

Embracing Religious Institutions Operating Charter Schools

Universal education for all citizens is a cornerstone of American democracy. While the public school system is governed by federal, state, and local laws, the primary responsibility lies with the local governments. Most public schools are financed by local property taxes but they also receive funding from the federal government if they meet minimum standard guidelines. Since the schools financial status depends on the financial status of the community, the public education system reflects the economic disparities among counties within a state, or respective districts. The lack of funding for many schools has greatly contributed to the decline in the public school system. As this trend continues, the general public's frustration with the system increases, and they turn to their local and state government for the answers.

In the mid-1990s state legislatures began passing charter legislation in response to the growing public frustration with the public school system¹. This marked a drastic movement from the former approach of trying to reform existing schools by permitting the creation of entirely new schools—charter schools. Charter schools challenge the existing notions of the public education system on numerous levels. Sponsors wishing to create a charter school submit an application to the local school board for approval. This paper will argue that religious institutions should be allowed to sponsor charter schools in Illinois. A discussion of what charter schools are, the problems arising from a religious institution sponsoring a charter school under the Establishment Clause, the benefits of religious institutions operating charter schools, and the specific issues preventing religious institutions from operating charter schools in Illinois will accompany this argument.

A Look into Charter Schools

¹ www.uscharterschools.org

Charter schools are non sectarian public schools that are exempt from many of the regulations that apply to traditional public schools.² A “charter” is a performance contract which specifies the school’s mission, program, goals, student population, and methods of evaluation.³ Charter schools are accountable to their sponsor, usually a state or local school board, for complying with the terms of the charter agreement.⁴ The length of time for which a charter is granted varies, but most are granted for three to five years.⁵ Upon expiration, the entity granting the charter may renew the school’s contract.⁶ The establishment of charter schools within a district provides parents with a form of parental school choice.⁷ This choice is hoped to foster competition within the public school system and consequently impel public schools to improve.

Each state has taken its own approach to charter schools. States may be limited to the amount of control that they can grant charter schools because of the language contained in their state constitutions.⁸ Some constitutional provisions may mandate the level of state supervision required. Thus, in some states charter schools may more closely resemble traditional public schools while in other states they may be more similar to private institutions.⁹ State legislation may specify what types of entities may apply for a charter, who may grant a charter, and restrictions for conversions to charter school status.¹⁰ Charters may be developed in one of three ways: (i) a new educational program not in existence before being granted its charter, (ii) a traditional public school is converted to charter school status, or (iii) a private school or program

² Preston Green III, *Charter Schools and Religious Institutions: A Match Made in Heaven?*, 158 Ed. Law Rep. 1, 2 (2001).

³ U.S. Charter Schools, Overview, http://www.uscharterschools.org/pub/uscs_docs/o/index.htm.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ Julie F. Mead, *Devilish Details: Exploring Features of Charter School Statutes That Blur the Public/Private Distinction*, 40 Harv. J. on Legis. 349, 350 (2003).

⁸ Robert J. Martin, *Charter the Court Challenges to Charter Schools*, 109 Penn St. L. Rev. 43, 48 (2004).

⁹ Mead, *supra* note 7, at 351.

¹⁰ *Id.* at 353.

may be converted to a public charter school.¹¹ A state charter statute may permit the establishment of one, two, or all three types of charter schools.

Converting an existing public school to a charter school is probably the least contested method of establishment. Usually, political interests play an important role in the granting of a school's charter. State to state variations are greater in regards to the conversion of private schools into public charter schools. Only nine states and the District of Columbia allow this conversion while twenty-seven states, including Illinois, expressly prohibit them.¹² States that specifically ban the conversion of private schools encounter problems when determining whether a school is new school occupying an old building or a conversion school.¹³ In attempts to thwart this problem, a state may include in its definition of conversion when a new charter school wishes to occupy a premises formerly used by a private school.

Religious Institutions and Charter Schools

Religious institutions have numerous incentives for participating in charter school programs. Charter schools would help provide churches a way to educate students who cannot afford to pay private tuition.¹⁴ This is increasingly important at a time when enrollment at religious institutions is declining and they are struggling to keep their doors open.¹⁵ If a religious institution receives a charter they will be able to keep or improve their educational programming and offer higher salaries to teachers.¹⁶ Religious institutions have a better chance of receiving public funding through charter grants than from school voucher programs, a program that has yet

¹¹ Mead, *supra* note 7, at 353.

¹² *Id.* at 356; 105ILCS5/Art. 27A

¹³ *Id.*

¹⁴ Green, *supra* note 2, at 2.

¹⁵ *Id.*

¹⁶ *Id.*

to be adopted by any state.¹⁷ In addition, most provide a variety of secular services already, such as athletics and tutoring.

To receive federal funding for charter schools under the Public Charter School Grants Program (PSCP) states must follow the federal definition of a charter school and not affiliate with a sectarian school or religious institution.¹⁸ Whether a religious institution can operate a charter school is primarily a question of state law and policy. States that do not prohibit religious institutions from obtaining a charter allow religious institutions to operate charter schools as a public school.¹⁹ Charter schools must be nonsectarian in their programs, admissions policies, employment practices, and other operations. Religious institutions face even more difficulties than other institutions seeking to obtain a charter because they must abide by the First Amendment. Litigation suits increasingly arise as to whether including sectarian schools would violate the Establishment Clause and its affiliated doctrine pertaining to the separation of church and state.²⁰

Religious institutions or their members may try to involve themselves with the charter movement through a variety of methods. These include trying to operate a charter school in its official capacity, attempting to convert a parochial school into a charter school, contracting with charting schools to provide secular services, and entering into leasing agreements with charter schools.²¹ In attempting to address some of the issues religious institutions involvement in the charter school process raise, the Department of Education issue non regulatory guidance in December 2000.²² These guidelines stated that private schools that converted into charter

¹⁷ Green, *supra* note 2, at 2.

¹⁸ Martin, *supra* note 8, at 55.

¹⁹ *Id.* at 51.

²⁰ *Id.* at 55-56.

²¹ Green, *supra* note 2, at 7.

²² *Id.* at 5.

schools were ineligible for PSCP funds and also prohibited parochial schools that converted into charter schools from receiving funds.²³ Charter schools that contract with religious institutions for secular services are permitted regardless of whether the school received PSCP funding, as long as no public funds went towards the advancement of religious or encourage religious activity.²⁴ If a charter school leases space from a religious institution, it must ensure that the school selected the space based on religious neutral criteria and that the space contained no religious symbols.²⁵

It is critical to note the distinction between accommodation and promotion of religious observance in the context of religious education and violations of the Establishment Clause.²⁶ If an activity has a religious purpose, and the school effectively promotes religion by potentially compelling non-practicing students to participating, the court will most likely find a school to be actively promoting a religious observance and thus in violation of the Establishment Clause.²⁷ Daily prayer, studying religious texts, and non attendance at school on religious holidays are examples of religious observances that a school may not actively promote. However, a school may choose to accommodate certain religious observances because the Supreme Court says the school does “not directly promote religious but rather respect[s] and indirectly facilitate[s] a student’s own choices.”²⁸ Permissive religious observances include allowing students to miss school on religious holidays, engage in prayer or text study not conducted by the class, and wear clothing indicating their religious preference.²⁹

²³ Green, *supra* note 2, at 5.

²⁴ *Id.*

²⁵ *Id.* at 6.

²⁶ Benjamin Siracusa Hillman, *Is There a Place For Religious Charter Schools*, 118 Yale L.J. 554, 562 (2008).

²⁷ *Id.*

²⁸ *Id.* at 563.

²⁹ *Id.*

Benefits of Religious Charter Schools

Both parents and teachers tend to choose charter schools for the advantageous opportunities they provide over traditional public schools in most districts. Charter schools are held to high educational standards and held accountable for the academic results to several groups of people.³⁰ Both parents and teachers appreciate the small class sizes that these schools offer because it allows more individualized attention for each student. Furthermore, parents often choose charter schools because they practice educational philosophies that are in line with their own beliefs.³¹ Religious institutions that open charter schools shed the faith based practices and teach the values and culture of the religion in an academic context.

Opponents to religious charter schools say that public schools should remain value neutral, as the promotion of religious values undermines the separation of church and state. While charter schools are free from some of the regulations that apply to public schools, they are still public schools.³² This notion that public schools are value neutral is ludicrous. The history of the United States traces the influences of Protestant teaching through the public school system.³³ With the rise of American religious diversity along with judicial enforcement of the Establishment Clause, the Protestant influence in public schools declined.³⁴ Yet “Christmas” and “holiday” assemblies still occur in most public schools throughout the United States, with relatively few objections.

The values taught within a school usually reflect the community which it serves. This is due to the strong local structure of the public school system because decisions get made at a local

³⁰ U.S. Charter Schools, Overview, http://www.uscharterschools.org/pub/uscs_docs/o/index.htm.

³¹ *Id.*

³² Charles C. Haynes, “Inside the First Amendment: Religious Charter Schools: Following the money, lose the faith”, Gannet News Services, June 24, 2008.

³³ Hillman, *supra* note 26, at 581.

³⁴ *Id.* at 580.

level, where the contestation of normative values happens.³⁵ Therefore, in areas with minimal religious diversity between students and teachers, the religious values may permeate through the classrooms with few objections being raised to these practices.³⁶ Those who wish to object may fear social retaliation if they protest, or may lack the resources to bring a change to the status quo.³⁷ Thus, the schools tend to foster the values of the community without expressly stating an intention to do so.

Religious charter schools expand upon the values of the community and the history of the public school system. Religious institutions already play an important role in many communities and charter schools are directed towards a narrower segment of the population than traditional public schools.³⁸ Many families are unable to afford parochial schools and want their children to learn in an academic environment that fosters the same values they practice at home. By allowing parents to participate in the creation of charter schools grounded in their values, these schools become a conduit for members of religiously observant communities to meet their own needs.³⁹ When these families have a stake in the public school system, they place a higher value in public life generally and this in turn fosters democracy.

Democracy thrives on community building and the achievement of common purposes. A common problem with the public schooling system is the conflicting values and beliefs on how and what should be taught. Charter schools offer a solution to this problem because each school fosters a specific mission and parents who send their children to these schools agree for their child to be taught in accordance with that mission. Thus, charter schools collectively build a smaller sense of community within a larger community framework. Communities that want to

³⁵ *Id.* at 584.

³⁶ Hillman, *supra* note 26, at 584.

³⁷ *Id.*

³⁸ *Id.* at 587.

³⁹ *Id.* at 589.

permit religious institutions to establish charter schools should be allowed to do so, in furtherance of democratic principles.

In recent years religious institutions have experienced increasing financial pressures that are causing them to shut down their independently owned parochial schools. As Catholic Archbishop Donald W. Wuerl told The Washington Post, “We simply don’t have the resources to keep all those schools open”.⁴⁰ This has led religious groups, such as the Catholic diocese, to look at charter schools as a funding alternative. Opponents to religious charter schools believe that the government should not support the funding of religious institutions in any way. However, what these opponents do not realize is how much money these parochial schools have saved the government from spending on education. In 1998, a Special Task Force on Catholic Schools released a two year study in which it found that the Archdiocese of Chicago would have to close or downsize some of its 270 elementary schools in Cook and Lake Counties within a year unless it found new funding.⁴¹ The Archdiocese educates many poor children who are not Catholic. The Catholic Conference of Illinois estimated in 2000 that there were 594 Catholic schools educating 212,285 children. It stated that these schools saved Illinois \$1.4 billion annual, which is what it would cost to educate those students in public schools.⁴²

Challenges & Proposals for Religious Institutions

On June 16, 2008 seven Roman Catholic schools in Washington D.C. were transformed into seven public charter schools.⁴³ The Catholic schools cited lack of public funding as a main reason for converting to charter schools. Other religious groups, such as Judaism, have opened

⁴⁰ Charles C. Haynes, “Inside the First Amendment: Religious Charter Schools: Following the money, lose the faith”, Gannet News Services, June 24, 2008.

⁴¹ Illinois School Choice, www.heritage.org/research/education/schoolchoice/illinois.cfm. (last visited May 8, 2009).

⁴² *Id.*

⁴³ Charles C. Haynes, “Inside the First Amendment: Religious Charter Schools: Following the money, lose the faith”, Gannet News Services, June 24, 2008.

non-religious schools and include the language portion of their faith, in this case Hebrew, in their mission statement.⁴⁴ Conversion requires these schools to be non sectarian, meaning they can neither promote nor denigrate religion.⁴⁵ The state statutes by which religious institutions establish charter schools must be constitutional both facially and “as applied”. However, the biggest problem for most religious institutions is that the Supreme Court has held that state constitutions may impose greater separation between church and state than the Establishment Clause requires.⁴⁶

State statutes with more permissive methods for allowing religious organizations to participate in establishing charter schools should be more weary of “as applied” challenges than “facial” statutory constitutional challenges. The Supreme Court decision in *Bowen v. Kendrick* suggested that a statute that permits religious institutions to be involved in charter schools might withstand a facial constitutional challenge by showing that it does not have the primary effect of advancing religion.⁴⁷ It can do this by using religiously neutral criteria when awarding charters. The critical factor would be whether the statute on its face awarded charters primarily to pervasively sectarian institutions.⁴⁸ The Supreme Court identified three factors that reduced the risk of providing government funds to sectarian institutions under the Establishment clause: (i) the statutes neutral grant requirements; (ii) the wide variety of eligible public and private organizations, and (iii) the large number of eligible religious institutions that were not pervasively sectarian.⁴⁹

⁴⁴ Charles C. Haynes, “Inside the First Amendment: Religious Charter Schools: Following the money, lose the faith”, Gannet News Services, June 24, 2008.

⁴⁵ *Id.*

⁴⁶ Green, *supra* note 2, at 16.

⁴⁷ *Id.* at 7.

⁴⁸ *Id.*

⁴⁹ *Id.*

Once state statutes are found facially constitutional, “as applied” challenges may prove more problematic for religious institutions wishing to participate in charter schools. Sponsors, those in charge of granting the charters, must show that their decision was based on the educational value of the proposal.⁵⁰ This is easier to show in the context of higher-education, since the Supreme Court has twice found that church-operated colleges and universities were not pervasively sectarian and therefore eligible for governmental funding.⁵¹ However, in regards to elementary and secondary education the Supreme Court has never clearly stated whether a school operated by a religious institution is automatically pervasively sectarian.⁵² Furthermore, religious institutions operating charter schools might also have to satisfy the requirements of the endorsement test. The biggest problem religious institutions face in this area is that the younger children are more likely to perceive an impermissible symbolic link between the charter school and the religious institution.⁵³

Religious institutions seeking to establish charter schools in Illinois face numerous difficulties. Illinois charter law statute was established in 1996 and has been classified as a “weak” charter school law.⁵⁴ Illinois ranks twenty-second out of the forty-one states that currently allow public charter schools for the total number of available charters.⁵⁵ The statute is so restrictive that it prevents the expansion of the charter system throughout the state, even though Illinois charter schools are among the top performing charters in the country.⁵⁶ In 1996 the Illinois General Assembly approved 45 charter schools for the state of Illinois: fifteen in Chicago, fifteen in Chicago suburbs, and fifteen in the rest of the state. In 2003, they approved

⁵⁰ Green, *supra* note 2, at 10.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at 12.

⁵⁴ www.heritage.org/research/education/schoolchoice/illinois.cfm

⁵⁵ Illinois Network of Charter Schools, News Release (Sept. 8, 2008), http://www.incschools.org/news_releases.html

⁵⁶ *Id.*

an additional fifteen charters for Chicago. The statute expressly prohibits funding to institutions that are controlled by religious organizations. Furthermore, the statute expressly prohibits the granting of charters to convert “any existing private, parochial, or non-public school to a charter school”.⁵⁷

The cap on charter schools and the express prohibition of funding are the two biggest obstacles religious institutions face to operating charter schools. Currently, there are only 39 charters throughout the whole state and in Chicago there are no more charters left to grant, all the while the demand for charter schools throughout the state continues to grow. As of June 2008, 13,000 students remained on waiting lists and many more children lack the opportunity to even access the charter system.⁵⁸ Thus the first problem religious institutions face is that unavailability of charters in most geographic localities in Illinois. The Illinois legislature needs to address this issue by lifting the caps in place and allowing a state independent authorizer to get charters to communities where they are needed the most.⁵⁹ Secondly, the legislature needs to revise the statute to permit funding for specific institutions operated by religious organizations. The legislature should include plans for monitoring that the funds are used properly and to ensure compliance with the Establishment Clause.

Conclusion

In summation, charter schools provide numerous benefits to the communities where they are established. They not only provide parents with an opportunity to choose whether to send their children to traditional public schools or to a public school that fosters values similar to ones at their own home, but they also provide parents an opportunity to send their children to a school

⁵⁷ 105 ILCS 5/Art.27A-4(c)

⁵⁸ Illinois Network of Charter Schools, News Release (June 12, 2008), http://www.incschools.org/news_releases.html

⁵⁹ *Id.*

with higher educational standards in areas where the traditional public schools are failing.

Religious institutions play a strong role in society and foster community development which further enhances democratic principles. In many areas, the values of the community and the religious institutions greatly overlap. As long as religious institutions refrain from promotion of religion under the Establishment Clause, they should be allowed to participate in charter schools.

The current Illinois statute should be amended to increase the number of charter schools permitted throughout the state and allow religious institutions to operate charter schools.