

The Civil Rights Project



*Proyecto Derechos Civiles*

Equity Overlooked:  
Charter Schools and Civil Rights Policy

*By*

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## Executive Summary

The expansion of charter schools is a central policy focus of the Obama Administration. Charter schools encompass a variety of schools with different priorities serving many communities and students from a range of backgrounds. There are outstanding and diverse charters, some of which have been highlighted by this or prior administrations. While the administration has acknowledged the importance of regulating and closing low performing charter schools, it has yet to respond to concerns raised about continued racial isolation in charter schools.

Why is this lack of civil rights oversight so troubling? Without necessary safeguards against the segregating effects of charter schools, disadvantaged families are left to comprehend and cope individually with the complicated landscape of school choice. Access to the educational marketplace is unequally constrained by a number of factors, including contact with advantaged social networks through which information regarding school quality is exchanged, language barriers, socioeconomic status and the ability of parents to arrange transportation for their schoolchildren. Unless proactive equity measures – like extensive outreach and free transportation – are embedded in the design of charters, and subsequently *monitored* and *enforced*, this popular version of education reform simply reinforces unequal educational opportunity.

The Civil Rights Project is in the midst of an analysis of rapidly growing charter school enrollment, which we anticipate releasing next month. Similar to trends described in our 2003 report and in other research on racial isolation in charter schools, we find higher levels of segregation for black students in charter schools compared to traditional public schools. This finding is particularly striking given that the CRP has reported increasing segregation for black (and Latino) students in public schools for nearly two decades. In other words, charter school segregation levels for black students are even outpacing steadily increasing public school segregation.

As new incentives for expanding charter schools continue to emerge, it is critically important for the federal government to issue and enforce new guidance on charter schools and civil rights policy. With many states pursuing the expansion of charter school programs - in the face of mounting evidence linking charters to increased levels of segregation - there should be no further delay. This paper describes the contours of state legislation relating to charter schools and racial diversity, as well as limited oversight activities to monitor compliance with these policies. We also highlight serious gaps in charter school enrollment data based on an on-going Civil Rights Project analysis of charter school racial, socioeconomic and linguistic segregation. We conclude with recommendations for designing charter school civil rights policy to ensure that the spread of educational choice continues to provide equal opportunities and integrated education to students from all backgrounds.

## Equity overlooked: Charter schools and civil rights policy

The last half of the twentieth century witnessed a steady movement towards increased family and student choice in education. As a reform strategy, school choice promises an influx of educational alternatives to compete with existing public schools, with proponents of choice arguing that creating an education marketplace of schools to meet student demand will force *all* schools to improve and, consequentially, will lead to improved student achievement. Choice has captured the political imagination of stakeholders at all levels of government, across the ideological spectrum. A current manifestation of that interest is seen through intensifying levels of support for charter schools.

Charter programs are public schools operating in accordance with a founding charter formulated by stakeholders. They are not subject to traditional school regulations. Advocates initially touted this flexibility as a way to promote innovation, but it is now more commonly cited as a strategy to raise student achievement. Federal backing for charter schools grew under the administrations of Presidents George H.W. Bush and Bill Clinton and continues to mount. In June 2009, U.S. Secretary of Education Arne Duncan indicated the ten remaining states without charter school legislation - along with states imposing limits on the number of charter schools established - would be at a disadvantage to receive more than four billion dollars worth of federal education stimulus money.<sup>1</sup> With such strong federal financial incentives for authorizing or increasing the number of charter schools, particularly in a larger context of declining state and local education revenues, Secretary Duncan's message to states unambiguously underlines the present importance placed on furthering charter school initiatives.<sup>2</sup>

At this juncture, a careful and nuanced understanding of the charter school impact is critical. The recent emphasis on charter expansion in order to get priority for much-needed education funds makes it increasingly necessary to step back and examine what the evidence about charter schools tells us nearly two decades after the first charter school opened in Minneapolis, Minnesota. The old adage "study your past if you would define your future" holds true as charters continue to be promoted as a 21<sup>st</sup> century solution for improving American education.

The Civil Rights Project has documented increasing public school segregation for almost twenty years.<sup>3</sup> Research continues to substantiate an array of harms associated with segregated learning environments,<sup>4</sup> rendering the racial composition of charter schools a policy question of vital importance for the educational and life opportunities of the next generation. The following brief outlines several key issues associated with racial isolation and the burgeoning charter

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<sup>1</sup> Miron, G and Dingerson, L., "The Charter School Express," *Education Week*, (October 2, 2009.)

<sup>2</sup> A recent article described this as a "bid for the Olympics". Dillon, S., "States Mold School Policies to Win New Federal Money," *New York Times*, (November 10, 2009). Available at <http://www.nytimes.com/2009/11/11/education/11educ.html?hp>

<sup>3</sup> Importantly, for our purposes, minority isolation is often linked with poverty and linguistic segregation. Orfield, G. *Reviving the Goal of an Integrated Society: A 21st Century Challenge*. (Los Angeles, CA: The Civil Rights Project/Proyecto Derechos Civiles at UCLA, 2009).

<sup>4</sup> Linn, R. and Welner, K., Eds, *Race-conscious Policies for Assigning Students to Schools: Social Science Research and the Supreme Court Cases*, (Washington, D.C.: National Academy of Education, 2007); Orfield, G., Frankenberg, E., and Garces, L. M., "Statement of American Social Scientists of Research on School Desegregation to the U.S. Supreme Court in *Parents v. Seattle School District* and *Meredith v. Jefferson County*," *The Urban Review* 40 no. 1, (October 2008): 96-136; Mickelson, R. A., "Twenty-First Century Social Science on School Racial Diversity and Educational Outcomes," *Ohio State Law Journal* 69 (2008): 1173-1228.

movement. We first provide a short historical description of the guiding tenets of charter, magnet school and choice ideology. Next we describe the contours of state legislation relating to charter schools and racial diversity, as well as the limited oversight activities to monitor compliance with these policies. And finally, we describe serious gaps in charter enrollment data garnered from an on-going Civil Rights Project analysis of racial, socioeconomic and linguistic segregation in charter schools. We conclude with recommendations for designing policy to ensure that the spread of educational choice continues to provide equal opportunities and integrated education to students from all backgrounds.

## **Ideology and Origins of School Choice and the Charter Movement**

School choice is a longstanding concept with important early historical roots in the days of resistance to southern desegregation. Although eventually blocked by the Supreme Court,<sup>5</sup> one early reaction to *Brown v. Board of Education*<sup>6</sup> was to shut down public school districts and provide state-financed vouchers allowing white students to attend private schools (referred to as segregation academies). “Freedom of choice” plans, another popular southern resistance strategy, were versions of token integration. In what was often an atmosphere of violence, intimidation and virulent opposition, black students were given the opportunity to “choose” to transfer to majority white schools. These plans were used for years to effectively preserve segregation. In 1968, more than a decade after *Brown v. Board of Education*, the Supreme Court ruled in a case from New Kent County, Virginia, that “rather than further the dismantling of the dual system, the plan has operated to simply burden children and their parents with a responsibility [that should be] placed squarely on the School Board.”<sup>7</sup> Freedom to choose in New Kent meant that, three years after the strategy was adopted, no white student in the county had elected to attend the segregated black school, and 85% of the county’s black students were still attending all-black schools. Similar patterns were documented across the South.<sup>8</sup> In both vouchers and freedom of choice plans, educational choice was used in the aftermath of *Brown* as a way to circumvent desegregation.

During this same time period, economist Milton Friedman proposed a model for education reform, based on his economic philosophy, calling for the privatization of public schools. Friedman argued that universal vouchers, or public funding for voluntary enrollment at a school other than an assigned facility (usually a private or parochial school), would encourage innovation and experimentation in education.<sup>9</sup> Some schools offer students better educational opportunities than others, contended Friedman and other choice proponents, and parents and guardians should distinguish between these options and then select schools for their children accordingly.<sup>10</sup> Advocates and scholars further assert that American education will improve

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<sup>5</sup> *Griffin v. School Board of Prince Edward County*, 377 U.S. 218 (1964).

<sup>6</sup> *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954).

<sup>7</sup> *Green v. Bd. of Educ. of New Kent County*, 391 U.S. 430, 441-42 (1968).

<sup>8</sup> Lassiter, M. D., *The Silent Majority: Suburban Politics in the Sunbelt South* (Princeton: Princeton University Press, 2007); *Green v. County School Board of New Kent County*, 391 U.S. 430, (1968); Henig, J. *Rethinking School Choice: Limits of the Market Metaphor*, (Princeton: Princeton University Press, 1995); Orfield, G. *Must We Bus? Segregated Schools and National Policy* (Washington D.C.: The Brookings Institution, 1978).

<sup>9</sup> Friedman, M. "The Role of Government in Education," in *Economics and the Public Interest*, ed. Solo, R.A. (New Brunswick, N.J.: Rutgers University Press, 1955), 123-144

<sup>10</sup> The Center for Education Reform, “School Choice.” [http://www.edreform.com/Issues/School\\_Choice/](http://www.edreform.com/Issues/School_Choice/)

through the establishment of a consumer relationship between families and academic programs, as the influence of the market forces schools to compete for students.<sup>11</sup>

### *Access to school choice*

The ability to choose assumes ready exposure to available school options. Research suggests that families' access to the educational marketplace is unequally constrained by a number of factors, including contact with advantaged social networks through which information regarding school quality is exchanged, language barriers, socioeconomic status and the ability of parents to arrange transportation for their schoolchildren.<sup>12</sup> Education studies both in the U.S. context and abroad, from England to New Zealand to Chile, all highlight a basic point. Unrestricted choice results in stratification.<sup>13</sup> Take, for example, the application process for a new charter school specializing in math and science. A parent or student must first hear about the charter program, which is dependant on the extent to which the new school has conducted outreach and advertising, whether materials were available in multiple languages, and/or if an encounter with another parent or contact provided information about the charter. The family must then navigate the application process, which often involves a lottery but also can mean a combination of other requirements like testing, teacher recommendations, parental involvement commitment,<sup>14</sup> or essays. If the student is accepted, then transportation to and from the school may have to be provided by the parent.

On the other side of the process, schools may also have incentives to serve a certain population. While charter schools receive public funding like other public schools, significant private investment augments public support for charter schools.<sup>15</sup> Targeted recruitment of students could help charter schools accomplish achievement promises made to these private

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<sup>11</sup> Chubb, J. E. & Moe, T. M., *Politics, Markets, and America's Schools*. (Washington, D.C.: The Brookings Institution, 1990); Friedman, supra note 9.

<sup>12</sup> Fuller, B., Elmore, R. F., and Orfield, G., Eds. *Who Chooses? Who Loses? Culture, Institutions, and the Unequal Effects of School Choice*. (New York: Teachers College Press, 1996), 25-49; Bell, C. A., "All Choices Created Equal? The Role of Choice Sets in the Selection of Schools." *Peabody Journal of Education: Issues of Leadership, Policy, and Organizations* 84 no. 2, (2009); Wells, A. S. "African-American Students' Views of Choice." In Fuller, B., Elmore, R., and Orfield, G., Eds., *Who Chooses? Who Loses? Culture, Institutions, and the Unequal Effects of School Choice* (New York: Teachers College Press, 1996), 25-49; Koedel, C. et al., *The Social Cost of Open Enrollment as a School Choice Policy*, working paper, [http://economics.missouri.edu/working-papers/2009/wp0910\\_koedel.pdf](http://economics.missouri.edu/working-papers/2009/wp0910_koedel.pdf) (accessed October 27, 2009).

<sup>13</sup> Fuller, Elmore, and Orfield, supra note 12; Gewirtz, S., Ball, S. J. & Bowe, R. *Markets, Choice and Equity in Education*. (Buckingham: Open University Press, 1995); McEwan, P. "Evaluating Multigrade School Reform in Latin America." *Comparative Education* 44 no. 4, (November 2008): 465-483; Morphis, E.A. *The Shift to School Choice in New Zealand*, National Center for the Study of Privatization 179, [http://www.ncspe.org/publications\\_files/OP179.pdf](http://www.ncspe.org/publications_files/OP179.pdf) (accessed October 27, 2009).

<sup>14</sup> Requiring parental time commitment may indicate that charter schools have a more advantaged student body than surrounding public schools that don't have similar requirements. For a discussion of this in one type of charter schools, see discussion of KIPP schools in Carnoy M., Jacobsen, R., Mishel, L., & Rothstein, R., *The Charter School Dust-up: Examining the Evidence on Enrollment and Achievement* (New York: Teachers College Press, 2005), chapter 4.

<sup>15</sup> Examples of management organizations funded by private investors include Green Dot, KIPP, and Uncommon Schools. See Scott, J., "The Politics of Venture Philanthropy in Charter School Policy and Advocacy," *Education Policy* 23 (1): 106-136. Of course, some public school districts in wealthy areas also have non-profit foundations set up to augment public funding as well.

funders.<sup>16</sup> It follows that school choice, unless carefully constructed and implemented with consideration for the above obstacles, will almost always exacerbate inequality.<sup>17</sup>

### *Political framework of school choice*

Choice framed one way aligns well with its proponents' unqualified advocacy of markets, competition and privatization. It also appeals to other sectors by offering an exit option – though not a systematic solution – from deteriorating central city school systems. The mere presence of educational alternatives to underfunded and highly segregated urban schools, long mired in the fallout from the Supreme Court's failure to authorize widespread metropolitan desegregation solutions, offers hope.<sup>18</sup> So while the philosophical underpinnings of school choice emanated from Friedman's economic theories, the notion quickly gained traction among some low-income constituents, communities of color and advocates who wished to found their own schools.<sup>19</sup>

Framed another way, however, choice has – and continues to be – an essential element of long-standing and successful racial integration programs. Because school choice disrupts a common reliance upon neighborhood school zones (which often means that patterns of residential segregation are replicated in school populations), it provides a mechanism for attracting a student body from a much larger, and often more diverse, geographic area. Magnet schools, one of the oldest and still the largest form of school choice, rely upon this feature and were designed for the express purpose of integration.<sup>20</sup> Presented as an alternative to mandatory busing, magnets were typically established with desegregation goals and transportation and outreach provisions.<sup>21</sup> Managed choice assignment plans<sup>22</sup> have been another popular strategy for promoting educational equity. They give parents the option of ranking a certain number of schools but cede control to the district to make the final assignment decision. District-managed choice decisions are typically based on a set of decided factors (i.e. racial or socioeconomic

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<sup>16</sup> Ibid.

<sup>17</sup> One example is a recent study of the different school choice programs in San Diego, which found that San Diego's choice programs like magnet schools that had mechanisms supporting integration such as transportation were more integrated than their open enrollment or charter school choice options that did not have such structures to encourage integration. Betts, J. R. et al., *Does School Choice Work? Effects on Student Integration and Achievement* (San Francisco: Public Policy Inst. of California, August 2006).

<sup>18</sup> Stulberg, L. *Race, Schools, and Hope: African Americans School Choice after Brown*. (New York: Teachers College Press, 2008).

<sup>19</sup> Wells, A. S., et al., "Charter School Reform and the Shifting Meaning of Educational Equity: Greater Voice and Greater Inequality?" In Petrovich, J., and Wells, A. S., Eds., *Bringing Equity Back: Research from a New Era in American Educational Policy*. (New York: Teachers College Press, 2005), 219-243.

<sup>20</sup> Goldring, E. and Smrekar, C. "Magnet Schools and the Pursuit of Racial Balance." *Education and Urban Society*, 33, (2000): 17-45; Frankenberg, E. and Le, C. Q. "The Post-Seattle/Louisville Challenge: Extra-legal Obstacles to Integration." *Ohio State Law Journal* 69, (2008): 1015-1072,

<sup>21</sup> Frankenberg, E., and Siegel-Hawley, G. *The Forgotten Choice? Rethinking Magnet Schools in a Changing Landscape*, (Los Angeles, CA: The Civil Rights Project/Proyecto Derechos Civiles at UCLA, 2008); Blank, R. K., et al., "Survey of Magnet Schools. Analyzing a Model for Quality Integrated Education." Final Report of a National Study (Washington, D.C.: U.S. Dept. of Education, 1983), 10-11; Steele, L. and Eaton, M., *Reducing, Eliminating, and Preventing Minority Isolation in American Schools: The Impact of the Magnet Schools Assistance Program*. (Palo Alto, CA: American Institutes for Research, U.S. Dept. of Education, Office of the Under Secretary, 1996).

<sup>22</sup> Also referred to as "controlled choice." Locales with longstanding controlled choice plans include San Francisco and Berkeley, California, and Cambridge, Massachusetts. See Biegel, S., "Court-Mandated Education Reform: The San Francisco Experience and the Shaping of Educational Policy after *Seattle-Louisville* and *Brian Ho v. SFUSD*," *Stanford Journal of Civil Rights & Civil Liberties*, 4 (2008): 159-215; Chavez, L. and Frankenberg, E., *Integration Defended: Berkeley Unified's Strategy to Maintain School Diversity*, (Los Angeles, CA: The Civil Rights Project/Proyecto Derechos Civiles at UCLA, 2009).

composition of schools, student achievement, and/or sibling status) to help ensure school-level diversity.

Early proponents of charters touted the programs, which generally do not have established attendance zones, as another opportunity to rupture school boundary lines that continue to bond racially isolated neighborhoods to their schools. They differ at the outset from strategies like managed choice plans, however, because charter schools make admissions decisions independently of the effect on other schools. In a managed choice plan, for example, a district considers how assignment decisions will effect the racial composition of all district schools. Perhaps partly as a result of these distinctions, prior research suggests that charters have not made good on their initial integrative vision.<sup>23</sup> As a result, charters have decidedly trended toward the first – market-oriented – model of choice.

### *Equity to excellence: A shift in national policy*

In 1974, the Supreme Court handed down the *Milliken v. Bradley* decision effectively hardening city-suburban boundary lines.<sup>24</sup> Suburban communities were released from responsibility for metropolitan patterns of school segregation unless plaintiffs could show intentional discrimination. The ruling limited the scope of desegregation remedies and left few possibilities for racially isolated minority districts, and suburban districts, not subject to desegregation requirements, provided whites with a clear and easy alternative. In order to stem the tide of white flight from cities begun in the post-World War II era, and exacerbated by desegregation limited to central cities under *Milliken*, districts sought to incorporate at least some family choice into student diversity plans. What mechanisms might help entice or retain middle class white parents and middle-class families of color – key to both a healthy tax base and successful racial and socioeconomic integration – in urban school systems when they had the choice of nearby suburban systems not subject to desegregation efforts? Magnet programs emerged as an uneasy compromise between desegregation requiring mandatory student reassignment and unrestrained school choice. They quickly became very popular educational options in many districts.

The dawn of the Reagan Revolution witnessed an historic shift in education policy. Years of emphasis on equity by several administrations, in the form of desegregation efforts or as part of the War on Poverty, gave way to a strident call for “excellence.” American students were lagging behind the rest of the world, declared “The Nation at Risk,”<sup>25</sup> a federal report commissioned during the Reagan Administration on the state of public schooling. The report advocated increasingly rigorous academic requirements for better preparing students to help the U.S. compete on a global scale and to maintain its dominance in that arena. This shifting view of the mission of public schools coincided with declining wages for lower-educated workers and a diminished public sphere more generally. Public schooling then became viewed as more of a

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<sup>23</sup> Wells, A. S., et al., “Charter Schools and Racial and Social Class Segregation: Yet Another Sorting Machine?” In Kahlenberg, R., Ed., *A Nation at Risk: Preserving Education as an Engine for Social Mobility*, (New York, NY: Century Foundation Press, 2000), 169-222; Frankenberg, E. and Lee, C., “Charter Schools and Race: A Lost Opportunity for Integrated Education.” *Education Policy Analysis Archives*, 11, no. 32. (2003); Garcia, D. R., “The Impact of School Choice on Racial Segregation in Charter Schools.” *Educational Policy* 22, (2007), 805-829; Institute on Race & Poverty, *Failed Promises: Assessing Charter Schools in the Twin Cities*. (Minneapolis, MN: Institute on Race & Poverty at University of Minnesota Law School, 2008).

<sup>24</sup> *Milliken v. Bradley*, 94 S. Ct. 3112, 3134-41 (1974).

<sup>25</sup> National Commission on Excellence in Education, *A Nation at Risk: The Imperative for Educational Reform*. (Washington, D.C.: U.S. Department of Education, 1983).



private commodity, with increased efforts to find the best schools, whether by means of moving to a district with “better” public schools or through intra- or inter-district choice.<sup>26</sup>

A revival of Friedman’s 1955 voucher concept heralded a new approach to problems of urban schools. Rather than emphasizing comprehensive strategies for disrupting the educational harms associated with concentrated poverty and racial isolation, vouchers offered a piecemeal approach to declining central city schools. Today, a handful of cities – Washington, D.C., Cleveland, and Milwaukee, to name a few – continue to experiment with vouchers. Yet unlike charter programs, school vouchers failed to gain national footing, due in part to state laws prohibiting the use of public funds for private schools and a series of defeats of public referenda.<sup>27</sup>

While federal support for vouchers was evident during the Reagan years, the advent of the charter school concept helped ignite more fervent backing for school choice under the first Bush Administration, which has persisted into the current administration. In 1991, the first charter school legislation passed in Minnesota. California followed suit in 1992, and nearly forty more states would adopt charter laws over the next decade.<sup>28</sup> The U.S. Department of Education authorized grant allocations in 1994, making it easier to finance and establish charter programs.<sup>29</sup> Competitive funding for charters grew exponentially from 1995 to 2005, rising from \$6 million in federal grant money to \$217 million.<sup>30</sup> These federal dollars supplement basic charter school revenue, which is derived from state per-pupil funding following charter students from their public school district.

Under President Clinton, school choice became more firmly embedded in 21<sup>st</sup> century education policy. Clinton called for the creation of 3,000 new charter schools in a 1997 State of the Union address, an initiative George W. Bush pushed even further by requesting \$200 million in funding for charters.<sup>31</sup> In 2002, Bush signed the No Child Left Behind (NCLB) Act into law, further encouraging choice by offering a transfer provision to students attending habitually low-performing schools.<sup>32</sup> Although the transfer provision of NCLB does not focus on transfers to charter schools, and has been reportedly under-utilized, it does introduce “school choice” to students attending underperforming schools and indirectly supports charter schools which depend on parental choice. However, the Act ignores the fact that some states may be failing to provide adequate funding to the very schools the state may require to be reconstituted as charters. Ohio’s Supreme Court, for example, has found the state’s system of school financing to violate the state’s constitution.<sup>33</sup> In other words, the federal government provides large Title I grants to

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<sup>26</sup> Frankenberg & Le, 2009 supra note 20.

<sup>27</sup> *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); Reardon, S. F., & Yun, J. T. *Private School Racial Enrollments and Segregation*. (Los Angeles, CA: The Civil Rights Project/Proyecto Derechos Civiles at UCLA, 2002). The most recent referendum on vouchers was defeated in Utah in 2007; substantial majorities of voters have defeated all ten ballot initiatives for vouchers.

<sup>28</sup> “History of Charter Schools” accessed on November 9, 2009 at [http://www.uscharterschools.org/pub/uscs\\_docs/o/history.htm](http://www.uscharterschools.org/pub/uscs_docs/o/history.htm).

<sup>29</sup> “The Role of the Federal Government” accessed on November 9, 2009 at [http://www.uscharterschools.org/pub/uscs\\_docs/fs/index.htm](http://www.uscharterschools.org/pub/uscs_docs/fs/index.htm).

<sup>30</sup> Ibid.

<sup>31</sup> “History of Charter Schools” supra note 28.

<sup>32</sup> No Child Left Behind Act of 2001, P. L. 107-110, 8 January 2002.

<sup>33</sup> In Ohio, the courts have ruled that the current funding system violates the constitution by providing inadequate resources to districts, but no remedy has been implemented to address this violation. For more information, see [http://www.schoolfunding.info/states/oh/lit\\_oh.php3](http://www.schoolfunding.info/states/oh/lit_oh.php3) (accessed on November 2, 2009).

states and requires states to hold every district accountable for making adequate yearly progress, even if the state is not providing adequate funding to each district.

In more recent political displays of support for school choice, during the 2008 presidential campaign, both parties prioritized choice—almost entirely in the form of charter schools, but also in terms of vouchers—in their education platforms.<sup>34</sup> As part of his platform during the 2008 campaign, President Obama continued to support the expansion of charters, proposing to double federal funding for charters to \$400 million.<sup>35</sup>

In 2009, more than \$200 million was appropriated for the federal charter schools program to assist with starting charter schools. These competitive planning grants are available to states and local groups who want to begin a charter school.<sup>36</sup> While the Obama Administration has also acknowledged the importance of regulating and closing low performing charter schools, it has yet to respond to concerns raised by research highlighting continued racial and socioeconomic isolation in charter schools. The impact of leadership from the highest level of government in addressing problems of student isolation in charter schools should not be underestimated, particularly now when such large fiscal “carrots and sticks” are being proffered based on the permissibility of state charter school legislation.<sup>37</sup>

### **A different choice: Principles of magnet school design connect educational choice to civil rights**

Magnet schools represent another type of school choice. Magnets are schools initially designed to give greater flexibility to families while also pursuing district goals of creating and maintaining diverse schools environments. Magnet programs originated a generation earlier than charter programs and still educate more students than charters, though they receive far less federal funding.<sup>38</sup> Although both types of schools are traditionally focused around a particular theme (e.g., arts, math and science, or college preparatory), magnet schools exist within a larger school district and are usually subject to district regulations. By contrast, charter schools may be authorized in various ways, including in many states by a school district, and are generally given more autonomy than regular schools.

Because magnet schools were originally implemented to help districts achieve desegregation goals - sometimes as a result of a court order - there were a number of civil rights provisions deliberately designed to counter the stratifying effect (described earlier) educational choice often produces amid unequal, segregated neighborhoods and districts. One such strategy involved making sure all eligible families were aware of possible magnet school options. This might entail presentations to local schools about magnet programs. Additionally, magnet schools often had explicit racial/ethnic enrollment goals, and if demand for magnet schools exceeded

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<sup>34</sup> Abramson, L, “McCain, Obama Offer Dueling Education Plans,” NPR, July 28, 2008, <http://www.npr.org/templates/story/story.php?storyId=93004032>.

<sup>35</sup> Elliot, D., “Obama vows to double charter-school funding.” (NPR: All Things Considered, September 9, 2008), Retrieved on October 14, 2009 from <http://www.npr.org/templates/story/story.php?storyId=94428402>.

<sup>36</sup> Information available at <http://www.ed.gov/programs/charter/index.html>

<sup>37</sup> Miron and Dingerson, supra note 1.

<sup>38</sup> MSAP funding has remained stagnant in recent years, and has not even been adjusted for inflation. As a result, only 41 districts received funding during the 2007-2010 funding cycle. (See “Department Awards \$100 Million in Magnet School Grants,” accessed on November 2, 2009 at <http://www.ed.gov/news/pressreleases/2007/09/09272007.html>.) Magnet school funding was just over \$100 million in FY 2008, or approximately half of CSP allocation.

available capacity, they used a lottery to determine admission.<sup>39</sup> Magnet schools were generally located in high-poverty or high-minority neighborhoods and their specialized themes were designed to attract student enrollment from more distant areas of the district. Finally, acceptance by or assignment to a magnet school nearly always included a guarantee of free transportation to ensure students could attend magnet schools.<sup>40</sup> While some of these civil rights provisions may be part of charter school legislation in a smattering of states, they are not intrinsically part of the design of *all* charter schools in the way these principles guided the initial establishment of magnet programs. Further, these provisions are arguably more important for charter schools that operate outside of a district (whose built-in bureaucracy may, for example, help with outreach efforts for traditional public schools), possibly rendering charters less able to reach a broad, diverse cross-section of a community. Some of these provisions were among those identified in the Supreme Court's recent *Parents Involved* decision.<sup>41</sup>

In terms of federal financial support, a key difference between magnet and charter schools lies in the link tying magnet fiscal incentives to school diversity. Historically, in order to receive funding, the Magnet Schools Assistance Program (MSAP) required schools to design a plan emphasizing the reduction or prevention of racial isolation. Many magnets still operate under these guidelines, although other goals have been added to MSAP funding priorities more recently.<sup>42</sup>

In sum, there were a number of ways magnet schools—at least initially—were structured to help ensure that students from all backgrounds were aware of and could attend magnet schools. These efforts were essential given the magnet focus on creating diverse environments. Magnet schools, then, can be viewed as a long-standing example of the effort to link choice with equity, and represent an important model to consider in the future design and development of charter legislation. In addition, charter funding priorities should reflect those of magnet schools and the Supreme Court's recent decision emphasizing the important goals of reducing racial isolation and creating diverse schools.

## **Charter School Legislation & Civil Rights**

### *Federal guidance and legislation related to charter schools and diversity*

While magnet schools were created early on as a mechanism for achieving school diversity - with federal funding to support magnets and their districts in operationalizing those goals - the federal record on charter schools and diversity is much more uneven. In several instances, the Department of Education (ED) has issued guidance regarding charter schools and civil rights. Federal law prohibiting discrimination on the basis of race, among other characteristics, applies to charter schools. Under Clinton, the Office of Civil Rights issued

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<sup>39</sup> More recently some magnet schools, like specialized schools, have added other admissions criteria like GPA or test scores. However, recipients of the federal MSAP grants are required to use a lottery to allocate seats if over-subscribed.

<sup>40</sup> For more discussion, see Frankenberg & Siegel-Hawley, *supra* note 21.

<sup>41</sup> *Parents Involved in Community Schools, Petitioner v. Seattle School District No. 1, et al.; Meredith v. Jefferson County Board of Education*, 551 U.S. 701 (2007). The Court recognized school districts' compelling interest in reducing racial isolation and in creating diverse schools even as the decision also struck down Louisville's and Seattle's voluntary integration policies for not being narrowly tailored to achieve these goals.

<sup>42</sup> See Frankenberg and Le, *supra* note 20, for discussion, and effect of additional priorities on magnet school racial isolation. Arguably, the lessened effectiveness of MSAP grantees in meeting their goals related to racial isolation emphasizes even more the importance of having a clear focus on civil rights goals and policies.

guidance in May 2000 (which is non-binding but represents the opinion of the ED) on the relationship between charter schools and federal civil rights law, e.g., the responsibility of charter schools in terms of recruiting and admitting students of differing backgrounds. This guidance was archived by the Bush Administration and no longer reflects the ED's official stance on charters and civil rights policy. Many viewed the archiving of that guidance as a negative signal from the Bush administration with regard to the monitoring of charters for civil rights enforcement and the current administration has yet to issue clarification on charters and civil rights.

The year 2000 also marked the last annual U.S. Education Department report on charter schools,<sup>43</sup> a key federal overview of charter trends in enrollment, implementation and accountability. Two subsequent ED reports were released. The first was released in 2002 and another one followed in 2004. This means that five years have now passed since the last federal government review of charter schools. Data in these reports were disaggregated by racial composition, students receiving free and reduced-priced lunches, English Language Learner (ELL) status and disability. All of the federal reviews found higher levels of minority segregation for charter schools than traditional public schools.<sup>44</sup> Additionally, charter schools were less likely to serve low-income students and students with disabilities, and thus may serve a somewhat more "advantaged" population than traditional public schools. At the time of the studies, charters were serving a roughly equivalent percent of ELLs compared to other public schools.

More recent federal guidance from the ED during the Bush Administration specified that charter schools receiving funding under the Public Charter Schools Program (CSP) must use a lottery to admit students if over-subscribed.<sup>45</sup> While a lottery may help produce more equitable admissions processes, the guidance complicated its potential benefits by stipulating that the lottery can be weighted (e.g., to favor those seeking to transfer under NCLB).<sup>46</sup> Further eroding

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<sup>43</sup> In fact, two federal reports were released that year: *The State of Charter Schools: 2000, Fourth Year Report*, U.S. Department of Education: Office of Educational Research and Improvement, <http://www.ed.gov/PDFDocs/4yrrpt.pdf>, (accessed October 27, 2009), and U.S. Department of Education, *Evaluation of the public charter schools program: Year one evaluation report*. (Washington, D.C.: Office of the Under Secretary, Planning and Evaluation Service, Elementary and Secondary Program Division, 2000).

<sup>44</sup> In addition to those discussed above, additional federal evaluations include Nelson, B., Berman, P., Ericson, J., Kamprath, N., Perry, R., Silverman, D., and Solomon, D., *The state of charter schools 2000: Fourth-year report*. (Washington, D.C.: U.S. Department of Education, Office of Educational Research and Improvement, 2000); Berman, P., Nelson, B., Ericson, J., Perry, R., and Silverman, D., *A national study of charter schools: Second-year report*. (Washington, D.C.: U.S. Department of Education, Office of Educational Research and Improvement, 1998); Berman, P., Nelson, B., Perry, R., Silverman, D., Solomon, D., and Kamprath, N., *The state of charter schools: Third-year report*. (Washington, D.C.: U.S. Department of Education, Office of Educational Research and Improvement, 1999); RPP International and University of Minnesota, *A study of charter schools: First-year report*. (Washington, D.C.: U.S. Department of Education, Office of Educational Research and Improvement, 1997); Finnegan, K., Adelman, N., Anderson, L., Cotton, L., Donnelly, M. B., & Price, T. *Evaluation of the public charter schools program: Final report*. (Washington, D.C.: U.S. Department of Education, 2004).

<sup>45</sup> *Charter Schools Program*. Title V Part B. (Washington D.C.: Department of Education, 2004). <http://www.ed.gov/policy/elsec/guid/cspguidance03.pdf> (accessed October 27, 2009). In addition to operating costs, one of the challenges of establishing charter schools is finding (and affording) physical space, so an additional purpose of CSP is to seek funding allocation for facilities that is comparable to that for non-charter public schools.

<sup>46</sup> Lower performing schools in a district may likely be the racially isolated ones, so weighting could help prevent creaming by only attracting students from more advantaged families. Perhaps a more tightly focused way to achieve this goal would be to further weight applicants by whether they belong to a demographic subgroup of students that did not make AYP or had test scores that contributed to the school's failure to make AYP.

the potential equalizing effect of lotteries, CSP permits charter schools to set minimum criteria, like test score/grade point average cut-offs,<sup>47</sup> or parental participation, for admission. In each of these instances, such requirements may limit access for groups of students and make it difficult to achieve an enrollment that is racially and economically diverse. In terms of outreach, under CSP charter schools should inform all potential students in the community about the opportunity to attend the schools, although “community” is not defined and thus subject to interpretation for compliance purposes.<sup>48</sup> Thus, during the Bush Administration, not only was the previous guidance on charter school compliance with civil rights policy archived, but 2004 CSP funding guidelines for charter schools were adopted, containing a number of provisions that may work against allowing equal access for students from all backgrounds to charter schools.

### *State Charter Legislation and Racial Diversity*

While the federal government has lent important financial support – along with minimal civil rights guidance – state charter school legislation is fundamental to the creation and characteristics of charters around the country. Each state determines whether it will permit charter schools, as well as the regulations under which “charters” will be granted to establish charter schools. In our review of legislation in the 40 states and District of Columbia that allow charter schools, we classified them into the following three major categories describing their state legislation. State legislation:

1. Has a general non-discrimination (e.g., on basis of race, ethnicity, etc.) provision;
2. Requires that establishing a charter school does not interfere with existing desegregation plan, OCR agreement or other desegregation plan in place; and/or
3. Includes some type of affirmative actions to create diverse schools.

The non-discrimination provision described in the first category is similar to that in effect in the federal legislation, which is vague and likely difficult to enforce. The second group of states contains legislation requiring compliance with existing desegregation plans and is comparable to the Supreme Court’s *Emporia* requirement for public school districts newly created while a desegregation plan was in place. In *Emporia*, the Court prohibited the formation of a school district if it would impede the existing district’s ability to desegregate. Specifically pertaining to charter schools located where desegregation cases already exist, more recent federal court decisions require charter schools to show that their existence will not negatively affect desegregation<sup>49</sup> and they must comply with existing orders.<sup>50</sup> The legislative stipulation, however, may have less impact on charter schools as desegregation plans end.<sup>51</sup>

The third category is arguably more far-reaching and varies in terms of whether states *require* such affirmative efforts or whether they *permit* them. In some instances, like in North and South Carolina, states prohibit operating charter schools that deviate from a certain percentage of the surrounding area or district. In other states, there is a requirement to do more extensive outreach. Finally, in states like Massachusetts, the district in which the charter school

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<sup>47</sup> Charter Schools Program, *supra* note 45 at 14-15.

<sup>48</sup> *Ibid.*

<sup>49</sup> *Berry v. School District of Benton Harbor*, 56 F. Supp. 2d 866 (W. D. Mich. 1999). The court approved the establishment of the charter school.

<sup>50</sup> *Davis v. East Baton Rouge Parish School Board, et al*, C.A. No. 56-1662 (M.D. La. 1999).

<sup>51</sup> Further, Parker has argued that this guidance is somewhat vague, however. See Parker, W., “The Color of Choice: Race and Charter Schools.” *Tulane Law Review* 75, No. 3, (2001): 563-630.

exists is permitted, but not required, to take more affirmative actions with regard to racial isolation.

**Diversity provisions in state charter school legislation<sup>52</sup>**

General non-discrimination <sup>53</sup>	Desegregation order/plan compliance	More affirmative actions
Alaska	Arizona	California (some)
D.C.	Arkansas	Colorado (for some)
Georgia	Colorado	Connecticut
Idaho	Delaware	Florida
Maryland	Illinois	Hawaii
New Hampshire	Indiana	Kansas
New Mexico	Iowa	Massachusetts*
New York	Louisiana	Minnesota* <sup>54</sup>
Oregon	Michigan	Missouri*
Tennessee	Nevada	Nevada
Texas	North Carolina	New Jersey
Utah	Oklahoma	North Carolina
Wyoming	Pennsylvania	Ohio (some)
	South Carolina	Rhode Island
	Virginia	South Carolina
		Wisconsin

\* indicates state legislation permits but does not require affirmative actions

The above table illustrates an extremely wide variation in charter diversity policies among states. Just sixteen states fall under the third “more affirmative actions” category and thirteen states’ provisions contain a general non-discrimination clause, in essence offering only a vague commitment to civil rights policy in their charter schools. These disparate levels of guidance and enforcement, regarding the importance of avoiding racial isolation, contrast starkly to the origins of many magnet programs.

Why is this lack of civil rights oversight so troubling? Unless proactive equity measures – like extensive outreach and free transportation – are embedded in the design of charters, and subsequently *monitored* and *enforced*, this popular version of education reform simply reinforces unequal educational opportunity. Without necessary safeguards against the segregating effects of charter schools - already documented by the government in their own charter school evaluations, in addition to research by other scholars – families are left to comprehend and cope individually with the complicated landscape of school choice. This is challenging for families with limited resources, time, or knowledge of the variety of educational options – even more so for families “disadvantaged” by mainstream society, such as having limited English proficiency or who dropped out of school themselves. A recent study from the Institute of Race and Poverty

<sup>52</sup> See more detailed survey of each state’s diversity provisions along with date enacted/amended in the appendix.

<sup>53</sup> Mississippi failed to reenact its charter school legislation in 2009, thus having the effect of repealing its general non-discrimination in 2009.

<sup>54</sup> Minnesota, however, exempts charter schools from compliance with the state desegregation rule because they are not considered a “school” (see Minnesota Rule 3535.0100 accessed on October 27, 2009 at <https://www.revisor.leg.state.mn.us/rules/?id=3535.0110>).

notes, “If parents do not act to move children from failing schools then expanded choice will not lead to improved performance in traditional or charter schools.”<sup>55</sup> The authors provide evidence suggesting that few parents or families actually do opt out of failing public schools: between just one and three percent of 3.5 million families eligible for school transfers under NCLB take advantage of the policy.<sup>56</sup> In other words, due to the lack of oversight of civil rights policies, charter schools (as is the case with the NCLB transfer provision) currently place much of the burden on individual families to take advantage of additional educational choice options. Limited or unequal access to charter schools renders irrelevant the theory suggesting that increased choice will improve the quality of all schools.

#### *Evidence of oversight for charter school diversity*

While it is clear from the above chart that many states do value the importance of charter schools not interfering with diversity efforts, compliance with federal and state civil rights policies by the more than 3,800 charter schools (as of 2007-08) is more ambiguous. Below, we describe several examples of evaluation and enforcement of state or federal policies.

- As mentioned above, charter schools usually must comply with existing desegregation orders. We found evidence of compliance with this requirement in a few states.<sup>57</sup> In 1999, the Supreme Court of South Carolina upheld denial of charter for failing to obtain OCR approval for new school facilities and enrollment deviating from district's racial composition by more than 10%.<sup>58</sup>
- An example of more recent charter enforcement took place in South Carolina. Riverview Charter School in Beaufort, South Carolina, and OCR reached an agreement requiring the charter school to offer enrollment to all non-whites on its waiting list and to engage in efforts to recruit more students and faculty of color in subsequent years.<sup>59</sup>
- The attorney for the Little Rock School District in Arkansas charged that authorizing charter schools in Pulaski County has made it more difficult for the district to comply with its desegregation settlement. The charter schools in Arkansas currently enroll approximately 3,000 students. The district attorney's memo summarizes a number of reasons for the charters' segregative impact. In particular, he suggested that charter schools not providing transportation block access to them for poor, black students.<sup>60</sup>
- CRP queried charter officials in twelve states to ask whether charter schools in their state have been subjected to any alteration in their policies or practices related to diversity. Nine states reported no such actions. One state, Oklahoma, reported that charter schools in two areas had to adapt their policies in terms of which areas they could accept or recruit students from.

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<sup>55</sup> Institute of Race and Poverty, *supra* note 23, p. 44.

<sup>56</sup> Institute of Race and Poverty, *supra* note 23; OCR clarified in a “Dear Colleague” letter in January 2009 that charter schools within a district were required to allow for student transfers. See <http://www.ed.gov/about/offices/list/ocr/letters/colleague-20090108.html>.

<sup>57</sup> E.g., *Berry* litigation in Michigan and *Davis* in Louisiana, *supra* notes 49 and 50.

<sup>58</sup> *Beaufort County Bd. of Educ. v. Lighthouse Charter Sch. Comm.*, 335 S.C. 230, 516 S.E.2d 655 (1999). The court remanded the case to the lower court to determine if the state's racial composition requirement for charter schools was constitutional, which ultimately led to amending the state's diversity requirements. See Appendix.

<sup>59</sup> Cerve, K., “Riverview faces stringent orders to boost minority enrollment,” *The Beaufort Gazette*, July 25, 2009. (Accessed on October 20, 2009 at <http://www.islandpacket.com/news/local/story/915709.html>).

<sup>60</sup> <http://www.arktimes.com/assets/documents/desegreport.pdf>; See also [http://www.arktimes.com/blogs/arkansasblog/2009/11/post\\_30.aspx](http://www.arktimes.com/blogs/arkansasblog/2009/11/post_30.aspx).

- Rhode Island’s legislation requires that charter schools enroll a diverse cross-section of the population of the district in which the charter school is located. According to our research, after the 2007 *Parents Involved* decision from the Supreme Court, Rhode Island switched its requirement for lottery (for oversubscribed schools) from being weighted by race/ethnicity to being weighted by gender.<sup>61</sup>

These examples are not exhaustive, but are indicative of a need for major oversight presence for charter school diversity.

### **CRP analysis of charter school students: Deep segregation, gaping holes in data**

The CRP is in the midst of an analysis of the rapidly growing charter enrollment, and we anticipate releasing the findings of this study next month. Similar to trends of racial isolation in charter schools described in our 2003 report<sup>62</sup> and in other research, we find higher levels of segregation for black students in charter schools compared to traditional public schools. Given that the CRP has reported increasing segregation for black (and Latino) students in public schools for nearly two decades, this finding of higher levels of segregation in charter schools is particularly striking. In other words, segregation levels for black students *in charter schools* are even outpacing steadily increasing segregation of black students in other public schools.

In the midst of our work to examine the composition of students in charter schools across the country, we have encountered difficulties in obtaining comprehensive data regarding the extent to which charter schools are serving low-income and English Language Learners. These data holes have important civil rights implications as well as provide limited demographic context within which to evaluate the charter school movement’s reported student outcomes more generally.

#### *Understanding whether low-income students are served by charter schools*

In order to receive federal funding (e.g., Title I, Title II, Title III, Title V), a school must offer the free/reduced lunch program for students. For schools with lower percentages of low-income students, schools must document that the federal funds they receive are targeted specifically for the low-income students. If the school participates in the School Lunch Program, the U.S. Department of Agriculture reimburses the school for each lunch, at rates that vary depending on the number of eligible students enrolled at the school. USDA also provides some food and technical assistance.<sup>63</sup> The provision of free and reduced lunches does not necessarily require a kitchen at the school facility, since lunches could simply be delivered. Regardless of their participation in the School Lunch Program, charter schools are still eligible for state per-pupil funding that follows a student to the charter program. Charter schools may lack the administrative personnel provided by the district to traditional public schools, and may choose not to participate in the Free Lunch Program.<sup>64</sup>

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<sup>61</sup> The Civil Rights Project has repeatedly written that we believe the *PICS* decision does allow for carefully designed race-conscious methods to create diverse schools. See, for example [http://www.civilrightsproject.ucla.edu/policy/court/voltint\\_joint\\_full\\_statement.php](http://www.civilrightsproject.ucla.edu/policy/court/voltint_joint_full_statement.php) and <http://www.civilrightsproject.ucla.edu/policy/court/voltint-anniversary.php>.

<sup>62</sup> See Frankenberg and Lee, *supra* note 23.

<sup>63</sup> See <http://www.fns.usda.gov/cnd/Lunch/AboutLunch/NSLPFactSheet.pdf> accessed on October 15, 2009.

<sup>64</sup> There is an option through the National School Lunch Program to offer free lunch to all students, and only submit paperwork estimating the number of low-income students every four years. A charter school could eliminate the administrative burden of monitoring free/reduced lunch compliance under this option.



To date, the only publicly-available way to measure the percentage of low-income students in schools has been through analysis of school-reported data of students eligible to receive free or reduced-price lunch. For a number of reasons, educators and researchers have long believed this underestimates the percentage of poor students in schools.<sup>65</sup> In our analysis of low-income students in charters, we conclude that it is even more difficult to ascertain the poverty composition of charter school students. Nationwide in 2007-08, only 72% of charter students attended schools reporting at least one student eligible for free/reduced lunch (FRL), which we use as evidence that the school offers a free/reduced lunch program. Most of the remaining charter schools reported a value of “missing” while some charter schools report no eligible students.<sup>66</sup> This combined category (e.g., schools reporting values of “missing” and zero) includes more than 1,000 charter schools and 35% of all white charter students at schools not reporting a single free/reduced price eligible student. Comparatively, more than 93% of students in non-charter public schools attend schools where there is evidence of free/reduced lunch program. This discrepancy in reporting the presence of free and reduced lunch eligible students (72% of charter schools versus 93% of traditional public schools) suggests the greater difficulty in understanding the low-income composition of charter schools’ enrollment.

In order to supplement the incomplete National Center for Education Statistics’ Common Core data (CCD),<sup>67</sup> we conducted a preliminary examination of the School and Staffing Survey data from 2003-04, which was the last year of publicly available data. Our examination indicates that a slightly higher percentage of urban non-charter public schools have a majority of free/reduced lunch students than do urban charter schools.<sup>68</sup> In addition to our own analysis, the literature is also mixed as to whether charter schools are serving economically disadvantaged students at a higher rate than public schools. One analysis, which excluded all schools reporting no eligible students, found that charter schools enrolled a much lower percentage of students eligible for free or reduced lunch than did the “matched” public schools.<sup>69</sup> A study in California

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<sup>65</sup> Kurki, A., Boyle, A., and Aladjem, D. K., *Beyond Free Lunch - Alternative Poverty Measures in Educational Research and Program Evaluation*, American Institutes for Research,

<http://www.air.org/news/documents/AERA2005Alternative%20Poverty%20Measures.pdf> (accessed October 27, 2009); Reardon, S. F., Yun, J. T., and Kurlaender, M., "Implications of Income-Based School Assignment Policies for Racial School Segregation," *Educational Evaluation and Policy Analysis* 28, no. 1 (Spring 2006): 49-75.

<sup>66</sup> We have chosen to group schools reported as “missing” and those reporting “zero” free/reduced lunch students as those for which we do not know about the availability of free lunch program. Earlier analyses cited in Carnoy et al., 2005, *supra* note 14, noted that a number of charter schools did not report serving hot lunches. In 2007-08, however, nearly 300,000 charter school students were in schools reporting “missing” data, while approximately 32,000 were in schools reporting “0”.

<sup>67</sup> It is possible that individual state datasets may provide more accurate free/reduced lunch data, although it is unclear why these two data sources would not have the same demographic counts.

<sup>68</sup> Source: U.S. Department of Education, National Center for Education Statistics, School and Staffing Survey (SASS), "Public School Data File," 2003-04. Overall, however, due to the higher percentage of charter schools located in urban areas, SASS data indicated that a larger share of charter schools were majority low-income than were non-charter public schools. These data also indicated, however, a larger percentage of charter schools reporting no free/reduced lunch students than in non-charter public schools. These results reflect sampling weights calculated by NCES.

<sup>69</sup> As cited in Carnoy, et al., 2005, *supra* note 14.

reached similar conclusions.<sup>70</sup> Other research has commented on the difficulty of ascertaining SES percentage of charter schools.<sup>71</sup>

*Difficulty in understanding the extent to which ELL students are served.*

Similar difficulty in obtaining data extends to English Language Learners (ELL) in charter schools. ELL status is only reported at the district level, not the school level, in CCD. While the vast majority of districts have schools that are either completely non-charter or completely charter, there are 700 districts - enrolling more than 11 million students - all over the country that contain *both* charter and non-charter schools. Unfortunately, district-level data for these districts, in which ELL students comprised the highest share of students, does not indicate whether students were in charter schools or non-charter schools.

Our on-going examination of ELL students and charter schools includes these district-level data, augmented with data from the Office of Civil Rights' regular survey of schools. Merging this information did not, however, rectify the lack of data about ELL students in charter schools. Due to the sampling procedure used by OCR,<sup>72</sup> we were only able to match 939 charter schools (out of more than 3,000) in 2005-06 with the ELL data. A number of states in the OCR sample contain charter schools that do not report ELL student information at all.<sup>73</sup>

Since the OCR data only contain a sample of schools, the lack of universal coverage of schools for which there is data makes comparisons between charter and non-charter schools difficult. Just under two-thirds of non-charter schools were included in the OCR sample. For example, after merging racial data from the CCD with ELL data from OCR, the racial composition of both charter and non-charter schools for which ELL information exists varies substantially from those not reporting ELL information. Thus, it is impossible to know whether patterns of ELL segregation overlapping with racial segregation are being driven by the differing racial compositions of schools in our sample.

Finally, in our analyses of 2005-06 and 2007-08 data, we noticed a substantial decline in the percentage of students classified as Limited English Proficient in CCD. While it is impossible to know precisely why this trend occurs, a Boston-area study suggested misclassification of ELL students occurred due to new guidelines about reclassifying students.<sup>74</sup> Taken together, these circumstances produce exceedingly murky data on ELL charter school enrollment patterns. The difficulty in understanding the extent to which ELL students enroll in charter schools emphasizes again the need for more comprehensive data about charter school students. We must have these data in order to fully evaluate the charter reform, specifically the

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<sup>70</sup> Raymond, M. E. "The Performance of California Charter Schools." CREDO, Hoover Institution, Stanford University, (2003). Accessed on October 27, 2009 at <http://credo.stanford.edu/Performance%20of%20California%20Charter%20School.FINAL.complete.pdf>

<sup>71</sup> In addition to studies cited in this section, see Eberts, R. W. and Hollenbeck, K., "Impact of Charter School Attendance on Student Achievement in Michigan," Staff Working Papers 02-80, (Kalamazoo, MI: W.E. Upjohn Institute for Employment Research, 2002), (reporting they lacked free/reduced lunch data for 44 of 89 charter schools in their dataset).

<sup>72</sup> Please refer to <http://www.ed.gov/about/inits/ed/edfacts/surveytool/crdcollection/index.html> for more detailed and specific information.

<sup>73</sup> These states with missing ELL data for charter schools include CT, DC, DE, IN, MA, MI, MN, MO, NC, NH, NJ, NY, OH, PA, UT, and WY. Additionally, three states reported no ELL students in charter schools: AZ, MS, and TN.

<sup>74</sup> Uriarte, M., & Tung, R. *English learners in Boston Public Schools in the aftermath of policy change: Enrollment and educational outcomes, AY2003-AY2006*. (Boston: The Mauricio Gastón Institute for Latino Community Development and Public Policy, 2009).

way it contributes to stratification of students along lines of race, class, and English language acquisition.

## **Policy Recommendations**

Tying education stimulus eligibility to charter numbers unfairly pressures states to ramp up efforts to authorize and open charter schools without considering the impact on racial and economic isolation of students. Surely the Obama Administration would want to make sure civil rights protections are in place as charter schools continue to expand, in addition to requiring active and continual monitoring of charter schools and their student composition. President Obama has appointed strong civil rights proponents to influential positions within the Department of Education, which is reason to hope that these issues will soon be addressed. With new incentives for expanding charter schools, it is critically important that new guidance on civil rights policy regarding charter schools is issued and enforced. There should be no further delay as states will continue to expand charter capacity and segregation remains high. Furthermore, since the goals of local choice and creativity can be pursued in magnet schools or pilot schools, and because magnets are more equitable in transportation and other basic equity provisions, they should receive treatment and funding that is at least equal to that offered to charter schools under federal and state legislation. The following are some specific steps the new administration might consider in future efforts to connect charter schools to overlooked civil rights policy:

- a. OCR should develop and issue new guidance, and create reporting requirements for states regarding patterns of enrollment and attrition.** The archiving of OCR's charter school guidance suggests there are few enforcement activities. OCR guidance regarding charter schools and civil rights requirements is no longer in force. It should use all available data to monitor access and integration for protected classes of students and for charter schools' impact on existing court-ordered, voluntary, or 441B desegregation plans. OCR and the Education Department should work with charter schools and charter authorizers to design practices that might help attract and retain a diverse group of students.
- b. Charter school patterns of enrollment and attrition need to be carefully monitored.** Using unique student identifiers, we need to know charter school graduation rates, as well as the percentage of children transferring to charters but not staying there. Charters with high attrition rates, especially if higher than nearby school districts, need additional scrutiny. Attrition data should be made public, without personally identifiable information.
- c. New federal guidelines and legislation on charter schools should include diversity provisions similar to those used by magnet schools.** Charters could use many of the same provisions that helped magnet schools use choice to increase diversity. These include providing full and extensive information, outreach to all racial/ethnic, socioeconomic and linguistic groups, no admissions/attendance/parent involvement requirements, and free transportation. Many of these stipulations were part of the former OCR guidance which should now be enforced.
- d. Greater Oversight and enforcement by state and federal agencies is needed.** A number of states have laws with specific provisions but little evidence of

enforcement. States, by dint of the legislation they have adopted, seemingly value the importance of diversity in charter schools, and federal and state agencies should work together to ensure that these diversity provisions are complied with by charter schools. States should also review their charter school legislation to see whether they may unwittingly incentivize the creation of charter schools that would attract a homogeneous student body.

- e. **The federal government must collect and report more accurate and complete data on the demographics of charter school enrollment: It is imperative to know the extent to which free/reduced lunch and ELL students are enrolling in charter schools.** Basic questions are unanswerable with existing federal data. This can make it impossible to understand the extent to which, for example, charter schools serve low-income students. Tracking and publicly reporting basic information about students should be a requirement for any school that receives public funding. Charter schools should be evaluated to ensure that they are enrolling, retaining, and graduating proportional shares of students by race/ethnicity, ELL status, socioeconomic status, and students with disabilities as their surrounding districts. Schools could also be required to report the number of students in different subgroups who apply to the charter school compared to those who actually enroll, among schools that are over-subscribed. OCR could and should do this. The federal government should also reinstate its former practice of providing annual reports on the state of charter schools.
- f. **We need safeguards against privately-funded charters that have the effect of increasing racial isolation.** To the extent that there is any preference for funding charter schools or charter school management organizations that exacerbate or maintain racial isolation, foundations should consider the large body of evidence regarding the social and long-term benefits of integrated school settings, in addition to considering achievement promises by potential charter school operators. States could refuse to authorize any new charters for foundation-funded management organizations that operate segregated existing charter schools. Or, states might allow these organizations to add new charters with a provision ensuring they remedy the problem in existing schools and take measures to avoid similar problems in new ones.

Charter schools encompass a variety of schools with different priorities serving many communities and students from a range of backgrounds. There are outstanding and diverse charters, some of which have been highlighted by this or prior administrations. It is our hope that we can better design and implement policies to enable these schools—and all public schools—to combine the creativity of communities and educators to create high-quality, integrated schooling options for all students.

## Appendix

### Survey of State Charter School Legislation about Diversity<sup>75</sup>

State	Charter Legislation	Year Adopted / Amended
Alabama	None	
Alaska	State law contains no discrimination provisions other than general provision barring sex discrimination against students in all public schools, and providing for implementation of affirmative action to ensure equal educational opportunity (EEO) in school districts that violate nondiscrimination provision. <sup>76</sup>	1981
Arizona	State charter school law contains discrimination provision in admission of students; mandates compliance with desegregation orders and consent decrees (cannot admit student if it would violate order/decrees); requires charter to include commitment to protecting civil rights.	1994
Arkansas	Charters in districts under court-ordered desegregation plans must use a weighted lottery in student selection as well as issues relative to funding; State board cannot approve charter schools that the board believes will hamper desegregation efforts of public school districts in the state.	added by 2001 amendments
California	County board of education will deny a charter petition if the board finds that the petition does not reasonably specify means by which a school's student body will reflect racial and ethnic balance of the general population living in the school district granting the charter. <sup>77</sup>	1992
Colorado	A charter school shall be subject to any court-ordered desegregation plan in effect for the school district in which it operates; Institute charter schools <sup>78</sup> must have a plan for outreach and recruitment of students whose race, gender, and ethnicity reflect the demographics of the community that the institute charter school intends to serve.	outreach component amended 2008
Connecticut	Charter application must specify procedures to promote a diverse student body, state board will give preference to granting charters in districts that have 75% or more minority students; in granting charters, state board must consider the	1997 amendment

<sup>75</sup> The authors are grateful to Jacqueline Dan for her assistance in researching and compiling state charter school legislation. Current as of October 16, 2009. Direct citations and language are available upon request from Civil Rights Project.

<sup>76</sup> This is from the *general* education laws, not *charter* specific legislation.

<sup>77</sup> Charter schools in California are most commonly chartered by local school boards; they can also be chartered by the state board of education.

<sup>78</sup> The Colorado state legislature created the Charter School Institute in 2004 as an independent agency within the Department of Education. The Institute considers applications from new charter schools or existing charter schools seeking to transfer from local district authorization to the Institute. Source - <http://www.csi.state.co.us/about.htm>.

	effect of the proposed charter school on the reduction of racial, ethnic and economic isolation in the region in which it is to be located; Commissioner of Education may place a school on probation if it fails to achieve measurable progress in reducing racial, ethnic and economic isolation.	
Delaware	Charter school may not be formed to circumvent a court-ordered desegregation plan. General non-discrimination prohibition.	1995
DC	Law contains no discrimination provisions other than general non-discrimination provision.	1995
Florida	Charter must address (and charter is granted based on) how school will achieve racial/ethnic balance reflective of district or community served.	1996
Georgia	State law contains no discrimination provisions other than general non-discrimination provision.	1998
Hawaii	Charter application must include plan for identifying, recruiting, and selecting students to make certain that student participation is not exclusive, elitist, or segregative.	1994
Idaho	State law contains no discrimination provisions other than general non-discrimination provision.	1998
Illinois	Charter law is not intended to alter any court-ordered desegregation plans in effect for any school district.	1996
Indiana	Charter school proposal must include plan for compliance with any applicable desegregation order.	2001
Iowa	State law contains a general non-discrimination provision and mandates compliance with any applicable desegregation order.	2002
Kansas	Pupils in attendance at the school must be reasonably reflective of the racial and socio-economic composition of the school district as a whole.	1994
Kentucky	None	
Louisiana	Charter school is subject to any court-ordered desegregation plan in effect for the city or parish school system.	1997
Maine	None	
Maryland	State law contains no discrimination provisions other than general non-discrimination provision.	2003
Massachusetts	School committee may have charter school participate in a program to end "racial imbalance" by accepting non-resident students from another city, town, or regional school district who attend a school in which more than 50 percent of attending students are non-white.	1993 law made charter schools subject to state-wide racial balancing provisions that were enacted

		in 1966
Michigan	Public school academy operating in a school district subject to a court desegregation order must select pupils in accordance with that order. <sup>79</sup>	1995
Minnesota	If the charter school reflects the racial and ethnic diversity of the area, it may limit admission to a geographic area of greater than average non-white population.	1991
Mississippi	State law contains no discrimination provisions. General non-discrimination provision repealed July 1, 2009. <sup>80</sup>	repealed 2009
Missouri	Charter school may establish a geographical area around the school whose residents receive a preference in enrollment provided that such preferences do not result in the establishment of racially or socioeconomically isolated schools.	1998
Montana	None	
Nebraska	None	
Nevada	Charter school shall, if practicable, ensure that the racial composition of charter school does not differ from district by more than 10%. Charter school shall also comply with desegregation orders. <sup>81</sup>	1997
New Hampshire	State law contains no discrimination provisions other than general non-discrimination provision on a statewide basis.	adopted 1995 <sup>82</sup>
New Jersey	Charter must, to the maximum extent practicable, seek the enrollment of a cross-section of school-aged population including racial and academic factors.	1996
New Mexico	State law contains no discrimination provisions other than general non-discrimination provision.	1999
New York	State law contains no discrimination provisions other than general non-discrimination provision.	1998
North Carolina	After one year, charter school must reasonably reflect racial and ethnic composition of the local school administrative unit or the special population the school seeks to serve within that unit, and the school will be subject to any court-ordered desegregation plan in effect for the unit.	1996

<sup>79</sup> Michigan's terminology for charter schools is "public school academy".

<sup>80</sup> The MS legislature let the charter school legislation lapse this year, although they are expected to adopt a new law in 2010 (<http://www.eschoolnews.com/news/top-news/?i=60251>). Mississippi charter legislation had contained the following provision: "The terms of each charter shall include the following... (f) A provision that no person shall be denied admission to the charter school on the basis of race, color, creed or national origin." §§ 37-28-9

<sup>81</sup> "If practicable" (NV) and "to the maximum extent practicable" (NJ) mean if possible. It is hard to tell exactly what this language means because there is no case law enforcing it. However, the language of "shall" (NV) and "must" (NJ) suggests that charter schools have a heavy burden to justify not meeting these requirements.

<sup>82</sup> Amended in 2008 to replace "charter school" with "chartered public school".

<http://www.ed.state.nh.us/education/doe/organization/accountability/CSAC%20Meetings/minutes3-08.pdf>

North Dakota	None	
Ohio	Community school <sup>83</sup> must specify the ways by which the school will achieve racial and ethnic balance reflective of the community it serves. Community school must take any and all corrective measures to comply with a desegregation order if its racial composition is violative of that order.	1997
Oklahoma	Charter school must admit student who resides in school attendance area or school district under court desegregation order or relevant US Department of Education OCR agreement unless resident school district notifies charter school that admission of said student would violate order or agreement.	1999
Oregon	State law contains no discrimination provisions other than general non-discrimination provision. <sup>84</sup>	adopted 1999; amended 2001
Pennsylvania	School district may not approve charter application if charter school would place the school district out of compliance with a desegregation order of a federal or state court order or a state human relations commission order.	1997
Rhode Island	Charter school application must have a program to encourage the enrollment of a diverse student population, and the makeup of the school must be reflective of the student population of the district.	1995

<sup>83</sup> A “community school” is what Ohio calls its public charter schools. More specifically, a “community school” is a public nonprofit school that operates *independently* of any school district, under contract with an authorized sponsoring entity (<http://www.ode.state.oh.us/GD/Templates/Pages/ODE/ODEPrimary.aspx?page=2&TopicRelationID=662>).

<sup>84</sup> Original 1999 provision prohibited discrimination based on ethnicity, national origin, and income level; amended in 2001 to include "race".



South Carolina	Racial composition of charter school enrollment may differ by no more than twenty percent from school district or targeted student population, but local school district may find charter school not operating in racially discriminatory manner without regard to twenty percent requirement. Charter application must describe how school plans to ensure that the enrollment is similar to the racial composition of the local school district or the targeted student population in the district the school proposes to serve and provide assurance that the school does not conflict with any school district desegregation plan or order in effect for that district. <sup>85</sup>	Adopted in 1996; Amended in 2002 & 2006
South Dakota	None	
Tennessee	State law contains no discrimination provisions other than general non-discrimination provision.	2002
Texas	State law contains no discrimination provisions other than general non-discrimination provision.	1995
Utah	State law contains no discrimination provisions other than general non-discrimination provision.	1998
Vermont	None	
Virginia	Charter must comply with any court-ordered desegregation plan.	1998, amended 2000 & 2002; reenacted 2009 <sup>86</sup>
Washington	None	
West Virginia	None	
Wisconsin	Charter school petition must include means by which school will achieve a racial and ethnic balance among its pupils that is reflective of the school district population.	1993
Wyoming	State law contains no discrimination provisions other than general non-discrimination provision.	1995

<sup>85</sup> Amended in 2002 to specify that the charter school racial composition should be within 20% of the school district or targeted population's composition. In 1996, statute required that it should be within 10% of these populations. The 2002 amendment also allowed school district to consider "good faith" efforts of charter school officials if racial composition was not within 20% of population. The changes were made in 2002 pursuant to a lawsuit in which the SC Supreme Court determined that the original 1996 law was unconstitutional for saying that "under no circumstances" could the racial composition deviate from the 10% rule. The SC Supreme Court found that the good faith exception to the new 20% rule made the provisions constitutional. *Beaufort County Board of Education v. Lighthouse Charter School Committee* (Op. No. 25583, Jan. 27, 2003). The South Carolina Charter School Act of 2006 stipulated compliance with existing desegregation orders.

<sup>86</sup> The 2000 amendment prohibits discrimination in a "public" charter school as opposed to just a "charter school." The 2002 amendment added the desegregation plan compliance provision and said that this provision would apply to "regional" public charter schools with desegregation plans in effect for the relevant school divisions; for other charter schools they are subject to desegregation requirements in the relevant division.