SCHOOL CHOICE FOR SOME:

CHARTER SCHOOLS AND STUDENTS WITH DISABILITIES

By

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"*If we are to achieve a richer culture… we must weave one in which each diverse human gift will find a fitting place*."[2]

INTRODUCTION

In the last fifteen years, charter schools have become increasingly prevalent as an educational option for children in the public schools. Charter schools propose to offer excellent education, with less government intervention and often at a lower cost. Although charter schools often run without many of the restrictions of state law, the schools are still required to educate students with disabilities under the strictures of the Individuals with Disabilities Education Act (IDEA). While charters may be able to offer unique opportunities for some students through new teaching methods, smaller classrooms, and school choice, they are often run on small budgets by administrators with little to no formal training in special education policy and law. As a result, disabled students may not reap the same rewards from charter schools as non-disabled students.

This paper attempts to show some of the difficulties that charter schools may have in educating students with disabilities. First, this paper will discuss charter schools, the schools' legal responsibilities to disabled students, and the major issues in charter school special education delivery. Next, this paper will discuss charter school issues in Chicago, Illinois, a city with a long history of special education litigation. This paper will argue that the ever increasing

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charter schools started under the city's Renaissance 2010 program actually decrease opportunities for special education students.

AN OVERVIEW OF CHARTER SCHOOLS AND IDEA RESPONSIBILITIES

Charter Schools

A charter school is a public school, often founded by parents, teachers, or others, that operates without many of the restrictions that apply to traditional public schools.[3] Each school has a written charter or contract, generally spanning 3-5 years, with the state or local education agency, authorizing them to operate within the district.[4] Each charter school is accountable to the authorizing agency for fulfilling the requirements of their charter, generally through performance based assessments.[5] Failure to meet these goals can result in the closing of the school.[6]

In exchange for this accountability, and in exchange for generally receiving lower funds per student, charter schools generally operate with a degree of autonomy from many state regulations. As of 2005, 40 states plus the District of Columbia have adopted charter school laws[7], and each state's charter schools are defined and operate under individual state law.[8] Because of this, charter schools in various states can be defined by their unique policies on hiring, management, disciplinary policies, and educational theories.[9]

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[3] U.S. Charter Schools, Overview, http://www.uscharterschools.org/uscs_docs/o/index.htm (last visited May 15, 2010).
[4] *Id.*
[5] *Id.*
[6] *Id.*
[7] Center for Education Reform, Charter School Highlights and Statistics, http://www.edreform.com/pubs/chglance.htm (last visited May 15, 2010). The ten states without charter school statutes are Alaska, Kentucky, Maine, Montana, Nebraska, North Dakota, South Dakota, Vermont, Vest Virginia, and Washington. Many of these states have seen some legislation towards charter school statutes. *Id.*
[8] Jay P. Hubert, *Schools Without Rules? Charter Schools, Federal Disability Law, and the Paradoxes of Deregulation*, 32 HARV. C.R.-C.L. L. REV. 301, 301-353 (1997)
[9] LEE ANDERSON ET. AL., A DECADE OF CHARTER SCHOOLS: EVALUATION OF THE PUBLIC CHARTER SCHOOLS PROGRAM: 2000-2001 EVALUATION REPORT (2002), *available at* http://policyweb.sri.com/cep/publications/yr2.pdf (last visited May 15, 2010).

While charter schools may be exempted from state regulations, as essentially public entities, charter schools are still subject to federal laws, including all federal laws relating to the IDEA, Section 504 of the Rehabilitation Act of 1973 (Section 504), the Americans with Disabilities Act (ADA), and No Child Left Behind (NCLB).[10] The analysis in this paper focuses on the requirements of the IDEA and more specifically on the Least Restrictive Environment mandate.

The IDEA and the Least Restrictive Environment Mandate

The Individuals with Disabilities Education Act (IDEA), is the law that governs the educational rights of children with disabilities in the United States.[11] The IDEA requires that all states accepting IDEA funds must provide children with disabilities a free appropriate public education (FAPE) that meets their unique needs.[12] In general, the IDEA dictates the appropriate practices for identifying children with disabilities, creating an Individualized Education Program (IEP) that spells out the specific services a child will receive, and all other procedures for educating children with disabilities.

One of the most litigated rules of the IDEA is the Least Restrictive Environment (LRE) mandate. The LRE mandate states that, to the greatest extent appropriate, students with disabilities must be educated in the regular classroom with the appropriate supplementary aids and services along with their nondisabled peers in the school they would attend if not disabled, unless that student's IEP and unique needs require an alternate more restrictive placement.[13] School districts may not make placements based only on the category of disability, severity of disability, configuration of the educational delivery system, the availability of educational

[10] Hubert, *supra* note 8.
[11] 20 U.S.C. §1400-1415 (2008).
[12] 20 U.S.C. §1400(d)(1)(A) (2008).
[13] 20 U.S.C. §1412(5), 34 C.F.R. §300.550(b)(2).

services, the availability of space, or administrative convenience, but rather must make determinations based on the student's individual needs.[14]

ISSUES IN DELIVERY OF SPECIAL EDUCATION IN CHARTER SCHOOLS

In districts where parents can choose between a variety of public schools for their children, charter schools often present an attractive option. Parents of students with disabilities are often drawn to charters because of their small size, unique instructional approaches, positive reputations, and high expectations of students.[15] These positive characteristics are often possible because of the decreased state regulation of charter schools. Regardless of this deregulation, charter schools must still follow all the mandates of federal disability education law. This has created concerns about the ability of charter schools to conform to the mandates, including funding issues, lack of expertise in special education delivery, and a potential for discrimination.

Funding Concerns

Special education funding for charter schools can be a complex and difficult to maze for charter school administrators to navigate. Charter schools receive funding from the local districts, who receive funding from federal, state, and local funds.[16] The total amount received is based on a per-student count multiplied by the average cost of educating a child with a disability.

The consequences of this funding vary depending on the designation of the charter school. Depending on state law, charter schools are designated either as their own Local Education Agencies (LEA) or as a member school of a larger LEA.[17] If a charter school is an

[14] *Id.*
[15] U.S. Department of Education, Charter Schools and Students with Disabilities: A National Study, Office of the Educational Research and Improvement 26 (2000).
[16] Lauren M. Rhim et. al., *Charter School Statutes and Special Education: Policy Answers or Policy Ambiguity?*, 41(1) JOURNAL OF SPECIAL EDUCATION 50, 51 (2007).
[17] *Id.*

independent LEA, it alone must absorb the costs of providing special education services to children with disabilities. This includes the cost of providing private placement outside of the public school system if the student requires a more restrictive environment.[18]

This can result in a difficult financial situation for the charter school. Charter schools generally operate with significantly smaller operating budgets than large public school districts. Fulfilling the requirements of the IDEA, including those related to testing, evaluation, and out-of-district placement, can bankrupt a small school with limited resources.[19] Lack of resources is often cited by charter school administrators as the reason for failing to meet the IEP requirements for special education students.[20]

Lack of Knowledge and Expertise

Studies have shown that lack of knowledge about special education laws, policy, and practice may impede the impede charter schools from appropriately serving special education students. For example, in 2000, 36% of charter school directors felt unprepared to serve students with disabilities.[21] This may be because few charter school operators are actually trained school administrators, leaving them without the necessary knowledge to navigate the complex requirements of the IDEA.[22] It has been documented that, due to this lack of knowledge and

[18] Rebekah Gleason, *Charter Schools and Special Education: Part of the Solution or Part of the Problem*, 9 U. D.C. L. Rev. 145, 158-59 (2007).
[19] M.J. McLaughlin & K. Henderson, *Charter Schools in Colorado and Their Response to the Education of Students with Disabilities*, 32(2) JOURNAL OF SPECIAL EDUCATION 99-107 (1998).
[20] CHESTER E. FINN ET. AL., CHARTER SCHOOLS IN ACTION: RENEWING PUBLIC EDUCATION 159 (Princeton Press 2000).
[21] Mary B. Estes, *Choice for All? Charter Schools and Students with Special Needs*, 37(4) JOURNAL OF SPECIAL EDUCATION 257, 258 (2004).
[22] *Id.*

education, charter school administrators may also fail to access extra funds that may be available for special education.[23]

The Potential for Discrimination

Recent analysis has found that charter schools may be more prone to discrimination against students with disabilities. In Boston charter schools, more than one-half of all charter schools had 15% students with disabilities, where as the greater Boston schools district had 21% students with disabilities.[24] In an older national study, the U.S. Department of Education found that charter schools served 3% fewer students with disabilities than public schools, even when the researchers included charter schools that only served students with disabilities in the figure.[25]

Lower enrollments may be caused by a variety of figures. Research has suggested that charter schools may "counsel out" or discourage children with disabilities from enrolling in the schools.[26] Approximately one-fourth of schools surveyed in 2000 reported that they discouraged students with disabilities from enrolling in their schools, generally asserting that this "counseling out" was in the student's best interest.[27] Moreover, the students with disabilities currently enrolled in charter schools may skew towards students with less severe disabilities.[28]

Charter schools may also discriminate by failing to appropriately identify children with disabilities either because of financial concerns or lack of special education knowledge. For example, in Arizona, it has been reported that charter schools have failed to provide the hours of

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[23] Cassandra M. Guarnio & Derrick Chau, *Special Education in Charter and Conventional Public Schools, in* CHARTER SCHOOL OPERATIONS AND PERFORMANCE: EVIDENCE FROM CALIFORNIA 161-73 (RAND Education, 2003).
[24] James Vaznis, *Charter Schools Lag in Serving the Neediest*, BOSTON GLOBE, Aug. 12, 2009, *available at* http://www.boston.com/news/local/massachusetts/articles/2009/08/12/charter_schools_lag_in_serving_students_with_special_needs/ (last visited May 15, 2010).
[25] U.S. Department of Education, Charter Schools and Students with Disabilities: A National Study, Office of the Educational Research and Improvement 26 (2000).
[26] Thomas A. Fiore et. al., *Charter Schools and Students with Disabilities: Review of Existing Data*, U.S. Department of Education (1998)
[27] U.S. Department of Education, Charter Schools and Students with Disabilities: A National Study, Office of the Educational Research and Improvement 20 (2000).
[28] Rhim, *supra* note 16, at 53.

special education services listed in a student's IEP, have used improper testing procedures to determine eligibility for special education, and have failed to update IEPs or hire special education teachers.[29]

CITY EXAMPLE: CHICAGO CHARTERS

Chicago's education system has a long history of poor service delivery, complex bureaucracy, and IDEA violation. In an attempt to improve services to regular and special education students, the Chicago Public Schools have gone through a series of reforms, culminating most recently in the Renaissance 2010 movement under Arne Duncan. Unfortunately, Renaissance 2010 schools have not achieved as many positive outcomes as administrators might have hoped. Moreover, the movement has particularly concerning ramifications for special education students. Evidence shows that many of the charter schools started under Renaissance 2010 are not educating an equal number of students with disabilities and may be failing those students that are currently enrolled. This may violate not only the IDEA in general, but the LRE mandate in particular. The LRE mandate is of particular importance to the city of Chicago, which is currently under court-ordered monitoring to ensure LRE compliance.

Education Policy in Chicago: Renaissance 2010

Illinois first enacted its charter school law in 1996, granting 15 charters to the city of Chicago.[30] In recent years, however, under Chicago's Renaissance 2010 plan, the number of available charters has expanded to 90.[31] As of 2009, 46 of those charter campuses have opened, with seven more set to open during the 2009 and 2010 school years. Renaissance 2010 was not

[29] *Special Ed a Problem for Charters: Providing Services Costly, But So Is Ignoring the Law*, ARIZONA REPUBLIC, Apr. 14, 2002, at B.1.
[30] *Chicago's Charter Schools*, CATALYST IN BRIEF, Feb 2010, at 2.
[31] *Id.*

predicated, however, simply on school openings, but rather on closing or "turning over" failing schools.

The Chicago Public Schools (CPS) adopted the Renaissance 2010 policy in 2004.[32] Under the plan, charter schools, performance schools, and contract schools would be created that had more autonomy than traditional neighborhood schools, but also agreed to performance requirements. Renaissance 2010 schools would replace closed schools, which were shuttered due either to academic failure or limited enrollment.[33]

Now 6 years into the plan, studies show that at least the charter schools under Renaissance 2010 do not lead to significant gains in student achievement. For example, RAND Corporation's 2008 study on Chicago charter schools showed that gains in student achievement in test scores at charter schools are on par with gains at traditional schools.[34] In fact, while charter schools have not significantly improved their state testing results, typical neighborhood high schools have shown slight gains greater than those at charter schools.[35] Students do show some gains in their graduation rates, and college attendance, but only if they are attending a multi-grade high school.[36] In general, Chicago charter schools have lower compensated teachers and fewer teachers with advanced degrees and certification.[37] Charter schools also serve a lower

[32] CPS Board Report 04-09220-PO4 (2004).
[33] CPS Board Report 04-0255-PO2 (2004).
[34] Booker, K. et al., *Achievement and Attainment in Chicago Charter Schools*, RAND Corporation (2008).
[35] Liz Brown & Eric Gutstein, *The Charter Difference: A Comparison of Chicago Charter and Neighborhood High Schools*, University of Illinois Chicago College of Education, *available at* http://www.uic.edu/educ/ceje (Last visited May 16, 2010).
[36] Booker, *supra* note 34.
[37] Liz Brown & Eric Gutstein, *The Charter Difference: A Comparison of Chicago Charter and Neighborhood High Schools*, University of Illinois Chicago College of Education, *available at* http://www.uic.edu/educ/ceje (Last visited May 16, 2010).

number of low-income, limited English proficiency, and special education students than traditional neighborhood schools.[38]

Failure for Special Education at Renaissance 2010 Schools

As of 2007, one study performed by Access Living showed that Renaissance 2010 schools had 10% students with disabilities, whereas CPS neighborhood schools had 13%.[39] A separate study performed by the University of Illinois Chicago showed that, during the same time period, city charter schools had 12.5% students with disabilities whereas neighborhood schools had 17.8%.[40] The Access Living study also showed that Renaissance 2010 schools had a significantly smaller percentage of students with emotional disturbance, cognitive disabilities, and other disabilities including traumatic brain injury. As of 2008, the Access Living study showed that the numbers based on disability category had somewhat even out, but CPS still had a greater number of students with cognitive disabilities.[41] Moreover, although studies have shown that students without disabilities may make some gains in terms of graduation rate and college attendance, there have been no gains for students with disabilities.[42]

The question remains as to why Renaissance 2010 schools enroll fewer students with disabilities than neighborhood schools. One possible benign reason might be the fact that, at the time the studies were completed, many charter schools only served children in early grades, before many students are properly identified with a disability.[43] Other evidence, however, may show a more concerning picture of lack of available services and improper admission and disciplinary procedures.

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[38] *Id*. As of 2007, Charter schools served 6% fewer low-income students, 3.2% fewer limited English proficiency students, and 5.3% fewer special education students (as measured by IEPs). *Id.*
[39] Rodney Estvan, *Renaissance 2010 and Students with Disabilities* 15, Access Living (2009).
[40] Brown & Gutstein, *supra* note 37.
[41] Estvan, *supra* note 39.
[42] *Id.*at 18.
[43] *Id.*

Chicago charter schools may simply not have the resources necessary to teach children with disabilities. Chicago charter schools are less likely to have certified teachers able to teach special education and are more likely to have teachers with little to no experience.[44] Because of funding and knowledge, charter schools are also less likely to be able to teach children with more severe disabilities, because they generally lack the facilities, including separate resource classrooms, necessary.[45] Anecdotal evidence shows that charter schools may also lack the resources to provide the basic IEP services needed by many students. For example, school administrators have stated that, given their allotted funding, they are unable to hire psychologists or social workers, especially if those professionals are only going to serve an extremely limited population.[46]

In addition to lack of appropriate programs for students with disabilities, improper admissions procedures may make it difficult or impossible for students with disabilities to even enter the front door of many charters. Whereas non-disabled students at closed schools can choose to apply to a wide variety of charter and contract schools, the CPS policy for disabled students at schools closed under Renaissance 2010 provides that:

> Students with disabilities at a neighborhood school closed…will be placed at the closest school to their homes that can implement their [IEP]. Students with disabilities at a non-neighborhood school closed pursuant to this policy will be placed at the neighborhood school or the closest school to their homes that can implement their [IEP]. [47]

In effect, this policy prevents students with disabilities from accessing charter schools by denying them school choice.

[44] Brown and Gutstein, *supra* note 37.
[45] Estevan, *supra* note 39, at 19.
[46] Anecdotal evidence through this section comes from this writer's work with special education students and conversations with charter school administrators.
[47] CPS Policy 07-0523-PO2.

When students are able to matriculate into Chicago's charter schools, restrictive school discipline policies may make it difficult for them to stay there. The IDEA prescribes a rubric under which students with disabilities may be disciplined.[48] Under the IDEA, if a behavior is a manifestation of a student's disability, then the school may not suspend or expel a student for more than 10 days without first attempting to make a behavior plan to remediate the behavior. Moreover, schools must provide reasonable accommodations to their disciplinary codes to students with disabilities.

In contrast, many of the charter schools in Chicago operate with strict and complex disciplinary codes.[49] Anecdotal evidence has shown that these schools may be unwilling to modify their codes or to provide support for disabled students. For example, in one of the larger corporate-run charter schools, a student with a traumatic brain injury and cognitive disability was repeatedly suspended for forgetting rules relating to her assignment book, wearing a elastic hair-tie on her wrist, and tucking in her shirt. When lawyers intervened, the school stated that they were unable to provide the student with any assistance in following the rules. Moreover, the school argued that the abovementioned rules were so integral to the instructional method that, if the student was unable to follow them unassisted, the school was unable to continue to educate her.[50]

What are the Consequences for Students with Disabilities?

The result of these issues is that Renaissance 2010 charter schools, promoted as providing choice and opportunity to students attending struggling public schools, may prevent students with disabilities from having that same opportunity. As the city closes failing neighborhood

[48] 20 U.S.C. §1415(k)
[49] Estevan, *supra* note 39, at 23.
[50] Anecdotal on going case from this author's work at Equip for Equality, a non-profit legal services provider in Chicago.

schools under Renaissance 2010, they replace them with charter schools. These schools may be inaccessible to disabled students due to lack of school resources, city policies, and strict discipline codes. By limiting disabled students from attending charter schools, the city is relegating students with disabilities to the already failing neighborhood schools.

Not only does this unfairly discriminate against students with disabilities, it may put the city in danger of violating a court-ordered settlement agreement. In 1992, students with disabilities and their parents brought a class action suit against the Chicago Board of Education and the Illinois State Board of Education (ISBE), alleging that the city systematically failed to educate students with disabilities in the least restrictive environment.[51]

In 1998, the Chicago Board of Education settled with the plaintiffs, agreeing to bring between one-third and one-half of its schools into compliance over a period of eight years.[52] A monitor was appointed by the court to ensure compliance. The parties agreed that the court-ordered monitoring would end in 2006. In 2005, however, the monitor filed a report with the court stating that, which the City had made improvements, "much work remain[ed]," and the monitoring should be extended until the end of the 2009-2010 school year.[53] The district court adopted the Monitor's decision, extending the court's authority until September 1, 2010. Under the new agreement, there is no provision allowing for extended monitoring past the September 1, 2010 date. It is likely, however, that if the City again fails to show substantial compliance, the plaintiffs will argue for another extension.[54]

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[51] Corey H. v. Board of Education, 995 F.Supp 900 (N.D.Ill. 1998).
[52] *Id.*at 908. ISBE refused to settle with the plaintiffs and the plaintiff's case against ISBE proceeded to court. The Court found that ISBE had also violated the IDEA by failing to enforce IDEA in the city of Chicago. *Id.*at 917-18.
[53] Corey H. v. Board of Education, 534 F.3d 683, 868 (7th Cir. 2008).
[54] Alexander S. Elson, The Termination of Consent Decrees in IDEA Class Actions (May 10, 2008) (unpublished comment, Washington University in St. Louis), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1286837 (last visited May 15, 2010), citing Interview with Sharon Soltman, Esp., Counsel for Plaintiffs in *Cory H. v. Board of Education*, in St. Louis, MO (April 19, 2008).

The LRE mandate states that, to the greatest extent appropriate, students with disabilities must be educated in the regular classroom in the school they would attend if not disabled.[55] Because of Renaissance 2010, many schools that were once neighborhood schools, the schools that students with disabilities would attend if they were not disabled, are now charter schools. The remaining neighborhood schools may therefore be funding a disproportionately high number of special education students. The monitor and students with disabilities may be able to argue that, because of this, CPS has constructively created a segregated schooling system for students with disabilities in violation of the settlement agreement.

CONCLUSION

The proliferation of charter schools in American education is a concerning point for many special education advocates. If charter schools are, as they seem to be, the wave of the future of education, they must reform in order to provide for all students.. With the right reforms, Chicago may have the opportunity to be an example of a functioning charter school system that provides an equal, appropriate, and rich education to all students, disabled and non-disabled alike.

The Chicago Public Schools have recently vowed to revamp the floundering special education system.[56] In this overhaul, CPS should look closely at reforming the charter school laws to increase opportunities for students with disabilities. One of the first steps might be special education funding reform. A school cannot be expected to provide services for disabled students without the funds to do so. Although lower cost per pupil may be an integral aspect of Chicago's charter schools, this may not be possible for students with disabilities.

[55] 20 U.S.C. §1412(5), 34 C.F.R. §300.550(b)(2).
[56] Rex W. Huppke & Azam Ahmed, *CPS Vows Special Education Overhaul*, CHICAGO TRIBUNE, March 29, 2010.

In order to ensure charter school preparedness, CPS should not approve any new charter schools that do not have, as an integral part of their charter proposal, detailed plans for educating students with disabilities. Moreover, CPS should require that all charter school administrators be educated in special education policy, practices, and law. Although these changes will certainly not assuage all doubts about the charter school system, they may go a long way in affording students with disabilities an equal opportunity to access educational choices.