Special Education from the (Damp) Ground Up: Children with Disabilities in a Charter School-Dependent Educational System

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Hurricane Katrina created the need and the opportunity to reconstitute the New Orleans public school system. Educational reformers took advantage of the destruction of existing institutions to build a new system based on educational choice and dependent on charter schools to provide the choices. The disaster also created the need and opportunity to rebuild the system of special education in the city, but education for children with disabilities appears to have been an afterthought. Reports have surfaced of children being steered away from charter schools or inadequately served there. This paper asks what principles should guide reformers in establishing education for children with disabilities in a reconstructed school system committed to choice and charters. The principles include the following: (1) Guaranteeing that the general education system takes responsibility for all children; (2) Adequately supporting children with disabilities in general education; (3) Improving outcomes; (4) Providing equal opportunity for choice; (5) Assigning costs fairly; and (6) Protecting parents' and children's rights. This paper will discuss each principle in turn, considering its implications for policy and its legal ramifications.

Suppose that the public education institutions in a major city were suddenly swept away, along with many of the other physical and social structures. The sudden disappearance of the school system creates a huge social problem. Those who return to the city after the disaster and those who move in for the first time include large numbers of children who need schooling, and the structures to provide it no longer exist. But the situation also presents a huge opportunity: a chance to build an education system from the ground up, without all the time-encrusted procedures and entrenched interests that educational reformers decry.

The city, of course, is New Orleans, and educational reformers took advantage of the city’s disaster in 2005 to build an educational system not quite like anything ever seen before.
before. Specifically, they created a system with an array of options, primarily relying on charter schools to provide educational choice for parents whose children are enrolled in the public school system. More than forty-nine charter schools serve over half of the student population. The Recovery School District (RSD) operates ordinary public schools and oversees most of the charters. The Orleans Parish School Board operates traditional public schools as well as charter schools. There are no attendance zones, so students may choose a school anywhere in the city. Some schools are "transformation schools," in which private entities conduct operations for some but not all grades. This system, or perhaps more accurately this array, is explicitly viewed as experimental, allowing future decision makers to retain those options that work and discard those that fail to produce educational achievement.


3 The RSD, created in 2003, before Katrina, has responsibility for schools that have failed to meet state minimum academic standards for at least four consecutive years, although some such schools continue to be the responsibility of the local school board. Recovery School District, Frequently Asked Questions, http://www.rsdla.net/InfoGlance/FAQs.aspx (visited Aug. 3, 2009). The RSD has operations elsewhere in Louisiana as well as in New Orleans. Id. See generally ERROR! MAIN DOCUMENT ONLY.LA. REV STAT. ANN. § 17:1990 (West 2009) (RSD enabling statute)

4 Id.


What is perhaps less obvious than the opportunity to rebuild education from the ground up in post-2005 New Orleans is that the city’s disaster also produced both a need and an opportunity to reconstitute education for children with disabilities. Many authorities complain that the American system of special education for children with disabilities has become too separate from general education, too complacent about poor outcomes, insufficiently anchored in research-based practices, and too dominated by legal rules.\(^8\) The reconstruction of the public schools in a major city provides an opportunity to create a new system of education for children who have disabilities.

Nevertheless, it appears that children with disabilities and their educational needs were at most an afterthought in the educational planning for a rebuilt New Orleans.\(^9\) In many schools, services for children with disabilities are inadequate.\(^10\) Uncertainty remains concerning what rights children with disabilities have to education in specific schools, and there are charges that children with disabling conditions are being steered away from some charter schools towards the traditional public schools that provide them traditional special education programs.\(^11\) Not only do inadequate services and steering of

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\(^8\) See, e.g., *RETHINKING SPECIAL EDUCATION* 161-62 (Chester E. Finn et al. eds. 2001).


\(^10\) See infra text accompanying notes ___ (reporting data indicating inadequate evaluations and related services for children).

\(^11\) See Carr, supra note ___ (“Activists report they are hearing fewer complaints this year of charter schools outright turning away special education children, but they say some charter operators have found subtle ways to discourage children with special needs from staying. . . . [Roslyn Johnson] Smith [president of a board of a charter school] wrote in her blog entry that she knows of one charter school that ‘did a blitz for speech-only students,’ so it would appear to have an appropriate number of special education students, and could avoid taking those with emotional and behavioral disorders.”); Steve Ritea, *Left Behind? Some Accuse New Orleans’ East Bank Charter Schools of Turning Away Students with Special Needs*, TIMES-PICAYUNE (New Orleans), Apr. 30, 2007, available at http://www.nola.com/timespic/stories/index.ssf?/base/news-3/1177911859154840.xml&coll=1 (“Most New Orleans public school students may be enrolled in charter schools these days, but many charters are avoiding taking special education students, particularly those with profound disabilities, a violation of state and federal law, critics charge.”); see also News Hour: New Orleans Charter Schools Produce Mixed Results (PBS television broadcast May 6, 2009), available at http://www.pbs.org/newshour/bb/education/jan-june09/nolacharter_05-06.html (“Parents are seeking places
students diminish the freedom afforded children with disabilities and their parents to select specialized programs, but these conditions also undermine the value of the city’s experiment with educational choice. If a significant fraction of students—those with disabilities—are kept from having adequate choices, no one will ever know if a choice system can work when all students are included. Most important, critical opportunities to improve education for children with disabilities are at risk of being lost.

Public school arrangements in New Orleans are hardly carved in stone at this time. There is still the chance to influence the public school system’s response to students in general, and to students with disabilities in particular. Accordingly, it seems sensible to ask what an optimal system of education for children with disabilities would look like, and to consider how such a program could be instituted in New Orleans. What

for their children who may have physical handicaps, mental or emotional handicapping conditions, and they’re not being accepted by charters. I get referrals from specific principals of charter schools. ‘Go to Banneker. Tell Miss Branche I sent you. Go to Banneker.’” (quoting Cheryllyn Branch, principal of Benjamin Banneker Public Elementary School). In New Orleans the proportional enrollment of special education students in charter schools is 8%, but in traditional public schools it is 12%. The discrimination against students with disabilities may be even more extreme because, as Carr and Ritea note, schools are reported to be artificially raising their counts by taking only the children who are easiest to serve and directing others elsewhere. One source states, “In general, most charter schools participating in [a twenty-three school study] do not appear to deny enrollment, ‘counsel out,’ or discriminate against students with disabilities applying for enrollment.” NEW SCHOOLS FOR NEW ORLEANS, THE SPECIAL EDUCATION PROJECT: A STUDY OF 23 CHARTER SCHOOLS IN THE RECOVERY SCHOOL DISTRICT 30 (2008). The qualifications of “in general” and “most” do not inspire confidence, however, and the study goes on to state that several schools have counts of children with disabilities of less than 7% and that one charter school reportedly had stopped accepting students with disabilities on account of a quota. Id. at 31. The study says charter school leaders and special educators in the schools blame parents’ reluctance to acknowledge their children’s special education status for the low special education enrollments; it also indicates that child counts may be inaccurate and record keeping is poor and decentralized. Id. at 31-32. Reports of steering and disproportionately low enrollment of students with disabilities have surfaced with respect to charter schools in other cities. See EILEEN M. AHEARN ET AL., PROJECT SEARCH: SPECIAL EDUCATION AS REQUIREMENTS IN CHARTER SCHOOLS FINAL REPORT 4-5 (2001) (collecting studies). Paradoxically, the study by New Schools for New Orleans also indicates that some schools may be ignoring various needs of students with disabilities in order to keep the students on the school rosters and furnish them only the services currently available at the schools. NEW SCHOOLS FOR NEW ORLEANS, supra, at 37. This should cause grave concern over adequacy of services.

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, 312 (1997) (“If a charter school’s success depended on whether it could exclude students who have special educational needs or are costly to educate, the school could hardly be a good model for traditional public schools, which must serve all children. Certainly this would defeat a central charter school objective.”).
methods can be used to increase the achievement of students with disabilities, to minimize their isolation, to protect their rights and permit them to contribute their share to the common educational enterprise? With particular reference to New Orleans, what methods should be used in a city school system that has set its course on providing educational choice?

Although significant scholarship exists on legal reform of special education, and some writing discusses how educational rights of children with disabilities might be protected in charter school-focused regimes, little work exists on what can be done to improve the educational opportunities for children with disabilities in a reformed public school system that is committed to choice. This paper will suggest some principles that should guide reformers in reconstructing a program of special education in the reconstructed city. These principles include: (1) Guaranteeing that the general education system takes responsibility for all children; (2) Adequately supporting children with disabilities in general education; (3) Improving outcomes; (4) Providing equal opportunity for choice; (5) Assigning costs fairly; and (6) Protecting parents’ and children's rights. The paper will discuss each principle in turn, considering the policy implications and legal ramifications of each. It will conclude that parents of children

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with special education needs can be afforded choice, and that legally they must be afforded choice. But outcomes will not be improved, children with disabilities will not be treated as equals, and rights will be violated unless the school system takes seriously the job of guaranteeing high quality supportive services for children who need special education.

I. GUARANTEEING THAT THE GENERAL EDUCATION SYSTEM TAKES RESPONSIBILITY FOR ALL CHILDREN

In 2002, the President’s Commission on Excellence in Special Education declared:

Children placed in special education are general education children first. Despite this basic fact, educators and policy-makers think about the two systems as separate . . . . In such a system, children with disabilities are often treated, not as children who are members of general education and whose special instructional needs can be met with scientifically based approaches, they are considered separately with unique costs—creating incentives for misidentification and academic isolation. . . . General education and special education share responsibilities for children with disabilities. They are not separable at any level—cost, instruction, or even identification.\(^{15}\)

Any rebuilding of the system for educating children with disabilities needs to be based on the reality that children with disabilities are children with disabilities. The public school system has every bit as much responsibility for them as it does for all other children.

Special education should be, in the words of the President’s Commission, not “an end-point, [but] a gateway to more effective instruction and strong intervention,” so that the child with a disability can learn as much as any child can. Special education is not a place to put children; instead it is a bundle of services to assist them to hold their own educationally.  

The responsibility of the school system as a whole for the population of children as a whole is easy to lose sight of, due to the historical exclusion of children with disabilities from public school and the elaborate nature of the legal regime needed to guarantee the right to education for children who have disabling conditions and need special help in order to learn. Traditionally, the role of the legal system in the education of children with disabilities was keeping them out of public school, and as late as the 1970s, millions of children were completely excluded from public education or languishing in patently inadequate public school programs. Courts routinely upheld the decisions of public school authorities who refused to educate children with disabilities.

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16 See Wendy F. Hensel, Sharing the Short Bus: Eligibility and Identity Under the IDEA, 58 HASTINGS L.J. 1147, 1200 (making point in context of discussion of over-identification of children with disabilities). The theme “Special education is a service, not a place” has been taken up by special education authorities in various jurisdictions. See, e.g., Md. State Dep’t of Educ., Special Education Is a Service—Not a Place, ALL INCLUSIVE, June 2001, at 1, available at http://www.msde.state.md.us/SpecialEducation/AllInclusive.pdf; Office of Superintendent of Public Instruction, Washington Administrative Code Special Education Regulations Phase Two Questions and Answers (“Special Education . . . a service, not a place.”), at http://www.k12.wa.us/SpecialEd/pubdocs/Phase2.pdf (visited Aug. 10, 2009). In the present era, special education is not even unique as a bundle of services. Many students need extra help in order to perform well in school, and students in many schools receive assistance under title I remedial programming, 20 U.S.C.A. § 6301 (West 2009), early intervening services, 20 U.S.C.A. § 1413(f) (West 2009), supplemental educational services under the No Child Left Behind law, 20 U.S.C.A. § 6316(e) (West 2009), or any number of other programs without ever being identified as children with disabilities.

17 Before the law’s passage, 1.75 million children with disabilities were excluded from public school and 2.5 million were in inadequate programs. H.R. REP. NO. 94-332, at 11-12 (1975).

The tide began to turn as parents organized politically and at the same time filed right to education cases in the federal courts, claiming that denying their children public education violated the equal protection and due process clauses of the Fourteenth Amendment to the Constitution.\(^\text{19}\) Decrees in two district court cases,\(^\text{20}\) combined with years of political pressure by parents and allies, led Congress to enact the Education for All Handicapped Children Act of 1975,\(^\text{21}\) which for the first time established an enforceable statutory entitlement to free, appropriate public education for all children with disabilities. Renamed the Individuals with Disabilities Education Act (IDEA) in 1990,\(^\text{22}\) the law requires states that accept federal special education money to provide free, appropriate public education to all children with disabilities in their jurisdiction.\(^\text{23}\) States and local school districts assume the duty to provide adapted educational services, as well as services related to education, such as transportation, physical and occupational therapy, sign language interpretation, school nursing, and other kinds of accommodations and support.\(^\text{24}\)

Under IDEA, children with disabilities must be educated to the maximum extent appropriate with children without disabilities, and supplementary aids and services must be provided to prevent removal from regular classes.\(^\text{25}\) Parents of children with

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23 See 20 U.S.C.A. § 1411(i) (West 2009) (authorizing appropriations). For ease of reference in light of recent changes in many of the statutory provisions cited here, the West unofficial version of the United States Code will be used rather than the official version.

24 See § 1401(26) (defining “related services”).

25 § 1412(a)(5).
disabilities have rights to participate\textsuperscript{26} in the creation of the written individualized education program (IEP), which sets out the services and supports to be delivered to their child and the measurable annual goals the child is expected to meet.\textsuperscript{27} Participation rights include the ability to challenge the program or placement the school system offers, as well as any other aspect of the provision or denial of education to the child, by demanding a “due process” hearing; both the parents and the school district may appeal the result of the hearing to court.\textsuperscript{28}

The latest amendments to IDEA, the Individuals with Disabilities Education Improvement Act, were enacted in 2004.\textsuperscript{29} The amendments left the fundamentals of IDEA intact, but added, among other things, requirements regarding highly qualified teachers, state and district-wide student assessment, selection of services based on peer-reviewed research to the extent practicable, and other features of modern educational reform.\textsuperscript{30} The entitlement to special education does not exclude any child from general education; instead, it provides the child with access to more, and more intense, instructional and related services than would otherwise be offered. Indeed, the 2004 revisions place a new and strengthened emphasis on involvement and progress in the

\textsuperscript{26} See § 1414(d)(1)(B)(i) (requiring opportunity for parental participation in devising individualized education program).

\textsuperscript{27} § 1414(d)(1)(A).

\textsuperscript{28} § 1415(f)-(i). The child remains in the existing placement during the pendency of proceedings. § 1415(j). Attorneys’ fees are available to parents if they are successful. § 1415(i)(3)(B)-(F). The law also provides rights to challenge long-term suspensions, expulsions, or other removals from school imposed on children with disabilities. § 1415(k).


general education curriculum and achievement of learning standards based on that curriculum.\textsuperscript{31}

What does all this suggest for special education in a rebuilt New Orleans school system? Principally, that students with disabilities should not be an afterthought, but that planning for the education of students with disabilities has to be an integral part of the plan for the general educational enterprise, because education of children with disabilities is an integral part of the mission of general education. If the reform of the hour for general education is to be school choice, methods must be found to make that reform work for everyone. To exclude children with disabilities from the plan for institutional reform is as misguided as was the old practice of excluding them from public schooling altogether. It should be remembered that even the historical exclusion of children with disabilities from public school was not so much due to hostility towards them as it was due to the failure to consider them the responsibility of the school system and include them in the plan for providing public education.\textsuperscript{32} As the Supreme Court said in describing the origins of federal laws barring disability discrimination, “Discrimination against the handicapped was perceived by Congress to be most often the product, not of invidious animus, but rather of thoughtlessness and indifference—of benign neglect.”\textsuperscript{33} Children with disabilities must be involved in the school choice plan, and they must be thoughtfully involved.

\textsuperscript{31} See generally Weber, supra note __ [Reflections], at 19-21 (discussing amended IDEA’s relationship to assessment efforts under No Child Left Behind and administrative implementation of assessment requirements).

\textsuperscript{32} At the same time that some public school systems and various courts were keeping children with disabilities out of public schools, other systems were providing services to meet their needs, devoting substantial local resources to do so. See Mark C. Weber, The Transformation of the Education of the Handicapped Act: A Study in the Interpretation of Radical Statutes, 24 U.C. DAVIS L. REV. 349, 357-59 (1990) (citing examples).

What are the minimum requirements for planning for children with disabilities in a charter school-dependent system? Many ideas might be advanced, but here are a few: The system of application for charters should require a demonstration that the school operators can serve the full range of children with disabilities. Plans for selection and training charter school personnel should be made with special education evaluation and service needs in mind. The state must establish financial arrangements for special education services so that serving the full range of children with disabilities does not impose an undue hardship on any given school or set of schools. Above all, the system as a whole and each of its components must take ownership of education for children with disabilities.

II. ADEQUATELY SUPPORTING CHILDREN WITH DISABILITIES IN GENERAL EDUCATION

What is the optimal way to include children with disabilities in the reconstructed and reformed public school system? Under the No Child Left Behind law and IDEA, the very minimum is that all but the smallest number of children who have very severe cognitive impairments must be afforded the opportunity to master the general

34 See infra text accompanying notes ___ (detailing weaknesses of existing charter schools in providing services needed by some groups of students with disabilities).
35 See infra text accompanying notes ___ (detailing weaknesses of existing charter schools in providing personnel needed to serve some groups of students with disabilities).
36 See infra text accompanying notes ___ (describing financial considerations).
37 Under the No Child Left Behind regulations, only a small fraction of children may be counted towards the total of children meeting proficiency standards based on alternate or modified educational assessments. 34 C.F.R. § 200.13(c)(2) (2009) (permitting inclusion of proficient and advanced scores of students with cognitive disabilities based on alternate academic achievement standards, but not to exceed 1% of all students assessed in reading/language arts and mathematics; also permitting inclusion of proficient and advanced scores of other students with disabilities based on modified academic achievement standards, but not to exceed 2% of all students assessed in reading/language arts and mathematics). Even the alternate achievement standards must be aligned with the state’s academic content standards, promote access to the general curriculum, and reflect professional judgment of the highest achievement standards possible, § 200.1(e)(1), and the modified academic achievement standards must be aligned with the state’s academic content standards for child’s grade, be challenging for eligible students, and be developed through a documented and validated standards-setting process, § 200.1(e)(2).
curriculum and pass the same proficiency assessments that other children do.\textsuperscript{38} It is hard to imagine that children with disabilities could achieve success in the general curriculum if they are excluded from the ordinary classrooms where that curriculum is taught. But it is also difficult to imagine that children with conditions that have an adverse effect on learning and create a need for special education could succeed in that setting without supports and assistance.\textsuperscript{39} This understanding harmonizes with the IDEA requirement that children be educated with children who are not disabled “to the maximum extent appropriate,” and that “special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occur[] 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.”\textsuperscript{40} Thus the prerequisite to having any possibility of providing adequate education is that children with disabilities are to be educated in the same settings as children without disabilities.\textsuperscript{41}

\textsuperscript{38} Of course, they may need, and are entitled to receive, accommodations in the testing process so that the assessment actually measures their educational achievement. A child who cannot see should not be given a paper-and-pencil test, and a child with a condition such as dyslexia that substantially slows reading speed should not be given a timed test. Under current law, each child’s IEP must include a “statement of any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the child on State and districtwide assessments . . . .” 34 C.F.R. § 300.320(6)(i) (2009).

\textsuperscript{39} The essential conditions for eligibility for special education are the presence of one or more listed disabling conditions that adversely affect educational performance and cause the child to need special education. See 34 C.F.R. § 300.8 (2009) (defining “child with a disability”). The interpretation of the eligibility terms has caused significant controversy. See, e.g., Robert A. Garda, Jr., \textit{Who Is Eligible Under the Individuals with Disabilities Education Improvement Act?}, 35 J.L. & EDUC. 291 (2006) (suggesting narrow reading of certain eligibility provisions); Hensel, \textit{supra} note ___ (suggesting broader reading of eligibility provisions); Mark C. Weber, \textit{The IDEA Eligibility Mess}, 57 BUFF. L. REV. 83 (2009) (endorsing broader reading).

\textsuperscript{40} 20 U.S.C.A. § 1412(a)(5)(A) (West 2009).

\textsuperscript{41} Although doubts have occasionally surfaced about the desirability of inclusive education, see, e.g., Ruth Colker, \textit{The Disability Integration Presumption: Thirty Years Later}, 154 U. PA. L. REV. 789 (2006), the consensus of authorities is strongly in its favor, see, e.g., Jose Blackorby et al., \textit{Relationships Between the School Programs of Students with Disabilities and Their Longitudinal Outcomes}, in \textbf{WHAT MAKES A DIFFERENCE? INFLUENCES ON OUTCOMES FOR STUDENTS WITH DISABILITIES} 7-1, 7-7 (2007) (“Bivariate analyses show that, across measures, students with disabilities who took more academic classes in general education settings had greater academic success than peers who took fewer classes there.”); Rebecca A.
To make sure these children actually achieve success at grade level while in the mainstream, one needs to confront the next problem: What quality and quantity of aid and accommodation will the schools furnish students with disabilities who are learning alongside other students in general education classrooms? In several important cases from the 1990s to the present, courts rejected school district proposals to place children in non-mainstreamed settings. The courts in these cases reasoned that the school districts had offered insufficient support for the children in the regular classroom to permit that option to work. In Oberti v. Board of Education, the Third Circuit required a school district to place a child with Down Syndrome in a general education class with supporting services. The child had previously had difficulty in a regular classroom, but had not received supplemental aids or services, and evidence showed the child could succeed if provided such things as time with an itinerant special education instructor, special education training for the general education teacher, modifications to the curriculum, parallel instruction, and part-time resource room attention. The court said there was an “apparent tension” between the law’s “strong preference for mainstreaming” and its emphasis on meeting individual needs of the child, but said the way to resolve the tension


42 See OFFICE OF SPECIAL EDUC. PROGRAMS, U.S. DEP’T OF EDUC., GOING TO SCHOOL: INSTRUCTIONAL CONTEXTS, PROGRAMS, AND PARTICIPATION OF SECONDARY SCHOOL STUDENTS WITH DISABILITIES (2003), at 6-1 (“[T]he discussion surrounding the nature of the free appropriate public education assured students with disabilities has advanced beyond consideration of where students are educated to an emphasis on how they are educated.”).


44 995 F.2d 1204 (3d Cir. 1993).
“lie[s] in the school’s proper use of ‘supplementary aids and services.’” Even children who cannot be expected to perform on a par with nondisabled peers should still be given extra services and supports so to be included in the general education setting to the maximum degree possible, and supplemental services once again are the key to making that work.  

IDEA obliges charter schools to furnish the same supplemental services that all public schools must furnish in order to satisfy the requirement to educate children with disabilities in the same classes as children without disabilities to the maximum extent appropriate, and not to remove children with disabilities from the mainstream unless “education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.” Nevertheless, there is evidence that New Orleans charter schools are not living up to the responsibility to provide the supplementary aids and services: Children with behavior needs are not receiving behavior intervention plans and counseling services; children with mood and attention disorders are not receiving intervention to direct them back to the task of learning.  

Although the aggregate number

45 Id. at 1214 (quoting, in part, 20 U.S.C. § 1412(a)(5)(A)). The Ninth Circuit recently adopted the Oberti court’s approach to the least restrictive environment issue.  
46 See Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1047 (5th Cir. 1989) (“If the child’s individual needs make mainstreaming appropriate, we cannot deny the child access to regular education simply because his educational achievement lags behind that of his classmates.”); see also Roncker v. Walter, 700 F.2d 1058, 1063 (6th Cir. 1983) (“In a case where the segregated facility is considered superior, the court should determine whether the services which make that placement superior could be feasibly provided in a non-segregated setting. If they can, the placement in the segregated school would be inappropriate under the Act.”).  
48 See NEW SCHOOLS FOR NEW ORLEANS, supra note __, at 12-13 (listing accounts of individual children from random file reviews at twenty-three charter schools in New Orleans); id. at 27 (“The number of students receiving counseling services appears low especially in a city where children are recovering from a variety of traumatic events brought about or exacerbated by Hurricane Katrina.”); id. at 28 (“[O]nly 11 of the 27 students exhibiting behavior problems had Behavior Intervention Plans. Additionally, 11 of the 80 students whose files were reviewed were determined eligible for special education under the category of Emotionally Disturbed,” but only three of this group had Behavior Intervention Plans in place as mandated by both federal and state special education laws.”).
of special education teachers in charter schools may be adequate, among various schools there is a vast range of ratios of students with disabilities to special education teachers, suggesting severe deficiencies of personnel in some places. Of twenty-three New Orleans charter schools included in one study, fourteen had a student-to-special education teacher ratio of 10 to 1 or below, but four had a ratio of 21 to 1 or above and one school had a ratio of 32 to 1.49 One school in the study had not successfully obtained related service providers at all, and so students there were receiving no related services even though their IEPs required them.50 Students in charter schools that rely on related service providers furnished by the Recovery School District do not receive the support from those personnel that the students need to optimize their academic performance.51

The problems may in fact run deeper, for if children are not being properly evaluated and identified as needing specialized services, no one will know that their needs are unaddressed, and they will fall behind in their learning. In the study of charter schools, the staff in three of the nine that rely on the RSD for evaluating children reported grave dissatisfaction due to delays and failure to cooperate in scheduling and conducting the evaluations.52 Staff in schools that contract with outside providers reported higher levels of satisfaction with the evaluators, but in half the schools they complained that the

49 Id. at 23. The report also indicates difficulty in meeting the range and severity of needs of students in those schools that have established self-contained special education programs; it notes “a lack of resources and, in some instances, staff.” Id. at 25.
50 Id. at 26 (“One school was still attempting to engage related service providers but was unable to find clinicians willing to serve their students due to the very low number of students in need of therapy.”).
51 See id. at 26 (“[T]he six schools receiving services from the RSD reported infrequent SEC [Special Education Coordinator] collaboration with RSD clinicians, sporadic attendance at IEP meetings, and no communication with general education teachers to ensure that service delivery relates back to the classroom and learning. Four of the six schools reported a very high level of dissatisfaction with services from the RSD . . . .”).
52 NEW SCHOOLS FOR NEW ORLEANS, supra note __, at 29.
evaluators do not always attend IEP meetings. Overall, “[a] troubling number of special education files in many schools do not include current evaluations that support eligibility determinations.” Nine of twenty-three schools studied failed even to provide information about numbers of initial student referrals for special education evaluations. Schools appear to prefer to declare children eligible for services under section 504 of the Rehabilitation Act when many of the same children would be eligible under IDEA.

Including children with disabilities in general education classes conducted by charter schools offers the best chance to cause those children to achieve academically, but serious levels of support need to be present for the achievement actually to occur.

III. IMPROVING OUTCOMES

The goal of education for children with disabilities is education of children with disabilities. Yet nationally the educational outcomes for children with disabling conditions are poor, and not just for those children who have severe cognitive impairments that might be expected to place outside limits on their progress. Things are immensely better than they were before the 1975 Education for All Handicapped

53 Id.
54 Id. at 33. The study doubts whether students are being tested in all areas of suspected disabilities, id., one of the federal requirements, 20 U.S.C.A. § 1414(b)(3)(B) (West 2009).
55 NEW SCHOOLS FOR NEW ORLEANS, supra note __, at 32.
56 The report states that the twenty-three schools have “an astonishing number of 504 Plans in comparison to other urban jurisdictions,” but that evaluation and eligibility standards being used are obscure, and several school special education coordinators “estimated that at least 30% of students with 504 plans would qualify for special education eligibility.” Id. at 33. Failing to identify these children and find them eligible under IDEA would be a violation of 20 U.S.C.A. § 1412(a)(3)(A) (West 2009). Schools may be reluctant to find IDEA eligibility because of the clearer rights provided by that statute with regard to procedural matters and student discipline, see Weber, supra note __ [Eligibility Mess], at 154, although in fact caselaw and regulations provide significant protections for children covered by section 504, see S-1 v. Turlington, 635 F.2d 343, 348-50 (5th Cir. 1981) (imposing protections in disciplinary measures for students covered by section 504), abrogated in part not relevant, Honig v. Doe, 484 U.S. 305, 317 (1988); see also infra text accompanying notes ___ (describing procedural protections under section 504 regulations).
Children Act, when millions of children were out of school or in inadequate programs, but achievement still lags. Students with disabilities mainstreamed into general education have difficulty keeping up (even those whose sole impairments are in vision or hearing), and they are disproportionately subjected to corporal punishment. Many

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57 See supra note __ and accompanying text (noting 1.75 million children out of school and 2.5 million in inadequate programs). It was a spectacular achievement to establish programs for all the unerved and underserved children during the first few years of federally mandated special education services. Moreover, there have been major strides in more recent years, even though more remains to be done. See Office of Special Educ. Programs, U.S. Dep’t of Educ., Changes over Time in the Early Postschool Outcomes of Youth with Disabilities (2005), at ES-2 (“The school completion rate of youth with disabilities increased and the dropout rate decreased by 17 percentage points between 1987 and 2003. . . . The rate of postsecondary education participation by youth with disabilities more than doubled over time, increasing to 32% the share of . . . youth who had been out of high school up to 2 years and who had enrolled in a 2- or 4-year college or a postsecondary vocational, technical, or business school.”), ES-3 (“Over time, considerably more out-of-school youth with disabilities earned above the federal minimum wage. . . .”), 7-2 (“An increase in students with disabilities being at the appropriate grade level for their age and improvement in their grades may have contributed to the significant increase in the proportion of students with disabilities who completed high school . . . . This improvement in the school completion rate, accompanied by changes in the rigor and inclusiveness of students’ school programs, in parents’ expectations, and in parents’ own circumstances, may have worked alone or in combination to increase the odds of youth with disabilities pursuing postsecondary education.”), available at http://www.nlts2.org/reports/2005_06/nlts2_report_2005_06_complete.pdf; see also Students with Disabilities Making Great Strides, New Study Finds, at http://www.ed.gov/news/pressreleases/2005/07/07282005.html (visited Aug. 10, 2009).

58 See, e.g., Office of Special Educ. Programs, supra note __ [Changes over Time], at 4-2 (“Youth in the general population who had completed high school showed an approximate 5-percentage-point increase in college enrollment between 1987 and 2001. Despite a larger increase for youth with disabilities, the gap between the two groups continued. At the time of the 2003 survey, approximately one in five out-of-secondary-school youth with disabilities (19%) currently were attending postsecondary school, a rate that was less than half that of their peers in the general population (40%, p<.001).”) (footnote and citation omitted), 7-3 (“Still, fewer than one-third of . . . youth with disabilities had enrolled in any kind of postsecondary school since leaving high school, and only 10% had gone to a 4-year institution. These rates are fractions of the participation rates for youth in the general population. Further, most postsecondary school students in the general population went to 4-year colleges, whereas 2-year college enrollment was most common postsecondary participation among youth with disabilities.”).

59 Office of Special Educ. Programs, supra note __ [Going to School], at 6-31 (“Between 89% and 99% of students in all disability categories except mental retardation have teachers who expect them to keep up with others in their general education classes. Fewer actually do keep up; however, there is a wide range . . . . Gaps between the percentages of students who are expected to keep up and the percentages who actually do range from 9 percentage points for students with hearing impairments and 10 percentage points for students with visual impairments to 30 percentage points for students with mental retardation or other health impairments and 33% for students with emotional disturbances (p<.05”).

60 Human Rights Watch, Impairing Education: Corporal Punishment of Students with Disabilities in US Public Schools 2 (2009) (“Students with disabilities—who are entitled to appropriate, inclusive educational programs that give them the opportunity to thrive—are subjected to violent discipline at disproportionately high rates. Students with disabilities make up 19 percent of those who receive corporal punishment, yet just 14 percent of the nationwide student population.”); see id. at 3 (“Students with disabilities are routinely subjected to other forms of physical discipline in addition to paddling . . . . According to interviews conducted for this report, students with disabilities have been subjected to a wide
special education students sit in classes that are pitched below what is appropriate for
their age.\textsuperscript{61} By high school, seven out of eight students with disabilities are performing
more than a year behind grade level.\textsuperscript{62} Children with disabilities in charter schools in
New Orleans appear to be doing even worse than students with disabilities nationally, and
are reportedly reading two to three grade levels below basic performance.\textsuperscript{63}

Educational research has found ways of instruction that can remedy this situation
if the methods are applied carefully enough and with sufficient intensity. Congress
required the use of these techniques when it revised IDEA in 2004 to mandate that each
child’s IEP include a “statement of the special education and related services and
supplementary aids and services, based on peer-reviewed research to the extent
practicable.”\textsuperscript{64} There has been some delay in coming to grips with this provision, but
perhaps courts are making a start. In \textit{Waukee Community School District v. Douglas L.},
the court, without directly relying on the language of the regulation, found that the

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\textsuperscript{61} \textit{Id.} at 5-6 (“The percentage of students with disabilities who are in general education academic classes
that are performing at grade level ranges from 70% of students with visual impairments to 83% of students
with learning disabilities or hearing impairments (p<.05). Youth with hearing impairments are the least
likely to be in classes that are functioning below grade level (10%); students with mental retardation,
traumatic brain injuries, or multiple disabilities are more than twice as likely to be in such classes (20% to
27%, p<.05). Very small percentages of students in most categories are in advanced placement or honors
classes . . . .”).

\textsuperscript{62} \textit{OFFICE OF SPECIAL EDUC. PROGRAMS, U.S. DEP’T OF EDUC., THE ACHIEVEMENTS OF YOUTH WITH
DISABILITIES DURING SECONDARY SCHOOL} (2003), at 4-3 to 4-4 (“[C]omparison of teacher-reported
standardized test performance with students’ actual grade level reveals that students with disabilities are an
average of 3.6 years behind expected performance for their grade level in both reading and mathematics. In
both subjects, only about one in eight students with disabilities are at grade level, above grade level, or less
than one grade level behind. Another fifth are 1 to 2.9 grade levels behind, two-fifths are 3 to 4.9 grade
levels behind, and one-fourth are five or more grade levels behind.”). These figures have not changed since
the late 1980s. \textit{See id.} at 4-4. Twice as many students with disabilities repeat one or more grades as do
youth in the general school-age population. \textit{Id.} at 2-4 (“It is much more common that youth with
disabilities repeat at least one grade level; more than one-third (36%) do so. This is a much higher rate of
grade retention than for same-age youth in the general population (18%, p<.001).”).

\textsuperscript{63} \textit{NEW SCHOOLS FOR NEW ORLEANS, supra} note __, at 18-19. As the report notes, factors other than the
education provided by the charter schools contribute to the weakness of the students’ performance,
including gaps in school attendance before and after the Katrina and poor home resources. \textit{Id.} at 18.

education provided a child with pervasive developmental disorder failed to meet the IDEA standard for appropriate education when the methods used to control the student’s behavior—primarily restraint-type interventions to induce compliance and lengthy time-outs—reinforced the problem behavior and were contraindicated by professional research. 65 These behavior interventions were not reasonably calculated to address the child’s behavioral problems in an adequate manner, and thus the district violated the appropriate education requirement. 66

Other courts have required provision of intense, high-quality, research-supported interventions by relying on the least restrictive environment duty imposed by IDEA. Although the Supreme Court has read the IDEA standard for appropriate education as mandating merely an educational benefit for a child with a disability, 67 the duty to provide aids and supplemental services to permit education to the maximum extent with children without disabilities is not bound by that limit. 68 In L.B. v. Nebo School District, one particularly significant case that is the logical sequel to the least restrictive environment cases discussed in the previous section of this paper, a school district offered a child with autism a non-mainstreamed preschool placement in which a limited number

65 51 IDELR 15 (S.D. Iowa 2008).
66 Id. at p. 88.
67 Bd. of Educ. v. Rowley, 458 U.S. 176, 200 (1982). The obligation to provide appropriate education is thus more a duty to “open the door of public education to [children with disabilities] on appropriate terms than to guarantee any particular level of education once inside.” Id. at 192.
68 See Roncker v. Walter, 700 F.2d 1058, 1060 (6th Cir. 1983) (distinguishing case concerning least restrictive environment from dispute over appropriate educational methodology, such as Rowley); Mark C. Weber, The Least Restrictive Environment Obligation as an Entitlement to Educational Services: A Commentary, 5 U.C. DAVIS J. JUV. L. & POL’y 147, 149 (2001) (“[T]he positive command in the statute provides a basis for services that are at a higher level than the standard of meaningful access to education, which Board of Education v. Rowley found to be the basic entitlement to appropriate education conferred by the statute that is now IDEA.”); see also Cedar Rapids Cmty. Sch. Dist. v. Garret F., 526 U.S. 66 (1999) (upholding order requiring provision of extensive and costly health-related services to keep ventilator-dependent child in school).
of nondisabled children participated. The program offered services such as speech therapy, occupational therapy, and eight to fifteen hours a week of applied behavioral analysis therapy to correct autistic behaviors. The Tenth Circuit ruled against the district and instead sided with the parents, who proposed that the child continue in a private, mainstreamed preschool class with the assistance of an aide and with thirty-five to forty hours of applied behavioral analysis services delivered mostly at home. The court did not ask what level of services was needed to permit the child to make some educational progress, but rather what level of services would enable the child to succeed in a mainstream class. The extra services needed would be delivered outside the regular school day, so that the child could spend the ordinary day with her nondisabled peers in a general education classroom. The emphasis on least restrictive setting thus reinforces the emphasis on improving outcomes by providing high levels of assistance to children with disabilities in mainstreamed settings.

For public school systems dependent on charter schools, the lesson is that high-quality supplemental services need to be delivered to keep the child in the charter school, if needs be by providing them at home, as part of general education classes, or in parts of the school day when they will not interfere with mainstream instruction. Unfortunately, existing information indicates that IEPs, the programs for delivery of the services that children with disabilities need, are deficient in many New Orleans charter schools, and do

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69 379 F.3d 966, 968 (10th Cir. 2004).
70 Id. at 977-79.
71 See id. at 976-77.
not provide for instruction keyed to children’s needs.\textsuperscript{72} This situation needs to be corrected.

IV. PROVIDING EQUAL OPPORTUNITY FOR CHOICE

Avoiding disability discrimination means affording parents of children with disabilities the same choices of charter or non-charter schooling that parents of other children enjoy. IDEA severely restricts what charter schools can do to limit parents’ choices, and title II of the Americans with Disabilities Act\textsuperscript{73} (ADA) and section 504 of the Rehabilitation Act\textsuperscript{74} impose duties to serve all that exceed even those created by IDEA. Therefore, when charter schools provide inadequate services to children with disabilities or when they direct children with disabilities who are difficult or costly to serve away from themselves and toward the traditional schools or a limited range of charters, it is not just irresponsible from a systems point of view (as noted in section I) or undesirable from an education point of view (as noted in section II and III), but illegal.

The points that need development here include the importance of school choice for parents of children with disabilities, the nature of the duties imposed on charter schools by IDEA and its regulations to serve all students with disabilities who wish to attend, and the scope of the duties imposed by the ADA and section 504 to serve all students with disabilities who wish to attend.

The importance of choice. It is not altogether clear that charter schools and public school systems’ reliance on charters necessarily represent progress. Charter schools are

\textsuperscript{72} NEW SCHOOLS FOR NEW ORLEANS, \textit{supra} note \textsuperscript{__}, at 35 (“Although special educators in several schools are developing well written, data-driven IEPs, special educators in other schools, unfortunately, are creating IEPs that lack substance and clarity and do not serve as meaningful blueprints for individualized programming.”). The New Schools study says that IEPs in charter schools rarely use curriculum-based assessment, and the goals in many IEPs are too general and not measurable. \textit{Id.} at 36.

\textsuperscript{73} 42 U.S.C.A. §§ 12131-12150 (West 2009).

\textsuperscript{74} 29 U.S.C.A. § 794 (West 2009).
accused of being a giveaway to the private sector, a means to exacerbate educational inequality, part of a plot to undermine teacher unions, and a bridge to disestablishment of public schools altogether.\textsuperscript{75} They are not necessarily educationally effective: One nationwide study revealed that fourth graders in charter schools were doing significantly worse in reading and math than similar children attending traditional public schools,\textsuperscript{76} and a comprehensive review of nineteen studies of effectiveness of charter schools relative to public schools found no evidence that charter schools outperform other public schools.\textsuperscript{77}

Even so, the one indisputable quality of a charter school-dominated system is choice. Parents can vote with their enrollment forms for particular schools that they believe will best serve their children. This choice may be valued highly by some families, and it may promote competition among schools to serve students better.\textsuperscript{78}


\textsuperscript{76} See Diana Jean Schemo, Study of Test Scores Finds Charter Schools Lagging, N.Y. TIMES, Aug. 23, 2006, \textit{available at} http://www.nytimes.com/2006/08/23/education/23charter.html?_r=1&fta=y (“Fourth graders in traditional public schools did significantly better in reading and math than comparable children attending charter schools, according to a report released on Tuesday by the Federal Education Department. . . . The study found that in 2003, fourth graders in traditional public schools scored an average of 4.2 points better in reading than comparable students in charter schools on the National Assessment of Educational Progress test, often called the nation’s report card.”).

\textsuperscript{77} See Martin Carnoy et al., CHARTER SCHOOL DUSTUP: EXAMINING THE EVIDENCE ON ENROLLMENT AND ACHIEVEMENT (2006).

\textsuperscript{78} The operative word remains “may.” See Kent Fisher, Competition Isn’t Driving Out Lousy Charter Schools, DALLAS MORNING NEWS, Apr. 17, 2005, \textit{available at} http://texasedequity.blogspot.com/2005/04/competition-isnt-driving-out-lousy.html (“Nine years after the
Parents of children with disabilities ought to be afforded the same degree of choice as parents of other children.

*Duties to serve imposed by IDEA and its regulations.* It is true that courts deciding IDEA cases have frequently rejected claims of parents in traditional public school systems to placement of their children with disabilities in the neighborhood school or other school the parent prefers.\(^79\) This situation exists despite a regulation requiring that the child be placed as close as possible to the child’s home and that, “unless the IEP of the child with a disability requires some other arrangement,” the school the child attends is the school the child would attend if not disabled.\(^80\)

Nevertheless, the IDEA regulations applicable to a choice system are not the same as those that apply to a unitary system where the administration reserves the right to assign students at will. Specifically, a federal regulation enforcing IDEA provides that if a child with a disability has an existing individualized education program (IEP) and the child transfers to a new public agency in the same state and enrolls in a new school in the same school year, the new public agency must provide appropriate education to the child,

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\(^{80}\) 34 C.F.R. § 300.116(b)(3), (c) (2009). For example, in *White v. Ascension Parish School Board*, 343 F.3d 373 (5th Cir. 2003), the court ruled that a hearing impaired student who needed a cued speech transliterator could not demand to be served in a neighborhood school when the school district made the services available in a school that centralized the service personnel. The court upheld the district’s decision even though the particular person providing the service worked only with the plaintiff child and so could have been moved to his neighborhood school. The court said that administrative convenience supported the centralized assignment, and that another child might possibly share the transliterator in the future. *Id.* at 382. The court agreed with the parents that the child’s placement in the neighborhood school was not possible only because the school district chose not to provide the services there, and that the IEP required the centralized arrangement only because the district wrote it that way. But the court interpreted the regulations’ language so as not to impose a mandate that would stand in the face of a “permissible policy choice” on the part of the district. *Id.* at 380-81.
including services comparable to those described in the child’s IEP from the previous public agency.\textsuperscript{81} This obligation applies until the new public agency either adopts the child’s existing IEP as its own or develops, adopts, and implements a new IEP in cooperation with the parents.\textsuperscript{82} Under federal law, “public agency” includes local educational agencies (LEAs) as well as nonprofit public charter schools that are not otherwise included as LEAs and are not a school of an LEA.\textsuperscript{83}

Therefore, all public charter schools that are their own LEAs, that is, all those that are not sub-units of some entity such as a school district that is an LEA, must accept children who transfer in with an existing IEP and must provide all the services called for under the IEP. Moreover, if the child is identified as being a child with a disability while enrolled in a charter school that is its own LEA, the charter school must serve the child, just as every LEA that enrolls a child with a disability must do.\textsuperscript{84} The special education cases concerning assignment within a unitary public school district are not applicable because there are no other schools in the LEA (that is, the charter school itself) to which to reassign the child. So the charter school that is an LEA must serve the child.\textsuperscript{85}

Even if the charter school is one of several schools administered by a school district or other LEA, the LEA has to serve “children with disabilities attending those charter schools in the same manner as” the LEA “serves children with disabilities in its other schools, including providing supplementary and related services on site at the

\textsuperscript{81} 34 C.F.R. § 300.323(e) (2009).
\textsuperscript{82} Id.
\textsuperscript{83} 34 C.F.R. § 300.33 (2009).
\textsuperscript{85} Louisiana state law also imposes on obligation not to exclude prospective pupils based on exceptionality as defined in the special education law, although the state law does permit “specific requirements related to a school’s mission such as . . . achievement of a certain academic record for schools with a college preparatory mission.” LA. REV. STAT. ANN. § 17:3991(B)(1)(d)(3) (West 2009), amended, 2009 La. Sess. Law Serv. Act 123 (S.B. 146) (West).
charter school to the same extent to which” the LEA “has a policy or practice of providing such services on the site” of “its other public schools.”

Thus IDEA demands that unless a traditional public school of the LEA could opt not to provide services to the child but instead could have the district assign the child elsewhere, a charter school of the LEA cannot refuse to accept the child.

*Duties to serve imposed by the ADA and section 504.* The obligations described above are all requirements imposed by IDEA and its regulations. Yet another body of law requires charter schools to serve all children with disabilities who choose to enroll, and further restricts the ability of even those charter schools that are part of a school district or other LEA to refuse to serve a child with a disability. Under title II of the ADA and section 504 of the Rehabilitation Act, any state or local government entity, as well as any recipient of federal funding, is bound to not discriminate against individuals with disabilities in its program and operations. Charter schools are both units of state or local government and recipients of federal funding, so they must obey both statutes.

The duty of a governmental entity under the ADA includes the obligation to not deny a qualified person with a disability the opportunity to participate in or benefit from services, programs, or activities offered, and to affirmatively provide reasonable

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87 Louisiana law provides that for RSD schools, all students who would have been eligible to enroll in or attend the pre-existing school before its transfer to the RSD are eligible to attend, notwithstanding any other provision. LA. REV. STAT. ANN. § 17:1990(F)(1) (West 2009).
88 42 U.S.C.A. § 12132 (West 2009) (Americans with Disabilities Act title II). This includes a charter school, which is an “instrumentality of a State or States or local government.” See 28 C.F.R. § 35.104 (2009).
90 The definition of child with a disability in IDEA is not the same as that of individual with a disability in section 504 and the ADA, compare 20 U.S.C.A. § 1401(3) (West 2009) (IDEA) with 42 U.S.C.A. § 12102 (West 2009) (ADA) and is usually thought to be somewhat narrower, see MARK C. WEBER, SPECIAL EDUCATION LAW AND LITIGATION TREATISE § 2.3, at 2:9-2:10 (3d ed. 2008), but the distinctions are not critical to the discussion here.
modifications in policies, practices, or procedures when necessary, unless the entity
demonstrates that the modification would fundamentally alter the nature of the service,
program, or activity it provides. The duty also includes the obligation not to impose or
apply eligibility criteria that screen out or tend to screen out individuals with disabilities
or any class of individuals with disabilities unless the entity shows that the criteria are
necessary for the provision of the service, program, or activity being offered.
Moreover, the statutory duty includes the obligation to avoid selection of a site or facility
that has the effect of excluding individuals from the benefits of the service, program, or
activity, or impairing the accomplishment of its objectives for individuals with
disabilities. Recipients of federal money from the United States Department of
Education are required under section 504 to observe the same requirements regarding
denial of services, use of criteria with discriminatory effects, and siting of facilities,
and this is consistent with the directive of Congress that the regulations enforcing title II
of the ADA be consistent with the regulations originally promulgated by the Department
of Health, Education, and Welfare, to enforce section 504.

One area where the Department of Education regulations for section 504 are more
detailed than the general reasonable-modification-up-to-fundamental-alteration duty
under the ADA is preschool, elementary, and secondary education, the area that charter
schools’ operations occupy. The section 504 regulations mandate that an entity that has

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92 § 35.130(b)(7).
94 § 35.130(b)(4).
96 §104.4(b)(4).
97 §104.4(b)(5).
98 The supplanting of this general obligation by the specifics of the obligation to provide free, appropriate
public education means that the limit of fundamental alteration does not apply to the section 504 duty. See
Heubert, supra note 329-30 (citing U.S. Department of Education interpretation).
a preschool, elementary, secondary, or adult education program receiving federal education money must provide a free, appropriate public education to each age-eligible person with a disability \(^99\) in the entity’s jurisdiction. \(^100\) Implementation of an IEP developed in accordance with IDEA is one means of meeting the section 504 standard. \(^101\) Although a public educational entity subject to section 504 may refer a person for services other than those it operates or provides itself, the entity must continue to make sure the free, appropriate public education duty and other requirements of the law are met with regard to that person. \(^102\) Other obligations similar to those found in IDEA also apply, such as the requirement to place children with disabilities with children without disabilities to the maximum extent appropriate, with supplemental aids and services to prevent the need for removal; \(^103\) the duty to obey identification, evaluation, and placement standards; \(^104\) and the obligation to provide parents with procedural safeguards including an opportunity for an impartial hearing in the case of a dispute. \(^105\)

In summary, under section 504, the whole range of IDEA-like requirements applies to charter schools, and under the ADA, so do additional and more general duties to provide reasonable modification of programs, services, and activities for students with

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99 See §104.3(l)(2). See infra note ___ and accompanying text [note re parallel title vi language].
100 §104.33(a). This duty applies to “preschool, elementary, secondary, and adult education programs or activities that receive Federal financial assistance and to recipients that operate, or that receive Federal financial assistance for the operation of, such programs or activities.” §104.31. The definition of appropriate education is arguably elevated above that required by IDEA, for it calls for “the provision of regular or special education and related aids and services that . . . are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met . . .,” the standard adopted by the lower courts in interpreting IDEA’s predecessor in Board of Education v. Rowley, 458 U.S. 176 (1982), and rejected by the Supreme Court in favor of a “basic floor of opportunity” or “some educational benefit” standard. See id. at 200. See generally supra text accompanying notes ___ (discussing Rowley standard).
101 34 C.F.R. §104.33(b)(2) (2009). Transportation must be provided if the person is placed or referred elsewhere, and it must not cost more than if the entity provided the services. §104.33(b)(c)(2).
102 § 104.33(b)(3).
103 § 104.34(a).
104 §104.32.
105 §104.36.
disabilities up to the point where the modification becomes a fundamental alteration. This ADA-section 504 regime closes even further whatever door IDEA might leave ajar for charter schools that are not LEAs themselves but instead part of an LEA to direct children to other schools. Unless the charter school can somehow claim that the child demanding service is not in its jurisdiction, it remains responsible for guaranteeing that the child is provided free, appropriate public education even if it refers the child elsewhere. Moreover, even in situations where it might be permissible under section 504 to refer the child elsewhere, the charter school would nevertheless violate the ADA if it failed to make reasonable modifications in its policies, practices, or procedures in order to include the child in its program, unless doing so would amount to a fundamental alteration of the program.\(^{106}\) This set of duties reinforces the conclusion that it violates basic equality principles embodied in the disability civil rights laws to fail to provide children with disabilities the full range of school choice options comparable to the range offered students without disabilities.\(^{107}\)

There is still another theory under which even the directing of children with disabilities away from particular charter schools—let alone the formal exclusion of the children from particular charter schools—violates section 504 and its ADA correlate. In New Orleans, charter school personnel are alleged to have steered families whose children have disabilities away from the charter school and toward other schools on

\(^{106}\) The range of situations in which a school could claim a fundamental alteration is tightly limited. See Heubert, supra note 336-38. On a related note, see Heubert, supra note __, at 325-26 for a discussion of how the anti-retaliation provisions of section 504 and the ADA constrain charter schools from conditioning a child’s admission to the school on the parents’ surrender of IDEA rights.

\(^{107}\) See O’Neill et al., supra note __, at 2 (“Except in the most extreme circumstances, charter schools are not allowed to restrict the admission of students with disabilities.”), 12 (“Although the ‘undue burden’ threshold is high, a court assessing any particular placement or accommodation could deem it overly burdensome and disallow it . . . . But Section 504 and ADA are anti-discrimination statutes, which seek to assure a level playing field, and there is reason to believe that the very uniqueness of many charter school programs may serve to raise the bar even higher.”).
account of the children’s disabling conditions. This conduct bears a direct analogy to employees of municipalities or other covered entities steering racial minorities seeking housing away from their own areas and toward minority areas on account of their race. Racial steering in housing violates the Fair Housing Act and title VI of the Civil Rights Act. Title VI is parallel in its structure and language to section 504 and title II of the ADA, and the statutes are construed similarly with respect to intentional discrimination, which is what steering is. Hence, disability steering of the type alleged may be challenged as a violation of section 504 and the ADA, just as racial steering may be challenged under title VI of the Civil Rights Act.

V. ASSIGNING COSTS FAIRLY

Often, though not always, students with disabilities are more costly to educate than are students who do not have special needs. This appears to be a reason that

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108 See supra notes __ and accompanying text.
111 Compare 42 U.S.C.A. § 2000d (West 2009) (title VI) (“No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”) with 29 U.S.C.A. § 794a (West 2009) (section 504) (“No otherwise qualified person with a disability in the United States . . . shall, solely by reason of his or her 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 . . . .”). A qualified person with a disability is, for purposes of elementary and secondary education, someone with a disability who simply meets age standards for public education or whom a state must serve under IDEA. 34 C.F.R. § 104.3(l)(2) (2009) (defining “qualified handicapped person”).
112 See Barnes v. Gorman, 536 U.S. 181, 185 (2002) (construing statutes similarly). Disparate impact discrimination may be treated differently with regard to disability discrimination statutes and the others.
114 Sometimes the costs of educating students without disabilities are understated, because individual costly-to-educate students are merged into the average. The general education student who receives tutoring under No Child Left Behind, remedial instruction under title I, and extra time from the classroom teacher because of needs that have never been identified as arising from disabilities absorbs more resources than a typical general education student or many special education students, who might receive only limited
charter schools sometimes shun students with disabilities. It is also the reason for federal funding support for special education, though the federal dollars have never covered all the extra costs of providing an appropriate education to children who need special education, and there is little reason to expect that they should, given the underlying responsibility of states and localities to educate all children.\footnote{115}{Federal law controls how state educational authorities may and, in some instances, must allocate federal special dollars to local school districts and the schools that directly serve children with disabilities. The original Education of All Handicapped Children Act of 1975 allocated federal special education money based on the count of children with disabilities being provided special education and related services in each state.\footnote{116}{The 1997 IDEA Amendments changed that formula. The law now uses the pre-1997 Act count for the state’s baseline, but distributes increases in funding since 1999 using a formula that relies on the state’s number of school-aged children, \textit{i.e.}, not the number of children with disabilities alone, but all children, with a boost for the state’s resource room time or a specific form of therapy. \textit{See supra} note \_\_\_ and accompanying text (describing similarity of special education and other supplemental services). Moreover, a student in the honors track at a school in a wealthy district who takes four Advanced Placement courses, competes in interscholastic sports, writes for the literary journal, plays in the orchestra, and spends her spare time directing her own productions in the school’s video workshop absorbs far more resources than a typical special education student receiving resource room help or other lower-cost services, vastly more than such a student in a poor district. \textit{See generally} Laurie Reynolds, \textit{Skybox Schools: Public Education as Private Luxury}, 82 WASH. U. L.Q. 755, 757 (2004) (“In terms of dollars spent per pupil, wealthy districts may outspend poor districts by a factor of two or three.”).}

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\footnote{115}{Error! Main Document Only.}{The maximum federal funding that permitted under IDEA is 40\% of the average cost of educating a child without disabilities for each child receiving special education. 20 U.S.C.A. § 1411(a)(2) (West 2009). Congress has never appropriated enough money to provide support at that level. Instead, amounts are ratably reduced to meet appropriations. § 1411(d)(2)-(3). The support varies from year to year, but the usual figure is slightly above 10\%. \textit{See The IDEA Improvement Act of 1997: Hearing on H.R. 5 Before the Subcomm. on Early Childhood, Youth and Families of the H. Comm. on Education and the Workforce}, 105th Cong. 103 (1997) (statement of George W. Severns, Ph.D.). Bills have periodically been introduced to guarantee funding up to the 40\% maximum. \textit{See, e.g.}, S. 2185, 109th Cong. (2006) (IDEA Full Funding Act); H.R. 1107 (2005) (Full Funding for IDEA Now Act).}

\footnote{116}{Pub. L. No. 94-142 § 5(a), 89 Stat. 776 (1975) (repealed 2004).}
relative population of children in poverty. \(^{117}\) All the money but a percentage for state administrative costs is to be passed through to local school districts, allocated on the basis of the pre-1997 Act children-with-disabilities-count baseline, with increases since 1999 allocated on the school-aged population of the district, again with a supplement for relative population of children in poverty. \(^{118}\) Many states continue to use the district’s count of children with disabilities in distributing exclusively state special education funding. \(^{119}\)

Under the regulations interpreting the current version of IDEA, an LEA that contains charter schools must provide the charter schools federal special education funds on the same basis that the district provides federal special education money to the district’s other public schools, including proportional distribution based on the comparative enrollment of children with disabilities. \(^{120}\) If the charter school is its own LEA, the state is to allocate federal special education money to it on a formula looking to

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\(^{117}\) 20 U.S.C.A. § 1411(d)(2)-(3) (West 2009). This description is slightly oversimplified, for there are maximum and minimum grants and protection against grant decreases. § 1411(d)(3)(B). When Congress changed the funding formula, it repealed a provision that limited the count of children used for state special education funding allocations to no more than 12% of the school-aged population in the state. 20 U.S.C.A. § 1411(a)(5) (West 1996) (repealed 1997).

\(^{118}\) 20 U.S.C.A. § 1411(f)(2) (West 2009). The Department of Education pressed for this change, citing evidence that child disability category counts were inconsistent among the states. See The IDEA Improvement Act of 1997, supra note __, at 103 (statement of Thomas R. Bloom, Inspector General, U.S. Dep’t of Educ.) (“Representatives from all ten of the independent organizations with whom we spoke corroborated our conclusion that the states differed significantly in the proportion of children they counted in the various disability categories.”). The sponsors of the 1997 legislation also wanted to eliminate incentives for identifying children with disabilities without sufficient justification. H. REP. NO. 105-95, at 88 (1997) (“The Committee developed the change in [funding] formula to address the problem of over-identification of children with disabilities.”).

\(^{119}\) See Thomas Parrish, Disparities in the Identification, Funding, and Provision of Special Education, in RACIAL INEQUITY IN SPECIAL EDUCATION 15, 18 (Daniel J. Losen & Gary Orfield, eds. 2002) (“[M]ost . . . states have more generic systems providing funding based on the number of students receiving special education services or on general enrollment.”); id at 29 (identifying 24 of 28 surveyed states as linking funding for local school districts to counts of children with disabilities being served by district). Some states use proxies for the count of identified children, such as (1) weighting formulas that allocate set amounts for the assumed extra cost of educating each child in a given disability category, or (2) resource-based models, which allocate funding based on teacher and related service personnel count. See generally THOMAS PARRISH ET AL., 1 STATE SPECIAL EDUCATION FINANCE SYSTEMS, 1999-2000, at 3-11 (2003) (describing state financing systems and collecting and analyzing survey data on prevalence).

\(^{120}\) 34 C.F.R. § 300.209(b)(ii)(A) (2009).
(1) the base amount—the amount the LEA would have received in fiscal year 1999 on the basis of the count of children with disabilities in that year—and (2) the remaining funds—essentially, the increases since 1999—allocated by numbers of children enrolled in “public and private elementary schools and secondary schools within the LEA’s jurisdiction” adjusted slightly for relative numbers of children living in poverty in the jurisdiction.\(^{121}\) Since the charter school that is its own LEA has no jurisdiction other than the children enrolled in it, the relevant number for the post-1999 increases would appear to be the number of children, with and without disabilities, enrolled in the charter school.\(^{122}\) Irrespective of anything the state does concerning allocation of federal special education money to local school districts or charter-school LEAs, states may take 10% of the federal funding that they retain for state administrative purposes and use it to establish a local education agency high-cost fund to assist local school districts and other LEAs (including charter school that are their own LEAs) to serve high-need children with disabilities, such as those who require highly specialized placements or other expensive services.\(^{123}\)

Two problems may arise for charter schools that are their own LEAs in funding services for children with disabilities. First, a child whose needs are very expensive, may enroll and serving the child may absorb a disproportionate share of the federal special education funds, money which would have been allocated to the school based on the abstract count of children with disabilities (for pre-1999 amounts) and children in general

\(^{121}\) § 300.705(a)-(b). The quotation in the text is from § 300.705(b)(3)(i).
\(^{122}\) Under principles applicable to LEAs in general, charter schools that are their own LEAs that were created after 1999, which would be the bulk of own-LEA charter schools, take a share of the base amount for the LEA that would have been responsible for serving children with disabilities now served by the newly created charter school LEA, based on the relative numbers of children with disabilities. See § 300.705(b)(2)(i).
\(^{123}\) § 300.704(c).
(for post-1999 increases). Second, even if the child is not particularly expensive to serve, the charter school might enroll so few children with disabilities with similar instructional or services needs that it cannot capture any economies of scale, for example, by sharing the time of a special education teacher or therapist among several children.

If the first problem arises, the solution lies with the state. Either it should provide extra federal special education money from its high-needs fund, or it should allocate state special education money under a formula that gives special assistance to LEAs, whether charter schools or conventional school districts, that serve children whose services are especially costly. The solution to the second problem also lies with the state. If the state commits itself to a system entailing choice among many small schools, again whether charter or not, it prevents those schools from capturing economies of scale and needs to allocate state funding in a way that supports its decision. Although charter schools might try to band together to share personnel, that solution is more likely to work with conducting evaluations and providing occasional therapies, activities that can be done by someone who moves from school to school. It is much harder for schools to share a teacher or classroom aide or sign-language interpreter. The state is going to have to allocate costs to permit individual schools to have these personnel when they are needed to serve children with more serious needs. There is no fair or legally permissible way of doing choice on the cheap.

What if a state refuses to adopt a funding formula that treats charters fairly when the charter must educate children whose needs are particularly costly to meet? Cases successfully challenging state funding arrangements are difficult to find, but they do exist. One court has upheld a claim that the Pennsylvania funding formula, which
requires the state to allocate special education funds based on a school district’s overall average daily membership, rather than on the district’s special education needs or ability to provide appropriate education (combined with the guarantee that the district not receive less special education money than in year before and a mechanism for funding tuition for approved private schools separately) violated due process rights, section 504, and the Equal Educational Opportunity Act and caused the plaintiffs, who were parents of special education students in the district, injury in fact.124 Similar claims might be advanced by parents of children in a charter school if the state allocation of funding treats charter school students so unfairly that services suffer and appropriate education is not being provided.125

VI. PROTECTING PARENTS’ AND CHILDREN’S RIGHTS

IDEA affords considerable substantive and procedural protections for children’s educational rights. The substantive rights include free, appropriate public education and placement in the least restrictive environment with support services to enable the child to succeed there, both of which rights were discussed above. IDEA also confers procedural rights: Parents of children with disabilities must be allowed to participate in the creation of the written program that sets out the services to be delivered to their child;126 they may challenge the services or placement the school offers, as well as other aspects of the

125 State law claims may or may not be more likely to succeed than federal law claims. An effort by a charter school to obtain funding from a school district for the extra expense of providing at-home instruction for a child who needed it failed because the court interpreted a state law provision shifting the cost of private day or residential school placement from a charter school to the local public school district did not encompass at-home instruction, but only more traditional private day or residential schooling. Golden Door Charter Sch. v. State-Operated Sch. Dist., 948 A.2d 716 (N.J. Super. Ct. 2008).
provision or denial of education to the child, by demanding an adversarial “due process” hearing, and both the parents and the school district may appeal the result of the hearing to court;\(^{127}\) children with disabilities cannot be removed from their existing placements for disciplinary reasons except for specified causes and for limited periods of time, and disciplinary determinations are subject to hearing rights;\(^{128}\) complete cessation of services on disciplinary grounds is never permitted.\(^{129}\) The procedural protections manifest a “congressional emphasis” on parental participation and transparency of public school decision making.\(^{130}\)

Children with disabilities receiving their education in charter schools are entitled to the same substantive and procedural protections as their counterparts in other public schools.\(^{131}\) The school district is the guarantor of rights for children in charter schools that are public schools of the school district,\(^{132}\) the charter school is the guarantor of rights for children in charter schools that are their own LEAs,\(^{133}\) and the state educational agency is the guarantor of rights for children in charter schools that are neither.\(^{134}\) A

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\(^{127}\) § 1415(f)-(i) (West 2009). The child remains in the existing placement during the pendency of proceedings. § 1415(j). Attorneys’ fees are available to parents if they are successful. § 1415(i)(3)(B)-(F).  
\(^{128}\) § 1415(k).  
\(^{129}\) §§ 1412(a)(1)(A); 1415(k)(1)(D)(i).  
\(^{130}\) See Bd. of Educ. v. Rowley, 458 U.S. 176, 206 (1982) (“We think that the congressional emphasis upon full participation of concerned parties throughout the development of the IEP, as well as the requirements that state and local plans be submitted to the Secretary for approval, demonstrates the legislative conviction that adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP.”); see also id. at 205 (“Congress placed . . . emphasis on compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process . . .”). A public school’s failure to provide notice and hearing rights on excluding a child with disabilities from school is a violation of both the federal special education law and the Constitution. Jackson v. Franklin County Sch. Bd., 806 F.2d 623, 631 (5th Cir. 1986).  
\(^{131}\) 34 C.F.R. § 300.209(a) (2009) (“Children with disabilities who attend public charter schools and their parents retain all rights under [IDEA].”).  
\(^{132}\) § 300.209(b).  
\(^{133}\) § 300.209(c). This subsection and the previous one include a proviso “unless state law assigns that responsibility to some other entity.”  
\(^{134}\) § 300.209(d).
charter school may face liability under IDEA if it fails to provide adequate educational services to a child with disabilities.\textsuperscript{135}

Just as the ADA and section 504 supplement the obligations of charter schools to serve children with disabilities rather than turn them away, they also confer additional, to some degree overlapping, substantive and procedural rights on children with disabilities in charter schools. These include the rights to appropriate education in the least restrictive environment, to reasonable modification of policies, practices, or procedures, and to due process protections.\textsuperscript{136} Claims for injunctive relief and damages may be brought under the ADA and section 504 if the charter school does not comply with its obligations under these statutes.\textsuperscript{137} In \textit{Scaggs v. New York Department of Education}, the plaintiffs alleged that a charter school owned and operated by a private management company failed to identify students with special education needs, failed to give the students educational programs to address their needs, and failed to monitor their performance.\textsuperscript{138} They also alleged that the school did not provide safe and adequate transportation, and that it did not prevent violent and disruptive behavior by the students.

\textsuperscript{135} See \textit{S.S. v. Howard Road Acad.}, 562 F. Supp. 2d 126, 129 (D.D.C. 2008) (denying motion to dismiss claim against charter school for compensatory education for allegedly failing to provide appropriate education over two-year period to child with disabilities enrolled there); Irene B. v. Phila. Acad. Charter Sch., No. Civ. A. 01-1716, 2003 WL 24052009, at *9-*10 (E.D. Pa. Jan. 29, 2003) (denying motion to dismiss claim against charter school for, \textit{inter alia}, failing to provide services called for on IEP from previous school or convene meeting to create new IEP; excusing exhaustion of administrative remedies); \textit{see also} ABC Alternative Learning Ctr., 38 IDELR 41 (Office of Special Educ. & Rehabilitative Servs., U.S. Dep’t of Educ. 2002) (upholding state education agency’s withholding of funds from charter school that failed to pay for compensatory services for student with disabilities under due process hearing order).

\textsuperscript{136} See \textit{supra} text accompanying notes \_\_ (describing charter school obligations under section 504 and ADA).

\textsuperscript{137} See \textit{Tennessee v. Lane}, 541 U.S. 509 (2004) (affirming denial of motion to dismiss action for damages under ADA title II). These claims are often brought through administrative complaints filed with the Office for Civil Rights of the Department of Education; the ultimate threat is withholding of federal funds, but resolution agreements may include remedies such as reimbursement for tutoring, therapy, and other services. \textit{See, e.g.}, Boston Renaissance Charter Sch., 26 IDELR 889 (Office for Civil Rights, U.S. Dep’t of Educ. 2007) (imposing reimbursement remedy for expulsion of student identified as covered under section 504).

\textsuperscript{138} No. 06-CV-0799, 2007 WL 1456221, at *1 (E.D.N.Y. May 16, 2007)
They alleged overcrowding, absence of refrigeration facilities, inadequate school lunches, rodent infestation, and insufficient certified teachers and school supplies. They said that substandard education at the charter school left them unable to function at grade level once they had returned to traditional public schools. The court dismissed several of the claims asserted, but it denied a motion to dismiss the claim against the management company, among other defendants, for violation of section 504. The court declared that:

Plaintiffs’ extensive list of Riverhead’s failures and omissions with regard to disabled students, as set forth supra, combined with their assertions that defendants were aware of plaintiffs’ disabilities, that plaintiffs’ parents requested accommodation and programs to address such disabilities and that defendants intentionally refused to take any remedial or corrective action to remedy the problems, are sufficient to plead causes of action under the ADA and Section 504.

Similarly, in Irene B. v. Philadelphia Academy Charter School, the court denied a motion to dismiss a claim based on section 504 against a charter school brought on behalf a child with Down Syndrome when the parents alleged that the school failed to provide their child services needed to address his disability and provide him an appropriate education; inappropriately disciplined the child for behavior related to his disability; and subjected

139 Id.
140 Id.
141 Id. at *15-16, (applying “gross-misjudgment” standard to section 504 claim). The court dismissed the ADA title II claim against the company on the ground that it was not a public entity covered by title II. Id. at *16 n.14.
142 Id. at *16.
him to an incident in which the school principal screamed at him, physically dragged him to the school office bruising his arm, and threatened to expel him.\footnote{No. Civ. A. 01-1716, 2003 WL 24052009, at *10 (E.D. Pa. Jan. 29, 2003). The court did not require that a standard of bad faith or gross misjudgment be met. \textit{Id.} at *10 n.21.}

Moreover, the obligations of constitutional due process and equal protection also apply to entities such as charter schools, which exercise power under state and local governmental authority, and claims may be asserted against them and their officers for injunctive relief and damages.\footnote{For a general discussion of § 1983 claims in the education context, see Mark C. Weber, Fitzgerald v. Barnstable School Committee, Safford Unified School District No. 1 v. Redding, and the Future of Section 1983 Education Litigation, \textit{West’s Educ. L. Rep.} (forthcoming).} The \textit{Scaggs} court declared that the charter school management company and the charter school principal could be deemed state actors subject to suit for damages or injunctive relief under 42 U.S.C. § 1983 for violations of the Constitution.\footnote{\textit{Scaggs}, 2007 WL 1456221 at *13 (denying motion to dismiss § 1983 claim against charter school company); \textit{see also} Riester v. Riverside Cmty. Sch., 257 F. Supp. 2d 968 (S.D. Ohio 2002) (holding that private company operating charter school and employee of private company acting as principal of school were state actors capable of suit under § 1983 for allegedly violating teacher’s First Amendment rights). In \textit{Scaggs}, the court also upheld a § 1983 claim against the public charter school itself, finding sufficient allegations of municipal policy in the plaintiffs’ assertion that there was a schoolwide failure to provide necessary educational programs and services. 2007 WL 1456221 at *14; \textit{see id.} at *18 (upholding supervisory liability claim and claim for failure to intercede). \textit{Irene B.} also found that § 1983 applied to the charter school and its principal, rejecting the principal’s qualified immunity defense, though the court ultimately ruled that the allegations were insufficient to state a claim of violation of the Fourteenth Amendment equal protection clause. \textit{Irene B.}, 2003 WL 24052009, at *10-*13.}

The bottom line is that children in charter schools and their parents have a wide range of rights, and may enforce those rights by judicial means. Charter schools and the public school systems that rely on them need to protect the rights of children with disabilities because it is in their self-interest, required under the law, and constitutes proper educational policy.
CONCLUSION

A school system committed to choice needs to observe the basic principles discussed in this paper. It needs to guarantee that the general education system takes responsibility for all children. It needs to provide adequate accommodations and supports to integrate children with disabilities as equals in general education. It must improve outcomes for children with disabilities. It has to provide children with special education needs and their parents equal opportunity for choice. It has to assign costs fairly, and it has to afford protection to the legal rights of parents and children. The way to achieve these goals is to plan for the education of children with disabilities at every step of the way, from program development to financing, to the structure of administrative supervision. Only by that means can children with disabilities thrive in a system of school choice. Only if a system dependent on charter schools serves all children can it claim to be successful.