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AN END TO FEDERAL FUNDING OF FOR-PROFIT CHARTER SCHOOLS?

MARK D. EVANS*

In Arizona State Board for Charter Schools v. U.S. Department of Education, the Ninth Circuit validated a U.S. Department of Education policy that for-profit charter schools are ineligible for federal funding under the Individuals with Disabilities Education Act and Title I of the Elementary and Secondary Education Act. That policy now threatens to chill the growth of charter schools in states that would have otherwise encouraged their expansion. This Note examines the details of the Ninth Circuit's decision, its effect on states that allow for-profit charter schools, and its impact on the charter school movement.

INTRODUCTION

Two federal statutes—the Individuals with Disabilities Education Act (“IDEA”)¹ and the Elementary and Secondary Education Act (“ESEA”)²—provide funding for some of America’s schools’ most important objectives. IDEA grants federal assistance to schools serving children with physical and mental disabilities.³ It establishes a powerful monetary incentive for school districts to ensure that they are providing all children the opportunity to take advantage of a free public education. ESEA, originally passed in 1965 and heavily amended in 2001 by the No Child Left Behind (“NCLB”) Act, establishes the framework for federal support of the American public education

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1. Individuals with Disabilities Act, 20 U.S.C. §§ 1400–87 (2000 & Supp. V 2005).

2. Elementary and Secondary Education Act, 20 U.S.C. §§ 6301–8962 (2000 & Supp. V 2005).

3. ALLAN G. OSBORNE, JR. & CHARLES J. RUSSO, SPECIAL EDUCATION AND THE LAW: A GUIDE FOR PRACTITIONERS 9 (2003).

system.⁴ Title I of ESEA, one of the most heavily funded federal education programs, offers financial support to schools striving to meet the unique needs of economically disadvantaged students.⁵

Charter schools, like most public schools, depend on federal funding through IDEA and ESEA to effectively operate.⁶ Since the early 1990s the popularity of charter schools has grown rapidly.⁷ This is especially true in states like Colorado, where laws are particularly conducive to charter school development.⁸ Charter schools in most states must be formed as nonprofit entities.⁹ Colorado, however, has no such restriction.¹⁰ Although there are currently no Colorado schools specifically chartered as for-profit organizations,¹¹ there are a sig-

4. See 1 JAMES A. RAPP, EDUCATION LAW § 5.01[3][g][ii] (2006). President Bush signed the No Child Left Behind Act of 2001 into law in January 2002. Pub. L. No. 107-110, 115 Stat. 1425 (2002).

5. U.S. DEP'T OF EDUC., OFFICE OF THE UNDER SEC'Y, NO CHILD LEFT BEHIND: A DESKTOP REFERENCE 13 (2002) [hereinafter NO CHILD LEFT BEHIND DESKTOP REFERENCE], available at <http://www.ed.gov/admins/lead/account/nclbreference/reference.pdf>.

6. In 2006, Title I of ESEA was funded with \$12.7 billion and IDEA received \$ 11.6 billion, making them the two most heavily funded federal education programs. U.S. Dep't of Educ., Summary of Discretionary Funds, FY 2008 Congressional Action, <http://www.ed.gov/about/overview/budget/budget08/08bylevel.pdf> (last visited Jan 17, 2008) [hereinafter Summary of Discretionary Funds]. Charter schools must be treated as other public schools for purposes of distributing IDEA and Title I funds. U.S. Dep't of Educ., Nonregulatory Guidance 34 CFR Part 76, Subpart H (Dec. 2000), available at http://www.uscharterschools.org/pdf/fr/sea_guidance_main.pdf; see also THOMAS B. FORDHAM INST., CHARTER SCHOOL FUNDING: INEQUITY'S NEXT FRONTIER 35 (2005), available at <http://www.edexcellence.net/doc/Charter%20School%20Funding%202005%20FINAL.pdf>.

7. U.S. DEP'T OF EDUC., EVALUATION OF THE PUBLIC CHARTER SCHOOLS PROGRAM 3-4 (2004) [hereinafter EVALUATION OF CHARTER SCHOOLS], available at <http://www.ed.gov/rshstat/eval/choice/pcsp-final/finalreport.pdf>.

8. Colorado state law provides multiple chartering authorities and allows a wide range of people and organizations to establish charter schools. See COLO. DEP'T OF EDUC., THE COLORADO CHARTER SCHOOL HANDBOOK: A GUIDE FOR STARTING AND OPERATING A CHARTER SCHOOL 2 (2006) [hereinafter HANDBOOK], available at <http://www.cde.state.co.us/cdechart/download/CSHandbk.pdf>.

9. Fiona Greaves & Preston Green, *The Legal Issues Surrounding Partnerships Between Charter Schools and For-Profit Management Companies*, 206 ED. LAW REP. 27, 28 (2006).

10. *Id.* at 31. Four other states' statutes do not prohibit for-profit charter schools (Arizona, New York, Virginia, and Wisconsin). *Id.*

11. Telephone interview with Denise Mund, Senior Consultant, Colorado Charter Schools, in Denver, Colo. (Mar. 7, 2007).

nificant number of Colorado charter schools whose day-to-day operations are directed by for-profit management companies.¹²

A recent federal court of appeals decision may cut off vital financial support to for-profit charter schools serving disabled and economically disadvantaged students. In *Arizona State Board for Charter Schools v. U.S. Department of Education* (“*Arizona Board*”), the Ninth Circuit validated a U.S. Department of Education (“Department”) policy that for-profit charter schools are ineligible for federal funding under IDEA and ESEA.¹³ That policy—apparently without the benefit of any formal rulemaking—was based on the Department’s interpretation of its guiding statutes and had not been established prior to the events giving rise to the case. *Arizona Board*, the first federal appellate decision to address whether the Department’s funding policy is statutorily permissible, may chill the growth of charter schools in states that previously would have welcomed their expansion.

Because the Department’s policy is based on federal statutes, it is presumably intended to be applicable nationwide. If that policy is applied and judicially affirmed in the Tenth Circuit, any distribution of IDEA or ESEA funds to for-profit charter schools in Colorado would be prohibited, even though such schools are allowed under Colorado law. *Arizona Board* left unclear to what extent the Department’s policy applies to charter schools that have contracted with for-profit education management companies to run their day-to-day operations.¹⁴ Regardless of whether the law allows such management contracts, however, *Arizona Board* may deter Colorado’s experiment in encouraging for-profit charter schools.

Arizona Board presents two problems for healthy charter school growth. First, it encumbers for-profit charter schools’

12. The Life Skills Center of Denver and Life Skills Center of Colorado Springs are run by White Hat Management. Life Skills Center, http://www.lifeskillscenters.com/about_school.htm (last visited Nov. 8, 2007). Four Colorado charter schools are managed by Edison Schools. Edison Schools, http://www.edisonschools.com/edison-schools/schools/school_list?state=CO (last visited Nov. 8, 2007). Mosaica Education also operates four charter schools in Colorado. Mosaica Education, <http://www.mosaicaeducation.com/article.asp?key=11> (last visited Nov. 8, 2007).

13. 464 F.3d 1003, 1010 (9th Cir. 2006).

14. The decision states that charter schools can contract with for-profit companies to manage operations and still maintain federal funding. *Id.* However, the line between management by for-profit companies and for-profit schools is sometimes blurred. See Greaves & Green, *supra* note 9, at 29.

ability to educate special needs and economically disadvantaged students. This creates an obstacle to the continued expansion of for-profit charter schools, and frustrates the efforts of state legislatures to assist disadvantaged students through charter school development. Second, *Arizona Board* encourages the creation of charter schools that are effectively for-profit, with only illusory supervision by nonprofit governing boards. Such arrangements obscure the nature of schools' operations from the eyes of the tax-paying public. This Note will consider the potential effects of applying *Arizona Board's* holding to Colorado, a state with an exceptionally active charter school movement.

This Note aims neither to endorse nor disparage for-profit charter schools. Instead, it illustrates that the Department's policy regarding funding of for-profit charter schools—as validated in *Arizona Board*—realizes all of the disadvantages of a policy fully supportive of for-profit charter schools while also incurring the disadvantages of a policy fully prohibiting them. It realizes all of the advantages of neither. Part I is an introduction to the charter school movement nationally and in Colorado. Part II explores federal support of charter schools under IDEA and Title I of ESEA. Part III examines the details of the *Arizona Board* decision and its potential effect on for-profit charter schools. Finally, Part IV suggests ways that for-profit charter school operators, hoping to establish themselves in Colorado, can mitigate the effects of the Department's funding policy as affirmed in *Arizona Board*.

I. THE CHARTER SCHOOL MOVEMENT

Arizona Board's impact on the charter school movement should be considered in the context of the ideology behind charter schools and the history of their development. Charter schools often are opened specifically to serve children that have special needs or come from impoverished backgrounds—the same student populations that IDEA and Title I of ESEA are designed to support.¹⁵ Both federal and state governments, encouraged by the success of early charter schools, have taken steps to promote their expansion and their ability to serve dis-

15. See EVALUATION OF CHARTER SCHOOLS, *supra* note 7, at xiv (“[M]any charter schools tend to target students with educational disadvantages.”).

advantaged students.¹⁶ Colorado in particular has passed laws highly conducive to charter school expansion.¹⁷ This Part provides background information on the charter school movement both nationally and in Colorado, the controversy surrounding for-profit charter schools, the funding mechanisms for charter schools, and the federal incentives that exist to encourage the creation of additional charter schools.

A. *The History of the Movement*

A charter school is a public school operated by a group of community members under a contract, or “charter,” between organizers of the charter school and a legislatively designated charter school authorizer.¹⁸ A movement for greater school choice and school accountability sparked the development of these schools in the 1990s.¹⁹ Charter schools provide families the choice to send their children to a public school that is individually chartered and operated separately from the traditional public school system.²⁰ They are created for a variety of reasons, often including the desire to effect an alternative vision of education or to serve a special population of students.²¹ State requirements for charter schools vary considerably, but share two common assumptions: “(1) that accountability for outcomes will improve school performance and (2) that high levels of autonomy will allow schools to better meet student needs and, as a result, improve performance.”²²

16. The federal government promotes charter schools through the Public Charter School Program, which requires states to demonstrate the difference grants under the program will make in assisting “educationally disadvantaged” students. NO CHILD LEFT BEHIND DESKTOP REFERENCE, *supra* note 5, at 109. One of the goals emphasized by the Colorado Charter Schools Act is to increase learning opportunities for “pupils who are identified as academically low-achieving.” COLO. REV. STAT. § 22-30.5-102(2)(b) (2006).

17. See Randy DeHoff, *Looking Back, Moving Forward: Colorado Charter Schools*, NAT’L ASS’N OF STATE BOARDS OF EDUC., Autumn 2003, at 30, available at http://www.nasbe.org/Standard/14_Autumn2003/dehoff.pdf.

18. See HANDBOOK, *supra* note 8, at 2. In Colorado, either local school boards or the statewide Charter School Institute can act as charter authorizers. *Id.*

19. Tom Loveless, *Charter School Achievement and Accountability*, in NO CHILD LEFT BEHIND? THE POLITICS AND PRACTICE OF SCHOOL ACCOUNTABILITY 177, 177 (Paul E. Peterson & Martin R. West eds., 2003).

20. Robert J. Martin, *Charting the Court Challenges to Charter Schools*, 109 PENN ST. L. REV. 43, 43 (2004).

21. EVALUATION OF CHARTER SCHOOLS, *supra* note 7, at 3.

22. *Id.*

Many charter schools are designed to serve the needs of students who have struggled in a traditional public school setting. Some states' charter school laws emphasize the need to assist low-achieving students.²³ The Department reports that "[c]ompared with traditional public schools, charter schools enroll more African American students, fewer whites, and slightly higher proportions of students eligible for free and reduced-price lunches. Charter schools also attract high proportions of low performing students."²⁴

A person or group wishing to establish a charter school typically must complete a charter application and submit it to a charter authorizer.²⁵ A charter authorizer is an organization that has received authority from the state legislature to grant charters or authorize charter schools.²⁶ If the authorizer grants the charter, then the newly established charter school receives public funding that otherwise would have been used in traditional public schools. Once operating, a charter school must meet the terms of its charter or face closure by its authorizer.²⁷ However, charter schools are freed from most of the state and local regulations applied to traditional public schools, giving them much greater autonomy as they strive to meet the goals of their charter.²⁸

The number of charter schools in operation has expanded rapidly since they first appeared on the American education scene less than twenty years ago.²⁹ Minnesota became the first state to allow charter schools in 1991, and many other states quickly followed suit.³⁰ Attendance has risen sharply, and today charter schools are a significant part of the American education system. "By the 2002–03 school year, 39 states and the District of Columbia had charter school laws in place, and more than 2,700 charter schools were operating nationally, serving hundreds of thousands of students from every socioeconomic

23. See, e.g., COLO. REV. STAT. § 22-30.5-102(2)(b) (2006).

24. EVALUATION OF CHARTER SCHOOLS, *supra* note 7, at 23. See also THOMAS B. FORDHAM INST., *supra* note 6, at 7 ("In most states, charter schools serve a comparable or higher percentage of students eligible for free and reduced price lunches than district schools.")

25. See EVALUATION OF CHARTER SCHOOLS, *supra* note 7, at xvii, 6. Procedures vary from state to state.

26. *Id.*

27. *Id.* at ix.

28. See *id.* at 3.

29. See *id.* at ix.

30. See *id.*

and demographic segment of the U.S. population.”³¹ Although almost anyone can create a charter school,³² most states’ laws require charter schools to be organized as nonprofit entities.³³

B. Colorado’s Charter School Act

Colorado stands to be affected more than most states by *Arizona Board* because the state’s General Assembly—which has been exceptionally proactive in encouraging the growth of charter schools—has left open the possibility of for-profit charter schools.³⁴ The General Assembly approved the Colorado Charter Schools Act in 1993 with bipartisan support.³⁵ The intent behind the Act was to “create a legitimate avenue for parents, teachers, and community members to implement new and innovative methods of educating children that are proven to be effective and to take responsible risks . . . within the public education system.”³⁶ A primary goal of the Act is to “increase learning opportunities for all pupils, with special emphasis on expanded learning experiences for pupils who are identified as academically low-achieving.”³⁷

In accordance with this goal, Colorado charter schools may not deny admission to students with disabilities “solely because they may need special education and related services.”³⁸ Stu-

31. See *id.* USA Charter Schools estimates that one million students are currently enrolled in 3,500 charter schools. The source of these figures is, however, unclear. USA Charter Schools, http://www.uscharterschools.org/pub/uscs_docs/o/index.htm (last visited Jan. 18, 2008).

32. See EVALUATION OF CHARTER SCHOOLS, *supra* note 7, at 3.

33. Greaves & Green, *supra* note 9, at 28.

34. See HANDBOOK, *supra* note 8, at 3–4. In particular, the General Assembly left open the possibility of for-profit charter schools in Colorado. See COLO. REV. STAT. § 22-30.5-104(4) (2006). Colorado has some of the most charter school-friendly laws in the nation. See DeHoff, *supra* note 17, at 30.

35. HANDBOOK, *supra* note 8, at 3.

36. COLO. REV. STAT. § 22-30.5-102(3) (2006).

37. *Id.* § 22-30.5-102(2)(b).

38. LAURA FREPPEL, COLO. DEPT OF EDUC., COLORADO CHARTER SCHOOLS SPECIAL EDUCATION GUIDEBOOK 27 (Date Unlisted), available at <http://www.cde.state.co.us/cdechart/guidebook/sped/pdf/SpecialEdGuidebook.pdf>. Federal law also mandates that students enrolled in charter schools receive a “free appropriate public education.” OFFICE FOR CIVIL RIGHTS, U.S. DEPT OF EDUC., APPLYING FEDERAL CIVIL RIGHTS LAWS TO PUBLIC CHARTER SCHOOLS 16 (2000) [hereinafter OFFICE FOR CIVIL RIGHTS], available at http://www.uscharterschools.org/pdf/fr/civil_rights.pdf. Whether a school is for-profit or otherwise, enrollment “must be open to any child who resides within the school district.” COLO. REV. STAT. § 22-30.5-104(3) (2006).

dents with disabilities must be given the same opportunity to meet charter schools' minimum admissions criteria as others.³⁹ Charter schools are subject to all federal and state laws prohibiting discrimination on the basis of race, gender, religion, disability, or the need for special education services.⁴⁰ Additionally, they may not charge tuition under most circumstances.⁴¹ Permissive admissions policies and high demand from parents have resulted in swift growth of charter schools in the state. At the start of the 2006–07 school year, 52,242 students enrolled in Colorado charter schools.⁴²

The number of charter authorizers in Colorado has also grown since passage of the 1993 law. Under the original Charter Schools Act, only the local school board in the district in which the school was to be located could approve a charter.⁴³ The General Assembly amended the law in 2000 to allow the state to force failing traditional public schools to convert to charter school status.⁴⁴ The General Assembly created an additional method of authorization in 2004 when it responded to some school boards' reluctance to authorize charter schools by passing the Institute Charter Schools law.⁴⁵ This law created a state-level charter authorizer, the Charter School Institute, which allows some charter school applicants to completely bypass the local school district in which their proposed school is to be located.⁴⁶ The availability of multiple chartering authorities promotes charter school growth by allowing charter appli-

39. FREPPEL, *supra* note 38, at 27.

40. COLO. REV. STAT. § 22-30.5-104(3) (2006).

41. *Id.* § 22-30.5-104(5).

42. Colo. Dep't of Educ., Fall 2006 Charter School Pupil Membership by District, School, and Grade, http://www.cde.state.co.us/cdechart/download/CHARTERSEnrollment_2006.pdf (last visited Jan. 18, 2007). During the 2004–2005 school year, 36,872 students enrolled in Colorado charter schools and another 25,195 were on waiting lists. COLO. DEP'T OF EDUC., THE STATE OF CHARTER SCHOOLS IN COLORADO 2004–2005: THE CHARACTERISTICS, STATUS AND PERFORMANCE RECORD OF COLORADO CHARTER SCHOOLS vi (2006) [hereinafter STATE OF CHARTER SCHOOLS], available at <http://www.cde.state.co.us/cdechart/charsurv.htm>.

43. DeHoff, *supra* note 17, at 31 (indicating that in 2003 chartering authority was limited to local school boards); see also HANDBOOK, *supra* note 8, at 3–4 (providing a history of Colorado charter school legislation).

44. HANDBOOK, *supra* note 8, at 4.

45. *Id.*

46. See *id.*

cants to select the most favorable authorizer for their first application and then reapply to another if turned down.⁴⁷

Colorado also promotes charter schools by allowing almost anyone to apply for a charter.⁴⁸ A governing body—typically a board of directors—administers a charter school after it is approved in a manner agreed upon by the applicant and the authorizer.⁴⁹ In most states a charter school's governing body must be a nonprofit organization, but can contract with for-profit entities for school management or other services.⁵⁰ Colorado, however, is one of only a few states whose laws allow charters to be granted directly to for-profit entities.⁵¹ Because Colorado law allows for-profit charter schools, Colorado's education system stands to be impacted by the Department's policy of denying some funds to those schools, which *Arizona Board* validated.

C. *The Debate Over For-Profit Charter Schools*

Both for-profit charter schools and charter schools run by for-profit management companies have been the subject of intense criticism and debate.⁵² Despite their controversial nature, however, for-profit charter schools and management companies are an established part of the American education landscape. During the 2004–05 school year, 436 charter schools were run by for-profit management companies.⁵³ Schools which are “failing” under the NCLB Act present a tre-

47. See Stephen D. Sugarman & Emlei M. Kuboyama, *Approving Charter Schools: The Gate-Keeper Function*, 53 ADMIN. L. REV. 869, 885–86 (2001). Not all states provide for more than one chartering authority. See *id.* at 880–87.

48. See COLO. REV. STAT. § 22-30.5-102(3) (2007) (declaring intent to allow “parents, teachers, and community members” to start a charter school—a very expansive group).

49. *Id.* § 22-30.5-104(4).

50. Greaves & Green, *supra* note 9, at 28, 31. In addition to Colorado, Arizona, New York, Virginia, and Wisconsin do not require charter schools to organize as nonprofit entities. *Id.* at 31.

51. *Id.*

52. Compare Kathleen Conn, *For-Profit School Management Corporations: Serving the Wrong Master*, 31 J.L. & EDUC. 129, 129 (2002), with R. David Walk, Jr., *How Educational Management Companies Serve Charter Schools and Their Students*, 32 J.L. & EDUC. 241, 243 (2003) (criticizing Kathleen Conn's criticism of for-profit management companies).

53. Greaves & Green, *supra* note 9, at 27. An additional ninety-nine non-charter schools were also run by for-profit management companies. *Id.* These companies thus oversaw the education of almost 240,000 students. *Id.*

mendous opportunity for expansion of profit-oriented education companies.⁵⁴ Education is big business, and the “potential nationwide market for education management organizations is huge.”⁵⁵

Critics of for-profit schools describe the private corporations as “legal entities established within a paradigm of maximization of profits for . . . the shareholders.”⁵⁶ The profit motive, which critics believe exists for both for-profit charter schools and management companies, presents an inherent conflict of interest: the more money is spent on students, the less money is available for profit.⁵⁷ Because corporate directors and managers owe fiduciary duties only to shareholders, critics argue that they do not adequately protect students’ interests.⁵⁸

Opponents of for-profit charter schools and management companies also voice criticisms applicable to charter schools in general. First, for every student who attends a charter school, money is taken from the budget of a traditional public school.⁵⁹ Second, maintaining accountability for the performance of for-profit charter schools may be difficult in situations where the only corrective response available to school districts is to cancel a management company’s contract or revoke a school’s charter.⁶⁰ Administrators rarely employ such drastic measures because they can leave students “in the lurch” and overcrowd nearby public schools that must absorb the displaced pupils.⁶¹

Additionally, for-profit charter schools are not necessarily compatible with the notions that first gave rise to the charter school movement.⁶² Traditionally, charter schools have been mechanisms for giving community members more control over their children’s education.⁶³ One of the appeals of charter schools is that they loosen the grip of administrative organiza-

54. Lewis D. Solomon, *Edison Schools and the Privatization of K-12 Public Education: A Legal and Policy Analysis*, 30 *FORDHAM URB. L.J.* 1281, 1300 (2003). See *infra* Part I.E (describing possible restructuring arrangements for failing schools).

55. Solomon, *supra* note 54, at 1300.

56. Conn, *supra* note 52, at 129.

57. *See id.*

58. *See id.*

59. *Id.* at 142.

60. *Id.* at 147.

61. *Id.*

62. See STATE OF CHARTER SCHOOLS, *supra* note 42, at 82.

63. *See id.* (“Ten years ago all charter schools were founded by parents and/or local grassroots efforts hoping to make a change in their local community.”).

tions thought to encourage inefficiency and stifle creative freedom.⁶⁴ For-profit charter schools and management companies may simply recreate the original shortcomings of traditional public schools by replacing public bureaucracy with corporate red tape.⁶⁵

Despite these concerns, criticism of for-profit charter schools and management companies is far from universal. Proponents argue that it is overly simplistic to characterize the management of for-profit schools as conflicted between spending on students and increasing profit.⁶⁶ Any successful profit making strategy must provide a better education than the public school alternative, or else parents will not send their children to charter schools.⁶⁷ All charter schools are obligated to fulfill the terms of their charters, which typically include academic standards, and must answer directly to their chartering authority.⁶⁸ Additionally, proponents argue that although charter schools have greater autonomy than traditional schools, they remain subject to control by substantial portions of local, state, and federal law.⁶⁹ Critics' cries about the evils of for-profit charter schools could be based more on those critics' interest in the traditional public school system than any objectively observed difficulties with for-profit school operations.⁷⁰

D. Colorado Charter School Funding

Colorado charter schools receive money from federal, state, local, and charitable sources. The Colorado Public School Finance Act, through which most funds are provided, determines how much funding each school district in the state receives based on an annual pupil count.⁷¹ Adjustments are made according to differences in cost of living, personnel costs, district size, and the number of at-risk pupils in each district.⁷² The state then divides the total amount of money allocated for each

64. See Solomon, *supra* note 54, at 1301 (referring to bureaucracy and cost inefficiencies that plague traditional public school districts).

65. See *id.*

66. See Walk, *supra* note 52, at 244.

67. *Id.*

68. See *id.* at 248–49.

69. See *id.*

70. See *id.* at 241 (explaining that the charter school movement has been a slap to both the face and the wallet of traditional school district administrators).

71. FREPPEL, *supra* note 38, at 19–20.

72. *Id.* at 20.

district by the number of students in the district to determine the district's per pupil revenue.⁷³ Charter schools receive "one hundred percent of the district per pupil revenues" for each student enrolled in the school.⁷⁴ School districts also must direct a proportionate share of resources generated by federal aid programs, such as IDEA and Title I of ESEA, to charter schools within their geographic area.⁷⁵

Federal funding is especially important to schools serving disabled or economically disadvantaged children. Statewide, Colorado charter schools' per-pupil funding was 3.3% federal, 71.5% state, and 12.1% local for the 2002–03 school year.⁷⁶ These percentages vary greatly, however, from district to district. In Denver, where a higher percentage of students are economically disadvantaged,⁷⁷ charter school funding is 16.9% federal.⁷⁸ IDEA will provide roughly 20% of all special education funding in the state during the 2006–07 school year.⁷⁹ Thus, despite a low statewide contribution by the federal government, charter schools that serve either special needs or economically disadvantaged students are highly dependent on federal funding.

E. Federal Incentives for Charter School Creation

Federal government incentives, along with charter-friendly state laws,⁸⁰ have catalyzed charter school growth in Colorado.⁸¹ ESEA supports the creation of charter schools through

73. *Id.*

74. COLO. REV. STAT. § 22-30.5-112(2)(a)(III) (2007).

75. *See id.* § 22-30.5-112(3).

76. THOMAS B. FORDHAM INST., *supra* note 6, at 35.

77. A greater percentage of students qualify for free or reduced price lunch in Denver than in charter schools state-wide. *See* STATE OF CHARTER SCHOOLS, *supra* note 42, at 33–34.

78. THOMAS B. FORDHAM INST., *supra* note 6 at 35.

79. COLO. DEPT OF EDUC., 2006 SPECIAL EDUCATION SERVICES IN CHARTER SCHOOLS: SURVEYING PERCEPTIONS OF CHARTER SCHOOL ADMINISTRATORS AND SPECIAL EDUCATION DIRECTORS 10, 12 (2007) [hereinafter 2006 SPECIAL EDUCATION SERVICES], *available at* http://www.cde.state.co.us/cdechart/download/pdf/MAIN/2006_SpedServicesCS.pdf.

80. *See supra* Part I.B (noting the existence of multiple charter authorities in Colorado as well as great flexibility regarding who can apply to establish a charter school).

81. *See* 20 U.S.C. § 6316(b)(8) (Supp. V 2005) (listing conversion to charter school status as a possible restructuring arrangement); NO CHILD LEFT BEHIND

both the Public Charter Schools Program (“PCSP”) and provisions facilitating the conversion of failing traditional public schools into charter schools.

The PCSP provides competitive grants to assist with developing new charter schools.⁸² Grants are given by the Department of Education to state education agencies, which then make sub-grants to individual charter schools.⁸³ The Department gives priority to states that “demonstrate progress in increasing the number of high-quality charter schools.”⁸⁴ Thus, state education agencies have an incentive to authorize charter schools in order to obtain additional federal funds.⁸⁵ The Department’s “Non-Regulatory Guidance” regarding the PCSP indicates that for-profit charter holders are not eligible to receive PCSP grants.⁸⁶ Grants may be given, however, to nonprofit charter holders that employ for-profit management companies in their schools.⁸⁷

ESEA also encourages the creation of new charter schools with provisions facilitating conversion of traditional public schools into charter or other “alternative” schools. The NCLB Act conditions Title I of ESEA funding on state implementation

DESKTOP REFERENCE, *supra* note 5, at 13 (regarding the Public Charter Schools Program).

82. See 20 U.S.C. § 7221 (Supp. V 2005); NO CHILD LEFT BEHIND DESKTOP REFERENCE, *supra* note 5, at 13.

83. See 20 U.S.C. § 7221(a) (Supp. V 2005); NO CHILD LEFT BEHIND DESKTOP REFERENCE, *supra* note 5, at 109. A “state education agency” is “the agency primarily responsible for the State supervision of public elementary schools and secondary schools.” 20 U.S.C. § 7801(41) (Supp. V 2005).

84. NO CHILD LEFT BEHIND DESKTOP REFERENCE, *supra* note 5, at 110.

[The Department] must give preference to States that have multiple chartering agencies (or an appeals process for prospective charter schools that initially fail to be approved by a single agency), that ensure accountability of public charter schools for reaching clear and measurable objectives, and that give public charter schools a high degree of autonomy over their budgets and expenditures.

U.S. Dep’t of Educ., Public Charter Schools Program Description, <http://www.ed.gov/print/programs/charter/index.html> (last visited Nov. 4, 2007).

85. The PCSP awarded Colorado a \$20 million grant in 2007 for support of the state’s “efforts to plan, design, implement, and disseminate information about charter schools.” Press Release, U.S. Dep’t of Educ., Ten States Awarded Grants to Help Expand School Choice (June 5, 2007), *available at* <http://www.ed.gov/print/news/pressreleases/2007/06/06052007a.html>.

86. U.S. DEP’T OF EDUC., CHARTER SCHOOLS PROGRAM TITLE V, PART B, NON-REGULATORY GUIDANCE 11 (2004), *available at* <http://www.ed.gov/policy/elsec/guid/charterguidance03.doc>.

87. *Id.* at 16.

of strict accountability standards.⁸⁸ States are required to develop a definition of “adequate yearly progress” and monitor whether schools are achieving it.⁸⁹ If a school fails to make adequate yearly progress for five years, then the responsible local education agency must “fundamentally restructure the school.”⁹⁰ Possible restructuring arrangements include (1) reopening as a public charter school, (2) replacing all or most of the school staff, (3) entering into a contract with an organization such as a private management company to run the school, (4) turning operation of the school over to a state education agency, or (5) any other major restructuring.⁹¹ Several of these options may involve turning over control of a school to a for-profit entity.⁹²

In sum, Colorado’s state education laws, combined with federal incentives, make the state highly conducive to charter school development. Colorado allows both nonprofit and for-profit entities to apply for charters, and provides multiple chartering authorities to which they can apply. The federal government has created incentives to develop charter schools under the PCSP and facilitates conversion of failing traditional schools to charters. Despite this charter-friendly landscape, however, the Department’s policy of denying federal funding under IDEA and Title I of ESEA to for-profit charter schools may preclude development of these schools in Colorado. Because for-profit charter schools have many of the same obligations to students as traditional public schools, yet cannot receive all of the funds available to traditional schools, an extension of *Arizona Board* to the Tenth Circuit may prevent the introduction of for-profit charters and the expansion of schools run by for-profit management companies.

88. 20 U.S.C. § 6316(a)(1) (Supp. V 2005); NO CHILD LEFT BEHIND DESKTOP REFERENCE, *supra* note 5, at 15–16.

89. 20 U.S.C. § 6316(a)(1) (Supp. V 2005); NO CHILD LEFT BEHIND DESKTOP REFERENCE, *supra* note 5, at 17.

90. NO CHILD LEFT BEHIND DESKTOP REFERENCE, *supra* note 5, at 18.

91. 20 U.S.C. § 6316(b)(8) (Supp. V 2005).

92. Restructuring options could hypothetically include reopening as a for-profit public charter school, reopening with a for-profit management company, contracting for management and educational services with a for-profit company, and so on.

II. FEDERAL SUPPORT OF CHARTER SCHOOL OPERATIONS

Once charter schools are in operation, federal and state laws require them to accept both students with disabilities and students from economically disadvantaged households.⁹³ Federal money is distributed to most public schools to help them offset the cost of these obligations. Federal funds are available to nonprofit charter schools to defray the ongoing cost of educating children with disabilities under IDEA,⁹⁴ and Title I of ESEA provides support for nonprofit schools serving economically disadvantaged students.⁹⁵ Money provided under these statutes is critically important to helping schools fulfill their obligation to educate disabled and financially disadvantaged students.⁹⁶

A. Federal Support for Students with Disabilities

IDEA, the Americans with Disabilities Act (“ADA”), and section 504 of the Rehabilitation Act of 1973 are the central pieces of legislation codifying America’s commitment to provide children an education without regard to disability.⁹⁷ Together, they require that any change in the American education landscape must continue to allow disabled children to attend and benefit from the public schools.

93. FREPPEL, *supra* note 38, at 27. Federal law also mandates that students enrolled in charter schools receive a “free appropriate public education.” OFFICE FOR CIVIL RIGHTS, *supra* note 38, at 18. Whether a school is for-profit or otherwise, enrollment “must be open to any child who resides within the school district.” COLO. REV. STAT. § 22-30.5-104(3) (2006). Many other states have constitutional provisions that courts have interpreted as requiring the state to provide education services to all students, regardless of disability. Scott F. Johnson, *Re-examining Rowley: A New Focus in Special Education Law*, 2003 BYU EDUC. & L.J. 561, 568 (2003).

94. NANCY LEE JONES, RICHARD N. APLING & DAVID P. SMOLE, *INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA): BACKGROUND AND ISSUES* 104 (2004).

95. 20 U.S.C. § 6301 (Supp. V 2005) (statement of purpose); NO CHILD LEFT BEHIND DESKTOP REFERENCE, *supra* note 5, at 13.

96. *See, e.g.*, 2006 SPECIAL EDUCATION SERVICES, *supra* note 79, at 11 (noting IDEA will cover roughly 20% of the cost of special education in Colorado during the 2006–2007 school year).

97. *See* OSBORNE & RUSSO, *supra* note 3, at 8–10, 16.

1. Special Education Law Background

IDEA's mandate that "all children with disabilities have available to them a free appropriate public education"⁹⁸ can be traced to the United States Supreme Court's decision in *Brown v. Board of Education*.⁹⁹ The Court has long emphasized the paramount role of education in American society.¹⁰⁰ It was not until *Brown*, however, that the Court clearly articulated that education "is perhaps the most important function of state and local governments" and "is a right which must be made available to all on equal terms."¹⁰¹ The rationale of *Brown* was subsequently applied to other categories of students who had been denied educational benefits.¹⁰² Eventually the judiciary helped remove barriers to the education of "females, the disabled, non-English speaking children, and other groups."¹⁰³

One of the cases most influential in prompting the development of IDEA legislation, in part because it originated in the nation's capital, was *Mills v. Board of Education*.¹⁰⁴ *Mills* was a civil action brought on behalf of seven children seeking to attend the District of Columbia's public schools.¹⁰⁵ The plaintiffs alleged that, although the children could benefit from an education, they had been labeled with various behavioral problems and wrongfully excluded from any schooling.¹⁰⁶ The court reasoned that because the District of Columbia Code required all parents to send their children to school between the ages of seven and sixteen, the school district was "required to make

98. Individuals with Disabilities Education Act, 20 U.S.C. § 1400(d) (2000 & Supp. V 2005).

99. OSBORNE & RUSSO, *supra* note 3, at 6.

100. *See, e.g., Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 534 (1925) (confirming that "certain studies plainly essential to good citizenship must be taught").

101. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

102. RAPP, *supra* note 4, § 5.01[3][e].

103. *Id.* *See generally* *United States v. Virginia*, 518 U.S. 515 (1996) (holding single-sex public university violates equal protection clause); *Plyler v. Doe*, 457 U.S. 202 (1982) (holding state's policy of not providing public education to undocumented schoolchildren violates the equal protection clause); *Lau v. Nichols*, 414 U.S. 563 (1974) (holding school district's failure to make provisions for non-English speaking Chinese students violated § 601 of the Civil Rights Act of 1964).

104. *See* OSBORNE & RUSSO, *supra* note 3, at 8.

105. *Mills v. Bd. of Educ.*, 348 F. Supp. 866 (D.C. Cir. 1972).

106. *Id.* at 868 (noting the children were labeled as "behavioral problems, mentally retarded, emotionally disturbed[,] or hyperactive").

such opportunity available.”¹⁰⁷ The school board’s argument that providing special education services to the plaintiffs would be financially impossible was not persuasive.¹⁰⁸ No child may be excluded from the school system unless alternative services are provided, the court stated, and insufficiency of resources is not a valid reason to deny students an education.¹⁰⁹ *Mills* seemed to awaken Congress to the need for legislation addressing special needs students in America’s public schools.¹¹⁰

2. IDEA and the Rehabilitation Act

Special education in the United States is governed by the combination of three major federal laws: section 504 of the Rehabilitation Act, the ADA, and IDEA.¹¹¹ Section 504 prohibits all public schools that receive federal funds from denying admission to an otherwise qualified student because of the student’s disability.¹¹² The ADA extends the protections of section 504 to all schools, including those that do not receive federal financial assistance.¹¹³ Neither section 504 nor the ADA provides schools any funding to help them meet their obligation to accommodate disabled students.¹¹⁴ IDEA, which does provide funding, was enacted to assist states in providing an education to all students with disabilities.¹¹⁵

107. *Id.* at 873–74.

108. *Id.* at 875.

109. *Id.* at 878. The court also detailed a hearing procedure that the school district must follow when determining how to educate students with special needs, including a requirement that parents be involved in the process. *Id.* at 880.

110. See OSBORNE & RUSSO, *supra* note 3, at 8.

111. *Id.*

112. *Id.* at 10. See 29 U.S.C. § 794(a) (2000).

113. See 42 U.S.C. § 12101 (2000); OSBORNE & RUSSO, *supra* note 3, at 16. “The substance of Section 504/ADA demands that access be meaningful, which means that educational needs arising from a child’s disabilities are met with appropriate programming; that each child is guaranteed a free appropriate education (FAPE). In other words, access must be both physical and programmatic.” Julie F. Mead, *Determining Charter Schools’ Responsibilities for Children with Disabilities: A Guide Through the Legal Labyrinth*, 11 B.U. PUB. INT. L.J. 167, 170 (2002).

114. See OSBORNE & RUSSO, *supra* note 3, at 10.

115. 20 U.S.C. § 1400(d) (2000).

IDEA furnishes the framework within which American schools provide special education.¹¹⁶ Because IDEA makes receipt of funding contingent on states meeting substantive goals and following detailed procedural steps, states have a strong incentive to comply.¹¹⁷ Generally, if a school satisfies the requirements of IDEA it will also be in compliance with section 504 and the ADA.¹¹⁸ Students between the ages of three and twenty-one may qualify for services under IDEA if they have a specifically identified disability and are in need of special education.¹¹⁹ Qualifying disabilities include a variety of physical, mental, and emotional impairments including specific learning disabilities.¹²⁰

IDEA is premised on the notion that educating children with disabilities is approximately twice as costly as educating those without.¹²¹ To help ease the financial burden on schools serving disabled children, IDEA facilitates distribution of federal government funds to state education agencies.¹²² Funds are allocated initially to individual states by a formula that provides each state a base amount; additional funds then are distributed according to each state's school-age population and school-age population that is in poverty.¹²³ State education agencies then make sub-grants to local education agencies.¹²⁴ Local education agencies use the money to support individual

116. OSBORNE & RUSSO, *supra* note 3, at 8–9. What would eventually become IDEA was originally passed by Congress in 1975 as the Education for All Handicapped Children Act. *Id.* at 9.

117. *See* Bd. of Educ. v. Rowley, 458 U.S. 176, 180–81 (1982); OSBORNE & RUSSO, *supra* note 3, at 9.

118. *See* OFFICE FOR CIVIL RIGHTS, *supra* note 38, at 16. Because compliance with IDEA controls income to schools, and IDEA is more education-specific than the Rehabilitation Act, IDEA receives far more attention from both schools and legal analysts.

119. 20 U.S.C. § 1412(a)(1) (2000 & Supp. V 2005); OSBORNE & RUSSO, *supra* note 3, at 9.

120. 20 U.S.C. § 1401(3) (2000 & Supp. V 2005).

121. JONES, APLING & SMOLE, *supra* note 94, at 117.

122. *Id.* at 43–45. A state educational agency is a “State board of education or other agency or officer primarily responsible for the State supervision of public elementary schools and secondary schools.” 20 U.S.C. § 1401(32) (2000 & Supp. V 2004).

123. 20 U.S.C. § 1411(d) (Supp. V 2005); JONES, APLING & SMOLE, *supra* note 94, at 45.

124. 20 U.S.C. § 1411(f) (Supp. V 2005); JONES, APLING & SMOLE, *supra* note 94, at 87. A local education agency is a public board of education or other authority organized for administrative control of elementary and secondary schools. 20 U.S.C. § 1401(19) (Supp. V 2005).

elementary and secondary schools within their districts serving students with qualifying disabilities.¹²⁵

IDEA's definitions of "elementary school" and "secondary school" were central to the Ninth Circuit's decision in *Arizona Board*. IDEA states that an "elementary school" is "a nonprofit institutional day or residential school, including a public elementary charter school, that provides elementary education."¹²⁶ Similarly, a "secondary school" is "a nonprofit institutional day or residential school, including a public secondary charter school, that provides secondary education."¹²⁷ Only schools that fall within these definitions are eligible to receive federal funding under IDEA.¹²⁸

To receive money under IDEA, state and local education agencies must ensure that all eligible children are receiving a "free appropriate public education."¹²⁹ IDEA requires that school officials work together with parents to develop an "individualized education plan" for every qualifying student.¹³⁰ Additionally, students with disabilities must be placed in the "least restrictive environment," meaning that, to the maximum extent appropriate, they should be educated alongside children who do not have disabilities.¹³¹ Since IDEA was enacted, all levels of the education system have struggled to define exactly what constitutes a "free appropriate public education." In 1982, the United States Supreme Court's seminal opinion on the issue, *Board of Education v. Rowley*, concluded that disabled children must have "access to specialized instruction and related services which are individually designed to provide educational benefit."¹³²

Access to educational benefit may come at great expense to the school or district obligated to provide it. The Supreme

125. See, e.g., COLO. REV. STAT. § 22-20-109(5) (2006) ("When a child with a disability enrolls in and attends a district charter school . . . the district of residence shall be responsible for paying to the district or institute charter school the tuition charge for the excess costs incurred in educating the child.").

126. 20 U.S.C. § 1401(6) (Supp. V 2005).

127. *Id.* § 1401(27).

128. See *Ariz. State Bd. for Charter Schs. v. U.S. Dep't of Educ.*, 464 F.3d 1003, 1005 (9th Cir. 2006).

129. JONES, APLING & SMOLE, *supra* note 94, at 103.

130. 20 U.S.C. § 1414(d) (2000 & Supp. V 2005); OSBORNE & RUSSO, *supra* note 3, at 9.

131. 20 U.S.C. 1412(a)(5) (2000 & Supp. V 2005); OSBORNE & RUSSO, *supra* note 3, at 25.

132. *Bd. of Educ. v. Rowley*, 458 U.S. 176, 201 (1982).

Court held in *Cedar Rapids Community School District v. Garret F.* that a school district was obligated to provide full-time individual care during the school day for a ventilator-dependent child.¹³³ Without such care, the Court reasoned, the child would not have “meaningful access to the public schools.”¹³⁴ The cost of providing services necessary for a child to attend school, the Court held, may not determine whether such services are made available.¹³⁵ This interpretation of IDEA, though equitably appealing, allows one disabled student to impose a tremendous financial strain on an individual school or school district. The availability of funding under IDEA, passing from the federal government, to states, to local education agencies, is thus critical to effectively educating both special needs and non-disabled children. Charter Schools that lose access to IDEA funding following *Arizona Board* may be unable to effectively serve disabled students.

B. Federal Support for Economically Disadvantaged Students

The federal government also provides financial support to schools serving predominantly economically disadvantaged students. Title I of ESEA—aptly captioned “Improving the Academic Achievement of the Disadvantaged”—is the largest federal program supporting elementary and secondary education; it was funded with \$12.7 billion in 2006.¹³⁶ Because there is a high correlation between poverty and low academic achievement, supporting economically disadvantaged students is of central concern to the federal government.¹³⁷ Much like IDEA, Title I serves “to ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education.”¹³⁸

Title I grants “funding that may be used to provide additional instructional staff, professional development, extended-time programs, and other strategies for raising student achievement in high-poverty schools.”¹³⁹ Unlike special educa-

133. 526 U.S. 66, 69, 79 (1999).

134. *Id.* at 79.

135. *Id.* at 77–78.

136. Summary of Discretionary Funds, *supra* note 6.

137. See NO CHILD LEFT BEHIND DESKTOP REFERENCE, *supra* note 5, at 13.

138. 20 U.S.C. § 6301 (Supp. V 2005).

139. NO CHILD LEFT BEHIND DESKTOP REFERENCE, *supra* note 5, at 13.

tion services, schools generally are not required to participate in Title I programs unless they wish to receive Title I funds. Grants are made to local education agencies based on the number of poor children in each agency's school district.¹⁴⁰ Title I defines elementary and secondary schools similarly to IDEA. An "elementary school" is "a nonprofit institutional day or residential school, including a public elementary charter school" and a "secondary school" is "a nonprofit institutional day or residential school, including a public secondary charter school."¹⁴¹

Title I funds reach about 12.5 million students in both public and private schools.¹⁴² Local education agencies are required to provide eligible children attending private elementary and secondary schools, their teachers, and their families, with services equitable to those provided public school students.¹⁴³ A public agency must maintain control of funds expended and materials purchased to support children in private schools.¹⁴⁴ However, students in private schools can receive Title I services by way of a contract between the public agency and an "individual, association, agency, or organization" that is independent of the private school.¹⁴⁵

III. HOW ARIZONA BOARD AFFECTS CHARTER SCHOOLS

All Colorado public schools, including charter schools, must accept and provide an education to students regardless of the student's physical, mental, or financial status.¹⁴⁶ The federal government helps most schools finance this obligation by providing funds through IDEA and Title I of ESEA.¹⁴⁷ The U.S.

140. 20 U.S.C. § 6333(a), (c) (2000 & Supp. V 2005). Local education agencies are a "public board of education or other public authority legally constituted within a State for either administrative control or direction of . . . public elementary schools or secondary schools . . ." 20 U.S.C. § 7801(26) (2000 & Supp. V 2005).

141. 20 U.S.C. § 7801(18), (38) (Supp. V 2005).

142. U.S. DEP'T OF EDUC., IMPROVING BASIC PROGRAMS OPERATED BY LOCAL EDUCATION AGENCIES (Title I, Part A), <http://www.ed.gov/programs/titleiparta/index.html> (last visited Mar. 14, 2007).

143. 20 U.S.C. § 6320(a) (Supp. V 2005).

144. *Id.* § 6320(d).

145. *Id.* § 6320(d)(2)(A)(ii).

146. See COLO. REV. STAT. § 22-30.5-104(3) (2006); FREPPEL, *supra* note 38, at 27.

147. *Supra* Part II (explaining federal obligations to charter schools).

Department of Education (“Department”) has adopted a policy, however, that for-profit charter schools are ineligible to receive funding under either statute.¹⁴⁸ The impact of that policy, which *Arizona Board* affirmed, will depend largely on how courts define “for-profit” charter schools.

A. *The Arizona Board Decision*

Arizona Board is the first appellate decision to hold that for-profit charter schools do not qualify for federal funding under IDEA and Title I of ESEA. In 2003, the Department’s Office of Inspector General audited the Arizona Department of Education’s (“ADE”) distribution of federal funds.¹⁴⁹ The Department found that the ADE improperly provided for-profit charter schools with federal funds awarded under ESEA and IDEA.¹⁵⁰ After hearing ADE’s reply, the Department issued a final determination declaring that the applicable statutes clearly indicated that schools awarded funds must be non-profit.¹⁵¹ This “determination” appears to be the Department’s first clear statement of its policy on funding of for-profit charter schools.

The Arizona State Board for Charter Schools, along with several for-profit charter school operators, sought review of the Department’s determination in federal district court.¹⁵² The district court granted summary judgment in favor of the Department.¹⁵³ The Board for Charter Schools appealed.¹⁵⁴

The issue presented to the Ninth Circuit boiled down to the meaning of the word “including” in IDEA and Title I’s definitions of elementary and secondary schools.¹⁵⁵ Both statutes define elementary school as “a nonprofit institutional day or residential school, including a public elementary charter school.”¹⁵⁶ The definition of secondary schools is similar.¹⁵⁷ The court held that only those schools fitting the statutes’ definitions of

148. *Ariz. State Bd. for Charter Sch. v. U.S. Dep’t of Educ.*, 464 F.3d 1003, 1006 (9th Cir. 2006).

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.* at 1005.

156. 20 U.S.C. § 1401(6) (Supp. V 2005); 20 U.S.C. § 7801(18) (Supp. V 2005).

157. 20 U.S.C. § 1401(27) (Supp. V 2005); 20 U.S.C. § 7801(38) (Supp. V 2005).

elementary and secondary schools are eligible for funding.¹⁵⁸ Thus, according to the court, for-profit charter schools are eligible for funds only if the phrases added by Congress beginning with “including” were intended to expand the definitions—in other words, “including” was intended to mean “and.” However, for-profit charter schools are not eligible if “including” merely elaborates on the previous clause—thus reading “including” to mean “for example.” The Ninth Circuit followed the *Chevron U.S.A, Inc. v. Natural Resources Defense Council* model for evaluating statutory interpretations by agencies.¹⁵⁹ The court held that for-profit charter schools do not fall within the definitions of elementary and secondary schools based on its finding that the statute was unambiguous, or in the alternative, deferring to the Department’s interpretation.

The court first held that the meaning of the relevant statutes was plain and unambiguous.¹⁶⁰ Applying traditional tools of statutory interpretation, the court found that “[a] natural reading establishes that only ‘non-profit institutional day or residential school[s]’ are eligible to receive funding under the ESEA and the IDEA.”¹⁶¹ ADE argued that “including” meant “and” or “in addition to,” thus allowing for-profit public charter schools to qualify.¹⁶² The court rejected ADE’s interpretation of the statute.¹⁶³ Such a meaning was counterintuitive, the court reasoned, because it would require “that the term ‘non-profit’ school somehow includes for-profit institutions.”¹⁶⁴

The court next analyzed the legislative histories of IDEA and Title I, and concluded that they supported the court’s interpretation of the plain and unambiguous meaning of the statute. The Improving America’s Schools Act of 1994 added the terms “nonprofit” and “institutional” to the Title I definitions.¹⁶⁵ Additionally, the court cited the history of the Charter Schools Expansion Act of 1998 as evidence that Congress intended IDEA and Title I to assist only nonprofit charter

158. *Arizona Board*, 464 F.3d at 1005.

159. 467 U.S. 837, 842–844 (1984).

160. *Arizona Board*, 464 F.3d at 1007.

161. *Id.*

162. *Id.* at 1006.

163. *Id.* at 1008–09.

164. *Id.* at 1009.

165. *Id.* It is worth noting that this occurred only three years after Minnesota passed the nation’s first charter school law.

schools.¹⁶⁶ In its report on the Expansion Act, the House Committee on Education and the Workforce noted that “there is nothing in the statute that prohibits charter schools from contracting with for-profit companies to manage the operations of a charter school. The Department currently does not prohibit charter schools who contract out specific services with for-profit organizations from receiving federal dollars.”¹⁶⁷ The court reasoned that there was no need for Congress to acknowledge the possibility of contracting with for-profit management companies if Congress intended to allow the schools themselves to be for-profit. “[I]f for-profit charter schools were eligible for funding, then it would not be noteworthy that charter schools could also contract with for-profit companies and still receive funding.”¹⁶⁸

Finally, the court determined that even if it had found the statutory language was ambiguous, it “would still reach the same result because the Department’s interpretation is reasonable and entitled to deference.”¹⁶⁹ Quoting *Chevron*, the court noted that “considerable weight should be accorded to an executive department’s construction of a statutory scheme it is entrusted to administer.”¹⁷⁰ Because the Department’s determination that for-profit charter schools do not qualify for federal funding under the IDEA and Title I was reasonable, the court held that determination must stand.¹⁷¹ The court did not decide whether the Department’s determination was entitled to a lesser form of deference—such as that granted in *Skidmore v. Swift & Co.*—because the result “would be the same under any standard of deference.”¹⁷²

166. *Id.*

167. *Id.* at 1009–10. This quote is from the 1997 Charter School Expansion Act, a precursor to the Charter School Expansion Act of 1998.

168. *Id.* at 1010.

169. *Id.*

170. *Id.* (quoting *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984)).

171. *See id.*

172. *Id.* (quoting *Vigil v. Leavitt*, 381 F.3d 826, 835 (9th Cir. 2004)). In *Skidmore v. Swift & Co.*, the United States Supreme Court held that agency “rulings, interpretations, and opinions” should factor into a court’s judgment, though not control it. 323 U.S. 134, 140 (1944). “The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.” *Id.*

B. *The Effect of the Ninth Circuit's Decision*

The impact of *Arizona Board's* conclusion—that for-profit charter schools are ineligible for federal funding under IDEA and ESEA¹⁷³—is difficult to predict. On its face, the decision restricts only for-profit charter schools and not schools that contract with profit-making companies. What constitutes a for-profit charter school, however, is subject to interpretation. Many schools, both charter and traditional, contract for services with for-profit companies.¹⁷⁴ Some charter schools contract with for-profit education management organizations to run their day-to-day operations.¹⁷⁵ The line between for-profit and nonprofit ownership and operation begins to blur when management organizations essentially run schools, and it becomes difficult to tell into which category a school fits.

Among clearly for-profit charter schools, those serving students with disabilities may be the most affected by an extension of *Arizona Board*. Charter schools may not discriminate based on student disability,¹⁷⁶ and schools receiving money under IDEA are sometimes called upon to make extraordinary expenditures on behalf of a very small number of students.¹⁷⁷ Even those who are not receiving IDEA funds, however, are required to comply with the mandates of section 504 of the Rehabilitation Act.¹⁷⁸ Forcing compliance with section 504—which does not provide any compensation to schools—while simultaneously cutting off IDEA funds, could put for-profit charter schools in a very difficult position. Such schools may be tempted to “counsel out” students, an illegal practice in which school administrators discourage attendance by special needs children.¹⁷⁹

For-profit charter schools catering to students from low-income families may also be adversely impacted. In Denver,

173. *Arizona Board*, 464 F.3d at 1009–1010.

174. Greaves & Green, *supra* note 9, at 27.

175. *Id.*

176. See FREPPEL, *supra* note 38, at 27.

177. See, e.g., *Cedar Rapids Cmty. Sch. Dist. v. Garret F.*, 526 U.S. 66, 71, 79 (1999) (holding school district must fund continuous nursing services for a ventilator dependant child).

178. See OSBORNE & RUSSO, *supra* note 3, at 10.

179. See FREPPEL, *supra* note 38, at 5, 27. “Some research suggests that charter schools often counsel parents of children with disabilities that the charter school cannot meet the child’s needs and that the child should attend another school.” Mead, *supra* note 113, at 173.

where a greater number of students than the statewide average qualify for Title I assistance,¹⁸⁰ charter schools get 16.9% of their funding from the federal government.¹⁸¹ One of the great promises of the charter school movement is to provide an alternative for students who are not succeeding in traditional public schools.¹⁸² Many of these students come from low-income areas where Title I funds would otherwise be available to provide much-needed educational assistance.¹⁸³ Disallowing Title I funds to for-profit charter schools thus limits their ability to effectively serve economically disadvantaged students, a result incongruous with Congress's allowance of Title I services in private schools.¹⁸⁴

Arizona Board may also affect the transparency with which new charter schools structure their management. The decision provides an incentive to a company wishing to start a new charter school to set up a nonprofit governing board that is little more than a shell for its business venture. Such an arrangement may allow a school to maintain eligibility for federal funding, but hides the school's profit motive from the community. Unfortunately, because charter schools receive a significant amount of funding from the federal government,¹⁸⁵ there is a powerful incentive to avoid being classified as "for-profit" by engaging in such obfuscation.

A series of Pennsylvania cases highlights the potential for legal problems when the relationship between a charter school's nonprofit governing board and for-profit management company gets too close.¹⁸⁶ In *West Chester Area School District v. Collegium Charter School*, the Pennsylvania Supreme Court approved of a charter school's proposed contractual relationship with a for-profit management company.¹⁸⁷ Pennsylvania's Charter School Law required schools to be organized as nonprofit corporations and forbade granting a charter to any for-profit entity.¹⁸⁸ The charter at issue was prepared by the for-

180. See STATE OF CHARTER SCHOOLS, *supra* note 42, at 33–35.

181. THOMAS B. FORDHAM INST., *supra* note 6, at 35.

182. See, e.g., COLO. REV. STAT. § 22-30.5-102(2)(b) (2006) (declaring the Colorado General Assembly's intent to emphasize the provision of increased opportunity to academically low-achieving pupils).

183. See NO CHILD LEFT BEHIND DESKTOP REFERENCE, *supra* note 5, at 13.

184. See 20 U.S.C. 6320(d) (Supp. V 2005); *infra* Part II.B.

185. See THOMAS B. FORDHAM INST., *supra* note 6, at 35.

186. Greaves & Green, *supra* note 9, at 28–29.

187. 812 A.2d 1172, 1174 (Pa. 2002).

188. *Id.* at 1184.

profit entity and obligated the school to contract with the for-profit entity for educational and administrative services.¹⁸⁹ The school's by-laws, however, specified that the nonprofit board of trustees would retain control over "general, academic, financial, personnel[,] and related policies."¹⁹⁰ The court reasoned that because the charter was to be granted to a nonprofit corporation, and because the school's board of trustees retained ultimate control, the agreement complied with the Charter School Law.¹⁹¹ In *Butler Area School District v. Einstein Academy*, however, a proposed charter school's management structure factored into a trial court's decision to forbid its operation.¹⁹² In that case, the nonprofit corporation and the for-profit management company were operated by the same two individuals.¹⁹³ The court granted an injunction prohibiting the school from providing education to students.¹⁹⁴

A charter school governance arrangement in which the "nonprofit" governing board that owns the charter is made up exclusively of employees of the management company that runs the school is obviously questionable. Colorado law does not specifically forbid such an arrangement. It does, however, indicate that the manner in which the governing board administers the school must be agreed to by the chartering authority.¹⁹⁵ A charter applicant must explain the relationship between the charter holder and the employees of the school,¹⁹⁶ and must show that there is community support for the proposed school.¹⁹⁷ These provisions encourage transparency during the approval process, but leave open the question of how close a relationship between a governing board and management company can be present before the entire operation is effectively for-profit.

The Department's policy not only incorporates the negative aspects of a law strictly prohibiting for-profit charter schools, but also the negative aspects of a law fully supporting them. If for-profit schools were fully supported, they could advertise and

189. *Id.*

190. *Id.* at 1185.

191. *Id.*

192. 2001 WL 34092698 (Pa. Com. Pl. Sept. 10, 2001).

193. *Id.* at *209-213.

194. *Id.* at * 217. See also Greaves & Green, *supra* note 9, at 29.

195. COLO. REV. STAT. § 22-30.5-104(4) (2006).

196. *Id.* § 22-30.5-106(1)(i).

197. *Id.* § 22-30.5-106(1)(c).

operate as the market demands. Under the current system, however, purportedly nonprofit schools may serve as shell organizations for profit-oriented education management companies. These companies thus can escape the oversight that would come with an honest presentation of their motives, because their schools enjoy the “nonprofit” label. The Department’s policy therefore allows the negative effects of endorsing for-profit charter schools—such as balancing students’ interests against the bottom line and diverting money away from traditional public schools—without proper public oversight. On the other hand, if for-profit charter schools were strictly prohibited, all remaining charter schools would be on an equal playing field, with access to federal support under IDEA and Title I of ESEA. The current system, however, impairs for-profit charter schools’ ability to support disabled students and students from low-income families, giving them an incentive to discourage attendance by needy children.

Colorado does not yet have for-profit charter schools.¹⁹⁸ Thus, it is possible that the Department’s policy will serve only to deter their development. That alone, however, is significant. The growth of charter schools in Colorado has been explosive. At the start of the 2004–05 school year, 25,195 children remained on waiting lists to enroll in charter schools.¹⁹⁹ Some educators speculate that demand can no longer be met by the mom-and-pop neighborhood charter schools that were at the heart of the charter school movement’s beginnings.²⁰⁰ The supply of parents and citizens willing to devote the time and energy necessary to start a school is limited, and for-profit schools and management companies may be the only way to fill the void.²⁰¹ For the reasons stated above, *Arizona Board* may keep that void from being filled if the Tenth Circuit adopts similar reasoning.

IV. POTENTIAL RESPONSES TO *ARIZONA BOARD*

The *Arizona Board* decision should concern both companies wishing to start for-profit charter schools and charter

198. Telephone interview with Denise Mund, Senior Consultant, Colorado Charter Schools, in Denver, Colo. (Mar. 7, 2007).

199. STATE OF CHARTER SCHOOLS, *supra* note 42, at vi.

200. *See id.* at 82.

201. *See id.*

schools that employ for-profit management companies. Possible strategies for schools hoping to ensure the availability of federal funding include reorganizing as a nonprofit entity, challenging the Department's policy in jurisdictions other than the Ninth Circuit, and lobbying for new legislation.

A. *Organize as a Nonprofit Organization*

Schools threatened by the Department's policy—precluding for-profit charter schools from receiving federal funding under IDEA and Title I of ESEA—may re-organize as nonprofit entities. The Department's audit of Arizona's education spending, which gave rise to *Arizona Board*, faulted the state only for technical non-compliance with a federal statute.²⁰² Prior to ADE's appeal, the Department suggested that the problem could be solved if the for-profit charter schools "could be reconstituted as non-profit entities that are independent of the profit-making entities that currently administer them . . . [and] [t]hose schools could contract with the profit-making entities for administrative and management services."²⁰³

Most of the approximately forty Arizona schools affected by the *Arizona Board* decision have taken that approach.²⁰⁴ Following the Department's determination that the state was improperly providing funds to for-profit schools, the State Superintendent notified affected schools that they must convert to nonprofit status and gave them guidance on how to do so.²⁰⁵ So far it appears that none of the affected schools have had to shut down or substantially disrupt operations.²⁰⁶

The notion that for-profit charter schools may simply reorganize as nonprofit entities illustrates how a focus on technical compliance with the law can obscure the true nature of a situation. If the school's curriculum, management, staff, and facilities are all the same, and the only change is the prefix prior to "profit" in the school's legal structure, then what is the point of requiring the change? Rather than requiring for-profit charter

202. Brief of Petitioners-Appellants at 14, *Ariz. State Bd. for Charter Schs. v. U.S. Dep't of Educ.*, 464 F.3d 1003 (9th Cir. 2006) (No. 05-17349).

203. *Id.* at 12 n.4.

204. Telephone Interview with Lee McIlroy, Research Analyst, *Ariz. State Bd. for Charter Sch.*, in Phoenix, Ariz. (Mar. 14, 2007).

205. Brief for Respondents-Appellees at 4–5, *Ariz. State Bd. for Charter Schs. v. U.S. Dep't of Educ.*, 464 F.3d 1003 (9th Cir. 2006) (No. 05-17349).

206. Telephone Interview with Lee McIlroy, *supra* note 204.

schools to create “nonprofit” shells, either allowing for-profit organizations to hold charters and receive federal funds, or completely disallowing for-profit management of charter schools, would provide the public with a more honest view of the schools’ operations.

B. Challenge the Department in Other Circuits

The Ninth Circuit is the only federal appellate court to have directly addressed whether for-profit charter schools are eligible for funding under IDEA and ESEA. Its logic in *Arizona Board* is vulnerable to attack. Challenges to the Department’s policy on for-profit charter schools may be successful in other jurisdictions.

The court’s initial finding, that the plain meaning of the statute is unambiguous, is itself unclear. The court states that in “both legal and common usage, the word ‘including’ is ordinarily defined as a term of illustration, signifying that what follows is an example of the preceding principle.”²⁰⁷ Indeed, the assertion that ADE’s definition of the word “including” is in tension with Webster’s has some merit.²⁰⁸ However, as the court points out, there are cases on record accepting use of the word “including” to mean “and.”²⁰⁹ The Department, in its determination following ADE’s response to its audit, acknowledged that express inclusion of “public charter schools” in the statute created ambiguity.²¹⁰ Additionally, to accept that the statute unambiguously forbids granting federal funds to for-profit charter schools is to accept that the Arizona Department of Education was either ignorant of or acting in flagrant violation of the law. This is difficult to believe, especially given the Department’s decision not to pursue a refund of the purportedly misdirected money.²¹¹

207. *Arizona Board*, 464 F.3d at 1007.

208. See MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY (11th ed. 2003) (“to take in or comprise as a part of a whole”).

209. *Arizona Board*, 46 F.3d at 1008 (citing *Adams v. Dole*, 927 F.2d 771, 777 (4th Cir. 1991); *Liverpool v. Baltimore Diamond Exch., Inc.*, 799 A.2d 1264, 1273–74 (Md. 2002)).

210. Brief of Petitioners-Appellants, *supra* note 202, at 15.

211. See Brief for Respondents-Appellees, *supra* note 205, at 4–5 (“The Department declined, however, to pursue a refund of the funds improperly allocated to for-profit schools.”).

The legislative contexts of both IDEA and Title I support the argument that the statutes are ambiguous. A court “should not confine itself to examining a particular statutory provision in isolation” when determining whether Congress had directly spoken on an issue.²¹² The Charter School Expansion Act of 1998 (“Expansion Act”) added the words “including a public elementary charter school” to the definition of elementary school in Title I.²¹³ The purpose of the Expansion Act was, not surprisingly, to *expand* the availability of charter schools. When the Act passed, Title I already stated that only nonprofit elementary and secondary schools qualified for funding. At the time, the existence and funding of public charter schools, both nonprofit and otherwise, was well known. Thus, there was no need for Congress to specify that public charter schools were included if it only intended funding to go to nonprofit charter schools. One could argue that if Congress intended funding to go to for-profit charter schools it would have either removed the word “nonprofit” or specified that for-profit schools were to be included. Indeed, either of these options would have clarified Congress’s intent. The point, however, is that what Congress did do was not, as the Ninth Circuit suggests, unambiguous.

The Ninth Circuit’s interpretation of the relevant legislative history is incomplete and misleading. The portion of the House Report on the Charter Schools Amendments Act of 1997 cited by the court does support the idea that charter schools are allowed to hire for-profit management companies.²¹⁴ The House Report does not, however, limit the ability of for-profit organizations to obtain charters. In fact, the “Background and Need for Legislation” section of the Report acknowledges that, depending on state law, charter schools “may be established by non-profit or *for-profit* private or public organizations, teachers, parents, or other private citizens.”²¹⁵

The Senate Report regarding the Charter School Expansion Act of 1998 also contemplates the creation of for-profit charter schools. Senator Coats’ testimony states that “[p]arents, teachers, school administrators, community groups,

212. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000).

213. Pub. L. No. 105-278, § 3(j)(2), 112 Stat. 2682, 2689 (1998).

214. H.R. REP. NO. 105-321, at 19 (1997). The Charter School Amendments Act of 1997 was an earlier version of the Charter School Expansion Act of 1998, which was eventually enacted into law.

215. *Id.* at 8 (emphasis added).

businesses and colleges can all apply for a charter.”²¹⁶ Senator Lieberman speaks favorably of the fact that federal seed money to charter schools has resulted in a “quadrupling [of] the number that were *in business* just four years ago,” and lauds the cooperation of “citizens, educators, *business leaders*, and politicians.”²¹⁷

It is not possible to say that Congress clearly intended funding under IDEA and Title I of ESEA to go to for-profit charter schools. Statements in the legislative history of the Charter School Expansion Act of 1998, combined with other pieces of federal legislation unambiguously intended to increase the number of charter schools in the country, however, render the Department’s interpretation of IDEA and Title I of ESEA questionable. Challenges to the Department’s policy in other circuits thus may be able to move beyond the first step of the *Chevron* inquiry, and prompt a more detailed discussion of whether deference is due to the Department.

The Ninth Circuit stated that even if it had found the definitions in IDEA and Title I ambiguous, it would have deferred to the Department and reached the same result.²¹⁸ The extent to which deference is proper, however, is unclear in this situation. Courts must grant *Chevron* deference to agency interpretations when “Congress would expect the agency to be able to speak with the force of law” when it addresses an ambiguity or gap in a statute.²¹⁹ The Department’s determination lacks the procedural safeguards which typically accompany agency decisions afforded *Chevron* deference.²²⁰ “The fair measure of deference to an agency administering its own statute has been understood to vary with circumstances, and courts have looked to the degree of the agency’s care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency’s position”²²¹ The Ninth Circuit stated that its result would have been the same had it granted a lesser form of deference, but provided little analysis to support that claim.²²² The context and legislative history of IDEA and Title I, the

216. 144 CONG. REC. S12247 (1998) (emphasis added).

217. *Id.* at S12248, 49 (emphasis added).

218. *Arizona Board*, 464 F.3d at 1010.

219. *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001).

220. The determination did not involve formal adjudication with notice and comment procedures. *See id.* at 229–30.

221. *Id.* at 228.

222. *Arizona Board*, 464 F.3d at 1010.

relative informality of the Department's determination, and the novelty of questions concerning for-profit charter schools may indicate that little deference is due to the Department's statutory interpretation.

Challenges to the Department's policy in other jurisdictions will face an uphill battle. There appears to be enough wiggle room in the applicable statutes, however, for a challenger to show that they do not unambiguously prohibit funding of for-profit charter schools under IDEA and Title I of ESEA. The odds of showing that the Department's policy is an unacceptable interpretation of those statutes, however, are too speculative to predict.

C. Lobby to Change the Law

If Congress wants for-profit charter schools to receive federal funds under IDEA and Title I, it need only amend the statutes to make that clear. *Arizona Board* turned on a narrow issue of statutory interpretation which could easily be mooted by Congressional action. If Congress allows IDEA and Title I funding to go to for-profit charter schools, then these schools will be better able to serve disadvantaged student populations and will no longer be tempted to hide behind shell nonprofit organizations. If Congress withdraws all support from either for-profit charter schools or schools which contract with for-profit management companies, then such schools may be prevented from opening or continuing operations. If this were the case, all charter school students could enjoy the benefits of IDEA and Title I funding. In any event, either scenario is more logical than the current state of the law.

CONCLUSION

The U.S. Department of Education's policy of not allowing funding of for-profit charter schools creates a twofold problem. First, the current state of the law makes it difficult for such schools to serve special needs and low-income students. This frustrates the attempts of state legislatures and the United States Congress to facilitate charter schools' expansion. Second, it may encourage the creation of effectively for-profit charter schools with only illusory supervision by nonprofit governing boards, thus obscuring the nature of the schools' operation

from the public eye. Although companies hoping to establish charter schools may be able to work around *Arizona Board*, Congress should clearly state whether for-profit charter schools and for-profit school management companies should be a part of the American public education system.