NOTES

ACCOUNTABILITY THROUGH PROCEDURE? RETHINKING CHARTER SCHOOL ACCOUNTABILITY AND SPECIAL EDUCATION RIGHTS

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Almost every state has experimented with charter schools to improve education outcomes for high-needs students. Charter schools operate with more autonomy and flexibility than traditional public schools, but at the expense of democratic accountability mechanisms. While this model has produced positive results, some charter schools deny access to or underenroll students with disabilities. The Individuals with Disabilities Education Act entitles all students with disabilities to a free and appropriate public education and establishes certain procedures by which students and their parents can vindicate this right, but these procedures are imperfect. This Note argues that the absence of democratic responsiveness in the charter model amplifies existing shortcomings of special education procedures, frustrating the purposes of both charter school authorization statutes and the Individuals with Disabilities Education Act. It concludes by offering suggestions for charter school authorizers and lawmakers to improve access to alternative, less-legalized mechanisms for protecting special education rights in the charter school context.

INTRODUCTION

In the late 1980s, Ray Budde imagined a radical solution for reforming public schools—education by charter.[1] Since then, public charter schools have become, at least to many, a beacon of hope to reform struggling districts and close the achievement gap that exists between racial and socioeconomic groups in American education.[2] Over

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1. Ray Budde is credited as the progenitor of the charter school idea. See generally Ray Budde, Education by Charter: Restructuring School Districts 16–20 (1988) (outlining the idea for a system allowing teachers to innovate in charter schools under the traditional district umbrella). It is worth noting that Budde did not support charter schools as alternatives to traditional districts. See Susan Saulney, Ray Budde, 82, First to Propose Charter Schools, Dies, N.Y. Times (June 21, 2005), http://www.nytimes.com/2005/06/21/us/ray-budde-82-first-to-propose-charter-schools-dies.html (on file with the *Columbia Law Review*).

2. The achievement gap refers to the discrepancy in average educational attainment levels between students from minority backgrounds and low-income households and their nonminority peers that come from economically advantaged backgrounds. See generally

the course of the 1990s and 2000s, charter schools have grown rapidly in the United States.[3] Charter school operators voice a bold vision: use independent schools and innovative methods that would provide increased opportunities for college attainment to educationally disadvantaged communities.[4] This ostensible freedom to innovate comes with a cost: Charter schools operate without accountability to democratically elected school boards that are a staple of traditional school systems.[5] Public charter schools, in their current form, receive government funding to educate students without traditional district governance.[6] While this tradeoff may enhance the educational opportunities available to some students,[7] commentators have argued other

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Kati Haycock, Closing the Achievement Gap, Educ. Leadership, Mar. 2001, at 6, 6 (defining the achievement gap and summarizing outcomes for different ethnic groups).

3. By one estimate, nearly 6,500 charter schools served over 2.5 million students in the 2013–2014 school year, a dramatic increase from the approximately 3,000 charter schools that were in operation in the 2003–2004 school year. Grace Kena et al., U.S. Dep't of Educ., The Condition of Education 2016, at 78–81 (2016), http://nces.ed.gov/pubs2016/2016144.pdf [http://perma.cc/4KRK-LFT7].

4. E.g., Mission, Collegiate Acads., http://collegiateacademies.org/page/92/mission [http://perma.cc/WTZ6-QFG9] (last visited Feb. 2, 2017) ("We provide an excellent education to every scholar entering our building, regardless of their previous experiences or current abilities . . . . [W]e accept ALL scholars and do whatever it takes to meet their needs."); About KIPP, Knowledge Is Power Program, http://www.kipp.org/about-kipp [http://perma.cc/8J9H-ZKSW] (last visited Feb. 2, 2017) (stating KIPP's purpose to "create a respected, influential, and national network of public schools that are successful in helping students from educationally underserved communities develop the knowledge, skills, character, and habits needed to succeed in college and the competitive world beyond"); Our Mission, Uncommon Schs., http://www.uncommonschools.org/our-approach/the-opportunity-gap [http://perma.cc/2WVU-5CGT] (last visited Feb. 2, 2017) ("Our mission is to start and manage outstanding urban charter public schools that close the achievement gap and prepare low-income students to graduate from college.").

5. See, e.g., Yilan Shen, Nat'l Conference of State Legislatures, Authorizing Charter Schools 1 (2011), http://www.ncsl.org/documents/educ/AuthorizingCharterSchools.pdf [http://perma.cc/CD66-9PHH] ("Charter schools are publicly funded, privately managed and semi-autonomous schools of choice."). This defining principle has led to state-constitution-based language in several states, including Washington, where the state supreme court in *League of Women Voters of Washington v. State* determined that public funding of charter schools violated the Washington Constitution because charter schools lacked democratic accountability and were therefore not the same "common schools" entitled to public funds under the state constitution. 355 P.3d 1131, 1141 (Wash. 2015).

6. See About Charter Schools, Nat'l All. for Pub. Charter Schs., http://www.publiccharters.org/get-the-facts/public-charter-schools/ [http://perma.cc/6WHR-UNR8] (last visited Feb. 6, 2017).

7. See, e.g., Joshua D. Angrist et al., Charter Schools and the Road to College Readiness: The Effects on College Preparation, Attendance and Choice 27–29 (2013), http://users.nber.org/~dynarski/Charters_and_College_Readiness.pdf [http://perma.cc/E47G-UUHD] (finding charter schools in Boston produced gains for students in Advanced Placement (AP) attainment, SAT scores, and college enrollment over traditional public schools); Ctr. for Research on Educ. Outcomes, National Charter School Study 9 (2013), http://credo.stanford.edu/documents/NCSS%202013%20Executive%20Summary.pdf [http://perma.cc/NPY5-QQZ4] [hereinafter CREDO, Charter School Study] (finding "charter schools now advance the learning gains of their

students—particularly students with special education needs—have been unable to take part in this vision proffered by charter schools.[8]

Concurrently, ensuring that students with special needs have access to a free and appropriate public education (FAPE) is a core commitment of federal special education law.[9] The Individuals with Disabilities Education Act (IDEA), which provides a detailed framework of the rights available to students with disabilities and their families, articulates two core purposes: ensuring the availability of FAPE and safeguarding the education rights of children and parents.[10] Congress enacted IDEA's predecessor—the Education for All Handicapped Children Act (EAHCA)[11]—in 1975 after Geraldo Rivera's exposé of Willowbrook State School revealed the inhumane conditions in which the State of New York institutionalized its school-aged children with disabilities.[12] In enacting

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students more than traditional public schools in reading" and charter school student math achievement is "similar to [that] of students in traditional public schools"); cf. Ron Zimmer et al., RAND Corp., Charter Schools in Eight States: Effects on Achievement, Attainment, Integrations, and Competition 84, 86 (2009), http://www.rand.org/content/dam/rand/pubs/monographs/2009/RAND_MG869.pdf [http://perma.cc/H7ZP-S5NQ] (finding no evidence charter schools poach high-performing students from traditional districts and that charter schools in some states produce higher graduation and college-enrollment rates). But see Education Reforms: Exploring the Vital Role of Charter Schools: Hearing Before the Subcomm. on Early Childhood Elementary & Secondary Educ. of the H. Comm. on Educ. & the Workforce, 112th Cong. 19–21 (2011) (statement of Dr. Gary Miron, Professor of Evaluation, Measurement & Research, W. Mich. Univ.) [hereinafter Miron Testimony] (discussing "lackluster performance" by charter schools and offering critiques).

8. See U.S. Gov't Accountability Office, GAO-12-543, Charter Schools: Additional Federal Attention Needed to Help Protect Access for Students with Disabilities 7 fig.2 (2012) (finding students with disabilities composed 11.1% of the national school-aged population but 8.2% of the charter school population); Fact Sheet: Educational Access for New Orleans Public School Students with Disabilities, S. Poverty Law Ctr., http://www.splcenter.org/news/2015/07/27/fact-sheet-educational-access-new-orleans-public-school-students-disabilities [http://perma.cc/4G5C-ZSDQ] [hereinafter S. Poverty Law Ctr., Fact Sheet] (last visited Feb. 1, 2017) (comparing 7.8% disability enrollment in charter schools with 12.6% in traditional public schools in New Orleans).

9. See, e.g., Florence Cty. Sch. Dist. Four v. Carter ex rel. Carter, 510 U.S. 7, 13 (1993) ("IDEA was intended to ensure that children with disabilities receive an education that is both appropriate and free."); Sch. Comm. of Burlington v. Dep't of Educ. of Mass., 471 U.S. 359, 369 (1985) (holding schools deciding whether to grant private-school-tuition reimbursements should consider Congress's purpose to ensure access for children with disabilities); Robert A. Garda, Jr., Disabled Students' Rights of Access to Charter Schools Under the IDEA, Section 504 and the ADA, 32 J. Nat'l Ass'n Admin. L. Judiciary 516, 520 (2012) [hereinafter Garda, Rights of Access] (asserting the access right is the "core of IDEA").

10. 20 U.S.C. § 1400(d)(1)(A)–(B) (2012).

11. Pub. L. No. 94-142, 89 Stat. 773 (1975) (codified as amended in scattered sections of 20 U.S.C.).

12. Willowbrook: The Last Great Disgrace (WABC-TV television broadcast 1972), http://geraldo.com/page/willowbrook (on file with the *Columbia Law* Review). Rivera's investigative report exposed degrading conditions at a New York state-run institution for persons with special needs, prompting public outcry and calls for reform. See, e.g.,

EAHCA, Congress intended to reduce the incidence of institutionalization by guaranteeing access to education for all students, regardless of disability.[13] EAHCA and its successor IDEA attempt to achieve these aims by mandating procedural safeguards that attempt to provide the means by which parents and students can protect their IDEA-created substantive rights, namely the right to the provision of FAPE.[14]

When Congress enacted EACHA in 1975, public education consisted of schools geographically organized into school districts governed by centralized, elected school boards.[15] The emergence of the charter school model less than ten years later prompted questions about the coherence of the federal special education regime in its application to charter schools[16] and whether charter schools were doing enough to educate students with special needs.[17] While courts and scholars have for the most part agreed that charter schools must abide by federal special

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Remembering an Infamous New York Institution, NPR (May 7, 2008, 7:00 AM), http://www.npr.org/templates/story/story.php?storyId=87975196 [http://perma.cc/9ZBK-MQT7] ("Rivera's gripping TV coverage of conditions at Willowbrook not only helped shutter the institution, but also changed the way people were treated at such places nationwide.").

13. See S. Rep. No. 94-168, at 9 (1975) ("Providing educational services will ensure against persons needlessly being forced into institutional settings. . . . [The act] takes positive necessary steps to ensure that the rights of children and their families are protected.").

14. Id. at 6 ("The new provisions . . . laid the basis for . . . protection of handicapped children's rights by due process procedures . . . ."); see also infra section II.B (summarizing the federal special education law framework).

15. The charter school concept did not enter policy circles until the late 1980s. See supra note 1 and accompanying text.

16. See Robert A. Garda, Jr., Culture Clash: Special Education in Charter Schools, 90 N.C. L. Rev. 655, 679–81 (2012) [hereinafter Garda, Culture Clash] (arguing charter school market norms clash with the rights-based philosophy undergirding the federal disability regime); Jay P. Heubert, Schools Without Rules? Charter Schools, Federal Disability Law, and the Paradoxes of Deregulation, 32 Harv. C.R.-C.L. L. Rev. 301, 313–41 (1997) (analyzing the application of federal special education and disability laws to charter schools); Lisa Snell, Reason Pub. Policy Inst., Special Education Accountability: Structural Reform to Help Charter Schools Make the Grade 12–14 (2004), http://reason.org/files/3c2966c9e879c1ee0a025e21ece535d4.pdf [http://perma.cc/78Q8-MAGP] (discussing problems with IDEA application to charter schools).

17. E.g., Erin Hankins Diaz, Is It Really a Choice? How Charter Schools Without Choice May Result in Students Without a Free Appropriate Public Education, 2016 B.Y.U. Educ. & L.J. 25, 46 ("Though charter schools enjoy both bipartisan and vast parental support, their record of effectively educating all students, especially those with special needs, is questionable."); Garda, Culture Clash, supra note 16, at 681 ("Charter schools often do not properly identify, assess, and enroll disabled students, particularly severely disabled students; provide students a continuum of alternative educational placements under the Least Restrictive Environment obligation; or comply with the 'child find' requirements of IDEA."); Rebekah Gleason, Charter Schools and Special Education: Part of the Solution or Part of the Problem, 9 UDC/DCSL L. Rev. 145, 169–70 (2007) ("Many [charter] schools, however, also misunderstand the needs of students with disabilities and have not taken advantage of the resources available to them.").

education laws,[18] students with disabilities and their families have struggled to access the promise of charter school education.[19] While IDEA provides for dispute resolution procedures for families of children with special needs,[20] these often time-consuming procedures sometimes fail to provide satisfaction to aggrieved students and parents.[21] In traditional public schools, democratic accountability mechanisms supplement these procedures: Students and their families can petition the school board, attend public meetings, support new candidates, or run for the school board themselves.[22] Charter schools purposefully eschew these operational accountability and oversight mechanisms in favor of "outcome accountability," which has prompted some criticism in policy circles.[23] This Note explores the extent to which the absence of

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18. E.g., Garda, Rights of Access, supra note 9, at 542 (concluding that students with disabilities have rights to access charter schools, but identifying several complicating factors); Heubert, supra note 16, at 303 ("[P]ublic charter schools and charter school boards are subject to all the rules and procedures of federal disability law to which traditional public schools and school districts are bound.").

19. See, e.g., U.S. Gov't Accountability Office, supra note 8, at 7 fig.2 (finding students with disabilities composed 11.1% of the national school-aged population but 8.2% of the charter school population during the 2009–2010 school year). Individual districts can exhibit even larger enrollment disparities. E.g., S. Poverty Law Ctr., Fact Sheet, supra note 8 (comparing 7.8% disability enrollment in charter schools with 12.6% disability enrollment in traditional public schools in New Orleans). But see David Rostetter et al., Office of the Indep. Monitor, Report on the Progress and Effectiveness of the Los Angeles Unified School District's Implementation of the Modified Consent Decree During the 2014–2015 School Year—Part 2, at 31 (2016), http://oimla.com/pdf/20160711/AnnualReport20142015_Part2_Final.pdf [http://perma.cc/863T-NPDZ] (finding Los Angeles charter schools increased the enrollment of students with disabilities by nearly 3% over six years, reducing the gap with traditional public schools to just under 1% in the 2015–2016 school year).

20. 20 U.S.C. § 1415 (2012).

21. See, e.g., Elizabeth A. Harris, Lawsuit Accuses Brooklyn Charter School of Failing to Provide Special Education Services, N.Y. Times (Nov. 5, 2015), http://www.nytimes.com/2015/11/06/nyregion/lawsuit-accuses-brooklyn-charter-school-of-failing-to-provide-special-education-services.html?_r=0 (on file with the *Columbia Law Review*) (discussing a lawsuit challenging charter school discipline of children with special needs); Students with Disabilities Encounter Discrimination in New Orleans Schools, S. Poverty Law Ctr. (Mar. 11, 2014), http://www.splcenter.org/news/2014/03/12/students-disabilities-encounter-discrimination-new-orleans-schools [http://perma.cc/4JLG-YDML] (providing an example of a parent's inability to ensure access for a son with limited sight and autism to public charter schools in New Orleans).

22. This structure of institutional democratic accountability started giving way to neoliberal market accountability in the 1980s. See generally Stewart Ranson, Public Accountability in the Age of Neo-Liberal Governance, 18 J. Educ. Pol'y 459, 460–65 (2003).

23. See, e.g. Annenberg Inst. for Sch. Reform, Public Accountability for Charter Schools: Standards and Policy Recommendations for Effective Oversight 5 (2014), http://annenberginstitute.org/sites/default/files/CharterAccountabilityStds.pdf [http://perma.cc/E2DL-P9ZJ] (offering policy solutions to promote charter school accountability); David Osborne, Progressive Policy Inst., Improving Charter School Accountability: The Challenge of Closing Failing Schools 16–17 (2012),

democratic accountability in the charter school model amplifies the shortcomings of the litigation-based procedures mandated by federal law, arguing that disability-rights advocates should leverage the charter school accountability conversation to improve compliance with IDEA and promote access for students with disabilities. It further argues that improving access to charter schools for students with disabilities will, in turn, help charter schools better live up to one rationale for their existence—improving educational outcomes for the highest-needs students.

Part I examines several representative state legal regimes that govern charter schools. It also provides background on the federal disability law framework that not only establishes access and education rights for students with disabilities but also creates procedures that attempt to secure those rights. Part II discusses the shortcomings of these procedures, particularly in the charter school context, in which market forces[24] and post-hoc charter withdrawal provide the only accountability mechanisms. Part III suggests a number of reforms that will leverage democratic accountability to provide alternative avenues for students with disabilities and their families to vindicate rights secured by federal law.

I. CHARTER SCHOOLS AND THE FEDERAL DISABILITY LAW FRAMEWORK

IDEA,[25] Title II of the Americans with Disabilities Act (Title II of the ADA),[26] and Section 504 of the Rehabilitation Act of 1973 (Section 504)[27]

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http://progressivepolicy.org/wp-content/uploads/2012/06/06.2012-Osborne_Improving-Charter-School-Accountability_The-Challenge-of-Closing-Failing-Schools.pdf [http://perma.cc/9742-6ZK2] (arguing underperforming charter schools lack effective oversight). In 2015, the Supreme Court of Washington held in *League of Women Voters of Washington v. State* that charter schools violated the state's constitution. 355 P.3d 1131, 1141 (Wash. 2015). The court determined that public funding of charter schools violated the Washington Constitution because charter schools lacked democratic accountability and were therefore not "common schools." Id.; see also infra notes 201–203 and accompanying text (discussing *League of Women Voters* and charter school accountability in further detail).

24. This Note references the market forces argument in support of charter schools several times. See infra notes 36–37, 42, 54, 194 and accompanying text. One justification for expanding the number of charter schools is that they will create a market for education that will produce higher quality opportunities for students and parents through competition for students. See Garda, Culture Clash, supra note 16, at 667 ("Charters, as schools of choice, provide students alternatives to their assigned schools and create market accountability."); cf. Heubert, supra note 16, at 302 n.8 ("Proponents of private sector involvement believe it will unleash the power of free market competition in K-12 education."). For helpful background on the history of the accountability and market view of education, see generally Robert A. Garda, Jr., Coming Full Circle: The Journey from Separate But Equal to Separate and Unequal Schools, 2 Duke J. Const. L. & Pub. Pol'y 1, 22–32 (2007).

25. Pub. L. No. 108-446, 118 Stat. 2647 (2004) (codified as amended in scattered sections of 20 U.S.C.).

provide access and education rights to students with disabilities and impose a number of requirements on charter schools. This Part discusses the origin and legal framework for charter schools and the application of federal disability law to them. Section I.A discusses representative legal regimes that govern charter schools. Section I.B examines the federal disability law structures, identifying specific rights and procedures guaranteed to students and their families. Section I.C analyzes the application of this framework to charter schools, concluding that charter schools must (but sometimes fail to) comply with the access principle established by the federal disability law framework.

A. *Legal Foundations of Charter Schools*

To fully understand the shortcomings of federal disability law as applied to charter schools, it is important to understand how charter schools are functionally and legally distinct from traditional school districts. This section provides background on what a charter school is and how the legal mechanisms that provide the basis for their legitimacy—state-specific charter school authorization statutes—insulate them from direct democratic accountability.

While they have several definitions,[28] charter schools are publicly-funded, often privately-managed, schools.[29] Charter schools secure public funding by organizing under state charter school authorization statutes that often mandate certain educational outcomes for charter school students.[30] For instance, California's charter authorization statute permits denial of a charter contract authorization for failure to specify student-performance goals in a charter application.[31] Advocates for charter

26. Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified as amended at 42 U.S.C. § 12101–12213 (2012)).

27. Pub. L. No. 93-112, 87 Stat. 355, 394 (1973) (codified as amended at 29 U.S.C. § 794 (2012)).

28. See, e.g., 20 U.S.C. § 7221i (2012) (offering several features of public charter schools). Distinctive characteristics of charter schools include: "exempt[ion] from significant State or local rules that inhibit the flexible operation and management of public schools" and "operat[ion] in pursuit of a specific set of educational objectives determined by the school's developer and agreed to by the authorized public chartering agency." Id. § 7221i(1)(A), (C).

29. See, e.g., Charter Schools 101, Nat'l Educ. Ass'n, http://www.nea.org/home/60831.htm [http://perma.cc/2X5S-WJRK] (last visited Feb. 2, 2017) ("Charter schools are privately managed, taxpayer-funded schools exempted from some rules applicable to all other taxpayer-funded schools."); Frequently Asked Questions About Public, Charter Schools, Uncommon Schs., http://www.uncommonschools.org/our-approach/faq-what-is-charter-school [http://perma.cc/CFH8-NUQ9] (last visited Feb. 2, 2017) ("A charter school is an independently run public school granted greater flexibility in its operations, in return for greater accountability for performance.").

30. See, e.g., N.Y. Educ. Law § 2851 (McKinney 2016) (requiring prospective charter schools to include statements of purposes consistent with goals outlined in the act with applications for charters).

31. Cal. Educ. Code § 47605(b)(5)(a)(i)–(ii) (West 2016).

schools have touted the schools' utility as a means of closing the achievement gap[32] among students of varying demographics and income levels in the United States.[33] Several state charter authorization statutes explicitly invoke this in their purposes sections.[34] The spread of charter schools has provoked polarized debate among education academics and reformers with respect to their effectiveness,[35] accountability,[36] and desirability.[37] While many studies demonstrate that charter schools can

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32. See supra note 2.

33. E.g. Joshua D. Angrist et al., supra note 7, at 37 (finding charter schools enrolled higher percentages of disadvantaged students and delivered better results than traditional public schools); CREDO, Charter School Study, supra note 7, at 82–85 (same).

34. See, e.g., Cal. Educ. Code § 47601(b) (identifying legislative intent of better serving "pupils who are identified as academically low achieving"); N.Y. Educ. Law § 2850(2)(b) (listing among purposes "[i]ncreas[ing] learning opportunities for all students, with special emphasis on expanded learning experiences for students who are at-risk of academic failure").

35. Compare Angrist et al., supra note 7, at 37 ("[C]harter attendance raises the probability that students pass high-stakes exams required for high-school graduation, boosts the likelihood that students qualify for an exam-based college scholarship, increases the frequency of AP test-taking, substantially increases SAT scores and shifts students away from two-year colleges toward four-year schools."), CREDO, Charter School Study, supra note 7, at 3 (finding "charter schools now advance the learning gains of their students more than traditional public schools in reading" and charter school student math achievement is "comparable to the learning gains in traditional public schools"), and Zimmer et al., supra note 7, at 84–86 (finding charter schools do not poach high-performing students from traditional districts and may produce higher graduation and college-enrollment rates in some districts), with Miron Testimony, supra note 7, at 19 ("We found charter schools performing at a lower level, although they were gaining faster than traditional public schools. . . . [T]he performance tended to level off once performance level neared . . . the traditional public schools."). Dr. Miron attributed "lackluster performance" nationally by charter schools to "[l]ack of effective oversight," "[i]nsufficient autonomy," and "[h]igh attrition of teachers and administrators," among other reasons. Id. at 21.

36. Compare Annenberg Inst. for Sch. Reform, supra note 23 (offering measures to improve perceived accountability shortfalls), with Bruno V. Manno, Chester E. Finn, Jr. & Gregg Vanourek, Charter School Accountability: Problems and Prospects, 14 Educ. Pol'y 473, 476 (2000) (framing accountability as adherence to performance targets and being subjected to market forces). For more background on accountability-litigation failures, see infra sections II.B–.C.

37. Diane Ravich, an educational historian, has been a particularly outspoken critic of charter schools, arguing that they threaten our commitment to traditional public schools. See, e.g., Diane Ravitch, The Charter School Mistake, L.A. Times (Oct. 1, 2013), http://www.latimes.com/opinion/op-ed/la-oe-ravitch-charters-school-reform-20131001-story.html [http://perma.cc/CVW8-VYYN] ("Abandoning public schools for a free-market system eviscerates our basic obligation to support them whether our own children are in public schools, private schools or religious schools, and even if we have no children at all."); see also Curt Dudley-Marling & Diana Baker, The Effects of Market-Based School Reforms on Students with Disabilities, Disability Stud. Q. (2012), http://dsq-sds.org/article/view/3187/3072#endnoteref01 [http://perma.cc/N6BQ-VRXB] (considering whether market-based reform in education is beneficial for students with disabilities).

deliver improved outcomes for their students,[38] critics have maintained that charter schools achieve these results by targeting the highest-achieving students and weeding out underperformers with rigid disciplinary codes.[39] Nevertheless, charter schools have proliferated quickly and have garnered support from across the national political spectrum.[40] The core intuition behind the adoption of charter schools is that they trade traditional oversight and regulation mechanisms, like democratically elected school boards, for stricter accountability for student outcomes[41] and the added burden of competing in the education market.[42] This trade-off, proponents argue, facilitates innovation that would enable charter schools to outperform their traditional-district-school peers.[43]

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38. See, e.g., Angrist et al., supra note 7, at 8 (finding charter school lottery winners performed better than charter school lottery losers at comparable public schools); Zimmer et al., supra note 7, at 86 ("[T]hose attending a charter high school were 8 to 10 percentage points more likely to enroll in college.").

39. See, e.g., Ira Nichols-Barrer et al., Does Student Attrition Explain KIPP's Success?, Educ. Next, Fall 2014, at 63, 66–68 (finding low-performing students left KIPP schools at higher rates and, unlike in traditional districts, were replaced by higher-performing students).

40. E.g., Joy Resmovits, Charter Schools Get Bipartisan Boost from U.S. House, Huffington Post (May 9, 2014, 1:59 PM), http://www.huffingtonpost.com/2014/05/09/charter-school-vote-2014_n_5295641.html [http://perma.cc/M34J-ZVFC]. However, the nomination and confirmation of U.S. Secretary of Education Betsy DeVos thrust charter schools into the political arena once again. See Josh Mitchell et al., Betsy DeVos Confirmed as Education Secretary with VP Pence's Tiebreaking Vote, Wall St. J. (Feb. 7, 2017, 6:20 PM), http://www.wsj.com/articles/betsy-devos-approved-as-education-secretary-with-vp-pences-tie-breaker-vote-1486488839 (on file with the *Columbia Law Review*) ("Her nomination became a flashpoint in a long debate over how best to improve U.S. education. Charters, which reduce the role of teachers unions, have grown rapidly in recent years in urban school districts, while overall enrollment in traditional school districts has declined."). The debate over Secretary DeVos's confirmation focused on her record advocating for for-profit charter school expansion in Michigan. See, e.g., Editorial, Big Worries About Betsy DeVos, N.Y. Times (Jan. 10, 2017), http://www.nytimes.com/2017/01/10/opinion/big-worries-about-betsy-devos.html (on file with the *Columbia Law Review*) ("She has poured money into charter schools advocacy, winning legislative changes that have reduced oversight and accountability. About 80 percent of the charter schools in Michigan are operated by for-profit companies, far higher than anywhere else."). Yet, some on the left have started to view all charter schools more skeptically. See, e.g., ACLU Raises Serious Concerns over Nomination of DeVos for Secretary of Education, ACLU of Mich. (Nov. 23, 2016), http://www.aclumich.org/article/aclu-raises-serious-concerns-over-nomination-devos-secretary-education [http://perma.cc/WFK3-WEXJ] (criticizing DeVos's advocacy for charter schools).

41. See infra note 54 and accompanying text.

42. See Garda, Culture Clash, supra note 16, at 666–69 (providing an overview of charter school proponents' argument that market competition for students motivates school improvement and allows students and families to choose schools that will be the best fit for them).

43. See Diaz, supra note 17, at 45 ("Proponents of charter schools believed that by removing many of the constraints faced by traditional public schools, charter schools could experiment with curriculum and other areas to make needed improvements in

Since Minnesota passed the first charter school authorization statute in 1992, forty-one states and the District of Columbia have followed its lead.[44] While authorization statutes vary across jurisdictions,[45] many contain a number of key components. The statutes typically enable authorization agencies—including state boards of education, higher education institutions, school districts, or municipalities—to issue charters to would-be school organizers.[46] The issuance of charters has the purpose and effect of freeing the schools from direct accountability to democratically elected school boards[47] in return for increased accountability for student outcomes.[48] Charter authorization statutes often require the charter to contain both simple logistical information and student-outcome goals. New York, for instance, mandates that the charter agreement provide a mission statement, a proposed budget, and

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education."); Garda, Culture Clash, supra note 16, at 663 & n.27 ("This freedom from regulation, it was urged, would provide the flexibility that is necessary for school innovation and improvement.").

44. Ctr. for Educ. Reform, Charter School Laws Across the States: 2015 Rankings and Scorecard 2 (Alison Consoletti Zgainer & Kara Kerwin eds., 2015), http://www.edreform.com/wp-content/uploads/2015/07/CharterLaws2015.pdf [http://perma.cc/6K5A-TMDU]. Charter school authorization statutes are currently in place in Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, the District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Virginia, Washington, Wisconsin, and Wyoming. Id. at 6.

45. See generally Elaine Liu, Note, Solving the Puzzle of Charter Schools: A New Framework for Understanding and Improving Charter School Legislation and Performance, 2015 Colum. Bus. L. Rev. 273 (proposing a model to evaluate charter statutes); Ctr. For Educ. Reform, supra note 44 (providing state-by-state analysis of charter authorization statutes). This section examines state statutes that occupy different strata in the Center for Education Reform rankings. For the full rankings, see id.

46. See Cal. Educ. Code § 47605 (West 2016) (authorizing school boards to grant or deny charters to form schools); Minn. Stat. Ann. § 124E.05 (West 2016) (enabling school boards, charitable organizations, and institutions of higher education—both public and private—to apply to the state Commissioner of Education for authorization authority); N.Y. Educ. Law § 2851 (McKinney 2016) (granting chartering authority to the state Board of Regents, local districts eligible for state aid, and the State University of New York Board of Trustees); see also U.S. Gov't Accountability Office, supra note 8, at 3 (explaining states authorize different agencies that may approve the establishment of a charter school, including state departments of education, state boards of education, school districts or local educational agencies, institutions of higher education, and municipal governments). Several states empower only the state board of education or state commissioner of education to authorize charters. For examples, see Conn. Gen. Stat. Ann. § 10-66bb (West 2010); N.J. Stat. Ann. § 18A:36A-4 (West 2013).

47. This is true in most cases. Some statutes allow local school boards to issue charters. For an example, see N.Y. Educ. Law § 2851. Under this model, the charter school's governing body is accountable to a democratically elected board but only for renewal after the five-year term. Charter schools still enjoy operational autonomy.

48. See, e.g., id. § 2850 (stating a purpose of providing "schools with a method to change from rule-based to performance-based accountability systems").

descriptions of student-achievement goals, methods for evaluating student performance, and discipline policies, among other requirements.[49] Because the charter contracts are limited in duration, typically for a period of no more than five years,[50] charter schools must meet the goals in their contracts to earn reauthorization. The group that ultimately makes this determination is the charter school authorizer, which can be a state department of education, local school district, or an independent organization, depending on the relevant state's charter authorization statute.[51] Courts have frequently given charter authorizers deference in reviewing the decisions on whether to grant or renew a charter.[52]

As charter schools avoid traditional democratic accountability mechanisms, they must adhere to a number of outcome-accountability provisions in the state authorization statutes to be eligible for funding and renewal. New York, for example, mandates that charter schools provide annual reports to the Board of Regents and the public on the progress they have made toward the achievement goals outlined in the charter contract.[53] These reports ostensibly serve two functions: They help the authorizer determine whether to renew a charter and affect family decisions when selecting charter schools for their children, informing the market for schools.[54] Many authorization statutes also

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49. Id. § 2851. Other charter authorization statutes contain similar requirements. For examples, see Conn. Gen. Stat. Ann. § 10-66bb; Minn. Stat. Ann. § 124E.10; N.J. Stat. Ann. § 18A:36A-5.

50. See Conn. Gen. Stat. Ann. § 10-66bb; Minn. Stat. Ann. § 124E.10; N.Y. Educ. Law § 2851.

51. See About, Nat'l Ass'n of Charter Sch. Authorizers, http://www.qualitycharters.org/about/ [http://perma.cc/6ZTB-9XDJ] (last visited Feb. 19, 2017) ("[Authorizers] decide who can start a new charter school, set expectations and oversee school performance, and decide which schools should continue to serve students or not. Depending on state law, authorizers can be school districts, education agencies, independent boards, universities, mayors and municipalities, and not-for-profits.").

52. See In re Grant of Charter to Merit Preparatory Charter Sch. of Newark, 88 A.3d 208, 212 (N.J. Super. Ct. App. Div. 2014) ("We may reverse the Commissioner's decision to grant or deny a charter only if it is arbitrary, capricious, or unreasonable."); Pinnacle Charter Sch. v. Bd. of Regents of Univ. of State of N.Y., 969 N.Y.S.2d 318, 320 (N.Y. App. Div. 2013) (finding parents and the charter governing the board have "no constitutionally protected property interest in the renewal of a charter" and granting the Board of Regents deference in its renewal decision). But see Bd. of Educ. of Somerset Cty. v. Somerset Advocates for Educ., 984 A.2d 405, 413–14 (Md. Ct. Spec. App. 2009) (applying heightened deference when the state board decides whether to grant a charter but relaxed deference when the board reviews a local district decision).

53. N.Y. Educ. Law § 2857. For other states that have similar reporting requirements, see Conn. Gen. Stat. Ann. § 10-66cc; Minn. Stat. Ann. § 124E.16; N.J. Stat. Ann. § 18A:36A-16.

54. Proponents of charter schools argue that outcome accountability operates on two levels. At the governmental level, charter schools are dependent on their results to renew their charters. At the education-market level, charter schools are dependent on outcomes to attract and retain students. This market-based theory has attracted both critics and

provide for procedures by which authorizers can revoke charters.[55] In New York, the Board of Regents or any charter authorizer may revoke a charter upon one of several conditions, including persistent low academic achievement, violations of law, violations of the charter agreement, and failure "to meet or exceed enrollment and retention targets of students with disabilities."[56] In spite of the existence of these removal provisions, explicit revocation of a charter for failure to meet academic performance targets has been rare.[57]

In summary, the wave of state charter school authorization statutes initiated by Minnesota allow for schools that receive public funding but operate independent of the traditional school board governance. Instead of being accountable to school boards, charter schools are accountable to their charter agreements and the state agency that authorizes the charter. As is discussed below[58] and as others have noted, this model has an uncomfortable fit with the federal disability law framework presented in section I.B.[59]

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advocates in practice. See infra note 148 and accompanying text. Compare Osborne, supra note 23, at 6 ("While some charter enthusiasts initially believed that parents would close charters that produced little academic growth by removing their children, this has proven only partially true."), with Alison Consoletti, Ctr. for Educ. Reform, The State of Charter Schools: What We Know—and What We Do Not—About Performance and Accountability 6 (2011), http://www.edreform.com/wp-content/uploads/2011/12/StateOfCharterSchools_CER_Dec2011-Web-1.pdf [http://perma.cc/N47A-9H42] ("[S]ince their inception, charter schools historically have experienced a 15 percent closure rate. These closures are concentrated in the first five years of a charter school's existence—just long enough to know whether a school is failing to meet its goals . . . .").

55. E.g., Cal. Educ. Code § 47607(c) (West 2016); N.J. Stat. Ann. § 18A:36A-17.

56. N.Y. Educ. Law § 2855. Additional grounds for revocation in California include failure to meet pupil-achievement targets outlined in the charter application and financial mismanagement. Cal. Educ. Code § 47607(c). In New Jersey, the Commissioner of Education may summarily revoke charters or mandate a probationary period during which the charter must address specific concerns articulated by the commissioner. N.J. Stat. Ann. § 18A:36A-17.

57. See Kelsey W. Mayo, Legal Aspects of Charter School Oversight: Evidence from California, 42 Fordham Urb. L.J. 671, 680–83 (2014) (arguing that a significant number of California charter schools have closed by nonrenewal of the charter agreement but noting "[r]evocation is a rare and contentious form of charter closure"); Osborne, supra note 23, at 13–15 (discussing shortcomings of revocation statutes and authorizing boards when data regarding school performance are not acted upon).

58. See infra sections I.C, II.B–.C.

59. See Garda, Culture Clash, supra note 16, at 661 ("The competing principles of special education and charter schools—and the resulting problems—raise fundamental questions about both the charter movement and special education law."); Gleason, supra note 17, at 146 ("Objectives and purposes of charter schools inherently conflict with the objectives and principles of special education."); Heubert, supra note 16, at 302 (examining "whether and how public school deregulation . . . can be reconciled with the application of detailed regulatory frameworks that themselves reflect fundamental and widely held educational and political values").

B. *The Federal Disability Law Framework*

Three federal statutes provide the basis for students with disabilities to access public education—IDEA,[60] Title II of the ADA,[61] and Section 504.[62] This section considers each in turn, discussing the substantive and procedural rights guaranteed by each statute and the interpreting case law.

1. *IDEA.* — Congress enacted IDEA in 1990, to replace EAHCA,[63] with the stated purpose of "ensur[ing] that all children with disabilities have available to them a free appropriate public education . . . designed to meet their unique needs."[64] Courts have construed the substantive provisions of IDEA against the backdrop of this overriding congressional purpose.[65] IDEA is a conditional funding statute that functions by providing federal grants to states provided that the state ensures that its local education agencies (LEAs) comply with a number of key provisions.[66] Of these, ensuring that every student has access to a "free appropriate public education"[67] is among the most important.[68] Relative to the clarity with which it defined the procedural protections available

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60. Pub. L. No. 108-446, 118 Stat. 2647 (2004) (codified as amended in scattered sections of 20 U.S.C. (2012)).

61. Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified as amended at 42 U.S.C. § 12101 (2012)).

62. Pub. L. No. 93-112, 87 Stat. 355, 394 (1973) (codified as amended at 29 U.S.C. § 794 (2012)).

63. Pub. L. No. 94-142, 89 Stat. 773, 775 (1975) (codified as amended at 20 U.S.C. §§ 1400–1450).

64. 20 U.S.C. § 1400. The events prompting the first disability-education legislation provide insight into the intent behind these provisions. Prior to 1975, it was common for children with disabilities to be educated in state-run institutions, away from their families and typical peers. Geraldo Rivera's documentary on Willowbrook State School explored one such place where children lived in awful conditions and prompted a shift in thinking about special education. Willowbrook: The Last Great Disgrace, supra note 12. After exposing the degrading, inhumane conditions at Willowbrook, Rivera issued a plea for reforming the way schools educate children with disabilities: "What we need here is a new approach . . . . What you see here just doesn't have to be this way." Id.

65. See Sch. Comm. of Town of Burlington v. Dep't of Educ. of Mass., 471 U.S. 359, 369 (1985) (holding that the decision whether to grant private-school-tuition reimbursements should construe EACHA in consideration of Congress's purpose of ensuring educational access for children with disabilities).

66. 20 U.S.C. § 1412(a)(1).

67. Id.

68. See, e.g., Timothy W. v. Rochester Sch. Dist., 875 F.2d 954, 960 (1st Cir. 1989) (holding federal law guaranteed education regardless of disability); Garda, Rights of Access, supra note 9, at 520 ("At the core of IDEA is the 'zero-reject' principle . . . ." (quoting *Timothy W.*, 875 F.2d at 960)). The origin of this idea predates IDEA and EAHCA with the seminal cases of *Pennsylvania Ass'n of Retarded Citizens v. Pennsylvania*, in which a consent decree recognized a right similar to FAPE, 343 F. Supp. 279, 287 (E.D. Pa. 1972), and *Mills v. Board of Education*, in which the court found the board's exclusion of students with disabilities was a violation of the Equal Protection Clause. 348 F. Supp. 866, 874–75 (D.D.C. 1972).

to parents and guardians, Congress spoke more nebulously about the contours and substantive rights in FAPE, electing to leave questions of what services constitute an adequate education to local education providers and parents.[69] However, IDEA does provide a number of definitions for what FAPE covers in section 1401.[70] To qualify as FAPE, the special education must (1) be "provided at public expense, under public supervision and direction," (2) adhere to state standards, (3) include preschool, primary, or secondary education, and (4) observe an individualized education program.[71] What qualifies as special education is also loosely defined, covering individualized instruction in schools, hospitals, institutions, or private homes.[72] In *Board of Education v. Rowley*, the Supreme Court, interpreting IDEA's predecessor statute, found that "[i]mplicit in . . . [FAPE] is the requirement that the education to which access is provided be sufficient to confer some educational benefit," but the Court declined to provide any substantive test for adequacy.[73] Instead, the Court reasoned that the procedural protections would provide a successful means of ensuring the substantive quality of the education.[74] Recently, the Court took an opportunity to substantively define the requirement of FAPE in *Endrew F. v. Douglas County School District*, holding that "a school must offer an [individualized education plan] reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances."[75]

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69. See Bd. of Educ. v. Rowley, 458 U.S. 176, 187 (1982) (noting EAHCA does not define FAPE but leaves to courts and administrators the role of "giving content" through common law (quoting Rowley v. Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., 483 F. Supp. 528, 533 (S.D.N.Y. 1980))); Thomas F. Guernsey & Kathe Klare, Special Education Law 34–35 (3d ed. 2008) ("Congress was much less specific in defining a FAPE on a substantive level than it was in defining it on a procedural level."). The Supreme Court recently provided additional guidance on what FAPE entails in its resolution of Endrew F. v. Douglas County School District RE-1, No. 15-827, 2017 WL 1066260 (Mar. 22, 2017). See infra note 75 and accompanying text (discussing the new *Endrew F.* standard).

70. 20 U.S.C. § 1401.

71. Id. § 1401(9).

72. Id. § 1401(29).

73. 458 U.S. at 200–02.

74. See id. at 206 (attributing to Congress the belief that "adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an [individualized education plan]"). See generally Jon Romberg, The Means Justify the Ends: Structural Due Process in Special Education Law, 48 Harv. J. on Legis. 415, 416 (2011) ("The IDEA, as interpreted by *Rowley*, views special education law through a strongly proceduralist lens . . . .").

75. No. 15-827, 2017 WL 1066260, at *10 (Mar. 22, 2017). As this standard is very new, it has yet to be applied in lower courts as of this writing. The parties in *Endrew F.* had contested whether the appropriate standard for FAPE should be "more than de minimis" or instead should have more substantive "bite." Transcript of Oral Argument at 3, 35, *Endrew F.*, No. 15-827, 2017 WL 1066260; see also Amy Howe, Argument Analysis: Justices Grapple with Proper Standard for Measuring Educational Benefits for Children with Disabilities, SCOTUSblog (Jan. 11, 2017, 6:12 PM), http://www.scotusblog.com/2017/01/argument-analysis-justices-grapple-proper-standard-measuring-

FAPE requires that LEAs provide placement for students with disabilities within their jurisdiction.[76] Schools must ensure that they educate students with disabilities in the "least restrictive environment" by, for instance, removing students from regular classes only if absolutely necessary.[77] In most cases, IDEA guarantees access to the school the child would attend absent the disability, "[u]nless the [individualized education plan] . . . requires some other arrangement."[78] Nevertheless, these requirements do not entitle a student to access any particular school in the event of a disability.[79]

Of the procedural protections provided by EAHCA and IDEA, the "centerpiece" is the individualized education plan (IEP).[80] IDEA mandates that schools and families agree to IEPs for each student.[81] IEPs must provide for student achievement goals, describe how educators will measure progress, and outline what support and services the district will provide.[82] As a practical matter, the IEP serves as an instructional tool for both regular education and special education teachers.[83] Within the context of IDEA, the IEP is the "primary vehicle for implementing . . . congressional goals."[84] The statute mandates that an IEP team—including a special education teacher, a local education agency representative, a general education teacher, and the parents—convene at least once annually to review the content and goals outlined in the IEP.[85] Once the parties present agree to the IEP, the document becomes a source of rights for the student (in turn providing the basis for a substantial

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educational-benefits-children-disabilities/ [http://perma.cc/6R46-BZG9] (contrasting the "more than merely de minimis" standard and one "with bite").

76. 20 U.S.C. § 1412(a)(5).

77. Id. §1412(a)(5)(A) ("[R]emoval of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.").

78. 34 C.F.R. § 300.116(c) (2006).

79. Hudson ex rel. Hudson v. Bloomfield Hills Pub. Sch., 910 F. Supp. 1291, 1304 (E.D. Mich. 1995) ("[N]othing in the statute or regulations *requires* a school district to in every instance place a child in the neighborhood school that he/she would attend if not handicapped."), aff'd, 108 F.3d 112 (6th Cir. 1997). For discussion on how charter schools fit into the LEA model, see infra section I.C.

80. Honig v. Doe, 484 U.S. 305, 311 (1988). Others replace "program" with "plan," but both refer to the same document.

81. 20 U.S.C. § 1414(d)(1)(B).

82. Id.; 34 C.F.R. § 300.320(a)(3) (2007).

83. See, e.g., Aleada Lee-Tarver, Are Individualized Education Plans a Good Thing? A Survey of Teachers' Perceptions of the Utility of IEPs in Regular Education Settings, 33 J. Instructional Psychol. 263, 269 (2006) ("[T]he majority of regular education teachers found Individualized Education Plans useful tools in planning and implementing educational goals and objectives for children with disabilities within their classes.").

84. *Honig*, 484 U.S. at 311.

85. 20 U.S.C. § 1414.

amount of education litigation).[86] These procedures tend to presume attendance at the current school, but they do little regarding initial placement—an issue that Part II discusses in more detail.[87] In part, this is attributable to the fact that Congress designed IDEA before the advent of charter schools.[88] Section I.C addresses the question of initial placement and IDEA's application to charter schools in further detail.

In addition to providing procedures for the creation of the IEP, IDEA mandates that states adopt a number of procedures to address parent grievances.[89] In addition to ensuring that parents have access to relevant educational records and that surrogates may protect the child in cases in which the parents are unknown,[90] IDEA requires that the LEA notify the parent of any changes to placement or the IEP and mandates that states establish due process procedures to address parental grievances.[91] To initiate an impartial hearing, parents or students must send a complaint detailing the identification, evaluation, placement, or FAPE wrongdoing at issue to the LEA.[92] States may opt to employ a one-tier hearing, in which the State Education Agency (SEA) provides the impartial hearing without appeal, or a two-tier model, in which the student's LEA provides an initial hearing that is subject to appeal to the SEA.[93] After the SEA has reached a conclusion, regardless of the model, either party may appeal the decision to a state or federal district court within ninety days of the decision.[94] During the impartial hearing, the party challenging the school's decision, as a default, bears the burden of proof.[95] It is worth noting that several states have opted out of this

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86. See Perry A. Zirkel & Brent L. Johnson, The "Explosion" in Education Litigation: An Updated Analysis, 265 Educ. L. Rep. 1, 3 (2011) (West) ("The special education cases accounted for more than a third of this new high in federal court decisions in the K–12 context, reinforcing the need for special attention to both policymaking and practice in this school sector.").

87. IDEA explicitly mandates several types of procedures, including those for requesting records and filing complaints regarding placement (among other potential issues). 20 U.S.C. § 1415(b). However, the implementing regulations contain indicia of a presumption that a child is already assigned to an LEA, like the requirement that a parent initiating a due process complaint include the name of the school the child is attending. 34 C.F.R. § 300.508(b).

88. See supra notes 15–16 and accompanying text.

89. For an extensive and excellent guide to the procedural requirements mandated by IDEA and Section 504, see generally Guernsey & Klare, supra note 69, at 171–93.

90. 20 U.S.C. § 1415(b)(1)–(2).

91. Id. § 1415(b)(3)–(7); see also 34 C.F.R. §§ 300.500–.536 (2015).

92. 20 U.S.C. § 1415(b)(6). IDEA imposes a number of requirements that the complaint must meet. Per § 1415(h)(1), individuals issuing complaints have the right to retain counsel or the assistance of other individuals familiar with the impartial hearing process.

93. 34 C.F.R. §§ 300.511, 300.514(b).

94. Id. § 300.516.

95. See Schaffer ex rel. Schaffer v. Weast, 546 U.S. 49, 51 (2005) (holding the party challenging the IEP in an impartial hearing bears the burden of proof). Because IDEA itself is silent on the issue of burdens, Justice Ginsburg dissented in *Schaffer*, arguing that a

default, shifting the burden of proof in IEP hearings to the defending school district.[96] While impartial administrative hearings and judicial proceedings are pending, the student "must remain in his or her current educational placement."[97] However, if the family is challenging LEA treatment of "an application for initial admission to public school, the child . . . must be placed in the public school until the completion of all the proceedings."[98]

A parent or guardian may also opt to bring civil action in either state or federal district court to challenge the results of the appeal to the SEA.[99] In a decision interpreting EAHCA, the Supreme Court clarified that parties seeking to challenge LEA action must exhaust the administrative procedures outlined in EAHCA prior to pursuing litigation in federal court.[100] In this ensuing civil action, the judge may review the record from the hearing and appeal (and any additional evidence offered by the parties) to make a preponderance of the evidence determination of what relief is or is not warranted.[101] The focus of this review, however, is largely procedural, with judges deferring to LEAs on issues of educational policy.[102] *Rowley*, which continues to provide the operative standard for IDEA-based litigation, set forth a two-part test for determining whether the LEA failed to provide FAPE. Courts should ask: "First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to

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court should consider the policy aims of the statute when assigning burdens of proof. Id. at 64–66 (Ginsburg, J., dissenting). *Schaffer* left open the question of whether states may, if they wish, override this default rule by statute or regulation and place the burden of proof on the school district. Some states have done exactly that. See infra note 96 and accompanying text.

96. See N.J. Stat. Ann. § 18A:46-1.1 (West 2013); N.Y. Educ. Law § 4404(1)(c) (McKinney 2016); Conn. Agencies Regs. § 10-76h-14 (2017); see also Elisa Hyman et. al., How IDEA Fails Families Without Means: Causes and Corrections from the Frontlines of Special Education Lawyering, 20 Am. U. J. Gender Soc. Pol'y & L. 107, 144 & n.200 (2011) (noting some states have placed burdens of proof on school districts by statute); Sonja Kerr, *Winkelman*: Pro Se Parents of Children with Disabilities in the Courts (or Not?), 26 Alaska L. Rev. 271, 274 n.22 (2009) (same).

97. 34 C.F.R. § 300.518(a).

98. Id. § 300.518(b).

99. 20 U.S.C. § 1415(i)(2)(A) (2012).

100. Smith v. Robinson, 468 U.S. 992, 1008 (1984). The Court further noted that allowing equal protection claims based on rights secured by EAHCA would contradict Congress's intent to facilitate cooperation between the LEA and the student's family. Id. at 1011–12.

101. 20 U.S.C. § 1415(i)(2)(C); see also Dennis Fan, Note, No IDEA What the Future Holds: The Retrospective Evidence Dilemma, 114 Colum. L. Rev. 1503, 1515–17 (2014) (discussing the procedure for independent judicial review).

102. See Bd. of Educ. v. Rowley, 458 U.S. 176, 206 (1982) ("[T]he provision that a reviewing court base its decision on the 'preponderance of the evidence' is by no means an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review.").

receive educational benefits?"[103] While courts have struggled to develop a coherent answer to the question of whether the substantive value of LEA actions can excuse districts from procedural violations, adhering to the procedures in IDEA will typically prevent districts from incurring liability.[104]

2. *Title II and Section 504.* — Title II of the ADA and Section 504 provide an alternative, complementary source of rights for students and their families.[105] This section considers both statutes together, because both their language and the substantive requirements they impose on educational institutions are similar.[106] In some cases, Section 504 may be an attractive option for parents seeking to bypass the administrative procedures when challenging LEA action, because Section 504 "does not have the extensive administrative procedures that must be exhausted prior to bringing a lawsuit."[107]

Title II of the ADA prohibits entities, including public schools, from excluding individuals with disabilities from "the services, programs, or activities of a public entity."[108] Section 504 similarly prevents entities that receive federal funding from denying individuals with disabilities the opportunity to participate in or access the benefits of a program funded by federal money.[109] The implementing regulation for Title II, however, provides guidance on the scope of the statute when applied to public entities, exempting entities from making modifications that would "fundamentally alter the nature of the service, program, or activity."[110]

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103. Id. at 206–07.

104. See Romberg, supra note 74, at 442 ("*Winkelman* thus confirms that procedural protections in the IEP process are vital to the IDEA but does virtually nothing to clarify the contours of those procedural rights.").

105. See Garda, Rights of Access, supra note 9, at 520 (noting "the unqualified duty to provide a free appropriate public education (FAPE) under Section 504 interacts with ADA's undue burden and fundamental alternation limits on the duty to accommodate disabled students").

106. See, e.g., id. at 524 (considering both statutes together); Heubert, supra note 16, at 322–24 (same).

107. Guernsey & Klare, supra note 69, at 6.

108. 42 U.S.C. § 12132 (2012).

109. 29 U.S.C. § 794 (2012).

110. 28 C.F.R. § 35.130(b)(7) (2015). Compare with 34 C.F.R. § 104.33 (2016), which contains no such limitation on Section 504's requirement that schools provide students with FAPE. But see Garda, Rights of Access, supra note 9, at 525 (discussing uncertainty whether § 104.33 implicitly incorporates a "reasonableness" standard for LEA accommodations from § 140.12). While at first glance the "fundamental alteration" standard would appear to provide a limitation to the demands of the statute, this is not always the case. See, e.g., D.R. v. Antelope Valley Union High Sch. Dist., 746 F. Supp. 2d 1132, 1148 (C.D. Cal. 2010) (finding student's request for access to the elevator did not constitute a "fundamental alteration" of the educational program under ADA). One could imagine a hypothetical in which constructing an elevator at great expense would not constitute a "fundamental alteration" of the curriculum. To counter such a situation, hearing officers and courts have implicitly added an "undue burden" layer to the analysis. Garda, Rights of Access, supra note 9, at 533–37.

This limitation would appear to limit an LEA's ability to provide FAPE outside any particular school (through compensation to attend a private school or de facto segregating all students with disabilities into one school) to circumstances when providing FAPE at a given school would fundamentally alter the school's ability to function.[111]

C. *Placement and the Application of Federal Disability Law to Charter Schools*

The framers of EAHCA and IDEA designed the Act for a time before charter schools were a common means of educating students.[112] IDEA mandates compliance from LEAs, which it defines as "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."[113] The LEA paradigm maps fairly closely to the traditional district "board" model. The traditional district model facilitates compliance with IDEA, because districts that serve a large number of students achieve economies of scale in the provision of services and may be in a better position to offer impartial hearings if the state follows a two-tier approach for adhering to IDEA's procedural requirements.[114] IDEA does not guarantee access to any particular school within the student's LEA, although the implementing regulations express a preference for education close to a child's home.[115] LEAs that contain multiple individual schools may opt to centrally locate services within one school and maintain compliance with FAPE.[116]

To qualify for funding under IDEA, charter schools may join with other charter schools to form one LEA, operate under the umbrella of a traditional district LEA, or compose single-school LEAs, depending on

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111. E.g., 34 C.F.R. § 104.34(a); Garda, Rights of Access, supra note 9, at 539.

112. See Garda, Culture Clash, supra note 16, at 670 (arguing Congress presumed application to the traditional district model); Heubert, supra note 16, at 347 ("The federal definition of an LEA [was] in place before charter schools were conceived . . . ."). Charter schools currently educate roughly 5.1% of the public school student population. Charter School Enrollment, Nat'l Ctr. for Educ. Statistics, http://nces.ed.gov/programs/coe/indicator_cgb.asp [http://perma.cc/66EV-6NVU] (last updated Apr. 2016).

113. 20 U.S.C. § 1401(19)(A) (2012).

114. Garda, Culture Clash, supra note 16, at 670 (stating that EAHCA "presumed the existence of a district with a bureaucracy of sufficient size to handle burdensome procedural requirements and to capitalize on economies of scale for service provision to disabled students"); see also Snell, supra note 16, at 12 (discussing the absence of economies of scale in the charter school context).

115. 34 C.F.R. § 300.116(b)(3). But see White ex rel. White v. Ascension Par. Sch. Bd., 343 F.3d 373, 380 (5th Cir. 2003) (finding placement in a centralized school appropriate because education in a neighborhood school would not be possible).

116. See, e.g., *White*, 343 F.3d at 379 ("'Educational placement', as used in the IDEA, means educational program—not the particular institution where that program is implemented."); Schuldt v. Mankato Indep. Sch., Dist. No. 77, 937 F.2d 1357, 1361–63 (8th Cir. 1991) (finding an LEA was not obligated to construct a wheelchair ramp at the closest school to plaintiff's home as it provided satisfactory placement elsewhere in the district).

their state's charter-authorization statute.[117] An LEA comprising multiple charter schools could, in compliance with IDEA, designate one member in which to house all special education programs,[118] achieving the same economies of scale benefits available to traditional districts.[119] However, for those charters that must operate as independent LEAs in major population centers like New York, New Jersey, and Washington, D.C., this is not an option.[120] Single-school LEAs in these states must guarantee access to a free and appropriate education, but they do not need to provide it themselves—instead, the school could opt to pay for education of the student in a private school.[121]

In sum, Part I of this Note identifies some legal regimes for charter school authorization and identifies the substantive rights created and protected by the federal disability law framework. As section I.B.1 concludes, these rights are defined in a highly procedural manner. Part II will discuss the deficiencies of these procedures in the charter school context, noting that the lack of democratic oversight of charter schools creates an additional barrier for those seeking to address special education issues.

II. INADEQUATE AVENUES FOR SECURING SPECIAL EDUCATION RIGHTS

While IDEA, ADA, and Section 504 create significant procedural and substantive rights for students with disabilities and impose requirements on educational institutions,[122] their application in the charter school context has produced some tension.[123] This Part examines the inadequacies of the procedural view of access rights in the charter school context. Section II.A discusses the persistent charter school compliance issues manifested through underenrollment of students with disabilities and examples of charter school denial of access. Section II.B examines the shortcomings of the proceduralist vision for special education rights in the charter school context and why litigation in federal courts is

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117. See Kristin Yochum, How LEA Status Impacts Public Charter Schools for Special Education Purposes, Nat'l All. for Pub. Charter Sch. (Sept. 12, 2012, 8:00 PM), http://blog.publiccharters.org/2012/09/lea-status-impacts-public-charter-schools-special-education-purposes/ [http://perma.cc/WR23-57WJ] (providing an overview of differences in LEA statuses across states).

118. Cf. *White*, 343 F.3d at 380 (allowing consolidation of services within an LEA).

119. See supra note 114 and accompanying text.

120. Yochum, supra note 117 (showing charter schools in New York, New Jersey, and Washington, D.C., operate as single-school LEAs).

121. See 20 U.S.C. § 1412(a)(10) (2012) (stating LEAs can pay for services for covered students in private schools). It is worth noting, however, that this is not a viable option for most charter schools, particularly if they operate as single-school LEAs. See Garda, Culture Clash, supra note 16, at 695–96 ("Independent charter schools are less likely to have a budgetary cushion for private school placements, litigation, or expensive treatments.").

122. See supra section I.B.

123. See infra section II.A (discussing noncompliance in the charter school context).

wanting as a solution to exclusion of students with disabilities from charter schools. Finally, section II.C discusses the extent to which the dearth of operational accountability amplifies the procedural inadequacies of IDEA.

A. *Charter School Compliance with IDEA and Section 504*

Despite the fact that charter schools must adhere to the requirements of IDEA, several studies have found that students with disabilities are proportionally underrepresented in charter schools.[124] Professor Robert A. Garda Jr. has suggested that this systematic underenrollment is the result of the discordant motivating principles behind special education law and the charter school movement.[125] Professor Garda explains that the motivating principles behind the charter school movement are deregulation and outcome accountability—principles that conflict with the proceduralist view of rights that undergirds the federal special education regime to the detriment of students with disabilities.[126]

The quantitative and anecdotal data are particularly troubling for students with more severe disabilities.[127] The Government Accountability Office report on special education in charter schools notes that representatives from charter schools cite inadequate resources as an explanation for their schools' inability to offer students with severe disabilities "self-contained" classrooms that serve students with especially high needs.[128] With respect to students who are capable of functioning in

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124. E.g., U.S. Gov't Accountability Office, supra note 8, at 7 fig.2 (finding students with disabilities composed 11.1% of the national school-aged population but 8.2% of the charter school population); S. Poverty Law Ctr., Fact Sheet, supra note 8 ("Children with disabilities are significantly underrepresented in many New Orleans charter schools - averaging 7.8 percent of total enrollment. In the RSD, students with disabilities comprise about 12.6 [percent] of the student body.").

125. Garda, Culture Clash, supra note 16, at 679–80.

126. Id. at 660–61.

127. See, e.g., Lauren M. Rhim & Margaret J. McLaughlin, Nat'l Ass'n of State Dirs. of Special Educ., Charter Schools and Special Education: Balancing Disparate Visions 25 (2000), http://files.eric.ed.gov/fulltext/ED444297.pdf [http://perma.cc/3NJW-X7P7] (reporting that of students with disabilities enrolled in charter schools, a disproportionate number are students with mild to moderate disabilities, but acknowledging the possibility that parents of students with severe disabilities may opt out of pursuing charter schools).

128. U.S. Gov't Accountability Office, supra note 8, at 16–17. A self-contained classroom is a separate classroom where special education teachers provide students with moderate or severe disabilities additional support. See Suzie Dalien, Self-Contained Classroom Defined, Special Ed Resource (Nov. 11, 2014, 9:08 PM), http://specialedresource.com/resource-center/self-contained-classroom-defined [http://perma.cc/Y455-H4ZA]. Students in self-contained settings study an individualized curriculum that is less closely aligned with general education standards and aimed at promoting functional life skills. Id.

an inclusion setting,[129] questions persist about the extent to which strict discipline policies (a feature of some charter schools[130]) have the effect of denying FAPE.[131]

Charter advocates argue that the discrepancy in enrollment rates may reflect self-selection by parents of students with disabilities.[132] Some have even contested the extent to which students with disabilities are underrepresented.[133] A number of analyses using data from different cities have found that the difference in enrollment percentage of students with disabilities is possibly attributable to factors like self-selection and voluntary attrition.[134] While the "self-selection" explanation would be reasonable if charter schools had fully developed special education capabilities that parents chose to avoid, it is less persuasive when there is anecdotal evidence of pre-application disclaimers to parents by charter schools, a process known as "counseling out."[135] One

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129. An inclusion setting is one in which a teacher educates both typical students and students with special needs together, sometimes with the help of a special education teacher or paraprofessional. See generally Inclusion, Special Educ. Guide, http://www.specialeducationguide.com/pre-k-12/inclusion/ [http://perma.cc/K97E-434C] (last visited Mar. 26, 2017).

130. See Daniel J. Losen et al., Charter Schools, Civil Rights and School Discipline: A Comprehensive Review 8 (2016), http://civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/federal-reports/charter-schools-civil-rights-and-school-discipline-a-comprehensive-review/losen-et-al-charter-school-discipline-review-2016.pdf [http://perma.cc/NU2S-DWLD] (noting some charter schools "have publicly embraced either a 'no excuses' or the 'broken windows' theory of school discipline").

131. See, e.g., Harris, supra note 21 (reporting on a lawsuit accusing charter schools in New York of denying FAPE through suspension of students with special needs).

132. See, e.g., Marcus A. Winters, Why the Gap? Special Education and New York City Charter Schools 4 (2013), http://www.crpe.org/sites/default/files/CRPE_report_speced_gap-nyc-charters.sept13.pdf [http://perma.cc/L6UJ-DDGR] (concluding a gap exists because students with more severe disabilities are less likely to apply to charter schools).

133. E.g., Marcus A. Winters, The Myth About the Special Education Gap, Educ. Next, Fall 2015, at 35 http://educationnext.org/files/ednext_XV_4_winters.pdf [http://perma.cc/A8AY-PNJT] [hereinafter Winters, The Myth] (attributing enrollment-gap growth, in part, to overdiagnosis of specific learning disabilities in traditional public schools).

134. E.g., Rhim & McLaughlin, supra note 127, at 25–26 ("State informants presume that, in general, students with low incidence disabilities are receiving adequate services in their current public school and are not choosing to enroll in new charter schools."); Winters, The Myth, supra note 133, at 36 (stating the author's studies in Denver and New York City attributed the enrollment gap to self-selection prior to elementary school).

135. See Garda, Culture Clash, supra note 16, at 686; Julie F. Meade, Determining Charter Schools' Responsibilities for Children with Disabilities: A Guide Through the Legal Labyrinth, 11 B.U. Pub. Int. L.J. 167, 173 (2002) ("[W]hen [counseling out is] intended to discourage the enrollment of children with disabilities in order to avoid serving children whose disabilities require accommodation (including special programming), the practice would violate Section 504/ADA as it would result in the categorical exclusion of students on the basis of disability."); Lauren Morando Rhim & Margaret J. McLaughlin, Special Education in American Charter Schools: State Level

example from New Orleans, where the traditional district system is yielding to a system of charter schools, highlights this problem.[136] Kelly Fischer, a parent of a child with autism, blindness, and a developmental delay, met with representatives of eight publicly funded charter schools and found that five claimed they had no programs that could accommodate her son.[137] Only one school intimated that it would have a program that could accommodate Fischer's son.[138] The self-selection explanation is more persuasive when there is actual choice among various special education programs.[139]

A second question raised by the underenrollment phenomenon is whether it is fair to characterize underenrollment as problematic in the first place. Professor Ruth Colker has suggested that IDEA and similar disability-rights legislation rely on a presumption that integrating students with disabilities would reduce the segregation and neglect that typified state-run institutions like Willowbrook; such an assumption blinds policymakers to alternative approaches that may better serve students and people with disabilities.[140] Professor Colker argues that IDEA's presumption of placing children in the least restrictive

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Policy, Practices and Tensions, 31 Cambridge J. Educ. 373, 380 (2001) (discussing the practice of "counseling out").

136. This fact in itself compounds the access problem. Charter school advocates have touted New Orleans as a test city for the effects of an all-charter school model on student education outcomes. See, e.g., Neerav Kingsland, The New Orleans Case for All-Charter School Districts, Educ. Next, Summer 2015, at 57, 59, http://educationnext.org/files/ednext_XV_3_forum.pdf [http://perma.cc/ZQV3-DKLU] ("New Orleans is the first city to build an education system based on [school choice]. As a result, student achievement is on the rise; equity is increasing; and New Orleans citizens strongly back the reform efforts."). If charter schools become the dominant locale of teaching within a district or region, and the underenrollment phenomenon continues, then this would seem to amplify the problem posed for children with special needs, as they would lack an effective fallback in traditional public education if they fail to access charter schools.

137. S. Poverty Law Ctr., Access Denied: New Orleans Students and Parents Identify Barriers to Public Education 12 http://www.splcenter.org/sites/default/files/d6_legacy_files/downloads/publication/SPLC_report_Access_Denied.pdf [http://perma.cc/F8TQ-J4X8] (last visited Feb. 2, 2017) [hereinafter S. Poverty Law Ctr., Access Denied]; Kari Harden, N.O. Struggles to Provide Adequate Education for Special-Needs Students, La. Wkly. (Dec. 13, 2013), http://www.louisianaweekly.com/n-o-struggles-to-provide-adequate-education-for-special-needs-students/ [http://perma.cc/8ZT3-PRZP]; see also Eden B. Heilman, Stranger than Fiction: The Experiences of Students with Disabilities in the Post-Katrina New Orleans School System, 59 Loy. L. Rev. 355, 362–67 (2013) (discussing how the 100% charter model in New Orleans places the onus on parents to apply to attend certain schools and providing examples of how charter schools in New Orleans have excluded would-be applicants).

138. S. Poverty Law Ctr., Access Denied, supra note 137, at 12–13.

139. Somewhat analogously, the argument that interest follows opportunity has been made in the Title IX context. See, e.g., Sally Jenkins, Not for Lack of Interest, Wash. Post (Apr. 2, 2005), http://www.washingtonpost.com/wp-dyn/articles/A19944-2005Apr1.html (on file with the *Columbia Law Review*).

140. Ruth Colker, The Disability Integration Presumption: Thirty Years Later, 154 U. Pa. L. Rev. 789, 794 (2006).

environment can disadvantage students who would benefit from education in a more restrictive setting by leading schools to reduce the availability of restrictive settings, like self-contained classrooms.[141] Professor Colker makes a fair point: Integration of students with disabilities for the sake of integration, without more, is unsatisfying as a means to promote educational achievement.[142] Nevertheless, excluding students with disabilities from charter schools may contradict a guiding purpose of forming charter schools in the first place: promoting academic achievement for low-achieving populations.[143] State legislatures began experimenting with charter schools to close the achievement gap and improve educational outcomes.[144] Moreover, this argument would neglect the ancillary benefits that may accrue to students and teachers at the charter schools beyond the realm of special education.[145]

Finally, if charter schools can deliver significant educational gains for their students,[146] students with special needs should be able to access that improvement in order to realize the underlying aims of IDEA. Charter school proponents tout numerous educational and social benefits that can redound to their students, including enhanced opportunity to access postsecondary education, better educational outcomes, and greater accountability for student results.[147] However, claiming to offer these advantages to improve the opportunity available to all students while proportionally underenrolling students with disabilities is hypocritical. Charter advocates have countered that charter schools' existence has disrupted the market for education in a manner that improves the educational opportunity for all students—even those who do not attend charter schools—by forcing traditional schools to compete and ostensibly improve in the market for education.[148] While this may be true for typical students, it does not provide a satisfactory answer for students with special needs, or at least significant special needs, if the

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141. Id. at 796.

142. Id. at 855–56.

143. See supra notes 30–42 and accompanying text.

144. See supra notes 28–34 and accompanying text.

145. Cf. Elizabeth F. Emens, Integrating Accommodation, 156 U. Pa. L. Rev. 839, 843 (2008) (arguing, outside of the education context, that adherence to ADA produces third-party benefits that should induce compliance).

146. One national study found that charter schools, on average, delivered better math learning gains for students with special needs than did traditional public schools. See CREDO, Charter School Study, supra note 7, at 17, 41.

147. See supra notes 4, 7 and accompanying text.

148. Marcus A. Winters, Manhattan Inst. for Policy Research, Everyone Wins: How Charter Schools Benefit All New York City Public School Students 8 (2009), http://www.manhattan-institute.org/pdf/cr_60.pdf [http://perma.cc/87JV-PWFU] ("I find some evidence that increases in the competition that a traditional . . . public school faces from charter schools . . . leads to an increase in the [English Language Arts] proficiency of students who remain in public schools. Competition from charter schools also benefits students with very low prior math proficiency.").

districts remain the only destination for special education students. The argument that parent choice can effectively supplant traditional governance mechanisms is wholly moot if there is no choice for parents to start.[149]

While many have written on ways to better induce charter schools and state legislatures to correct the underenrollment phenomenon as a general matter,[150] such a discussion is largely beyond the focus of this Note. Instead, this Note concentrates on the problems with extant avenues for parents to challenge exclusion from charter schooling—IDEA-based procedures, traditional litigation, and the marketplace for education. Section II.B discusses how the procedural avenues and litigation available to parents do not provide fully satisfying outcomes in the charter school context, and section II.C argues that the lack of operational accountability mechanisms in charter schools can amplify this problem for parents.

B. *Procedural Protections for Access and the Charter Model*

As previously discussed, one of the core intuitions behind the federal special education regime is that providing for procedures and processes that force parties with different interests to collaborate to develop an IEP results in substantively positive outcomes for students.[151] IDEA came into existence against the backdrop of the "procedural revolution," during which lawmakers experimented with granting

149. One could imagine that the exclusion of students with disabilities from charter schools coupled with the argument that charter schools exert competitive pressure on traditional schools, see id. at 8, could have negative consequences for students in traditional public schools. If students with severe disabilities have no option to attend charter schools, traditional districts attempting to compete with charter schools might divert resources or attention from serving the high-needs students they have no risk of losing toward general education students who can take advantage of the market for education.

150. See generally Garda, Culture Clash, supra note 16, at 693–717 (proposing statutory changes to better enable charter schools to adhere to special education statutes); Gleason, supra note 17, at 166–69 (discussing lessons from the District of Columbia experience); Joshua Gillerman, Note, Building Capacity: Building on the Special Education Quality Improvement Amendment Act of 2014 by Developing a Framework for a Baseline Offering of a Continuum of Special Education Services in D.C. Public Charter Schools, 23 Geo. J. on Poverty L. & Pol'y 107, 127–31 (2015) (proposing capacity and continuum-of-service mandates for District of Columbia public schools).

151. See David Neal & David L. Kirp, The Allure of Legalization Reconsidered: The Case of Special Education, 48 Law & Contemp. Probs. 63, 65 (1985) (discussing legalization and the legal procedures created by EAHCA); Romberg, supra note 74, at 444–46 (discussing intellectual trends in procedural due process at the time of EAHCA's enactment); supra note 69 and accompanying text (discussing the rationale in *Rowley*); see also Owen M. Fiss, Reason in All Its Splendor, 56 Brook. L. Rev. 789, 789 (1990) (highlighting the expansion of due process rights from the criminal to the civil context during the 1960s).

substantive rights by protecting them with procedures.[152] The multilevel procedures for dispute resolution—including the impartial hearing, SEA appeal, and provision for civil actions—reflect this notion.[153] The processes provided in IDEA presume that a student is within an LEA's "jurisdiction"[154] and are designed primarily to determine whether the LEA has provided FAPE through the IEP, assuming the student is on the rolls.[155] The logic that procedural protections tend to guarantee substantively fair outcomes breaks down when there is uncertainty as to what procedural protections should apply. This section considers first the issues raised by IDEA-created procedures in their application to charter schools and second the litigation costs to students with IEPs and their families.

1. *IDEA-Created Procedures and Charter Schools.* — IDEA emphasizes two general types of procedures to which LEAs and SEAs must conform. First, the Act imposes a number of requirements that govern the process by which parents and LEA officials create an IEP and agree on placement.[156] Second, IDEA mandates that SEAs create extensive procedures, which somewhat imitate litigation, for administrative dispute resolution.[157] Professors David Neal and David L. Kirp label the Act's focus on procedure as "legalization."[158] As a general matter, scholars have debated the relative merits and demerits of the "legalization" phenomenon.[159] Justifications for the heavy procedural nature of IDEA

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152. See Romberg, supra note 74, at 444 (discussing the due process bent in lawmaking as the backdrop for EAHCA enactment).

153. See supra notes 92–98 and accompanying text.

154. 20 U.S.C. § 1413(a)(1) (2012); see also Garda, Rights of Access, supra note 9, at 527–28 (noting that while IDEA mandates the existence of IEPs for each student within an LEA jurisdiction, it does allow for the provision of services elsewhere).

155. 20 U.S.C. § 1415(a) (requiring agencies receiving funding to "establish and maintain procedures in accordance with this section to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of a free appropriate public education by such agencies"). Given the context that IDEA's predecessor was written prior to the invention of charter schools in 1991, the language appears to presume districts would have jurisdiction over students within their boundaries.

156. See, e.g., 20 U.S.C. § 1415(b)(1)–(5) (requiring the creation of SEA procedures to ensure access to information relating to child performance, written notice, and parent inclusion in meetings to update the IEP, change evaluations, and provide for mediation).

157. See supra notes 80–88 and accompanying text (detailing procedures mandated by IDEA and discussing presumptions in favor of educational institutions).

158. Neal & Kirp, supra note 151, at 64. In contrast to the professionalism model for the creation and provision of government services, which recipients consume passively, the legalization model "focus[es] on the individual as the bearer of rights" and leverages "legal techniques such as written agreements and court-like procedures to enforce and protect rights." Id. at 65.

159. See generally Martin A. Kotler, The Individuals with Disabilities Education Act: A Parent's Perspective and Proposal for Change, 27 U. Mich. J.L. Reform 331 (1994) (discussing challenges for parents in using procedures to vindicate special education rights); Romberg, supra note 74, at 416–17 & n.8 (summarizing scholarly debate over

include invocations of federalism,[160] judicial competence,[161] and deference to decisions of professional educators.[162] Others have criticized the ability of the procedures created by IDEA to deliver desirable outcomes for students, with some concern as to their impact on low-income parents or those who do not possess the legal sophistication necessary to navigate the procedural landscape.[163] This concern is particularly salient in the charter school context, given the emphasis placed on serving high-needs communities in charter authorization statutes.[164]

While the balance of costs and benefits to the "legalization" of special education law may ultimately be positive,[165] there are special challenges for individuals posed by its application in the charter setting—namely, that many of the procedures confer favorable presumptions on the educational institutions. First, while the principle that every child is entitled to FAPE would seem to imply that exclusion from an LEA is unlawful,[166] schools may reject students with disabilities as long as the schools can ensure an alternative location for the provision of FAPE.[167] Within an LEA that encompasses multiple schools, like a traditional school district, courts have granted broad discretion to cluster students with disabilities at selected schools to ensure the achievement of

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legalization). Even Professors Neal and Kirp caution that "legalization may degenerate into legalism: a mechanical approach in which law and procedures become ends in themselves and substantive goals are lost in mechanical adherence to form." Neal & Kirp, supra note 151, at 66.

160. E.g., Neal & Kirp, supra note 151, at 72 (discussing the IEP as a legalization device that "provides a means of holding local administrators accountable while paying some deference to the belief that the federal government should not interfere too much with local autonomy in education").

161. Cf. Bd. of Educ. v. Rowley, 458 U.S. 176, 206 (1982) ("[T]he provision that a reviewing court base its decision on the 'preponderance of the evidence' is by no means an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review.").

162. See id. at 207 ("The primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational method most suitable to the child's needs, was left by the Act to state and local educational agencies in cooperation with the parents or guardian of the child."); Romberg, supra note 74, at 425 ("Through the IDEA, the federal government constrains how the district's decision about special education is made, not what decision is made—the process, not the substance.").

163. See Kotler, supra note 159, at 361–66 (discussing the balance of parent–educator power in utilizing IDEA procedures).

164. See supra notes 48–49 and accompanying text.

165. See Neal & Kirp, supra note 151, at 86 (noting legalization is complex and often inadequate but conceding its staying power as a model); Romberg, supra note 74, at 442–56 (praising legalization and offering a theory of structural due process). But see Kotler, supra note 159, at 341 ("The formalistic procedures to protect parental rights have not served to level the playing fields between parents and educators."). This Note does not ultimately pass judgment on the merits and demerits of the processes in general, other than to identify when accountability shortfalls can exacerbate challenges for parents in the charter school context. See infra section II.C.

166. See supra note 68 and accompanying text (discussing the "zero-reject" principle).

167. See Garda, Rights of Access, supra note 9, at 52.

economies of scale.[168] Even single-school LEAs, however, can reject students as long as they can afford to provide compensation for a private education[169] or ensure placement at other schools[170] or a state institution.[171] As Professor Garda has argued, the apparent legality of shutting school doors to students with disabilities (with the limitation that an LEA must in some way provide for placement) does contravene the intent behind IDEA.[172] Shifting students away from public schools would violate the antisegregation aspiration of the Act. Moreover, there may be secondary benefits to students in classrooms exposed to a greater diversity of learning styles and teaching methods.[173] The practical result of this leeway granted to educational institutions is that the procedures contemplated by IDEA do not ensure access to public charter schools.[174] The practice of "counseling out"[175] would further insulate charter schools from responsibility for the IDEA procedures that provide rights-

168. See, e.g., White ex rel. White v. Ascension Par. Sch. Bd., 343 F.3d 373, 381 (5th Cir. 2003) ("[F]or provision of services to an IDEA student, a school system may designate a school other than a neighborhood school."); Garda, Culture Clash, supra note 16, at 670 ("LEAs rather than individual schools [are] primarily responsible for providing education for all disabled students."); Garda, Rights of Access, supra note 9, at 521 (noting districts may "concentrate resources for particular disabilities at a limited number of regional schools and 'cluster' students with the same disabilities at those schools instead of creating programs at each neighborhood school"); cf. Snell, supra note 16, at 19 ("An emerging strategy for charter schools is the pooling of resources to achieve economies of scale in collective purchasing power.").

169. 20 U.S.C. § 1412(a)(10)(B) (2012) ("Children with disabilities in private schools and facilities are provided special education and related services . . . at no cost . . . if such children are placed in, or referred to, such schools or facilities by the State or appropriate local educational agency . . . .").

170. See Garda, Rights of Access, supra note 9, at 522 (stating that the practice of placing students at schools outside the LEA "is not questioned by courts").

171. 20 U.S.C. § 1413(g)–(j) (providing for "[d]irect services by the State educational agency").

172. Garda, Rights of Access, supra note 9, at 523 ("While this may not violate the letter of IDEA, it certainly violates the spirit of the law to grant disabled students access to public schools that had previously excluded them."); see also supra notes 13–14 and accompanying text (discussing purposes behind the enactment of federal special education statutes). See generally Kotler, supra note 159, at 343–60 (discussing the history of exclusion of students with disabilities prior to the enactment of IDEA).

173. E.g., Charles A. Peck, Patricia Carlson & Edwin Helmstetter, Parent and Teacher Perceptions of Outcomes for Typically Developing Children Enrolled in Integrated Early Childhood Programs: A Statewide Survey, 16 J. Early Intervention 53, 53, 59 (1992) (finding that parents of students without disabilities perceived benefits to their children's development as a result of placement in programs with students with special needs).

174. This is most troubling when charter schools are the only viable option for satisfactory public education, as is the case in places like New Orleans. See Heilman, supra note 137, at 359–60 (describing the "wholly decentralized system" of schools in New Orleans). However, excluding some students would seem to contravene stated goals of enhancing educational opportunity for all students, and this should raise concerns internal to the charter movement. See supra note 34 and accompanying text.

175. See supra notes 135–136 and accompanying text (discussing "counseling out" and its role in the underenrollment phenomenon).

vindication avenues only for students who are already subject to an LEA's jurisdiction.[176]

While the letter and procedures of IDEA may alone be unsatisfying for parents and guardians, ADA and Section 504 provide some legal recourse to challenge exclusion from school on the basis of a disability.[177] However, litigation carries its own significant disadvantages in the education context, as is discussed in the next section.

2. *Challenges in Education Litigation.* — Parents and guardians seeking to challenge the results of an impartial hearing and SEA appeal do have the option of filing a civil action to review the determination in federal or state court.[178] However, the text of IDEA grants LEAs broad discretion to decline to place students within their LEA if they can secure an alternative that also provides FAPE.[179] Therefore, litigation brought to ensure access to charter schools must also leverage the standards found in Section 504 and ADA.[180]

In addition to the difficult burden that parents must satisfy in order to win at the litigation stage, there are a number of other costs, inherent to litigation, that make courts an unsatisfying venue for school-access dispute resolution. First, even successful litigation requires a substantial investment of time. In one example, a class of plaintiffs in New Orleans, who had been denied admission to or counseled out of charter schools on the basis of disability, filed a complaint in 2010;[181] it took four years to

176. See Heubert, supra note 16, at 318–19 (listing IDEA requirements and observing that compliance with IDEA would "significantly affect the pedagogy, classroom organization, curriculum, staffing, staff time, and resource allocation of every public charter school no less than it does those of traditional public schools").

177. See supra section I.B.2; infra section II.B.2 .

178. 20 U.S.C. § 1415 (2012) (outlining the "procedural safeguards" guaranteed to children with disabilities and their parents regarding receiving FAPE); see also supra notes 99–104 and accompanying text (describing post-impartial-hearing civil actions).

179. See supra section I.A.1 (observing that the letter of the law permits schools to reject students with disabilities as long as they can ensure an alternative location for the provision of FAPE).

180. See supra section I.B.2. ADA and Section 504 can serve as bases for litigation without exhaustion of time-consuming administrative procedures. Guernsey & Klare, supra note 69, at 6. For an extensive discussion of how the ADA and Section 504 can be used to compel the creation of services, see generally Garda, Rights of Access, supra note 9, at 529–42 ("Services that do not fundamentally alter the program must be provided on-site while only services that fundamentally alter the school can be provided off-site."). While the questions of right of access to charter schools are "far from settled," id. at 542, it is clear that any assertion of special education rights using ADA or Section 504 will require utilization of the court system.

181. Complaint, P.B. ex rel. Berry v. Pastorek, No. 2:10-cv-04049 (E.D. La. Mar. 24, 2015), http://www.splcenter.org/sites/default/files/d6_legacy_files/downloads/case/pb_v_pastorek.pdf [http://perma.cc/X8BK-FY27].

negotiate a consent decree.[182] The consent decree, for its part, provided for a written grievance procedure for students with disabilities and assessment of disciplinary policies to ensure compliance with federal law,[183] but its delay is concerning. While complaints about the timeliness and cost of litigation are well known,[184] they have particular resonance in the special education space, in which students are entitled to receive services for only a finite amount of time.[185]

Second, three issues with available remedies limit the effectiveness of litigation as a solution to the access problem. First, except for public litigation[186] and class actions,[187] private civil actions produce remedies that are individual to the plaintiffs in an action.[188] Successful litigation can solve the access problem for one individual (after months or years of litigation), but it would not dent the broader access problem for other students with disabilities. Second, public institution litigation itself may be ill-suited to the special education issue, particularly due to the murky

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182. Proposed Settlement, *P.B. ex rel. Berry*, No. 2:10-cv-04049, http://www.louisianabelieves.com/docs/default-source/newsroom/1-8-15---pb-v-white---settlement-agreement.pdf [http://perma.cc/9B6R-U42C].

183. Consent Decree at 13, *P.B. ex rel. Berry*, No. 2:10-cv-04049, http://www.splcenter.org/sites/default/files/d6_legacy_files/downloads/case/pb_order.pdf [http://perma.cc/Z4AB-SVC6].

184. See generally Brookings Inst., Justice for All: Reducing Costs and Delay in Civil Litigation 1 (1989); Carrie E. Johnson, Rocket Dockets: Reducing Delay in Federal Civil Litigation, 85 Calif. L. Rev. 225, 231 (1997) ("Delay might also compromise justice by eliminating the option of judicial adjudication altogether. When parties are unable to obtain timely relief, the expense of continuing to litigate may force them to accept inequitable settlements . . . ."); Emery G. Lee III & Thomas E. Willging, Defining the Problem of Cost in Federal Civil Litigation, 60 Duke L.J. 765, 773 (2010) (discussing cost of discovery relative to the stakes of federal civil litigation).

185. Students who are eligible for special education services are covered by IDEA while between the ages of three and twenty-one. 20 U.S.C. § 1412(a)(1)(A) (2012). Therefore, litigation elapsing over the course of three to five years could yield uncertainty about children's educational placement for a substantial percentage of their educational careers. In the special education space, losses in educational time can be particularly difficult to recoup, especially with students who have intellectual disabilities.

186. Public law litigation is an alternative litigation model in which parties seek "the vindication of constitutional or statutory policies" instead of dispute resolution "between private parties about private rights." Abram Chayes, The Role of the Judge in Public Law Litigation, 89 Harv. L. Rev. 1281, 1284 (1976); see also Charles F. Sabel & William H. Simon, Destabilization Rights: How Public Law Litigation Succeeds, 117 Harv. L. Rev. 1016, 1022 (2004) (identifying "three successive waves" of public law litigation in the education context: desegregation, school finance equity, and "adequacy"). The model was used to compel prison reform and enforce desegregation of American education. Id. However, it has less purchase in statutory schemes.

187. The complaint from *P.B. ex rel. Berry* is just one example of a class action seeking certification pursuant to Federal Rule of Civil Procedure 23. See infra note 190 and accompanying text (discussing deficiencies with class action litigation generally); see also supra note 181 and accompanying text (describing the *P.B. ex rel. Berry* case).

188. See Chayes, supra note 186, at 1282–83 (describing traditional features of private litigation).

questions of resource allocation that seem to undergird these disputes.[189] Finally, recent limitations on class actions may also limit their effectiveness in the special education access context.[190]

In most special education cases, courts finding a violation of IDEA will issue declaratory or injunctive relief to compel provision of FAPE.[191] Even if courts were to compel charter schools to provide a more complete range of services for students with disabilities, such injunctions would likely carry additional monitoring costs of their own.[192] Moreover, in the special education context, would-be litigants must face the practical reality that the defendant is an entity with whom the plaintiff would ultimately hope to build a strong working relationship.

C. *The Absence of Operational Accountability and Oversight Amplifies Procedural Failings*

It is true that a number of the costs associated with litigation exist to an equal degree in the public charter school and private litigation settings. Charter schools trade traditional oversight mechanisms for increased outcome accountability to secure renewal of the charter[193] and the additional burden of competing in a marketplace for education.[194] However, the absence of direct accountability avenues—like a publicly elected school board—amplifies the problems with the procedures through which students with disabilities can vindicate their rights because such procedures become the *only* formal mechanism to resolve

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189. See supra note 186 and accompanying text.

190. Federal Rule of Civil Procedure 23 mandates certain prerequisites for class certification, including:

> (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). In the wake of the Supreme Court's decision in Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011), satisfying Rule 23(a)(2) will likely be substantially more difficult. See Robert H. Klonoff, The Decline of Class Actions, 90 Wash. U. L. Rev. 729, 773–74 (2013) (noting that prior to *Wal-Mart*, commonality was rarely an impediment to class certification). Such a discussion is beyond the scope of this Note.

191. See, e.g., Guernsey & Klare, supra note 69, at 227 (noting the most common remedy sought in such cases is injunctive or declaratory relief).

192. See, e.g., Chayes, supra note 186, at 1292 (identifying consequences of an ongoing injunction); Owen M. Fiss, Foreword: The Forms of Justice, 93 Harv. L. Rev. 1, 46 (1979) (discussing limitations of structural injunctions).

193. See supra notes 4–6 and accompanying text.

194. See supra notes 42, 54, 146 and accompanying text (discussing charter schools' role in the education marketplace); supra section II.A (arguing the education market's ability to deliver higher-quality outcomes for students breaks down without the ability of students and parents to take advantage of meaningful choice). Professors Curt Dudley-Marling and Diana Baker argue that these market-based reforms themselves are problematic for students with disabilities. Dudley-Marling & Baker, supra note 37.

disputes with the LEA.[195] Moreover, oversight from community members can reduce the incidence of bad behavior by school officials.[196]

Some states have addressed the special accountability challenges created by charter schools by enacting statutes that compel charter schools to grant access to school records or create procedures for receiving complaints.[197] With respect to special education accountability, several states have attempted to address the underenrollment phenomenon by mandating quotas of students with disabilities that charter schools must meet or exceed.[198] In New York, for example, the charter authorization statute mandates that charter schools provide the percentage of students with disabilities in their annual reports to the authorization agencies.[199] However, evidence is mixed about the extent to which state authorization institutions have revoked charters generally,[200] let alone as a means to enforce enrollment quotas. Potential additional regulations, without addressing the inaccessibility of charter school administrators, are not sufficient to soften the problems with the special education procedures discussed above.

The issue of democratic accountability of charter schools has been the subject of recent state constitutional litigation. In 2015, the Supreme Court of Washington held that charter schools violated that state's constitution in *League of Women Voters of Washington v. State*.[201] Relying on an opinion from 1909, the court concluded that charter schools were not "common schools" authorized to receive state funds under the Washington Constitution because they lacked democratic

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195. See supra section I.A (discussing insulation of charter school governance from democratic oversight). While there is considerable diversity in charter authorization statutes, and some states do allow for public participation in school oversight in the form of parent board members or open meetings, the majority of states insulate charter schools from public participation. See Ctr. for Educ. Reform, supra note 44 (assessing the "operational autonomy" of charter schools in each state). The closing of avenues by which parents interact with school officials is of special concern in the special education setting. In the special education context, "[t]he policy of the IDEA is to provide families a right to be heard on matters concerning their children" because "parental participation is a normative good in its own right." Romberg, supra note 74, at 452.

196. Annenberg Inst. for Sch. Reform, supra note 23, at 5 ("Parent and student representation helps ensure input and oversight from those directly involved with the school on a day-to-day basis and helps guard against unethical or illegal behavior.").

197. For example, in Pennsylvania, charter schools are bound by the state's "Right-to-Know" transparency laws. See id. (discussing noncompliance with records requests laws in Pennsylvania).

198. See Garda, Culture Clash, supra note 16, at 684–85 (discussing examples of special education quotas but noting that a particular mandate in New Orleans "has done little to curb the underrepresentation of disabled students").

199. N.Y. Educ. Law § 2857(2)(d) (McKinney 2016).

200. See, e.g., Osborne, supra note 23, at 3 (finding that charter revocation is rare and that underperforming schools face little threat of revocation).

201. 355 P.3d 1131 (Wash. 2015).

accountability.[202] This decision could have significant impacts in other states that have constitutional provisions that limit the provision of educational funds to public, free, or common schools.[203]

The democratic-accountability debate provides a valuable entry point for those seeking to address the persistent underenrollment of children with disabilities in charter schools and the dearth of meaningful procedural avenues to secure access to charter schools. Part III offers concrete suggestions for charter school authorizers to enhance public accountability and, in so doing, promote alternative avenues for parents and guardians of children with special needs to assert their rights.

III. ENHANCING CHARTER SCHOOL ACCOUNTABILITY MECHANISMS

A number of reforms to the ways that charter schools are accountable to the public could both preempt accountability-based state constitutional litigation and create avenues through which students with special needs and their parents or guardians could vindicate federally guaranteed rights. First, section III.A identifies methods for enhancing public access to charter school boards. Second, section III.B articulates proposals to improve the ability of charter school authorization agencies to remove charters from noncompliant schools.

A. *Enhance Public Access to Charter Board Governance*

The largest challenge for dramatically altering public access to charter school governance is striking a balance that preserves the independent character of public charter schools.[204] However, several fixes could promote increased public participation and transparency in the special education context without removing charters' ability to operate independently. Each solution attempts to navigate this tension of

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202. Id. at 1137. On January 4, 2016, two state senators in Washington introduced legislation to work around *League of Women Voters* by making charter school operators accountable to democratically elected school boards in preexisting traditional districts. An Act Relating to Charter Schools, S. 6163, 64th Leg., Reg. Sess. (Wash. 2016); see also John Higgins, Lawmakers Float Proposal to Keep Charter Schools, Seattle Times (Jan. 4, 2016), http://www.seattletimes.com/seattle-news/education/lawmakers-to-propose-way-to-keep-charter-schools-in-state/ (on file with the *Columbia Law Review*) (reporting on the attempt to reverse *League of Women Voters* by statute).

203. See Preston C. Green III, Bruce D. Baker & Joseph O. Oluwole, Having It Both Ways: How Charter Schools Try to Obtain Funding of Public Schools and the Autonomy of Private Schools, 63 Emory L.J. 303, 305–06 (2013) (discussing state constitutional limitations on allocation of public funds to privately managed schools). Litigation challenging the constitutionality of charter schools has been unsuccessful in Michigan and California. See Wilson v. State Bd. of Educ., 89 Cal. Rptr. 2d 745, 753 (Cal. Ct. App. 1999); Council of Orgs. & Others for Educ. About Parochiaid v. Engler, 566 N.W.2d 208, 222 (Mich. 1997).

204. See supra notes 4–8, 46–47 and accompanying text (noting one defining characteristic of charter schools is independence from traditional oversight mechanisms and some regulations).

attempting to capture the benefits of public accountability while balancing the costs that regulation or too much oversight could impose on the charter school model.

1. *Create Special Education Ombudspersons for Charter Schools.*[205] — The function of this office would be primarily to review placement decisions and allegations of "counseling out" and address claims that would not qualify for consideration under the IDEA-created procedures.[206] State statutes could create several ombudspersons' offices to exist independent of LEAs but with responsibilities to monitor schools across multiple LEAs to ensure compliance, thereby achieving economies of scale.[207] Allowing ombudspersons to take legal action on behalf of parents could function to solve the problems caused by "legalization" for legally unsophisticated parties[208] and provide a powerful disincentive to manipulation. Moreover, a special education ombudsperson could centralize records-keeping of complaints made about specific charter schools that could be relevant in reauthorization and revocation decisions.[209]

2. *Provide for a Democratically Elected, Parent Charter Board Representative.* — While parent involvement in charter schools will necessarily vary by LEA, only ten states require that all charter schools reserve board seats for parents.[210] Ensuring parent representation on charter school boards would provide support for the argument that parents support charter schools[211] and provide an additional avenue by which parents of children with special needs can affect governance decisions. This accountability avenue could operate in two ways: First, it would allow a parent who is dissatisfied with a school to run for a board position to directly affect school policies. If elected by the community, the new representative would gain the ability to oversee school decisionmaking. Second, election of parent representatives to charter

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205. Annenberg Inst. for Sch. Reform, supra note 23, at 8 (proposing school districts create an ombudsperson "to whom parents can challenge or appeal enrollment, classification . . . or withdrawal decisions by the charter school").

206. For parents of children who have already achieved access to public charter schools, the IEP and impartial hearing and appeal processes allow for both informal and formal avenues with which to secure rights related to the provision of FAPE. See supra notes 152–154 and accompanying text (discussing the apparent presumption of enrollment undergirding IDEA procedures).

207. See supra notes 114, 118–119 and accompanying text (noting charter schools may not benefit from economies of scale in the provision of special education services).

208. See Hyman et al., supra note 96, at 111 ("The obstacles that families without resources face in the IDEA are compounded by the increasingly technical nature of the IDEA and the inability . . . to retain professionals to assist in navigating the intricacies of disability definitions, evaluation processes, the development of IEPs, the complex of procedural safeguards, among other provisions . . . .").

209. See supra notes 50–54 and accompanying text.

210. Annenberg Inst. for Sch. Reform, supra note 23, at 5.

211. See Nat'l All. for Pub. Charter Sch., supra note 6 (discussing rationales for charter schools).

school boards would also bring a small measure of traditional democratic accountability to the charter school model by forcing the parent board representative to address the concerns of her constituency.

The strength of this solution is that it provides a less formal means for parents concerned about special education to bypass the burdensome procedural constraints of the IEP process and impartial hearing proceedings, which can cause difficulty for parents.[212] It also provides an opportunity for parents to affect school policy more generally. Reserving only one seat for a democratically elected parent representative would protect the independence of charter school boards, safeguarding the special innovation capabilities that are a core argument in support of charter schools.[213] This solution has more utility in addressing the problem of "disciplining out"[214] students with special needs (who are already at the school) than it does in addressing the "counseling out" phenomenon[215] and access problem, because ostensibly only the families of students would have the privilege of voting in this particular election. Therefore, a method for maintaining accountability to the larger community that exists beyond each individual school is necessary to help parents and students exercise access rights.

3. *Mandate Periodic Public Charter School Board Meetings.* — Ensuring that charter school governing bodies conduct regular public meetings could serve as a means to promote accountability to the community without compromising the essential independence of the school boards.[216] Such meetings do not necessarily need to be required as frequently as in the traditional district setting, so as to keep charter schools relatively independent and free to innovate.[217] However, even quarterly public meetings would allow community members to take concerns to charter boards directly without bypassing formal procedures. Publicly accessible board meetings could provide an important avenue for parents who have been unable to secure placement for a child in the charter school to advocate for their children in a less formal way.

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212. See supra section I.B.1 (describing IDEA-mandated procedures). See generally Kotler, supra note 159 (providing a helpful overview of IDEA procedures).

213. See Heubert, supra note 16, at 307 (summarizing the innovation rationale).

214. See supra notes 21, 131 and accompanying text.

215. See supra note 135 and accompanying text.

216. See, e.g., Benjamin Herold, Mayor's Education Office Seeks to Lift the Veil on Philly Charter Board Meetings, thenotebook (Apr. 4, 2013, 4:49 PM), http://thenotebook.org/articles/2013/04/04/mayor-s-education-office-seeks-to-lift-the-veil-on-philly-charter-board-meetings [http://perma.cc/JGG8-MKER] (describing a plan to open charter school board meetings to the public without compromising essential independence from certain regulations).

217. See supra note 43 and accompanying text (describing independence as a factor in facilitating charter school innovation and success, according to charter school advocates). This recognizes that the market for education—while imperfect in the special education setting—does provide an accountability lever that does not exist for traditional districts. See supra notes 16, 54 and accompanying text.

Arguments that are frivolous could be ignored at very little cost to the board members, and parents would not need to invest in an attorney, a time-consuming IDEA dispute-resolution process, or appeal litigation to make their voices heard.

B. *Strengthen Oversight by Authorizing Institutions*

In addition to implementing measures to improve public access to charter school governance, states should consider measures to enhance oversight. The essential charter school rationale is the trade of removing oversight burdens on day-to-day activities and intensifying accountability for student outcomes. The following measures aim to strengthen the outcome accountability rationale as it applies to special education.[218]

1. *Provide State Funding for Authorizers to Better Supervise Charter Governance and Special Education Provision.* — Some oversight by the charter school authorizer is necessary to ensure compliance with broad state mandates for charter school outcomes[219] or special education enrollment percentages.[220] However, some charter authorizers have reported inadequate funding and support necessary to conduct their supervisory duties.[221] Increasing funding should allow for a more effective oversight regime in general,[222] with possible secondary benefits from special education oversight. While increasing funding alone will not solve the accountability issue entirely, it would be a vital piece in enabling charter school authorizers to fulfill their special education oversight role.[223]

2. *Enhance Special Education Reporting Requirements.* — While special education enrollment reporting is already in place in New York,[224]

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218. See supra note 42 and accompanying text (introducing the concept of accountability trade-off).

219. See supra notes 53–57.

220. See supra notes 198–199 and accompanying text.

221. See Nat'l Ass'n of Charter Sch. Authorizers, The State of Charter School Authorizing 6–8 (2013), http://www.qualitycharters.org/wp-content/uploads/2015/08/NACSA_2013-SOCA.pdf [http://perma.cc/V899-L462] ("[T]here continue to be wide disparities in the level of staffing and financial resources available to authorizers."); Osborne, supra note 23, at 16–17 (discussing reports of inadequate funding for charter school authorizers).

222. See Osborne, supra note 23, at 22–23 (discussing optimal funding and staffing levels for charter school authorizers to promote effective oversight).

223. The Center for Education Reform has argued for relying on independent charter school authorizers instead of departments of education or school districts. See Consoletti, supra note 54, at 15 ("Independent authorizers are better able to hold charter schools accountable because . . . they have their own staff, management team, and funding streams."). Shifting to independent authorizers could solve the resource and capacity problems identified above. However, isolating the authorizer from public accountability could even further remove charter schools from public accountability, unless such a move takes steps to promote public access to the independent authorizer.

224. See N.Y. Educ. Law § 2857(2)(d) (McKinney 2016).

creating additional reporting requirements could induce better compliance with enrollment mandates while reducing charters' ability to circumvent those mandates by cherry-picking only lower-needs students. Potential areas for reporting could include a breakdown of the types of disabilities served and a plan for how to reconcile charter school discipline programs with IEP behavior-modification plans to ensure provision of FAPE.[225] Due to privacy concerns, certain elements of these reports would need to be kept from the public,[226] but they could be useful in aiding the work of charter authorization agencies.

3. *Limit All Charter Contracts to Five Years and Make Renewal Meetings Public.* — Ensuring that charter school contracts exist for limited durations facilitates outcome accountability by enabling passive nonrenewal rather than relying on active revocation procedures that do not exist in every jurisdiction.[227] Mandating that the charter authorizer conduct a public renewal hearing could create a forum for dissatisfied parents to voice concerns about lack of access to a charter school board.[228] Public hearings would also provide a forum for satisfied parents to defend a preferred charter school.

CONCLUSION

Charter schools claim legitimacy as a solution to the problem of educational inequity by offering parents choice and delivering improved outcomes. However, the inadequate education of students with disabilities is one of the more pervasive inequities that school systems must address. To realize their full potential, charter schools must similarly combat this inequity. Moreover, "choice" is a realistic claim only if all students, including students with disabilities, have access to charter schools or charter school lotteries. To ensure that students with disabilities have access to charter schools and, equally importantly, that they have access to adequate recourse when their right to a free and appropriate public education is violated, states should reexamine their charter school authorization statutes to strengthen the mechanisms that facilitate charter school accountability to the communities they serve.

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225. See supra note 131 and accompanying text (noting concern about strict discipline policies in charter schools resulting in the substantive denial of FAPE).

226. IDEA mandates that states implement measures to ensure confidentiality for students with disabilities and their families. 20 U.S.C. § 1417(c) (2012).

227. See supra notes 55–58 and accompanying text.

228. A system like this is in place in Illinois. See Ill. State Charter Sch. Comm'n, Accountability System for Charter Schools Authorized by the Illinois State Charter School Commission 7 (2014), http://www.isbe.net/documents/iscsc-accountability-system.pdf [http://perma.cc/VD52-WMKK] (discussing the public hearing or community forum that must be held during the renewal period of a charter school).