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# Civil Rights and the Charter School Choice: How Stricter Standards for Charter Schools Can Aid Educational Equity

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### Recommended Citation

Rachel E. Rubinstein, Comment, *Civil Rights and the Charter School Choice: How Stricter Standards for Charter Schools Can Aid Educational Equity*, 3 Wash. J. of Educ. L. & Pol'y Rev. 78 (2017).

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# WASHINGTON EDUCATION LAW AND POLICY REVIEW

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## Civil Rights and the Charter School Choice: How Stricter Standards for Charter Schools Can Aid Educational Equity

**Author: Rachel E. Rubinstein\***

### INTRODUCTION

In July 2014, hundreds of parents, grandparents, and authorized caregivers trying to enroll their children in New Orleans public schools were still waiting in line at the Family Resource Center on Marais Street when it closed at 5 p.m.<sup>1</sup> Hundreds of parents left the event unsure of where their child would attend school that fall. The frustrating process was a symptom of the charter school landscape, which sacrifices uniformity and transparency in order to maintain open-enrollment school choice.

Choice, however, is only actually available to those families with viable schooling options and the opportunity to make that selection. In a district where nearly one-third of adults are illiterate, and nearly 40% of households lack Internet access,<sup>2</sup> the city's three Family

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\* J.D., 2017 University of Richmond School of Law. The author would like to thank Professor Kimberly Jenkins Robinson at the University of Richmond and the staff of the University of Washington Education Law and Policy Review.

<sup>1</sup> Danielle Dreilinger, *Anger, Frustration as Hundreds of New Orleans Parents Turned Away from Public School Enrollment Center*, TIMES-PICAYUNE, July 9, 2014, [http://www.nola.com/education/index.ssf/2014/07/hundreds\\_of\\_new\\_orleans\\_parent.html](http://www.nola.com/education/index.ssf/2014/07/hundreds_of_new_orleans_parent.html); Matt Higgins, *Frustrated Parents Wait Hours to Enroll Children in Schools, Only to Be Turned Away*, THE LENS, July 9, 2014, <http://thelensnola.org/2014/07/09/frustrated-parents-wait-hours-to-enroll-in-schools-only-to-be-turned-away/>.

<sup>2</sup> Lindy Boggs, *Opening Doors for Fathers: Education, Training, Employment and Career Mobility, Fathers, Family and Community Policy Briefs*, NAT'L CTR. FOR CMTY. LITERACY 2 (2010) ("The National Adult Assessment of Adult Literacy found that 44 percent of New Orleans adults can read at only the lowest functional level—meaning, for example, that they can locate an expiration date on a

Resource Centers are the only means by which some parents and guardians can enroll their child in school. The lack of a uniform, district-wide application and enrollment process presents an additional burden on low-income parents—as well as parents and students with disabilities, who may struggle to access the school building or its website.<sup>3</sup>

The frustrating application and enrollment system in New Orleans is but one example of inequities charter schools may impose as a result of their autonomy and distinction from traditional public schools. Over the last few years, emerging research has begun to demonstrate that charter schools, on average, are more racially isolated and less socioeconomically integrated than their traditional public school counterparts.<sup>4</sup> Low-income students and students with disabilities are often less able to attend charter schools due to barriers created by lack of transportation or adverse admission criteria.<sup>5</sup> Before federal and state governments incentivize or authorize the growth of charter schools, more research is necessary to determine how charter school legislation either remedies or exacerbates growing school inequality in and among the fifty states.

This paper analyzes the way variations in charter-enabling legislation may exacerbate segregation and how federal and state reforms could better utilize the charter system to further

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driver's license but cannot fill out most motor vehicle forms."); Bill Callahan, *America's Worst-Connected Big Cities*, REDISTRIBUTING THE FUTURE (Nov. 3, 2014), <http://redistributingthefuture.blogspot.com/2014/11/americas-worst-connected-big-cities.html>.

<sup>3</sup> See, e.g., Stern et. al, *The Normative Limits of Choice*, 29 EDUC. POL'Y 448 (2015).

<sup>4</sup> See generally Erica Frankenberg et al., *Choice Without Equity: Charter School Segregation and the Need for Civil Rights Standards*, THE C. R. PROJ. AT UCLA (2010).

<sup>5</sup> *Infra* Part IV; Erica Frankenberg & Genevieve Siegel-Hawley, *Equity Overlooked*, THE C. R. PROJ. AT UCLA 1, 14 (2009); Erica Frankenberg & Genevieve Siegel-Hawley, *Choosing Diversity: School Choice and Racial Integration in the Age of Obama*, 6 STAN. J. C.R. & C.L. 219, 229 (2010).

integration. Part I discusses the history of school choice and the social science underlying its potential as a vehicle for integration as well as further segregation. Part II reviews research on charter school demographics and the effectiveness of relevant civil rights statutes. Part III analyzes themes in local charter legislation that can influence charter school segregation by limiting accessibility for low-income families and students with disabilities. Finally, Part IV offers recommendations for policy changes at the federal and local levels. While legislation and litigation can still influence diversity and protect civil rights in education, this paper explains why we should be wary of the risk that may come with expanding private management of an essential public good.

## I. Histories and Versions of School Choice

Although charter schools are still young, the underlying principle of school choice is not. School choice was prevalent in the South before and after the *Brown* rulings,<sup>6</sup> as both a vehicle for Black education, and later as a tool of token integration.<sup>7</sup> The following section offers a background on school choice from both perspectives: as the only option for education for low-income Black families in the Reconstruction era, and, conversely, an escape route from traditional public education during post-*Brown* desegregation.

### A. *The School-Choice Movement: Various Inceptions and Purposes*

The school-choice movement today appears prominently in debates over the use of voucher subsidies and the expansion of charter schools. The legal concept of choice in education, however, was recognized by the Supreme Court in 1925 and continued to expand

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<sup>6</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) [*Brown I*]; *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955) [*Brown II*].

<sup>7</sup> James Forman Jr., *The Secret History of School Choice: How Progressives Got There First*, 93 GEO. L.J. 1287, 1291 (2005).

in subsequent rulings.<sup>8</sup> Prior to that, school choice had taken root in several African-American communities during the Reconstruction era, as slow desegregation efforts prompted Black families to establish independent schools rather than wait for inconsistent and lagging government efforts.<sup>9</sup> After local governments began building schools, many parents, Black and White, continued to enroll their children in independently run institutions.<sup>10</sup> School choice therefore contributed to the dual, segregated school system that persisted in most states before and after the ruling in *Brown*.

As courts began to demand progress in rulings such as *Brown II*,<sup>11</sup> opponents to integration creatively circumvented desegregation orders, with freedom-of-choice used as a popular option. For example, lower courts in Richmond, Virginia upheld school choice plans that gave parents and school board officials complete control over student attendance assignments.<sup>12</sup> While homogenous public options began to disappear in other districts as a result of judicial orders, White attendance in private schools drastically increased.<sup>13</sup> As families began to relocate to suburbs, courts became hesitant to compel desegregation across school district lines.<sup>14</sup> After the 1964 Civil Rights Act, 42 U.S.C. §2000c et seq., the Court in *Swann v. Charlotte Mecklenburg* upheld an affirmative integration plan that included busing students, albeit within the limits of metropolitan public school district, in order to achieve racial balance.<sup>15</sup>

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<sup>8</sup> *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925); *Wisconsin v. Yoder*, 406 U.S. 2015 (1972).

<sup>9</sup> Forman, *supra* note 7.

<sup>10</sup> *Id.*

<sup>11</sup> *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955) [*Brown II*].

<sup>12</sup> JAMES E. RYAN, *FIVE MILES AWAY, A WORLD APART: ONE CITY, TWO SCHOOLS, AND THE STORY OF EDUCATIONAL OPPORTUNITY IN MODERN AMERICA* 50 (2010).

<sup>13</sup> *Id.* at 51.

<sup>14</sup> RYAN, *supra* note 12; James R. Osamudia, *Opt-Out Education: School Choice as Racial Subordination*, 99 IOWA L. REV. 1083, 1092 (2014).

<sup>15</sup> *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971).



Such affirmative integration efforts, however, were too late to remedy residential segregation—the new impetus for racially isolated schools.<sup>16</sup> Only a couple years later, the Court imposed a hard limitation on what was necessary for states to achieve integration.<sup>17</sup> This ruling distinguished *de jure* from *de facto* segregation, permitting segregated schools to persist as long as the district could show segregation was not a direct result of public policy.<sup>18</sup> Thus the racial imbalance persisting in school districts today is somewhat a result of school choice through residential choice, albeit in addition to judicial unwillingness to extend integration mandates beyond the urban-suburban dichotomy.

### *B. Charter Schools: A Modern Vehicle Driving Choice*

Modern scholarship on school choice refers primarily to education reforms reacting to the 1983 report *A Nation at Risk*.<sup>19</sup> As the 1990's approached, a variety of scholars argued that the only way to detach United States schools from bureaucratic control and bring about reform was through school choice.<sup>20</sup> Political scientists published works advocating that free-market economic principles should extend to the education sector.<sup>21</sup> In 1988, a Massachusetts professor proposed a free-market option, theorizing that a public entity could grant a temporary charter to teachers interested in

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<sup>16</sup> See generally RYAN *supra* note 12; See also James E. Ryan & Michael Heise, *The Political Economy of School Choice*, 111 YALE L.J. 2043, 2025 (2002).

<sup>17</sup> See Ryan & Heise *supra* note 16.

<sup>18</sup> Milliken v. Bradley, 418 U.S. 717 (1974).

<sup>19</sup> NAT'L COMM'N ON EXCELLENCE IN EDUC, *A Nation at Risk: the Imperative for Educational Reform: A Report to the Nation and the Secretary of Education*, U.S. DEP'T OF EDUC. (1983).

<sup>20</sup> See, e.g., DIANE RAVITCH, *THE LIFE AND DEATH OF THE GREAT AMERICAN SCHOOL SYSTEM: HOW TESTING AND CHOICE ARE UNDERMINING EDUCATION* 118 (2010).

<sup>21</sup> See, e.g., MILTON FRIEDMAN & ROSE FRIEDMAN, *FREE TO CHOOSE: A PERSONAL STATEMENT* (1990); John E. Chubb & Terry M. Moe, Politics, *Markets and the Organization of Schools*, 82 AM. POLITICAL SCI. REV. 1065 (1988).

employing a different educational model.<sup>22</sup> Three years later, Minnesota became the first state to codify charter schools by statute.<sup>23</sup>

Charter schools quickly became a popular channel of reform, championed by President Clinton in his 1997 State of the Union address, and then integrated by President Bush into the No Child Left Behind Act, 20 U.S.C. §§ 6301–6578. In 2008, presidential candidates from both political parties included choice as a key tenet in their proposals for education reform.<sup>24</sup> As a result, one of the predominant measures of education reform in the Obama administration was to provide states with federal grant funding for charter school growth through “Race to the Top (RTT).”<sup>25</sup> The program incentivized charter school development by awarding a significant number of points to states with strong charter school legislation, resulting in greater RTT funding for those states.<sup>26</sup> Strong charter legislation meant removing any statewide caps on the number of charter schools, permitting multiple agencies to authorize the formation of new charter schools, and equal funding between public and charter schools. By 2008, the number of students in charter schools nationwide was close to 1.4 million, compared to an estimated 350,000 students who attended charter schools in 1999.

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<sup>22</sup> Ray Budde, *The Evolution of the Charter Concept*, 78 PHI DELTA KAPPAN 72 (1996); RAVITCH, *supra* note 20, at 114–25.

<sup>23</sup> 1991 MINN. LAWS. 124D.

<sup>24</sup> Genevieve Siegel-Hawley & Erica Frankenberg, *Does Law Influence Charter School Diversity? An Analysis of Federal and State Legislation*, 16 MICH J. RACE & L. 321, 338 (2011).

<sup>25</sup> *Id.*; Osamudia, *supra* note 14, at 1097; U.S. DEP’T OF EDUC., RACE TO THE TOP PROGRAM EXECUTIVE SUMMARY 11–12 (2009) [hereinafter RTT EXECUTIVE SUMMARY].

<sup>26</sup> RTT EXECUTIVE SUMMARY, *supra* note 25, at 11–12.

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C. *Exercising Choice in Charters Today*

In the most general terms, a charter school is a publicly funded entity that is privately operated in accordance with a contract between the educational management organization (EMO) or charter management organization (CMO) and a local authorizing agency. The potential advantage of charter schools is that detachment from local regulations gives the CMO or EMO the leeway to develop innovative education programs with creative solutions to meet student needs.<sup>27</sup> Charter schools receive greater autonomy in exchange for a contract promising accountability, with the threat of closure if the school does not meet outlined goals.<sup>28</sup> The independent nature of charters, combined with a strong tradition of local control over education, means that the extent and degree to which each state regulates charter schools can vary.<sup>29</sup> Such variances may open the charter school market to a range of for-profit and non-profit EMOs and CMOs wishing to operate schools.<sup>30</sup> Today, 2.5 million children attend charter schools across thirty-seven states and the District of Columbia.<sup>31</sup> While charter schools continue to expand across more states and school districts, it is important to use research from the past decade and a half to ensure that continued growth of charter schools brings positive

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<sup>27</sup> Jennifer Rebol Rust, *Investing in Integration: A Case for 'Promoting Diversity' in Federal Education Funding Priorities*, 59 LOY. L. REV. 623, 659 (2013).

<sup>28</sup> Ryan & Heise, *supra* note 16, at 2073. Charter school contracts typically last five years and are evaluated before renewal.

<sup>29</sup> *Id.*

<sup>30</sup> Gary Miron et. al., *Schools Without Diversity: Education Management Organizations, Charter Schools and the Demographic Stratification of the American School System*, EDUC. & THE PUB. INT. & EDUC. POL'Y RES. UNIT (2010), <http://nepc.colorado.edu/files/EMO-Seg.pdf>.

<sup>31</sup> CTR. FOR EDUC. REFORM, CHOICE AND CHARTER SCHOOLS: FACTS (2015), <http://www.edreform.com/issues/choice-charter-schools/facts/>.

results to the students served and to the public education system as a whole.<sup>32</sup>

## II. Emerging Evidence and Growing Concerns

Substantial research suggests that American schools are rapidly approaching rates of segregation reflective of pre-desegregation America.<sup>33</sup> One concern inherent in the charter school debate is whether freedom-of-choice is an effective tool to further integration. This section discusses the emerging research demonstrating patterns in charter school choice and accessibility. Further, it reviews scholarship on civil rights provisions of charter school legislation, foreshadowing the state-specific analyses in Part III.

### A. *Choosing Segregation: It Happened Before and Can Happen Again*

Regardless of their race, parents typically indicate similar preferences and concerns when selecting a school for their child.<sup>34</sup> In practice, however, although parents indicate they do not seek racial homogeneity, the demographics of the school parents select when transferring their children suggest the opposite is often true.<sup>35</sup> Studies on charter school selection in one of the largest charter markets duplicated that observation, finding that students transferring to charter schools often left more diverse public

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<sup>32</sup> INST. OF EDUC. SCI., *Public School Enrollment*, NAT'L CTR. FOR EDUC. STAT. (May 2015), [http://nces.ed.gov/programs/coe/indicator\\_cga.asp](http://nces.ed.gov/programs/coe/indicator_cga.asp).

<sup>33</sup> Orfield et. al., *Brown at 62: School Segregation by Race, Poverty and State*, UCLA C. R. PROJ. (2016).

<sup>34</sup> Gregory R. Weiher & Kent L. Tedin, *Does Choice Lead to Racially Distinctive Schools? Charter Schools and Household Preferences*, 21 J. POL'Y ANALYSIS & MGMT. 79, 82–84 (2002).

<sup>35</sup> *Id.* at 91; Heather K. Olson Beal & Petra Munro Hendry, *The Ironies of School Choice: Empowering Parents and Reconceptualizing Public Education*, 118 AM. J. EDUC. 521, 527 (2012).

schools—that had higher overall academic outcomes—to attend a more homogenous, lower-performing charter school.<sup>36</sup> Some authors posit that parents wish to enroll their children in schools with other students from the same background, despite sharing the same academic preferences as families from other backgrounds.<sup>37</sup> Further, parents do not always select schools in line with what they themselves indicate as the most rational choice, nor do all parents see every charter school as a viable option for their child.<sup>38</sup>

While school-choice proponents make a compelling case that it will promote diversity and integration, others note the ways school choice inherently favors privileged parents with the resources to navigate a complex system.<sup>39</sup> The introduction of charter schools as an option for school choice may inadvertently impose negative effects on public schools in subtracting from their student population.<sup>40</sup> The charter option can allow parents to self-select into more homogenous environments, with the resulting impact of creating a more homogenous environment in the public schools the children are exiting.<sup>41</sup> Without regulations or incentivizing greater balance, public education through choice and charter schools may begin catering to private preferences, rather than to the common good and the needs of the greater community.<sup>42</sup>

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<sup>36</sup> David R. Garcia, *Academic and Racial Segregation in Charter Schools: Do Parents Sort Students into Specialized Charter Schools?*, 40 EDUC. & URB. SOC'Y. 590, 598–99 (2008).

<sup>37</sup> *Id.* at 593.

<sup>38</sup> Beal & Hendry, *supra* note 35, at 524.

<sup>39</sup> *Id.* at 525.

<sup>40</sup> Garcia, *supra* note 36 at 591.

<sup>41</sup> *Id.*

<sup>42</sup> Wendy Parker, *From the Failure of Desegregation to the Failure of Choice*, 40 WASH. U. J.L. & POL'Y. 117, 127 (2012) (“Dean Martha Minow notes well the consequences of allowing parental choice: we are changing public schooling from creating a community value to satisfying individual desires.”).

*B. The State of Segregation: Charter Schools Are No Exception*

Researchers at the UCLA Civil Rights Project have reported on the benefits of integrated education, the state of segregated schools today, and the racial composition of charter schools over the last decade.<sup>43</sup> Researchers found that in most states, rates of enrollment in charter schools was higher for Black students than any for other race/ethnicity; in four states, White enrollment in charters outweighed that in public schools.<sup>44</sup> The authors looked further, however, to examine whether the charter schools are more homogenous than the traditional public schools. They found that nationally 70% of Black charter school students attend a school that is intensely segregated (90–100% minority).<sup>45</sup> The UCLA team concluded that, despite their potential to provide an integrated education, evidence demonstrates that many charter schools are more segregated and racially isolated than traditional public schools in the same state.<sup>46</sup>

The research team at UCLA began to question the ability of charter schools to provide their promised solution of innovative, integrative education. Emerging literature began to recognize that certain legislative policies applicable only to charter schools were helping facilitate general school segregation, as well as White flight from traditional public schools into racially isolated charters.<sup>47</sup> The UCLA Civil Rights Project compiled data from a survey of forty states and the District of Columbia.<sup>48</sup> The authors found alarming rates of racial isolation in charter schools, outpacing the patterns of segregation

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<sup>43</sup> Erica Frankenberg & Chungmei Lee, *Charter Schools and Race: A Lost Opportunity for Integrated Education*, 11 EDUC. POL'Y ANALYSIS ARCHIVES 1, 10–11 (2003).

<sup>44</sup> *Id.* at 21–22.

<sup>45</sup> *Id.* at 15, 17.

<sup>46</sup> *Id.* at 36.

<sup>47</sup> *Id.* at 38; Linda A. Renzulli & Lorraine Evans, *Choice, Charter Schools, and White Flight*, 52 SOC. PROBLEMS 402 (2005).

<sup>48</sup> Frankenberg et. al., *supra* note 4.

occurring in traditional public schools.<sup>49</sup> While Black students are overenrolled in charter schools in all regions, they found that was often a result of the charter school's location in an "urban" district.<sup>50</sup> When separated and examined by region, some patterns of enrollment evidenced that segregation was largely a result of White flight.<sup>51</sup> Because charter school operations can vary based on their state's guiding legislation, the UCLA-CRP report demonstrated the need for comprehensive civil rights protections to prevent the choice of a charter education from creating a segregated, two-tiered public education system.

### C. *Civil Rights Statutes: Some State Versions of Protection*

At the state level, charter school legislation varies greatly, so while statutes can often incentivize integration, they may dually and inadvertently encourage racial isolation. After conducting the largest and most recent study of charter school demographics,<sup>52</sup> Frankenberg and Siegel-Hawley divided the forty-six states with charter school legislation into three categories based on the nature of each state's civil rights legislation in regard to charter schools.<sup>53</sup>

Frankenberg and Siegel-Hawley's study identified ten states with legislation requiring charter schools or their authorizers to include explicit plans for increasing diversity in their charter application.<sup>54</sup> When directed by statute, an authorizing board may mandate that

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<sup>49</sup> *Id.* at 4–8.

<sup>50</sup> Siegel-Hawley & Frankenberg *supra* note 24, at 348.

<sup>51</sup> Frankenberg et. al., *supra* note 4, at 30, 82 ("In the West, where traditional public schools are the most racially diverse, and in some areas of the South, white students are overenrolled in charter schools. In some cases, white segregation is higher in charter schools despite the fact that overall charter schools enroll fewer white students. These charter schools are contributing to white flight in the country's town most racially diverse regions.").

<sup>52</sup> *Id.*

<sup>53</sup> Siegel-Hawley & Frankenberg, *supra* note 24, at 344.

<sup>54</sup> *Id.*

both the board and applicant consider the impact the charter may have on racial and ethnic isolation in the school's proposed region.<sup>55</sup> Other states with similar legislation take varying approaches, from having vague requirements where charter enrollment must 'reasonably reflect' that of the surrounding school district, to more specific mandates defining the exact percentage difference charter enrollment demographics may differ from the district's overall makeup.<sup>56</sup> More importantly, several of the states provide that authorizing boards ask charter applicants to detail proposed efforts for outreach and how the school plans to disseminate information to prospective students and parents.<sup>57</sup> Such plans play a key role in ensuring the charter will be accessible, by accounting for website and building accessibility and disseminating information through events that will meet parents where they are.

The second category of state legislation noted by Frankenberg and Siegel-Hawley is that requiring charter schools to comply with pre-existing desegregation orders.<sup>58</sup> As of 2012, only seven states' legislation explicitly required that charter schools comply with desegregation decrees.<sup>59</sup> The Office of Civil Rights issued a notice of guidance in 2014 to affirm that Federal Civil Rights laws are equally applicable to charter schools.<sup>60</sup> While the letter explicitly states that

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<sup>55</sup> Joseph Oluwole & Preston C. Green III, *Charter Schools: Racial-Balancing Provisions and Parents Involved*, 61 ARK L. REV. 1 (2008). Compare CONN. GEN. STAT. § 10-66bb (c) (Supp. 2007), with FLA. GEN. STAT. § 1002.33 (7) (a) (8) [and] CAL. EDUC. CODE § 47605 (b)(5)(G).

<sup>56</sup> Siegel-Hawley & Frankenberg *supra* note 24, at 346. Compare KAN. STAT. ANN. § 72-1906 (d)(2), with S.C. CODE ANN. § 59-40-50(B)(7).

<sup>57</sup> Siegel-Hawley & Frankenberg *supra* note 24, at 346.

<sup>58</sup> *Id.* at 345.

<sup>59</sup> Julie F. Mead & Preston C. Green III, *Chartering Equity: Using Charter School Legislation and Policy to Advance Equal Educational Opportunity*, NAT'L EDUC. POL'Y CTR. 1, 6 (2012).

<sup>60</sup> Catherine E. Lhamon, *Dear Colleague Letter: Charter Schools*, DEP'T OF EDUC. OFF. OF C.R. (May 14, 2014), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201405-charter.pdf>.



charter schools located in a district subject to a court-ordered desegregation plan “must be operated in a manner consistent with that desegregation plan,” charter applicants may also be exempt from specific court orders so long as they demonstrate the charter school’s operation will not negatively impact the desegregation process.<sup>61</sup> In states subject to desegregation orders, opening a charter school may require a modification to the order, creating flexibility for charter schools that can lead to heightened levels of segregation in the remaining traditional public schools.<sup>62</sup> Moreover, many statutes set vague criteria, where the charter applicant must show only that its existence would not unduly interfere with, or negatively affect, desegregation and compliance with existing orders.<sup>63</sup>

The third and final category created by Frankenberg and Siegel-Hawley contains those remaining states with some general nondiscrimination provision in their legislation. This local legislation, however, often merely reiterates existing federal responsibilities.<sup>64</sup> Without more direction or encouragement from authorizing bodies, charter schools may struggle in their initiatives to diversify. Additionally, the lack of a singular body collecting and monitoring data to enforce or evaluate the use of nondiscriminatory practices reinforces the information gap and onus placed on parents.<sup>65</sup> This continues to place low-income families at an immediate disadvantage because they may lack the time, knowledge, or resources to gather the information necessary to exercise a meaningful choice.<sup>66</sup>

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<sup>61</sup> See *id.* at 7, n.12; See Wendy Parker, *The Color of Choice*, 75 TUL. L. REV. 563, 618 (2001).

<sup>62</sup> Lhamon, *supra* note 60, at 7; Parker, *supra* note 61, at 617.

<sup>63</sup> Parker, *supra* note 61, at 617.

<sup>64</sup> Siegel-Hawley & Frankenberg, *supra* note 24, at 345.

<sup>65</sup> *Equity Overlooked*, *supra* note 5.

<sup>66</sup> *Id.*

### III. The Control of Local Legislation – Attributes Affecting Access

Since charter schools have more autonomy than public schools, they have greater flexibility to employ strategies to attract a diverse student body. That same autonomy, however, may allow for practices that encourage student sorting, resulting in more racially isolated schools.

#### A. Federal Legislation and Influence

Under President Obama's administration, charter schools were eligible for additional grants through the federal government's Charter Schools Program (CSP). CSP awards over \$157 million in grant money to states wishing to expand or open new charter schools.<sup>67</sup> Charter applicants apply for money through their State Education Agency (SEA) after the school receives approval from the state's charter authorizer.<sup>68</sup> SEAs applying for a grant must follow a series of CSP guidance principles that are recommended, but not mandatory, in order to have their grant application approved.<sup>69</sup> The guiding points ask the applicant to provide descriptions for how the school will be managed, its relationship with the charter authorizing

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<sup>67</sup> U.S. DEP'T OF EDUC. PRESS OFF., *U.S. Department of Education Contributes to an Improving Charter Schools Sector* (Sept. 28, 2015), <http://www.ed.gov/news/press-releases/us-department-education-contributes-improving-charter-schools-sector>.

<sup>68</sup> U.S. DEP'T OF EDUC., *Charter Schools Program State Educational Agencies (SEA) Grant: Eligibility* (Oct. 16, 2015), <http://www2.ed.gov/programs/charter/eligibility.html>; CTR FOR PUB. EDUC., *Public Charter School Authorizers*, DOC. LIB. (Figure 1), <http://www.centerforpubliceducation.org/Libraries/Document-Library/Fig-1-Public-Charter-School-Authorizers-20092010.pdf>.

<sup>69</sup> U.S. DEP'T OF EDUC., *Charter Schools Program: Title V, Part B of the ESEA, Nonregulatory Guidance*, (Jan. 2014), <http://www2.ed.gov/programs/charter/legislation.html> [hereinafter *Title V, Part B*].

board, and how funds will be allocated.<sup>70</sup> Absent is any requirement that applicants include plans for racial balancing or other outreach and inclusivity initiatives.

In June 2015, the United States Department of Education (USDE) released new guidance for selection of CSP grants with the priority of strengthening high-quality charter schools.<sup>71</sup> While some provisions aimed to strengthen oversight of charter schools by their authorizing boards or SEAs, few changes were made that would incentivize charters to diversify the student body.<sup>72</sup> The guidance rewards charter schools for employing “evidence-based” best practices, with measures that increase diversity serving as an example, but by no means a required practice.<sup>73</sup> The National Coalition on School Diversity noted in its comments to USDE that the regulatory guidance could more explicitly state how factors pertaining to diversity would be reviewed by the SEA as part of the charter school’s oversight.<sup>74</sup>

The lack of affirmative requirements is particularly problematic in terms of admissions, as charters either become part of an open enrollment plan or are exempted from geographically-based school assignments. Without more explicit requirements, charter schools may employ tactics designed to discourage certain types of students

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<sup>70</sup> *Id.*

<sup>71</sup> Charter Schools Program Grants to State Educational Agencies, 80 Fed. Reg. 34,202 (June 15, 2015).

<sup>72</sup> *Id.*

<sup>73</sup> 80 Fed. Reg. 34,202, 34,216 (“Thus, while we encourage SEAs and charter schools to take steps to improve student body diversity in charter schools, paragraph (2) of selection criterion (g) *Oversight of Authorized Public Chartering Agencies* does not require every approved school to be racially and ethnically diverse.”).

<sup>74</sup> NAT’L COALITION ON SCH. DIVERSITY, *Comments Re: Proposed Priorities, Requirements, Definitions, and Selection Criteria—Charter Schools Program Grants to State Educational Agencies*, 2 n.6 (Jan. 5, 2015), [http://school-diversity.org/pdf/NCSA\\_comments\\_on\\_Proposed\\_Priorities-CSP\\_1-5-15.pdf](http://school-diversity.org/pdf/NCSA_comments_on_Proposed_Priorities-CSP_1-5-15.pdf).

from attending their particular charters.<sup>75</sup> Such strategies include: pointing out increased diversity at neighboring schools, expressing a lack of resources regarding disability services, or failing to provide translation services or transportation without an explicit parental request.<sup>76</sup> These activities work to undermine the very principle of free-choice, as the school consequently appears to parents as an unviable option.

Agencies who authorize charter school applicants in each state vary. Some states use state or district education boards as their primary authorizers, while others also allow local non-profits or universities to act as authorizers.<sup>77</sup> In addition to approving new applicants, charter authorizers approve school operation plans and monitor the schools for the achievement outcomes agreed to in the charter contract. Smaller authorizing boards may therefore struggle to keep up with rapid expansion of new charter schools.<sup>78</sup> A report from the Center for Media and Democracy cites an audit by the Office of the Inspector General, concluding that in 2012 the USDE had little information following up on the subsequent effectiveness of CSP grant funding.<sup>79</sup> The report explains how OIG's audit evidences a

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<sup>75</sup> Kevin G. Welner, *The Dirty Dozen: How Charter Schools Influence Student Enrollment*, TEACHERS COLLEGE REC. #17104 (2013), <http://www.tcrecord.org/>.

<sup>76</sup> *Id.* See *infra* Part III.B.

<sup>77</sup> CTR. FOR PUB. EDUC., *Charter Schools- Finding out the Facts (Table 1)*, CHARTER SCHOOLS (March 24, 2010), <http://www.centerforpubliceducation.org/Main-Menu/Organizing-a-school/Charter-schools-Finding-out-the-facts-At-a-glance/Charter-schools-Finding-out-the-facts.html>.

<sup>78</sup> ANNENBERG INST. FOR SCH. REFORM, *Public Accountability for Charter Schools: Standards and Policy Recommendations for Effective Oversight*, BROWN UNIV. 12 (2014), <http://www.annenberginstitute.org/sites/default/files/CharterAccountabilityStandards.pdf> ("In Philadelphia, for example, as of spring 2014, a staff of only six in the district's Charter Schools Office is responsible for reviewing every application for a new charter and providing oversight to the city's eighty-six existing charter schools.").

<sup>79</sup> CTR. FOR MEDIA AND DEMOCRACY, *Charter School Black Hole: CMD Special Investigation Reveals Huge Info Gap on Charter Spending*, (Oct. 2015); U.S. DEP'T.

lack of sufficient oversight at both federal and state levels, resulting in a large amount of funds being unaccounted for and thus potentially not used for their originally stated purpose.<sup>80</sup> Strengthening the accountability and oversight provisions exacted by authorizers could minimize discretionary admissions tactics and increase funding transparency.<sup>81</sup>

### *B. Local Legislation and Student Sorting*

Local legislation substantially controls charter school administration, while federal law merely holds charter schools to the same anti-discrimination law as all federal funding recipients. Without stricter, local civil rights protections that mandate particular methods for inclusivity, charter schools may reinforce segregation originating from parental selection biases and disparate access to educational opportunities.<sup>82</sup> In addition to civil rights legislation, there are a variety of factors in local legislation that may also influence racial stratification among charter schools. Beyond enrollment standard and admissions manipulation, anomalies in the day-to-day operations of charter schools include variances in charter responsibility to provide transportation, administer special services, and answer to oversight authorities. Both legislation and the individual nature of schools can lead to practices that encourage excluding difficult or expensive-to-educate students and including advantaged students more likely to achieve better academic outcomes.

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OF EDUC., *The Office of Innovation and Improvement's Oversight and Monitoring of the Charter Schools Program's Planning and Implementation Grants, Final Audit Report* (Sept. 2012).

<sup>80</sup> THE ALLIANCE TO RECLAIM OUR SCH., *The Tip of the Iceberg: Charter School Vulnerabilities to Waste, Fraud and Abuse*, CTR. FOR POPULAR DEMOCRACY 2–3, 5.

<sup>81</sup> ANNENBERG INST. FOR SCH. REFORM, *supra* note 78, at 13.

<sup>82</sup> Jane Tanimura, *Still Separate and Still Unequal: The Need for Stronger Civil Rights Protections in Charter-Enabling Legislation*, 21 S. CAL. REV. L. & SOC. JUST. 415 (2012).

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*i. Location*

Location undoubtedly affects parents' school selection, but location also impacts the information parents receive and how aware they are of different school options. A study of charter school enrollment in Washington, D.C., concluded that proximity was one of the highest determinants of enrollment and found, therefore, that *de facto* housing segregation is strongly reflected in the makeup of surrounding charter schools.<sup>83</sup> Although racial isolation in a charter school may certainly be a result of the surrounding racial make-up, charter schools in areas identified as "urban" also offer an alternative for more affluent families to opt-out of local schools while sparing them private school expenses.<sup>84</sup> Locating a charter school in a neighborhood already experiencing a racial transition will likely exacerbate segregation trends in the local school system.<sup>85</sup>

Many charter schools, either by mission or by legislation, locate in areas with larger populations of minority students, which accounts for the disproportionately high enrollment of Black students in charter schools nationwide.<sup>86</sup> Oftentimes, legislation either gives preferences to, or incentives for, charter management applicants who propose to focus on "at-risk" or "challenging" student populations.<sup>87</sup> While strategic location may allow a charter school

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<sup>83</sup> Nicholas Jacobs, *Understanding School Choice: Location as a Determinant of Charter School Racial, Economic, and Linguistic Segregation*, 45 EDUC. & URBAN SOC'Y 477 (2011) ("Rather this study provides an alternative theory of how free-choice markets allow segregation to persist in charter schools. . . my models show that racial segregation is a function of neighborhood de facto segregation.").

<sup>84</sup> Renzulli & Evans, *supra* note 47, at 401.

<sup>85</sup> Erica Frankenberg & Genevieve Siegel-Hawley, *Not Just Urban Policy: Suburbs, Segregation and Charter Schools*, 8 AASA J. SCHOLARSHIP & PRAC. 4–5 (2012).

<sup>86</sup> See e.g., Parker, *supra* note 63. See also Frankenberg et. al., *supra* note 4.

<sup>87</sup> Siegel-Hawley & Frankenberg, *supra* note 24, at 347. See OHIO ADMIN. CODE 3301-56-01 (2015) (establishing standards for placing districts under academic watch).

to become a competitive alternative to underperforming and underfunded public schools, a charter school located in an area with higher concentrations of poverty may serve a population that lacks the information required to make a meaningful decision.<sup>88</sup> Charter schools locating in low-income areas should assert their presence to local parents and work to present themselves as accessible to all students from the immediate area and any surrounding neighborhoods, maximizing the odds of attracting a diverse student body.

*ii. Auxiliary Services*

In order for charter schools to be a meaningful option for all families, they must offer all the services that students may need for an appropriate and adequate education.<sup>89</sup> One major advantage of charter schools' departure from typical district regulations—where only those assigned to the school may enroll—is their ability to attract outside students. Families from other public school districts may require an assurance that free transportation is available before they will consider enrolling their child. Siegel-Hawley and Frankenberg's analysis revealed that four states do not explicitly require charter schools to provide transportation.<sup>90</sup> Further, where charter schools present an opportunity to override urban-suburban segregation, only eleven states have legislation that provides for

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<sup>88</sup> Parker, *supra* note 42 (“The entire charter school movement depends on parents’ ability to make and successfully implement the choices that will improve the education their children receive. Yet, as a method of reform for the most disadvantaged, charter schools require much of parents with limited resources as a starting point. It seems ironic, at best, that charter schools are designed to harness the power of individual action, but then must rely on the power of those parents with the fewest resources.”).

<sup>89</sup> See generally Derek Black, *Civil Rights, Charter Schools and Lessons to Be Learned*, 64 FLA. L. REV. 1763. Students in concentrated poverty require additional resources of all types for the opportunity at an adequate education.

<sup>90</sup> Siegel-Hawley & Frankenberg, *supra*, note 24, at 348, 367.

transportation across district lines (and often, only in special cases).<sup>91</sup>

Choice of charter school is further constrained by limited special education accommodations, English language services, or free and reduced lunch programs. While federal law requires that charter schools abide by disability rights protections and the standard of the free and reduced lunch program, charter schools may be exempt from state or district-wide mandates that go beyond the federal minimum. Schools also may cite a lack of facilities or staff which insulates the school from offering the service unless specifically requested.<sup>92</sup> For example, federal law requires that charter schools make all their materials disability-accessible, but they only must provide translation services upon request.<sup>93</sup> Charter schools may also offer fewer free and reduced lunch options. The Education Law Center (ELC) in Philadelphia, for example, found that slightly over 70% of charter schools offer free and reduced lunch programs, compared with over 80% of traditional public schools in the district.<sup>94</sup> Another nationwide study estimated that in 2012 only 72% of charter schools enrolled in the National School Lunch Program, which was below the national average.<sup>95</sup> Researchers use enrollment in free and reduced lunch programs to estimate the number of low-income students charter schools serve; thus, these

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<sup>91</sup> *Id.* at 349; See WIS. STAT. § 118.51 (14)(a).

<sup>92</sup> Ted Rebarber & Alison Consoletti Zgainer, *Survey of America's Charter Schools 2014*, CTR. FOR EDUC. REFORM 15 (2014).

<sup>93</sup> U.S. DEP'T. OF EDUC., *Frequently Asked Questions About the Rights of Students with Disabilities in Public Charter Schools Under Section 504*, OFF. FOR C. R. 12 (Dec. 28, 2016); U.S. DEP'T OF EDUC., *Dear Colleague Letter: English Language Learner Students and Limited English Proficient Parents*, OFF FOR C. R. & DEP'T OF JUST. (Jan. 7., 2015).

<sup>94</sup> *Id.*

<sup>95</sup> Rebarber & Zgainer, *supra* note 92 at 15; Frankenberg & Siegel-Hawley, *supra* note 5, at 245, n.130. According to the NCES Common Core of Data, 20% of charter schools reported they did not enroll in the National School Lunch Program, compared with 1.5% of traditional public schools. *Id.*



lower free and reduced lunch percentages may indicate fewer low-income students attending charter schools.<sup>96</sup> Since their autonomous nature does not always require that schools provide essential services cost-free, charter schools without such services may not represent a realistic choice for many low-income families.

Researchers with the ELC also found that charter schools enroll a lower proportion of English-language learners (ELL) than is expected from a typical public school district.<sup>97</sup> While federal and state civil rights protections should prohibit charter schools from rejecting students on discriminatory bases, charter schools may point to a lack of certified personnel in the area, or more comprehensive services at the district public school, to discourage enrollment by students who are more costly to educate.<sup>98</sup> Parents may be immediately dissuaded from application or enrollment if the school cannot offer translation services or a certified English-language teacher upon their arrival.

### *iii. Admissions and Outreach*

Two barriers to equity in school choice—information and access—often result from legislation dictating authorization procedures and requirements for charter applications. Some states mandate that charter applicants include plans for community outreach and recruitment efforts, but others are vague or purposefully flexible in the ways they permit charter schools to attract and recruit their

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<sup>96</sup> See, e.g., David Lapp, *Education Law Center Analysis: Philadelphia Charter School Demographics*, EDUC. LAW CTR. 3 (Nov. 14, 2013), [http://www.elc-pa.org/wp-content/uploads/2014/03/ELC\\_Testimony\\_AuditorGeneral\\_CharterSchools\\_3\\_7\\_14-.pdf](http://www.elc-pa.org/wp-content/uploads/2014/03/ELC_Testimony_AuditorGeneral_CharterSchools_3_7_14-.pdf).

<sup>97</sup> Rebarber & Zgainer, *supra* note 92, at 2, 4.

<sup>98</sup> Kevin G. Welner & Kenneth R. Howe, *Steering Toward Separation: The Policy and Legal Implications of “Counseling” Special Education Students Away from Charter Schools*, in *SCHOOL CHOICE AND DIVERSITY: WHAT THE EVIDENCE SAYS* 93 (Janelle T. Scott ed., 2005); Welner, *supra* note 75, at 3–4.

desired student body.<sup>99</sup> Under the federal CSP, schools receiving CSP money should employ a random lottery if more students apply to enroll than the school has capacity to admit.<sup>100</sup> Weighted lotteries are permitted in some cases to target traditionally disadvantaged students, so long as the charter school explains that intention in its charter application.<sup>101</sup> While a random lottery seems like the most equitable admissions procedure, the lottery provisions can be watered down. For example, some schools may assign higher weights to students living within a certain radius, students with siblings at the schools, or children of faculty and staff. Some schools may even automatically admit students who paid for pre-school services with the same charter organization.<sup>102</sup>

A study by the Annenberg Institute also found inequitable practices in the use of application requirements and enrollment periods that effectively discriminated against low-income students.<sup>103</sup> The study cites examples of schools who limited applications by providing an enrollment window of only one hour or requiring parents to promise a minimum number of volunteer hours.<sup>104</sup> These practices dissuade parents working multiple jobs or with excessive childcare responsibilities, who feel they could not meet such stringent requirements.

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<sup>99</sup> Siegel-Hawley & Frankenberg, *supra* note 24, at 346; Erica Frankenberg & Genevieve Siegel-Hawley, *A Segregating Choice: An Overview of Charter School Policy, Enrollment Trends, and Segregation*, in *EDUCATIONAL DELUSIONS: WHY CHOICE CAN DEEPEN INEQUALITY AND HOW TO MAKE SCHOOLS FAIR* 134 (Gary Orfield & Erica Frankenberg eds., 2013).

<sup>100</sup> 20 U.S.C. § 7221i(1)(H). Title V, Part B ESEA.

<sup>101</sup> U.S. DEP'T OF EDUC., *supra* note 71, at 18.

<sup>102</sup> *Id.* Tomiko Brown-Nagin, *Toward a Pragmatic Understanding of Status-Consciousness: The Case of Deregulated Education*, 50 *DUKE L.J.* 753, 873–74 (2000); Robert Garda, *Searching for Equity Amid a System of Schools: The View from New Orleans*, 42 *FORDHAM URB. L.J.* 613, 634 (2015).

<sup>103</sup> ANNENBERG INST. FOR SCH. REFORM, *supra* note 78, at 7–10.

<sup>104</sup> *Id.*

As public institutions receiving public funding, charter schools are accountable to the taxpayers they serve and should therefore remain a viable option for all types of families. Charter schools that impose parental-involvement clauses, lengthy applications, mandatory extra-curricular commitments, and harsh discipline policies play an enormous role in eliminating equal access to charter schools for low-income and minority students.<sup>105</sup> Once enrolled, charter schools may continue to further manipulate their student body through harsh discipline policies or other “counseling-out” strategies.<sup>106</sup>

*iv. Quality and Number of Authorizers*

It is difficult to draw a broad conclusion about the impact of charter school admissions policies or outreach practices, as such methods vary based on the requirements of the school’s authorizer.<sup>107</sup> Where some states provide that only the local school district or state board of education may authorize new charter schools, others allow third-party authorizers, such as higher education institutions or non-profit organizations.<sup>108</sup> While theoretically the presence of multiple authorizers may incentivize competition to provide high-quality oversight and accountability services, in reality, the myriad of options allows charter applicants denied by one authorizer to shop for another with more lax guidelines.<sup>109</sup> Charter schools therefore

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<sup>105</sup> Welner, *supra* note 75.

<sup>106</sup> Garda, *supra* note 102, at 639.

<sup>107</sup> Yilan Shen, *Authorizing Charter Schools*, NAT’L CONF. STATE LEGIS. 1 (May 2011).

<sup>108</sup> States that allow local school and/or state board authorization include: Arkansas, Connecticut, Delaware, Illinois, Louisiana, Massachusetts, Maryland, New Hampshire, New Jersey, New Mexico, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Virginia, and Wyoming. States that allow authorization through other entities, such as universities or nonprofits, include: Arizona, California, Colorado, Florida, Indiana, Mississippi, Minnesota, Nevada, New York, North Carolina, Ohio, Oklahoma and Wisconsin.

<sup>109</sup> Shen, *supra* note 107, at 3–4.

could first design their admission or outreach policies and then shop for an authorizer willing to approve the application.

States charge authorizing bodies with developing criteria for charter applications (also called ‘petitions’ or ‘proposals’).<sup>110</sup> Many states use the application process as the means by which charter schools must fulfill self-defined diversity goals or state-mandated racial-balancing provisions. Florida, for example, provides that one criterion for approval must be based on the school’s purported plan to achieve a racial balance reflective of the community the school serves.<sup>111</sup> Connecticut goes further to allow the Commissioner of Education to place on immediate probation any charter school that establishes an environment of racial and economic isolation.<sup>112</sup> Other states, such as North Carolina, are far more lax in their request for diversity plans. North Carolina, for example, merely mandates that charter school enrollment “reasonably reflect” the racial and economic composition of the surrounding school district.<sup>113</sup>

To maximize social benefits from charter school authorization, some non-profits in the industry, such as the National Association of Charter School Authorizers, provide guidelines authorizers should follow when reviewing charter applicants.<sup>114</sup> The guidelines, however, only vaguely explain optimal provisions, such as a “clear and compelling mission” and “sound business plan.”<sup>115</sup> An authorizer then typically forms a five-year contract with the charter applicant’s board of directors, which provides periodic monitoring and accountability evaluations.<sup>116</sup> Charter authorizers should

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<sup>110</sup> *Id.* at 1.

<sup>111</sup> Oluwole & Green, *supra* note 55; FLA STAT. §1002.33 (7)(a)(8).

<sup>112</sup> CONN. GEN. STAT. §10-66bb (h)(1)(c).

<sup>113</sup> Oluwole & Green, *supra* note 55, at 35. *Compare* KAN. STAT. ANN. § 72-1906 (d)(2), *with* N.C. GEN. STAT. § 115C-238.29F(g)(5).

<sup>114</sup> NAT’L ASS’N OF CHARTER SCH. AUTHORIZERS, *Principles & Standards: For Quality Charter School Authorizing* (2015).

<sup>115</sup> *Id.* at 13.

<sup>116</sup> *Id.* at 14.

establish a set of high-quality standards to ensure scrutiny in the authorization process; however, the NACSA guidelines are essentially silent on the subject of diversity and community impact. The guidelines discourage schools from creating neighborhood-based connections and direct authorizers to ignore political or community influences when making renewal decisions.<sup>117</sup> Variations in renewal and closure policies may therefore have a disparate impact on communities who begin to build connections with their local school, only to have the operations overturned or shuttered for poor or inconsistent performance.

Furthermore, authorizing agencies may have an incentive to impose lax policies in order to attract and contract with more charter applicants, as each authorizer enters into a paid contract with the schools they charter.<sup>118</sup> The contract, or “charter” between an authorizer and school, lasts for a multi-year period for each charter school, yet the authorizers rarely assume any risk in the event that a school fails to perform.<sup>119</sup> The authorizer has the power to deny the charter for renewal and then grant use of the school facilities to a new applicant.<sup>120</sup> Without more consistent mandates for charter approvals, the combination of monetary incentives and relaxed authorizer duties can encourage the proliferation of inequitable charter schools.

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<sup>117</sup> *Id.* at 20 (“A quality authorizer does not make renewal decisions, including granting probationary or short-term renewals, on the basis of political or community pressure or solely on promises of future improvement.”).

<sup>118</sup> Shen, *supra* note 107, at 3.

<sup>119</sup> *Principles and Standards*, *supra* note 114, at 8, 24 (“A quality authorizer. . . assumes responsibility not for the success or failure of individual schools, but for holding schools accountable for their performance.”).

<sup>120</sup> See generally, Hope Acad. Broadway Campus v. White Hat Mgmt. L.L.C., LEXIS 2380 (Ohio 2015); Editorial, *White Hat Charter-School Case Underscores Need for Tighter Charter Laws in Ohio*, CLEVELAND.COM (Sept. 18, 2015), [http://www.cleveland.com/opinion/index.ssf/2015/09/flawed\\_ruling\\_in\\_white\\_hat\\_cha.html](http://www.cleveland.com/opinion/index.ssf/2015/09/flawed_ruling_in_white_hat_cha.html).

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C. *Choice and Charters in the Courts*

Despite growing concerns over charter schools' impact and exacerbation of re-segregation trends, the limited litigation involving charter schools typically treats the schools favorably in terms of funding, expansion, and authorization.<sup>121</sup> In contrast, freedom-of-choice plans instituted by school districts shortly after the ruling in *Brown* received greater criticism, as the Supreme Court recognized how such plans were subverting or delaying school integration.<sup>122</sup>

i. *Choice During Desegregation*

Before *Brown*, a variety of Southern states manipulated student assignment policies in order to maintain a dual, segregated school system. Resistance to the holding in *Brown* resulted in affirmative orders to integrate schools.<sup>123</sup> In *Griffin v. County School Board*, the Court reviewed the blatant opposition to desegregation by Prince Edward County in Virginia, which opted to close public schools and offer tuition vouchers to White students to attend newly established private schools.<sup>124</sup> Virginia school districts returned to the Supreme Court in *Green v. County School Board*, where plaintiffs challenged the county's freedom-of-choice plan as ineffective in combating segregation, as few White parents elected to enroll their children in predominantly Black schools.<sup>125</sup> The Court struck down the freedom-of-choice plan for reasons that could equally apply to today's choice-based charter-school systems. The majority opinion in *Green* noted the ways freedom-of-choice plans are discriminatory

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<sup>121</sup> See generally Preston Green III et. al., *Having It Both Ways: How Charter Schools Try to Obtain the Funding of Public Schools and the Autonomy of Private Schools*, 63 EMORY L.J. 303 (2013).

<sup>122</sup> See *Green v. Cty. Sch. Bd. New Kent*, 391 U.S. 430, 439–40 (1968) (citing *Bowman v. Cty. Sch. Bd.*, 382 F.2d 326, 333 (4th Cir. 1957)).

<sup>123</sup> See *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955).

<sup>124</sup> 277 U.S. 218 (1964).

<sup>125</sup> 391 U.S. 430 (1968).

because they improperly place the burden of desegregation on the parents of underserved children.<sup>126</sup>

With the precedent set by *Green*, states slowly began to exhibit actual progress toward integration. The ruling in *Swann v. Charlotte-Mecklenburg Board of Education*<sup>127</sup> demonstrated promise that states were beginning to institute effective policies for intradistrict integration. The busing plan the Court approved, however, was established after lower courts found choice and permission for students to transfer was ineffective, and instead served to reverse progress in schools that had temporarily integrated.<sup>128</sup> While the rest of the *Swann* holding seemed to promise more progressive rulings by the Court, such idealism was squashed by the Court's decisions in *Milliken v. Bradley* and *Keyes v. School District No. 1, Denver, Colorado*—allowing states to confine their desegregation policies to a single school district suffering from *de jure* segregation.<sup>129</sup> The impact was to encourage White flight to suburbs, now insulated from mandatory integration and busing policies by the ruling in *Milliken*.<sup>130</sup>

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<sup>126</sup> *Id.* at 442–43 (“Rather than further the dismantling of the dual system, the plan has operated simply to burden children and their parents with a responsibility which *Brown II* placed squarely on the School Board.”).

<sup>127</sup> 402 U.S. 1 (1971).

<sup>128</sup> *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 300 F. Supp. 1358, 1366 (W.D.N.C., 1969) (“Freedom of students of both races to transfer freely to schools of their own choices has resulted in resegregation of some schools which were temporarily desegregated. The effect of closing the black inner-city schools and allowing free choices has in overall result tended to perpetuate and promote segregation.”).

<sup>129</sup> *Keyes v. Sch. Dist. No. 1, Denver, Colo.*, 413 U.S. 189 (1973); *Milliken v. Bradley*, 418 U.S. 717 (1974).

<sup>130</sup> RYAN, *supra* note 12, at 105–17; Erwin Chemerinsky, *The Segregation and Resegregation of American Public Education: The Court's Role*, 81 N.C. L. REV. 1597, 1605 (2003).

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ii. *Charters, Choice and the Courts*

In theory charter schools may offer an alternate route to cross-district integration due to their autonomous status, but state and local statutes, as well as individual school policies, still often restrict enrollment to students in the immediate school district, with many states further permitting the use of neighborhood preferences during admissions. The precedent set by the decisions in *Milliken* and *Keyes* indicate the unwillingness of the Court to become too embroiled in what it traditionally views as a local realm of control. Consequently, should charter schools lead to a dual school system of separate quality with distinct racial isolation, courts may likely define any resulting segregation as *de facto* and therefore not a constitutional violation.

The first federal case involving charter schools, *Villanueva v. Carere*, challenged the constitutionality of the Colorado Charter Schools Act, alleging the abrupt closing and conversion of two Denver public schools violated Equal Protection rights.<sup>131</sup> The Tenth Circuit refused to enjoin the closure of the two predominantly Hispanic schools, permitting the state to proceed in converting the schools from community-controlled to charter-operated.<sup>132</sup> Although emerging scholarship indicates school closures due to charter conversion disparately impact low-income and minority students,<sup>133</sup> courts today fail to view the emergence of school choice with the same critical eye toward segregation as the Supreme Court did in *Green*. Instead, courts approach charter school challenges through legislative interpretation, maintaining the same respect and hyper-deferential attitude toward local, legislative control.

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<sup>131</sup> *Villanueva v. Carere*, 85 F.3d 481 (10th Cir. 1996).

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

<sup>133</sup> See e.g., Nicole Stelle Garnett, *Disparate Impact, School Closures and Parental Choice*, CHICAGO LEGAL FORUM 289 (2014).



State courts today approach charter school challenges by either broadly or narrowly interpreting legislation. State courts therefore may contribute to shaping the standards and purpose of charter schools in the states. In Georgia during the *Brown* era, for example, courts upheld the operation of “special schools,” which effectively allowed a dual school system with public state schools running alongside independently operated schools.<sup>134</sup> The “special schools” term was later added to the Georgia Constitution, and in 2011 a court therefore concluded that the state’s Charter School Commission Act was constitutional.<sup>135</sup> Similar legislative deference occurred in Missouri courts when parents sought to challenge the state’s Charter Schools Act over concerns that charter schools would dilute public school funds.<sup>136</sup> Broadly interpreting the meaning of “school purposes” in the state constitution, the court concluded that the Act and subsequent use of public funds for privately-operated schools was constitutional.<sup>137</sup> Broad readings demonstrate both the court’s persistent deference to state legislatures and consistent unwillingness to impose mandatory or specific remedies in the locally-controlled education arena.

The Washington Supreme Court, however, had a new approach toward the state’s charter legislation in *League of Women Voters v. State*.<sup>138</sup> Two years after Washington voters passed Initiative 1240 (the Charter School Act), multiple education rights and non-profit groups brought suit against the state, challenging the Act’s diversion of public funds to the new privately-operated schools.<sup>139</sup> The Court concluded that charter schools, which are administered by an appointed board and therefore not subject to voter-based

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<sup>134</sup> *State Bd. of Educ. v. Cty. Bd. of Educ.*, 10 S.E.2d 369 (Ga. 1940); *Searcy v. State*, 86 S.E.2d 652 (Ga. Ct. App., 1955).

<sup>135</sup> *Gwinnett Cty. Sch. Dist. v. Cox*, 710 S.E.2d 773 (Ga. 2011).

<sup>136</sup> *Sch. Dist. of Kan. City v. State*, 317 S.W.3d 599 (Mo. 2010).

<sup>137</sup> *Id.*

<sup>138</sup> *League of Women Voters of Wash. v. State*, 355 P.3d 1131 (Wash. 2015).

<sup>139</sup> *Id.*

accountability, are not within the state's constitutional provision for "common schools," and therefore should not be treated as such by receiving equal public funding.<sup>140</sup> The Washington decision sets an important precedent for plaintiffs wishing to challenge the constitutionality of charter-enabling statutes that divert public funds from locally-controlled public schools, toward corporate administrators with greater autonomy.

iii. *Court Intervention and Legislative Deference*

Although courts have the potential to be a driving force for integration, some recent decisions in the realm of education prohibit schools from voluntarily undertaking measures to diversify. In addition, state courts are hesitant to intervene in local matters, and instead defer to the legislature to reform its own policy. Arguments based on racial inequality, however, enjoy a federal question status that offers the potential for federal intervention. Where states may hesitate to undertake voluntary racial-balancing efforts after the United States Supreme Court's decision in *Parents Involved in Community Schools v. Seattle School District No. 1*, balancing statutes pertaining to school choice present an opportunity to institute affirmative integration through methods precluded in regular public schools assignments.<sup>141</sup>

In *Parents Involved v. Seattle*, the Supreme Court ruled that student assignment plans using race as a tiebreaker represented an unconstitutional use of racial classifications.<sup>142</sup> The decision demonstrates the high bar for schools to demonstrate use of race classifications necessary to serve a compelling state interest. Justice Kennedy's concurrence, however, noted that race-conscious policies may be constitutional so long as they further a broader compelling interest of promoting diversity that takes race into

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<sup>140</sup> *Id.*; WASH. CONST. art. IX, § 2.

<sup>141</sup> Oluwole and Green, *supra* note 55, at 41–43.

<sup>142</sup> 551 U.S. 701 (2007).

account as only a single factor among many.<sup>143</sup> The ruling leaves a door open for schools to consider race as a factor contributing to the overall student body, particularly where no laws prevent charter schools from defining a mission statement dedicated to multicultural education or a goal of establishing a diverse student body.<sup>144</sup>

The model instituted in Hartford, Connecticut demonstrates that choice, when properly regulated, may be an effective means to achieve diversity within and across districts. However, despite immense progress towards integration, studies of the region posit that race-based disparities will likely persist if an information gap between low-income parents and those with greater resources to gather the necessary information remains.<sup>145</sup> In addition, plaintiffs in Connecticut continue returning to court, recently achieving a victory for school quality access on the basis of unconstitutional funding inequities.<sup>146</sup> However, unlike the Connecticut Court, not all state courts are willing to intervene with such affirmative orders to the legislature. Similar to court intervention in the desegregation era following *Brown*, the degree and impact of courts encouraging proactive integration will likely remain mixed.<sup>147</sup>

Choice will remain a staple in education so long as parents desire it and states authorize its use in the public school setting. Whether or not charter schools represent a choice furthering school equity requires more research and longitudinal studies. Because charter schools and legislative efforts to regulate them are relatively new in many states, longitudinal research in particular is just now being

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<sup>143</sup> *Id.* at 797–98.

<sup>144</sup> CONN GEN STAT. 10-66bb(d)(8).

<sup>145</sup> *Id.* at 235.

<sup>146</sup> *Conn. Coal. for Justice in Educ., Inc. v. Rell.*, LEXIS 2183 (Conn. Super. Ct., Sept. 7, 2016).

<sup>147</sup> See generally Kimberly Robinson, *The High Cost of Education Federalism* 48 WAKE FOREST L. REV. 287, 294–322 (2013).

completed. Recent results clarify evidence that charter schools are as racially isolated as our current public schools, if not more so. The charter school movement requires policy changes and greater state and federal-level regulation if the movement will ever serve to rectify segregation rather than reinforce it.

#### **IV. More Oversight, Fewer Loopholes: Recommendations Moving Forward**

Recent federal administrations endorsed the expansion of charter schools by funding grants to schools and operators as well as incentives for states to implement charter-friendly legislation. States are likely also happy to receive the additional funding that follows students to charter schools through the CSP, Race to the Top, and even Title I funds. As states continue to define charters as “public” or “common” schools and dedicate taxpayer money to both non-profit and for-profit school operators, more protections are necessary to ensure transparency, accountability, and fairness to the residents who are impacted when a locally-controlled public school becomes a privately operated autonomous charter school.

##### *A. Federal Incentives and Action*

The federal government has some regulatory oversight of charter schools through the CSP, which issues grants to state education agencies based on applications describing the charter school’s objective, operations, expected community impact, facilities, and more. The state education agency may then distribute funding to charter schools, or to efforts for charter development. While the recent CSP guidelines are an improvement—previous guidelines required no mention of community impact or outreach plans—they could do more to encourage proactive steps toward achieving diversity.<sup>148</sup>

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<sup>148</sup> See *supra* section III.B.

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*i. Authorization, Outreach, and Oversight*

Much of the variation in charter school operations comes from the requirements of each local authorizing agency, which differ by state. The CSP and subsequent federal guidelines should include more provisions targeting the authorizing board, whether that be a local board of education, non-profit, or higher education institution. State laws currently outline the responsibility of authorizers but are often vague, allowing broad discretion by the authorizing agency in what it requires from new applicants and how they assess renewals. The federal CSP should condition grant money on the implementation of state standards for authorizing agencies. High-quality standards would require charter applicants to provide detailed plans to achieve racial and socioeconomic diversity, as well as strategies for disseminating information and engaging in outreach toward disadvantaged students and families.<sup>149</sup>

High standards for authorizers should also require more data collection and transparency in reporting results to the local community, state, and federal agencies. Authorizers are currently the only source of oversight and accountability for charter schools other than the charter operator itself. The federal government should mandate that the authorizer collect and accurately report data on its schools' enrollment demographics. The Education Department's Office for Civil Rights (OCR) should monitor charter student enrollment and attrition by subgroup and provide annual reports to ensure charter schools are enrolling their proportional share of students in each subgroup (English-language status, race/ethnicity, socioeconomic status, etc.).<sup>150</sup> Any school that continues to receive public money, as charter schools do, should be

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<sup>149</sup> This should also include informing parents who are transfer-eligible of their option as well as the time frame and information for engaging in the transfer and application processes.

<sup>150</sup> Frankenberg et. al., *supra* note 4, at 20.

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subject to the same accountability as all public schools, by providing transparent, accurate information accessible to the taxpayers.

Widespread evidence suggesting subtle civil rights violations by charter schools prompted OCR to put forth a “Dear Colleague” letter addressing concerns in the charter school community.<sup>151</sup> The letter reminded charter schools that federal legislation like IDEA and Title IV of the Civil Rights Act still apply to all charter schools, and specifically mentioned the discriminatory practices charter schools may mistakenly pursue in violation of federal law.<sup>152</sup> In addition, OCR and the Office for Special Education and Rehabilitative Services (OSERS) recently published Frequently Asked Questions pertaining to charter schools and students with disabilities.<sup>153</sup> The substance of these federal documents suggests the Department is aware of stakeholder concerns that charter schools may be engaging in inequitable or discriminatory practices and that oversight has failed at ensuring equal access to the charter school opportunity.

ii. *Admissions, Enrollment and Lottery Weights*

Due to the dominant role authorizers play in a charter school’s administration and oversight, current standards for quality authorizers set out by the National Association of Charter School Authorizers should mention more actions that would encourage schools to achieve greater racial or socioeconomic diversity.<sup>154</sup>

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<sup>151</sup> Lhamon, *supra* note 60.

<sup>152</sup> For example, an admission policy cannot be discriminatory on its face; cannot exclude students on the basis of socioeconomic status, disability or language proficiency; and must provide English-language learner (ELL) services/information to interested parents.

<sup>153</sup> U.S. DEP’T. OF EDUC., *Frequently Asked Questions About the Rights of Students with Disabilities in Public Charter Schools under Section 504 of the Rehabilitation Act of 1973 (OCR)* and *Frequently Asked Questions About the Rights of Students with Disabilities in Public Charter Schools under the Individuals with Disabilities Education Act (OSERS)* (Dec. 28, 2016).

<sup>154</sup> *Principles and Standards supra* note 114.

Moving past concerns over access to admissions information and procedures, oversubscribed charters should use neutral lotteries to ensure a level of fairness to applicants. Aspects of the CSP permit charter schools to use weighted lotteries to further diversity,<sup>155</sup> but, as discussed above in section III.B of this paper, charter schools do not always design lotteries fairly, setting aside seats for children of charter employees as well as neighborhood preferences that only serve to increase homogeneity. Federal funds should be contingent on 1) the design of lotteries that further diversity goals and 2) data collection of lottery results to ensure oversight by the authorizer and accountability to parents and students. A fair lottery minimizes neighborhood and personnel preferences, instead weighting lotteries for students based on socioeconomic status and/or zip code, thus increasing the socioeconomic and geographic diversity that often leads to racial diversity.<sup>156</sup> Some of the charter school movement's greatest strengths, autonomy and accountability, are also its greatest weaknesses, as variations in policy expose the discriminatory impact of profit-based, results-driven education.

#### *B. State and Local Policies that Encourage Integration*

In addition to the suggestions for improving legislation pertaining to the factors outlined in section III.B, state and local legislation should emphasize the importance of integrated education for children today, and the responsibility of charter schools to serve as creative models furthering integrated learning. While states have considerable independence when forming education policies, charter school policies should be more uniform to ensure that charter schools as a whole serve as a meaningful option for all students and as a vehicle that supports and celebrates integration and diversity.

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<sup>155</sup> *Title V, Part B supra* note 69.

<sup>156</sup> Richard D. Kahlenberg & Halley Potter, *Diverse Charter Schools*, CENTURY FOUND. 14–15 (2012).

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*i. Authorization Standards and Obligations*

Agencies that authorize new charter contracts or renew those of existing schools yield considerable power in defining the purpose and services of the charter schools they oversee. As discussed in Part III, both state statutes and authorizing bodies should mandate that all charters provide services such as transportation, free and reduced lunch programs, language and disability services, and outreach efforts to ensure the charter school is a viable option for any interested family. Additionally, state laws that confine charter enrollment to a single district could extend the opportunity to students across district lines while allowing preferences for local students. Schools could maintain diversity by employing a racial-balancing provision—similar to that in Connecticut—that ensures inter-district enrollment does not have a disparate impact on low-income and minority students living in the charter school’s public neighborhood district.

Such statutory changes and mandates will be ineffective without consistent oversight of their implementation by the school’s authorizing agency. Each authorizer, however, has monetary incentives to accept and renew contracts with charter operators. States should therefore appoint or create a singular body (such as the state’s Board of Education) that has the final say in approving charter applicants.<sup>157</sup> If the lower authorizing body approves an application with less than adequate plans for racial and socioeconomic integration and outreach, the state agency could reject the application or require revisions before approval. The higher authority could additionally impose further oversight by mandating data reporting and instituting sanctions for schools that fail to make progress toward diminishing racial isolation. Regardless of the additional statutory protections states put in place for charter

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<sup>157</sup> Some states already do this, but others employ the opposite approach, where applicants must pass the local district board after approval from a higher state authority.



schools, oversight will remain key to ensuring schools operate in accordance with their approved application and make progress toward their stated goals concerning achievement and diversity.

ii. *Remedying Recruitment and the Information Gap*

Although charter schools may be constrained in their racial balancing efforts by the *Parents Involved v. Seattle* ruling, Justice Kennedy's concurrence drew a distinction between student assignment plans that rely on race, as opposed to those that consider race as part of a greater school or district-wide mission to promote diverse learning environments.<sup>158</sup> States' racial-balancing provisions as pertaining to charter schools vary. Strong legislation requires affirmative steps to ensure a charter applicant includes a plan to achieve a racially-diverse student body, whereas weaker provisions require that a school's demographics merely reflect that of the surrounding school district.<sup>159</sup> While all states should seek to implement legislation similar to the states in the "affirmative steps" category, charter schools proactively should take advantage of their special status to employ strategies to attract a diverse student body.

In 2011, the federal government released guidance on the voluntary use of race in achieving diversity in public schools.<sup>160</sup> The primary takeaway is that—for those schools that prove achieving diversity and reducing racial isolation serves a compelling interest with respect to the school's mission and circumstances—they may consider the race of applicants where race-neutral approaches would be ineffective to achieve the school's goals.<sup>161</sup> Charter

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<sup>158</sup> *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 789 (2007).

<sup>159</sup> See *supra* section II.C.

<sup>160</sup> U.S. DEP'T. OF EDUC. AND U.S. DEP'T OF JUST., *Guidance on the Voluntary Use of Race to Achieve Diversity and Avoid Racial Isolation in Elementary and Secondary Schools* (2011).

<sup>161</sup> *Id.* at 8.

schools therefore have the autonomy to establish an independent school district and a mission statement with goals of furthering diversity and reducing racial isolation. With that unique mission in mind, it would be permissible for charter schools to consider the race of individual applicants in order to further diversity by attracting students across district lines. Common practices in successful, diverse charter schools include listing an explicit commitment to diversity in their mission statements and using socioeconomic status as a weight in admissions lotteries.<sup>162</sup>

Charter schools can and should do much more to ensure the community is aware of the school as a viable option and that community members have access to the materials they need to make an informed decision about the school and participate in its application process. A study of high-performing, diverse charter schools revealed common patterns in recruitment, location, and admissions that produced successful integration.<sup>163</sup> Researchers found most schools included a mission statement with an explicit goal toward diversity and employed admissions lotteries with weights based on geography and family income.<sup>164</sup> Location also plays a significant role, as the noted diverse schools were also located in areas easily accessible to low-income and ELL families.<sup>165</sup> Charter schools should look strategically at their selected or assigned location and the role that may play in attracting a diverse subset of families. Families that are unable to see or access the school are at an immediate disadvantage, as they may be unaware of the option, unable to attend open houses, or unable to obtain application materials in person.

Finally, a significant disqualifier for low-income families is the information gap between parents with and parents without time,

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<sup>162</sup> Kahlenberg & Potter, *supra* note 156.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at 3.

<sup>165</sup> *Id.*

Internet access, social capital, and transportation to gather all the materials needed to make and execute an informed decision. Charter schools simply are not part of an open-choice plan unless all families are aware of the choices and can realistically participate in each option. Diverse charter schools have been known to recruit outside grocery stores, community centers, and coffee shops in order to both spread awareness of the school and attract low-income families by bringing the information to them. Charter schools will not be an equitable choice unless they also reduce the information gap and level the playing field between affluent families and disadvantaged students.

*C. Moving a Public Education System to Private Control:  
Greater Implications*

In general terms, the philosophy underlying the charter school movement views success through the lenses of competition and capitalism. The competition theory posits that schools, public and charter, will compete and raise one another's standards while trying to attract students. The capitalist approach assumes that markets should offer a variety of products at different price and quality. But competition and capitalism may only be beneficial in certain arenas. Education as a public good should be available to all consumers, and it is in the best interest of our country and its next generation of citizens to ensure that every taxpayer who buys into the marketplace has equal access to a high-quality product.

Stricter federal and local regulations could have the potential to ensure each charter school is a true public option. However, without local cooperation, charters with animus may capitalize on regulation loopholes. For example, even strict racial-balancing mandates have been linked to increased closures of predominantly minority schools with excessively high concentrations of poverty and racial isolation,

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clearing space for charter schools to open in their wake.<sup>166</sup> Oversight of authorizers and proliferation of new standards requires either more state involvement at a higher level, or a federal body dipping further into the local realm of education control. Charter school regulation overall is only an issue because of their fast-growing population, signaling a trend in public distrust and devaluation of our traditional, neighborhood public schools.

#### V. Conclusion

As quasi-public institutions funded by state and federal tax money, charter schools should offer open enrollment to all students in their eligible districts and employ a neutral, random lottery and wait lists when demand exceeds the number of eligible seats. The decentralized system, however, presents a complicated puzzle for oversight that can involve multiple levels of government or even non-government entities. At both federal and state levels, establishing an authority for oversight and accountability could begin to ensure equitable practices across the charter-school landscape. This would strengthen civil rights protections for students harmed by schools taking advantage of regulatory loopholes, and it may encourage charter schools to take greater initiative in promoting a diverse student body.

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<sup>166</sup> Brown-Nagin, *supra* note 102, at 779.