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DETERMINING CHARTER SCHOOLS' RESPONSIBILITIES FOR CHILDREN WITH DISABILITIES: A GUIDE THROUGH THE LEGAL LABYRINTH

JULIE F. MEAD*

I. INTRODUCTION

Since their birth in Minnesota in 1991,¹ charter schools² have proliferated throughout the United States. Thirty-seven states,³ the District of Columbia⁴ and

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¹ MINN. STAT. § 124D.10-11 (then termed "Outco me-Based Schools").

² Charter schools are those schools that exist by virtue of a charter or contract from a designated chartering authority in their state. Charter schools are relieved from some state regulations in exchange for a commitment to outcomes specified by the charter statute and the specific charter contract that created the school. Charter schools allow parents the opportunity to select the school their child attends rather than having their child assigned to a school by virtue of their place of residence.

³ Alaska (ALASKA STAT. §14, ch. 3), Arizona (ARIZ. REV. STAT. §15, art. 8), Arkansas (ARK. CODE ANN. ch. 6, § 23), California (CAL. EDUC. CODE § 47600 *et seq.*), Colorado (COLO. REV. STAT. § 22-30.5 *et seq.*), Connecticut (CONN. GEN. STAT. § 10-66e), Delaware (DEL. CODE ANN. tit. 14, ch.5), Florida (FLA. STAT. ch. 228.056), Georgia (GA. CODE. ANN. § 20-2-2060 *et seq.*), Hawaii (HAW. REV. STAT. § 302A-1182), Idaho (IDAHO CODE § 33-5200 *et seq.*), Illinois (ILL. COMP. STAT. 5/27A *et seq.*), Indiana (IND. CODE § 20-5.5 *et seq.*), Kansas (KAN. STAT. ANN. § 72-1900 *et seq.*), Louisiana (LA. REV. STAT. ANN., tit. 17, ch. 42), Massachusetts (MASS. GEN. LAWS ch. 71, § 89), Michigan (MICH. COMP. LAWS, part 6A, ch. 380, § 500), Minnesota (MINN. STAT. § 124D), Mississippi (MISS. CODE ANN. § 37-28), Missouri (MO. REV. STAT. § 160.400 *et seq.*), Nevada (NEV. REV. STAT. § 336), New Hampshire (N.H. REV. STAT. ANN. § 194-B), New Jersey (N.J. STAT. ANN. § 18A:36A), New Mexico (N.M. STAT. ANN. §§ 22-8B & 22-8C), New York (N.Y. EDUC. LAW § 2850 *et seq.*), North Carolina (N.C. GEN. STAT. § 115C-238), Ohio (OHIO REV. CODE ANN. § 3314), Oklahoma (OKLA. STAT. § 70-3-130 *et seq.*), Oregon (OR. REV. STAT. § 338), Pennsylvania (1997 PA. LAWS 22), Rhode Island (R.I. GEN. LAWS § 16-77), South Carolina (S.C. CODE ANN. § 59-40), Texas (TEX.

Puerto Rico⁵ have all authorized the development of charter schools. The U.S. Department of Education estimates that during the 1999-2000 school year, approximately 1735 to 1790 charter schools operated nationwide and served at least 350,000 students,⁶ of which approximately 8% had identified disabilities.⁷ Given the state statutory and regulatory waivers enjoyed by charter schools, how these new public schools provide services to children with disabilities has been an evolving and enduring concern of the charter school community.⁸

Determining a charter school's specific responsibilities for children with disabilities requires examination of three sources of legal authority: federal law, state law, and the charter contract. In addition to the general protections afforded by the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution, three federal statutes⁹ direct delivery of services to children with disabilities. While state legislatures through their statutes may relieve charter schools of state rules and regulations, including those related to special education, they have no authority to waive federal requirements.

Federal laws clearly contemplate that charter schools are public schools that will serve students with disabilities in a comparable manner as students with disabilities are served in more traditional public schools. In fact, the Charter Schools Expansion Act, which provides grant monies to states and their charter schools, defines a charter school as a "public school" that, among other requirements, "complies with . . . section 504 of the Rehabilitation Act of 1973, and part B of the Individuals with Disabilities Education Act."¹⁰ Accordingly, Section 504 of the Rehabilitation Act of 1973 (Section 504)¹¹ and the Individuals

EDUC. CODE ANN. § 12), Utah (UTAH CODE ANN. § 53A-1a-500 *et seq.*), Virginia (VA. CODE. ANN. § 22-1-212), Wisconsin (WIS. STAT. § 118.40), and Wyoming (WYO. STAT. ANN. § 21-2-300 *et seq.*).

⁴ D.C. CODE ANN. § 31-2853.

⁵ 111 P.R. LAWS ANN. § 18.

⁶ U.S. Department of Education, *Frequently Asked Questions (for Reporters)*, at <http://www.uscharterschools.org/pub/uscs_docs/gi/faq.htm>.

⁷ According to data collected by the U.S. Department of Education, eight percent of students attending charter schools had identified disabilities. This compares with a national average of eleven percent of public school students identified with a disability. THE STATE OF CHARTER SCHOOLS 2000, FOURTH-YEAR REPORT (January 2000), at <<http://www.ed.gov/pubs/charter4thyear/c3.html#4>>.

⁸ See, e.g., THOMAS A. FIORE ET AL., CHARTER SCHOOLS AND STUDENTS WITH DISABILITIES: A NATIONAL STUDY, U.S. Department of Education, Office of Educational Research and Improvement (2000); LAUREN M. RHIM & MARGARET J. McLAUGHLIN, CHARTER SCHOOLS AND SPECIAL EDUCATION: BALANCING DISPARATE VISIONS (2000).

⁹ Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 794; 34 C.F.R. 104 *et seq.*; Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 *et seq.*; and Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400 *et seq.*; 34 C.F.R. 300 *et seq.*

¹⁰ 20 U.S.C. § 8066.

¹¹ 29 U.S.C. § 794; 34 C.F.R. 104 *et seq.*

with Disabilities Education Act (IDEA),¹² together with Title II of the Americans with Disabilities Act (ADA),¹³ form a foundation that dictates special education responsibility in charter schools. However, due to variance across the country regarding the legal status of charter schools in relation to school districts, understanding *that* federal law applies is just the beginning. Precisely *how* federal law applies and what obligations a charter school has with regard to students with disabilities lies within a complex labyrinth of federal, state, and contract law.

This article will discuss the obligations charter schools have for students with disabilities. The first section examines Section 504 and the ADA as applied to charter schools. The second section of the article examines the IDEA and issues related to its delivery in the charter school context. This discussion explains how both state law and individual charter contract provisions determine how the IDEA is implemented in a given charter school. The third section of the commentary examines what special issues attach when a charter school seeks to serve only or predominantly children with disabilities. The final section explores the implications of special education law for charter school authorizers.

II. SECTION 504/ADA AND CHARTER SCHOOLS

Section 504 of the Rehabilitation Act of 1973¹⁴ is a civil rights statute analogous to Title VI¹⁵ and IX.¹⁶ Although it provides no funding, Section 504 prohibits discrimination on the basis of disability by any recipient of federal financial assistance.¹⁷ The Americans with Disabilities Act (ADA) extends these nondiscrimination provisions to the workplace regardless of whether the employer receives federal money.¹⁸ Title II of the ADA addresses the schools' treatment of children with disabilities. Its requirements mirror those of Section 504 in public school contexts.¹⁹ Therefore, Section 504/ADA will be treated together for the purposes of this article.

Inherent in the Section 504/ADA prohibition of discrimination is the consideration of access. In this case, non-discriminatory access demands an

¹² 20 U.S.C. 1400 *et seq.*; 34 C.F.R. 300 *et seq.*

¹³ 42 U.S.C. § 12101 *et seq.*

¹⁴ 29 U.S.C. § 794; 34 C.F.R. 104 *et seq.*

¹⁵ Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000D *et seq.*

¹⁶ Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681.

¹⁷ Section 504 reads: "No otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a).

¹⁸ For a detailed explanation of Section 504 and the ADA, see DIXIE SNOW HUEFNER, *GETTING COMFORTABLE WITH SPECIAL EDUCATION LAW: A FRAMEWORK FOR WORKING WITH CHILDREN WITH DISABILITIES* (2000).

¹⁹ PERRY A. ZIRKEL & JEANNE M. KINCAID, *SECTION 504, THE ADA AND THE SCHOOLS* (1995).

answer to the question: Is charter school attendance open to children with disabilities in a manner comparable to that of non-disabled children? At first blush, care must be taken to ensure that any entry criterion a charter school may adopt (when allowed to do so by state statute) is not discriminatory in nature. For example, a charter school that required students to have IQ scores²⁰ within a particular range may be vulnerable to challenge as IQ scores are designed to give a measure of intellectual potential.²¹ While it is unclear precisely how OCR or a court might view such a requirement, a strong argument could be made that an IQ criteria violates Section 504/ADA as it creates a complete bar to some children with mental disabilities, since IQ scores are used, in part, to define those disabilities. That is not to say that a charter school that seeks to serve children often termed "gifted" would necessarily violate Section 504/ADA. Rather, the problem arises with the selection device. A better strategy would be for a school to require demonstrated achievement on some standard measures coupled with grades and/or teacher recommendations in much the way children now qualify for "gifted" programs in traditional public schools. While achievement and measured IQ are closely related, they focus on different issues. Since achievement measures what a child can do, it is not as likely to raise the same concerns under Section 504/ADA as is an IQ score criteria.

This example, however, is more extreme. The more likely application of Section 504's guarantee of access would occur in any school, even those without any special entry criteria. In that case the access issue is programmatic in nature. It is insufficient to simply admit children with disabilities into the charter school to demonstrate non-discriminatory access. The substance of Section 504/ADA demands that access be meaningful, which means that educational needs arising from a child's disabilities are met with appropriate programming; that each child is guaranteed a free appropriate public education (FAPE).²² In other words, access must be both physical and programmatic.

A decision by the Office for Civil Rights (OCR) following an investigation of a complaint against the Boston Renaissance Charter School in 1997 provides an illustration.²³ A student enrolled in kindergarten began exhibiting frequent

²⁰ Some states specifically prohibit any selection criteria that would narrow the number of eligible students. Louisiana, for example, specifically prohibits the use of IQ scores. *See* LA. REV. STAT. ANN. § 3991(B)(3). Other states use language that while less explicit appears to prohibit admission requirements based on either IQ or achievement scores. *See, e.g.,* N.J. STAT. ANN. § 18A:36A-7 ("A charter school . . . shall not discriminate in its admission policies or practices on the basis of intellectual or athletic ability, measures of achievement or aptitude . . ."); OKLA. STAT. § 70-3-140(D) "a charter school shall not limit admission based on . . . measures of achievement, aptitude . . ."

²¹ SALLY J. ZEPEDA & MICHAEL LANGENBACH, SPECIAL PROGRAMS IN REGULAR SCHOOLS: HISTORICAL FOUNDATIONS STANDARDS AND CONTEMPORARY ISSUES 87 (1999).

²² 34 C.F.R. § 104.33.

²³ Boston (MA) Renaissance Charter School, 26 IDELR 889 (OCR 1997).

behavioral difficulties.²⁴ The school responded with suspension.²⁵ Eventually the school recommended the child be evaluated for special education eligibility pursuant to the IDEA and Massachusetts law.²⁶ The school also required that the child only attend school for one half of the scheduled school day.²⁷ The school did not inform the parents of Section 504 or their rights under its provisions. The parents refused special education testing at first, but after problems persisted for several months, they agreed.²⁸ The child was not found eligible under the IDEA, but did qualify as a child with a disability under Section 504's functional definition²⁹ given his hyperactivity and the possible Attention Deficit Hyperactivity Disorder (ADHD).³⁰ Although the school made some minor changes in the child's program, the school continued frequent suspension and its restriction that the child could only attend school for half of the school day.³¹ The parents withdrew him from the charter school during first grade and enrolled him in a traditional public school where his teacher reported he completed his first grade year successfully and without the need for early dismissal or suspension.³²

OCR found the charter school had committed a number of Section 504 violations.³³ First, the school had not adopted or disseminated the required notice of non-discrimination on the basis of disability.³⁴ The school had also failed to designate a staff member to receive grievances and to investigate and resolve complaints.³⁵ Further the school had also neglected to inform the parents of their rights under Section 504 including the right to file a complaint and request an impartial hearing to resolve any dispute.³⁶ The school had likewise failed to explain to the parents the safeguards provided by the law and its regulations for students facing suspension or expulsion to ensure that disciplinary procedures are equitably applied.

More importantly, OCR found that, in addition to these procedural errors, the charter school had violated the child's substantive rights to FAPE in two ways.³⁷ First, the school failed to provide supplementary aids and services within the

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at 890.

²⁷ *Id.*

²⁸ Boston (MA) Renaissance Charter School, 26 IDELR 889, 891 (OCR 1997).

²⁹ The regulations define a person with a disability as someone who "(i) has a physical or mental impairment which substantially limits one or more major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment." 34 CFR § 104.4(l).

³⁰ Boston (MA) Renaissance Charter School, *supra* note 23.

³¹ *Id.*

³² *Id.*

³³ *Id.* at 890.

³⁴ 34 C.F.R. § 104.8.

³⁵ *Id.* § 104.7.

³⁶ *Id.* § 104.36.

³⁷ Boston (MA) Renaissance Charter School, *supra* note 23, at 890.

regular classroom in order to accommodate the child's disability.³⁸ Secondly, the school violated Section 504 when it restricted the child's school day. Section 504 requires that children with disabilities have access to a school day of the same length as that of non-disabled peers unless school officials can demonstrate that the child, due to the nature and severity of his disability, requires the shortened day as an accommodation.³⁹ The school agreed to a settlement that required it to make the necessary policy changes, train its staff appropriately and reimburse the parents for the childcare and tutorial expenses they had incurred while the child was enrolled in the charter school.⁴⁰

As the experience of the Boston Renaissance School depicts, Section 504/ADA dictate more than good intentions on the part of a charter school. Assurances of non-discrimination must satisfy both procedural and substantive requirements set forth in federal regulations. Charter schools must determine how they will acquire services for children with disabilities from the onset of operations. For charter schools that are part of larger school districts, this should not be problematic. For more independent charter schools, it may be. Like any small school district, a freestanding charter school lacks the economy of scale that provides the necessary impetus and cost savings for establishing programs and hiring staff in anticipation of students.⁴¹ Accordingly, many charter schools must essentially stand ready to serve a child with a disability if and when that child enrolls. Understandably, such a process makes planning and budgeting difficult. Yet, charter schools must understand when developing their programs that serving children with disabilities is an obligation that cannot be avoided.

In addition, since charter schools have considerable autonomy in designing programs, care must be taken in the development of programming such that students are not excluded either by design or by default. For example, Nevada's charter school law has a provision, which reads:

If the governing body of a charter school determines that the charter school is unable to provide an appropriate special education program and related services for a particular disability of a pupil who is enrolled in the charter school, the governing body may request that the board of trustees of the school district of the county in which the pupil resides transfer that pupil to an appropriate school.⁴²

If a Nevada charter school purposefully limited the special education programming it offered in order to invoke this provision and limit the number of children with disabilities the school accepted, a viable Section 504/ADA might be

³⁸ 34 C.F.R. § 104.34.

³⁹ *Id.* § 104.33(b)(1).

⁴⁰ *Boston (MA) Renaissance Charter School*, *supra* note 23.

⁴¹ Jay P. Heubert, *Schools without Rules? Charter Schools, Federal Disability Law, and the Paradoxes of Deregulation*, 32 HARV. C. R.-C. L. L. REV. 301 (1997).

⁴² NEV. REV. STAT. § 386.580(3).

made that the school discriminated on the basis of disability.⁴³ This example demonstrates that in order to be responsive to the public in a non-discriminatory manner and minimize vulnerability to any legal challenge, charter schools must consider the needs of children with disabilities when designing the school, not as an afterthought to their enrollment.⁴⁴

The issue of programming also brings up a practice that some have called "counseling out."⁴⁵ Some research suggests that charter schools often counsel parents of children with disabilities that the charter school cannot meet the child's needs and that the child should attend another school. To the extent that all parents are counseled about the fit between a child's learning style and the curricular approach adopted by the charter school, this practice is not troublesome. However, when such sessions are intended to discourage the enrollment of children with disabilities in order to avoid serving children whose disabilities require accommodation (including special programming), the practice would violate Section 504/ADA as it would result in the categorical exclusion of students on the basis of disability.⁴⁶

The lessons learned in other school choice contexts provide further insight into this issue of programmatic access. From letters of inquiry and investigations of complaints in magnet school⁴⁷ and open enrollment⁴⁸ contexts, several lessons can be discerned. First, a parental choice cannot be honored if it does not meet the

⁴³ For a discussion of a school's power to control programming and its possible link to charges of discrimination in school choice contexts, see Julie F. Mead, *Including Students with Disabilities in Parental Choice Programs: the Challenge of Meaningful Choice*, 100 WEST'S EDUCATION LAW REPORTER 463 (1995).

⁴⁴ RHIM & MCLAUGHLIN, *supra* note 8.

⁴⁵ JERRY HORN & GARY MIRON, AN EVALUATION OF THE MICHIGAN CHARTER SCHOOL INITIATIVE: PERFORMANCE, ACCOUNTABILITY, AND IMPACT, The Evaluation Center, Western Michigan University (July 2000); FIORE, *supra* note 8; RHIM & MCLAUGHLIN, *supra* note 8.

⁴⁶ For a discussion of this issue, see the transcript of a Special Education Workshop held at the 1997 Charter Schools National Conference in Washington, D.C. Tom Hehir, the Director of the Office of Special Education Programs and Anne Hoogstraten, then a Senior Staff Attorney for the Office of Civil Rights, discuss this issue, at <http://www.uscharterschools.org/lpt/uscs_docs/4>.

⁴⁷ "[M]agnet school' means a public elementary or secondary school or public elementary or secondary education center that offers a special curriculum capable of attracting substantial numbers of students of different racial backgrounds." 20 U.S.C. § 7204.

⁴⁸ "Open enrollment" allows a student to apply for enrollment in a school, regardless of residential attendance patterns. Intra-district open enrollment programs allow a student to select from a menu of schools within the district of residence. See, e.g., the Seattle School District or the Indianapolis Public Schools open enrollment programs. Inter-district plans allow a student to attend schools within a given state that are outside of his or her district of residence. See, e.g., WIS. STAT. § 118.51.

requirements of federal disability law.⁴⁹ A free appropriate public education (FAPE) is a child's entitlement that must be protected and ensured as long as the child is enrolled in any form of public school. No child should have to trade FAPE in order to get "choice." School authorities can neither require such a trade by forcing parents to waive their child's access to services nor allow such a trade by agreeing with a parental request to forgo services that the child needs in order to receive FAPE.⁵⁰

This reasoning does not suggest that a child's needs might not change in the charter school context. Depending on the educational environment created there, it is certainly conceivable that a child's disability could manifest itself differently in the new school environment, thereby requiring fewer or at least different interventions. The key is that the school honors the mandated commitment to equal educational opportunity by ensuring that the child's needs (not programmatic availability, administrative convenience or teacher convenience) dictate any changes and that all changes occur through the proper procedures.⁵¹

Charter schools can take some affirmative steps to truly serve *all* children that desire their unique form of public education. The following six directives, while not exhaustive, form a minimum response by charter school operators to Section 504/ADA. They should:

- (1) Familiarize themselves with Section 504/ADA and its requirements.⁵²
- (2) Adopt a formal policy of non-discrimination on the basis of disability.⁵³
- (3) Designate a staff person to receive and investigate any complaints of discriminatory treatment.⁵⁴

⁴⁹ Lunar Letter, 17 EHLR 834 (OSEP 1991); Evans Letter, 17 EHLR 836 (OSEP 1991); Bina Letter, 18 IDELR 582 (OSEP 1991).

⁵⁰ See San Francisco Unified School District, 16 EHLR 824 (OCR 1990) (finding that parents who enroll their children in the district's alternative high schools could not be required or allowed to waive their children's right to special education services); Fallbrook Union Elementary School District, 16 EHLR 754 (OCR 1990) (finding that a school district participating in California's statewide open enrollment program could not exclude children with disabilities even though meeting their needs increased costs to the district); Chattanooga (TN) Public School District, 20 IDELR 999 (OCR 1993) (finding a violation of section 504 where a school district required parents to waive their children's rights to special education as a condition of participation in the district's magnet school programs).

⁵¹ 20 U.S.C. § 1414; 34 C.F.R. §§ 300.340-347.

⁵² For a general background on Section 504/ADA, see ZIRKEL & KINCAID, *supra* note 19 and SUSAN GORN, WHAT DO I DO WHEN . . . THE ANSWER BOOK ON SECTION 504 (2000). Other valuable resources include State Educational Agencies' charter school publications. The U.S. Office for Civil Rights also provides assistance in understanding Section 504/ADA. See, e.g., *Applying Federal Civil Rights Laws to Public Charter Schools* (May 2000) <<http://www.ed.gov/offices/OCR/docs/charindex.html>>.

⁵³ 34 C.F.R. § 104.8.

⁵⁴ *Id.* § 104.7.

(4) Prepare materials to inform parents of their rights under Section 504/ADA.⁵⁵

(5) Consider how the school will acquire the necessary expertise to evaluate and serve children with disabilities during the charter school's design or development phase.

(6) Train all staff concerning their role in making the charter school free from discrimination on the basis of disability.

III. CHARTER SCHOOLS AND THE IDEA

The Individuals with Disabilities Education Act (IDEA) forms a companion piece of legislation to Section 504/ADA. While Section 504 and the ADA prohibit discrimination, the IDEA provides funding to serve those children with disabilities whose impairments "ad versely affect[] a child's educational performance"⁵⁶ such that they require special education.⁵⁷ This complex federal law requires states, as a condition of the funding provided, to ensure that the educational needs of its children with disabilities are appropriately met.⁵⁸ As such, the *State* through its state educational agency (SEA) is the ultimate guarantor of FAPE for each child with a disability that resides there.⁵⁹ The SEA, then, must ensure that each local educational agency (LEA)⁶⁰ meets the Act's mandates.⁶¹ In the most basic of terms, a LEA must:

- (1) Identify, locate and evaluate all eligible children (Child Find).⁶²
- (2) Make FAPE available through special education and related services.⁶³
- (3) Include children with disabilities in large-scale assessments (those dictated

⁵⁵ *Id.* § 104.36.

⁵⁶ *Id.* § 300.7(c).

⁵⁷ 20 U.S.C. § 1401(3)(A).

⁵⁸ "A State is eligible for assistance . . . if the State demonstrates to the satisfaction of the Secretary that the State has in effect policies and procedures to ensure that . . . [a] free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21, inclusive, including children with disabilities who have been suspended or expelled from school." *Id.* § 1412(a).

⁵⁹ *Id.* § 1412(11).

⁶⁰ "A local educational agency is eligible for assistance . . . if such agency demonstrates to the satisfaction of the State educational agency that it . . . has in effect policies, procedures, and programs that are consistent with the State policies and procedures established under section 1412." *Id.* § 1413(a).

⁶¹ It is beyond the scope of this article to provide an in-depth examination of all the IDEA entails. For another reference that has accepted that mission, see HUEFNER, *supra* note 18. For a short handbook on the subject developed especially for charter schools, see ELIZABETH GIOVANNETTI ET AL., CHARTER SCHOOLS AND THE EDUCATION OF CHILDREN WITH DISABILITIES (2001).

⁶² 20 U.S.C. § 1412(a)(3).

⁶³ *Id.* § 1412(a)(3)(A).

by the state or those the charter school has determined that all children must take).⁶⁴

(4) Establish written policies and procedures for implementing law.⁶⁵

In other words, each LEA has an affirmative obligation to identify and serve appropriately all eligible children with disabilities within its jurisdiction and have written policies and procedures in place to effect that result. An LEA is the legal entity that ensures appropriate educational programming at the local level under the guidance, direction, and oversight of the State. Therefore, the specific responsibilities that a charter school has under the IDEA depend initially on whether the charter school is a local educational agency for the purposes of the Act.

In 1997, the amendments to the Individuals with Disabilities Education Act included specific provisions regarding charter schools. The first section requires that for "charter schools that are public schools of the local educational agency [LEA]," the LEA must serve students attending those schools in the same manner it serves students in its other schools and must provide funds received through the IDEA to the charter schools in a like manner to its other schools.⁶⁶ In addition, the IDEA makes provision for charter schools that are designated as LEAs independent of any larger district.⁶⁷ The regulations further note that a third kind of charter school may exist which is neither an LEA nor part of another LEA.⁶⁸ In such a case, "the SEA [State Educational Agency] is responsible for ensuring that the requirements of this part are met."⁶⁹ A clear decree underlies these requirements. Namely, that "[c]hildren with disabilities who attend public charter schools and their parents retain all rights under the [IDEA] underlies these requirements."⁷⁰ As the Office for Civil Rights explained: "It has long been the Department's position that public school choice programs must maintain openness and equity, vital components of publicly supported education."⁷¹

Table 1 depicts how each state has handled the LEA issue. In eighteen states, the school district in which the charter school is located serves as the LEA.⁷²

⁶⁴ *Id.* § 1412(17).

⁶⁵ *Id.* § 1413(a)(1).

⁶⁶ *Id.* § 1413(a)(5).

⁶⁷ 20 U.S.C. § 1413(e)(1)(B).

⁶⁸ 34 C.F.R. 300.312 (d)(1).

⁶⁹ *Id.* The Office of Special Education Programs (OSEP) reaffirmed these requirements in a recent letter. Letter to Gloeckler, 33 IDELR 222 (OSEP 2000).

⁷⁰ 34 C.F.R. 300.312(a).

⁷¹ Letter to Bocketti, 32 IDELR 225 (OCR 1999). For a discussion regarding the inclusion of children with disabilities in other types of parental choice plans, see Mead, *supra* note 41.

⁷² ALASKA STAT. § 14, Chapt. 3; CAL. EDUC. CODE § 47640; COLO. REV. STAT. § 22-30.5-104; FLA. STAT. ch. 228.056; GA. CODE. ANN. § 20-2-2065(a)(1); IDAHO CODE § 33-5205(3)(p); ILL. COMP. STAT. 5/27A *et seq.*; see also Illinois State Board of Education, *Charter School Frequently Asked Questions at*

New Hampshire,⁷³ New York,⁷⁴ and Oregon⁷⁵ designate the child's resident district as the responsible agency to ensure a child's needs are being met. Connecticut has created a statutory scheme that contemplates cooperation between the charter school and the resident district, assigning some duties to the school district (holding IEP team meetings and paying for costs) and leaving others (ensuring service delivery) to the charter school.⁷⁶ Nineteen states consider charter schools to be LEAs themselves.⁷⁷ A California charter school may petition the state for approval to operate as its own independent LEA.⁷⁸ Somewhat similarly, a charter school in the District of Columbia may "elect" whether to be its own LEA or part of the DC school district's service delivery plan.⁷⁹ Finally, four states, Illinois, Louisiana, Texas, and Wisconsin have a mixture of types of charter schools for special education purposes.⁸⁰ Some of the

<<http://www.isbe.state.il.us/charter/CSQ&A.htm>>; KAN. STAT. ANN. § 72-1900 *et seq.*; LA. REV. STAT. ANN. § 3995(B); MISS. CODE ANN. § 37-28; N.M. STAT. ANN. § 22-8B-4(D); NEV. REV. STAT. § 386.570(1); OKLA. STAT. § 70-3-136; S.C. CODE ANN. § 59-40-50; TEX. EDUC. CODE ANN. § 12; VA. CODE ANN. § 22.1-212.14, WIS. STAT. § 118.40(7); WYO. STAT. ANN. § 21-3-314.

⁷³ N.H. REV. STAT. ANN. § 194-B.

⁷⁴ N.Y. EDUC. LAW § 2853(4).

⁷⁵ OR. REV. STAT. § 338.165.

⁷⁶ CONN. GEN. STAT. § 10-66ee.

⁷⁷ ARK. CODE ANN. CHAP. § 6-23-401(b)(4); ARIZ. REV. STAT. § 15-183(E)(7); DEL. CODE ANN. § 505; HI § 302A-1185; ILL. COMP. STAT. 5/27A *et seq.*; see also Illinois State Board of Education, *Charter School Frequently Asked Questions at* <<http://www.isbe.state.il.us/charter/CSQ&A.htm>>; IND. CODE § 20-5.5-8-3 & § 20-5.5-8-5; LA. REV. STAT. ANN. § 3995(B); MASS. GEN. LAWS § 71.89(t); MICH. COMP. LAWS § 380.1751; MINN. STAT. § 124D.10(12); MO. REV. STAT. § 160.415(7)(2); N.J. STAT. ANN. § 18A:36A-11(b); N.C. GEN. STAT. § 115C-238.29F(d)(4); OHIO REV. CODE ANN. § 3314.06(D); PA. STAT. ANN. § 1725A(3); R.I. GEN. LAWS § 16-77-6; TEX. EDUC. CODE ANN. § 12.012(3); UTAH CODE ANN. § 53A-1a-500 *et seq.*; and WIS. STAT. § 1 18.40(2r) & (7).

⁷⁸ CAL. EDUC. CODE § 47641.

⁷⁹ D.C. CODE ANN. § 31-2853.12(19).

⁸⁰ *E.g.*, Louisiana has created four types of charter schools:

(i) Type 1, which means a new school operated as the result of and pursuant to a charter between the nonprofit corporation created to operate the school and a local school board. Within such type 1 charter schools, only pupils who would be eligible to attend a public school operated by the local school board within the same city or parish will be eligible to attend as provided in the charter.

(ii) Type 2, which means a new school or a preexisting public school converted and operated as the result of and pursuant to a charter between the nonprofit corporation created to operate the school and the State Board of Elementary and Secondary Education. Prior to the creation of such a charter to convert a preexisting school, it shall be approved by the professional faculty and staff of the preexisting school and by the parents or guardians of children in the school as provided in R.S. 17:3983(C). Within such type 2 charter schools, pupils who reside within the state will be eligible to attend

schools, generally those sponsored by local school districts, are schools within LEAs.⁸¹ Others, typically those sponsored by other charter school authorities, are independent LEAs.⁸² Finally, a Wisconsin school district may decide whether a charter school it sponsors will be an instrumentality or a non-instrumentality of the school district.⁸³ In special education terms, because the district employs all the personnel for instrumentality charter schools,⁸⁴ those schools fall under the

as provided in the charter.

Creation of a type 2 charter school shall comply with the provisions of R.S. 17:3983(A)(2)(a)(I).

(iii) Type 3, which means a preexisting public school converted and operated as the result of and pursuant to a charter between a nonprofit corporation and the local school board. Prior to the creation of such a charter, it shall be approved by the members of the faculty and staff of the preexisting school who are certified by the state board and approved by the parents or guardians of children enrolled in the school as provided in R.S. 17:3983(C). Within such type 3 schools, only pupils who would be eligible to attend a public school operated by the local school board within the same city or parish, or pupils from the same area as those permitted to attend the preexisting school will be eligible to attend as provided in the charter.

(iv) Type 4, which means a preexisting public school converted and operated or a new school operated as the result of and pursuant to a charter between a local school board and the State Board of Elementary and Secondary Education. Prior to the creation of such a charter to convert a preexisting school, it shall be approved by the professional faculty and staff of the preexisting school and approved by the parents or guardians of children enrolled in the school as provided in R.S. 17:3983(C). Within such type 4 schools, only pupils who would be eligible to attend a public school operated by the local school board within the same city or parish, or pupils from the same areas as those permitted to attend the preexisting school will be eligible to attend as provided in the charter, unless an agreement with another city or parish school board is reached to allow students from outside the parish to attend the charter school.

LA. REV. STAT. ANN. § 3973(2)(B). Louisiana statutes then specify the LEA status of each type of charter school: "Any type 2 charter school shall be considered the local education agency for the purposes of any special education funding or statutory definitions, while the local school board shall remain the local education agency for any type 1, 3, or 4 charter school." *Id.* § 3995(B).

⁸¹ See, e.g., ILL. COMP. STAT. 5/27A *et seq.*; see also Illinois State Board of Education, *Charter School Frequently Asked Questions*, at <<http://www.isbe.state.il.us/charter/CSQ&A.htm>>.

⁸² For example, the four special chartering authorities in the state of Wisconsin - the City of Milwaukee, the University of Wisconsin-Milwaukee, the University of Wisconsin-Parkside, and the Milwaukee Area Technical College - may only charter schools that are non-instrumentalities, i.e., independent of the school districts in which they are located. This results in each charter school sponsored by one of these charter school authorities designated as an LEA charter school. WIS. STAT. § 118.40(2r).

⁸³ *Id.* § 118.40(7).

⁸⁴ *Id.* Conversely, employees of non-instrumentality charter schools may not, by definition, be employees of school districts.

district's LEA umbrella, while non-instrumentality charter schools are independent LEAs. Therefore, a Wisconsin school district may sponsor some charter schools for which it serves as the LEA and some charter schools for which each charter school is its own LEA.

Table 1: Charter School LEAs under State Statutes

LEA	States
School District	AK, CA, CO, FL, GA, ID, IL, KS, LA, MS, NM, NV, OK, SC, TX, VA, WI, WY
Resident School District	NH, NY, OR
Shared Responsibility	CT
Charter School Elects, Petitions	CA, DC
Charter School	AR, AZ, DE, HI, IL, IN, LA, MA, MI, MN, MO, NJ, NC, OH, PA, RI, TX, UT, WI

As Table 1 illustrates that while charter schools must all serve children with disabilities consistent with the IDEA, the entity responsible for ensuring that compliance varies from state to state and even from charter school to charter school within a state. Knowing what agency serves as the LEA is the first step to understanding the obligations of a given school. An additional layer of complexity is added by each charter contract. The specific terms of the contract may define further how the IDEA is implemented in a given charter school. Each type of charter school addressed under the IDEA and its regulations will be addressed in turn. Issues related to individual charter contracts associated with each type will also be discussed.

As noted above, the first charter school type named in the IDEA is the charter school that is part of a larger LEA, usually a school district. In that instance, the school district serves as the LEA for IDEA purposes and owes the same obligation to charter school students as it does for its students in more traditional schools.⁸⁵ Charter schools that fall into this category will need to work with their parent school districts to develop their special education delivery patterns. It will also be important to consider these issues at the time the charter school contract is being negotiated. For example, how will special education staff be hired? Will the charter school have this duty as it does with its other teachers or do the parties (the charter school and the school district) agree that the LEA will assign special education staff? Who will supervise special education staff? How will funding be affected? It may also be necessary for the sponsoring school district to examine and alter its service delivery pattern to ensure that charter school is as

⁸⁵ 20 U.S.C. § 1413(a)(5); 34 C.F.R. § 300.312(c).

programmatically accessible as possible.⁸⁶ These are just a sampling of the issues that need to be discussed and described in the contract in order to fully allocate responsibility for the IDEA delivery in a district charter school.

The second charter school type named in the IDEA is the LEA charter school, a charter school that is independent of any larger district and serves as its own LEA.⁸⁷ These independent charter schools have the same obligations listed above as larger school districts that serve as LEAs.⁸⁸ LEA charter schools must consider the same questions raised above for district charters and may wish to consider entering into agreements on those issues with the school district in which they are located or the school districts from which their students come. However, if state law has not designated the LEA for independent charter schools, each individual charter school bears those LEA responsibilities. As are all LEAs, LEA charter schools are free to enter into cooperative agreements or contracts with other agencies or schools to provide the needed services. The manner in which a LEA charter school meets these obligations is at the discretion of the school with oversight from its chartering authority. The obligations may not, however, be abrogated. Whatever arrangements a charter school makes to satisfy the IDEA's mandates, the school retains the responsibility to ensure that all federal obligations are indeed being met.⁸⁹

Being an "independent" charter school does not, however, necessarily mean that the charter school is its own LEA. Independent charter schools should first consult with state law to be certain they are LEA charter schools. This step is necessary because states may designate another entity to assume this responsibility for independent charter schools. As Table 1 indicates, some states through statutes may require local or resident school districts to serve as LEAs even for those charter schools that are otherwise independent of a school district. The state of Oregon provides such an example as Oregon law assigns the duty to serve children with disabilities to the child's "resident district" for schools chartered by the state board of education and that are otherwise independent from local districts.⁹⁰

An interesting issue that arises in the LEA charter school context might be termed the state statute conundrum (see Figure 1). Seven states (Hawaii, Illinois, Mississippi, New York, Oregon, Pennsylvania, and Wisconsin) and the District of Columbia relieve charter schools from compliance with state statutes and administrative rules regarding special education.⁹¹ Idaho relieves charter schools

⁸⁶ For a discussion of the link of delivery pattern and exclusion of children with disabilities from magnet school contexts, see Mead, *supra*, note 43; Joseph R. McKinney & Julie F. Mead, *Law and Policy in Conflict: Including Students with Disabilities in Parental Choice Programs* 32 EDUC. ADMINISTRATION QUARTERLY 107 (1996).

⁸⁷ 20 U.S.C. § 1413(e)(1)(B); 34 C.F.R. § 312(b).

⁸⁸ 34 C.F.R. § 300.18(b)(2).

⁸⁹ 20 U.S.C. § 1412(11).

⁹⁰ OR. REV. STAT. § 338.165.

⁹¹ See HAW. REC. STAT. § 302A, REV. STAT. § 302A-1182; ILL. COMP. STAT. 5/27A *et*

from state administrative rules, but not its statutes.⁹² This relief creates an interesting situation for those charter schools. These sources of state authority typically define how a state will implement the IDEA. They often create more detailed eligibility definitions and criteria for determining whether a child qualifies as a child with a disability beyond that delineated in the federal statute and regulations.⁹³ Whatever is contained within those exempted state provisions, according to federal law, an LEA charter school must adopt written policies and procedures to implement the mandates of the IDEA that must meet with the satisfaction of the state educational agency.⁹⁴ Accordingly, LEA charter schools find themselves faced with a choice. They must choose whether to create their own independent policies and procedures based solely on federal law or whether to follow the state's rules and regulations despite being technically relieved from them. Many charter schools may decide that the most practical route may be the latter, given the myriad other issues involved in charter school operation. In addition, given the fact that the SEA must be satisfied with whatever is developed and the state statutes and regulations effectively create an existing template, voluntary compliance may be the simplest way to assure SEA satisfaction.

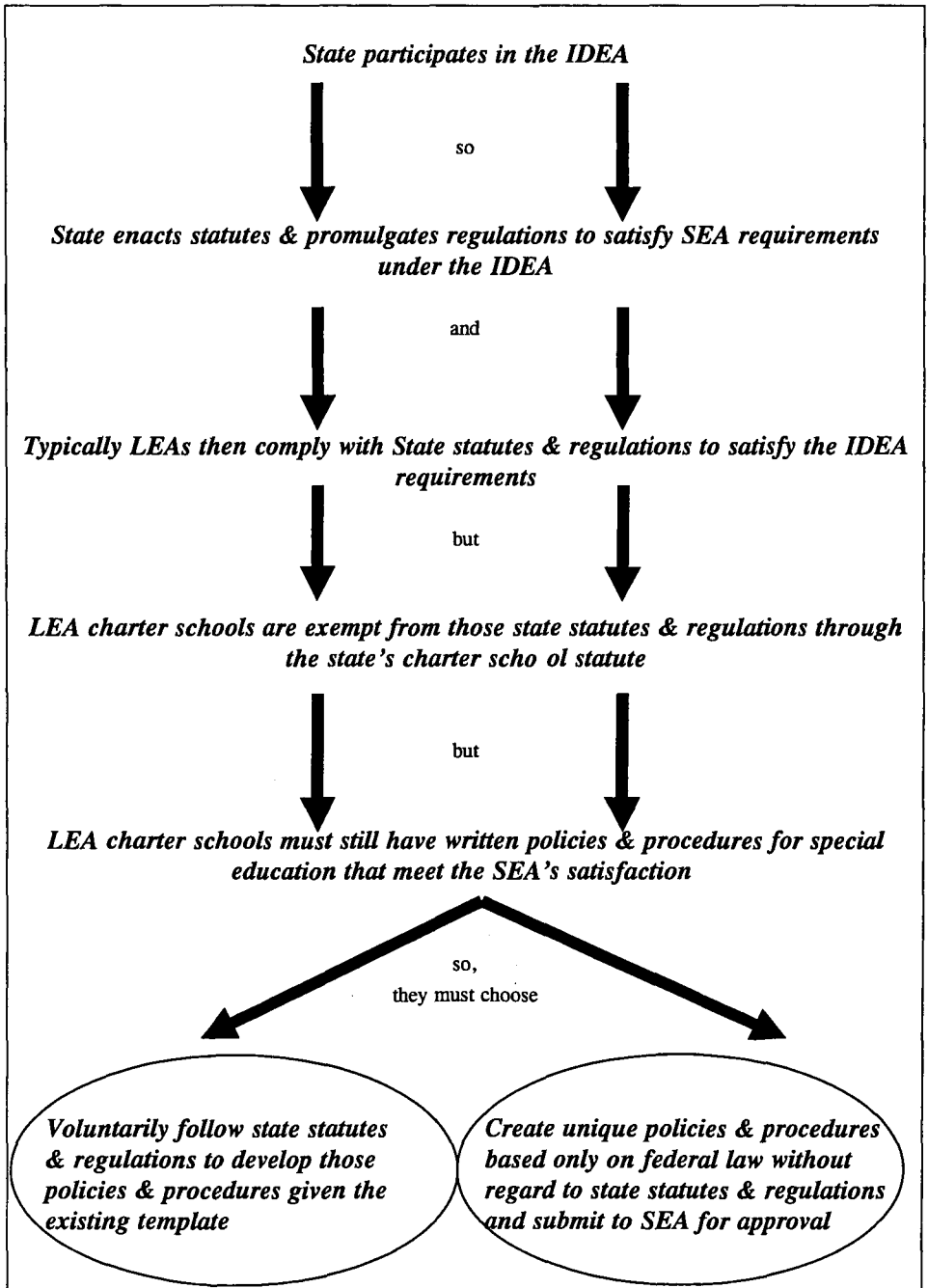
seq., MISS. CODE ANN. § 37-28; N.Y. EDUC. LAW § 2850 *et seq.*; OR. REV. STAT. § 338; 1997 PA. LAWS 22; and WIS. STAT. § 118.40; D.C. CODE ANN. § 31-2853.

⁹² IDAHO CODE § 33-2002.

⁹³ *See, e.g.*, WIS. STAT. § 115; WIS. PI § 11.36.

⁹⁴ 20 U.S.C. § 1413(a).

Figure 1: State Statute Conundrum for Independent LEA Charter Schools Relieved From State Special Education Statutes & Regulations



Those charter schools located in states that allow schools to request waivers of state statutes and regulations⁹⁵ might also wish to consider this conundrum if they are contemplating petitioning the state for an exemption from state special education rules.

Finally, as explained in federal law, some charter schools are neither part of a larger LEA, nor independent LEAs. It is for these schools that a section was added to the regulations when they were promulgated in 1999 and names the SEA as the responsible party for ensuring compliance with IDEA.⁹⁶ As explained by the U.S. Department of Education in the explanatory materials accompanying the release of the IDEA's final rules and regulations, the agency added this section to make clear Congressional intent that all public charter schools comply with the IDEA. By creating this catch-all category, the regulations reiterate the state's ultimate obligation to ensure that the IDEA is fully implemented in all public schools.⁹⁷ Additionally, this section makes explicit the fact that all public charter schools must meet the IDEA mandates regardless of whether the IDEA funds are received by the school or not.⁹⁸ This section of the regulations also provides that SEAs may assign an entity to assume some or all of the "initial responsibility," but that the SEA bears the ultimate responsibility for ensuring that compliance occurs in a consistent manner.⁹⁹ This provision would apply in Connecticut, New Hampshire, New York, and Oregon. In each of these states, legislatures have declined to name the charter school as the LEA or to make charter schools part of larger LEAs.¹⁰⁰ Rather, each state has created a situation in which the charter school and the resident school districts of its students must work together to be certain the needs of children with disabilities are met. As such, no single LEA is responsible for serving a particular charter school. The designation of responsibility for service delivery to the resident district of each eligible charter school child means that a charter school with students from multiple districts will need to coordinate with more than one LEA for the purpose of serving their students with disabilities. In this situation, federal law serves as a reminder that the state must ensure that this process results in the proper implementation of the law where responsibility has not been assigned to a single entity.¹⁰¹

A final word about contract provisions is in order. As mentioned above, regardless of the type of charter school for special education purposes, the charter contract may contain provisions that add to or describe how obligations will be met. Therefore, charter schools must examine their contracts to determine whether there exist provisions specific to special education responsibilities. In

⁹⁵ See, e.g., Kansas, KAN. STAT. ANN. § 72-1906(14) and Rhode Island, R.I. GEN. LAWS §16-77-4(b)(13).

⁹⁶ 34 C.F.R. § 300.312(d).

⁹⁷ 20 U.S.C. § 1412.

⁹⁸ 64 Fed. Reg. 12,546.

⁹⁹ 34 C.F.R. § 300.312(d)(2).

¹⁰⁰ See *supra* notes 73-76.

¹⁰¹ 34 C.F.R. § 300.312 (d)(1).

addition, as with all contract provisions, care must be taken to ensure that charter contract provisions violate neither state nor federal law.

Two recent administrative decisions reaffirm charter schools' obligation to comply with the various provisions of the IDEA and provide illustrations of that obligation in a charter school context. A due process complaint against a Texas charter school succeeded as the parents demonstrated that their child did not receive the services necessary to achieve FAPE.¹⁰² The hearing officer also noted that even though the charter school was new and had limited resources it was still bound by all the IDEA requirements.¹⁰³ Lack of resources was no excuse for non-compliance. In a separate due process complaint against an Arizona charter school, a state hearing officer held for the parents, finding numerous procedural and substantive violations of the IDEA involving a charter school's failure to appropriately address a child's learning disability.¹⁰⁴ In that case, as a defense to the allegations, the charter school produced a letter from personnel in the State Department of Education that provided erroneous advice concerning the charter school's obligations.¹⁰⁵ The hearing officer rejected this thinking, noting that following "flawed" advice provided no justification for ignoring the child's needs for special educational services.¹⁰⁶ Both of these decisions and others like them reinforce the necessity of charter school personnel to fully understand the IDEA and its requirements.¹⁰⁷

IV. MAY A CHARTER SCHOOL SERVE ONLY CHILDREN WITH DISABILITIES?

As has already been discussed, it is beyond argument that charter schools must comply with the provisions of the IDEA and Section 504. That compliance must include attention to one of the central tenets of both laws; that children with disabilities be educated in the least restrictive environment.¹⁰⁸ Strict requirements under both the IDEA and the regulations of Section 504 mandate that children

¹⁰² Seashore Learning Center Charter School, 32 IDELR 224 (TX SEA 1999).

¹⁰³ *Id.*

¹⁰⁴ The Basis School, 32 IDELR 187 (Arizona SEA 2000).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ See also *Thompson v. Bd. of the Special Sch. Dist. No. 1*, 144 F.3d 574 (8th Cir. 1998) (holding that a child enrolled in a charter school could no longer file a complaint against his previous district as the charter school now was responsible for providing FAPE); *Houston Independent School District*, 32 IDELR 79 (Texas SEA 1999) (finding for a parent, in part, in a dispute over the services provided to a student at a HISD charter school); *Megan C. v. Indep. Sch. Dist. No. 625*, 30 IDELR 132 (D. Minn. 1999) (noting that when a mother withdrew her child from a district school and enrolled her at a charter school, the charter school became responsible for the development and implementation of an appropriate individualized educational program (IEP)); *Letter to Stager*, 33 IDELR 248 (OSEP 2000) (discussing the requirement that charter schools accurately count children with disabilities and maintain adequate records that allow for an audit by state authorities).

¹⁰⁸ 20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 104.33(b).

with disabilities be educated in the least restrictive environment (LRE) given their unique needs to the maximum extent appropriate.¹⁰⁹ That is, a child with a disability is required to be educated with his/her non-disabled peers unless the nature and severity of the child's disability make achieving a free appropriate public education (FAPE) unfeasible in such a setting.¹¹⁰ The plain reading of these LRE requirements suggests that they may create an implementation challenge to a charter school developed to serve a special population of children with disabilities. In essence, school officials in such a charter school would have to ensure that each child enrolled could only receive a free appropriate public education in a setting essentially segregated from children without disabilities.

In fact, since the advent of various forms of public school choice, the Office of Special Education Programs (OSEP) of the United States Department of Education has long advised that parental choices must be consistent with FAPE and the LRE requirements of the IDEA and Section 504.¹¹¹ The fact that a parent chooses such a setting is irrelevant to the issue of whether it satisfies the dictates of federal disability law. As OSEP explained in response to an inquiry from Indiana officials regarding parents' selection of the Indiana School for the Blind or the Indiana School for the Deaf under statewide open enrollment, "Under Part B [of the IDEA], parent preference cannot override the decision of the child's case conference [IEP] team."¹¹² Therefore, only those parental choices that are consistent with federal disability law can be honored. This long-held position of OSEP reiterates the fact that the FAPE is the child's entitlement and parents may not waive their child's rights, even in the name of parental choice.¹¹³

Even a cursory examination of the U.S. Charter Schools web page maintained by the United States Department of Education reveals that over thirty schools¹¹⁴ nationwide have been established under state charter school provisions that specifically target and/or limit their student populations to children with disabilities.¹¹⁵ These charter schools have been designed to address the particular needs of children with learning disabilities,¹¹⁶ behavioral/emotional disabilities,¹¹⁷

¹⁰⁹ *Id.*

¹¹⁰ *Id.*; see also *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036 (1st Cir. 1989); *Sacramento v. Rachel H.*, 14 F.3d 139 (9th Cir. 1994); *Clyde v. Puyallup Sch. Dist.*, 35 F.3d 1396 (9th Cir. 1994); *Bd. of Ed. of Murphysboro v. Illinois State Bd. of Ed.*, 41 F.3d 1162 (7th Cir. 1996).

¹¹¹ Lunar Letter, 17 EHLR 834 (OSEP 1991); Evans Letter, 17 EHLR 836 (OSEP 1991); Bina Letter, 18 IDELR 582 (OSEP 1991).

¹¹² Bina Letter, 18 IDELR 582 (OSEP 1991).

¹¹³ 20 U.S.C. § 1400(d)(1)(A).

¹¹⁴ This number is undoubtedly less than the actual number of charter schools designed for children with disabilities as only those charter schools that have voluntarily completed profiles of their programs appear on the website. Note that numerous charter schools of all types have not submitted information.

¹¹⁵ The phenomenon was also noted by FIORE ET AL., *supra* note 8.

¹¹⁶ See, e.g., Educational Horizons Charter School (Florida), Special Kidz Charter School (Florida), New Visions Charter School (Minnesota), LDA-Chay Stockwell

developmental and cognitive disabilities,¹¹⁸ autism,¹¹⁹ physical disabilities,¹²⁰ deafness and hearing impairments.¹²¹ These schools must take particular care to ensure that, consistent with federal law, children enrolled in their schools have contact with non-disabled children "to the maximum extent appropriate."¹²² Fulfilling this obligation may even mean that some children will need to be denied admission, if the nature and severity of the child's disability is such that he or she should be educated in more typical classroom settings that allow for more contact with children without disabilities than is provided for at the special education charter school. Operationally, that would require that each prospective student's IEP be evaluated to determine whether the parent's choice could be honored. The IDEA requires that each child's Individualized Education Program (IEP) include "an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class."¹²³ This provision creates a presumption of regular class placement¹²⁴ that cannot be ignored, regardless of school setting. A core principle of the IDEA is that programming, as defined by an IEP, must be designed to fit the child's needs.¹²⁵ The IEP dictates placement (the special education services delivered and the environment in which delivery occurs).¹²⁶ Placement does not dictate the IEP. Therefore, it would violate the IDEA to simply re-write a child's IEP to comport with the characteristics of the special education charter school if the nature and severity of the child's disability did not direct that change.¹²⁷

Academy (Michigan), Youth Academy Charter School (South Carolina), and School for the Arts in Learning (Washington, DC).

¹¹⁷ See, e.g., Edwards Hill Charter School (Arizona), Tampa Bay Academy (Florida), Devon Charter School (Florida), Ed Venture Charter School (Florida), Coastal Bend Youth City (Texas), and Lucas Charter School (Wisconsin).

¹¹⁸ See, e.g., Child Development Center Charter School (Florida), Metro Atlanta Respite and Developmental Services (Georgia), and Macomb Academy (Michigan).

¹¹⁹ See, e.g., MODEL Community School (Ohio), Autism Academy of Learning (Ohio), and Spectrum Charter School (Pennsylvania).

¹²⁰ See, e.g., Meyer Center for Special Children (South Carolina).

¹²¹ See, e.g., Lauren Clerc Elementary (Arizona), Sequoia School for the Deaf and Hard of Hearing (Arizona), Rocky Mountain Deaf School (Colorado), Metro Deaf School (Minnesota), and Jean Massieu School (Utah).

¹²² 20 U.S.C. § 1412(a)(5)(A).

¹²³ *Id.* § 1414(d)(1)(A)(iv).

¹²⁴ Senate Committee Report on P.L. 105-17, at 26. For a discussion of the statutory shift from a preference to a presumption for placement in regular classes, see: Julie F. Mead, *Expressions of Congressional Intent*, 127 WEST'S EDUCATION LAW REPORTER 511 (1998).

¹²⁵ 20 U.S.C. § 1414(d); 34 C.F.R. §§ 300.340-300.350; see also *Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982).

¹²⁶ 20 U.S.C. § 1412(a)(5); 34 C.F.R. § 300.352(b)(2).

¹²⁷ *Id.*

Charter schools that serve "children at risk"¹²⁸ may face a related problem. Although these schools do not target children with disabilities explicitly, the nature of the programming may be attractive to the parents of children with disabilities who struggle in traditional school settings. If the voluntary enrollment of students in such charter schools for "at risk" populations results in significantly higher than average numbers of children with disabilities, it raises issues of whether the setting is integrated or segregated according to disability. Therefore, care will be necessary to ensure that children with disabilities have appropriate contact with children who are not disabled, else the LRE provision of the IDEA may be violated.

V. IMPLICATIONS FOR CHARTER SCHOOL AUTHORIZERS

Charter school authorizers (CSAs),¹²⁹ regardless of whether they are also SEAs

¹²⁸ "Children at risk" is a term that generally means children at risk for school failure. See, e.g., GARY G. WEHLAGE ET AL., REDUCING THE RISK: SCHOOLS AS COMMUNITIES OF SUPPORT (1989). The precise statutory definition varies from state to state. See, e.g., WIS. STAT. § 118.153(1)(a):

'Children at risk' means pupils in grades 5 to 12 who are at risk of not graduating from high school because they failed the high school graduation examination administered under s. 118.30(1m) (d), are dropouts, or are two or more of the following:

- 1m. One or more years behind their age group in the number of high school credits attained.
2. Two or more years behind their age group in basic skill levels.
- 2m. Habitual truants, as defined in s. 118.16 (1) (a).
3. Parents.
4. Adjudicated delinquents.
5. Eighth grade pupils whose score in each subject area on the examination administered under s. 118.30 (1m) (am) was below the basic level, 8th grade pupils who failed the examination administered under s. 118.30 (1m) (am) 2., and 8th grade pupils who failed to be promoted to the 9th grade.

Id.

¹²⁹ States allow a number of institutions and organizations to serve as charter school authorizers. See, e.g., Alaska, ALASKA STAT. § 14.03.250(b); Colorado, COLO. REV. STAT. § 20-30.5-104; and Florida, FLA. STAT. § 228.056, which allow only school districts to charter schools. See also Arizona, ARIZ. REV. STAT. § 15-183(c); Delaware, DEL. CODE ANN. § 503; Georgia, GA. CODE ANN. § 20-2-2061, which also allow their respective State Board of Education to authorize charter schools. Indiana, IND. CODE § 10-5.5-1.15; Michigan, MICH. COMP. LAWS § 388.501(1)(a); Missouri, MO. REV. STAT. § 160.400(2); New York, N.Y. EDUC. LAW § 2851(3)); and Wisconsin, WIS. STAT. § 118.40(2r) allow some of their state universities to serve as charter school authorizers. Indiana, IND. CODE § 20-5.5-1.15, and Wisconsin, WIS. STAT. § 118.40(2r), allow city officials in Indianapolis and Milwaukee respectively to approve charter schools. Minnesota also grants this authority to the highest number of entities, allowing the following organizations to authorize charter schools: school boards, intermediate education agencies, public colleges, community and technical colleges, eligible private colleges, and

or LEAs, also play a role in ensuring children with disabilities are appropriately served in charter schools. That role presents itself in four stages of the development and operation of a charter school: (1) charter school proposal review, (2) charter contract negotiations, (3) charter school oversight, and (4) charter school contract renewal. First, authorizers must demand that charter school proposals clearly articulate how the school plans to meet the needs of students with disabilities. Are admissions processes non-discriminatory with respect to disability? Has both physical and programmatic access for children with disabilities been considered and addressed in school's design? Will the charter school hire its own personnel or contract with others for special education delivery? What other resources does the charter school expect to tap? Are there aspects of the proposed curriculum either intentionally or unintentionally that might create an over- or under-representation of children with disabilities? If so, how will the charter school address the particular issues that arise in that instance?

The second point of consideration should be during charter school contract development. Schools at this point have cleared the proposal review and enter into negotiations of contract provisions. It is important at this point to remember that contract provisions dictate the relationship between the school and the charter school authority. The manner and frequency of contract oversight, special educator hiring, special educator supervision, teacher training, adequate policy development, and funding are just a few of the issues that will need to be considered with regard to special education. Depending on the type of charter school, the charter school authorizer may wish to require further provisions to ensure that the charter school curriculum is provided consistent with federal disability law. For example, the authorizer may require that an LEA charter school provide copies of its special education policies and procedures to ensure that the school is satisfying its obligations.

Once the school becomes operational, the CSA's role shifts to one of oversight or contract supervision. The CSA periodically examines whether the charter school is in compliance of the charter school contract. This compliance review, whenever it occurs, should include an examination of whether children with disabilities are being appropriately enrolled and served in the charter school. Failure to properly serve children with disabilities could result in revocation of the charter school's contract.

Finally, the CSA must consider renewal or non-renewal of the charter at the end of the contract term. Again, the charter school's treatment of students with disabilities should be an issue used to determine whether or not the charter contract will be renewed. In fact, in those states that do not specify cause for renewal, a CSA may determine not to renew a school's charter for failure to attract adequate numbers of children with disabilities even if the school adequately served those who did attend. Conversely, an authorizer may

determine that a school that has over-enrolled children with disabilities did not appropriately serve public policy by creating what some might describe as a school segregated on the basis of disability. A CSA could require as a condition for renewal that a charter school create a plan to recruit more children with disabilities or more children without disabilities, as the case may be, in order to create a student body more reflective of expected local norms.¹³⁰

Finally, CSAs should keep in mind that failure to take reasonable steps to ensure compliance with federal disability law may create legal vulnerability for the CSA if a child with a disability is not properly served. In any administrative due process hearing that ensued under either Section 504/ADA¹³¹ or the IDEA,¹³² the LEA would be named as the respondent. However, particularly when no single LEA is identified for a school, an attorney may believe it prudent to protect the child's interests by naming the school and the CSA (as well as the "resident" school district in those states that assign a role to that entity), arguing that all played a role in the denial of FAPE for a particular child.

VI. CONCLUSION

As the discussion above illustrates, a charter school must examine the interplay between federal law, state law and its individual charter contract to fully understand its responsibilities for serving children with disabilities. Charter school personnel must develop a working knowledge of Section 504 and the IDEA just as all of their public school colleagues must. The unique situations created by charter school statutes with respect to special education delivery can be complex. Understanding these issues and their implications for charter school design, contract development, and program delivery is necessary for all involved so that charter schools truly stand as an educational option for all the public's children.

¹³⁰ See, e.g., LA. REV. STAT. ANN. § 3391(B)(1).

¹³¹ 34 C.F.R. § 104.36.

¹³² 20 U.S.C. § 1415.

