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# Autism Charter Schools: Legally Vulnerable or Viable?

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## Autism Charter Schools: Legally Vulnerable or Viable?

Janet R. Decker, Keshia Seitz, and Bruce Kulwicksi

### INTRODUCTION

Alex attends the New York Center for Autism Charter School, the state's "first public charter school dedicated exclusively to educating children with autism."<sup>1</sup> Previously, he was educated in a general education or inclusion class at a traditional public school with twenty students without disabilities. At his new charter school, he is surrounded by peers who share his diagnosis of autism. Alex's parents recognize that he is now in a segregated learning environment; however, they appreciate the new educational opportunities available at the charter school that were not possible at his previous school. At his new school, there is a four-to-one student-teacher ratio<sup>2</sup> and Alex receives "an intensive, 30-hours-per-week, year-round individualized educational program based on the principles of applied behavior analysis (ABA)."<sup>3</sup> Alex's school is an example of a niche charter school,<sup>4</sup> which are charter schools designed around a particular theme, culture, language, or

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1. *Overview*, N.Y. CENTER FOR AUTISM CHARTER SCH. (Dec. 22, 2009), [http://www.nyccharterschool.org/site\\_res\\_view\\_template.aspx?id=d4f27e8c-6d1e-4d9e-9d5f-0dcbf927eda7](http://www.nyccharterschool.org/site_res_view_template.aspx?id=d4f27e8c-6d1e-4d9e-9d5f-0dcbf927eda7). The vignette about Alex is based loosely on information gleaned from this autism charter school's website.

2. *School Detail for New York Center for Autism Charter School*, NAT'L CTR. FOR EDUC. STAT., [http://nces.ed.gov/ccd/schoolsearch/school\\_detail.asp?Search=1&ID=360014205779](http://nces.ed.gov/ccd/schoolsearch/school_detail.asp?Search=1&ID=360014205779) (Sept. 20, 2014).

3. *Overview*, *supra* note 1.

4. Within the broad classification of "niche charter schools," researchers have identified subcategories. One such subcategory is "ethnocentric charter school," which was coined by Fox and Buchanan. *See PROUD TO BE DIFFERENT: ETHNOCENTRIC NICHE CHARTER SCHOOLS IN AMERICA 1* (Robert A. Fox & Nina K. Buchanan eds., 2014) [hereinafter *PROUD TO BE DIFFERENT*]; Nina K. Buchanan & Robert A. Fox, *To Learn and to Belong: Case Studies of Emerging Ethnocentric Charter Schools in Hawai'i*, 11 *EDUC. POL'Y ANALYSIS ARCHIVES 1* (2003) (defining "ethnocentric charter schools").

heritage.<sup>5</sup> Similar niche charter schools are designed for gifted students,<sup>6</sup> students of color,<sup>7</sup> students learning a new language,<sup>8</sup> and students who subscribe to a particular culture<sup>9</sup> or faith.<sup>10</sup> Research surrounding niche charter schools is limited, but it suggests that these schools may be vulnerable to legal challenges. Because charter schools receive public funding like other public schools, they too must follow a number of federal, state, and local mandates. Since many niche charter schools are designed to serve a specific student population, and may thus enroll a homogeneous student body, researchers suspect that these schools may be segregating students in

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5. Suzanne E. Eckes, Robert A. Fox & Nina K. Buchanan, *Legal and Policy Issues Regarding Niche Charter Schools: Race, Religion, Culture, and the Law*, 5 J. SCH. CHOICE 85 (2011).
  6. See, e.g., *About Us*, METROLINA REGIONAL SCHOLARS ACAD., [http://www.scholarsacademy.org/apps/pages/index.jsp?uREC\\_ID=197642&type=d&pREC\\_ID=423850](http://www.scholarsacademy.org/apps/pages/index.jsp?uREC_ID=197642&type=d&pREC_ID=423850) (Sept. 20, 2014); SIGNATURE SCH., <http://www.signature.edu> (July 19, 2013); STARGATE SCH., <http://www.stargateschool.org> (July 19, 2013).
  7. See, e.g., AISHA SHULE/W.E.B. DUBOIS PREPARATORY ACAD. (Aug. 10, 2013), <https://web.archive.org/web/20130810030928/http://www.aishashule-duboisprep.com> (accessed using the Internet Archive index).
  8. See, e.g., *About Us*, ASIAN HUM. SERVS. PASSAGES CHARTER SCH., <http://www.passagescharterschool.com/p/about-passages.html> (Mar. 9, 2014); *Just the Facts*, ACAD. PACIFIC RIM CHARTER PUB. SCH., [http://www.pacrim.org/apps/pages/index.jsp?uREC\\_ID=89050&type=d&pREC\\_ID=168567&hideMenu=1](http://www.pacrim.org/apps/pages/index.jsp?uREC_ID=89050&type=d&pREC_ID=168567&hideMenu=1) (Sept. 20, 2014); *Mission & History*, YINGHUA ACAD., <http://www.yinghuaacademy.org/about/mission-history> (Mar. 9, 2014); PIONEER VALLEY CHINESE IMMERSION CHARTER SCH., <http://www.pvcics.org> (Mar. 9, 2014); WASH. YU YING PUB. CHARTER SCH., <http://www.washingtonyuying.org> (Mar. 9, 2014).
  9. See, e.g., KANU O KA 'ĀINA NEW CENTURY PUB. CHARTER SCH., <http://kanu.kalo.org> (July 19, 2013); TWIN CITIES INT'L ELEMENTARY SCH., <http://www.twincitiesinternationalschool.org> (July 19, 2013); *Who We Are*, NATIVE AM. CMTY. ACAD., <http://www.nacaschool.org/about> (Oct. 31, 2013).
  10. See, e.g., Marcia J. Harr Bailey & Bruce S. Cooper, *The Start-up of Religious Charter Schools* (2008), [http://www.ncspe.org/publications\\_files/OP170.pdf](http://www.ncspe.org/publications_files/OP170.pdf) (discussing charter schools that decline to identify as religious but which are “culturally relevant” to a faith group, including the Hellenic Classical Charter School). Cf. *General Education Curriculum*, HEBREW LANGUAGE ACAD. CHARTER SCH., <http://www.hlacharterschool.org/academics/general-education-curriculum> (Sept. 20, 2014) (focusing on Jewish culture); HELLENIC CLASSICAL CHARTER SCH., <http://www.hccs-nys.org> (July 19, 2013) (focusing on Greek Orthodox culture).

violation of the Fourteenth Amendment's Equal Protection Clause.<sup>11</sup>

While some research has identified charter school student populations that are segregated based on faith, religion,<sup>12</sup> culture,<sup>13</sup> or ability level,<sup>14</sup> the majority of research on segregation in charter schools highlights race-based segregation.<sup>15</sup> Linking the term "segregation" to race is logical considering that the term typically does denote racial segregation, especially in the legal discipline. In *Parents Involved in Community Schools v. Seattle School District No. 1*, the U.S. Supreme Court defined "segregated schools" as "legally separate schools for students of different races."<sup>16</sup> In this Article, however, we define the term more broadly and consider segregation to include isolation based on a variety of student classifications,

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11. See, e.g., Suzanne E. Eckes & Kari A. M. Carr, *Ethnocentric Niche Charter Schools: A View Through Legal and Policy Lenses*, in PROUD TO BE DIFFERENT, *supra* note 4, at 167, 170; Janet R. Decker, Suzanne E. Eckes & Jonathan A. Plucker, *Charter Schools Designed for Gifted and Talented Students: Legal and Policy Issues and Considerations*, 259 EDUC. L. REP. 1, 10–11 (2010); Erica Frankenberg & Chungmei Lee, *Charter Schools and Race: A Lost Opportunity for Integrated Education*, 11 EDUC. POL'Y ANALYSIS ARCHIVES 1, 12 (Sept. 5, 2003), <http://epaa.asu.edu/ojs/article/view/260/386>; Erica Frankenberg, Genevieve Siegel-Hawley & Jia Wang, *Choice Without Equity: Charter School Segregation*, 19 EDUC. POL'Y ANALYSIS ARCHIVES 1, 1 (2011), <http://epaa.asu.edu/ojs/article/view/779/878>; Robert A. Garda, Jr., *Culture Clash: Special Education in Charter Schools*, 90 N.C. L. REV. 655 *passim* (2012); Sarah Kinsman, *The Crack in Justice Scalia's Crystal Ball: Single-Sex Charter Schools May Prove His Prediction in VMI was Wrong*, 8 WM. & MARY J. WOMEN & L. 133 *passim* (2001).

12. Cf. Bailey & Cooper, *supra* note 10, at 3 (collecting examples of charter schools that are each "culturally related to their religious groups").

13. See Eckes, et al., *supra* note 5.

14. Decker et al., *supra* note 11 *passim*; Garda, *supra* note 11, at 657.

15. See, e.g., Nina K. Buchanan & Robert A. Fox, *Back to the Future: Ethnocentric Charter Schools in Hawai'i*, in THE EMANCIPATORY PROMISE OF CHARTER SCHOOLS 77, 82 (Eric Rofes & Lisa M. Stulberg eds. 2004) (arguing that the notion of separate but equal may be evolving such that "true equity" may be fostered when some niche charter schools serve specialized, segregated student populations); Suzanne E. Eckes & Anne E. Trotter, *Are Charter Schools Using Recruitment Strategies to Increase Student Body Diversity?*, 40 EDUC. & URB. SOC'Y 62, 72–73, 83–84 (2007) (finding that some charter school leaders deprioritized racial integration in favor of prioritizing positive outcomes for underserved racial communities); Frankenberg & Lee, *supra* note 11, at 16, 26 (finding that 70% of African American charter school students attend "intensely segregated" schools in comparison to 36% of African American students at traditional public schools); Jane Tanimura, *Still Separate and Still Unequal: The Need for Stronger Civil Rights Protections in Charter-Enabling Legislation*, 21 S. CAL. REV. L. & SOC. JUST. 399 (2012) (arguing that charter schools are permitting a greater racial and economic stratification in public schools).

16. 551 U.S. 701, 712 (2007).

including disability.<sup>17</sup>

The U.S. Department of Education’s Office for Civil Rights (OCR) is also concerned about disability-based discrimination that leads to segregation in charter schools. In May 2014, OCR issued a “Dear Colleague” letter providing non-regulatory guidance to charter schools.<sup>18</sup> The letter warns that because charter schools have choice-based admissions, they “need to be mindful of the rights of children and parents in the community when publicizing the school to attract students and when evaluating their applications for admission.”<sup>19</sup> It instructs charter schools to avoid “admissions criteria that have the effect of excluding students on the basis of race, color, or national origin from the school without proper justification [or that] categorically deny admission to students on the basis of disability.”<sup>20</sup> In 2012, the U.S. Government Accountability Office (GAO) also issued a report that identified disability-based discrimination occurring in charter school admissions as a potential concern.<sup>21</sup>

The OCR, GAO, and a growing number of researchers are focused on the exclusion of students with disabilities from charter schools.<sup>22</sup> Our focus, however, is on the opposite phenomenon—charter schools designed specifically for students with disabilities. Some of these schools, such as those designed for students with autism, may be violating the law by admitting only students with autism and, therefore, excluding both students without disabilities and students with disabilities other than autism.

It remains unclear whether niche schools like autism charter schools are actually facing litigation and, if so, what these lawsuits entail. The current literature rarely examines specific types of niche charter schools. Instead, it

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17. Other researchers have also applied the term “segregation” to the practice of isolating students on the basis of disability. *See, e.g.*, LAUREN MORANDO RHIM & PAUL O’NEILL, NAT’L CTR. FOR SPECIAL EDUC. IN CHARTER SCHS., IMPROVING ACCESS AND CREATING EXCEPTIONAL OPPORTUNITIES FOR STUDENTS WITH DISABILITIES IN PUBLIC CHARTER SCHOOLS 1 *passim* (2013), <http://blogs.edweek.org/edweek/speced/NAPCS-Disabilities-Report.pdf>; Stuart Buck, *Special Education Vouchers are Beneficial: A Response to Hensel*, 41 J.L. & EDUC. 651, 661–62 (2012); Wendy F. Hensel, *Vouchers for Students with Disabilities: The Future of Special Education?*, 39 J.L. & EDUC. 291, 340–42, 348–49 (2010); Elizabeth Adamo Usman, *Reality over Ideology: A Practical View of Special Needs Voucher Programs*, 42 CAP. U. L. REV. 53, 83–84 (2014); Perry A. Zirkel, *Is Vouchering the Way to Vouch for Special Education?*, 41 J.L. & EDUC. 649, 650 (2012).

18. Letter from Catherine E. Lhamon, Assistant Sec’y for Civil Rights, Office for Civil Rights, U.S. Dep’t of Educ., to Colleagues (May 14, 2014), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201405-charter.pdf> [hereinafter Letter].

19. *Id.* at 3.

20. *Id.*

21. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-12-543, CHARTER SCHOOLS: ADDITIONAL FEDERAL ATTENTION NEEDED TO HELP PROTECT ACCESS FOR STUDENTS WITH DISABILITIES 1 *passim* (2012), <http://www.gao.gov/assets/600/591435.pdf>.

22. *See, e.g.*, RHIM & O’NEILL, *supra* note 17; Mary Bailey Estes, *Charter Schools and Students with Disabilities: How Far Have We Come?*, 30 REMEDIAL & SPECIAL EDUC. 216, 216–17 (2009); Anthony M. Garcy, *High Expense: Disability Severity and Charter School Attendance in Arizona*, 19 EDUC. POL’Y ANALYSIS ARCHIVES 1 *passim* (2011), <http://epaa.asu.edu/ojs/article/view/908/891>; Garda, *supra* note 11.

often treats the schools as an undefined and ambiguous group.<sup>23</sup> Therefore, the purpose of this Article is to review charter school litigation involving claims of segregation or discriminatory admissions policies and practices. We then analyze the litigation by situating it within the context of autism charter schools. By contextualizing the litigation to a *specific* type of niche charter school, we highlight the unique legal issues these schools face, such as potential violations of the Individuals with Disabilities Education Act (IDEA), Section 504 of the Rehabilitation Act (“Section 504”), and the Americans with Disabilities Act (ADA). Autism charter schools often advertise that their mission is to exclusively serve students with autism,<sup>24</sup> thereby segregating students with autism from their non-disabled peers. Although no research has precisely documented the prevalence of autism charter schools, as of 2008 these schools comprised half of the total number of charter schools designed for children with disabilities.<sup>25</sup> The popularity of this type of niche charter school also appears to be growing, which may be explained by the dramatic increase in the number of students diagnosed with autism.<sup>26</sup> A report released in 2014 reveals that one in

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23. See, e.g., Robert Fox, Nina Buchanan, Suzanne Eckes & Letitia Basford, *The Line Between Cultural Education and Religious Education: Do Ethnocentric Niche Charter Schools Have a Prayer?*, 36 REV. RES. EDUC. 282 (2012); Eckes et al., *supra* note 5.

24. See, e.g., ARIZ. AUTISM CHARTER SCHS., <http://www.autismcharter.org> (Mar. 9, 2014) (“The mission of the Arizona Autism Charter School is to educate students with autism and related disorders . . . .”); FOREST HILL CHARTER SCH., <http://www.foresthillschool.org> (Mar. 9, 2014) (touting that it is “New Jersey’s First Charter School for Children with Autism”); *Overview*, *supra* note 1 (explaining that it is a “charter school dedicated exclusively to educating children with autism”); PALM BEACH SCH. FOR AUTISM, <http://pbsfa.org> (Mar. 9, 2014) (advertising that it serves children “who have autism spectrum disorder”); *Welcome*, THE PRINCETON HOUSE CHARTER SCH., <http://www.princeton-house.org/Pages/Default.aspx?id=30&groupId=18> (March 9, 2014) (“Our children represent the full spectrum of autism, from Asperger’s Syndrome to severely disabling autism.”).

25. JULIE F. MEAD, NAT’L ASS’N OF STATE DIRS. OF SPECIAL EDUC., CHARTER SCHOOLS DESIGNED FOR CHILDREN WITH DISABILITIES: AN INITIAL EXAMINATION OF ISSUES AND QUESTIONS RAISED 10 tbl.2 (2008), <http://www.nasdse.org/Portals/0/Web%20copy%20of%20Mead%20report-Jan%202008.pdf>.

26. Evidence that autism charter schools are growing is documented by recent news articles about the openings of these types of charter school. See, e.g., Morgan Jacobsen, *Spectrum Academy Charter School Breaks Ground on Utah County Campus*, DESERET NEWS (Jan. 10, 2014, 5:05 PM), <http://www.deseretnews.com/article/865593944/Spectrum-Academy-Charter-School-breaks-ground-on-Utah-County-campus.html>; John Mooney, *Specialization or Segregation? NJ’s First Charter School for Autistic Children Already Faces Challenges*, NJ SPOTLIGHT (Jan. 28, 2011), <http://www.njspotlight.com/stories/11/0127/2342>; Joseph Tepper, *Harlem Charter School Recruits Autistic Students*, N.Y. DAILY NEWS (Mar. 11, 2012, 4:00 AM), <http://www.nydailynews.com/news/harlem-charter-school-recruits-autistic-students-article-1.1036459>.

sixty-eight children and one in forty-two boys have an autism spectrum disorder.<sup>27</sup> In Part I, we explain the background and legal issues surrounding autism charter schools. Next, in Part II, we present our findings about the existing litigation relevant to autism charter schools. After reviewing 169 potentially relevant cases, we identified nine cases alleging segregation at charter schools. Despite the legal vulnerabilities of autism charter schools, none of the cases involved autism charter schools, and only one case alleged segregation based on ability level. The other eight cases alleged racial segregation. In the cases reviewed, many of the courts distinguished the segregation as permissible *de facto* segregation instead of impermissible *de jure* segregation. We conclude in Part III by speculating why there has been relatively little litigation alleging segregation in charter schools. We predict that additional lawsuits are probable, and we also provide recommendations to prevent autism charter schools and other niche charter schools from facing future litigation.

## I. BACKGROUND AND POTENTIAL LEGAL ISSUES

Autism charter schools may have emerged as a consequence of dissatisfaction with traditional public schooling from parents of children with autism. Parental dissatisfaction is evidenced by the disproportionately high prevalence of autism litigation brought against public school districts.<sup>28</sup> Autism charter schools may offer expertise in autism intervention that some traditional public schools are ill-equipped to provide. Accordingly, the emergence of autism charter schools may be a benefit for both parents unhappy with special education at traditional public schools, as well as for school districts struggling to effectively serve the growing number of students with autism. Despite the support behind autism charter schools, they may face significant legal vulnerabilities.

Autism charter schools are only one type of niche charter school designed to serve students with disabilities.<sup>29</sup> As of 2008, seventy-one charter schools were designed specifically for students with disabilities, fifty of which were located in

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27. Jon Baio, Ctrs. for Disease Control & Prevention, *Prevalence of Autism Spectrum Disorder Among Children Aged 8 Years—Autism and Developmental Disabilities Monitoring Network, 11 Sites, United States, 2010*, MORBIDITY & MORTALITY WKLY. REP., Mar. 28, 2014, at 1. *See also* Stephen J. Blumberg, Matthew D. Bramlett, Michael D. Kogan, Laura A. Schieve, Jessica R. Jones & Michael C. Lu, Ctrs. for Disease Control & Prevention, *Changes in Prevalence of Parent-reported Autism Spectrum Disorder in School-Aged U.S. Children: 2007 to 2011–2012*, NAT'L HEALTH STAT. REP., Mar. 20, 2013, at 1–2 (finding one in every fifty children aged six to seventeen had an autism spectrum diagnosis); Catherine Rice, Ctrs. for Disease Control & Prevention, *Prevalence of Autism Spectrum Disorders—Autism and Developmental Disabilities Monitoring Network, Six Sites, United States 2000*, MORBIDITY & MORTALITY WKLY. REP., Feb. 9, 2007, at 1.

28. Perry A. Zirkel, *Autism Litigation Under the IDEA: A New Meaning of “Disproportionality”?*, 24 J. SPECIAL EDUC. LEADERSHIP 92, 96–99 (2011); Perry A. Zirkel & Brent L. Johnson, *The “Explosion” in Education Litigation: An Updated Analysis*, 265 EDUC. L. REP. 1 (2011); *see also* Thomas A. Mayes & Perry A. Zirkel, *Special Education Tuition Reimbursement Claims: An Empirical Analysis*, 22 REMEDIAL & SPECIAL EDUC. 350 (2001) (discussing special education litigation more broadly).

29. RHIM & O'NEILL, *supra* note 17, at 17.

two states, Florida and Ohio.<sup>30</sup> Of the same seventy-one charter schools, forty were designed for students with a specific type of disability, such as autism.<sup>31</sup> Charter schools designed to serve students with disabilities raise interesting legal questions surrounding the unique legal entitlements and protections afforded to students with disabilities in all public educational settings.

#### A. Potential Constitutional Violations

The mission of most charter schools designed for students with disabilities is to intentionally treat students with disabilities *differently* from their non-disabled counterparts.<sup>32</sup> This raises concerns that niche charter schools are potentially violating the Equal Protection Clause of the Fourteenth Amendment, which prohibits the government from denying its citizens “equal protection of the laws.”<sup>33</sup> When applied to education, public schools must treat similarly situated students similarly.<sup>34</sup> In *Brown v. Board of Education*, the U.S. Supreme Court held that “separate but equal” educational facilities violate the Equal Protection Clause.<sup>35</sup> The Court’s unanimous opinion read, “[w]e conclude that in the field of public education the doctrine of ‘separate but equal’ has no place. Separate educational facilities are inherently unequal.”<sup>36</sup> Disability rights advocates have argued that the Court’s “view that separate environments bred a sense of inferiority” means that excluding students with disabilities from public schools should also be illegal.<sup>37</sup> Therefore, at first glance, the constitutional principle of equal protection seems to be at odds with the segregated learning environments of some autism charter schools.

Upon further inquiry, however, the Court has upheld some examples of differential treatment and segregation in public schools. Although the Court held in *Brown* that students of different races cannot be compelled to attend separate

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30. MEAD, *supra* note 25, at 9 tbl.1.

31. Twenty of the forty schools designed for a specific type of disability were autism charter schools. Twenty-five of the seventy-one schools were designed for students who were generally identified to have a disability and six schools were described as “model inclusion schools.” *Id.* at 10 tbl.2.

32. *Cf. Our Mission*, THE PRINCETON HOUSE CHARTER SCH., <http://www.princeton-house.org/Pages/ChildTemplate1.aspx?id=18&groupId=2> (Mar. 9, 2014) (stating that they operate “an exceptional education program committed to meeting the needs of children with autism and their families through education, support, resources and advocacy”).

33. U.S. CONST. amend. XIV, § 1.

34. The U.S. Supreme Court held students could not be treated differently based on race, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954), and native language, *Lau v. Nichols*, 414 U.S. 563 (1974). Additional federal and state legislation prohibits schools from discriminating against students based on disability, *e.g.*, Section 504 of the Rehabilitation Act of 1973, and sex, *e.g.*, Title IX of the Education Amendments of 1972.

35. 347 U.S. at 493–94.

36. *Id.* at 495.

37. Sarah E. Redfield & Theresa Kraft, *What Color is Special Education?*, 41 J.L. & EDUC. 129, 130 (2012).



schools,<sup>38</sup> the Court has also clarified that other types of racial segregation may be constitutional. For instance, intentional racial segregation or *de jure* segregation is legally impermissible, whereas racial segregation based on individual choices, or *de facto* segregation, withstands judicial scrutiny.<sup>39</sup> If a school enrolled 100% Latino students because Latino families chose to live in that particular area, a court would likely determine that nothing illegal has occurred because the segregation is not based on governmental action. Conversely, if district boundaries were redrawn to intentionally require all Latino students to attend a particular school, then a court would likely find illegal *de jure* segregation.

Since *Brown*, courts have further clarified the legality of separating students based on traits other than race, such as ability, language, sex, and religion.<sup>40</sup> Courts analyze student equal protection cases by applying three different levels of scrutiny. The highest level is termed strict scrutiny, followed by intermediate scrutiny, and lastly, rational basis review. The most difficult level of scrutiny to pass is strict scrutiny. When courts apply strict scrutiny to situations in which students are treated differently, the school must have a “compelling government interest,” or an extraordinary reason, for the differential treatment that is “narrowly tailored” to achieve the government interest.<sup>41</sup> Courts only apply strict scrutiny to protected classes based on race, national origin, religion, and alienage.<sup>42</sup> It is more likely that a school’s action will be found unconstitutional under a strict scrutiny analysis, as the highest level of review, than under an intermediate scrutiny analysis or rational basis review.

In contrast, courts typically do not find a Fourteenth Amendment violation when applying a rational basis review. Under this level of scrutiny, the school only needs a basis for discriminatory action that is “rationally related to furthering a legitimate state interest.”<sup>43</sup> That is, the school should have a fairly good reason to treat similar students differently. Consequently, it would be more difficult to withstand judicial scrutiny for niche charter schools that segregate students based on classifications such as race (which would undergo a strict scrutiny analysis) than classifications based on ability level (which would undergo a rational basis review). Due to the difference in the levels of scrutiny applied, and because the segregation takes place in niche charter schools, courts simply have more latitude under rational basis review to determine that charter schools designed for students with disabilities have a legitimate reason to segregate, and are therefore not in violation of the Equal Protection Clause. The courts’ latitude, however, is not limitless; the reason for the segregation in question is still important. In cases where students are segregated

38. *Brown*, 347 U.S. at 496.

39. *See, e.g., Bell v. Sch. City of Gary*, 324 F.2d 209 (7th Cir. 1963), *cert. denied*, 377 U.S. 924 (1964) (“there is no affirmative U.S. Constitutional duty to change innocently arrived at school attendance districts by the mere fact that shifts in population either increase or decrease the percentage of either Negro or white pupils.”).

40. *See* MARTHA M. MCCARTHY, NELDA H. CAMBRON-MCCABE & SUZANNE E. ECKES, *PUBLIC SCHOOL LAW: TEACHERS’ AND STUDENTS’ RIGHTS* 1 (7th ed. 2014).

41. *See, e.g., Grutter v. Bollinger*, 539 U.S. 306, 326 (2003), *superseded by state constitutional amendment*, MICH. CONST. Art I, § 26, *as recognized in Schuette v. Coal. to Defend Affirmative Action, Integration, & Fight for Equal. By Any Means Necessary*, 134 S. Ct. 1623 (2014).

42. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985).

43. *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 312 (1976).

by sex, arguments that the segregation is necessary to relieve the historical burden of sexism have survived intermediate judicial scrutiny.<sup>44</sup> When single-sex charter schools have been challenged, those schools have prevailed, as well.<sup>45</sup> Thus, using this same line of reasoning, autism charter schools could argue that segregation based on ability level is needed to relieve the historical burden of disability-based discrimination. The schools could claim that autism charter schools allow students with autism to receive specialized instruction and to avoid stigmatization sometimes present at traditional public schools.

### *B. Potential State and Federal Statutory Violations*

Even if courts would agree with the argument that segregation in autism charter schools is constitutional, there are additional state and federal statutory protections to consider. First, the state law where the charter schools is located must be applied. Importantly, state law may dictate whether charter schools are part of the Local Education Agency (LEA), are independent LEAs, or are free to choose whether they are an LEA or not.<sup>46</sup> Some state laws explicitly permit charter schools to base admissions on ability level,<sup>47</sup> whereas many other state statutes explicitly forbid discrimination based on intellectual ability or disability in charter schools.<sup>48</sup> State statutes may also require charter schools to have an open-enrollment admissions policy.<sup>49</sup>

In addition to state statutory requirements, charter schools designed for students with disabilities must be analyzed under federal law, including Section 504, ADA, and IDEA. Both Section 504 and the ADA prohibit schools from discriminating against students with disabilities.<sup>50</sup> IDEA requires public schools to provide a “free and appropriate public education” to eligible students with disabilities.<sup>51</sup> These three federal statutes greatly influence the analysis of whether charter schools designed for students with disabilities are engaged in illegal practices.

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44. *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 728 (1982) (noting that where a “pattern of discrimination against women” exists, a statutory scheme that “work[s] directly to remedy” that pattern will be upheld (internal citations omitted)).

45. *See Reach Acad. for Boys and Girls, Inc. v. Del. Dep’t of Educ.*, 8 F. Supp. 3d 574 (D. Del. 2014) (granting a preliminary injunction to prevent the nonrenewal of a Delaware all-girls charter school’s charter reasoning that its students showed likelihood of success on their equal protection and Title IX claims). This decision was not included in our data set because it was published after we completed data collection.

46. RHIM & O’NEILL, *supra* note 17, at 8–10.

47. *See, e.g.*, FLA. STAT. ANN. § 1002.33(10)(e)(5) (West 2013); *see also* Decker et al., *supra* note 11.

48. *See, e.g.*, MAINE REV. STAT. ANN. § 20A:2404-3 (West Supp. 2013); MISS. CODE ANN. § 37-28-43(1) (West Supp. 2013); N.J. STAT. ANN. § 18A:36A–7 (West 2013); TEX. EDUC. CODE ANN. § 12.1014(e) (West Supp. 2013).

49. MEAD, *supra* note 25, at 13–14; *see, e.g.*, D.C. CODE § 38-1802.06(a) (Supp. 2013).

50. 29 U.S.C. § 794 (2012); 42 U.S.C. §§ 12101, 12132 (2012).

51. 20 U.S.C. § 1400(d)(1)(A) (2012).

## 1. Section 504 and the ADA

A plain reading of Section 504 and the ADA indicates that individuals with disabilities are the only ones protected from discrimination; accordingly, these statutes would *not* give protection against discrimination to those who are non-disabled.<sup>52</sup> Therefore, if non-disabled students alleged discrimination because they were not admitted to a charter school designed for students with disabilities, Section 504 and the ADA would not offer those students any legal relief.<sup>53</sup>

When analyzing autism charter schools specifically, however, it is possible for a student with a disability other than autism (e.g., traumatic brain injury) to claim a Section 504 or ADA violation. For example, parents of children with disabilities other than autism could argue that their children are entitled to a specialized education similar to that provided by autism charter schools, but there is not a specialized school available for their child's particular disability. Moreover, parents of children with other disabilities could claim illegal discrimination by showing the disparate amount and quality of resources devoted to students with autism in comparison to their children. It is unclear whether courts would be persuaded by such arguments. The success of such claims would likely depend on the facts of each individual case. On one hand, if the case involved facts where an autism charter school was targeting students with autism for enrollment, a court may find that such a practice is a permissible recruitment strategy. Courts may reason that the resulting ability-level segregation is *de facto* not *de jure* segregation.

On the other hand, if parents of non-autistic students attempt to enroll their children at an autism charter school and are subsequently told that the school only enrolls students with autism or are given a less explicit response (such as the school is "not a good fit" for their child), courts may be more likely to determine that the charter school has engaged in illegal discrimination based on ability-level. Even if these schools explain that they would admit children without a diagnosis of autism, or if the schools have an anti-discrimination statement professing that they do not discriminate based on disability, a court could view these statements of non-discrimination as insincere. Courts may be more critical of autism charter schools that are not conducive to teaching students who do not have an autism diagnosis. For instance, an autism charter school may only offer a curriculum tailored to students with autism or only hire employees that are specially trained as autism educators. Courts or the OCR may determine that these practices are discriminatory to students with other disabilities.

## 2. IDEA

In addition to potential Section 504 and ADA claims, lawsuits could be filed claiming a violation of IDEA. For instance, many autism charter schools appear to be segregating children with autism from their typically developing peers.<sup>54</sup> a

52. MEAD, *supra* note 25.

53. *Id.*

54. See, e.g., *Application Requirements*, THE PRINCETON HOUSE CHARTER SCH., <http://www.princeton-house.org/Pages/FormTemplate.aspx?id=53&groupId=18> (Mar. 9, 2014) (stating that to be admitted "student[s] must have a primary exceptionality of Autism Spectrum Disorder, Autism, PDD, Asperger's Syndrome").

practice which could be found in violation of IDEA's Least Restrictive Environment (LRE) requirement.<sup>55</sup> Specifically, students with autism must be educated with children "who are not disabled" "to the maximum extent appropriate" and "separate schooling" is only to occur "when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily."<sup>56</sup> The LRE requirements under IDEA are typically referred to as "inclusion" or "mainstreaming."<sup>57</sup> In *Hendrick Hudson Central School District v. Rowley*, the U.S. Supreme Court held:

Despite this preference for "mainstreaming" handicapped children—educating them with nonhandicapped children—Congress recognized that regular education simply would not be a suitable setting for the education of many handicapped children . . . [IDEA] thus provides for the education of some handicapped children in separate classes or institutional settings.<sup>58</sup>

Therefore, a range of placement options are possible and appropriate under IDEA. For instance, a student may spend a portion of the day in the general education classroom with non-disabled peers and another portion of the day in another setting, such as a resource room that provides a smaller student-teacher ratio and, accordingly, more individualized instruction.<sup>59</sup> Yell and Katsiyannis clarify that,

IDEA favors integration, but recognizes for some students, more restrictive or segregated settings may be . . . necessary to provide a student with an appropriate education. . . . [However, i]t is only when an appropriate education cannot be provided, even with the use of supplementary aids and services, that students with disabilities may be placed in more restrictive settings.<sup>60</sup>

Thus, determining whether an autism charter school is violating IDEA's LRE mandate must be made on a student-by-student basis. Placement at an autism charter school may be the least restrictive option for some students with autism. However, charter schools that universally educate students with disabilities apart from their typically developing peers—without attending to the student's individual needs—are violating IDEA's LRE mandate.<sup>61</sup>

The students at most autism charter schools appear to be only educated with other students diagnosed with autism. As it is unlikely that the LRE for *all* of the children enrolled at autism charter schools is a setting devoid of *any* non-

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55. 20 U.S.C. § 1412(a)(5) (2012).

56. 20 U.S.C. § 1412(a)(5)(A).

57. See, e.g., *Least Restrictive Environment (LRE), Inclusion and Mainstreaming*, TEXAS WOMAN'S UNIVERSITY, <http://www.twu.edu/inspire/least-restrictive.asp> (last updated Oct. 9, 2014).

58. 458 U.S. 176, 181 n.4 (1982).

59. Mitchell L. Yell & Antonis Katsiyannis, *Placing Students with Disabilities in Inclusive Settings: Legal Guidelines and Preferred Practices*, 49 PREVENTING SCH. FAILURE 28, 31 (2004).

60. *Id.* at 30–31.

61. See MEAD, *supra* note 25; RHIM & O'NEILL, *supra* note 17.

disabled peers, it is likely that many of these students are not being educated amongst their typically developing peers “to the maximum extent appropriate,”<sup>62</sup> and it is therefore likely that many autism charter schools are violating IDEA’s LRE requirement.<sup>63</sup> That said, it is also incorrect to believe that *all* children with autism are appropriately placed in inclusive settings. While some autistic children who have adequate communication, social, imitation, and attention skills and who are not behaviorally disruptive may be best served in a less restrictive setting, there are other children with autism whose least-restrictive placement would be a segregated learning environment.

In addition to questions of improper placement, parents who unilaterally enroll their children at autism charter schools may be violating IDEA’s team decision-making principle. Under IDEA, the Individualized Education Program (IEP) team must determine what constitutes the LRE for each individual student.<sup>64</sup> Specifically, a student’s IEP team<sup>65</sup> must collectively agree to a student’s initial placement, as well as any change in the student’s placement. When parents transfer their children from traditional school settings to autism charter schools, they are doing so without collaborating with the IEP team.

A similar concern arose years ago when parents chose to unilaterally move visually impaired children from integrated settings to state schools that were only for visually impaired students. In 1991, the superintendent from the Indiana School for the Blind wrote a letter, which is referred to as the “Letter to Bina,” requesting clarification from the U.S. Department of Education’s Office of Special Education Programs (OSEP) to determine when parents were allowed to unilaterally choose to place children in a segregated school setting. OSEP responded:

[I]f a program “specifically provides that parent preference is the sole criterion for placement of children,” it would be inconsistent with the legal requirement that placements be determined by IEP teams in conformity with the law. Therefore, the letter concluded “parent preference cannot override the decision of the child’s [IEP] team.”<sup>66</sup>

To apply OSEP’s response to the current practice of parents unilaterally deciding to enroll their children with disabilities in charter schools, Mead maintains, “[t]his long-held position of OSEP reiterates the fact that [a free and appropriate public education] is the child’s entitlement and parents may not waive their child’s rights, even in the name of parental choice.”<sup>67</sup> The OCR further clarified the issue by stating, “choice programs must ensure that children with disabilities are not subjected to discrimination by . . . being required to waive services or rights in order to participate in them.”<sup>68</sup> The consistent message from the U.S. Department

62. See MEAD, *supra* note 25, at 14–15.

63. Similar violations of IDEA’s LRE requirement occur when students with disabilities are incarcerated. See Jennifer A.L. Sheldon-Sherman, *The IDEA of an Adequate Education for All: Ensuring Success for Incarcerated Youth with Disabilities*, 42 J.L. & EDUC. 227 (2013).

64. 20 U.S.C. § 1414(d)(1)(A)(i) (2012).

65. 20 U.S.C. § 1414(d)(1)(B).

66. MEAD, *supra* note 25, at 4.

67. Julie F. Mead, *Determining Charter Schools’ Responsibilities for Children with Disabilities: A Guide Through the Legal Labyrinth*, 11 B.U. PUB. INT. L.J. 167, 185 (2002).

68. MEAD, *supra* note 25, at 4.

of Education has been that parental choices consistent with federal disability law can and should be honored and that, conversely, parental choice does not supersede the legal requirements of IDEA.<sup>69</sup>

Essentially, the U.S. Department of Education has expressed the belief that parents may not always choose a placement that is appropriate for their children.<sup>70</sup> Yet, outside of the charter school context, these inappropriate parent-driven placements may also occur when parents choose to transfer their child from one traditional public school to another. Parents do not need IEP team approval before moving and transferring students with disabilities to new schools. According to a federal regulation clarifying transfers of students with disabilities, if a student transfers to a “new public agency” within the same state and enrolls at the new school within the same school year, then the new public agency is responsible for providing services comparable to those in the child’s existing IEP at the old school.<sup>71</sup> The new public agency can either adopt the student’s existing IEP or create a new IEP with a new team.<sup>72</sup> This new public agency could be a LEA,<sup>73</sup> but, depending on the state law, could also be the charter school itself. Thus, at an autism charter school, it is likely that the new IEP team would approve the new placement without incident. However, even if the legal requirement of IEP team approval is technically met for a new, more restrictive placement, an argument can be made that the placement at the autism charter school is nonetheless improper.<sup>74</sup> For example, students who are transferred from general education placements will not have comparable placements at autism charter schools because these schools are usually devoid of any students without disabilities.

## II. AN ANALYSIS OF THE CHARTER SCHOOL LITIGATION INVOLVING SEGREGATION

As Part I illustrates, autism charter schools are vulnerable to legal challenges; however, previous research has not studied the extent and features of relevant litigation.

### A. Methods

To fill the gap in the existing literature, we asked the following research questions: (1) what themes emerge from the case law regarding allegations of segregation at charter schools; and (2) are autism charter schools facing lawsuits alleging discriminatory admissions or practices? Using these research questions, we generated search terms to find existing, relevant cases and entered those terms into

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69. *Id.* at 5.

70. Lauren Morando Rhim & Margaret McLaughlin, *Students with Disabilities in Charter Schools: What We Now Know*, FOCUS ON EXCEPTIONAL CHILD., Jan. 2007, at 1, 4–5.

71. 34 C.F.R. § 300.323(e) (2013).

72. 34 C.F.R. § 300.33.

73. 20 U.S.C. § 1413(a)(1) (2012).

74. *But see* RHIM & O’NEIL, *supra* note 17, at 17 (“[P]arents are permitted to select [charter schools designed for students with disabilities] regardless of the recommendation of the IEP team.”).

the electronic legal database Westlaw.<sup>75</sup> We intentionally conducted a broad search in hopes of not only identifying the cases that specifically involved autism charter schools but also because we hoped to inform our analysis by locating all cases in which segregation was alleged to occur at charter schools. Searches generated a total of 169 cases. Next, we reviewed the 169 cases for relevance to our research questions. If a case was no longer “good law,”<sup>76</sup> did not relate to segregation at charter schools,<sup>77</sup> or only included procedural issues, we excluded it from our dataset. If the case was a lower court decision and its appellate counterpart was in the data set, it was also excluded. After 160 cases were excluded from the sample for these reasons, we entered the remaining nine cases into a spreadsheet and color-coded them to indicate whether they involved an autism charter school, an allegation of segregation at charter schools, or peripheral issues that informed our research questions. Next, we conducted a legal analysis of the existing litigation by grouping cases together based on our color-code system and similarity among the following variables: facts and procedural history, holding, rationale, dissenting opinion(s), concurring opinion(s), status, and lessons learned.

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75. Between February 20–26, 2014, we conducted three keyword searches. The terms used were (1) “equal protection clause” & “charter school” & da(aft 1/1991); (2) “segregation” & “charter school” & da(aft 1/1991); and (3) discriminat! & “charter school” & “admissions policy” “admissions practice” & da(aft 1/1991). All of the searches were of the “all state and federal cases” database with a date restriction after 1991 because that is the year of the first charter school law. Cases that appeared in more than one search were only counted once. A limitation of our search is that we did not do an additional search on LexisNexis. Additionally, it is possible that there are cases and unpublished decisions relevant to our research questions that were not captured in this search. Nonetheless, we concluded a pool of 169 cases would be large enough to identify meaningful insights into this body of litigation. *Cf.* Perry A. Zirkel & Amanda C. Machin, *The Special Education Case Law “Iceberg”: An Initial Exploration of the Underside*, 41 J.L. & Educ. 483 (2012).

76. To determine whether each case was no longer “good law,” they were KeyCited using Westlaw. To identify whether a case has been overturned, reaffirmed, questioned, or cited by subsequent courts, legal researchers “Shepardize” or “KeyCite.” These terms are trademarks of the companies who created the systems. Shephardizing describes using Shepard’s publications and citatory services which traditionally appeared in book form, but are now online through LexisNexis; whereas KeyCiting refers to the system that Westlaw employs.

77. For example, cases were excluded if they pertained to an allegation of racial discrimination, but did not discuss discriminatory admissions or segregation. *See, e.g.*, *Pocono Mountain Charter Sch. v. Pocono Mountain Sch. Dist.*, 908 F. Supp. 2d 597 (M.D. Pa. 2012) (denying the district’s motion to dismiss reasoning that a charter school did state a claim alleging equal protection violations based on racial or religious animus).

### B. Only One Case Focused on Ability-Level Segregation

Of these nine cases, none involved an autism charter school,<sup>78</sup> but one case focused on ability-level segregation<sup>79</sup> and eight cases involved claims of racial segregation.<sup>80</sup> In addition, we found that courts often offered a *de jure/de facto* distinction to justify the legality of the segregation for both ability-level and racial segregation. *Central Dauphin School District v. Founding Coalition of the Infinity Charter School* was the only case involving an allegation that a charter school was illegally discriminating based on ability level.<sup>81</sup> In this case, a school district with the authority to create charter schools denied an application for a charter school designed for gifted students.<sup>82</sup> The school district contended that the proposed admissions policy for the charter school violated the state's charter school law, which stated:

A charter school shall not discriminate in its admission policies or practices on the basis of intellectual ability, except . . . [a] charter school may limit admission to a particular grade level, a targeted population group composed of at-risk students, or areas of concentration of the school such as mathematics, science or the arts.<sup>83</sup>

The State Charter School Appeal Board reversed the school district's denial and the school district appealed to the Commonwealth Court of Pennsylvania.<sup>84</sup> The Board reasoned that the charter school did not violate the law because the school would accept any student and did not screen prospective students.<sup>85</sup> Therefore, conducting targeted marketing toward gifted students was permissible.<sup>86</sup> Additionally, the

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78. One published case involving an autism charter school exists; however, it did not come up in our search because it does not involve issues of segregation. Instead, the court analyzed whether a free and appropriate public education was provided when the autism charter school did not provide additional services such as physical and occupational therapy. *See M.N. v. N.Y. City Dep't of Educ.*, 700 F. Supp. 2d 356 (S.D.N.Y. 2010).

79. *Cent. Dauphin Sch. Dist. v. Founding Coal. of the Infinity Charter Sch.*, 847 A.2d 195 (Pa. Commw. Ct. 2004). However, one additional case mentioned disability discrimination, but it did not focus on this issue. Therefore, it was grouped with the racial-segregation cases. *Smith v. Henderson*, 944 F. Supp. 2d 89 (D.D.C. 2013).

80. *Villanueva v. Carere*, 85 F.3d 481 (10th Cir. 1996); *Smith v. Henderson*, 944 F. Supp. 2d 89 (D.D.C. 2013); *Cleveland v. Union Parish Sch. Bd.*, No. 12,924, 2009 WL 1491188 (W.D. La. 2009); *Save Our Schs.—Se. & Ne. v. D.C. Bd. of Educ.*, 564 F. Supp. 2d 1 (D.D.C. 2008); *Berry v. Sch. Dist. of Benton Harbor*, 56 F. Supp. 2d 866 (W.D. Mich. 1999); *Sheff v. O'Neill*, 733 A.2d 925 (Conn. Super. Ct. 1999); *In re Red Bank Charter Sch.*, 843 A.2d 365 (N.J. Super. App. Div. 2004); *In re Grant of Charter Sch. Application of Englewood on Palisades Charter Sch.*, 727 A.2d 15 (N.J. Super. App. Div. 1999).

81. *Cent. Dauphin Sch. Dist.*, 847 A.2d at 195.

82. *Id.* at 197.

83. *Id.* at 199 (quoting 24 PA. STAT. ANN. § 17-1723-A(b) (West 2001)).

84. *Id.* at 198.

85. *Id.*

86. *Id.*



school was prepared to teach non-gifted students and students with disabilities.<sup>87</sup> The court affirmed the Board’s decision, but it was a close four-to-three decision.<sup>88</sup> The majority reasoned that no evidence was presented that showed that the charter school would exclude non-gifted students.<sup>89</sup> Further, the school had previously inquired about contracting services for students with disabilities.<sup>90</sup> Also, the majority opined that the charter school’s goals aligned with the legislative intent of allowing charter schools to utilize various types of innovative teaching methods and provide students with more options.<sup>91</sup> The dissenting judges disagreed, arguing that the charter school’s written policy prohibiting discrimination could be “a subterfuge or [could] be supplanted by informal policies, patterns or practices that have the net effect of unlawfully discriminating, whether that be done intentionally or unintentionally.”<sup>92</sup> The dissent, concerned with the school’s marketing, suggested that the school’s “hollow representation” that it will accept all children was “a sham” and that its marketing was nothing more than a “bait and switch” pitch.<sup>93</sup> The charter school remains open and advertises its mission as “the creation, operation and maintenance of a world-class charter school in the Central Dauphin School District that addresses the intellectual, academic and social-emotional needs of mentally gifted children in grades K-12.”<sup>94</sup>

### C. Eight Cases Focused on Racial Segregation

The remaining eight cases involved allegations of segregation or discrimination based on race.<sup>95</sup> The first two cases involved lawsuits waged against existing charter schools. The next four cases included challenges made against proposed charter schools. In the final two cases, plaintiffs challenged the closure of traditional public schools due to the emergence of charter schools.

#### 1. Existing Charter School Cases

In the first of two cases involving existing charter schools, *Save Our Schools—Southeast & Northeast v. District of Columbia Board of Education*, a community group of parents concerned with the District of Columbia Public Schools (DCPS) sued the Two Rivers Charter School, the D.C. Board of Education,

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87. *Id.*

88. *Id.* at 195.

89. *Id.* at 199.

90. *Id.*

91. *Id.* at 199–200.

92. *Id.* at 206.

93. *Id.* at 207.

94. INFINITY CHARTER SCH., <http://www.infinityschool.org/infinity> (Nov. 16, 2014).

95. *Villanueva v. Carere*, 85 F.3d 481 (10th Cir. 1996); *Smith v. Henderson*, 944 F. Supp. 2d 89 (D.D.C. 2013); *Cleveland v. Union Parish Sch. Bd.*, No. 12,924, 2009 WL 1491188 (W.D. La. 2009); *Save Our Schs.—Se. & Ne. v. D.C. Bd. of Educ.*, 564 F. Supp. 2d 1 (D.D.C. 2008); *Berry v. Sch. Dist. of Benton Harbor*, 56 F. Supp. 2d 866 (W.D. Mich. 1999); *Sheff v. O’Neill*, 733 A.2d 925 (Conn. Super. Ct. 1999); *In re Red Bank Charter Sch.*, 843 A.2d 365 (N.J. Super. App. Div. 2004); *In re Grant of Charter Sch. Application of Englewood on Palisades Charter Sch.*, 727 A.2d 15 (N.J. Super. App. Div. 1999).

and others, on equal protection grounds.<sup>96</sup> The group alleged that the charter school fostered white flight. Specifically, the community group argued that the charter school's Caucasian, wealthy founders thought DCPS was "too black."<sup>97</sup> Thus, the charter school engaged "in discriminatory outreach and recruitment methods, such as by focusing its recruitment in neighborhoods with high concentrations of White and Latino residents and ignoring neighborhoods with high concentrations of Black residents."<sup>98</sup> The federal district court granted summary judgment to the charter school and the school district, holding that the community group did not have standing to bring the discriminatory admissions claim.<sup>99</sup> The court reasoned that the community group had not demonstrated that they had applied, were deterred from applying, or intended to apply to the charter school.<sup>100</sup> Two Rivers Charter School remains open today with approximately 1,800 students on a waiting list and has received positive attention from politicians and journalists.<sup>101</sup> A mother of a student attending the charter school posted on a Washington Post online forum, praising the school for being so racially diverse.<sup>102</sup> She wrote,

while the District is 51 percent African American, 39 percent white and 9 percent Latino, my son's school is 55 percent African American, 35 percent white and 8 percent Latino. Every parent knows how unusual that is in a city where the school population is often entirely or almost entirely white or African-American.<sup>103</sup>

In a similar case about racial segregation at an existing charter school, *In re Red Bank Charter School*, a New Jersey school district was concerned that a charter school worsened the racial imbalance in the district; therefore, the district challenged the New Jersey State Board of Education's renewal of the school's charter.<sup>104</sup> In this case, the district provided evidence that an increasing number of students of color enrolled in the charter school, which in turn decreased the number of students of color enrolled in district schools.<sup>105</sup> The appellate court affirmed the charter renewal but held that the Board must hold a separate hearing to analyze

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96. 564 F. Supp. 2d at 2.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* at 7.

101. Emma Brown, *D.C. Charter School Waitlists Vary Widely*, WASH. POST (May 7, 2013), [http://www.washingtonpost.com/local/education/dc-charter-school-waitlists-vary-widely/2013/05/06/c9ed3f14-b673-11e2-b94c-b684dda07add\\_story.html](http://www.washingtonpost.com/local/education/dc-charter-school-waitlists-vary-widely/2013/05/06/c9ed3f14-b673-11e2-b94c-b684dda07add_story.html); *Congressional Leadership Visits TR!*, TWO RIVERS PUB. CHARTER SCH. (July 17, 2013), <http://www.tworiverspcs.org/news/item/index.aspx?LinkId=46&ModuleId=35>; *Mission*, TWO RIVERS PUB. CHARTER SCH., <http://www.tworiverspcs.org/mission/index.aspx> (Mar. 10, 2014).

102. Tamara Brown, Op-Ed, *Two Rivers Public Charter School, An Inspiration for a Multicultural D.C.*, (May 9, 2012, 11:39 AM) WASH. POST, [http://www.washingtonpost.com/blogs/therootdc/post/two-rivers-public-charter-school-an-inspiration-for-a-multicultural-dc/2012/05/09/gIQAJTw8CU\\_blog.html](http://www.washingtonpost.com/blogs/therootdc/post/two-rivers-public-charter-school-an-inspiration-for-a-multicultural-dc/2012/05/09/gIQAJTw8CU_blog.html).

103. *Id.*

104. 843 A.2d 365, 368 (N.J. Super. App. Div. 2004).

105. *Id.*

the charter school's enrollment practices.<sup>106</sup> In its decision, the court balanced the State's policy to foster the development of charter schools with the "policy against racial discrimination and segregation in the public schools."<sup>107</sup> The school remains open today.<sup>108</sup>

## 2. Proposed Charter School Cases

The next four cases did not involve existing charter schools; rather, these cases analyzed whether proposed charter schools would cause unconstitutional racial segregation. In the first case, *In re Grant of Charter School Application of Englewood on Palisades Charter School*, three school districts challenged the State Board of Education's decision to grant charters to three new charter schools.<sup>109</sup> One district argued, among many other allegations, that a new charter school, Englewood on the Palisades Charter School, would cause the racial composition of the district to become imbalanced because Caucasian students would transfer to the charter school.<sup>110</sup> A New Jersey appellate court indicated that, prior to the State's charter legislation enactment, there was discussion about a "fear that charter schools would drain away 'the best and the brightest' and ultimately lead to elitism and segregation."<sup>111</sup>

The court explained that under New Jersey charter school legislation, charter schools' admission policies, "to the extent practicable, must 'seek the enrollment of a cross section of the community's school age population including racial and academic factors.'"<sup>112</sup> The district found that the charter school's application did not sufficiently specify how it would recruit a diverse student body.<sup>113</sup> However, the charter school countered that its application explained that they would advertise in "strategic places" and visit locations where it was necessary to attract a "true cross section of the population."<sup>114</sup>

The Board decided that the charter school's plan was adequate, and the court deferred to the Board's decision.<sup>115</sup> The charter school, whose admission plan was initially questioned, remains open today.<sup>116</sup> Its 2010–2011 student enrollment data indicates that the school's racial composition was approximately 57% Hispanic, 41% black, 1% white, and 1% other races/ethnicities,<sup>117</sup> whereas the surrounding Bergen County's racial composition was approximately 16% Hispanic, 6%, 72%

106. *Id.* at 379.

107. *Id.* at 468 (quoting *Jenkins v. Twp. of Morris Sch. Dist.*, 279 A.2d 619, 626 (N.J. 1971)).

108. RED BANK CHARTER SCH., <http://www.redbankcharterschool.com/rbcs/> (Mar. 10, 2014).

109. 727 A.2d 15, 15 (N.J. Super. App. Div. 1999).

110. *Id.* at 20.

111. *Id.* at 22 (citation omitted).

112. *Id.* at 24 (citation omitted).

113. *Id.* at 29.

114. *Id.*

115. *Id.* at 37.

116. ENGLEWOOD ON THE PALISADES CHARTER SCH., <http://www.epcs.ws/> (Mar. 10, 2014).

117. *School Detail for Englewood on the Palisades Charter School*, NAT'L CTR. FOR EDUC. STATISTICS, [http://nces.ed.gov/ccd/schoolsearch/school\\_detail.asp?Search=1&City=englewood&State=34&SchoolType=1&SchoolType=2&SchoolType=3&SchoolType=4&SpecificSchlTypes=all&IncGrade=-1&LoGrade=-1&HiGrade=-1&ID=340001400258](http://nces.ed.gov/ccd/schoolsearch/school_detail.asp?Search=1&City=englewood&State=34&SchoolType=1&SchoolType=2&SchoolType=3&SchoolType=4&SpecificSchlTypes=all&IncGrade=-1&LoGrade=-1&HiGrade=-1&ID=340001400258) (Mar. 10, 2014).

white, and 6% other races/ethnicities.<sup>118</sup> Thus, the district's concern that the charter school would not enroll a true cross section of the district may have been justified. However, instead of a disproportionate number of Caucasian students, the charter school appears to enroll a disproportionate number of students of color.

*Sheff v. O'Neill* also discussed proposed charter schools and segregation.<sup>119</sup> Two years after the Superior Court of Connecticut ordered the State to prioritize remedying racial, ethnic, and economic segregation in the schools of the Hartford Public School District, plaintiffs alleged the State's actions were inadequate.<sup>120</sup> The state district court discussed the school district's plan to use charter schools as a way to reduce ethnic, racial, and economic segregation in its schools.<sup>121</sup> The State's charter school law required "consideration of the reduction of racial, ethnic and economic isolation" before approving or renewing charter schools.<sup>122</sup> Thus, one purpose of charter schools was to increase racial—and other forms of—integration. The court discussed this justification along with other reasons to determine that the state's actions to reduce segregation in the school district's schools were adequate.<sup>123</sup>

Two additional cases involved charter schools that sought to open in districts where a desegregation order was in effect. In *Cleveland v. Union Parish School Board*, a Louisiana school district sought federal court approval to open a charter school because the action could affect the desegregation order that was in effect in the district.<sup>124</sup> It was the second time the district had sought court approval to open a charter school.<sup>125</sup> Its first attempt was unsuccessful because the court determined the proposed charter school would be "virtually all-white."<sup>126</sup> However, the court reasoned that additional efforts had been made to increase the racial diversity of the proposed charter school.<sup>127</sup> For instance, concrete efforts to recruit students of color had been made, racial minority students would be automatically enrolled instead of placed in the lottery, and the proposed school would be located in a more racially-diverse neighborhood.<sup>128</sup> Therefore, the district was permitted to open a charter school, but the district was ordered to make efforts to recruit and hire minority faculty, staff, and board members, and to increase the racial diversity of its student body.<sup>129</sup>

118. It is unclear what population should be used as a comparison sample, but since the charter school is located in Bergen County, its demographics were used. U.S. Dept. of Commerce, *Demographic Profile NJ - Bergen County*, U.S. CENSUS BUREAU (2010), <http://www.census.gov/popfinder/?fl=34:34003>.

119. 733 A.2d 925 (Conn. Super. Ct. 1999).

120. *Id.* at 932, 938.

121. *Id.* at 927–28.

122. *Id.* at 931. A similar case discusses South Carolina's Charter School Act's requirement that the racial composition of a charter school must not differ from the racial composition of the district by more than 10%. However, the Supreme Court of South Carolina vacated the case because the issue became moot. *Beaufort Cnty. Bd. of Educ. v. Lighthouse Charter Sch. Comm.*, 576 S.E.2d 180 (S.C. 2003).

123. *Sheff*, 733 A.2d at 943.

124. No. 12,924, 2009 WL 1491188 (W.D. La. May 27, 2009).

125. *Id.* at \*1.

126. *Id.* (internal citations omitted).

127. *Id.* at \*3.

128. *Id.* at \*3–4.

129. *Id.* at \*7.

In a Michigan case, *Berry v. School District of Benton Harbor*, two charter schools sought court approval to gain public funding to open in a district under a long-standing desegregation order.<sup>130</sup> The federal district court discussed the procedural history of the case and the history of other Michigan charter schools that had been either denied or granted public funding based on their student recruitment strategies among other factors.<sup>131</sup> After providing this background, the court held that the first school—which the court had previously denied funding—still needed to provide more precise information about the racial composition of its student body.<sup>132</sup> The court made this decision because it was concerned by the possible “resegregative” effect that the first charter school could have on the racial composition of the district.<sup>133</sup> The court authorized the second school’s funding, as long as the racial balance at the charter school would be comparable to that of the school district as a whole, which was 90% African American.<sup>134</sup> The court discussed a variety of evidence the charter school had provided including its transportation plans, recruitment efforts, precise student application information, faculty and staff recruitment, school board composition, and diversity training.<sup>135</sup> Additionally, the court ordered that the second charter school continue to update the court with information about the racial composition of its students, faculty, staff, and board members, as well as other relevant data.<sup>136</sup>

### 3. Traditional Public School District Cases

The final two cases involved disputes about school districts’ decisions to close traditional public schools. In *Villanueva v. Carere*, a group of Hispanic parents challenged the school district’s decision to close traditional public elementary schools and replace them with a new charter school.<sup>137</sup> They claimed the district acted with illegal discriminatory intent when it closed the schools and that the closure would have a discriminatory impact on Hispanic students.<sup>138</sup> However, the U.S. Court of Appeals for the Tenth Circuit Court held that the parents had not proven discriminatory intent or impact.<sup>139</sup> The court concluded its opinion by noting that complex and political disagreements, such as those surrounding segregation in charter schools, cannot always be remedied through the court system.<sup>140</sup> The court explained that “all disagreements cannot be resolved by the federal courts, especially when they relate to local educational policies upon which both warring factions hold deep and sincere beliefs. This question is political, not legal.”<sup>141</sup>

Similarly, in *Smith v. Henderson*, a federal district court did not grant a preliminary injunction which would have prevented the District of Columbia

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130. 56 F. Supp. 2d 866 (W.D. Mich. 2002).

131. *Id.* at 868–70.

132. *Id.* at 873–74.

133. *Id.*

134. *Id.* at 883.

135. *Id.* at 874–78.

136. *Id.* at 885–86.

137. 85 F.3d 481, 483–84 (10th Cir. 1996).

138. *Id.* at 485–86.

139. *Id.* at 486–87.

140. *Id.* at 488–89.

141. *Id.*

School District from implementing a consolidation and reorganization plan that called for the closure of many traditional public schools.<sup>142</sup> The plaintiffs alleged that the closures would discriminate against students who were African American, Latino, low-income, or disabled.<sup>143</sup> The court disagreed, reasoning that the closures coincidentally occurred in low-income neighborhoods where a higher proportion of African American and Latino students lived.<sup>144</sup> The closures were necessary because the students in those neighborhoods had transferred to charter schools.<sup>145</sup>

*D. Courts Offered a De Facto/De Jure Distinction to Justify Segregation*

One societal issue that may be immune to judicial intervention is *de facto* segregation, or segregation that occurs due to individual choices. When families of different ethnicities choose to live in separate neighborhoods, this is considered legally permissible, *de facto* segregation. *De facto* segregation differs from *de jure* segregation, which is separation that is required by governmental action. For instance, Jim Crow laws that prohibited Caucasian and black children from attending the same schools are an example of *de jure* segregation.

In the nine cases we reviewed, some courts made the distinction that *de facto* segregation in charter schools was permissible while *de jure* segregation would not be. The *de facto/de jure* distinction was discussed in cases involving students segregated by race or ability level. For instance, the *Dauphin* opinion explained that “there does not appear to be any ‘de jure’ intellectual ability discrimination . . . . Nor does there appear to be any ‘de facto’ discrimination in [the charter school’s] enrollment policies and practices.”<sup>146</sup> The court noted that the charter school’s proposed curriculum would likely attract more gifted students than lower ability students, but this was not an impermissible practice.<sup>147</sup> *Dauphin* illustrates that, as long as no evidence exists of discriminatory admissions, charter schools may be permitted to target a selective student body. If the facts were different and there was evidence that non-gifted students were counseled away from applying to the charter school, however, a court may find *de jure* segregation due to the discriminatory school practice of counseling out non-gifted students. Similarly, if autism charter school personnel advised students who did not have a diagnosis of autism that they should not apply to autism charter schools, then a court may find illegal discrimination. Whereas if an autism charter school selectively recruits students with autism by advertising its mission in educating students with autism, a court may not find a violation. Courts could reason that unless an autism charter school has an actual policy or practice that explicitly discriminates against students who do not have an autism diagnosis, then the resulting segregation is permissible *de facto* segregation.

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142. 944 F. Supp. 2d 89, 108 (D.D.C. 2013).

143. *Id.* at 95. As noted previously, the case did not focus on ability level segregation and thus, it was grouped with the racial segregation cases.

144. *Id.* at 93.

145. *Id.* at 102.

146. *Cent. Dauphin Sch. Dist. v. Founding Coal. of the Infinity Charter Sch.*, 847 A.2d 195, 199 (Pa. Commw. Ct. 2004).

147. *Id.*

## CONCLUSION

Despite the legal vulnerabilities of autism charter schools, relatively few cases involving issues of segregation at charter schools exist.<sup>148</sup> In this Section, we speculate why the litigation is limited. We also predict that future litigation is likely to occur in this area. We then conclude with recommendations to avoid equal protection violations from arising at charter schools designed for students with autism or other special student populations.

*A. Reasons for Limited Litigation*

We embarked on this study because past research identified the potential legal violations occurring at niche charter schools. We were interested in identifying if, in fact, litigation had occurred and if so, what it entailed. Our study revealed only nine cases that related to segregation occurring in charter schools, none of these cases involved autism charter schools, and only one focused on ability-level segregation.

Segregating students with autism away from non-disabled peers may limit an individual autistic student's progress and contradict years of advocacy efforts made for greater inclusion of students with disabilities. A philosophical argument could be made that autism charter schools violate the inclusive spirit and original purpose of IDEA.<sup>149</sup> However, it is likely that very little litigation has occurred because no one is motivated to file lawsuits against autism charter schools. Parents and traditional public school districts may not be motivated to challenge the current reality. Courts have not found impermissible segregation at charter schools in the relatively few challenges that have been alleged.

Parents are unlikely to challenge the existence of autism charter schools because these schools may be providing an attractive public school option. Some of the autism charter schools are offering expensive, intensive programming—such as applied behavior analysis—which was traditionally only available at private schools.<sup>150</sup> Support for autism charter schools appears to be growing considering the number of autism charter schools that continue to emerge.<sup>151</sup> Increasing support has also been given to other school-choice options for students with disabilities,

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148. That said, we reviewed only the published case law. Additional lawsuits that were settled or that were not published could exist.

149. See Daniel H. Melvin II, *The Desegregation of Children with Disabilities*, 44 DEPAUL L. REV. 599, 649 (1995).

150. See, e.g., Amy B. Wang & Paulina Pineda, *Arizona's First State-Approved Charter School for Autistic Kids to Open*, ARIZONA REPUBLIC (May 5, 2014), <http://www.azcentral.com/story/news/local/phoenix/2014/05/02/arizonas-first-charter-school-autistic-kids/8646327>; *General Information*, HOPE CTR. FOR AUTISM, <http://www.hopecenter4autism.org/about/general-information/> (June 1, 2014); *Overview*, *supra* note 1.

151. See Wang & Pineda, *supra* note 150; Lindsay Kastner, *Charter School Opens with Autism in Mind*, MY SA (Oct. 12, 2010), <http://www.mysanantonio.com/news/education/article/Charter-school-opens-with-autism-in-mind-699454.php>.

such as special education vouchers.<sup>152</sup> It may be that the entities developing these schools, and the parents who enroll their children in them, believe that the legal requirement of inclusion is not good policy for *all* children with autism. Perhaps, they believe that a segregated learning environment is better suited for some students with autism who may need specialized intervention that is easier to provide in segregated learning environments. Additionally, some parents may appreciate the benefits of inclusion, but prioritize the quality of the education provided at some autism charter schools over an integrated environment.<sup>153</sup>

Similarly, traditional school districts may not be motivated to challenge autism charter schools. They may even welcome the departure of some students—including some students with autism who are often considered more difficult and more expensive to educate. Both educators and parents may tolerate the segregation of students with autism because they may believe that the end justifies the means. Critics have warned that emphasis on student achievement should not overshadow the important equity goal of having an integrated student population.<sup>154</sup> Yet, some have responded that it is only possible to truly provide educational opportunities to underserved student populations if those students are targeted, and thus, segregated in separate schools.<sup>155</sup> Critics remain unpersuaded and reject this “separate but equal” justification.<sup>156</sup> For example, Mickelson et al. found the following:

Some Native American, black, Latino, white parents, and parents of special-needs children choose schools segregated by race or ability. Parents frequently say they choose better quality schools for their children, but the evidence . . . indicates that they are often guided less by a school’s academic reputation and more by its demographic profile. Parents appear to select a choice school with a student body similar to their own race, even if the choice school has lower test scores than their current school.<sup>157</sup>

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152. See JAY P. GREENE & GREG FORSTER, MANHATTAN INST., CIVIC REPORT NO. 38, VOUCHERS FOR SPECIAL EDUCATION STUDENTS: AN EVALUATION OF FLORIDA’S MCKAY SCHOLARSHIP PROGRAM (2003), [http://www.manhattan-institute.org/pdf/cr\\_38.pdf](http://www.manhattan-institute.org/pdf/cr_38.pdf); JAY P. GREENE & MARCUS A. WINTERS, MANHATTAN INST., CIVIC REPORT NO. 52, THE EFFECT OF SPECIAL-EDUCATION VOUCHERS ON PUBLIC SCHOOL ACHIEVEMENT: EVIDENCE FROM FLORIDA’S MCKAY SCHOLARSHIP PROGRAM (2008), [http://www.manhattan-institute.org/pdf/cr\\_52.pdf](http://www.manhattan-institute.org/pdf/cr_52.pdf); Stuart Buck & Jay P. Greene, *The Case for Special Education Vouchers*, 10 EDUC. NEXT 36 (2010), [http://educationnext.org/files/ednext\\_20101\\_36.pdf](http://educationnext.org/files/ednext_20101_36.pdf); Buck, *supra* note 17; Usman, *supra* note 17; Zirkel, *supra* note 17. Cf. Hensel, *supra* note 17.

153. LRE violations are also possible at other charter schools designed for students with disabilities if the students attending the charter school are covered by IDEA—which means that they meet IDEA’s eligibility requirements. See, e.g., MEAD, *supra* note 25, at 3–4.

154. Frankenberg & Lee, *supra* note 11.

155. See, e.g., Buchanan & Fox, *supra* note 15; Eckes & Trotter, *supra* note 15 (describing charter school leaders who may dismiss integration issues because they personally believe they are making a difference for disadvantaged students).

156. Frankenberg & Lee, *supra* note 11.

157. ROSLYN MICKELSON, MARTHA BOTTIA & STEPHANIE SOUTHWORTH, EDUC. POLICY RESEARCH UNIT & EDUC. AND THE PUB. INTEREST CTR., SCHOOL CHOICE AND SEGREGATION BY RACE, CLASS, AND ACHIEVEMENT 20 (2008), <http://eps1.asu.edu/epru/documents/EP1-0803-260-EPRU.pdf>.



Even when parents think they are choosing a school based on quality of education, they are sometimes mistaken. Whether parents who send their children to autism charter schools are wrong or right, the lack of litigation may illustrate that no one is motivated to challenge segregated learning environments found at some charter schools. According to Rhim and O’Neill, “charter schools developed specifically for students with disabilities continue to operate in a number of states, simultaneously generating enthusiasm and apprehension on the part of some parents and special education advocates.”<sup>158</sup>

In some instances, courts have also held that segregation occurring in charter schools does not violate the Equal Protection Clause. In the cases that we reviewed, courts reasoned that when charter schools targeted and recruited certain populations, the resulting homogeneous student population was a result of legally permissible *de facto* segregation.<sup>159</sup> Courts highlighted the distinction between charter schools explicitly denying admission based on ability or race—impermissible *de jure* segregation—and charter schools tailoring their advertising to particular populations. Since explicit discrimination is unlikely to occur and instead, charter schools are more likely to push out unwanted student populations in less obvious ways, it is understandable that few lawsuits have occurred. Courts have sent a message that simply identifying a disproportionate student population—or disparate impact—is not sufficient; plaintiffs must instead prove that they were treated in a discriminatory manner—or disparate treatment—which is a more difficult standard to meet.<sup>160</sup>

It is also possible that the choice movement has decreased the likelihood of litigation. It allows parents who may not agree with segregated charter schools to simply enroll their children elsewhere. The current reality differs from the past where a parent who did not agree with an aspect of their child’s schooling faced the difficult choice of either remaining dissatisfied at the neighborhood school or filing a lawsuit to escape the unwanted situation. It is understandable that parents would not choose to file suit considering the immense financial and emotional drain involved in launching a risky legal battle. Yet, as identified in *Save Our Schools*, issues of standing can arise if cases are not brought by parents who actually had their children enroll or attempt to enroll at the charter school in question.<sup>161</sup> Plus, bipartisan support for school choice is widespread. Current reforms in education policy—such as the American Recovery and Reinvestment Act of 2009, Race to the Top, and the proposed reauthorization of the Elementary and Secondary Education Act—all support an increase in charter schools.<sup>162</sup>

### *B. More Litigation is Probable*

It may seem contradictory to follow a section that explains why litigation has not occurred with a section that predicts that more litigation will occur. Nevertheless, a review of the current case law and literature led us to believe that more charter

158. RHIM & O’NEILL, *supra* note 17, at 18.

159. *See* Cent. Dauphin Sch. Dist. v. Founding Coal. of the Infinity Charter Sch., 847 A.2d 195 (Pa. Commw. Ct. 2004).

160. *See, e.g.*, Smith v. Henderson, 944 F. Supp. 2d 89, 101, 105 (D.D.C. 2013).

161. *Save Our Schs.—Se. & Ne. v. D.C. Bd. of Educ.*, 564 F. Supp. 2d 1, 3 (D.D.C. 2008).

162. Dylan P. Grady, *Charter School Revocation: A Method for Efficiency, Accountability, and Success*, 41 J.L. & EDUC. 513 (2012).

school lawsuits are inevitable. It is evident that awareness of this issue has increased in light of the growing body of research,<sup>163</sup> commentary,<sup>164</sup> and guidance from the U.S. Department of Education.<sup>165</sup> Critics such as Richard Kahlenberg have argued that when charter schools are “intentionally designed to encourage self-segregation” it “raises serious concerns, for both social and educational reasons.”<sup>166</sup>

Two cases in our dataset<sup>167</sup> and eight cases that were excluded from our dataset were filed by traditional public school districts against charter schools.<sup>168</sup> Therefore, we predict as limited public funding continues to be divided between traditional public schools and charter schools, an increasing number of traditional public school districts will file lawsuits against charter schools. Litigation alleging improper funding has been unsuccessful;<sup>169</sup> thus, it is likely that traditional public school districts will identify additional ways to allege legal violations against charter schools. Specifically, it is probable that the number of allegations of discriminatory admissions practices at charter schools will increase. Districts may be motivated to allege legal violations in attempts to keep students with autism at traditional public schools in order to retain the funding that accompanies students with disabilities.<sup>170</sup> These lawsuits may mirror the existing litigation filed by parents who have unilaterally transferred their children with disabilities to private schools.<sup>171</sup> In these cases, the parents seek private school tuition reimbursement. It is possible that a reverse situation could evolve where traditional public school districts file lawsuits to regain the funding that attaches to students with disabilities. Yet, school districts may not have the resources to challenge parental decisions to transfer their children

163. See, e.g., Eckes et al., *supra* note 5.

164. See, e.g., Richard D. Kahlenberg, *Popular, Bipartisan, and Mediocre*, NEW REPUBLIC (May 2, 2011), <http://www.tnr.com/book/review/charter-school-experiment>.

165. See, e.g., Letter, *supra* note 18.

166. Kahlenberg, *supra* note 164.

167. *In re Red Bank Charter Sch.*, 843 A.2d 365 (N.J. Super. App. Div. 2004); *Cent. Dauphin Sch. Dist. v. Founding Coal. of the Infinity Charter Sch.*, 847 A.2d 195 (Pa. Commw. Ct. 2004).

168. These eight cases were excluded from the data set because they did were either no longer good law, irrelevant, or only included procedural issues. See *Methods, supra* Part II.A; *Blount-Hill v. Zelman*, 636 F.3d 278 (6th Cir. 2011); *Racine Charter One, Inc. v. Racine Unified Sch. Dist.*, 424 F.3d 677 (7th Cir. 2005); *Project Reflect, Inc. v. Metro. Nashville Bd. of Pub. Educ.*, 947 F. Supp. 2d 868 (M.D. Tenn. 2013); *Pocono Mountain Charter Sch. v. Pocono Mountain Sch. Dist.*, 908 F. Supp. 2d 597 (M.D. Pa. 2012); *Chester Upland Sch. Dist. v. Pennsylvania*, 861 F. Supp. 2d 492 (E.D. Pa. 2012); *Angstadt v. Midd-West Sch. Dist.*, 286 F. Supp. 2d 436 (M.D. Pa. 2003); *Salt River Pima-Maricopa Indian Comm. Sch. v. Arizona*, 23 P.3d 103 (Ariz. Ct. App. 2001); *J.D. ex. rel. Scipio-Derrick v. Davy*, 2 A.3d 387 (N.J. Super. App. Div. 2010).

169. See, e.g., *Winn v. Ariz. Christian Sch. Tuition Org.*, 586 F.3d 649 (9th Cir. 2009); *Niehaus v. Huppenthal*, 310 P.3d 983 (Ariz. Ct. App. 2013); *Green v. Garriot*, 212 P.3d 96 (Ariz. Ct. App. 2009); *Taxpayers for Pub. Educ. v. Douglas Cnty Sch. Dist.*, Nos. 11CA1856, 11CA1857, 2013 WL 791140 (Colo. App. Feb. 28, 2013); *Council of Orgs. and Others for Educ. About Parochiaid, Inc. v. Governor*, 566 N.W.2d 208 (Mich. 1997).

170. However, the issue of funding is likely only relevant in states where the autism charter schools are considered a stand-alone LEA as opposed to a part of a district.

171. See, e.g., *Burlington v. Mass. Dep’t of Educ.*, 471 U.S. 359 (1985).

to autism charter schools. Additionally, districts may be grateful that the parents whose children are at autism charter schools are satisfied and not waging expensive special education lawsuits against them.<sup>172</sup>

If districts do not file lawsuits in the future, it is likely that parent and community groups that oppose the growing number of charter schools or that oppose segregated learning environments, such as the group in *Save Our Schools*, may become more organized and more litigious.<sup>173</sup> In other words, opponents of the charter school movement may create test cases to highlight and challenge segregation issues at charter schools.<sup>174</sup>

Additionally, it is possible there will be an increasing number of complaints filed with the OCR, the U.S. Department of Justice’s Civil Rights Division, or state departments of education, which allege legal violations at charter schools designed for students with disabilities. To file these complaints, no standing is required, which makes an increase in these complaints even more probable than lawsuits.<sup>175</sup>

### C. Recommendations to Prevent Future Litigation

Though niche charter schools—such as autism charter schools—may be popular due to their unique missions, these schools are vulnerable to legal violations. Niche charter school employees, attorneys, policymakers, and researchers should be aware and respond to these distinct challenges.

Autism charter school personnel must also educate themselves about their legal limitations and particularly about the difference between legal selective recruitment versus illegal selective admissions policies and practices. It may be acceptable to advertise that a charter school is designed for students with autism, but if the school is its own LEA (as determined by state law), the school should also make it clear that all students are welcome. Stating that a school is “exclusively” for students with autism or requiring parents to describe their child’s autism diagnosis on admissions forms could be problematic. Because these schools are left without clear guidance, attorneys should review the schools’ policies and practices.

Autism charter schools should also carefully evaluate programming and placement of each individual student. Therefore, if students would benefit from interacting with typically developing peers, then administrators should proactively incorporate diverse programming in the schools so that the students with autism are not isolated from typically developing peers. Some autism charter schools already appear to be providing their students with interactions with typically developing

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172. See, e.g., Alison Leigh Cowan, *Amid Affluence, a Struggle Over Special Education*, N.Y. TIMES (Apr. 24, 2005), <http://www.nytimes.com/2005/04/24/education/24westport.html>.

173. *Save Our Schs.—Se. & Ne. v. D.C. Bd. of Educ.*, 564 F. Supp. 2d 1 (D.D.C. 2008).

174. See, e.g., CHARTER SCHOOL SCANDALS, <http://charterschoolscandals.blogspot.com/> (May 14, 2014) (publicizing negative media coverage of charter schools, including increased segregation).

175. See, e.g., Office for Civil Rights, *How to File a Discrimination Complaint with the Office for Civil Rights*, U.S. DEPT. EDUC. (Sept. 2010), <http://www2.ed.gov/about/offices/list/ocr/docs/howto.pdf>.

peers,<sup>176</sup> which is important because most children with autism benefit from specialized social skills training and typically developing peers provide necessary models.<sup>177</sup> Additionally, students with autism may initially benefit from learning in specialized environments, but then need to learn how to generalize their skills in typical environments.<sup>178</sup> Importantly, at an autism charter school, the teacher-to-student ratio is likely to be small enough that these interactions would be teachable moments and not simply coexistence on a playground or another setting where the child with autism may not even attend to the typically developing peer.<sup>179</sup> Not only is the inclusion of programming with typically developing peers an advisable way to avoid legal challenges, but it also aligns with arguments for inclusion. Specifically, inclusion allows typically developing children to interact with students with disabilities so that they are more accepting of differences and do not fear children with disabilities.<sup>180</sup>

If autism charter schools do find that they are challenged for their segregated learning environment, they may be able to argue that segregation is necessary to achieve students' academic goals. There are other educational contexts where segregation has been widely accepted, such as gifted and talented classes at traditional public schools. Additionally, traditional public schools overwhelmingly track students based on ability level. Thus, autism charter schools could provide compelling arguments about the benefits of segregating students based on special characteristics. Specifically, they could argue that in order for some students to graduate to a less restrictive environment, the students must first receive specialized instruction in a more restrictive environment.

Policymakers may need to provide explicit legal requirements for autism and other charter schools designed for students with disabilities. Rhim and O'Neill encourage charter school proponents to lead efforts to "form coalitions and mobilize parents to advocate for policy changes in the best interests of students with disabilities."<sup>181</sup> Without extensive litigation—and therefore, without much guidance from the judiciary—policymakers should be clarifying what charter schools can and cannot do.<sup>182</sup> Florida and Ohio codified their state law to reflect

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176. In fact, the Ohio Charter School statute requires that autism-centric charter schools also have non-disabled students enrolled at the school. OHIO REV. CODE ANN. § 3314.061 (West 2013).

177. Keith C. Radley, W. Blake Ford, Allison A. Battaglia & Melissa B. McHugh, *The Effects of a Social Skills Training Package on Social Engagement of Children with Autism Spectrum Disorders in a Generalized Recess Setting*, 29 FOCUS ON AUTISM & OTHER DEVELOPMENTAL DISABILITIES 216, 216–17 (2014).

178. See Annemiek Palmen & Robert Didden, *Task Engagement in Young Adults with High-Functioning Autism Spectrum Disorders: Generalization Effects of Behavioral Skills Training*, 6 RES. AUTISM SPECTRUM DISORDERS 1377 (2012); Bridget A. Taylor & Sandra L. Harris, *Teaching Children with Autism to Seek Information: Acquisition of Novel Information and Generalization of Responding*, 28 J. APPLIED BEHAV. ANALYSIS 3 (1995).

179. See Radley et al., *supra* note 177.

180. Melvin, *supra* note 149.

181. RHIM & O'NEILL, *supra* note 17, at 27.

182. *But see* Sarah Wieselthier, *Judicial Clarity: Giving Teeth to the Application of Federal Disability Laws in Charter Schools*, 2013 B.Y.U. EDUC. & L.J. 67 (arguing that the judiciary should address disability-based discrimination occurring at charter schools).

their approval of autism charter schools.<sup>183</sup> For example, Ohio mandates that autism charter schools enroll both students with autism and non-disabled peers.<sup>184</sup> Texas has enacted a statute permitting the authorization of charter schools primarily for students with disabilities, which specifies that the schools cannot “discriminate in admissions or in the services provided based on the presence, absence, or nature of an applicant’s or student’s disability.”<sup>185</sup> It is possible that additional states could similarly provide clarification in their state law, especially considering that charter school policy is often determined at the state level.<sup>186</sup> At the federal level, the U.S. Department of Education could offer guidance that pertains specifically to charter schools designed for students with disabilities. The U.S. Department of Education’s 2014 OCR letter cautioned charter schools to not illegally exclude students with disabilities;<sup>187</sup> yet, more guidance is needed to clarify the legal parameters when charter schools exclude students *without* disabilities or without a specific disability, such as autism. Although it is unlikely to occur, Congress could also amend IDEA to clarify the LRE and IEP team decision-making issues that arise at some charter schools designed specifically for students with disabilities.

To prevent future litigation, researchers should continue to investigate the extent of legal violations at niche charter schools. Our dataset is comprised of a comprehensive set of judicial decisions; yet, much could be learned from supplementing this information with data collected from surveys, interviews, and observations. While a legal analysis can provide insights that a purely qualitative analysis is unable to provide, this study does not uncover underlying descriptions about what is occurring at autism charter schools. In order to reveal these valuable insights, future research should utilize qualitative methods to seek input from administrators, educators, and parents. Further, we only examined published court opinions, but much could be learned from disputes where lawsuits are threatened, settled, or appear in unpublished court opinions. Future researchers could review OCR and other relevant complaints, as well as the charter applications of charter schools designed for students with disabilities.

This study adds to the emerging literature about niche charter schools. We reviewed a pool of 169 cases to find that only nine were relevant to segregated learning environments at charter schools. No case involved an autism charter school and only one case offered guidance about ability-level segregation at charter schools. Despite this limited litigation, it is likely that future lawsuits will be filed alleging illegal segregation at charter schools. Therefore, this Article increases awareness about the possibility of legal challenges against autism and other charter schools, and provides practical solutions as to how lawsuits can be prevented.

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183. MEAD, *supra* note 25.

184. OHIO REV. CODE ANN. § 3314.061 (West 2013).

185. TEX. EDUC. CODE ANN. § 12.1014(e) (West 2013).

186. See Kevin P. Brady, Regina R. Umpstead & Suzanne E. Eckes, *Unchartered Territory: The Current Legal Landscape of Cyber Charter Schools*, 2010 B.Y.U. EDUC. & L.J.

191, 209–10 (2010) (providing a similar recommendation that state legislators provide clarity about cyber charter schools).

187. See Letter, *supra* note 18.