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## WHOSE CHOICE ARE WE TALKING ABOUT? THE EXCLUSION OF STUDENTS WITH DISABILITIES FROM FOR-PROFIT ONLINE CHARTER SCHOOLS

*Matthew D. Bernstein*\*\*\*

*I am a strong believer in testing. I believe the public is spending a lot of money on education, and they've got a right to know what the schools are doing and what the schools are not doing. They are not getting that today with the tests that are out there.*

—Albert Shanker, founder of the charter school movement, 1988<sup>461</sup>

*The development of common standards and shared assessments radically alters the market for innovation in curriculum development, professional development, and formative assessments. Previously, these markets operated on a state-by-state basis, and often on a district-by-district basis. But the adoption of common standards and shared assessments means that education entrepreneurs will enjoy national markets where the best products can be taken to scale.*

—Joanne Weiss, Chief of Staff, Secretary of Education Arne Duncan, 2011<sup>462</sup>

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<sup>461</sup> Albert Shanker, President, Am. Fed'n of Teachers at the Nat'l Press Club (Mar. 31, 1988).

<sup>462</sup> Joanne Weiss, *The Innovation Mismatch: "Smart Capital" and Education Innovation*, HARVARD BUS. REVIEW BLOG (Mar. 31, 2011, 8:00 AM), <http://blogs.hbr.org/innovations-in-education/2011/03/the-innovation-mismatch-smart.html>.

## I. INTRODUCTION: THE LIMITATIONS OF SCHOOL CHOICE

It is hardly controversial to say that the public education system in the United States is badly in need of change.<sup>463</sup> Parents, teachers, politicians, and students share a view that our schools are inadequate, under-funded, and performing poorly, even while they may disagree about solutions.<sup>464</sup> Test scores are declining, schools are facing funding shortages, and age-old problems like truancy, poverty, and declining facilities seem to be getting worse, not better.<sup>465</sup> The United States, once a worldwide leader in educational achievement, has seen its reading scores for fifteen-year-olds sink to seventeenth internationally, behind Estonia and Poland—and that is the nation's *best* result in the three-subject test.<sup>466</sup> In science and math, the United States has fallen out of the top twenty, and in the case of math, the country is now a below-average nation.<sup>467</sup> Nobody who is serious about our educational system would be willing to accept these results.

The need to reform education increasingly inhabits the public conscience through movies, editorials, and the news cycle.<sup>468</sup> More and more, these sources point to charter schools as the locus from which the next generation of schools will emerge. As No Child Left Behind<sup>469</sup> (“NCLB”) is replaced by market-inspired government initiatives like Race to the Top<sup>470</sup> and innovations from the private sector, there is a great divide emerging in public education. On one side stand the established holders of the torch, the traditional public schools that, since the nineteenth century, have comprised the core of public education. On the other are charter school reformers, the creative innovators allergic to the status quo who want to shake up the

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<sup>463</sup> This paper limits its focus to grades K-12, or primary and secondary education. Higher education is simply outside the focus here.

<sup>464</sup> See, e.g., Joe Nocera, *How to Fix the Schools*, N.Y. TIMES, Sept. 18, 2012, <http://www.nytimes.com/2012/09/18/opinion/nocera-how-to-fix-the-schools.html>.

<sup>465</sup> See Linda Darling-Hammond, *Education and the Income Gap*, WASH. POST, Apr. 27, 2012, [http://www.washingtonpost.com/blogs/answer-sheet/post/education-and-the-income-gap-darling-hammond/2012/04/26/gIQAhn0LkT\\_blog.html](http://www.washingtonpost.com/blogs/answer-sheet/post/education-and-the-income-gap-darling-hammond/2012/04/26/gIQAhn0LkT_blog.html).

<sup>466</sup> See Sam Dillon, *Top Test Scores From Shanghai Stun Educators*, N.Y. TIMES, Dec. 7, 2010, <http://www.nytimes.com/2012/12/07/education.html>.

<sup>467</sup> See *id.*

<sup>468</sup> The most influential and controversial recent example is WAITING FOR SUPERMAN (Electric Kinney Films 2010); see also Johanna Sorrentino, “Waiting for Superman”: What It Means for You and Your Child, EDUCATION.COM, <http://www.education.com/magazine/article/waiting-superman-means-parents/>.

<sup>469</sup> No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified as amended at 20 U.S.C. § 6301 (2006)).

<sup>470</sup> See U.S. Dep’t of Educ., *Race to the Top Program Executive Summary* (2009), <http://www2.ed.gov/programs/racetothetop/executive-summary.pdf>.

system from the inside and build a new one in its place. As the debate over the best form of public education increasingly fuels the ongoing struggles between public unions and the private sector, between free-market ideals and the social safety net, and between federal, state, and local control, education in the United States is being pulled apart. Left in the gap are the young people for whom the system is supposedly designed, those who stand to benefit most from a high quality public education.

In the last fifteen years, information technologies have fostered the emergence of a new kind of school: the fully online “cyber” or “virtual” charter. These schools, operated almost exclusively by for-profit, private companies that are traded publicly on the stock market, are growing rapidly.<sup>471</sup> The number of virtual schools nationwide has increased from seventeen in the 2003-2004 school year to seventy-nine in 2010-2011.<sup>472</sup> The majority of states now allow students to obtain some of their education online.<sup>473</sup> The companies that run these schools do not hide the fact that profits are their top priority.<sup>474</sup> Indeed, it is not hard to see why the corporate business world envisions a huge opportunity in public education: today, spending on education totals more than one trillion dollars,<sup>475</sup> and K12, Inc., the leader in privatized online education, estimates that the market for its schools is valued at \$15 billion.<sup>476</sup> The second biggest purveyor of online schools was recently bought for \$400 million<sup>477</sup> by Pearson Education, Inc., whose market capitalization is valued at approximately \$14.39 billion.<sup>478</sup> The purveyors of online schools tout their

<sup>471</sup> Gary Miron & Jessica L. Urschel, *Understanding and Improving Full-Time Virtual Schools: A Study of Student Characteristics, School Finance, and School Performance in Schools Operated by K12 Inc.*, NATIONAL EDUCATION POLICY CENTER (July, 2012), <http://nepc.colorado.edu/files/neperbk12-miron.pdf>.

<sup>472</sup> Gary Miron et al., *Profiles of For-Profit and Nonprofit Education Management Organizations: Thirteenth Annual Report, 2010-2011*, NATIONAL EDUCATION POLICY CENTER (Jan. 2012), <http://nepc.colorado.edu/publication/EMO-profiles-10-11> [hereinafter Miron et al.]. 2003-2004 is the first year for which cyber charter data is available, while 2010-2011 is the most recent data available. *Id.*

<sup>473</sup> Edward Lin, “Virtual” Schools: Real Discrimination, 32 SEATTLE U. L. REV. 177, 177 (2008).

<sup>474</sup> See generally K12’s CEO Discusses F1Q 2013 Results - Earnings Call Transcript, SEEKING ALPHA (Nov. 9, 2012, 8:00 AM), [http://seekingalpha.com/article/994861-k12-s-ceo-discusses-f1q-2013-results-earnings-call-transcript?source=email\\_rt\\_mc\\_focus&ifp=0](http://seekingalpha.com/article/994861-k12-s-ceo-discusses-f1q-2013-results-earnings-call-transcript?source=email_rt_mc_focus&ifp=0).

<sup>475</sup> U.S. Census, Table 216: School Expenditures By Type of Control and Level of Instruction in Constant (2008-2009) Dollars: 1980 to 2009, STATISTICAL ABSTRACT OF THE UNITED STATES: 2011, <http://www.census.gov/compendia/statab/2011/tables/11s0216.pdf>.

<sup>476</sup> Stephanie Saul, *Profits and Questions at Online Charter Schools*, N.Y. TIMES, Mar. 13, 2010, [http://www.nytimes.com/2011/12/13/education/online-schools-score-better-on-wall-street-than-in-classrooms.html?pagewanted=all&\\_r=1&](http://www.nytimes.com/2011/12/13/education/online-schools-score-better-on-wall-street-than-in-classrooms.html?pagewanted=all&_r=1&).

<sup>477</sup> *Id.*

<sup>478</sup> NYSE: PSO, GOOGLE FINANCE, <http://www.google.com/finance?chdnp=1&chdd=1&chds=1&chdv>

innovative approach to public education as an asset and they enjoy considerable support from the education establishment.<sup>479</sup> Citing many states' recent voluntary adoption of the Common Core Standards—an attempt to standardize educational goals across all fifty states—Joanne Weiss, Chief of Staff for Secretary of Education Arne Duncan, championed the notion that “education entrepreneurs will enjoy national markets where the best products can be taken to scale.”<sup>480</sup>

But the recent increase in the number of fully online schools exemplifies the costs as well as the benefits of privatized education. As in the consumer finance industry, where the development of derivatives moved faster than the ability of regulators to ensure their safety, the virtual education world is largely unregulated.<sup>481</sup> Very few states have passed legislation directed specifically at online charter schools, and this absence of oversight has caught the attention of legislators.<sup>482</sup> In the 2010-2011 school year, only 27.7% of for-profit virtual schools met Adequately Yearly Progress (“AYP”), the main measure of student achievement under NCLB.<sup>483</sup> This shocking figure was almost half the percentage of privately-run, brick-and-mortar schools, where 52% met AYP.<sup>484</sup> Schools managed by for-profit companies also fared worse than those managed by not-for-profits.<sup>485</sup> Only one-third of students at K12, Inc., the biggest purveyor of private education, achieved AYP.<sup>486</sup>

Average achievement based on test scores, especially under the nearly obsolete standards of NCLB, is only one concern regarding online public schools. Another is special education. While all charter schools are by definition exempt from many district and state requirements, they are not excused from obeying federal law regulating special education. There is a growing rift between the complex responsibilities all public schools owe to

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e&q=NYSE:PSO&ntsp=0&ei=tcPHUICsG-SXiQKPtWE (last visited Dec. 11, 2012).

<sup>479</sup> See John Watson & Jennifer Ryan, *Keeping Pace with K-12 Online Learning: A Review of State-Level Policy and Practice*, NORTH AMERICAN COUNCIL FOR ONLINE LEARNING 6 (Nov. 2007), <http://www.inacol.org/research/docs/KeepingPace07-color.pdf>.

<sup>480</sup> Weiss, *supra* note 2.

<sup>481</sup> See Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1 (2008).

<sup>482</sup> Meghan Knight, *Cyber Charter Schools: An Analysis of North Carolina's Current Charter School Legislation*, 6 N.C. J. L. & TECH. 395, 400-01 (2005) (noting that California, Colorado, Ohio, and Pennsylvania passed legislation regulating charters and Tennessee banned them outright).

<sup>483</sup> Miron & Urschel, *supra* note 11, at v.

<sup>484</sup> Alexandra Usher et al., *AYP Results for 2010-11*, CENTER ON EDUCATION POLICY 4 (2011), <http://www.cep-dc.org/displayDocument.cfm?DocumentID=386> (identifying a 52% national average for 2010-2011).

<sup>485</sup> Miron et al., *supra* note 12, at v.

<sup>486</sup> *Id.* at 21-22; Saul, *supra* note 16, at A1.

students with disabilities and the identity of charter schools as independent, efficient, and results-driven. These problems are further exacerbated in for-profit, online schools. Over the past decade, clear and convincing evidence has emerged that for-profit charter schools are not adequately maintaining their fiscal and educational responsibilities to students with disabilities.<sup>487</sup> While the lack of transparency maintained by most for-profit education companies has made gathering data difficult, it is apparent that online schools are both knowingly and unknowingly discriminating against students with severe disabilities.<sup>488</sup> According to a variety of sources, the profit motive at online schools incentivizes them to do whatever they can to avoid serving the students who cost the most to educate.<sup>489</sup> Chief among these are students with severe disabilities. As one special education scholar put it, “[t]he fewer disabled students a charter school enrolls, the greater its autonomy, the lower its costs, the higher its performance on statewide assessments, and the less bureaucratic red-tape it must deal with.”<sup>490</sup> In principle, this kind of discrimination is akin to racial bigotry and is broadly illegal.<sup>491</sup> It threatens not just cyber charter schools, but also the development of the American public school system as a whole.

By examining the history of special education law against the emergence of the for-profit and online education movements, this paper explores the charter school movement from a consumer law perspective. It aims to explain why much of the current debate over test scores, “accountability,” and teacher evaluation obscures other systemic fault lines that implicate the very reasons we have a public education system in the first place. In turn, the goal is to suggest solutions to some fundamental questions: in the twenty-first century, do we still need a public education system? What are our collective responsibilities to students? What does a quality education mean, and how do we maintain access to it?

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<sup>487</sup> See Educ. Law Ctr., *Charter Schools in Pennsylvania – Frequently Asked Questions*, <http://www.elc-pa.org/pubs/downloads/english/chaCharter%20Schools%20in%20PA%20%20Frequently%20Asked%20Updated%208-08.pdf>.

<sup>488</sup> See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-543, CHARTER SCHOOLS: ADDITIONAL FEDERAL ATTENTION NEEDED TO HELP PROTECT ACCESS FOR STUDENTS WITH DISABILITIES 6 (2012), available at <http://www.gao.gov/products/GAO-12-543>.

<sup>489</sup> Lin, *supra* note 13, at 184, 187; see Miron & Urschel, *supra* note 11, at 27; Nancy J. Zollers & Arun K. Ramanathan, *For-Profit Charter Schools and Students with Disabilities: The Sordid Side of the Business of Schooling*, 80 PHI DELTA KAPPAN 297, 301 (1998).

<sup>490</sup> Robert A. Garda, Jr., *Culture Clash: Special Education in Charter Schools*, 90 N.C. L. REV. 655, 689 (2012).

<sup>491</sup> See Mark C. Weber, *Special Education from the (Damp) Ground Up: Children with Disabilities in a Charter School-Dependent Educational System*, 11 LOY. J. PUB. INT. L. 217, 240–41 (2010).

## II. PUBLIC EDUCATION AND SCHOOL CHOICE AS CONSUMER LAW

It is surprising that public education is rarely thought of as a branch of consumer law, given the long-running tendency of education scholars, advocates, and the private education industry to apply the language and concepts of business to the field. Perhaps this is because, while the term “consumer” is used in a wide variety of social contexts, there is not a single authoritative definition. In 2012, it may be harder to say who is *not* a consumer than who is. The Consumer Financial Protection Bureau describes a consumer simply as an “individual.”<sup>492</sup> Another common definition can be found in the Illinois Consumer Fraud and Deceptive Practices Act, which defines a consumer as “any person who purchases or contracts for the purchase of merchandise not for resale in the ordinary course of his trade or business but for his use or that of a member of his household.”<sup>493</sup> The provision of educational services fits comfortably within these definitions.

Consumer *law* is generally defined as protections to purchasers of goods and services.<sup>494</sup> Most often, consumer protections occur in the form of government mandated disclosures (on, say, credit card statements), but they also take the form of legislation restricting certain business practices viewed as systemically harmful to consumers.<sup>495</sup> The recent creation of the Bureau of Consumer Financial Protection, designed to prevent future abusive lending practices of the kind that led to the financial crash of 2008, is one example.<sup>496</sup> One legal services website defines consumer law as “regulating many of the following business transactions and practices: advertising, sales and business practices; product branding; mail fraud; sound banking and truth in lending; quality produce and meats; housing material and other product standards.”<sup>497</sup> Public education, increasingly viewed as a “product,” fits among these definitions. Scholars increasingly use terms such as “supply-side” economics, “market-based ideas of

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<sup>492</sup> FED. FIN. INST..EXAMINATION COUNCIL, CFPB CONSUMER LAWS AND REGULATIONS 2 (2011), <http://thedebtcollectiondrill.com/tcd/wp-content/uploads/2012/06/FCRA.pdf>.

<sup>493</sup> Illinois Consumer Fraud and Deceptive Practices Act, ILL. COMP. STAT. 815 § 505/1 (2007) (Merchandise includes “intangibles” and “services.”).

<sup>494</sup> See BLACK’S LAW DICTIONARY 359 (9th ed. 2009).

<sup>495</sup> See Bar-Gill & Warren, *supra* note 21, at 83–84, 90.

<sup>496</sup> 12 U.S.C. § 5491 (Supp. V 2006).

<sup>497</sup> Global Legal Res., *Customer Protection Law*, HG.ORG, <http://www.hg.org/consume.html> (last visited Mar. 31, 2013).

competition,” and “shopping for schools” to describe public education today.<sup>498</sup>

Economist Milton Friedman first broached the idea that the private sector should involve itself in education. His 1955 article, *The Role of Government in Education*, called the federal presence in education “an indiscriminate extension of governmental responsibility.”<sup>499</sup> Friedman argued that there was an appropriate place for government in *financing* public education, as it promoted “a stable and democratic society,” but he thought that it was inappropriate for the government to *administer* schools themselves.<sup>500</sup> The federal government should give money to parents in the form of vouchers, Friedman posited, and parents should then decide where to spend it.<sup>501</sup> Friedman’s theory applied a classical free-market conception to public education; no one had previously proposed such a dramatic role for the private sector in schools. Under Friedman’s ideas, schools would (and *should*) compete among each other for students.<sup>502</sup> Those who offered inferior products (curriculum, support, activities) would not draw students/customers, and would therefore fold.<sup>503</sup> This was exactly the point: if a company was offering a low quality product, it should not be in business at all, let alone receive government money for its efforts.

Friedman’s notions of how the public school system should work, conceived over fifty years ago, essentially describe the way public education increasingly appears in the United States today. He envisioned a system in which government would provide money to each child’s parents, who would then be free to spend it “at a school of their own choice.”<sup>504</sup> Nonprofits, private businesses, and even “governmental units” would run schools.<sup>505</sup> Meanwhile, students and parents would hold the power of selection.<sup>506</sup> The primary difference between the United States of 2012 and Friedman’s 1955 vision of the future lies in the mechanism by which the

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<sup>498</sup> Natalie Lacireno-Paquet, *Do EMO-Operated Charter Schools Serve Disadvantaged Students? The Influence of State Policies*, 12 EDUC. POLICY ANALYSIS ARCHIVES 26, 3 (2004), available at <http://epaa.asu.edu/epaa/v12n26/>.

<sup>499</sup> Milton Friedman, *The Role of Government in Education*, THE FRIEDMAN FOUNDATION FOR EDUCATIONAL CHOICE 1, 1(1955), <http://www.edchoice.org/The-Friedmans/The-Friedmans-on-School-Choice/The-Role-of-Government-in-Education-%281995%29.aspx>.

<sup>500</sup> *Id.*

<sup>501</sup> *Id.* at 2.

<sup>502</sup> *Id.* at 3.

<sup>503</sup> *Id.*

<sup>504</sup> *Id.* at 6.

<sup>505</sup> *Id.* at 3.

<sup>506</sup> *Id.*



government distributes funds. Rather than providing money directly to each child's parents, today, funds flow from the federal government to *schools* on a per-student basis.<sup>507</sup> In terms of the entities controlling the schools themselves, however, Friedman was basically correct. We now live in a world in which "private initiative and enterprise [has quickened] the pace of progress" and government in some instances serves "its proper function of improving the operation of the invisible hand without substituting the dead hand of bureaucracy."<sup>508</sup>

Friedman's 1955 paper did not have an immediate effect on the public education landscape. In fact, the country would soon move in the opposite direction. Ten years later, President Lyndon Johnson, leaning on the legacy of his predecessor, John Kennedy, pushed a bill through Congress that instilled almost the opposite system Friedman desired.<sup>509</sup> In 1965, Congress ratified the Elementary and Secondary Education Act ("ESEA"), with "little debate and no amendments."<sup>510</sup> The ESEA was by far the most expansive foray of the federal government into public education in United States history, a realm that to that point had been left largely to the states.<sup>511</sup> As part of Johnson's initiatives like the Great Society and the War on Poverty, the ESEA sent huge block grants under its Title I to schools with high numbers of poor and disadvantaged students.<sup>512</sup> The basic premises of the original ESEA flew in the face of Friedman's warnings about an expansive presence for the federal government in funding schools and set the status quo that persists today.

The ESEA was reauthorized in 2001 as NCLB,<sup>513</sup> even while questions lingered over whether federal money had been properly spent over the previous thirty-six years.<sup>514</sup> Many advocates claimed that even with the large amount of dollars leaving federal coffers, achievement gaps had not narrowed.<sup>515</sup> NCLB installed an intense testing regime that punished schools for failure, but did not back up these new requirements with adequate

<sup>507</sup> Elementary and Secondary Education Act, Pub. L. No. 89-10, 79 Stat. 27 (1965).

<sup>508</sup> Friedman, *supra* note 39, at 6.

<sup>509</sup> Compare *id.*, with Elementary and Secondary Education Act.

<sup>510</sup> Tomiko Brown-Nagin, *Elementary and Secondary Education Act of 1965*, in 2 MAJOR ACTS OF CONGRESS 232, 233 (Brian K. Landsberg ed., 2004).

<sup>511</sup> *Id.* at 232.

<sup>512</sup> See *id.*; Elementary and Secondary Education Act, Pub. L. No. 89-10, 79 Stat. 27 (1965).

<sup>513</sup> See Forum On Educational Accountability, *About NCLB/ESEA*, [http://www.edaccountability.org/-About\\_NCLB.html](http://www.edaccountability.org/-About_NCLB.html) (last accessed Mar. 31, 2013); No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified as amended at 20 U.S.C. § 6301 (2006)).

<sup>514</sup> See generally Koret Task Force on K-12 Educ., *Choice and Federalism: Defining the Federal Role in Education*, i (2012), <http://media.hoover.org/documents/Choice-and-Federalism.pdf>.

<sup>515</sup> *Id.* at i.

federal dollars.<sup>516</sup> By 2007, six years after passage of the law, NCLB was \$55 billion behind the level of funding Congress had authorized.<sup>517</sup> Calls in the last five years for reauthorization of the ESEA and a fundamental overhaul of the discredited NCLB have been largely ignored, and the only significant change in federal education funding policy has been the Obama Administration's choice to shift control from the legislative process to the executive through waivers to NCLB and the creation of the Race to the Top program.<sup>518</sup> The funding mandates of the ESEA/NCLB remain the standard, and schools continue to rely heavily on the generosity of these programs, however limited they have become.<sup>519</sup> Today, national education policy is characterized by a Congress unwilling to revamp its philosophical commitment to NCLB—an unrealistic system of accountability premised on the notion that all students in the United States will read at grade level by 2014—nor to exercise its political will to re-envision the federal education system.<sup>520</sup>

While federal education policy has been marked by indecisiveness and a lack of leadership, corporate education entities have been working to build coalitions and establish themselves in the national public education landscape for the last twenty years.<sup>521</sup> If success is measured by market share, few business sectors have been more successful at establishing a competitive basis to acquire federal funds. As the percentage of students in traditional public schools has declined, it has risen almost as fast in schools run by corporations.<sup>522</sup> To understand how this has happened, it is necessary to examine the rise of charter schools in general.

### III. THE HISTORY OF CHARTER SCHOOLS: LATENT PRIVATIZATION

Charter schools are open to all students free of charge.<sup>523</sup> They are non-sectarian and are not permitted to discriminate against students on any

<sup>516</sup> Forum On Educational Accountability, *supra* note 53.

<sup>517</sup> *Id.*

<sup>518</sup> United States Dep't of Educ., *supra* note 10, at 2.

<sup>519</sup> See generally Miron & Urschel, *supra* note 11.

<sup>520</sup> See Joy Resmovits, *No Child Left Behind Reauthorization Debate Likely to Continue in Obama Second Term*, HUFF. POST (Nov. 11, 2012, 8:04 PM), [http://www.huffingtonpost.com/2012/11/19/no-child-left-behind-reauthorization\\_n\\_2161498.html](http://www.huffingtonpost.com/2012/11/19/no-child-left-behind-reauthorization_n_2161498.html).

<sup>521</sup> See *id.* See generally James Forman, Jr., *Do Charter Schools Threaten Public Education? Emerging Evidence from Fifteen Years of A Quasi-Market for Schooling*, 2007 U. ILL. L. REV. 839, 840 (2007).

<sup>522</sup> See generally Forman, *supra* note 61.

<sup>523</sup> Nat'l Alliance for Pub. Charter Sch., *What Are Charter Schools?*, <http://www.publiccharters.org/-About-Charter-Schools/What-are-Charter-Schools003F.aspx> (last accessed Dec. 11, 2012).

basis, including by gender, ethnicity, disability, class, or academic potential.<sup>524</sup> They are funded publicly through local, state, and federal tax sources and they are held to the same overarching state and federal academic standards as any public school.<sup>525</sup> Charter schools differ from traditional public schools in that they are often smaller and non-union and receive exemptions from certain state requirements about how to run themselves internally.<sup>526</sup> Charter schools can decide how to spend their money: they pick who they hire, how to set up their administrations, what books to buy, and how much to rely on technology.<sup>527</sup> They exist as part of a deal: they receive increased freedom from certain restrictions and regulations in exchange for a chance to experiment with new educational techniques and a promise to increase results.<sup>528</sup> If they fail, local authorizers can revoke their charters.<sup>529</sup> The idea is that students and parents can “shop” for charter schools in their area, and can choose to enroll in the schools they like best (or put their names in a lottery if there is more demand for a given school than there are spaces) in lieu of their local, traditional public schools.<sup>530</sup>

The charter school world has undergone extreme changes in ideology since its inception. What is today a movement fascinated with teacher quality, unsympathetic to unions, big on test results, and often at odds with traditional public schools was founded by a teacher and a union member expressly in opposition to those attributes.<sup>531</sup> It was not clear twenty years ago that the visions of Milton Friedman would merge with those of the founders of the charter school movement, and, abetted by burgeoning innovations in technology, coincide in the emergence of online for-profit schools. But in retrospect, the root ideologies of each fit together harmoniously.

The charter movement grew out of the separate but compatible ideas of two education pioneers: Ray Budde, a professor of educational management at the University of Massachusetts, and Albert Shanker, the former

<sup>524</sup> Garda, *supra* note 30, at 662–63.

<sup>525</sup> Nat’l Alliance for Pub. Charter Sch., *supra* note 63.

<sup>526</sup> *Id.*

<sup>527</sup> PAUL THOMAS HILL ET AL., CHARTER SCHOOLS AND ACCOUNTABILITY IN PUBLIC EDUCATION 4 (2002).

<sup>528</sup> Weber, *supra* note 31, at 218.

<sup>529</sup> Garda, *supra* note 30, at 666–67.

<sup>530</sup> Garda, *supra* note 30, at 656, 667, 669. The lottery system was famously dramatized in *Waiting for Superman*. See WAITING FOR SUPERMAN, *supra* note 8; see also Diane Ravitch, *The Myth of Charter Schools*, NEW YORK REV. OF BOOKS (Nov. 11, 2012) available at <http://www.nybooks.com/articles/archives/2010/nov/11/myth-charter-schools>.

<sup>531</sup> See, e.g., Albert Shanker, *supra* note 1.

President of the American Federation of Teachers. Budde's 1988 book, *Education by Charter: Restructuring School Districts*, gave the movement its name, linking the notion of a charter to the goals, objectives, and shared responsibilities of the Magna Carta and the voyage of Henry Hudson.<sup>532</sup> Budde's idea was that a group of teachers could propose a charter dedicated to a specific educational purpose, such a multi-level curriculum, a coordinated humanities program, or a whole-language approach.<sup>533</sup> The school would be free from certain district requirements and would be given a multi-year chance to experiment with new ideas. Eventually, groups of charter schools would form a "crisscrossing system" that would "free the educational system from the bonds of 'single-year operation syndrome'."<sup>534</sup> Each sector of the education world would benefit: charters would create "a strong sense of collegiality" among teachers, administrators would shed "the diffuse and heavy burden of being responsible for instruction," and principals could "continue doing what good principals are already doing: supporting their teachers and creating a safe, positive climate in which students can learn and grow."<sup>535</sup> Accountability would come every five years in the form of a district review.<sup>536</sup> If charters were not meeting the standards they set forth, the district could revoke the charter or demand a significant overhaul of the curriculum.<sup>537</sup>

Shanker's vision was similar. In a 1988 speech to the National Press Club, he outlined his ideas for a new kind of school that would promote authentic, teacher-driven innovation.<sup>538</sup> Shanker's beliefs emerged from the aftermath of the 1980s education reform movement, which was sparked by the publication of *A Nation at Risk*, the 1983 report from Ronald Reagan's Commission on Educational Excellence.<sup>539</sup> That report blasted the nation's "steady decline" in educational performance and called for vast improvements in content, expectations, time, and teaching.<sup>540</sup> High school

<sup>532</sup> Ray Budde, *Education By Charter*, 70 PHI DELTA KAPPAN 7, 518–19 (1989).

<sup>533</sup> *Id.* at 519.

<sup>534</sup> *Id.* "Single-year operation syndrome" was the idea that schools spend so much time trying to stay afloat during the present school year that they rarely considering long-term holistic innovation. *Id.*

<sup>535</sup> *Id.* at 520.

<sup>536</sup> *Id.*

<sup>537</sup> *Id.*

<sup>538</sup> Eventually, after reading Budde's work, Shanker embraced the "charter" terminology. See Albert Shanker, *supra* note 1; Ted Kolderie, *Ray Budde and the Origins of the "Charter Concept"*, EDUCATION EVOLVING (Jun. 2005) available at <http://www.educationevolving.org/pdf/Ray-Budde-Origins-Of-Chartering.pdf>.

<sup>539</sup> See generally The National Commission on Excellence in Education, *A Nation at Risk: The Imperative for Educational Reform* (Apr., 1983).

<sup>540</sup> *Id.* at 11–12.

students' average achievement on standardized tests, the report lamented, was lower than it had been twenty-six years previously.<sup>541</sup> But more than that, "many 17-year-olds do not possess the 'higher order' intellectual skills we should expect of them. Nearly 40 percent cannot draw inferences from written material; only one-fifth can write a persuasive essay; and only one-third can solve a mathematics problem requiring several steps."<sup>542</sup> This was an issue, according to the Commission, because technology and computers were set to radically transform entire industries, including health care, construction, education, industrial science, and the military.<sup>543</sup> "If an unfriendly foreign power had attempted to impose on America the mediocre educational performance that exists today," the report concluded, "we might well have viewed it as an act of war."<sup>544</sup> Shanker's design addressed this crisis in creativity by handing the reigns to *teachers* to rescue the curriculum from the educational ruts in which the nation found itself.<sup>545</sup>

Shanker's main complaint was that schools educated all students using a one-size-fits-all approach.<sup>546</sup> Even after the shock of *A Nation at Risk*, Shanker found it upsetting that the country was "reforming" its schools through regulations about seat time, an increase in mandated classes, an overemphasis on homework, and a litany of "regurgitating" on standardized tests.<sup>547</sup> These were remedies for the sake of remedies, designed by a government that was out of original ideas. Shanker directly invoked business language to explain why the government's reforms were obsolete.<sup>548</sup> He wrote that in the business world, when an industry fails to regulate itself, it is not surprising to see the government step in and take control.<sup>549</sup> That tendency is only natural, but equally understandable is the response from the business community, who, after a jolt, would want to control its own destiny.<sup>550</sup>

The whole point, Shanker said, was for the education community to re-take control of the reform movement, to come up "with better answers than would be imposed on them from some distance by those not actually

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<sup>541</sup> *Id.* at 11.

<sup>542</sup> *Id.* at 12.

<sup>543</sup> *Id.*

<sup>544</sup> *Id.* at 9.

<sup>545</sup> Shanker, *supra* note 1, at 15.

<sup>546</sup> *Id.* at 14.

<sup>547</sup> *Id.* at 14-15.

<sup>548</sup> *Id.* at 5.

<sup>549</sup> *Id.*

<sup>550</sup> *Id.* at 5.

involved in the field.”<sup>551</sup> Shanker envisioned the movement beginning through the formation of teacher-led autonomous “school[s] within . . . school[s].”<sup>552</sup> These new schools would institute higher expectations and standards, promote innovation in the school day, team-teach, and self-govern.<sup>553</sup> Unsurprisingly given his position as the head of the major teachers’ union, Shanker also emphasized the importance of vigorous collective bargaining, asserting, “[y]ou don’t see creative things happening where teachers don’t have any voice or power or influence.”<sup>554</sup>

Proceeding from the visions of both Shanker and Budde, the system-within-a-system was born. Both men emphasized that these new schools would be schools of choice: no teacher would be forced into this arrangement and no parent would be obligated to send his children to them. In fact, Shanker found it essential that parents and teachers would collaborate with each other to build “a new structure.”<sup>555</sup> Like Budde, Shanker wanted a guarantee that these new schools would be left to their own devices for five to ten years.<sup>556</sup> Essentially, both men were calling on school policymakers to give free market innovation a chance to improve schools.

In 1991, the ideals of Budde and Shanker became reality when Minnesota became the first state to pass legislation authorizing the creation of charter schools.<sup>557</sup> In 1992, the first charter school opened in St. Paul.<sup>558</sup> The school, City Academy High School, largely honored Shanker’s dream. It served students as old as twenty-one and offered job skills training, counseling, and other social services.<sup>559</sup> A local board, not a for-profit corporation, operated the school.<sup>560</sup> The following year, California became the second state to authorize charters, and from there the movement skyrocketed.<sup>561</sup>

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<sup>551</sup> *Id.*

<sup>552</sup> *Id.* at 12.

<sup>553</sup> *Id.* at 13.

<sup>554</sup> *Id.* at 9.

<sup>555</sup> *Id.* at 17.

<sup>556</sup> *Id.*

<sup>557</sup> *Charter Schools*, MINNESOTA LEGISLATIVE REFERENCE LIBRARY (July 2012), [www.leg.state.mn.us/trl/issues/issues.aspx?issue=charter](http://www.leg.state.mn.us/trl/issues/issues.aspx?issue=charter); *see also* Minn. Stat. § 124D.10 (2012).

<sup>558</sup> *Charter Schools*, *supra* note 97.

<sup>559</sup> *Id.*

<sup>560</sup> *Id.*

<sup>561</sup> *Understanding the Landscape*, CAL. CHARTER SCH. ASS’N, <http://www.calcharters.org/starting/landscape> (last visited Mar. 31, 2013); *Charter School History and Policy*, EDSOURCE,

From the very beginning of charter schools, all sides of the political spectrum found something to embrace. Charter schools represented both a Friedmanite method for transferring control of schools from the government to private citizens and a way in which liberal educators could institute local curriculum centered on marginalized communities. In 1993, the conservative Heritage Foundation sponsored the Center for Education Reform to back decentralized control of schools.<sup>562</sup> The liberal Brookings Institution created its own policy arm shortly thereafter.<sup>563</sup> The centrist Democratic Leadership Council also endorsed the movement, and in 1994, Bill Clinton pushed legislation through Congress that set aside federal money to spur the development of charter schools.<sup>564</sup> Voucher advocates of the Reagan era and liberal ethnic studies proponents both found elements they could stand behind. As Diane Ravitch wrote, it is ironic that George W. Bush, a conservative Republican, presided over the “largest expansion of federal control in the history of American education. It was likewise ironic that Democrats embraced market reforms . . . that traditionally had been favored by Republicans.”<sup>565</sup> All in all, with few political opponents, support for charter schools has grown exponentially over the last twenty years. Today, forty-one states and the District of Columbia permit charter schools, and there are over 5,000 charters in existence.<sup>566</sup>

#### IV. THE EMERGENCE OF FOR-PROFIT EDUCATION COMPANIES

Due to both deliberate and unintentional policy decisions, Milton Friedman’s vision of an educational system funded by government but run by private companies has remained foundational to the charter school movement. From their creation, discussion about charter schools and school choice were grounded in microeconomic theory. As two education scholars wrote in 1990 in justification of privatized education, “the private market can determine the appropriate quantity and quality of a good by reaching an equilibrium between consumers and producers that optimizes the utility of

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[http://www.edsource.org/iss\\_charter\\_policy.html](http://www.edsource.org/iss_charter_policy.html) (last visited Mar. 31 2013).

<sup>562</sup> Dorothy Shipps, *The Politics of Educational Reform*, in SHAPING EDUCATION POLICY: POWER AND PROCESS 259, 278 (Douglas E. Mitchell et al. eds., 2011).

<sup>563</sup> See *K-12 Education*, BROOKINGS INSTITUTION, <http://www.brookings.edu/research/topics/k-12-education> (last visited Mar. 31, 2013).

<sup>564</sup> DIANE RAVITCH, *THE DEATH AND LIFE OF THE GREAT AMERICAN SCHOOL SYSTEM* 125 (2010).

<sup>565</sup> *Id.* at 21.

<sup>566</sup> Elaine Mulligan, *The Facts on Charter Schools and Students with Disabilities*, NATIONAL DISSEMINATION CENTER FOR CHILDREN WITH DISABILITIES, <http://www.nichcy.org/wp-content/uploads/docs/charterschools.pdf>.

consumers and the profit of producers . . . the bureaucracy of governments leads to ineffective and inefficient institutions.”<sup>567</sup>

While the charter founders themselves never envisioned a role for private companies in *running* charter schools, charters fit naturally into public-private partnerships.<sup>568</sup> As Ray Budde originally envisaged, the core of a charter school is the charter itself, and innate in that founding document is a market conception. After all, a charter is essentially a performance contract.<sup>569</sup> There are two sides to the agreement and a quid pro quo: authorizers agree to a set of stipulations and charter schools agree to produce results. If the relationship falters in the middle, the authorizer may cancel the deal, but if the school performs well, the authorizer can extend the contract.<sup>570</sup> The nature of the agreement also lends itself easily to a public-private affiliation, as it is premised on the notion that whoever manages the charter school—whether it be a public or a private entity—it is *not* the school district.

Like Budde, Albert Shanker’s original plan for charter schools also included private business, even while, echoing Freidman, he anticipated the need for public financing. Charter schools “will have to operate on the same money that all other schools do,” he said, and added “[t]here is a role in all this for the federal government, state government, the local government, the business community, and foundations.”<sup>571</sup> Shanker could not have anticipated the extent to which he would be correct.

Wall Street analysts coined the term “educational management organization” (“EMO”) in the 1990s as an analogue to health management organizations (“HMOs”) in the health sector.<sup>572</sup> The term EMO refers most often to a for-profit business that draws upon a range of funding inputs, including venture capital and public funds, and that seeks to return profits to investors.<sup>573</sup> EMOs manage schools, but they do not technically run

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<sup>567</sup> Lacireno-Paquet, *supra* note 38, at 3.

<sup>568</sup> *Id.*

<sup>569</sup> See HILL ET AL., *supra* note 67, at 4.

<sup>570</sup> See *id.*; see also Guilbert C. Hentschke et al., *Education Management Organizations: Growing a For-Profit Education Industry with Choice, Competition and Innovation*, REASON PUB. POL’Y INST. 1, 7 (May 1, 2002), <http://reason.org/files/86f373eefe12bf11ff614e1305ff3362.pdf>.

<sup>571</sup> Shanker, *supra* note 1, at 18.

<sup>572</sup> Miron et al., *supra* note 12, at 1.

<sup>573</sup> *Id.* at 2; see Hentschke et al., *supra* note 110, at 4 (discussing the role of venture capital and public funds in for-profit EMOs). There are also non-profit EMOs, but they are outside the scope of the examination here.



them.<sup>574</sup> They are distinct from authorizers, school districts, and even charter founders.<sup>575</sup> They provide curriculum, management, and resources.<sup>576</sup> They are not, however, service contractors, who are often referred to as “vendors.”<sup>577</sup> A vendor provides more targeted and specific services, such as accounting, transportation, benefits and payroll, professional development, and even special education in some places.<sup>578</sup> EMOs, by contrast, supply the core academic and curricular needs of schools.<sup>579</sup> While privatization advocates often point out that since long before the advent of charter schools, traditional public schools found it useful to contract with private companies for a range of services—including textbooks, food services, and transportation contracts—the move to full administration of public schools by private companies marked a fundamental shift in education policy in the United States.<sup>580</sup> The central difference is the degree to which a company running a school has the power to violate students’ fundamental rights as enshrined in law.<sup>581</sup> In other words, there is a big difference between a company having a say in the construction of a textbook and a company controlling the entire substance of a school.

The first EMO began in the same time and place as charters more generally—1990s Minnesota.<sup>582</sup> Growth of EMOs in the 1990s and 2000s was explosive. The number of for-profit EMOs nationwide grew from 5 in the 1995-1996 school year to 99 in 2010-2011, and the number of schools those EMOs operated increased from 6 to 758 over the same time span.<sup>583</sup> During those years, enrollment increased from around 1000 students in 1995-1996 to about 394,000 in 2010-2011.<sup>584</sup> For-profit companies now operate in thirty-three states.<sup>585</sup> About 35% of all public charter schools in

<sup>574</sup> *Ariz. State Bd. for Charter Sch. v. U.S. Dep’t of Educ.*, 464 F.3d 1003 (9th Cir. 2006). The court makes this distinction clear. While private companies are not eligible for federal special education money, charter schools are free to contract out the management of their schools at 100%, making this distinction one of paperwork. *Id.* at 1009–10.

<sup>575</sup> *See, e.g., Miron et al., supra* note 12, at 3.

<sup>576</sup> *See generally, Hentschke, supra* note 110.

<sup>577</sup> *Miron et al., supra* note 12, at 2.

<sup>578</sup> *Id.*

<sup>579</sup> *See Hentschke, supra* note 110, at 6.

<sup>580</sup> *Forman, supra* note 61, at 850.

<sup>581</sup> *Zollers & Ramanathan, supra* note 29, at 303.

<sup>582</sup> *See The History of For-Profit Education Management Organizations*, at 3, [http://a100educational-policy.pbworks.com/f/EMO\\_History.pdf](http://a100educational-policy.pbworks.com/f/EMO_History.pdf) (last accessed Mar. 31, 2013). Its original name was Educational Alternatives, but in a symbol of the future of many EMOs, the company soon foundered on educational instability and merged with another EMO out of Arizona.

<sup>583</sup> *See Miron et al., supra* note 12, at *ii*.

<sup>584</sup> *Id.*

<sup>585</sup> *Id.* at *iii*.

the U.S. are operated by private companies, accounting for about 42% of all students enrolled in charter schools nationwide.<sup>586</sup> Almost all of the schools managed by EMOs nationwide (94%) are charter schools.<sup>587</sup>

There are many advertised benefits to the administration of schools by private companies. Corporations are theoretically better at monitoring student progress, mastering the substantial reporting and business aspects of running a school, and managing finances.<sup>588</sup> They also have a financial incentive to increase enrollment and to perform well because their contracts can be terminated, whereas traditional public schools often receive funding regardless of performance.<sup>589</sup> A national company like K12, Inc., which operates hundreds of schools across the United States, can also take advantage of economies of scale; it can develop one set of curricula, pedagogical principles, and administration policies, and apply those innovations to its entire cadre of schools. In theory, privately run public schools face more accountability, because, under the central tenet of school choice, students can leave if they are dissatisfied.<sup>590</sup> EMOs can also help with startup funds and curriculum development, which theoretically frees founders to concentrate on their local mission.<sup>591</sup>

Critics of allowing strong private involvement in public education cite the fiduciary duty publicly traded companies owe to their shareholders.<sup>592</sup> This mission often conflicts with the concurrent duty to students and federal standards, given the companies' acceptance of federal funds.<sup>593</sup> Detractors also cite a lack of control and decision-making for charter boards that have contracted with private companies.<sup>594</sup> Once a school hands over curricular control to a private company and invests time and energy into that company, it may be difficult to cancel a contract for lack of performance.<sup>595</sup> The authority that a private company may exercise over a charter school also violates one of the central ideas of the choice movement:

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<sup>586</sup> *Id.* at *i.* (figures are the most recent available, from the 2010-2011 school year).

<sup>587</sup> *Id.* at *iii.*

<sup>588</sup> Anne E. Trotter, Suzanne E. Eckes & Jonathan A. Plucker, *Education Management Organizations and Charter Schools: Serving All Students*, 213 ED. LAW. REP. 935, 938 (2006).

<sup>589</sup> *Id.* at 936, 940.

<sup>590</sup> *See id.*; *see also* Sandra Vergari, *Charter Schools: A Significant Precedent in Public Education*, 59 N.Y.U. ANN. SURV. AM. L. 495, 508 (2003).

<sup>591</sup> *See* Trotter et al., *supra* note 128, at 940.

<sup>592</sup> *Id.*

<sup>593</sup> *Id.* at 941.

<sup>594</sup> *Id.*

<sup>595</sup> *Id.*; Vergari, *supra* note 130, at 508.

independence.<sup>596</sup> Moreover, economies of scale also have drawbacks: they can lock a standardized curriculum in a place where a customized, local focus would better serve students. Finally, privatized charter schools lack transparency and tend to favor efficiency and their bottom line over their duty to serve all students.<sup>597</sup>

But the crux of the debate over the effectiveness of privatized education revolves around funding mechanisms. Charter schools funded by districts in general receive less money per pupil than traditional public schools.<sup>598</sup> In amending ESEA in 1997, Congress found that only one state—the original charter platform, Minnesota—provided charter schools with both capital and operating per-pupil expenses.<sup>599</sup> The remainder of states granted only operating funds to charters, leaving them to fend for funds for buildings and facilities on their own.<sup>600</sup> Today, many states fund only 70% to 90% of schools' necessary operating expenses.<sup>601</sup> Additionally, charter school boards lack authority to issue school construction bonds that can be used to finance capital improvements and the building of new schools.<sup>602</sup> Traditional public schools, by contrast, receive money for both capital and operating expenses, and frequently take advantage of bond initiatives to maintain financial viability.<sup>603</sup> While conventional public schools receive free access to buildings, most charters must rent space using money that could otherwise go towards instruction.<sup>604</sup> This kind of hard choice is one primary reason that charter schools often seek donations and private support or hand their entire operation over a private company.<sup>605</sup> Charters authorized by school districts must combat the vested interest of those districts in funding the traditional public schools over the charter schools,<sup>606</sup>

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<sup>596</sup> Trotter et al., *supra* note 128, at 941.

<sup>597</sup> *Id.*

<sup>598</sup> Jeanette M. Curtis, *A Fighting Chance: Inequities in Charter School Funding and Strategies for Achieving Equal Access to Public School Funds*, 55 HOW. L.J. 1057, 1060–61 (2012).

<sup>599</sup> H.R. REP. NO. 105-321, at 17 (1997).

<sup>600</sup> *Id.*

<sup>601</sup> *Id.*

<sup>602</sup> *Id.*

<sup>603</sup> *Id.*

<sup>604</sup> HILL ET AL., *supra* note 67, at 5.

<sup>605</sup> *Id.*

<sup>606</sup> MEAGAN BATDORFF ET AL., BALL STATE UNIVERSITY, CHARTER SCHOOL FUNDING: INEQUITY PERSISTS 14 (2010), available at <http://cms.bsu.edu/media/WWW/DepartmentalContent/Teachers/PDFs/charterschfunding051710.pdf>; see also *Measuring Up to the Model: A Tool for Comparing State Charter School Laws*, NATIONAL ALLIANCE FOR PUBLIC CHARTER SCHOOLS, <http://www.publiccharters.org/law/ViewState.aspx?state=NM>.

many districts charge a flat fee simply for having charter schools under their purview.<sup>607</sup>

According to a 2010 report from Ball State University entitled *Charter School Funding: Inequity Persists*, charter schools remain underfunded, in some cases severely so, when compared with traditional public schools.<sup>608</sup> The report warns that under-funding threatens the welfare of children attending charter schools, and especially students in urban areas.<sup>609</sup> These students, who “derive the greatest benefit from new and innovative ways of thinking about learning, experienced the greatest disparity in funding. Thus, true school choice may be denied de facto, or at least severely impaired, for those students who already have few positive educational opportunities.”<sup>610</sup> Founding and running a charter school has become increasingly difficult in the face of these myriad financial impediments.

Difficulties in obtaining full public funding have led to a slowdown in growth in for-profit EMOs over the past few years.<sup>611</sup> Many EMOs, failing to adequately predict the costs involved with educating many types of children and navigating the complex fiscal landscape, have simply folded.<sup>612</sup> Some EMOs are now looking to diversify into collateral fields like educational publishing, but two companies expanded into the school management arena this year.<sup>613</sup> EMO mergers appear to be increasing.<sup>614</sup> Concerns about the motives of private companies are also complicating their efforts to expand. In Washington state, a legislator expressed concern that the legislature there was handing millions of dollars in state funds to private companies without being able to exert much control over the schools it was funding.<sup>615</sup>

Struggling EMOs looking to increase profits in the face of a complicated financial climate are increasingly turning to cyber charters as an alternate method of augmenting their portfolios. Cyber charters account for over ten

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<sup>607</sup> See Knight, *supra* note 22, at 410.

<sup>608</sup> W. Holmes Finch, *Introduction* to Batdorff et al., *supra* note 146, at i.

<sup>609</sup> *Id.*

<sup>610</sup> *Id.* at i–ii.

<sup>611</sup> Miron et al., *supra* note 12, at i.

<sup>612</sup> *The History of For-Profit Education Management Organizations*, *supra* note 122, at 4.

<sup>613</sup> These are Pearson Education and Cambridge Education, LLC. See Miron et al., *supra* note 12, at ii.

<sup>614</sup> *The History of For-Profit Education Management Organizations*, *supra* note 122, at 3.

<sup>615</sup> Lin, *supra* note 13, at 184. A public school official put it this way: “They’re experimenting with kids’ lives on the public dollar.” Kevin P. Brady, Regina R. Umpstead & Suzanne E. Eckes, *Unchartered Territory: The Current Legal Landscape of Public Cyber Charter Schools*, 2010 B.Y.U. EDUC. & L.J. 191, 203 (2010).

percent of EMO-run schools, but because they enroll many more students on average than brick-and-mortar schools, they total more than 27% of all students in EMO-run schools.<sup>616</sup> Both of those proportions continue to rise.<sup>617</sup> In contrast to the rest of the private education sector, where there is much more diversity in company size, nearly all of the virtual schools are run by five large EMOs.<sup>618</sup>

The kind of virtual school these EMOs favor is fully online, not a hybrid of classroom- and internet-based instruction (nearly all schools today are hybrid in some way, in that they require students to complete some percentage of their work online).<sup>619</sup> These schools may or may not have actual brick-and-mortar buildings.<sup>620</sup> A student attending a fully virtual school may live hundreds of miles from the school's location and thus receive no instruction at the school site.<sup>621</sup> Lessons at these schools are dubbed "asynchronous," meaning that students and teachers work at different times, through tools like threaded discussion boards, testing programs, and help systems.<sup>622</sup> Coursework at virtual schools is primarily conducted on computers, through video lectures, PowerPoints, and virtual lessons—but students may also have paper textbooks or be required to perform science experiments in their homes using available materials.<sup>623</sup> Students enrolled in virtual schools obtain help and support with their work through online communication with the school's teachers, and from their parents or other people in their home.<sup>624</sup>

## V. THE EXCLUSION OF THE EXPENSIVE

Questions about for-profit charter schools and students with disabilities surfaced almost from the date EMOs came into existence. A landmark 1998 article by Nancy Zollers and Arun Ramanathan, subtitled *The Sordid Side*

<sup>616</sup> Miron et al., *supra* note 12, at 10.

<sup>617</sup> *Id.* at 9–10.

<sup>618</sup> These five EMOs are: Connections Education, K12, Inc., Leona Group, Mosaica Education, and White Hat Management. Connections, recently acquired by the education giant Pearson, and K12 are the two "dominant players." *Id.* at 10.

<sup>619</sup> Greg Vanourek et al., *An (Updated) Primer on Virtual Charter Schools: Mapping the Electronic Frontier*, NAT'L ASS'N OF CHARTER SCH. AUTHORIZERS 1, 5 (Sept. 2011) [hereinafter NACSA], [http://www.qualitycharters.org/images/stories/publications/Issue\\_Briefs/NACSA\\_Cyber\\_Series\\_EvergreenIssueBrief.pdf](http://www.qualitycharters.org/images/stories/publications/Issue_Briefs/NACSA_Cyber_Series_EvergreenIssueBrief.pdf).

<sup>620</sup> The laws of some states, such as New Mexico, require all schools to have an actual building. N.M. STAT. ANN. § 2-8B-4.2 (2011).

<sup>621</sup> NACSA, *supra* note 159, at 2.

<sup>622</sup> *Id.* at 15.

<sup>623</sup> *Id.* at 8.

<sup>624</sup> *Id.* at 13.

*of the Business of Schooling*, chronicled major legal improprieties at Massachusetts EMOs.<sup>625</sup> While these schools did a “decent” job of including students with *mild* disabilities, they “engaged in a pattern of disregard and often blatant hostility toward students with more complicated behavioral and cognitive disabilities.”<sup>626</sup> These companies not only enrolled a far lower number of students with severe disabilities than did traditional public schools, but treated students with severe disabilities as “financial liabilities.”<sup>627</sup> The offending schools were enabled, according to Zollers and Ramanathan, by “a state government that coddles charter schools while singling them out as examples of free-market accountability and innovation.”<sup>628</sup>

Zollers and Ramanathan interviewed dozens of parents and discovered a variety of ways that Massachusetts EMOs pushed away students with severe disabilities.<sup>629</sup> One of the most common practices was “counseling out” students.<sup>630</sup> Because EMOs often engage in recruiting campaigns to ensure they fill their schools, their representatives have more contact with the general public than do administrators of traditional public schools.<sup>631</sup> As EMOs engaged in self-promotion, they were simultaneously telling parents of expensive students that they would be “better served” in traditional public schools.<sup>632</sup> For students who enrolled nonetheless, the schools were often using inappropriate disciplinary procedures: segregating students in violation of the least restrictive environment requirement, suspending students improperly, and eventually trying to counsel them out.<sup>633</sup> These practices are broadly illegal, but parents who were unaware of their full rights under special education law were especially susceptible to this soft discrimination.<sup>634</sup> While there was nothing harmless about the actual practices the schools used, on paper nothing untoward appeared. A parental signature on the transfer application indicated that the transfer was a “voluntary” parental decision.<sup>635</sup> In the case of families of students with

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<sup>625</sup> Zollers & Ramanathan, *supra* note 29, at 298.

<sup>626</sup> *Id.*

<sup>627</sup> *Id.* at 297.

<sup>628</sup> *Id.* at 298.

<sup>629</sup> *Id.* at 299.

<sup>630</sup> *Id.* at 299.

<sup>631</sup> *Id.*

<sup>632</sup> *Id.*

<sup>633</sup> *Id.* at 300.

<sup>634</sup> Mary Bailey Estes, *Charter Schools and Students With Disabilities: How Far Have We Come?*, 30 REMEDIAL & SPECIAL EDUC. 216, 217 (2009).

<sup>635</sup> Zollers and Ramanathan, *supra* note 29, at 300.

severe disabilities who were counseled not to attend charters from the outset, there would be no paper trail at all.

Compounding these practices was the manner in which Massachusetts funded special education. Each charter school there received per-student funding based on its local district's special education and bilingual expenses, excluding the cost of private special placements.<sup>636</sup> Because the EMOs enrolled fewer students with severe disabilities and because they often claimed special funds for "substantially separate" classes of students with only moderate disabilities, they received a major advantage in funding over traditional public schools.<sup>637</sup> On top of that, Massachusetts also forced local districts—not charters—to pay for the busing of students to charter schools.<sup>638</sup> The state allowed for-profit companies to create "for-profit nonprofit[s]" that could apply for federal special education money—the cost of which was, again, based on the costs of educating students in the local district.<sup>639</sup> To add to the inequity, when students with severe disabilities left charter schools, regardless of whether they did so voluntarily, they most often returned to traditional public schools, thereby further raising the districts' costs.<sup>640</sup> These practices meant that for-profit companies were taking advantage of financial incentives but not upholding their end of the financial bargain to students.<sup>641</sup> The companies treated education as another market to be maximized.<sup>642</sup>

In the fifteen years since Zollers and Ramanathan conducted their research, these problematic behaviors have not abated. A recent report from the Government Accountability Office ("GAO"), the investigative arm of Congress, found that nationwide, charter schools enroll a lower percentage of students in thirteen disability categories compared to traditional public schools.<sup>643</sup> The audit noted that "[a]necdotal accounts also suggest that some charter schools may be discouraging students with disabilities from enrolling and denying admission to students with more severe disabilities

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<sup>636</sup> *Id.* at 301. Zollers and Ramanathan also discuss how these for-profit schools enroll a lower percentage of bilingual students. *Id.*

<sup>637</sup> *Id.*

<sup>638</sup> *Id.*

<sup>639</sup> *Id.* *But see* Arizona State Bd., 464 F.3d 1003, 1010 (9th Cir. 2006) (holding that for-profit charter schools were ineligible for federal funding under the IDEA and ESEA).

<sup>640</sup> Zollers and Ramanathan, *supra* note 29, at 301.

<sup>641</sup> *Id.*

<sup>642</sup> *Id.*

<sup>643</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-543, CHARTER SCHOOLS: ADDITIONAL FEDERAL ATTENTION NEEDED TO HELP PROTECT ACCESS FOR STUDENTS WITH DISABILITIES 9 (2012) [hereinafter GAO].

because services are too costly.”<sup>644</sup> In other words, charter schools are still engaged in widespread behavior that violates federal law.

The GAO report found that charter schools nationwide contain approximately 8.2% special education students, as compared to 11.2% for traditional public schools.<sup>645</sup> While the GAO reported that “little is known about the factors contributing to differences in enrollment patterns,” the report discusses a number of practices Zollers and Ramanathan identified more than a decade before.<sup>646</sup> The GAO found evidence of counseling out and of schools denying admission to students with severe disabilities.<sup>647</sup> It also uncovered the practice of giving “placement exams,” which may discourage students from attending because they target general education students and do not offer appropriate accommodations to students with disabilities.<sup>648</sup> In response to this procedure, the GAO found that many states are beginning to require that charter schools remove any questions about disability from their application forms, as these questions are a potential source of discouraging parents or promoting discrimination on the part of the school.<sup>649</sup> The GAO report exposed that some charter schools to approach special education “informally,” implementing modifications without including them on students’ official special education plans.<sup>650</sup> Charter school representatives and researchers noted that schools also engaged in reassessments of special education students that determined the students no longer required special education services.<sup>651</sup>

In response to these critiques, charter proponents argue that their schools have lower numbers of special education students because their small size and low student-to-teacher ratios allow them to better serve *all* students.<sup>652</sup> They argue that special education students who come to charter schools may discover, through intensive instruction, that improved differentiation across the entire classroom helps them realize that they no longer require

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<sup>644</sup> *Id.* at 12.

<sup>645</sup> *Id.* at 6–7.

<sup>646</sup> *Id.* at 11. Compare Zollers & Ramanathan, *supra* note 29, at 299–301, with GAO, *supra* note 183, at 12–13.

<sup>647</sup> GAO, *supra* note 183, at 12–13; see Zollers & Ramanathan, *supra* note 29, at 299.

<sup>648</sup> GAO, *supra* note 183, at 13.

<sup>649</sup> *Id.* at 15.

<sup>650</sup> *Id.* at 12–13. This practice creates huge problems when a student moves schools, and it violates the central protectionary promise of special education law.

<sup>651</sup> *Id.* at 14. This process may work with misdiagnosed students with ADHD, for example, but it has no relevance to students with severe impairments whose special education status is hardly in controversy.

<sup>652</sup> See Estes, *supra* note 174, at 217.



special education services at all.<sup>653</sup> Students who, in traditional public schools, might be misdiagnosed with learning disabilities, can thrive in charter schools after this intensive instruction.<sup>654</sup> And, as Angela Ciolfi and James Ryan argue, parents in struggling traditional schools often seek the procedural protections of special education as a way of safeguarding their childrens' civil rights, even if their children have no disabilities.<sup>655</sup> Once these students enter charters that already have those rights foremost in mind, charter proponents argue, the need for special education falls away.<sup>656</sup> Charter school officials also claim that, according to one scholar, "their enrollment numbers are lower partly because many parents of special-needs children choose to enroll in traditional schools that often are more experienced providing such services, or in private schools that can give those students individualized attention."<sup>657</sup> Yet even these positive aspects of charter schools point to the limited availability of school choice. While true parental choice is the primary ideal of the current reform movement, the de facto practices of many charter schools expose the lack of symmetry between charter and traditional schools vis-à-vis students with disabilities. The policies of exclusion of many charters make it clear that parents often feel as if they have no choice at all.<sup>658</sup>

Several recent lawsuits and administrative complaints have exposed additional illegal practices at charter schools. In a 2011 complaint filed with the Justice Department, the Bazelon Center, a nonprofit advocacy group, alleged that Washington D.C. charter schools systematically discriminate against students with disabilities.<sup>659</sup> About 18% of students in traditional public schools in Washington, D.C., receive special education services, compared with 11% in charter schools.<sup>660</sup> The Washington, D.C., schools system contains an unusually high percentage of charter schools, which serve about 29,000 students.<sup>661</sup> The District's identity as a vanguard in the

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<sup>653</sup> Stephanie Banchemo & Caroline Porter, *Charter Schools Fall Short on Disabled*, WALL ST. J., June 19, 2012, available at <http://online.wsj.com/article/SB100014240527023033792045774770038-93836734.html#>.

<sup>654</sup> *Id.*

<sup>655</sup> Angela A. Ciolfi & James E. Ryan, *Race and Response-to-Intervention in Special Education*, 54 HOW. L.J. 303, 339-40 (2011).

<sup>656</sup> Banchemo & Porter, *supra* note 193.

<sup>657</sup> *Id.*

<sup>658</sup> GAO, *supra* note 183, at 12.

<sup>659</sup> Bill Turque, *Advocates Accuse D.C. Charter Schools of Excluding the Disabled*, WASH. POST, May 13, 2011, available at [http://articles.washingtonpost.com/2011-05-13/local/35263131\\_1\\_charter-schools-charter-sector-public-education-options](http://articles.washingtonpost.com/2011-05-13/local/35263131_1_charter-schools-charter-sector-public-education-options).

<sup>660</sup> *Id.*

<sup>661</sup> *Id.*

charter movement brings high stakes to these charges for both charter advocates and critics.<sup>662</sup> The complaint alleges similar kinds of discrimination as Zollers and Ramanathan and the GAO found: counseling out, disability questions on applications, and claims of lack of capacity.<sup>663</sup>

One family's case was illustrative. A student named Jared McNeil was recently expelled from a charter school for misbehavior, his mother said in an interview with the *Washington Post*.<sup>664</sup> He did not enter the school with special education status, but was later diagnosed with "oppositional defiant disorder," which required him to "spend five hours a week outside the classroom receiving special services."<sup>665</sup> His mother said school counselors told her that "you might want to start looking for other schools," in violation of special education law.<sup>666</sup> School officials claimed that the expulsion was not related to his disability, but his mother maintains that he was forced out expressly because he was disabled.<sup>667</sup> Special education law requires schools to carry out certain procedural protections before a student can be expelled if the behavior in question results from the student's disability.<sup>668</sup> As McNeil's mother asserted, the school cannot simply expel a student with a disability without due process.<sup>669</sup>

In the 2010, the Southern Poverty Law Center filed an administrative complaint with the Louisiana Department of Education ("LDE") on behalf of students with disabilities in New Orleans.<sup>670</sup> The complaint alleged widespread discrimination against students in the Recovery School District ("RSD"), a post-Katrina special school district that took over low-performing schools previously run by the Orleans Parish School Board.<sup>671</sup> Over 70% of students in New Orleans attend charter schools, the highest

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<sup>662</sup> See WAITING FOR SUPERMAN, *supra* note 8 (highlighting the controversy surrounding former Washington, D.C., Superintendent Michelle Rhee).

<sup>663</sup> Turque, *supra* note 199.

<sup>664</sup> *Id.*

<sup>665</sup> *Id.*

<sup>666</sup> *Id.*; see 20 U.S.C. § 1412(a)(1)(A) (2004); 34 C.F.R. § 300.101 (2006).

<sup>667</sup> Turque, *supra* note 199.

<sup>668</sup> See 20 U.S.C. § 1415(k)(1)(E)–(F) (2004) (provisions regarding manifestation determinations).

<sup>669</sup> See 20 U.S.C. § 1415(k) (procedures for removal of a special education student to an alternative placement). The school refutes the charge, calling it "absolutely false." Turque, *supra* note 199.

<sup>670</sup> Complaint at 1, *Berry v. Pastorek*, No. 2:10-cv-04049 (E.D. La. Oct. 26, 2010), available at <http://www.lawyerscommittee.org/admin/education/documents/files/FILED-COMPLAINT-P-B-v-Pastorek.pdf>.

<sup>671</sup> EDUC. PROJECT, LAWYERS' COMM. FOR CIVIL RIGHTS UNDER LAW, *Louisiana Department of Education Litigation*, <http://www.lawyerscommittee.org/projects/education/page?id=0017> (last visited Mar. 5, 2013). See *Berry*, *supra* note 210.

rate in the nation.<sup>672</sup> When the LDE and the plaintiffs could not come to an agreement, the Lawyers' Committee for Civil Rights Under Law filed a class action lawsuit on behalf of an estimated 4,500 students with disabilities in New Orleans.<sup>673</sup> The complaint alleges many of the same practices identified in other locales: under-representation of special education students in charter schools (12.6% vs. 7.8%), counseling out, and state refusal to fix the problems.<sup>674</sup> At one school, an administrator allegedly told a plaintiff that he was "no longer welcome" at the school due to his disability.<sup>675</sup> The student could not find a school that would accept him and he remained out of school "for over 15 days without education services or a behavior support plan."<sup>676</sup> Another plaintiff reported being rejected by five different New Orleans schools due to his disability.<sup>677</sup> School officials also told students that their schools could not accommodate severe disabilities.<sup>678</sup> In an affront to the federal disability law, one school even lacked wheelchair accessibility.<sup>679</sup> All of these practices violate federal law.<sup>680</sup>

The issues in New Orleans did not occur sporadically or in isolation, according to the complaint, but represented a pattern of systematic discrimination.<sup>681</sup> Schools failed to identify students who required special education.<sup>682</sup> When the schools identified students who required additional services, officials made cynical efforts to confine the necessary remedies to sections of the law that require less procedural protection rather than recommend full special education.<sup>683</sup> Critical diagnostic tests were excessively delayed,<sup>684</sup> students routinely fell behind despite requesting services, and the graduation rate among students with disabilities in the RSD fell to 6.8%, compared to 19.4% statewide.<sup>685</sup> Almost half the students

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<sup>672</sup> *Id.*

<sup>673</sup> *Berry, supra* note 210, at 4.

<sup>674</sup> *Id.* at 3-4.

<sup>675</sup> *See id.* at 33-34.

<sup>676</sup> *See id.* at 34.

<sup>677</sup> *See id.* at 19.

<sup>678</sup> *See id.* at 19.

<sup>679</sup> *See Berry, supra* note 210, at 19.

<sup>680</sup> *See, e.g.,* 42 U.S.C. § 12132 (1990) ("Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."). *See generally* 20 U.S.C. § 1412 (2005); 34 C.F.R. § 300 (2006).

<sup>681</sup> *Berry, supra* note 210, at 10.

<sup>682</sup> *Id.* at 19-20, 22.

<sup>683</sup> *Id.* at 20.

<sup>684</sup> *Id.* at 23.

<sup>685</sup> *Id.* at 25.

with disabilities in the RSD failed to complete school.<sup>686</sup> All in all, the class's complaint relates sixty pages of infractions in the RSD.<sup>687</sup> While many of these problems are undoubtedly unique to post-Katrina New Orleans, the difference between New Orleans and the troubles in other locales is a matter of number, not kind. The situation in New Orleans demonstrates that students with disabilities are at the front lines of education policy and take the worst abuse when systems break down.

Another argument from supporters of privatization in education is that the line between public and private schools has already become blurry.<sup>688</sup> Because many private schools offer free tuition and public schools in some states are allowed to require admission tests for entry, supporters argue that the discrepancy between private and public is ambiguous.<sup>689</sup> "Our current language of schooling does not capture the complexity of education today," writes one such advocate.<sup>690</sup> This argument entirely ignores a central difference between public and private schools: students attending private schools using private money do not receive protection under federal law, while students who attend any school using public money do.<sup>691</sup>

Another recent legal fight exemplifies this point. In June of 2011, a consortium of parents and civil rights groups filed a complaint with the Justice Department's civil rights division alleging that the Milwaukee Parental Choice Program discriminates against children with disabilities by "segregating" them in public schools.<sup>692</sup> The program, which began in 1990, allows students, under specific circumstances, to attend private schools using state money.<sup>693</sup> The complaint alleges that Wisconsin's voucher system promotes discrimination, citing evidence that only 1.6% of students attending private schools using state vouchers are enrolled in special education, in contrast to almost 20% of special education students in the traditional public school system.<sup>694</sup> Despite these concerns, the state plans an expansion of the school choice program, promoted by Governor Scott

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<sup>686</sup> *Id.*

<sup>687</sup> See generally *Berry*, *supra* note 210.

<sup>688</sup> Forman, *supra* note 61, at 845.

<sup>689</sup> *Id.*

<sup>690</sup> *Id.*

<sup>691</sup> 34 C.F.R. § 300.137 (2012).

<sup>692</sup> Tom Held, *School Choice Program Shuts Out Disabled, Federal Complaint Says*, MILWAUKEE J. SENTINEL, June 7, 2011, available at <http://www.jsonline.com/news/education/123374903.html>.

<sup>693</sup> *Milwaukee Parental Choice Program*, WISCONSIN DEPARTMENT OF PUBLIC INSTRUCTION, <http://dpi.wi.gov/sms/choice.html> (last visited Mar. 5, 2013).

<sup>694</sup> Held, *supra* note 232.

Walker, that would raise income limits of participating students and expand the number of private schools that accept the vouchers.<sup>695</sup>

As online charters run by EMOs continue to gain in popularity, the problems with discrimination seen above in Massachusetts, Washington, New Orleans, and Milwaukee become even more acute. Despite a lack of lawsuits, there are increasing reports that suggest there are major obstacles to the free and appropriate education of students with disabilities in online charter schools. A recent exposé in the New York Times highlighted major improprieties at a number of online schools nationwide.<sup>696</sup> At Agora Cyber Charter School, run by K12, Inc., for example, achievement is abysmal. At least half of the students are behind in math and/or reading, and a third do not graduate on time.<sup>697</sup> Hundreds of students withdraw shortly after enrolling, leaving fees for re-takes and equipment behind.<sup>698</sup> These fees, and other income that includes federal and state taxpayer money, have made the company immensely profitable. Agora's projected profits for the next fiscal year are \$72 million, accounting for ten percent of K12's total revenues.<sup>699</sup> Yet some teachers at Agora manage as many as 250 students, and the company often collects as much public money as traditional public schools, despite the fact that its facilities costs are much lower.<sup>700</sup> K12, Inc. also profits by establishing schools in poorer districts in states that provide larger subsidies to areas where a high number of students live in poverty.<sup>701</sup> Yet in one such school, in Tennessee, even though K12, Inc. received the subsidy, only a few of the students enrolled at its school were actually from that county.<sup>702</sup> This incongruence is a central example of how the outdated legal landscape fails to properly incentivize companies to serve students.

K12, Inc. also spends a great deal less per pupil on special education than traditional public schools.<sup>703</sup> Even though the company enrolls students with disabilities at rates not significantly lower than conventional public schools, it serves students with less severe disabilities, and even so, spends substantially less than traditional schools on services for students with disabilities.<sup>704</sup> In fact, K12 "saves" at least \$500 per pupil when compared

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<sup>695</sup> *Id.*; see also Assemb. B. 40, 2013 Leg., Reg. Sess. (Wis. 2013).

<sup>696</sup> Saul, *supra* note 16.

<sup>697</sup> *Id.*

<sup>698</sup> *Id.*

<sup>699</sup> *Id.*

<sup>700</sup> *Id.*

<sup>701</sup> *Id.*

<sup>702</sup> *Id.*

<sup>703</sup> *Id.*

<sup>704</sup> Miron & Urschel, *supra* note 11, at 16.

to traditional public schools.<sup>705</sup> The company also uses a significant portion of the public money it collects from the government for advertising—approximately \$26.5 million in 2010.<sup>706</sup> While utilizing incoming money to generate more business is a common strategy in the business world, the practice prompts questions when it draws upon taxpayer funds intended to fund education directly.<sup>707</sup>

Only a few states have ratified laws specifically aimed at regulating online charter schools. A widespread lack of oversight characterizes the current educational landscape in the rest of the United States. For example, a 2008 article, “*Virtual*” Schools: Real Discrimination, by Edward Lin, exposes discriminatory practices at online schools in Washington State.<sup>708</sup> Lin found discriminatory recruiting, admission policies, and programming in these online schools.<sup>709</sup> He also found that online schools required significant parental participation in guiding students through lessons, “which necessarily excludes certain types of students.”<sup>710</sup> Many of the schools also failed to provide students with the technology, such as computers, necessary for them to succeed, thus limiting access and reinforcing the “digital divide.”<sup>711</sup> In their recruiting practices, the schools discriminated by promoting themselves only in certain sections of the state and in certain newspapers, which had the effect of disregarding bilingual and minority students.<sup>712</sup> And while Washington state law prevents the schools from charging tuition, most schools imposed fees for supplemental materials.<sup>713</sup>

The worst practices of these schools, however, appear to be in special education. For example, while 12.7% of students in Washington public schools receive special education services, the percentage of special education students at three online schools on which Lin focused were 1.0%, 3.1%, and 0.0%.<sup>714</sup> It is also clear that many of these schools simply did not understand their legal duty when it comes to special education. An audit of an online school in Washington called Internet Academy, for example,

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<sup>705</sup> *Id.* at 17.

<sup>706</sup> Saul, *supra* note 16.

<sup>707</sup> *Id.*

<sup>708</sup> Lin, *supra* note 13, at 178–80.

<sup>709</sup> *Id.* at 185–186.

<sup>710</sup> *Id.*

<sup>711</sup> *Id.* at 186.

<sup>712</sup> *Id.* at 187.

<sup>713</sup> Lin, *supra* note 13, at 190.

<sup>714</sup> *Id.* at 184 (citing figures from the Washington public education department).

found that the school did not provide individualized learning plans or track student hours.<sup>715</sup> Even more egregiously, as Lin reported, "in a survey of two well-established online schools and two state education agencies, one interviewee stated that parents need to be prepared to spend 'a good five-and-a-half hours per day really providing support for their [disabled] child'."<sup>716</sup> Relying on parents to provide special education services is illegal.<sup>717</sup> These kinds of practices likely continue, however, because of a combined lack of knowledge on the part of school administrators and parents, and because of the mistaken perceptions, perpetuated by the school choice movement, that certain schools are simply not equipped for certain students.<sup>718</sup> As Lin writes, "school administrators . . . should bear the burden of justifying the disparate impact on certain types of students, including those requiring special education . . . . If online schools cannot justify their practices and policies, then they should not qualify for public school funding."<sup>719</sup>

## VI. SPECIAL EDUCATION AND SCHOOL CHOICE: DIVERGENT PHILOSOPHIES

To understand the reasons this discrimination is occurring, it is necessary to recognize the divergent philosophies of the school choice and special education movements. Modern special education developed almost simultaneously to the charter school era. In 1975, the United States Congress, based on findings that more than 4 million children with

<sup>715</sup> *Id.* at 182.

<sup>716</sup> *Id.* at 187, n. 82.

<sup>717</sup> See 20 U.S.C. § 1412(a)(1)(A)–(B) (2004).

<sup>718</sup> See, e.g., jane100000, Comment to *Advocates Accuse D.C. Charter Schools of Excluding the Disabled*, WASH. POST (May 13, 2011) [http://articles.washingtonpost.com/2011-05-13/local/35263131\\_1\\_charter-schools-charter-sector-public-education-options](http://articles.washingtonpost.com/2011-05-13/local/35263131_1_charter-schools-charter-sector-public-education-options) ("It makes no sense to vilify charters for limiting [their] role to what they were intended to do."). This understanding of our charter schools treats them as though they were private institutions and again reflects the marketization ideals many in the business community have popularized. This attitude is further exemplified in the assumptions about who will use online schools. An education scholar identified the skills that lead to student success in online educational courses:

1. Be able to be open minded about sharing life, work, and educational experiences as part of the learning process;
2. Be able to communicate through writing;
3. Be self-motivated and self-disciplined;
4. Be willing to "speak up" if problems arise;
5. Be willing and able to commit to four to fifteen hours per week per course;
6. Be able to meet the minimum requirements for the program;
7. Be accepting of critical thinking and decision making as part of the learning process;
8. Be able to access to a computer and modem;
9. Be able to think through ideas before responding;
10. Be of the opinion that high quality learning can take place without going to a traditional classroom.

Brady et al., *supra* note 155, at 204–05. It is hard to see how most of the skills identified are meant to apply to students with severe disabilities.

<sup>719</sup> Lin, *supra* note 13, at 188.

disabilities were being denied equal educational opportunity,<sup>720</sup> ratified the Education for All Handicapped Children Act (“EAHCA”). Congress found that more than one million children with disabilities had been fully denied access to public education, and in many instances parents of these children were forced to seek help outside the public education system, often at great expense.<sup>721</sup> EAHCA was the first comprehensive law mandating affirmative obligations on the part of states and public schools with regard to people with disabilities.<sup>722</sup> Passage of the EAHCA reflected the conclusion that there was an important role for the federal government in regulating, through cooperation with the states, the provision of services to students with disabilities.<sup>723</sup> The EAHCA has gone through two major revisions—in 1990, as the Individuals with Disabilities Education Act (“IDEA”),<sup>724</sup> and in 2004, as the Individuals with Disabilities Education Improvement Act (“IDEIA”).<sup>725</sup> But its central tenets have remained intact.<sup>726</sup>

The IDEIA defines a disability to include intellectual impairments, hearing impairments, speech or language impairments, visual impairments, serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, and specific learning disabilities.<sup>727</sup> It ensures that eligible children receive a free, appropriate public education (“FAPE”) consistent with their educational needs.<sup>728</sup> A FAPE encompasses the regular and special education needs of students, including evaluation, placement, and procedural safeguards.<sup>729</sup> Schools are additionally obligated to identify and serve students not previously classified as eligible for

<sup>720</sup> NEW AMERICA FOUNDATION, *Individuals with Disabilities Education Act Overview* (Mar. 26, 2012), available at <http://febp.newamerica.net/background-analysis/individuals-disabilities-education-act-overview>.

<sup>721</sup> U.S. OFFICE OF SPECIAL EDUCATION PROGRAMS, *History: Twenty-Five Years of Progress In Educating Children with Disabilities Through Idea* (Jul. 19, 2007) available at <http://www2.ed.gov/policy/speced/leg/idea/history.html>.

<sup>722</sup> Garda, *supra* note 30, at 669.

<sup>723</sup> NEW AMERICA FOUNDATION, *supra* note 260.

<sup>724</sup> Anurima Bhargava et al., *The Right Idea: A Critical Look inside the Individuals with Disabilities Education Act (IDEA), its Effectiveness and Challenges, and the Role of the Lawyer in its Protection and Enforcement* (2012), available at [http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/2012\\_aba\\_annual/6\\_1.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/2012_aba_annual/6_1.authcheckdam.pdf).

<sup>725</sup> *Id.* at 2.

<sup>726</sup> *Id.* at 1–2.

<sup>727</sup> 20 U.S.C. § 1401(3)(A)(i) (2010).

<sup>728</sup> 20 U.S.C. § 1412(a)(1)(A) (2004).

<sup>729</sup> *Id.* IDEIA is one of three major statutes designed to protect people with disabilities. The other two are Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 701 et seq. (1998), and the Americans with Disabilities Act, 42 U.S.C.A. § 12101 et seq. (2009).



special education services.<sup>730</sup> If a school cannot provide a FAPE to a special education student, it must pay for that student to attend another school—whether public or private—that can.<sup>731</sup>

The IDEIA requires states to establish substantive and procedural due process rights for students with disabilities and create goals that specify the personnel, facilities, and funding allocations necessary to achieve a FAPE.<sup>732</sup> States and local districts must maintain clear and available documentation of these plans.<sup>733</sup> Special education is administered through the creation of an Individualized Education Program (“IEP”) for each student with an identified disability.<sup>734</sup> An IEP is a highly detailed road map for teachers and school personnel to follow in instructing special education students.<sup>735</sup> It may contain statements about the child’s present levels of academic achievement and functional performance, including how her disability affects her involvement and progress in the general education curriculum; measurable annual goals; narratives regarding progress towards meeting the annual goals; a list of related services and supplementary aids and services provided to her; an explanation of the extent to which she will or will not participate with non-disabled children in regular school activities; an inventory of curriculum modifications necessary to measure her performance on state and district-wide assessments; the projected dates and frequencies for the duration of the services and modifications; and a list of her postsecondary goals.<sup>736</sup> Properly administering IEPs takes an enormous amount of work on the part of teachers, administrators, and parents.<sup>737</sup> For many education professionals, the requirements of special education seem to absorb an unfairly disproportionate amount of time.

Yet despite the challenges to effectively practicing special education, the fundamental premises of the IDEIA comport with traditional American ideals of democracy and the eradication of discrimination.<sup>738</sup> The IDEIA mandates that,

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<sup>730</sup> 20 U.S.C. § 1412(a)(3) (2005).

<sup>731</sup> *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 247 (2009).

<sup>732</sup> 34 C.F.R. § 104.33–104.33 (2000).

<sup>733</sup> 34 C.F.R. § 104.33–104.35 (2000).

<sup>734</sup> 20 U.S.C. § 1414 (2005); 34 C.F.R. § 300.324 (2006).

<sup>735</sup> 20 U.S.C. § 1414; 34 C.F.R. § 300.324.

<sup>736</sup> 20 U.S.C. § 1414(d)(1)(A)(i) (2006).

<sup>737</sup> I can attest personally to the hard work involved in maintaining IEPs, having taught in a charter school for four years. At my school, all teachers of a given student were required to attend her IEP. Some teachers at my school had to attend as many as twenty IEP meetings in a given year.

<sup>738</sup> See *Garda*, *supra* note 30, at 669–70.

[t]o the maximum extent appropriate, children with disabilities... are educated with children who are not disabled, and... removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.<sup>739</sup>

All schools must use a “continuum of services” to ensure the schools meet the needs of each student, as outlined in the IEP.<sup>740</sup> These services can include mainstreaming all students with disabilities by placing them in regular education classrooms, as well as a range of additional services like home instruction, special classes, or supplementary instruction.<sup>741</sup> Most charter schools employ the full inclusion model, but many struggle to provide the additional services necessary to constitute a FAPE.<sup>742</sup> As scholar Mark Weber writes, “[s]pecial education is not a place to put children; it is a bundle of services to assist them to hold their own educationally.”<sup>743</sup> Many charters have limited capacity to offer more than basic inclusion.<sup>744</sup>

One reason charter schools struggle with the provision of special education services is that many are one-school Local Educational Agencies (“LEAs”).<sup>745</sup> Special education law dictates that each LEA must serve each special education student under its purview.<sup>746</sup> Traditionally, an LEA is a school district. Thus, under the IDEIA, if a student with an IEP enrolls in a school that does not possess adequate resources to fulfill that IEP, the district (LEA) may transfer the student to another school within the district that can carry it out.<sup>747</sup> Legally, the schools are interchangeable.<sup>748</sup> Districts often take advantage of their size and distributed resources to share the collective costs of special education.<sup>749</sup> As LEAs, districts can pool specialized resources, such as specially trained teachers and equipment, at a

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<sup>739</sup> 20 U.S.C. § 1412(d)(1)(A)(i).

<sup>740</sup> Garda, *supra* note 30, at 690.

<sup>741</sup> *Id.* at 699.

<sup>742</sup> *Id.* at 690–91.

<sup>743</sup> See Weber, *supra* note 31, at 222.

<sup>744</sup> *Id.* at 222.

<sup>745</sup> *Id.* at 237. In most states, it is state-chartered, rather than district-chartered schools, who are their own LEAs.

<sup>746</sup> *Id.*

<sup>747</sup> See Garda, *supra* note 30, at 711.

<sup>748</sup> *Id.* at 678.

<sup>749</sup> *Id.* at 678–79.

few schools in the LEA and compel attendance of students with certain severe disabilities there.<sup>750</sup>

Because some charter schools are not part of a larger LEA/district, under the law these schools must cater to every student who enrolls, no matter the financial burden.<sup>751</sup> As such, these charter schools are not able transfer students to any other school.<sup>752</sup> Students with severe disabilities cost more to educate than other students, and their presence may mean that a charter will have to make large-scale purchases of therapy equipment or enter expensive contracts with private providers of special education.<sup>753</sup> The financial pressure of enrolling students with severe disabilities threatens some schools' very existence. According to a 2002 report from the President's Commission on Excellence in Special Education, "the greatest concerns about costs for local districts are derived from high-need children with significant disabilities who require expensive placements within and outside of the district. Critical shortages of qualified staff in special education exacerbate these concerns."<sup>754</sup>

Although the IDEIA prioritizes funding for students with the most severe disabilities, LEAs with high numbers of students with severe disabilities may have less money available for other special education and non-special education students.<sup>755</sup> The IDEIA also does not provide supplementary funds to offset the fiscal shock on LEAs of providing a FAPE to children with especially high needs.<sup>756</sup> Indeed, federal funds have never covered the full costs of special education.<sup>757</sup> The maximum funding permitted under IDEIA is 40% of the average cost of educating a child without disabilities, but Congress has never provided full support even at that level, leaving the remaining portions to state and local funding sources.<sup>758</sup> To make up for the gaps in dollars, some states have established shared funds that local districts can tap into when necessary to offset the high costs of properly educating

<sup>750</sup> *Id.* This model of efficiency has significant parallels with the economies of scale utilized by companies like K12, Inc. The irony is that private companies running schools distributed across the United States share in many efficiency advantages, but pooling special education services is not one of them. There is simply no way to administer the most expensive special education services over the web.

<sup>751</sup> Weber, *supra* note 31, at 237.

<sup>752</sup> *Id.* at 222.

<sup>753</sup> *Id.* at 241.

<sup>754</sup> PRESIDENT'S COMM'N ON EXCELLENCE IN SPECIAL EDUC., U.S. DEPT. OF EDUC., A NEW ERA: REVITALIZING SPECIAL EDUCATION FOR CHILDREN AND THEIR FAMILIES 32 (2002) [hereinafter PRESIDENT'S COMMISSION].

<sup>755</sup> *See id.*

<sup>756</sup> *Id.*

<sup>757</sup> Weber, *supra* note 31, at 241.

<sup>758</sup> 20 U.S.C. § 1411(a)(2)(ii) (2006); Weber, *supra* note 31, at 242 n.121.

students with severe disabilities, but many states have not.<sup>759</sup> EMOs committed to properly adhering to special education law must maintain their own funding sources in case they see high incidences of students with severe disabilities enrolling at their schools. Because charter schools are public, private companies may not cherry pick their students or deny students enrollment based on their cost to educate or their identity as disabled.<sup>760</sup> The financial burden faced by privately run public schools with high numbers of students with severe disabilities is compounded by the imbalance of funding for all charter schools described above in Section IV.

Legal scholar Robert Garda, Jr., calls the philosophical divide between school choice and special education a “culture clash.”<sup>761</sup> The strong civil rights backbone to special education law is directly at odds with the school choice movement’s preference for efficiency, accountability, and outcomes.<sup>762</sup> Congress ratified the IDEIA in an era where the goal was to provide equal access to the educational system, not to ensure certain results.<sup>763</sup> Special education laws “simply do not allow the federal government to assess states’ compliance with outcome measures, such as disabled students’ graduation rates or performance on standardized tests.”<sup>764</sup> This more nebulous form of measuring success contrasts sharply with the current political preference to measure every school and every teacher by tests scores. Further, special education law is compliance-based rather than outcome-based – it favors inputs over outputs.<sup>765</sup> The goal of special education is to ensure that schools are properly following procedures that cannot be measured on tests; a number of courts have held that non-compliance with IDEIA procedures is the equivalent of the denial of a FAPE.<sup>766</sup>

<sup>759</sup> PRESIDENT’S COMMISSION, *supra* note 294, at 32–33.

<sup>760</sup> 34 C.F.R. § 104.4(a) (2012).

<sup>761</sup> See generally Garda, *supra* note 30.

<sup>762</sup> *Id.* at 688–89. The language of special education often overlaps with that of the civil rights movement: both speak of discrimination, access, and segregation.

<sup>763</sup> *Id.* at 669–70.

<sup>764</sup> *Id.* at 676.

<sup>765</sup> *Id.* at 676–77.

<sup>766</sup> See *Bd. of Educ. v. Rowley*, 458 U.S. 176, 201 (1982) (“[T]he ‘basic floor of opportunity’ provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.”); see also Garda, *supra* note 30, at 675 n. 84 (citing *Babb v. Knox Cnty. Sch. Sys.*, 965 F.2d 104, 108 (6th Cir. 1992); *W.G. v. Bd. of Tr. of Target Range Sch. Dist.*, 960 F.2d 1479, 1485 (9th Cir. 1992); *Spielberg ex rel. Spielberg v. Henrico Cnty. Pub. Sch.*, 853 F.2d 256, 259 (4th Cir. 1988); *Bd. of Educ. of Cnty. of Cabell v. Dienelt*, 843 F.2d 813, 814–15 (4th Cir. 1988); *Jackson v. Franklin Cnty. Sch. Bd.*, 806 F.2d 623, 629 (5th Cir. 1986); *Hall v. Vance Cnty. Bd. of Educ.*, 774 F.2d 629, 635 (4th Cir. 1985)).

Despite the shift with the passage of NCLB to a federal educational system heavily premised on outcomes and results, special education law remains focused on an older model. It compels a school to adjust to the child rather than the child to the school.<sup>767</sup> It also presages collective responsibility over school autonomy.<sup>768</sup> Congress ratified the original EAHCA in an era when centralized authority was more highly valued than independence, and these principles still undergird special education law today.<sup>769</sup> As a result, compliance with special education remains onerous, a “complex maze of procedures and paperwork that is difficult to navigate and implement.”<sup>770</sup> The amount of red tape required to properly adhere to special education law undoubtedly drives some EMOs away from special education. In fact, special education law represents the precise type of governing most anathema to private industry: it is a centrally administered federal imposition heavy on bureaucracy, and it exists to protect a tiny percentage of marginalized people who drive up costs, sue often, and demand outsized attention. It appears that rather than taking the necessary time and resources to fully understand special education law, however, many cyber charters simply choose to ignore it.

#### VII. MOVING FORWARD: RECOMMENDATIONS AND CONCLUSIONS

The improprieties at the intersection of special education and privatized education represent more than aberrations or the missteps of a few bad actors. Rather, they expose deep rifts in the public education landscape that need to be addressed head-on. Unfortunately, reformers with ambitious ideas about how to overhaul the system easily ignore students with severe disabilities. While it may be true that many “schools have been quite good about ensuring that online programs are available to students with disabilities,” the data available show that widespread and systematic discrimination persists.<sup>771</sup>

A basic set of changes will improve the educational landscape. First, every state should begin the process of creating law, whether administrative or legislative, that specifically spells out the boundaries and limits, rights and obligations of online charter schools. Central to this policy should be

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<sup>767</sup> Garda, *supra* note 30, at 679.

<sup>768</sup> *Id.* at 680.

<sup>769</sup> *Id.* at 669–70.

<sup>770</sup> *Id.* at 677.

<sup>771</sup> John F. Watson, *A National Primer on K-12 Online Learning*, NORTH AM. COUNCIL FOR ONLINE LEARNING, at 8–9 (2007), available at [http://www.inacol.org/cms/wpcontent/uploads/2012/11/iNACOL\\_NationalPrimerV1\\_2007.pdf](http://www.inacol.org/cms/wpcontent/uploads/2012/11/iNACOL_NationalPrimerV1_2007.pdf).

guidance on how to successfully implement special education, and steep requirements for new charters looking for authorization.<sup>772</sup> In addition, any cyber charter law should contain strict provisions for reporting and publicizing the special education approach each school employs. If we start to understand education as part of consumer law, it may be easier to recognize how disclosure requirements in education might parallel successful regulation in the financial services industry.

The current tendency of all private companies to guard their internal information obscures the full extent of these problems, and serves neither students with disabilities nor the companies themselves.<sup>773</sup> EMOs appear to want fewer restrictions imposed on them from government, yet their business models are almost entirely predicated on the continual flow of federal money to their bank accounts. To parse a phrase, they want to eat their cake, but they don't want to pay for it. If EMOs are accepting public financing, they owe the public a duty to demonstrate that they are spending it in ways that serve *all* Americans, as the law mandates. Maintaining the level of secrecy to which most companies cling lends credence to the assumptions of outsiders that private companies are assuring themselves huge profit margins, ignoring improprieties, or misusing public money.<sup>774</sup> Until EMOs can demonstrate that they are ready to uphold their end of the bargain under special education law, we should hesitate before authorizing more cyber charters, especially those that are for-profit and operating as their own LEAs.

When we continue to promote for-profit online schools in the face of widespread evidence of systematic discrimination, we send a message that it is okay to marginalize special education students. By ignoring this

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<sup>772</sup> See Robert Nott, *State Panel Turns Down Virtual Charter Sch. Bid*, SANTA FE NEW MEXICAN, Sept. 20, 2012, available at <http://www.sfnewmexican.com/Local%20News/092112charterschool#.-UWT8gZOG2ws> (discussing a group's application to open a cyber charter school that was recently denied in New Mexico due to concerns about special education implementation, among other issues).

<sup>773</sup> There is little available data on students with severe disabilities in online charter schools. I could find no scholarly articles examining special education in online public schools, and most of the literature is provided by the EMOs or their advocacy organizations. Nearly all of these reports and descriptions mention that the provision of special education services is a significant issue for online schools, then either tout the advantages to students with minor to moderate disabilities (ADD, learning disabilities, social anxiety), or make vague pronouncements that great care must be taken to assure access to all. If EMOs want to be seen as real educators and not just businesses, this must change.

<sup>774</sup> Trotter et al., *supra* note 128, at 949; see also Mary Bailey Estes, *Choice for All? Charter Schools and Students with Special Needs*, 37 J. SPECIAL EDUC. 257, 261 (2004) (discussing widespread underreporting of IEP information in the Texas charter schools; where Estes did find data, it showed an under-enrollment of special education students in Texas charter schools. A lack of transparency may be another reason, unfortunately, that these schools avoid lawsuits.).

ongoing crisis, we implicitly support the notion that profits are king. As Mary Bailey Estes writes, “if an appropriate education within a choice context is available to some, it must be available to all. Students with disabilities and their parents have a right not only to equal access but also to quality, comprehensive, effective programming.”<sup>775</sup> This is true no matter whether these students attend charter schools or traditional public schools, and regardless of who pockets special education funds.

Even with massive problems at privatized online schools, the collective goal of effectively practicing special education does not come down to who runs schools per se, but to our priorities as a nation. No actor, whether federal, state, local, or private, is entirely immune from cutting corners or engaging in objectionable practices. Our priorities in making policy should be to students, not to ideologies. In an interesting recent development, charter schools, recognizing the financial burdens they take on by insisting on self-control, started to form “special education cooperatives” to pool resources (such as speech pathologists, school psychologists, and assessment specialists) in order to share the cost of special education services.<sup>776</sup> In setting up collectives, charters with large numbers of students who are expensive to educate are implicitly acknowledging the benefits of the traditional public school system. Special education scholars and charter school advocates now recommend that

for purposes of implementing IDEA, charter schools need to be connected in some way with a special education infrastructure . . . . Access to the necessary expertise, provided in a way that does not compromise the autonomy of the charter school and its mission, is essential to ensure appropriate services for students with disabilities and protect the charter schools from the serious consequences of avoidable non-compliance.<sup>777</sup>

While taking advantage of economies of scale is a core philosophy of corporate education, the efficient pooling of resources and the collective sharing of burdens are also some of the central strengths of the traditional public education system. The fact that “charter schools have begun to operate in a manner increasingly similar to traditional public schools with regard to students with special needs” calls into question the need for two separate public school systems.<sup>778</sup> Why have two separate systems with

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<sup>775</sup> Estes, *supra* note 174, at 265.

<sup>776</sup> *Id.* at 217.

<sup>777</sup> Eileen Ahearn, *Public Charter Schools and Students with Disabilities*, COUNCIL FOR EXCEPTIONAL CHILDREN (2001), available at <http://www.cec.sped.org/AM/Template.cfm?Section=Home&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=2236> (last visited Mar. 4, 2013).

<sup>778</sup> Mary Bailey Estes, *Charter Schools: Do They Work for Troubled Students?*, 51 PREVENTING SCH. FAILURE 55, 59 (2006).

similar needs and funding streams that compete for resources? The continued creation of for-profit online charters funded with public money that only cater to certain students presents ethical, moral, and practical challenges to our national identity. If the current model persists, traditional public schools will be left with the students most expensive to educate, and the system will be in danger of collapse under its own weight.<sup>779</sup>

Charter schools continue to enjoy huge support from the Obama administration and from advocates on the left and the right.<sup>780</sup> Many charter schools do excellent work, including with students with disabilities. But gaps in funding threaten their existence, and the recent increase in lawsuits over special education place additional strains on revenue streams. This puts the country's public education system in an uncomfortable paradox. As we set up what is in effect a parallel system, we vest it with only some of the tools it needs to succeed. Charter school advocates couch the resistance to full funding and support of charter schools as a reflexive refusal to accept innovation and creative new approaches.<sup>781</sup> Union advocates and education policy scholars see the increasing presence of charter schools as a strain on resources and a way to hollow out the community core of traditional public schools.<sup>782</sup> They question the wisdom of this new system. But both groups agree that the emerging structure is not efficient. In a fiscal landscape facing increasing cuts to public education funding at all levels, burdens from state pension systems, and widening income stratification, maintaining two public education systems makes little sense.<sup>783</sup> As Robert Garda, Jr., puts it, "[c]harter schools' violations of disabled students' civil rights undermine not only their viability and validity, but also that of the entire public education system."<sup>784</sup>

Moreover, whether one supports the education innovations of the corporate reform movement or not, it is important to think about whether we are asking the right questions about education in this country. Teaching is enormously difficult in any educational environment and to overlay a school structure that is concerned primarily about its bottom line makes our results worse. What was once a focus on curriculum and schools as community centers has devolved into an obsession with measurement and

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<sup>779</sup> Garda, *supra* note 30, at 717.

<sup>780</sup> *Id.* at 658.

<sup>781</sup> *Id.* at 702.

<sup>782</sup> *Id.* at 707.

<sup>783</sup> *Id.* at 708–09.

<sup>784</sup> *Id.* at 717.



immediate results. The rise in virtual charter schools would likely not have been possible without the rigorous testing regime brought forth by education reformers in the second half of the twentieth century, codified in NCLB, and now embedded in the core of American education. What has been forgotten is, as Diane Ravitch elucidates, the ability to see every student as “a person of endless potential. Not rated by his or her test scores. Not defined by his or her family demographics. But as a person who is growing, developing, in need of adult guidance, in need of challenging and liberating education, an education of possibilities and passion.”<sup>785</sup> We have little excuse to be so far behind this mission in 2012.

Even by 1988, when Albert Shanker made his groundbreaking speech, the tendency of the American school to rely on standardized tests to measure student learning was already at a breaking point. Shanker railed against the “repeating and regurgitating things back on standard examinations” that was rampant at the time.<sup>786</sup> He lamented the loss of creativity and claimed that “the kids who do the best on these tests are not necessarily people who later on in life make the greatest contributions to society,” citing the examples of Edison, Churchill, and Einstein.<sup>787</sup> Even *A Nation at Risk* pointed to a lack of creativity and an absence of “higher order” intellectual skills.<sup>788</sup> Sadly, since *A Nation at Risk*, the nation has only increased its focus on test scores, but has nonetheless been unable to raise them significantly.<sup>789</sup>

In 1955, Milton Friedman had a vision of the American school as a center of “[a] stable and democratic society,” where education contributes to “widespread acceptance of some common set of values and...a minimum degree of literacy and knowledge on the part of most citizens.”<sup>790</sup> Friedman, perhaps history’s most influential libertarian thinker, saw a world in which “the education of my child contributes to your welfare.”<sup>791</sup> Ronald Reagan’s Commission on Educational Excellence echoed these concerns in 1983, writing:

All, regardless of race or class or economic status, are entitled to a fair chance and to the tools for developing their individual powers of mind and spirit to the

<sup>785</sup> RAVITCH, *supra* note 104, at 288.

<sup>786</sup> Shanker, *supra* note 1, at 14-15.

<sup>787</sup> *Id.* at 15.

<sup>788</sup> *Nation at Risk*, *supra* note 82, at 11.

<sup>789</sup> See, e.g., Nation’s Report Card, *Mathematics Scores for 9- and 13-Year-Olds Higher Than in All Previous Assessment Years*, [http://nationsreportcard.gov/ltr\\_2008/ltr0002.asp?subtab\\_id=Tab\\_3&-tab\\_id=tab1#chart](http://nationsreportcard.gov/ltr_2008/ltr0002.asp?subtab_id=Tab_3&-tab_id=tab1#chart) (last viewed Dec. 14, 2012).

<sup>790</sup> Friedman, *supra* note 39.

<sup>791</sup> *Id.*

utmost. This promise means that all children by virtue of their own efforts, competently guided, can hope to attain the mature and informed judgment needed to secure gainful employment, and to manage their own lives, thereby serving not only their own interests but also the progress of society itself.<sup>792</sup>

Today, the notion that schools are places to develop young people has been co-opted by the ambitions of business. This is not a standard battle between liberals and libertarians over the role of government in education. The clash here is more about the ways in which we protect our citizens and about the definition of a free education for all. The solution to the culture clash between the mission and identity of charter schools and the goals and ideals of special education may not be simply a tweak—it may require a system overhaul. The original idea of charter schools, after all, was to bring together teachers, administrators, and school authorizers in the name of productive education, to “creat[e] a safe, positive climate in which students can learn and grow.”<sup>793</sup> It is time to return to this grand concept.

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<sup>792</sup> *Nation at Risk*, *supra* note 81, at 9.

<sup>793</sup> Budde, *supra* note 72, at 520.

