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Judicial Clarity: Giving Teeth to the Application of Federal Disability Laws in Charter Schools

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JUDICIAL CLARITY: GIVING TEETH TO THE APPLICATION OF FEDERAL DISABILITY LAWS IN CHARTER SCHOOLS

*Sarah Wieselthier**

I. INTRODUCTION

D.B., a nine-year-old student with an emotional disability, was brutally restrained and held against his will in an isolation room ten times throughout the course of the school year due to manifestations of his disability.¹ On one occasion, D.B. began to panic as he was escorted to the in-school suspension room and fell to the ground sobbing.² The behavior interventionist then grabbed D.B. by his arms and dragged him into the room with such force that D.B.'s face and mouth slammed into the ground, chipping his tooth.³ Upon injury, D.B. began to panic further and was physically restrained for fifteen minutes before being brought to a small, soundproof closet where he was held for an additional thirty minutes.⁴ On another occasion, D.B. was told that if he was unable to calm down, he would be handcuffed and tasered; a school official then sat on top of him, constricting his breathing and causing him to urinate on himself.⁵

D.B. is classified as a student with a disability under the Individuals with Disabilities Education Improvement Act (“IDEA”),⁶ however, he has yet to receive an individualized

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1. Complaint at ¶¶ 155, 163, P.B. v. Pastorek, No. 2:10-cv-04049 (E.D. La. Oct. 26, 2010). D.B.'s disability manifests itself in emotional “meltdowns” at school three to four times a week. *Id.* at ¶ 159.

2. *Id.* at ¶ 163.

3. *Id.*

4. *Id.*

5. *Id.* at ¶ 164.

6. Individuals with Disabilities Education Improvement Act of 2004, 20 U.S.C. §§ 1400-1482 (2006). *See also infra* notes 44-53 and accompanying text (discussing the IDEA). For a student to be covered by the IDEA, he or she must be classified within one or more of the thirteen categories of disability enumerated in the IDEA. *See* 20 U.S.C. § 1401(3)(A) (2006). The thirteen categories of disability, all defined within the IDEA, are: mental retardation, hearing impairments, speech or language impairments, visual impairments, emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, specific learning disabilities, blindness, deafness, and multiple disabilities. MATT COHEN, A GUIDE TO SPECIAL EDUCATION ADVOCACY: WHAT PARENTS, CLINICIANS AND ADVOCATES NEED TO KNOW 39 (2009).

education plan (“IEP”)⁷ or the related services⁸ that the law requires.⁹ Instead, the public charter school where D.B. attends has removed him from the classroom and punished him for a manifestation of his disability.¹⁰

D.B.’s experience is not unique: countless students with disabilities who attend charter schools are not receiving the special education and related services that the law requires.¹¹ Charter schools are also engaging in discriminatory practices in order to limit the number of enrolled students with disabilities.¹² Consequently, these students are denied their right to receive a free appropriate public education (“FAPE”)¹³ and are discriminated against because of their disabilities. Some of the nation’s leading charter schools, touted for their success in achieving improved educational outcomes, are the worst culprits.¹⁴

7. An IEP is a “written statement for each child with a disability that is developed, reviewed, and revised in accordance with [the IDEA].” 20 U.S.C. § 1414(d)(1)(A)(i) (2010). The IEP is the “centerpiece” of the IDEA and is “designed to provide a road map for the child’s educational programming during the course of the coming year.” THOMAS F. GUERNSEY & KATHIE KLARE, SPECIAL EDUCATION LAW 109 (3d ed. 2008).

8. The IDEA requires that related services be provided to a classified student who requires them. 20 U.S.C. § 1401(9) (2010). *See also infra* notes 48-50 and accompanying text (discussing related services that must be provided under the IDEA).

9. Complaint, *supra* note 1, at ¶¶ 155-61.

10. *Id.* at ¶¶ 162-64.

11. D.B. is one of ten students with disabilities, eight of which attend charter schools, named in a class-action lawsuit against the Louisiana Department of Education. *See generally* Complaint, *supra* note 1. Each of the students has alleged that they were denied a FAPE; their stories are both horrific and eye opening. *Id.*

12. *See, e.g.,* Michael Winerip, *Message From a Charter School: Thrive or Transfer*, N.Y. TIMES, July 11, 2011, at A14 (discussing a student that was counseled out of continuing enrollment at Harlem Success Academy 3 in New York City); Letter from Ira A. Burnim & Lewis Bossing, Legal Dir. & Senior Attorney, Judge David L. Bazelon Center for Mental Health Law, to Anurima Bhargava, Chief, Educ. Opportunities Section, U.S. Dep’t of Justice, Civil Rights Div. (May 12, 2011), *available at* <http://www.bazelon.org/LinkClick.aspx?fileticket=ZHSqwTj8U78%3d&tabid=77> [hereinafter Bazelon Civil Rights Complaint] (discussing how charter schools seek to avoid enrolling students with disabilities by asking questions about disabilities in applications and counseling out and how students with disabilities have been segregated in the District of Columbia public school system). Some have speculated that “[d]iscrimination against students with disabilities may be even more extreme than it appears because charter schools are reported to be artificially raising their counts by taking only the children who are easiest to serve and directing others elsewhere.” Mark C. Weber, *Special Education from the (Dump) Ground Up: Children with Disabilities in a Charter School-Dependent Education System*, 11 LOY. J. PUB. INT. L. 217, 220 (2010).

13. 20 U.S.C. § 1400(d)(1)(A) (2006). *See infra* text accompanying note 45.

14. *Compare* THE LOTTERY (Great Curve Films 2010) (highlighting Harlem Success

Charter schools are unique in that they are public but free from the regulation and oversight traditional public schools are subject to in order to provide them with the opportunity to use innovative teaching methods to improve student outcomes.¹⁵ Despite this autonomy, charter schools are still bound by the federal special education and civil rights laws that protect students with disabilities.¹⁶ The rigid and rigorous standards of these disability laws are incongruent with the flexible and innovative structure of charter schools, making compliance a challenge.¹⁷

The problem with most charter schools is not that they seek to violate the laws protecting students with disabilities, but rather that they do not have the resources to provide these students with appropriate special education and related services.¹⁸ Charter schools face significant challenges in balancing their mission to achieve academic success through creative and flexible teaching methods against compliance with rigid federal disability laws.¹⁹ In order to achieve the appropriate balance, there must be judicial interpretation and clarification to give teeth to the requirement that charter schools comply with federal disability laws and to set forth the obligations and freedoms of charter schools in educating students with special needs.²⁰ Without the courts weighing in, this discrimination will

Academy and its achievements in providing opportunities for children requiring special education) *with* Winerip, *supra* note 12 (discussing how a student with disabilities attending Harlem Success Academy 3 was counseled out by a psychologist who told the student's mother that he was better suited elsewhere instead of classifying him with a disability and providing him services).

15. *See* discussion *infra* Part II.

16. Jay P. Heubert, *Schools Without Rules? Charter Schools, Federal Disability Law, and the Paradoxes of Deregulation*, 32 HARV. C.R.-C.I. L. REV. 301, 313-27 (1997). *See also* discussion *infra* Part III.B.

17. *See generally* LAUREN MORANDO RHIM ET AL., INST. FOR THE STUDY OF EXCEPTIONAL CHILDREN AND YOUTH, PROJECT INTERSECT RESEARCH REPORT #4: CHARTER SCHOOLS' SPECIAL EDUCATION INFRASTRUCTURES (2006). *See also* discussion *infra* Part IV.A.

18. Heubert, *supra* note 16, at 348; Stephanie Banchemo & Caroline Porter, *Charter Schools Fall Short on Disabled*, WALL ST. J., June 20, 2012, at A2 (noting that some charter schools do not have access to regional cooperatives to provide special education services like traditional school districts do and that charter schools receive an average of 20% less funding than traditional schools). *See also* discussion *infra* Part IV.C.

19. *See* discussion *infra* Part IV.

20. It should be noted that not all charter schools discriminate against students with disabilities or fail to provide a FAPE. In fact, many charter schools are dedicated exclusively to educating students with disabilities. JULIE F. MEAD, CHARTER SCHOOLS DESIGNED FOR CHILDREN WITH DISABILITIES: AN INITIAL EXAMINATION OF ISSUES AND QUESTIONS

continue.

This Note will examine charter schools' discrimination against students with disabilities and propose a solution for ensuring that charter schools enroll and educate these students in compliance with federal disability laws. Part II will discuss charter schools and why they are an attractive alternative to traditional public schools. Part III will examine the federal laws applicable to students with disabilities and their application to charter schools. Part IV will examine the discrimination that students with disabilities face in charter schools and will identify why this discrimination occurs. In Part V, this Note proposes that judicial intervention is necessary in order for discrimination and noncompliance to cease. History has shown that gains for students with disabilities have not been realized until a court has interpreted and required compliance with the complex requirements of the federal laws. Therefore, it is necessary for a court to clarify how a charter school can reconcile its mission and limited resources with its obligations under federal disability laws. Part VI concludes that, although judicial intervention is only one piece of the puzzle, it is essential to ensure that the rights of students with disabilities are protected when they seek to take advantage of the innovative educational opportunities charter schools afford to their non-disabled peers.

II. CHARTER SCHOOLS

Charter schools are public schools that “are free from a range of state laws and district policies stipulating what and how they teach, where they can spend their money, and who they can hire and fire. In return, they are held strictly accountable for their academic and financial performance.”²¹ Although state laws regarding charter schools differ, the mission of the charter school movement is the same: use innovative teaching methods to improve student outcomes, provide educational choice, and stimulate improvement of

RAISED 9-10 (2008). Because of their ability to be creative and use innovative methods with these students, many charter schools have been successful in educating students with disabilities and helping them progress in ways traditional public schools had been unable to accomplish. See, e.g., U.S. DEPT OF EDUC., SUCCESSFUL CHARTER SCHOOLS 44-45 (2004), available at <http://www.ed.gov/admins/comm/choice/charter> [hereinafter SUCCESSFUL CHARTER SCHOOLS] (discussing how at Ralph A. Gates Elementary School students receiving special education are included in general education skills groups that have a resource special education teacher as part of the teaching team and the school's child-find procedures).

21. SUCCESSFUL CHARTER SCHOOLS, *supra* note 20, at 1.

the existing public education system.²²

Charter schools provide an attractive option to parents who find that the traditional public school is not effective in instructing their children, but cannot afford to move to a location with a better school or to send their children to a private school.²³ Parents are drawn to the innovative curricula and instructional approaches, small class sizes, and positive reputations charter schools have for enhancing educational outcomes.²⁴ Although charter schools take different forms, successful charter schools share key elements that enable success, including mission-driven programming, internal accountability, strong partnerships with parents and the community, and innovation across the school program.²⁵

The charter school concept originated in the early 1970s, when an educator proposed the idea that a small group of teachers should be granted a charter to explore new educational approaches for their students.²⁶ Today, there are more than 4900 charter schools educating over 1.7 million students across the United States.²⁷

22. *Id.*

23. See Rebekah Gleason, *Charter Schools and Special Education: Part of the Solution or Part of the Problem?*, 9 UDC L. REV. 145, 154 (2007). See also THE LOTTERY, *supra* note 14 (following four families who sought to have their children selected in the lottery to attend a charter school in Harlem because they wanted their children to receive a high-quality education and not attend their failing zone school).

24. Gleason, *supra* note 23, at 154.

25. SUCCESSFUL CHARTER SCHOOLS, *supra* note 20, at 5-20. For an in-depth analysis of eight charter schools identified by the United States Department of Education as successful models, see SUCCESSFUL CHARTER SCHOOLS, *supra* note 20, at Part II. Despite the positive accolades surrounding charter schools and their ability to improve educational outcomes, critics have argued that there is no evidence that charter schools actually do a better job than traditional public schools. Gleason, *supra* note 23, at 154. Overall, it has been calculated that only 17% of charter schools deliver better results than the public schools that serve the same populations. PEG TYRE, THE GOOD SCHOOL: HOW SMART PARENTS GET THEIR KIDS THE EDUCATION THEY DESERVE 13 (2011). Yet successful authorizers have reported that performance growth and standardized test scores in their charter schools have exceeded that of their traditional public school counterparts. See U.S. DEP'T OF EDUC., SUPPORTING CHARTER SCHOOL EXCELLENCE THROUGH QUALITY AUTHORIZING: INNOVATIONS IN EDUCATION 64, 67, 70, 73, 77, 80, 83, 87 (2007), available at <http://www.ed.gov/nclb/choice/charter/authorizing/index.html>. For an interesting account of the differing community views on charter schools, see THE LOTTERY, *supra* note 14 (showing the community's reaction to the emergence of charter schools as an alternative to the failing traditional public schools in Harlem, New York City).

26. Clarisse C. Casanova, Note, *Charter Schools: A Step in the Right Direction or a Fourth Left Turn for Public Education?*, 7 WHITTIER J. CHILD & FAM. ADVOC. 231, 233 (2008).

27. *Request for Proposals to Establish Charter Schools Authorized by the Board of Regents: 2011 Charter School Application Kit*, N.Y. STATE EDUC. DEP'T (Jan. 3, 2011),

Minnesota enacted the first charter school law in 1991; since then, almost every state has followed suit and enacted a charter school statute.²⁸ These statutes set forth the process for obtaining and maintaining a charter and relieve the schools of most state and local regulations.²⁹ Depending on the state, the duration of the initial charter will range from three to five years.³⁰ Generally, as long as the charter school meets the performance goals outlined in its original contract, the charter will be renewed.³¹ Schools will be shut down before the charter expires, or the charter will not be renewed if they are unsuccessful at meeting specific goals.³²

III. SPECIAL EDUCATION³³

Before 1975, students with disabilities were routinely excluded from schools because states were not explicitly required to provide them with an education.³⁴ Legislation protecting individuals with disabilities was a direct result of the civil rights movement.³⁵ In *Brown v. Board of Education*,³⁶ the Supreme Court articulated that “it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education” and that this

available at <http://www.p12.nysed.gov/psc/documents/2011NYSEDAApplicationKir.pdf>.

28. Gleason, *supra* note 23, at 147. As of 2009, the only states without charter school legislation were Alabama, Kentucky, Maine, Montana, Nebraska, North Dakota, South Dakota, Washington, and West Virginia. DANNY WEIL, CHARTER SCHOOL MOVEMENT: HISTORY, POLITICS, POLICIES, ECONOMICS AND EFFECTIVENESS 123 (2d ed. 2009).

29. Heubert, *supra* note 16, at 301. Regulation is typically limited to health and safety of children, length of school year, enrollment reporting, and special education. See Gleason, *supra* note 23, at 148-49. In addition, the statutes set forth charter development, cover student issues such as non-discrimination and special education, establish the legal status and fiscal character of the schools, identify staffing and labor relations boundaries, and address the accountability of the charters to their boards. *Id.* at 149-150.

30. PETER W. CROOKSON, JR. & KRISTINA BERGER, EXPECT MIRACLES: CHARTER SCHOOLS AND THE POLITICS OF HOPE AND DESPAIR 64 (2002).

31. *Id.*

32. Kevin S. Huffman, Note, *Charter Schools, Equal Protection, and the New School Reform Movement*, 73 N.Y.U. L. REV. 1290, 1322-23 (1998).

33. Discussion of the history of special education legislation and the federal laws applicable to students with disabilities is adapted from Sarah Wieselthier, Note, *Grooming Dogs for the Educational Setting: The “IDEIA” Behind Service Dogs in the Public Schools*, 39 HOEFSTRA L. REV. 757, Part II (2011).

34. ALLAN G. OSBORNE, JR. & CHARLES J. RUSSO, SPECIAL EDUCATION AND THE LAW: A GUIDE FOR PRACTITIONERS 6 (2003).

35. See PAUL T. JAEGER & CYNTHIA ANN BOWMAN, DISABILITY MATTERS: LEGAL AND PEDAGOGICAL ISSUES OF DISABILITY IN EDUCATION 5-6 (2002).

36. 347 U.S. 483 (1954).

“opportunity, where the state has undertaken to provide it, is a right which must be made available to *all* on equal terms.”³⁷ By establishing that American public schools were open to *all* students, *Brown* paved the way for students with disabilities to receive a public education.³⁸

A. Federal Laws Protecting Students with Disabilities

Students with disabilities are protected from discrimination and afforded specific rights by the IDEA,³⁹ the Rehabilitation Act of 1973 (“Rehabilitation Act”),⁴⁰ and the Americans with Disabilities Act (“ADA”).⁴¹ The IDEA is the federal law that governs how states must provide special education to students with disabilities,⁴² while the Rehabilitation Act and the ADA are civil rights statutes that apply generally to all individuals with disabilities.⁴³

The purpose of the IDEA is “to ensure that all children with disabilities have available to them a [FAPE] that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living.”⁴⁴ The IDEA defines FAPE as:

37. *Id.* at 493 (emphasis added).

38. See JAEGER & BOWMAN, *supra* note 35, at 6. Further progress was not made until the early 1970s, when federal courts established the principle that *all* students must be provided a free appropriate public education and held that exclusion of children with disabilities from educational programming denied those children due process and equal protection of the law. *Mills v. Bd. of Educ.*, 348 F. Supp. 866, 875-76 (D.D.C. 1972); *Pa. Ass’n for Retarded Children v. Pennsylvania*, 343 F. Supp. 279, 302 (E.D. Pa. 1972).

39. The IDEA was originally passed in 1975 as the Education for All Handicapped Children Act. Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (1975) (current version at 20 U.S.C. §§ 1400-1482 (2006)). When the Education for All Handicapped Children Act was amended in 1990, the name was changed to the Individuals with Disabilities Education Act; it was later changed to the Individuals with Disabilities Education Improvement Act upon reauthorization in 2004. See CTR. FOR EDUC. & EMP’T LAW, STUDENTS WITH DISABILITIES AND SPECIAL EDUCATION LAW 2 (27th ed. 2010); Andrea Kayne Kaufman, *Policy and Law of Individuals with Disabilities Education Improvement Act of 2004: Attempting No Student With Disabilities Left Behind to the Extent Enforceable*, in EDUCATING INDIVIDUALS WITH DISABILITIES: IDEIA 2004 AND BEYOND 39 (Elena L. Grigorenko ed., 2008). Although the official name of the Act has changed, the acronym “IDEA” is still most commonly used.

40. Rehabilitation Act of 1973, 29 U.S.C. §§ 701-796 (2006).

41. Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 (2006).

42. Individuals with Disabilities Education Improvement Act, 20 U.S.C. §§ 1400-1482 (2006).

43. See 29 U.S.C. § 701(b)-(c) (1998); 42 U.S.C. § 12101(b)(1) (2009).

44. 20 U.S.C. § 1400(d)(1)(A).

[S]pecial education and related services that—(A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the standards of the State educational agency; (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and (D) are provided in conformity with the individualized education program. . . .⁴⁵

Although the IDEA by its terms does not specifically define the term “appropriate,”⁴⁶ the United States Supreme Court has provided that an appropriate education is one that provides an educational benefit.⁴⁷

For a student to receive an educational benefit from his or her education, it may be necessary for the school to provide related services.⁴⁸ Related services include “transportation, and such developmental, corrective, and other supportive services . . . as may be required to assist a child with a disability to benefit from special education”⁴⁹ Related services must be provided if they are required for a student to gain access to a special education program, necessary for the student to physically remain in the educational program, or when the student cannot make meaningful progress toward IEP goals without the services.⁵⁰ In order for a student to receive the necessary related services, the services must be documented in the student’s IEP.⁵¹ The IDEA requires all students

45. *Id.* § 1401(9).

46. *See* OSBORNE & RUSSO, *supra* note 34, at 21.

47. *Hendrick Hudson Cent. Sch. Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 206-07 (1982) (denying a student with a hearing impairment a sign language interpreter because the educational program the school provided complied with the procedures set forth in the federal law and was reasonably calculated to enable her to receive an educational benefit). The *Rowley* Court emphasized that “the requirement that a State provide specialized educational services to handicapped children generates no additional requirement that the services so provided be sufficient to maximize each child’s potential ‘commensurate with the opportunity provided other children.’” *Id.* at 198. This standard has been described as entitling students with disabilities to a “Chevrolet, not a Cadillac.” COHEN, *supra* note 6, at 102.

48. 20 U.S.C. § 1401(9).

49. *Id.* § 1401(26)(A). The IDEA provides a non-exhaustive list of related services, ranging from speech language pathology and audiology services to physical and occupational therapy, counseling, social work services, and medical services. *Id.*; GUERNEY & KLARE, *supra* note 7, at 44 & n.79.

50. OSBORNE & RUSSO, *supra* note 34, at 49.

51. *See* 20 U.S.C. § 1414(d)(1)(A)(i)(IV). *See also supra* note 7. The IDEA provides explicit requirements for what must be included in an IEP program. 20 U.S.C. § 1414(d)(1)(A). For a discussion of the information an IEP must include, see George Giuliani & Roger Pierangelo, *The Importance of Understanding Individualized Education Programs*

with disabilities to have an IEP developed by an IEP team. The IEP determines the needs of the student and sets forth an educational program that will provide the student with a FAPE.⁵² Failure to develop and implement an IEP constitutes a violation of the student's rights under the IDEA.⁵³

In addition to the IDEA, the Rehabilitation Act and the ADA offer protection to students with disabilities. The Rehabilitation Act is a civil rights law that makes discrimination against individuals with disabilities unlawful by those who receive funds by federal subsidies or grants.⁵⁴ The ADA seeks to eliminate discrimination against individuals with disabilities and includes a prohibition against disability discrimination.⁵⁵ Both statutes offer similar protections to individuals with disabilities, especially in the school setting.⁵⁶ Section 504 of the Rehabilitation Act ("Section 504")⁵⁷ provides that, "No otherwise qualified individual with a disability . . . shall, solely, by reason of his or her disability, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving Federal financial assistance" ⁵⁸ A student is covered under Section 504 if he or she has a physical or mental impairment that substantially limits a major life activity, such as learning; the coverage of the ADA is identical.⁵⁹ Therefore, a

(IEPs) in *Family Law*, N.Y. ST. B.A. FAM. L. REV. 16, 19-21 (2009).

52. 20 U.S.C. § 1414(d).

53. See generally Gabriela Brizuela, Note, *Making an "IDEA" a Reality: Providing a Free Appropriate Public Education for Children with Disabilities Under the Individuals with Disabilities Education Act*, 45 VAL. U. L. REV. 595 (2011) (discussing the differences between the circuits in evaluating when a failure to implement an IEP results in a denial of FAPE and arguing that the IDEA should mandate that school districts strictly adhere to all provisions of a student's IEP).

54. Rehabilitation Act of 1973, 29 U.S.C. § 701(b)-(c) (2006). Public schools are subject to the Rehabilitation Act because they receive federal subsidies and grants.

55. Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101(b)(1), 12181(7)(J) (2006).

56. COHEN, *supra* note 6, at 34, 36-37. For students with disabilities, the ADA did not add any protections that differ from what Section 504 and the IDEA were already providing in the school setting. See JAEGER & BOWMAN, *supra* note 35, at 12. The ADA is to be interpreted consistently with how courts apply Section 504. See ADA Amendments Act of 2008, Pub. L. No. 11-324, 104 Stat. 327 § 2(a)(3) (2008) (codified as amended at 42 U.S.C. §§ 12101-12213 (2009)). In fact, the ADA Amendments Act explicitly requires ADA and Section 504 cases to be analyzed under the same body of law. See ADA Amendments Act of 2008, Pub. L. No. 11-324, 104 Stat. 327.

57. 29 U.S.C. § 794 (2002).

58. *Id.* § 794(a).

59. COHEN, *supra* note 6, at 34-35. The ADA uses the same language as Section 504 to

student does not have to be classified as having a disability under the IDEA to receive services, benefits, or protection under either Section 504 or the ADA.⁶⁰

B. Application of Federal Disability Laws to Charter Schools

A charter school's accountability includes complying with the IDEA, Section 504, and the ADA.⁶¹ In fact, the regulations implementing the IDEA clearly state that, "Children with disabilities who attend public charter schools and their parents retain all rights under [the IDEA]."⁶² Additionally, as a public entity and recipient of federal funds, charter schools must adhere to Section 504 and the ADA.⁶³

Depending on the state's statute, the charter school may either be considered part of the local education agency ("LEA," usually a school district) in which the LEA retains the responsibility for students with disabilities attending the charter school, or it may be considered an independent LEA individually responsible for implementing special education for students with disabilities.⁶⁴

define a disability as a "physical or mental impairment that substantially limits one or more major life activities of [an] individual." 42 U.S.C. § 12102(1)(A) (2009).

60. See discussion *supra* notes 54-60 and accompanying text (discussing the requirements of Section 504 and the ADA).

61. ALLISON GANDHI ET AL., AM. INSTS. FOR RESEARCH, CHARTER SCHOOL SPECIAL EDUCATION COOPERATIVES: A MODEL FOR SUPPORTING THE DELIVERY OF SERVICES TO STUDENTS WITH DISABILITIES IN CHARTER SCHOOLS 1 (2011); RHIM ET AL., *supra* note 17, at 1 ("The charter contract is predicated on the supposition that a charter school applicant has the capacity to fulfill the plethora of obligations associated with operating a charter school."). See also Gleason, *supra* note 23, at Part II; Heubert, *supra* note 16, at Part II.

62. 34 C.F.R. § 300.209(a) (2006).

63. See MEAD, *supra* note 20, at 2 ("Section 504 and the ADA require that educational programs be operated free from discrimination on the basis of disability."); RHIM ET AL., *supra* note 17, at 1. It has been argued that charter schools have even greater obligations than public schools to serve students with disabilities. Heubert, *supra* note 16, at 313 ("For example, under the IDEA, Section 504, and [the ADA], charter schools that are independent of local school board control must meet the more extensive—and expensive—requirements to which traditional school districts and other 'local education agencies' are subject. In addition, Section 504 and [the ADA] apparently create heightened legal obligations for charter schools, magnet schools, and other public schools that offer distinctive or unique educational programs." (citation omitted)).

64. RHIM ET AL., *supra* note 17, at 2. The regulations implementing the IDEA specify the individual requirements for charter schools that are public schools of the LEA, charter schools that are LEAs, and charter schools that are neither an LEA nor a school that is a part of an LEA. 34 C.F.R. § 300.209(b)–(d) (2006).

Charter schools have various options for how to provide special education and related services to students who are classified as having a disability under the IDEA, Section 504, and/or the ADA.⁶⁵ Depending on whether a charter school is part of the LEA or an independent LEA, it can choose to provide the services directly, join a charter school special education cooperative and pool resources with other charter schools in the area, or contract out with individual consultants and service providers.⁶⁶

IV. THE STRUGGLE TO PROVIDE SPECIAL EDUCATION TO STUDENTS WITH DISABILITIES

Despite federal mandates to provide educational opportunities to students with disabilities, charter schools have struggled with compliance.⁶⁷ The underlying foundation of the IDEA was to provide students with disabilities access to a public education—something that they were routinely denied before federal legislation was enacted.⁶⁸ However, many charter schools have succumbed to the discriminatory practices of denying enrollment to students with disabilities, counseling students with disabilities to leave the school, and failing to provide students with special education and related services.⁶⁹ This is particularly frustrating because approximately 50% of parents of students with disabilities specifically enroll their children in charter schools because of dissatisfaction with special education

65. RHIM ET AL., *supra* note 17, at 5 & tbl.1 (2006) (listing the organizations and strategies charter schools use to assist them with providing special education and related services in order of prevalence as: authorizer, individual consultants, LEA or intermediate education agency or unit, state education agency, charter school association, charter school resource center, local non-profit that provides special education services, special education cooperative for charter schools, educating management organization, and risk-pooling).

66. *Id.* For an examination of charter school special education cooperatives, see GANDHI ET AL., *supra* note 61.

67. *See, e.g.*, Cassandra Guarino & Derrick Chau, *Special Education in Charter and Conventional Public Schools*, in ZIMMER ET AL., CHARTER SCHOOL OPERATIONS AND PERFORMANCE: EVIDENCE FROM CALIFORNIA 161 (2003); Lauren Morando Rhim, *Special Education Challenges and Opportunities in the Charter School Sector* (Nat'l Charter Sch. Research Project, Ctr. on Reinventing Pub. Educ., Working Paper No. 2008-12, 2008).

68. *See supra* notes 34-38 and accompanying text.

69. *See, e.g.*, Complaint, *supra* note 1 (alleging that charter schools in New Orleans have failed to provide special education and related services to students with disabilities); Winerip, *supra* note 12 (discussing a student that was counseled out of continuing enrollment at the Harlem Success Academy 3 in New York City); Bazelon Civil Rights Complaint, *supra* note 12 (discussing how charter schools seek to avoid enrolling students with disabilities by asking questions about disabilities in applications and by counseling out).

services in the traditional public school setting.⁷⁰ Most of the noncompliant charter schools have not sought to violate the federal laws protecting students with disabilities or to discriminate against them; they simply do not have the resources to adequately perform their obligations under the laws and provide the special education and related services required.⁷¹

A. Tension Between Charter School Philosophy and Federal Mandates

Charter schools operate with flexibility and a lack of regulation in order to foster an innovative and successful learning environment.⁷² In stark contrast, charter schools are bound by the rigid requirements of the IDEA, Section 504, and the ADA.⁷³ This tension is apparent in many areas, including student discipline, placement, and enrollment.

The IDEA sets forth specific guidelines for disciplining students with disabilities. A student classified under the IDEA cannot be removed from his or her placement for more than ten school days per school year, and any long-term suspension must first be reviewed in a manifestation determination hearing because students cannot be punished for manifestations of their disability.⁷⁴ These requirements often conflict with a charter school's philosophy on discipline. For example, at KIPP Academy Houston, students who misbehave are required to stand on the "Porch," are prohibited from socially interacting with anyone except adults, and must wear their uniforms inside out.⁷⁵ In order to work their way off the Porch, students must exhibit good behavior, perform community service, apologize, and set personal goals.⁷⁶ At Roxbury Preparatory Charter School, students will receive demerits for conduct violations such as misbehaving on the school bus, failing to remain silent and walk in lines in the hallway, disrupting class, or being disrespectful.⁷⁷ For

70. Gleason, *supra* note 23, at 153.

71. *See* Heubert, *supra* note 16, at 348.

72. *See* discussion *supra* Part II.

73. *See* discussion *supra* Part III.

74. Individuals with Disabilities Education Improvement Act, 20 U.S.C. § 1415(k) (2006). *See also infra* note 106 (discussing discipline of students with disabilities).

75. SUCCESSFUL CHARTER SCHOOLS, *supra* note 20, at 36.

76. *Id.*

77. *Id.* at 48.

students with certain disabilities, especially those with behavioral issues, complying with the school's strict code of conduct without support can be a challenge, and the punishment may violate the IDEA if there is no review process in place to determine whether the conduct was a manifestation of the student's disability.⁷⁸

Another tension lies in the environment in which students with special needs are educated. The IDEA requires students with disabilities be educated in the least restrictive environment ("LRE").⁷⁹ This means that, "[t]o the maximum extent appropriate, children with disabilities . . . are educated with children who are not disabled . . ."⁸⁰ Many charter schools have the goal of serving students with disabilities in inclusive environments—in a general education classroom rather than in a separate special education classroom, for example.⁸¹ Research has shown that charter schools serve a significantly higher percentage of students exclusively in the general education classroom than traditional public schools, suggesting that charter schools heavily rely on mainstreaming their special education students.⁸² However, because "[t]he goal is to serve special needs students in the [LRE] *that best promotes their learning*," mainstreaming may only be appropriate for certain students to receive a FAPE.⁸³ Additionally, in order to determine the LRE for an individual student with a disability, schools are required to provide a continuum of alternate placements, such as general inclusion, partial inclusion, or placement in a separate special education class.⁸⁴ Providing the continuum can be challenging for charter schools that operate with low budgets, limited staff, nominal

78. See SAMUEL A. KIRK ET AL., EDUCATING EXCEPTIONAL CHILDREN 235-52 (11th ed. 2006) (discussing that positive reinforcement is a successful strategy when educating a student with a behavioral disability); Complaint, *supra* note 1, at ¶¶ 100-08 (alleging violations of the IDEA in charter school discipline and how certain students with disabilities were suspended and punished because their behaviors were deemed inappropriate by the school and no behavior intervention plan was put in place).

79. 20 U.S.C. § 1412(a)(5)(A).

80. *Id.* (stating further that "special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.").

81. Guarino & Chau, *supra* note 67, at 167.

82. *Id.* at 165 (providing data regarding service settings in traditional public schools and charter schools in California).

83. *Id.* at 167.

84. See OSBORNE & RUSSO, *supra* note 34, at 21.

building space, and a small student population.

In terms of enrollment, charter schools are required to admit all students who apply; if supply exceeds demand, a lottery is used to determine admission.⁸⁵ Legally, a student's disability cannot be a factor in the selection process.⁸⁶ However, charter schools *do* consider a student's disability—they do not want to enroll a student that will be expensive or difficult to educate or perhaps they do not have the appropriate personnel or resources available to support the student's needs.⁸⁷ This is supported by the questions on charter school applications seeking information that would reveal the applicant's disabilities. Additionally, statistics show that charter schools educate significantly fewer students with disabilities than traditional public schools, especially when it comes to students with severe disabilities.⁸⁸ Thus, another tension lies in a charter school's compliance with Section 504 and the ADA's equal access requirements and its desire to exclude those students for whom it believes it cannot provide an appropriate education.

To further complicate matters, “[t]he very population that tends to be most in conflict with the ideals on which charter schools are based is one of the very populations that could most benefit from the

85. Bazelon Civil Rights Complaint, *supra* note 12, at 5; THE LOTTERY, *supra* note 14.

86. Eileen Ahearn, *Public Charter Schools and Students with Disabilities*, COUNCIL FOR EXCEPTIONAL CHILDREN (June 2001), <http://www.ccc.sped.org/AM/Template.cfm?Section=Home&TEMPLATE=/CM/ContentDisplay.cfm&CAT=none&CONTENTID=2236>.

However, Ohio's charter school statute grants its charter schools the discretion to hold a separate lottery for students with disabilities and set forth a number of spots specifically for students identified as autistic. MEAD, *supra* note 20, at 16. No other state has a similar provision permitting separate lotteries for students with special needs. *Id.* Cf. Thomas W. Carroll, *Increasing the Number of Students with Disabilities Served by Public Charter Schools*, FOUND. FOR EDUC. REFORM & ACCOUNTABILITY, <http://www.nyfera.org/?p=1482> (last visited Dec. 31, 2012) (proposing that charter schools should give preference to students with disabilities in their admission lotteries and allow charter schools to contract with regional Boards of Cooperative Education Services to provide special education services in order to increase the prevalence of students with disabilities in New York charter schools).

87. WEIL, *supra* note 28, at 251-52 (discussing how charter schools have shown a pattern of exclusion, use screening mechanisms in their admission processes, and do not admit students with special needs who are costly to educate); Bazelon Civil Rights Complaint, *supra* note 12, at 5-6.

88. Bazelon Civil Rights Complaint, *supra* note 12, at 5-6 (listing questions charter school applications ask that would reveal an applicant's disability). *See also infra* note 95 (providing statistical data regarding the number of students with disabilities educated in traditional and charter schools).

choice of a charter school.”⁸⁹ The ability for charter schools to be creative and experiment with innovative methods to educate students with disabilities can be invaluable for those students who have been unable to progress academically and receive a meaningful benefit from their education in traditional public schools.⁹⁰ Additionally, students with disabilities cannot be denied access to a type of public education that is available to their peers.⁹¹

Some have postulated “that ensuring that charter schools grant access and provide adequate services to all students, including students with disabilities, is a critical component of fulfilling the overall goal of the charter concept.”⁹² In the process of fulfilling this goal, charter schools cannot ignore their obligations under federal law.⁹³

B. Discriminatory Practices and Noncompliance with Federal Laws

Statistics show that charter schools educate substantially fewer students with disabilities in proportion to traditional public schools.⁹⁴ Although the lower numbers may reflect the common

89. Gleason, *supra* note 23, at 146.

90. See MEAD, *supra* note 20, at 19 (discussing that parents who choose to place their special needs children in charter schools focused on educating students with disabilities do so because of the small teacher-student ratio and supportive culture); Gleason *supra* note 23, at 146.

91. Cf. CROOKSON & BERGER, *supra* note 30, at 16 (“The charter school gospel holds that because schools will be smaller, more free to customize educational experiences to the needs of the students they serve, and better able to engage parents and communities in the business of educating their young, they will be more likely to overcome barriers to equal educational opportunity.”).

92. RHIM ET AL., *supra* note 17, at 37.

93. Cf. Rhim, *supra* note 67, at 24 (“Innovative practices are sometimes erroneously cited as non-compliance simply because they do not look similar to programs that the auditor has ever seen before—and therefore, the auditor reckons, there must be something wrong. Yet innovation is essential to the mandate of charter schools, and to penalize them in this manner is a perverse disincentive to improving services to students with disabilities.” (quotation marks omitted)).

94. Banchemo & Porter, *supra* note 18 (reporting statistics from a 2012 report by the Government Accountability Office that special education students made up 8.2% of charter school students during the 2009-2010 school year, below the 11.2% average at traditional public schools); Thomas Hehir, *Charters: Students with Disabilities Need Not Apply?*, 29:18 EDUC. WEEK, at 18 (2010), available at http://www.edweek.org/ew/articles/2010/01/27/19hehir_ep.h29.html?tkn=QQNC6AY97%2B01O7%2Bu4nwLnioyJY%2BAvdDbAtIU. During the 2006-2007 school year, 19.9% of students with disabilities in Massachusetts urban schools were enrolled in traditional schools, compared to 10.8% in urban charter schools. *Id.* The number was considerably less for students with significant disabilities. *Id.* In the District of Columbia, 18% of students at

charter school practice of serving students with disabilities in regular classrooms and working toward declassification,⁹⁵ there is disconcerting evidence that charter schools refuse to admit students requiring special education,⁹⁶ refuse to evaluate and identify their students for special education,⁹⁷ and counsel students with disabilities to leave and go elsewhere.⁹⁸ Refusing to admit students with

traditional public schools receive special education services, compared to 11% of students at charter schools. Bill Turque, *Advocates Accuse D.C. Charter Schools of Excluding the Disabled*, WASH. POST (May 12, 2011), http://www.washingtonpost.com/local/education/dc-charter-schools-exclude-the-disabled-advocates-say/2011/05/12/AFVgcV1G_story.html. More significantly, traditional public schools in the District of Columbia serve three times as many students with the most complex emotional and physical needs as compared to charter schools. *Id.* But see Guarino & Chau, *supra* note 67, at 163 (stating that the difference between the number of students with severe disabilities educated in California's charter schools and traditional public schools was statistically insignificant); Banchemo & Porter, *supra* note 18 (stating that one reason for the enrollment disparity is because charter schools declassify students out of special education).

95. See *supra* text accompanying notes 81-82.

96. See, e.g., Bazelon Civil Rights Complaint, *supra* note 12, at 5-6. Many charter schools use applications that ask detailed questions about the applicant's disabilities or that would reveal the applicant's disabilities. *Id.* at 5. These applications require that the applicant disclose any disabilities and individual or family history of psychiatric conditions and submit special education records, psychological or speech evaluations, and past or current Section 504 plans, as well as request permission to examine all of the child's school records. *Id.* at 5-6. Charter schools can then examine these answers and determine that they do not want to enroll the student because of his or her disability. See *id.* Other parents have been told up front by charter schools that their staff lacks the necessary training to serve their child and would not be able to accommodate the student. Complaint, *supra* note 1, at ¶¶ 151-54. See also Gleason, *supra* note 23, at 160 (discussing how some charter schools operate without any special education program and pointing out one school that requires parents to sign a "Waiver of Responsibility" acknowledging that the school is not equipped, nor does it offer, special education services). Additionally, about one-third of charter schools do not accept applicants with ambulatory needs because the building is not wheelchair-accessible. *Id.* at 160. See also Complaint, *supra* note 1, at ¶ 154 (stating that one student with ambulatory needs was unable to attend a charter school that wanted to educate the student because the school's facilities were not wheelchair accessible).

97. See, e.g., Complaint, *supra* note 1. For example, P.B., a student with bipolar disorder and attention deficit hyperactivity disorder ("ADHD") attends a charter school that refuses to evaluate him or provide him with accommodations despite the fact that he was in seventh grade for the third time. *Id.* at ¶¶ 110, 112, 114. D.T., a student with an emotional and behavioral disability, attends a charter school that has failed to evaluate him or identify him as a student with a disability pursuant to the IDEA. *Id.* at ¶ 137. As a result, he has been continually suspended from school for behaviors directly related to his disability; the charter school never provided him with the support and services necessary to enable him to make educational progress. *Id.* at ¶¶ 138-40. But cf. Guarino & Chau, *supra* note 67, at 162 (reporting that the difference in the percentage of students identified by California's charter schools as having a disability compared to the number identified by traditional public schools was not statistically significant).

98. See e.g., Winerip, *supra* note 12. Matthew Sprowal attended the Harlem Success

disabilities and counseling them to leave the school constitute violations of Section 504 and the ADA's requirement that students with disabilities be given access to the educational program equal to their non-disabled peers,⁹⁹ while refusing to evaluate and identify students with disabilities violates the child-find requirements of the IDEA.¹⁰⁰ Additionally, charter schools have failed to implement IEPs,¹⁰¹ neglected to develop and implement behavior intervention plans,¹⁰² and have unlawfully disciplined students for manifestations of their disability.¹⁰³ These actions violate key components of the IDEA, which sets strict standards and guidelines with regard to implementing IEPs¹⁰⁴ and disciplining students with disabilities.¹⁰⁵

Academy 3 charter school, where he was repeatedly punished for acting out. *Id.* During Matthew's third week of kindergarten, he was suspended for three days for bothering other children. *Id.* The school psychologist evaluated Matthew and told his mother that he would be better suited elsewhere. *Id.* The psychologist made Matthew's mother "believe that her son was so difficult that she [would be] lucky anyone would take him." *Id.* Once Matthew transferred to a traditional public school, he was diagnosed with an attention disorder and finally was provided with accommodations and special education services to help him thrive academically. *Id.* Advocates for Children of New York has reported that a disproportionate number of the cases they handle involving students being sent away from schools because of their disabilities involve charter schools. *Id.*

99. Bazelon Complaint, *supra* note 12, at 9. *See also supra* notes 54-60 and accompanying text.

100. Although states are permitted to develop their own identification procedures, the IDEA requires "an active effort to identify children in need of services . . ." GUERNSEY & KLARE, *supra* note 7, at 57. *See also* Individuals with Disabilities Education Improvement Act, 20 U.S.C. § 1414(a)-(c) (2006) (setting forth the procedure and requirements for child find and evaluations).

101. *See, e.g.,* Complaint, *supra* note 1, at ¶¶ 72-89 (alleging systematic violations of failing to provide a FAPE that confers a meaningful educational benefit).

102. *See, e.g., id.*, at ¶ 141 (discussing how a charter school created a behavior intervention plan for a student with an emotional and behavioral disability that failed to provide him with any counseling, mental health services, or any other effective behavioral interventions that would address his unique educational and behavioral needs).

103. *See, e.g., id.*, at ¶¶ 127-28 (discussing how a student diagnosed with ADHD was suspended more than ten times for a total of more than forty school days without a manifestation determination hearing, solely because of behaviors related to his disability, such as running in the halls, refusing to sit down, disrespecting authority, leaving the classroom without permission, and causing a class disturbance).

104. 20 U.S.C. § 1414(d) (2006) (setting forth the requirements for developing and implementing an IEP). *See also* GUERNSEY & KLARE, *supra* note 7, at ch. 7.

105. The IDEA limits the amount of days a student with a disability can be removed from the classroom and requires a manifestation determination hearing to take place before a student with a disability is punished with a long-term suspension. 20 U.S.C. § 1415(k). If at the manifestation hearing it is determined that the student's behavior was a result of his or her disability, then the student will not be suspended; instead, a functional behavioral assessment will occur to create a behavior intervention plan. *Id.* §§ 1415(k)(E)-(F). Only if it is

Although some parents of students with disabilities have complained to charter school administrations¹⁰⁶ or have initiated lawsuits¹⁰⁷ and administrative complaints,¹⁰⁸ most parents have responded to the discrimination by placing their child in a different public school that will educate their child in accordance with what the laws require.¹⁰⁹ By removing the student, the charter school is no longer held accountable for its failure to educate that student in compliance with federal laws, nor will the charter school be forced to develop a means of compliance for future students with disabilities who may enroll. A similar effect results when a discrimination lawsuit or administrative complaint is settled because there is no legal precedent established to encourage other charter schools to abide by the law.¹¹⁰

determined that the behavior was not a manifestation of the student's disability would it be permissible to discipline the student for his or her behavior in the same fashion as a non-disabled peer. *Id.* § 1415(k).

106. *See, e.g.,* Winerip, *supra* note 12 (discussing the attempts made by a parent of a student with a disability to discuss her grievances with the charter school administration).

107. *See e.g.,* United States v. Nobel Learning Cmty., Inc., 676 F. Supp. 2d 379, 379 (E.D. Pa. 2009) (suing a corporation that operates a charter school network for discriminatory practices in violation of the ADA and its implementing regulations); Scaggs v. N.Y. State Dep't of Educ., No. 06-CV-0799 (JFB)(VVP), U.S. Dist. LEXIS 35860, at *1-6 (E.D.N.Y. May 16, 2007) (suing state agencies and individual charter schools for violations of equal protection, the IDEA, Section 504, and the ADA); Complaint, *supra* note 1 (naming ten students with disabilities to represent a class of individuals discriminated against by public schools in New Orleans, Louisiana).

108. *See e.g.,* Complaint, The Legal Center for People with Disabilities and Older People v. Douglas Cnty. Sch. Dist. (Dep't of Justice, Civil Rights Div. July 18, 2011), *available at* <http://www.ednewscolorado.org/wp-content/uploads/2011/07/legalcentercomplaint.pdf> (complaining of Section 504 and ADA violations by charter schools in Colorado that provide only limited services to students with disabilities, do not provide special education services, and only serve students with mild disabilities); Due Process Complaint, E.A. v. La. Dep't of Educ. (La. Dep't of Educ., Legal Div. July 28, 2010) (complaining of IDEA violations by New Orleans public schools); Bazelon Civil Rights Complaint, *supra* note 12 (complaining of Section 504 and ADA violations by charter schools in the District of Columbia that use discriminatory enrollment practices and unlawfully segregate students with disabilities).

109. *See, e.g.,* Winerip, *supra* note 12 (discussing how a parent transferred her child with a disability from a charter school that did not serve his needs to a different public school where his needs were addressed and where the child was able to receive a benefit from his education).

110. *See* Scaggs v. N.Y. State Dep't of Educ., No 06-CV-799 (RRM)(WDW), 2011 U.S. Dist. LEXIS 73045 (July 7, 2011) (approving an infant compromise agreement in a suit alleging discrimination by charter schools against students with disabilities).

C. Identified Sources of Discrimination and Noncompliance with Federal Laws

It is no secret why discrimination and noncompliance occurs—charter schools are simply not equipped with the resources to understand their obligations under the law and provide special education and related services in accordance with the strict requirements the law has put in place.¹¹¹ Although traditional public schools face similar challenges, they are generally in a better position to cope with the challenge of educating disabled children due to greater funding and more supportive infrastructures.¹¹²

The challenges charter schools face in educating students with disabilities have been categorized as procedural and operational.¹¹³ Procedurally, charter schools struggle with understanding their legal responsibilities under the laws, which are complex and difficult to navigate.¹¹⁴ This can be attributed to a lack of experience educating students with disabilities on the part of the charter school administration and limited access to state special education services and support structures.¹¹⁵ If charter schools struggle in determining a student's disability status, developing a high-quality program with limited resources, and understanding the procedural and substantive requirements of the federal laws, then it is likely that they do not have the means to provide any accommodations or services to a student with special needs.¹¹⁶

In terms of operational challenges, charter schools must understand the planning required to be adequately funded and to have the instructional capacity to provide specialized services.¹¹⁷ Educating students with disabilities is expensive, and administering and developing a special education program requires human resources.¹¹⁸ Charter schools are typically small in terms of staff and budget, making it difficult to provide appropriate special education

111. *See generally* Rhim, *supra* note 67.

112. *See* GANDHI ET AL., *supra* note 61, at 2 (“Regular public schools also struggle with many of these challenges; however, the issues tend to be more pronounced and widespread in charter schools.”).

113. Rhim, *supra* note 67, at 10.

114. GANDHI ET AL., *supra* note 61, at 2; Rhim, *supra* note 67, at 11-14.

115. Rhim, *supra* note 67, at 12, 14.

116. *See* GANDHI ET AL., *supra* note 61, at 2; RHIM ET AL., *supra* note 17, at 37.

117. Rhim, *supra* note 67, at 16.

118. *Id.*

placement and related services that require specialized personnel and materials that can be difficult to afford, acquire, and retain.¹¹⁹ Further, charter schools may be unable to take advantage of funding streams due to a lack of information and administrative capacity to study various options.¹²⁰ As a result, charter schools cannot realize economies of scale like traditional public schools and end up “build[ing] capacity to deliver special education and related services as they go.”¹²¹ This is not an effective means of creating or implementing a program designed to provide a FAPE or to comply with federal disability laws.

V. PREVENTING DISCRIMINATION

With the reasons behind the discrimination and noncompliance identified, one would think that charter schools and authorizers would be able to decrease, and eventually eradicate, it. Yet this is not the case; solving these problems requires a variety of reforms. For years, scholars and disability advocates have identified the pieces to solving the puzzle and have made suggestions for policy makers, boards of education, authorizers, local school districts, and individual charter schools to implement. These suggestions include: employing stronger oversight and enforcement by the LEA and State Educational Agency (“SEA”); imposing monetary penalties by the SEA for noncompliance, such as reduced reimbursement or funding; creating incentives to develop quality special education programs; developing an infrastructure that includes planning for students receiving special education; training personnel about the demands of the federal laws and the education of students in compliance with those laws; promoting a special education cooperation model by which charter schools can pool their special education resources; and requiring charter school missions to include *all* students and be adaptable for any student’s IEP at the charter application and approval stage.¹²²

119. *Id.* at 19.

120. Guarino & Chau, *supra* note 67, at 173.

121. Rhim, *supra* note 67, at 19-20, 22 (“[T]he proportionate effect of a single child could be greater for a small charter school than a district with multiple schools and consequently, a larger budget. Specialized services that can run upwards of \$50,000 to \$100,000 annually represent a greater percentage of a charter school’s budget than most traditional public schools.”).

122. *See, e.g.*, GANDHI ET AL., *supra* note 61; RHIM ET AL., *supra* note 17; Hehir, *supra* note 94; Weber, *supra* note 12; Gleason, *supra* note 23, at 169-72; Heubert, *supra* note 16, at

Even though some of these ideas have come to fruition for certain charter schools, discrimination and noncompliance are still commonplace. Discrimination and noncompliance are evident in the District of Columbia, for example, where violations of Section 504 and the ADA have continued despite efforts of the District's Office of the State Superintendent of Education ("OSSE") to address discrimination by charter schools.¹²³ In 2009, the OSSE issued a Memorandum on Discrimination [A]gainst Children with Disabilities, which advised charter schools to stop their discriminatory practices. In 2010, the OSSE instituted Policies and Procedures for Placement Review, which required charter schools to consult with the OSSE before transferring a disabled student's placement.¹²⁴ Despite these efforts, the OSSE has still observed rampant discrimination as recently as 2011.¹²⁵

If the problem has been identified and solutions suggested—and sometimes even implemented—what is missing? The answer is judicial interpretation and clarification. No court has had the opportunity to weigh in on the discriminatory practices occurring in charter schools. This is the essential piece to the puzzle, for almost all significant moments regarding the education of students with disabilities were direct results of judicial intervention. Courts must identify that charter schools' discriminatory practices and failure to follow the mandates of federal laws are violations that will not be tolerated; this would give teeth to the provisions that make the IDEA, Section 504, and the ADA applicable to charter schools.

As illustrated by other milestones in the fight for the education of students with disabilities, the need for judicial intervention is evident. For example, despite the Equal Protection Clause of the Fourteenth Amendment¹²⁶ and the passage of the Civil Rights Act of 1964,¹²⁷ students with disabilities were still being excluded from public

348-51; Casanova, *supra* note 26, at 250-51; Rhim, *supra* note 67, at 25-35; S.H. Warren et al., *Primer for Charter School Operators: Special Education Requirements and Including Students with Disabilities in Charter Schools*, PRIMERS (Oct. 10, 2011), http://www.charterschoolcenter.org/sites/default/files/operator_present.pdf.

123. Bazelton Civil Rights Complaint, *supra* note 12, at 3.

124. *Id.*

125. *Id.* (stating that neither the Memorandum on Discrimination Against Children with Disabilities nor the Policies and Procedures for Placement Review have "adequately remedied charter schools' exclusionary practices or the needless segregation of students with disabilities").

126. U.S. CONST. amend XIV, § 1.

127. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended in scattered sections of 2 U.S.C., 28 U.S.C., and 42 U.S.C.).

schools.¹²⁸ It was not until two federal circuit courts in the 1970s declared the practice to be unconstitutional and proclaimed that all students must be provided a free appropriate education that students with disabilities were able to access the public education system.¹²⁹ Similarly, although the Education for All Handicapped Children Act¹³⁰ (a predecessor to the IDEA)¹³¹ provided that students with disabilities must be provided a FAPE,¹³² it was not until the Supreme Court's decision in *Hendrick Hudson Central School District Board of Education v. Rowley*¹³³ that school districts were supplied a definition of "appropriate" and given a workable test to determine whether a district was providing a FAPE.¹³⁴ Before this decision, it was difficult for school districts to understand their obligations under the law; since *Rowley*, both school districts and lower courts have a clearer understanding of what is necessary to provide an appropriate education.¹³⁵ Other court decisions were fundamental in giving teeth to various parts of the IDEA, including student discipline, exhaustion of administrative remedies, and reimbursement to parents for private placements.¹³⁶ These decisions

128. See *supra* notes 34-38 and accompanying text.

129. *Mills v. Bd. of Educ.*, 348 F. Supp. 866, 875-76 (D.D.C. 1972); *Pa. Ass'n for Retarded Children v. Pennsylvania*, 343 F. Supp. 279, 302 (E.D. Pa. 1972). See also discussion *supra* note 38.

130. Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (1975) (current version at 20 U.S.C. §§ 1400-1482 (2006)).

131. See *supra* note 39.

132. Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773, § 3(c).

133. 458 U.S. 176 (1982).

134. *Id.* at 198, 206-07 (defining appropriate as providing some educational benefit).

135. See generally Julie F. Mead & Mark A. Paige, *Board of Education of Hendrick Hudson v. Rowley: An Examination of its Precedential Impact*, 37 J. LAW & EDUC. 329 (2008).

136. *Sch. Comm. of Burlington, Mass. v. Dep't of Educ. of Mass.*, 471 U.S. 359, 369-74 (1996) (holding that a court can order a school district to reimburse parents for a unilateral placement if such placement is appropriate under the IDEA and creating a three-prong test to determine when reimbursement is required); *Florence Cnty. Sch. Dist. Four v. Carter*, 510 U.S. 7, 12-14 (1993) (holding that parents can be reimbursed for unilateral private placement when the school district's IEP was inadequate to meet the student's needs even if the private school was not approved by the state); *Honig v. Doe*, 484 U.S. 305, 323-29 (1988) (holding that a student with a disability cannot be excluded from the classroom for dangerous or disruptive conduct that is a manifestation of his disability without following the procedures set forth in the IDEA); *Polera v. Bd. of Educ. of Newburgh Enlarged City Sch. Dist.*, 288 F.3d 478, 488 (2d Cir. 2002) (holding that the fact that damages under Section 504 and the ADA were sought in addition to the relief available under the IDEA did not enable the plaintiff to sidestep the exhaustion requirements of the IDEA).

were so fundamental that certain rights afforded to students with disabilities are known by the name of the Supreme Court decision. In all of these areas, judicial interpretation was necessary to navigate the complex provisions of the IDEA and to ensure that school districts were in compliance.

There have been two recent federal lawsuits alleging discrimination by charter schools that ended in settlements and, thus, without a decision on the merits. In *Scaggs v. New York State Department of Education*,¹³⁷ students with disabilities alleged equal protection, IDEA, Section 504, and ADA violations against charter schools in New York.¹³⁸ Unfortunately, as to many of the plaintiffs, the case was dismissed for failure to comply with discovery orders and failure to prosecute.¹³⁹ The remaining plaintiffs reached a settlement and entered into an infant compromise, by which each plaintiff individually received sums ranging from \$1000 to \$18,000.¹⁴⁰

A settlement was also reached in *United States v. Nobel Learning Communities, Inc.*¹⁴¹ In *Nobel Learning Communities*, students with disabilities alleged that a private corporation operating a charter school network, Nobel Learning Communities (“NLC”), engaged in discriminatory practices in violation of the ADA and its implementing regulations by failing to enroll or dis-enrolling students with disabilities from its schools.¹⁴² Although the court dismissed the allegations of discrimination at NLC’s day care, elementary, and secondary schools because there were no facts creating a reasonable inference of a discriminatory policy, the cause of action against NLC’s preschools survived a motion to dismiss.¹⁴³ Surviving the motion to dismiss were allegations that NLC instituted a policy to exclude, remove, or otherwise discriminate against children with disabilities from NLC programs and acted on the policy by excluding, removing, or otherwise discriminating against

137. No. 06-CV-0799 (JFB)(VVP), 2007 U.S. Dist. LEXIS 35860 (E.D.N.Y. May 16, 2007).

138. *Id.* at *1-6.

139. *Scaggs v. N.Y. State Dep’t of Educ.*, No. 06-CV-799 (RRM)(WDW), 2010 U.S. Dist. LEXIS 82550 (E.D.N.Y. Aug. 10, 2010).

140. *Scaggs v. N.Y. State Dep’t of Educ.*, No. 06-CV-799 (RRM)(WDW), 2010 U.S. Dist. LEXIS 73045 (E.D.N.Y. July 7, 2011).

141. 676 F. Supp. 2d 379 (E.D. Pa. 2009).

142. *Id.* at 380.

143. *Id.* at 383-87.

children with disabilities.¹⁴⁴ In January 2011, the Department of Justice entered into a settlement agreement with NLC.¹⁴⁵ As part of the settlement, NLC agreed to adopt and implement a formal non-discrimination policy, make reasonable modifications to programs and services when necessary to afford its programs and services to students with disabilities, appoint an ADA compliance officer, and pay \$215,000 to the children named in the lawsuit.¹⁴⁶

There is one federal district court case currently in litigation that has the potential to be a landmark case to establish a charter school's obligations when educating students with disabilities and to reconcile the tension between charter school philosophy and the law: *P.B. v. Pastorek*.¹⁴⁷ *P.B.* is a class-action suit in the Eastern District of Louisiana alleging violations of the IDEA and the ADA by both charter schools and traditional public schools in New Orleans.¹⁴⁸ Eight of the ten named students allege discrimination and noncompliance by charter schools.¹⁴⁹ The alleged violations include failure to: identify and evaluate students with suspected disabilities, provide necessary accommodations, implement IEPs, and discipline students in compliance with the law.¹⁵⁰ The complaint survived a motion to dismiss in April 2011.¹⁵¹

P.B. is still at an early stage of litigation, but hopefully a decision will be reached on the merits by the federal court. The ideal situation would be for an appellate court to review the case in order to give more legal weight to the decision. It is necessary for either *P.B.* or another, similar case to continue through the litigation process in order for a court to create a legal precedent that will prevent discrimination and noncompliance by charter schools from continuing.

144. *Id.* at 381.

145. *Large Network of Private Schools Pays \$215,000 to Settle Lawsuit Alleging Discrimination Against Children with Disabilities*, U.S. DEPT OF JUSTICE (Jan. 14, 2011), <http://www.justice.gov/opa/pr/2011/January/11-crt-051.html>.

146. *Id.*

147. Complaint, *supra* note 1.

148. *Id.*

149. *Id.* at ¶¶ 110-87. For a discussion of the charter school movement in New Orleans post-Hurricane Katrina, see Weber, *supra* note 12.

150. Complaint, *supra* note 1, at ¶¶ 110-87.

151. Transcript of Oral Argument at 62, *P.B. v. Pastorek*, No. 2:10-cv-04049 (E.D. La. Apr. 26, 2011), *available* [at](http://www.splcenter.org/sites/default/files/downloads/case/pastorek_oralarg_mtdl.pdf) http://www.splcenter.org/sites/default/files/downloads/case/pastorek_oralarg_mtdl.pdf.

VI. CONCLUSION

Federal laws tell charter schools how to provide students with disabilities with an education, and scholars in the fields of law and education have provided guidance and suggestions for complying with those laws. Yet discrimination and noncompliance still occur. In response to the Government Accountability Office's June 2012 report that charter schools enroll fewer students with special needs than traditional public schools, the U.S. Department of Education has committed to provide additional guidance to charter schools on their legal responsibilities and will review charter school enrollment practices.¹⁵² That effort, by itself, is not enough. In order to give the mandates of the IDEA, Section 504, and the ADA teeth in the charter school context, it is necessary for the courts to provide instruction and clarification to charter schools on how to provide an education to students with disabilities that complies with both the federal laws and the school's mission.

Special education will continue to be one of the key challenges facing charter schools until judicial intervention takes place.¹⁵³ With one case pending in federal district court, there is the potential for another landmark decision in special education law—one that clarifies the obligations of charter schools under the federal disability laws and instructs charter schools how to stay true to their mission *and* comply with the laws. “The charter school movement shows much promise, and is providing important choice options within the American education system. It’s time to assure that *all* children benefit from it.”¹⁵⁴

152. Banchemo & Porter, *supra* note 18.

153. WEIL, *supra* note 28, at 252.

154. Hehir, *supra* note 94.