INTRODUCTION

The jury has been out regarding the effectiveness of charter schools across the nation since their inception in the 1990’s. Charter schools are “publicly funded elementary or secondary schools that have been freed from some of the rules, regulations, and statutes that apply to other public schools, in exchange for some type of accountability for producing certain results, which are set forth in each school’s charter.”\(^1\) Supporters of charter school education advocate that the schools promote parent choice, school autonomy, and innovation.\(^2\) Critics argue that charter schools lack stability, produce the same results as traditional public schools, and take away state funding resources without adequately address the widespread problems in public school systems.\(^3\)

Some studies report student successes in charter schools while others demonstrate the same, or even worse, results as traditional public schools.\(^4\) One reason for the discrepancies in charter school research is that charter schools vary significantly in their methods, teachers, and


\(^3\) Id.

even formation from one school to the next. As the debate about charter schools continues, children with disabilities are often left out of the conversation. For the most part, charter schools are inaccessible to students with disabilities, particularly students with more severe disabilities. However, students with disabilities who are enrolled in charter schools can receive substantial, albeit different, benefits in the charter environment. Recognizing that each charter school is not alike, this paper will demonstrate that charter schools are not as accessible to students with disabilities as traditional public schools because of their limited resources that leads to the “counseling out” of these students. This paper will also show why students with disabilities can benefit from charter schools if they become more accessible.

**WHY ARE FEWER STUDENTS WITH DISABILITIES ENROLLED IN CHARTER SCHOOLS?**

As public schools, all charter schools must abide by civil rights statutes such as Section 504 of the Rehabilitation Act and the Americans with Disabilities Act (ADA). Furthermore, each state that receives federal funds must comply with the Individuals with Disabilities Education Act (IDEA). Because charter schools are a part of a state’s public education system, all charter schools must comply with IDEA and its regulations concerning the education of students with disabilities.

A charter school’s responsibilities in providing services under IDEA and Section 504 stem from its legal identity as either a local educational agency (LEA) or as part of a larger LEA. If a charter school is its own LEA, it has the sole responsibility for the education of students with disabilities and must provide those students with evaluations, an Individualized...
Conversely, if a charter school is part of a LEA, the LEA bears the majority of the responsibility for providing special education to those students. This identification can have a significant impact on a charter school’s ability to comply with IDEA’s requirements, especially if the school is largely unaware of those requirements, as well as the school’s ability to finance special education. An independent LEA often lacks the resources, both financial and personnel resources, to effectively administer special education.

Despite federal and state requirements, charter schools do not always comply with the statutory and procedural guidelines set forth in IDEA nor do they enroll the same proportion of students with disabilities as traditional public schools. A February 2010 study demonstrates 13.6% of the nation’s public school students have IEPs whereas 9.8% of charter school students have IEPs. Charter schools educate a smaller percentage of students with disabilities than traditional public schools due, in part, to the “counseling out” of students with disabilities that stems from a school’s apprehension of providing special education with limited resources.

A student with a disability is “counseled out” of a charter school when that student is told he/she cannot attend the school during the admissions process, or that the school cannot provide

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9 Id. at 12.
10 Id.
14 Hehir, supra note 12.
the modifications or accommodations necessary to enable that student to attend.\(^ {15}\) Findings from nearly every state suggest that charter schools engage in this activity.\(^ {16}\) Recent survey data even indicates that 3% of charter schools have openly told parents they cannot enroll their child because of their disability and 44% admitted to advising parents that another school might offer “more appropriate services.”\(^ {17}\) It is both discriminatory and illegal to engage in counseling out of students with disabilities.\(^ {18}\) However, the U.S. Charter Schools website says, “Determining whether a particular educational environment is the best placement is not discrimination if conducted in an appropriate manner (ie: by an IEP team) and based on an individual child’s needs.”\(^ {19}\) Therefore, charter schools may decide that a student may not receive a “free appropriate and public education” (FAPE) or that the student will not be educated in his/her Least Restrictive Environment (LRE) at a specific charter school.

Some charter school advocates explain that schools counsel out students with disabilities due to: the difficulty in meeting all students’ needs with limited funding; charter school administrators’ lack of knowledge about special education; and the philosophical clash between charter schools’ desire for autonomy and the government mandates of IDEA.\(^ {20}\) According to Project Search’s research, “Many of those [charter schools administrators] interviewed explained that often counseling-out was not done with the intention of discrimination, but because they truly believed their school was not the best option for the potential student or because they did not realize the extent of the charter school’s responsibility.”\(^ {21}\)

\(^{16}\) Project Search, supra note 6 at 27.
\(^{17}\) Rhim, supra note 11 at 13.
\(^{20}\) Project Search, supra note 6 at 27.
\(^{21}\) Id.
While charter schools face similar challenges as traditional public schools in terms of finding appropriate special education staff and providing services with limited resources, they are also burdened by their unfamiliarity with the administration of special education services and their inability to access certain state resources.\textsuperscript{22} Some of these challenges can result from a school’s identification as an independent LEA. In her paper on special education challenges in the charter school setting, Lauren Morando Rhim points to two categories of challenges that charter schools face: procedural challenges and operational challenges.

Procedurally, charter schools are often unaware of the vast responsibilities required by federal, state, and district laws in the administration of special education.\textsuperscript{23} Additionally, charter schools are also often unaware of LEA and state funding schemes and the means of obtaining additional funds to serve students with disabilities.\textsuperscript{24} They have inadequate access to state service and support structures already in place to help students with disabilities. In Illinois, for example, school districts are permitted to pool together their funds in special education cooperatives in order to maximize special education resources, such as transition services, for a greater number of students in the area.\textsuperscript{25} Charter schools often have limited access to these cooperatives.\textsuperscript{26} In New York, charter schools are statutorily denied access to intermediate agencies, publicly funded entities that provide special education services to multiple districts, unless they purchase the services at a market rate.\textsuperscript{27}

Charter schools also face a variety of operational challenges when attempting to administer special education to their students. Charter school operators cite the five following

\textsuperscript{22} Rhim, \textit{supra} note 11 at 10.
\textsuperscript{23} \textit{Id.}
\textsuperscript{24} \textit{Id.} at 15.
\textsuperscript{25} See 105 Ill. Comp. Stat. 5/10-22.31
\textsuperscript{26} Rhim, \textit{supra} note 11 at 15.
\textsuperscript{27} \textit{Id.} at 16.
areas as ongoing challenges in special education: having adequate funds to provide special education services; “No Child Left Behind” requirements related to students with disabilities; obtaining IEP files from a student’s prior schools; finding qualified special education teachers; and finding qualified related services personnel.28

While these barriers are no excuse for counseling out students with disabilities, they shed some light on why charter schools are apprehensive to enroll students with disabilities. Charter schools cannot cite ignorance as an excuse for avoiding their responsibilities under IDEA, but they might better understand their obligations under special education laws if they tapped into the resources of other LEAs and traditional public schools. If charter schools had more supports from surrounding districts and cooperatives, they could utilize more funds and resources for special education as well as receive guidance on the procedural requirements of IDEA and state special education laws. A better understanding of the laws and regulations could prevent charter schools from counseling out students with disabilities out of a fear that they could not be accommodated.

On the other hand, there is additional evidence that some charter schools counsel out students with disabilities because they seek to improve their test scores. In high-performing charter schools such as Harlem Success in New York, at least half a dozen lower-grade students who were eligible for IEPs withdrew this school year.29 The school pressures parents of students with disabilities to remove their children prior to third grade, the year state testing begins.30 One teacher at the school, Paul Fucaloro, says, “I’m not a big believer in special ed.” In an attempt to demonstrate student progress, and to obtain additional private funding, some charter schools

28 Rhim, supra note 6 at 18.
30 Id.
counsel out students with disabilities to ensure higher test scores. In the current fiscal year alone, Success Charter Network has raised $4.8 million from private benefactors. While the pressure is on charter schools “to produce positive academic results” or risk losing the school’s contract, counseling out students with disabilities to increase test scores or to balance a school’s budget is illegal.

IS THE CHARTER SCHOOL ENVIRONMENT EVEN APPROPRIATE FOR STUDENTS WITH DISABILITIES?

Regardless of the reason for “counseling out” students with disabilities, charter schools should be more closely monitored by state boards of education to end this conduct. Not only is it illegal for schools to discourage students with disabilities from attending public institutions, but students with disabilities may also receive meaningful benefits from their enrollment at a charter school. If a student’s LRE is a charter school classroom, that student should have access to it.

The Supreme Court has concluded that a school provides a FAPE to a student “by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.” A school’s burden to provide FAPE to a student is not an onerous one. If the student with a disability is able to benefit from his/her education, the school meets its legal requirements under IDEA. While the law does not require a school to maximize a student’s educational opportunities, parents obviously desire an optimal education for their children. One of the founding principles behind charter school education is that the schools “create choice for parents and students within the public school system.” But why would parents or students choose charter schools over traditional public schools?

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31 Id.
34 Id.
According to the U.S. Department of Education’s study on charter schools and students with disabilities, parents enroll their children with disabilities in charter schools for two categories of reasons: positive characteristics of the charter school and negative experiences with their prior non-charter school.\(^{36}\) Two positive characteristics of charter schools seem to envelop most of the other positive attributes. First, teachers at charter schools spoke of individualizing instruction for all students, including those with disabilities.\(^{37}\) Some students in the study noted that their charter schoolteachers were more caring and more committed to their success than teachers at their previous non-charter schools.\(^{38}\) This individualized instruction is the crux of a student’s IEP and one of the core values of IDEA.

Second, charter school administrators and teachers reported that students with disabilities were fully integrated into the overall life of the school.\(^{39}\) This integration is demonstrated by the inclusion of students with disabilities in the general education classroom. However, while many charter schools cited inclusion as a pedagogical preference and utilized a special education teacher/instruction in the general classroom, other charter schools noted that full inclusion was the only option because they lacked the supports or staff to pull out students with disabilities.\(^{40}\) Regardless of the motivation for inclusion, at a majority of the schools, students with disabilities indicated that they had better relationships with their peers and with the staff than at their


\(^{37}\) Id. at 23.

\(^{38}\) Id. at 28.

\(^{39}\) Id. at 22.

\(^{40}\) Id. at 23.
Another pillar of IDEA is educating a student in his/her LRE. While each disabled child’s LRE may not be the general education classroom, it can be for some students.

Though the Department of Education study indicates several positive attributes of charter schools for students with disabilities, the data also reflects that negative experiences with a prior non-charter school outweigh the positive charter results. The report says, “Dissatisfaction with the [prior] school in general or with the special education program in particular was cited more frequently than any other reason for transferring a child.” Therefore, “parent choice” can often be described as a choice between the lesser of two evils. Critics of charter schools remain concerned that charter schools take away resources from traditional public schools without addressing the endemic facing the public school system. Some parents reported transferring their child to a new charter school even though they knew nothing about it because “they thought that the charter school had to be better than the previous situation.” This can be particularly concerning in light of the fact that some charter schools have no special education infrastructures in place.

Another factor parents should consider when deciding whether to enroll their disabled child in a charter school is the severity of the child’s disability. Charter schools may be able to provide FAPE to some students with disabilities, but might be an entirely inappropriate setting for children with more severe disabilities. Again, this stems from inadequate support structures and special education personnel. Many charter schools are currently unable to provide an appropriate education for students with more severe disabilities. Research reflects that students

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41 Id. at 33.
42 Id. at 17.
43 Id.
44 Donahoo, supra note 2.
45 Dept. of Education Study, supra note 36 at 17.
with disabilities who are enrolled in charter schools tend to have disabilities that are less severe in nature and less costly to remediate, while district schools tend to have a higher concentration of students with moderate or severe disabilities.\(^{46}\) This is not to say that charter schools may legally discriminate against students with more severe disabilities or engage in counseling out of those students. They share the responsibility of providing an appropriate education to students with even more serious disabilities, if that student can benefit from his/her education at the charter school. They must also share the costs that come from funding an education for students whose disabilities require more expensive services. The failure of charter schools to enroll these students places a disproportionate financial burden on traditional public schools.\(^{47}\)

However, at this point, most charter schools are unable to provide an appropriate education to students with more severe disabilities for many of the reasons already discussed. These schools lack: qualified special education instructors, funding, accessible classrooms, strong relationships with LEAs and surrounding districts, and more. A potential solution for some of these problems is identifying a charter school as part of a LEA instead of its own LEA. If a charter school is already part of a LEA, it should utilize the resources of the LEA. The LEA representative, such as a principal, special education director, case manager or counselor, could help facilitate problem-solving at charter schools, especially because this person has in depth knowledge of special education laws and resources.

**CONCLUSION**

Because charter schools are relatively new, they lack many of the resources necessary to administer special education services effectively. These challenges fall into two main categories: procedural and operational. While charter schools do enroll students with disabilities, research

\(^{46}\) Miron, *supra* note 13.

\(^{47}\) Hehir, *supra* note 12.
indicates that they enroll fewer students with IEPs than traditional schools and the students they do enroll have less severe disabilities. Statutory and school identification barriers contribute to charter schools’ lacking resources which often leads to the “counseling out” of these students.

It is unfortunate that students with disabilities are often counseled out of charter schools. Certain students, generally those with less severe disabilities, can receive benefits from the charter environment that they might not be receiving to the same degree in a traditional public school, particularly individualized instruction from caring teachers and inclusion in the general education classroom. Therefore, charter schools should be encouraged to enroll these students. This encouragement might come from changing the identification of a charter school and improving its relationship with the surrounding LEAs and school districts. Additional statutory changes to laws that inhibit a charter school’s ability to access state funding, special education cooperatives, and other resources might also improve a charter school’s ability to administer special education.

Finally, “at a minimum, charter schools with low enrollments of students with disabilities should be monitored by government agencies to determine if any violations of federal or state laws exist.” Additional monitoring, and potential litigation, might motivate charter schools to make necessary changes to their special education resources. Though the debate is ongoing about charter schools’ effectiveness, President Obama does not intend to abandon the charter school method in the near future. Therefore, educators, administrators, parents and lawmakers should focus on how to improve charter schools for all students, including students with disabilities.

48 Id.