASS. GEN. LAWS ANN. ch. 71, § 89 (West 1996). *See also* N.J. STAT. ANN. § 18A:36A-17 (West 1989).

92. The statutory language of California's, Colorado's and Kansas' revocation provisions represent the typical grounds for revocation. *See* CAL. EDUC. CODE § 47607(b)(1)-(4) (West 1993); COLO. REV. STAT. § 22-30.5-110(3)(a)-(d) (1995); KAN. STAT. ANN. § 72-1907(a)(1)-(4) (Supp. 1996). Minnesota's statute lists the following four grounds for terminating a contract: "1) failure to meet the requirements for pupil performance contained in the contract; 2) failure to meet generally accepted standards of fiscal management; 3) for violations of law; or 4) other good cause shown." MINN. STAT. § 120.064(Subd. 21)(b) (Supp. 1998). Again, Minnesota's revocation section does not differentiate between mid-year and end of the year revocation. However, the Minnesota law does provide that if a contract is terminated or not renewed, the school shall be dissolved according to the applicable provisions of chapter 308A or 317A [Cooperatives or Nonprofit Corporations]." *Id.*

93. N.H. REV. STAT. ANN. § 194-B:16(V) (Supp. 1997).

regulations it had gained freedom from under the charter agreement. The magnitude of the transition mid-year would depend on how closely the charter school resembled its non-charter form and organization. Additionally, the ease of returning to regular public school status would depend on how recently the school had converted to charter status. Theoretically, if the school had existed as a public school before becoming a charter school and not too much time had passed since the conversion, then a return to public school status would pose fewer difficulties than if the school had been created anew under charter legislation or had undergone a major transformation in becoming a charter school.

Some states allow charter schools to be formed from previous private schools or to be completely new schools.[94] If these schools face a charter revocation mid-year, then the school district's difficulties of providing displaced students with a school to finish out the year become greater, unless a plan is in place. Similar concerns over unemployed teachers surface with mid-year revocation. Districts may have to scramble to fit the students into their schools, money may not be available to provide necessary room and resources, and openings may not be available for mid-year employment. Who should take the risk or carry the burden of reallocation of teachers and students is a question that must be anticipated and adequately addressed in charter school legislation.

A related question may be asked at this point: is it the responsibility of the state to see that those children still receive an education? From a policy standpoint, a state which has delegated its responsibility to individual charter school directors to provide the children of the state with a free, public education should feel at least some obligation to step in and assist a failing school.[95] The question then becomes, would a state have a legal responsibility to provide an education for those students, or at least provide an opportunity for those students to receive an

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94. *See, e.g.*, ARIZ. REV. STAT. ANN. § 15-183(A) (1991).

95. For a discussion of how state constitutional education clauses constitute a possible legal source of restriction on school choice reform efforts in the event of school failure, see *The Limits of Choice: School Choice Reform and State Constitutional Guarantees of Educational Quality*, 109 HARV. L. REV. 2002, 2003 (1996) (arguing that "in many states, constitutional guarantees of adequate educational quality would indeed prohibit school choice reforms that allowed such school failures.").

education?[96] The state arguably has a legal obligation, if it closes down the school, as the entity ultimately responsible for maintaining and controlling a system of free public education, to bring those students back into the traditional public school system, even if it means placing students in already-full classes mid-year without funding allocated for those students. To avoid this problem, statutory provisions could provide that the funds allocated to the charter school for the remainder of the year follow the student back into that particular school (or those particular schools) that absorbed the displaced students. Obviously, this puts some of the risk of failure directly on the state, and while this may initially appear undesirable, it may have the effect of encouraging a state sponsoring entity to do everything in its power to help the charter school meet its contractual and financial obligations and educational goals. On the flip side, it places the burden of reabsorbing the students on an entity that is not directly responsible for the failure.

A. Possible Statutory Solutions to Revocation Concerns

States have, to a varying extent, dealt with the issue of revocation in their charters. While statutes almost universally outline the various circumstances under which a charter may be revoked, they much less frequently state how the various participants are to proceed once a charter *has been* revoked. Despite this lack of attention, some options exist,[97] and states should carefully design their revocation procedures and options in harmony with state constitutional standards.

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96. The constitutions of all fifty states contain clauses that charge the state with the responsibility to provide public education. For a complete list, see Allen W. Hubsch, *The Emerging Right to Education Under State Constitutional Law*, 65 TEMP. L. REV. 1325, 1343-48 (1992). At least thirteen states have had their educational systems adjudged as invalid under these clauses. For a comprehensive citation of these cases, and a thorough discussion of the issue of education clause litigation, see *The Limits of Choice: School Choice Reform and State Constitutional Guarantees of Educational Quality*, *supra* note 96 at 2010 (concluding that state court decisions invalidating state educational systems tend to share common elements, such as a focus on quality and adequacy, and whether the state has provided an adequate education for all students attending public school).

97. For a thorough discussion of various legislative remedies in a scholarly and theoretical presentation, see *The Limits of Choice: School Choice Reform and State Constitutional Guarantees of Educational Quality*, 109 HARV. L. REV. at 2017. The author argues that "every school choice reform should provide for the automatic closing or state take-over of schools that fail to meet minimum quality standards."

One option is to allow the contracting parties to set the terms of revocation and procedure in their contract. Kansas includes, in its charter, legislation a requirement that the charter contain a provision specifying "the manner in which contracts of employment and status of certified employees of the district who participate in the operation of the [charter] school will be dealt with upon non-renewal or revocation of the charter or upon a decision by any such employees to discontinue participation in the operation of the school."[98] While the statute does not specify what details should be included, it does mandate that the petitioners and the board of education of a school district address the issue. No similar provision specifically mentions what is to happen to the displaced students. In fact, the section covering renewal or revocation charters does not seem to contemplate a mid-year revocation. The language seems to refer specifically to the decision of the board of education to either renew or revoke the charter at the end of the initial three-year period.[99] However, a subsequent section requires that the board of education decide whether to revoke a charter school's charter within sixty days of a hearing on the matter.[100]

Another option is to grant to the state entity over education the authority to set statewide procedures to govern the revocation process. New Jersey's statute requires that the Commissioner of Education develop guidelines and procedures to govern the possibility of revocation of a school's charter.[101] Hopefully this would include guidelines concerning procedures for students who are displaced because of a revocation.

A third option is to have the statute itself provide the procedure for educating students whose charter school has failed or had its charter revoked. New Hampshire provides that if a charter is revoked or expires, "the parent of a pupil attending that school may apply to any other charter or open enrollment school eligible to receive tuition under the provisions of this chapter adopted by the school district." The statute then continues by explicitly stating that "the pupil's sending district shall not be relieved of its obligation to educate that pupil in accordance with

98. KAN. STAT. ANN. § 72-1906(c)(13) (Supp. 1996).
99. *Id.* at § 72-1907(a).
100. *Id.* at § 72-1907(b) (Supp. 1996).
101. N.J. STAT. ANN. § 18A:36A-17 (West Supp. 1997).

the district's policies."[102] "Sending district" is defined in a previous section as the "school district in which the pupil resides."[103] The responsibility to educate those students affected by a decision to revoke a charter remains with the school district which originally had the responsibility.

Minnesota's charter school statute, like New Hampshire's, provides the procedures for determining who has the responsibility for educating displaced charter school students. If a school's contract is not renewed or is terminated, "a pupil who attended the school, siblings of the pupil, or another pupil who resides in the same place as the pupil may enroll in the resident district or may submit an application to a nonresident district according to section 120.062 [Enrollment Options Program] at any time."[104] Furthermore, the statute requires that applications and notices be "processed and provided in a prompt manner."[105] Thus, the district in which the charter school is located has the duty to accept that student back into the district school system in the event of a revocation of a charter school's contract.

Of the states researched,[106] most were silent on how students are to be educated after their charter school's contract has been revoked. For example, of the statutes examined, charter school statutes from Arizona, California, Colorado, Georgia, Hawaii, Massachusetts, New Mexico, and Wyoming did not have provisions outlining a plan to immerse students back into the regular public school system.

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102. N.H. REV. STAT. ANN. § 194-B:16(VIII) (Supp. 1997).
103. *Id.* at § 194-B:1(XII) (Supp. 1997).
104. MINN. STAT. § 120.064(Subd. 22) (Supp. 1998).
105. *Id.*
106. *See supra* note 63.

VI. EXPANDING THEORIES OF EDUCATIONAL LIABILITY[107]

Every states constitution contains a clause establishing education as one of the state's responsibilities,[108] and the constitutions of forty-eight states clearly establish a mandatory duty to provide education to the children within its reach.[109] Even so, in the past, educational claims typically based their arguments on the Federal Constitution and litigated issues in federal court. However, federal precedent made it difficult for plaintiffs to succeed on these claims,[110] and as a result, plaintiffs increasingly have brought their claims in state courts and have called for interpretations of state constitutional law.[111] State courts, faced with issues of first impression and inexperienced in deciding educational issues, grope for theories and principles to guide their decisions.[112]

In the case of charter schools, the trend toward state constitutional interpretation should be troubling. The charter concept itself, which proposes a partnership between independent school directors and the state, on the basis of a contract or formal agreement, may very well have the effect of compounding the trend toward litigating questions of educational responsibility and quality.

At least one commentator has contemplated the issue of whether a state's constitutional education clause should apply to school choice reforms, such as the charter school:

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107. The educational reform context in which charter schools operate is the context of the marketplace. For an interesting take on the potential abuses of charter schools, see Mary L. Whitezell, *Charter Schools Can Be a Guise for a Corporation to Siphon Profits*, PITT. POST-GAZETTE, Aug. 13, 1995, at E2; *See also*, Lewis D. Solomon, *The Role of For-Profit Corporations in Revitalizing Public Education: A Legal and Policy Analysis*, 24 U. TOL. L. REV. 883, 886 (1993). For a thorough explanation of the theory of privatization of public schools and its implications, see Myron Lieberman, PRIVATIZATION AND EDUCATIONAL CHOICE (1989); *See also* Kimberly Colonna, *The Privatization of Public Schools-A Statutory and Constitutional Analysis in the Context of the Wilkinsburg Education Association v. Wilkinsburg School District*, 100 DICK. L. REV. 1027 (Summer 1996) (focusing on the state constitutional and state statutory issues raised by privatization.).

108. Allen W. Hubsch, *Education and Self-Government: The Right to Education Under State Constitutional Law*, 18 J.L. & EDUC. 93, 96-97 (1989).

109. Vermont and Minnesota are the exceptions to the mandatory language. *Id.* at 97.

110. Hubsch, *supra* note 109, at 103-04.

111. *Id.* at 115, 127-33.

112. *Id.* at 94 ("[S]ometimes, state courts have groped about dizzily in the recent education litigation, as if exposed to strong sunlight after a long period in the dark.").

> It seems unlikely that an education clause would provide relief for at-risk students in a state whose courts had previously rejected constitutional challenges to the state's educational system. The possibility that school choice might exacerbate inequality and cause more public schools to offer inadequate education might, however, prompt more successful state constitutional challenges; a state court would have good reason to reassess its interpretation of the state's education clause when the state legislature has enacted a choice policy that is intended to let deficient schools fail.[113]

Although a school system that allows individual administrators, teachers and parents to exercise choice over particular educational matters is fundamentally different from a traditional, state-operated public school system, constitutional education clauses are certainly broad enough to support a challenge on the basis that a state has failed in its constitutional obligation to provide an adequate education. The argument that students in a school choice program can merely switch to a better school would likely not excuse the state from its constitutional responsibilities.[114]

In addition to claims based on state constitutional education clauses, contractual theories of liability may prove useful to charter school litigants. In his article entitled "Contract Law: The Proper Framework for Litigating Educational Liability Claims," Kevin McJessy explores how contract law principles could be used to support claims against educational institutions.[115] McJessy first provides an overview of the various traditional legal theories advanced by claimants and then shows how contract principles may assist litigators in establishing educa-

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113. *The Limits of Choice: School Choice Reform and State Constitutional Guarantees of Educational Quality*, 109 HARV. L. REV. 2002, 2013 (1996). This statement is particularly troubling given the following comment by the "experts" of charter schools: "Some charter schools will fail and close or be closed. This is a plus for educational accountability and a model for public education generally." Chester E. Finn, Jr., et al, *Charter Schools in Action: What Have We Learned*, EXECUTIVE SUMMARY, The Hudson Institute, July 1996.

114. *The Limits of Choice: School Choice Reform and State Constitutional Guarantees of Educational Quality*, 109 Harv. L. Rev. 2002, 2014.

115. Kevin P. McJessy, *Contract Law: The Proper Framework for Litigating Educational Liability Claims*, 89 NW. U. L. REV., 1768, 1774 (1995).

tional liability on the part of school directors. Specifically, the article proposes that the principles of contract law would allow courts to "hold educational institutions legally accountable for the actions of their employees without triggering the concerns that induce courts to dismiss such claims based on the doctrine of academic abstention."[116]

McJessy proposes six reasons why courts and litigants should more seriously consider contract law as a method for substantiating educational liability claims:

> First, both legal commentators and the courts have thus far inappropriately given too little consideration to the propriety of such [contractual] claims. Second, contract principles avoid the concerns that induce courts to apply the doctrine of academic abstention. Third, the emerging student-school relationship is one particularly amenable to an application of contract principles. Fourth, courts have so widely rejected other theories of educational liability that contract law may provide the last hope for potential plaintiffs. Fifth, educational liability actions comport with the goal of contract law: to protect parties' reasonable expectations. Finally, contract theory has already met with limited success; consequently plaintiffs would not be asking courts to make new law but to take the lesser step of expanding existing law.[117]

In particular, McJessy notes the growing trend in education toward a market-oriented service in which students and their parents are the consumers and schools are the producers.[118] Although he does not explicitly mention charter schools, these

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116. McJessy at 1769.

117. *Id.* at 1784.

118. As the concept of education changes, so does the rhetoric used to describe education and schools. Take for example the following language, which echoes the language of other deregulation movements in various other service industries:

> The monopoly in public schools is breaking up. Competition is bringing experiments and forcing assumptions to change. Even some people in the teacher's unions and on school boards are starting to embrace the charter-school idea . . . . The school boards, traditionally just suppliers of education services, have the opportunity to become purchasers on behalf of the citizens they serve, and to think afresh about the sort of education they ought to be buying. *Charter Schools Free at Last*, THE ECONOMIST, July 2, 1994, at 31.

schools are clearly vulnerable to a contract theory of liability.[119] Specifically, McJessy mentions three main contract theories upon which liability could be based: breach of an express contract claim, promissory estoppel, and third-party beneficiary claim.[120]

McJessy's assertions should be of concern to educators, educational institutions, and state entities, for if the ideas expressed prove prophetic, the educational landscape may be forever changed. For charter schools, the newest players in educational reform, educational liability theories pose an even greater threat because the essence of these schools is their exchange of freedom from regulation for greater accountability, outlined in express "contract" form. Although the charter is not a contract between the student and the school, but exists, rather, between the school and a sponsoring board, the student could nonetheless arguably qualify as a third-party beneficiary. Under this type of claim, the plaintiff would argue that she was the beneficiary of the contract between the charter school's sponsoring entity and the school directors. She would then allege that the school failed to meet, or violated, the terms of that contract. As a consequence of a breach of contract, parents would be entitled to maintain a third-party action against the teachers, and through respondeat superior, against the schools.[121] Thus, even if charter schools are deemed "arms of the state" and are treated as public schools, under a contract theory of liability, they may find themselves in a legal quandary.

The conclusion of the article is that courts should be willing to adopt contract theories in considering educational liability claims. Looking at the movements at the forefront of educational

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119. As explained *supra* Part I, charter schools are independent public schools that operate on the basis of a contract with the local, county, or state school board, which sponsors the school and groups that organize and manage the school. The charter specifies particular aspects of the school such as the school's educational plan, expected outcomes, measurement procedures, and compliance provisions with other state and federal laws. The essential theory is that charter schools will continue to receive public money, will opt out of rigid state regulations, and through innovative educational techniques and specialization, succeed in delivering an education at least as adequate, if not more, than that offered by the traditional public school system. *See, e.g., Education Reform: A Charter For Success?* STATE TRENDS: CRITICAL ISSUES, EMERGING TRENDS AND BEST PRACTICES IN STATE GOVERNMENT, (The Council of State Governments), Winter 1997, at 1-3.

120. McJessy, *supra* note 115, at 1788-1810.

121. *Id.* at 1808.

liability, educators and legislators would be wise to carefully consider the extent and type of accountability they may be incurring in exchange for granting precious freedom from state regulation. This is particularly true if contract law proves successful with the courts, combined with the real potential for litigation based on state constitutional interpretations of the education clauses and charter schools.

VII. CONCLUSION

The establishment of charter schools within the public education system involves legal issues that should be considered carefully. Some of these issues involve constitutional concerns, while others are issues of statutory construction and state policy. The statutes of the various states which have ventured into the charter school arena show that the solutions to these legal issues are numerous and diverse. Legislation also shows that the legal issues have not always been adequately addressed.

The general consensus among commentators and educators is that the charter school movement will continue to gain legitimacy and achieve results. Its rapid growth from one state in 1991 to twenty-five in 1997 shows that charter reform is not likely to die out any time soon. The early consensus of the impact of the charter reform movement is that at least now there exists a viable third alternative to the traditional public school/private school system. However, since the movement is so new, and because of the lack of longitudinal studies regarding their effectiveness, charter schools may not be the educational panacea hoped for by its most ardent advocates.

The experiences of the few states which have faced litigation over their charter school laws and the possibility of a change in educational liability theories show that a legislature would be wise to proceed carefully in creating a system of public schools relinquished from the control of the state board of education or other responsible state entity. Since the real effects of the school choice reform movement, and charter schools in particular, are yet unknown, legislatures would be wise to proceed carefully lest by adopting choice programs, they jeopardize the education of many of the nation's children. Those states still contemplating the charter school idea as a means of jump-starting their educational environment, or as a way of offering viable alternatives to

parents, would be wise to look to the experiences of other states in dealing with the legal issues involved. Perhaps by learning from one another, from legislation, and subsequently, from charter schools, the effectiveness of the American educational system will improve.