

# Charter Schools and Special Education: Ensuring Legal Compliance and Effectiveness Through Capacity Building

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## I. INTRODUCTION

Charter schools are spreading like kudzu.<sup>1</sup> More than 3.2 million public-school students attend the nearly 7,000 public charter schools in forty-four states and the District of Columbia,<sup>2</sup> “but these figures understate the impact of charter schools.”<sup>3</sup> In twenty-one major cities, charter schools serve thirty percent or more of students, and in

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1. James E. Ryan & Michael Heise, *The Political Economy of School Choice*, 111 *YALE L.J.* 2043, 2074 (2002); Martha Minow, *Confronting the Seduction of Choice: Law, Education, and American Pluralism*, 120 *YALE L.J.* 814, 834–35 (2011).

2. NAT’L ALL. FOR PUB. CHARTER SCHS., PRIVILEGED TO LEAD: 2018 ANNUAL REPORT 7 (2019) [hereinafter PRIVILEGED TO LEAD]; see also KE WANG ET AL., NAT’L CTR. FOR EDUC. STATISTICS, *SCHOOL CHOICE IN THE UNITED STATES: 2019*, at 2 (2019) [hereinafter *SCHOOL CHOICE IN THE UNITED STATES*] (“In the 2016–17 school year, 7,011 charter schools in 43 states and the District of Columbia served about 6 percent of all public-school students.”).

3. Robert A. Garda, Jr., *Culture Clash: Special Education in Charter Schools*, 90 *N.C. L. REV.* 655, 657 (2012).

214 cities they educate more than ten percent.<sup>4</sup> Those “enrolled in charter schools is growing exponentially, more than tripling in the last decade,”<sup>5</sup> and though the growth rate has slowed, it is estimated that demand for charter schools outstrips supply by four-million students.<sup>6</sup>

The jury is still out on whether charter schools educate students better than traditional public schools<sup>7</sup> and whether they decrease the overall quality of education in all public schools.<sup>8</sup> But one thing is certain, Chester Finn’s early premonition that “special education may turn out to be the most dangerous land mine buried on the charter school’s property”<sup>9</sup> is proving correct.<sup>10</sup>

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4. KEVIN HESLA ET AL., NAT’L ALL. FOR PUB. CHARTER SCHS., *A GROWING MOVEMENT: AMERICA’S LARGEST CHARTER PUBLIC SCHOOL COMMUNITIES 6–14* (13th ed. 2019).

5. Garda, *supra* note 3, at 658. *See also* NAT’L ALL. FOR PUB. CHARTER SCHS., *ESTIMATED CHARTER PUBLIC SCHOOL ENROLLMENT, 2016–17* 1 (2016).

6. PRIVILEGED TO LEAD, *supra* note 2, at 7.

7. *See, e.g.*, SCHOOL CHOICE IN THE UNITED STATES, *supra* note 2, at ix, 38–40 (“In 2017, at grades 4 and 8, no measurable differences in average reading and mathematics scores on the National Assessment of Educational Progress (NAEP) were observed between students in traditional public and public charter schools. This pattern persisted after taking into account how differences in parents’ educational attainment were related to the assessment scores.”). For a review of current studies, see NAT’L COUNCIL ON DISABILITIES, *SCHOOL CHOICE SERIES: CHARTER SCHOOLS—IMPLICATIONS FOR STUDENTS WITH DISABILITIES 101–08* (2018) [hereinafter *IMPLICATIONS FOR STUDENTS WITH DISABILITIES*]; Kevin P. Brady & Wayne D. Lewis, Jr., *Unchartered Territory for the “Bluegrass State”: Lessons to be Learned from Over a Quarter-Century of Charter School Legislation*, 72 *ARK. L. REV.* 361, 369–72 (2019).

8. *See* *IMPLICATIONS FOR STUDENTS WITH DISABILITIES*, *supra* note 7, at 109–15 (2018); Derek W. Black, *Preferencing Educational Choice: The Constitutional Limits*, 103 *CORNELL L. REV.* 1359, 1395–1403 (2018) (reviewing impacts on public education of states’ preferences for school choice); Susan L. DeJarnatt, *A Legal Mandate That Authorizers Consider Fiscal and Other Impacts of Charter School Expansion*, 121 *W. VA. L. REV.* 811, 816–22 (2019) (highlighting the fiscal impacts of charter schools in Pennsylvania on educational needs).

9. Joseph R. McKinney, *Charter Schools’ Legal Responsibilities Toward Children with Disabilities*, 126 *EDUC. L. REP.* 565, 576 (1998).

10. *See* NAT’L CTR. FOR SPECIAL EDUC. IN CHARTER SCHS., *MODEL POLICY GUIDE: LEVERAGING POLICY TO INCREASE ACCESS AND QUALITY OPPORTUNITIES FOR STUDENTS WITH DISABILITIES IN CHARTER SCHOOLS 3* (2017) (“[M]any charter schools continue to struggle to appropriately educate students with disabilities.”); Garda, *supra* note 3, at 712 (highlighting the lack of knowledge charter schools have

As public schools, charter schools must comply with the federal statutes protecting students with disabilities: the Individuals with Disabilities in Education Act (IDEA),<sup>11</sup> section 504 of the Rehabilitation Act,<sup>12</sup> and Title II of the Americans with Disabilities Act.<sup>13</sup> The most onerous of these statutes, the IDEA, requires provision of a free appropriate public education (FAPE) in the least restrictive environment (LRE) to eligible students.<sup>14</sup> Nearly fifty years ago, Congress prohibited entities from receiving federal funding under the then Education of All Handicapped Children Act unless they could establish “sufficient size and scope” to educate students with disabilities because it knew complying with the statute was impossible without sufficient capacity.<sup>15</sup> But in 1997, Congress inexplicably exempted independent charter schools from the “size and scope” requirement.<sup>16</sup> This Article seeks

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in their special education obligations); Michael A. Naclerio, Note, *Accountability Through Procedure? Rethinking Charter School Accountability and Special Education Rights*, 117 COLUM. L. REV. 1153, 1173–77 (2017) (detailing the inadequacies of the procedural view of special education obligations in charter schools); Danielle Dreilinger, *Special Education Shortcomings Found at New Orleans Schools*, THE TIMES-PICAYUNE, (Dec. 21, 2016, 3:24 AM), [https://www.nola.com/news/education/article\\_b8503d39-c6a4-58c3-bcdb-b5262719992b.html](https://www.nola.com/news/education/article_b8503d39-c6a4-58c3-bcdb-b5262719992b.html) (identifying problems with special education in New Orleans charter schools); *Failing the Test: Charter Schools’ Winners and Losers*, CAP. & MAIN (June 1, 2016), <https://capitalandmain.com/failing-the-test-charter-schools-winners-and-losers-0601> (identifying problems with English Language Learners and special education in Los Angeles charter Schools); see also MICHAEL ROBINSON, MASSACHUSETTS CHARTER SCHOOL SPECIAL EDUCATION PERFORMANCE: BY THE NUMBERS (2016) (identifying the problems of under-enrollment and service provision for special education in Massachusetts charter schools).

11. 20 U.S.C. § 1400 (2018).

12. 29 U.S.C. § 794 (2018).

13. 42 U.S.C. § 12101 (2018).

14. 20 U.S.C. §§ 1414(d), 1412(a)(5)(a) (2018).

15. Education of All Handicapped Children Act of 1975, Pub. L. No. 94-142, § 614(c)(1), 89 Stat. 773, 786–87 (1975) (current version at 20 U.S.C. § 1413(e)(1)(A) (2018)). The Education of All Handicapped Children Act was renamed The Individuals with Disabilities in Education Act in 1990. Debra Chopp, *School Districts and Families Under the IDEA: Collaborative in Theory, Adversarial in Fact*, 32 J. NAT’L ASS’N ADMIN. L. JUDICIARY 423, 424 n.1 (2012).

16. Individuals with Disabilities Education Act of 1997, Pub. L. No. 105-17, § 613(e)(1)(B), 111 Stat. 37, 76 (1997) (codified as amended at 20 U.S.C. § 1413(e)(1)(B) (2018)). See generally S. REP. NO. 105-17 (1997); H.R. REP. NO. 105-95 (1997).

to remedy this mistake by suggesting that state law compel charter schools to establish sufficient capacity to fulfill their legal obligations to students with disabilities or to assign primary responsibility for students with disabilities in charter schools to another entity that has sufficient capacity to do that job effectively.

Part II describes the human and fiscal capacity and an extensive knowledge base required to fulfill the mandates of the IDEA. It also explains the data establishing that many charter schools struggle to enroll and appropriately serve students with disabilities due to their lack of capacity.

Part III makes recommendations to remedy the deficiencies identified in Part II. First, states should compel applicants for charter schools to demonstrate sufficient capacity to appropriately serve students with disabilities. States should also require this of charter schools or other entities serving as Local Educational Agencies (LEAs) for charter schools. Second, if a charter school or other entity serving as an LEA for a charter school fails to demonstrate that it has sufficient capacity to appropriately ensure that the needs of students with disabilities are met, states should compel it to link with a larger special education infrastructure. States should provide them with a variety of pathways to create the necessary capacity. In short, state law should compel applicants, charter schools, and other entities serving as LEAs for charter schools to demonstrate sufficient capacity to appropriately meet the needs of students with disabilities, which is best accomplished by demonstrating that they are linked with a broader special education infrastructure. Compelling charter schools and related LEAs to establish sufficient capacity, while permitting them flexibility in selecting capacity building options, advances the overall goal of special education—meaningful educational benefit—while preserving the foundations of charter schools—accountability, autonomy, and mission integrity.

## II. THE CAPACITY PROBLEM

Providing an appropriate education to students with disabilities is a challenge for *all* public schools but is particularly so for charter schools because many lack sufficient capacity. This Part explains how, on average, charter schools serve fewer students with disabilities—and less severe disabilities—than traditional public schools, suspend and

expel such students at a higher rate, and struggle to provide the full continuum of placements.

There are many reasons for these disparities with traditional public schools, but the underlying cause is that many charter schools lack sufficient capacity in terms of resources, personnel, knowledge, and expertise to properly enroll and serve students with disabilities. Many individual charter schools, for example, are designated as LEAs as a result of state law.<sup>17</sup> LEAs are typically composed of numerous individual schools, and these LEAs bear the “final responsibility for compliance with most state and federal laws.”<sup>18</sup> Because of this LEA designation, these “one-school LEAs,” or Charter School LEAs, “are treated the same under state and federal law as school districts that usually contain numerous schools,” despite having less capacity.<sup>19</sup>

Charter schools often struggle to meet their obligations to appropriately educate students with disabilities.<sup>20</sup> This is best evidenced by four facts: (1) charter schools tend to enroll a lower percentage of students with disabilities than traditional public schools; (2) charter schools enroll fewer students with severe disabilities; (3) charter schools educate more students in the general education classrooms; and (4) charter schools suspend and expel students with disabilities at a high rate.

The best indication that special education is a challenge for charter schools is their comparatively low enrollment of students with disabilities. A comprehensive review of the U.S. Civil Rights Data Collection established that “charter schools continue to enroll proportionally fewer students with disabilities (10.79%) as compared

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17. IMPLICATIONS FOR STUDENTS WITH DISABILITIES, *supra* note 7, at 27–28. Fifty-seven percent of charter schools are LEAs, while forty-three percent are considered part of a LEA, typically a school district. LAUREN MORANDO RHIM ET AL., NAT’L CTR. FOR SPEC. EDUC. IN CHARTER SCHS., KEY TRENDS IN SPECIAL EDUCATION IN CHARTER SCHOOLS IN 2015-16: SECONDARY ANALYSIS OF THE CIVIL RIGHTS DATA COLLECTION 12 (2019) [hereinafter RHIM ET AL., KEY TRENDS].

18. Garda, *supra* note 3, at 665.

19. *Id.* See, e.g., *Arizona State Bd. for Charter Schs. v. U.S. Dep’t of Educ.*, 464 F.3d 1003 (9th Cir. 2006); *Thompson v. Bd. of Special Sch. Dist. No. 1*, 144 F.3d 574 (8th Cir. 1998); *Friendship Edison Public Charter Sch. Chamberlain Campus v. Smith*, 561 F.Supp.2d 74 (D.D.C. 2008).

20. See, e.g., Complaint at 17–19, *P.B. v. Pastorek*, No. 2:10-cv-04049 (E.D. La. Oct. 26, 2010) (class action lawsuit identifying charter school failures to identify and serve students with disabilities).

to traditional public schools in comparable states (12.84%)” but that the gap is narrowing.<sup>21</sup>

Another indication that charter schools struggle to serve students with disabilities is that they “tend[] to enroll larger numbers of students with mild disabilities—such as learning disabilities, behavior disabilities, or mild intellectual disabilities—and smaller numbers of students with low-incidence or more significant disabilities.”<sup>22</sup> This disparity in disability types partly explains why “[c]harter schools also tend to provide instruction to higher percentages of students with disabilities in general education classrooms.”<sup>23</sup> The difference in “mainstreaming” between charter schools and traditional schools is extreme: “charter schools report a larger percentage of students with disabilities (83.50%) spending 80% or more of their time in the general education classroom than traditional public schools (65.53%).”<sup>24</sup> The disparity is

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21. RHIM ET AL., KEY TRENDS, *supra* note 17, at 2. *See also id.* at 25 (“[C]harter schools continue to serve proportionately fewer students with disabilities than do traditional district schools.”); IMPLICATIONS FOR STUDENTS WITH DISABILITIES, *supra* note 7, at 12, 38, 49. On the other hand, the increase in the *proportion* of students with disabilities enrolled in traditional public schools exceeded the increase in charter schools. This “enrollment rate” disparity is “statistically significant and supports concerns that charter schools are not enrolling students with disabilities as readily as traditional public schools.” RHIM ET AL., KEY TRENDS, *supra* note 17, at 8. *See also* CTR. FOR RESEARCH ON EDUC. OUTCOMES, NATIONAL CHARTER SCHOOL STUDY 2013 39 (2013) (findings based on a 2009 report that “charter schools serve a smaller proportion of special education students than the traditional public school sector.”).

22. IMPLICATIONS FOR STUDENTS WITH DISABILITIES, *supra* note 7, at 50. As noted by the NCD, “[s]tudents with more significant disabilities (e.g., intellectual and developmental disabilities), however, have particularly low levels of enrollment.” IMPLICATIONS FOR STUDENTS WITH DISABILITIES, *supra* note 7, at 12. *See also* RHIM ET AL., KEY TRENDS, *supra* note 17, at 16 (highlighting the “disproportionality” in enrollment based on race and disability).

23. IMPLICATIONS FOR STUDENTS WITH DISABILITIES, *supra* note 7, at 12. *See also id.* at 51.

24. RHIM ET AL., KEY TRENDS, *supra* note 17, at 19. This disparity “may reflect the tendency by charter schools to serve larger numbers of students with mild disabilities and smaller numbers of students with significant disabilities who may require smaller, more resource intensive educational settings.” IMPLICATIONS FOR STUDENTS WITH DISABILITIES, *supra* note 7, at 51. *See also id.* (“[A] number of stakeholders also commented on the fact that charter schools tend to enroll smaller numbers of students with more significant disabilities and that charter schools tend to prioritize the general education classroom.”). Interestingly, the data shows that charters serve more kids with autism and emotional disturbance than to district schools. *Id.* at 50–51.

even greater for Charter School LEAs because they lack the capacity to create a full continuum of alternative placements.<sup>25</sup> Charter schools do not match the specialized settings offered in traditional public schools.<sup>26</sup>

The final indication that charter schools struggle to serve students with special needs is the high levels of push-out of such students compared to traditional public schools. Charter schools suspend students with disabilities at a rate higher than traditional public schools, and Charter School LEAs expel students with disabilities at a rate higher than traditional public schools.<sup>27</sup>

While this “input” data—discrepancies in enrollment rates, disability severity, mainstreaming levels, and push-out rates—indicates that charter schools are challenged by special education, the “outcome” data is less clear. After an extensive review of all recent research regarding the educational impact of charter schools on students with disabilities, the NCD concluded that “there is currently no agreement among researchers regarding the effect of charter schools on student achievement. . . . It is even more challenging to determine the effect of charter school attendance on the performance of students with disabilities.”<sup>28</sup>

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25. RHIM ET AL., KEY TRENDS, *supra* note 17, at 19 (“[A] larger percentage of students with disabilities spending 80% or more of their time in the general education classroom compared to charter schools that are a part of an LEA (85.35% v. 80.31%). Conversely, [these independent LEAs] also report a smaller percentage of students with disabilities spending 39% or less of their time in the general education classroom compared to charter schools that are a part of an LEA (3.93% v. 7.76%).”).

26. See Joshua Gillerman, Note, *Building Capacity: Building on the Special Education Quality Improvement Amendment Act of 2014 by Developing a Framework for a Baseline Offering of a Continuum of Special Education Services in D.C. Public Charter Schools*, 23 GEO. J. ON POVERTY L. & POL’Y 107, 108, 113 (2015) (detailing D.C. charter schools and their inability to match the services provided by comparable public school because of the funding mechanisms).

27. RHIM ET AL., KEY TRENDS, *supra* note 17, at 20–21 (“Charter schools suspend more students with disabilities (11.85% vs 11.3%) and without disabilities compared to traditional public schools (5.6% vs 4.52%).”).

28. IMPLICATIONS FOR STUDENTS WITH DISABILITIES, *supra* note 7, at 101. See also *id.* at 14 (“On average, there are limited known outcomes—‘similar, not better’ results based on test outcomes—for students with disabilities who are enrolled in charter schools compared to their TPS peers.”).

There are a variety of reasons charter schools struggle to enroll and serve students with disabilities.<sup>29</sup> Researchers have suggested many possible causes of these enrollment disparities: students with disabilities are already enrolled in specialized programs in the public schools, parents may prefer the programs in traditional public schools, parents may lack information about charter schools or their rights in relation to charter schools, charter schools may be utilizing practices that discourage or counsel out parents of students with disabilities from applying,<sup>30</sup> and charters may declassify students from eligibility more readily and be more unwilling to classify students as disabled in the first place.<sup>31</sup> Underlying several of these causes is the inability of charter schools, due to lack of capacity, to create sufficient programs to attract and properly educate students with disabilities.<sup>32</sup>

*A. Sufficient Capacity Is Necessary to Educate Students with Disabilities*

Congress recognized from the initial passage of the Education of All Handicapped Children's Act in 1975 (renamed the Individual With Disabilities in Education Act in 1990) that meeting its mandates

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29. See generally Garda, *supra* note 3. Numerous suits have called out alleged shortcomings in how charter schools serve students with disabilities. Notable among these is *P.B. v. White*, where a federal judge put a consent order in place to address special education problems in New Orleans charter schools. *P.B. v. White*, No. 2:10-CV-04049 (E.D. La. March 25, 2015) (consent order between the parties).

30. IMPLICATIONS FOR STUDENTS WITH DISABILITIES, *supra* note 7, at 12–13, 51–56. See also GRISELDA ZETINO ET AL., SCHOOLS CHOOSING STUDENTS: HOW ARIZONA CHARTER SCHOOLS ENGAGE IN ILLEGAL AND EXCLUSIONARY STUDENT ENROLLMENT PRACTICES AND HOW IT SHOULD BE FIXED 6, 10–11 (2017) (detailing the explanation of enrollment gaps for special education in Arizona's charter schools).

31. See MARCUS A. WINTERS, CTR. ON REINVENTING PUB. EDUC., WHY THE GAP? SPECIAL EDUCATION AND NEW YORK CITY CHARTER SCHOOLS 15–16 (2013) (charting and comparing the data of the number of students with an IEP in New York City Charter Schools and the public schools); MARCUS A. WINTERS, CTR. ON REINVENTING PUB. EDUC., UNDERSTANDING THE CHARTER SCHOOL SPECIAL EDUCATION GAP: EVIDENCE FROM DENVER, COLORADO 3–4 (2014); Marcus A. Winters, *Understanding the Gap in Special Education Enrollments Between Charter and Traditional Public Schools: Evidence from Denver, Colorado* 44 EDUC. RESEARCHER 228, 230–33 (2015) (documenting declassifications of IEPs in charter schools in Denver).

32. Gillerman, *supra* note 26, at 108, 113.

requires access to significant financial resources, human capital, and broad-based expertise.<sup>33</sup> The IDEA presumes the existence of a centralized bureaucracy, overseeing numerous schools, to implement complex procedures and capitalize on economies of scale. The IDEA has always required small LEAs that are not of “sufficient size and scope to effectively meet the educational needs of handicapped children” to establish joint eligibility with other LEAs.<sup>34</sup> Small LEAs were not entitled to IDEA funds without combining fiscal and human resources. At the time the IDEA was passed, this provision was included to ensure small rural school districts could meet their IDEA obligations despite the lack of scale.<sup>35</sup> Charter schools did not yet exist. However, in the 1997 re-authorization of the IDEA, charter schools that are LEAs were exempted from this joint-eligibility mandate for LEAs without “sufficient size and scope.”<sup>36</sup> As a result, many charter schools exist today that may lack the sufficient size and scope to effectively educate students with disabilities.

A cursory examination of the obligations imposed by the IDEA make clear why capacity is so critical to fulfilling its mandates. While the IDEA imposes numerous obligations on states and schools,<sup>37</sup> at its core the IDEA requires states to provide a FAPE in the LRE to eligible students with disabilities.<sup>38</sup> Broken down into its component parts, this means that educational institutions must: (1) provide special education and related services,<sup>39</sup> (2) provide sufficient supplementary aides and services to educate students in the regular education environment “[t]o the maximum extent appropriate,”<sup>40</sup> and (3) “ensure that a continuum

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33. See Garda, *supra* note 3, at 671–72 (detailing IDEA’s predecessor and the provisions it included to ensure LEAs were able to meet its obligations).

34. Education of All Handicapped Children Act of 1975, Pub. L. No. 94-142, § 614(c)(1), 90 Stat. 773 (1975) (current version at 20 U.S.C. § 1413(e)(1)(A) (2018)).

35. Garda, *supra* note 3, at 671–72.

36. Individuals with Disabilities Education Act of 1997, Pub. L. No. 105-17, § 613(e)(1)(B), 111 Stat. 37, 76 (1997) (codified as amended at 20 U.S.C. § 1413(e)(1)(B) (2018)). See generally S. REP. NO. 105-17, 48 (1997); H.R. REP. NO. 105-95, at 28 (1997).

37. See 20 U.S.C. § 1400 (2018).

38. 20 U.S.C. § 1412(a)(1), (5) (2018); 34 C.F.R. §§ 300.101, .114–.120 (2019).

39. See 20 U.S.C. 1412(a)(1), (5) (2018).

40. 34 C.F.R. § 300.114(a)(2)(i) (2019).

of alternative educational placements is available to meet the needs of children with disabilities.”<sup>41</sup> Each of these obligations requires considerable resources, personnel, and expertise.

Providing special education requires experts and specialists to create an appropriate education plan and highly qualified special education teachers to deliver specially designed instruction tailored to meet the unique needs of each individual student.<sup>42</sup> Fulfilling the related service obligations requires financial resources and personnel sufficient to provide audiology, school health, social work, counseling, medical, psychological, interpretive, orientation and mobility services, speech language pathology, physical and occupational therapy, parent counseling and training, and transportation.<sup>43</sup> The FAPE obligation, standing alone, requires significant capital and human resources to provide appropriately, but that is only the beginning of the equation because the FAPE must be provided in the LRE.

Offering the necessary “supplementary aids and services” to enable students to be educated in the regular education environment also requires extensive capacity.<sup>44</sup> The services that must be offered include behavior specialists, health care assistants, sign-language interpreters, and instructional support assistants.<sup>45</sup> The obligation may also require the creation of a “resource room or itinerant instruction.”<sup>46</sup> The aids that have to be offered include items such as a wheelchair, computer, software, voice synthesizer, augmentative communication device, restroom equipment, and other assistive technology.<sup>47</sup> Personnel that knows the spectrum of available aids, how they work, and when they should be deployed are also essential.

Finally, “the continuum of alternative placements” that must be made available include “instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and

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41. *Id.* § 300.115(a).

42. *See id.* § 300.39 (2019) (detailing what special education means and the services that need to be provided in order to meet these student’s unique needs).

43. *Id.* § 300.34(a) (listing the related services required).

44. 20 U.S.C. § 1412(a)(5)(A) (2018); 34 C.F.R. § 300.114(a)(2)(ii) (2019). *See also* Gillerman, *supra* note 26, at 117–18 (providing an example for the capacity needed to ensure the school is meeting its FAPE in the LRE obligation).

45. 20 U.S.C. § 1401(26) (2018).

46. 34 C.F.R. § 300.115(b)(2) (2019).

47. *Id.* at §§ 300.5–6, 105.

institutions.”<sup>48</sup> Of all the obligations, this may be the most expensive and require the most expertise.<sup>49</sup> Creating the full continuum of placements or paying for placements at restrictive settings such as private schools or residential care facilities, requires considerable resources and knowledge.<sup>50</sup> It requires personnel knowledgeable about the creation and provision of effective specialized programs or at least knowledgeable of the appropriate placements in the region.

In sum, the FAPE and LRE requirements—the backbone of the IDEA—require significant financial resources and personnel with extensive expertise. The other important requirements of the IDEA—e.g. provision of transition and vocational services, evaluation and proper discipline procedures, as well as legal counsel to ensure compliance—

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48. *Id.* at § 300.115(b)(1). This obligation does not require each school, or LEA, to provide a full continuum of placements within the school or LEA; rather, the “available” placements may be at a location outside the school or the LEA. IDEA specifically permits placement at state institutions, 20 U.S.C. § 1413(g)(1)(D) (2018); 34 C.F.R. §§300.175, .227(a)(iv), (b) (2019), and private schools, 20 U.S.C. § 1412(a)(10)(B) (2018); 34 C.F.R. §§ 300.145–147, .325 (2019). LEAs also place students at traditional schools in other LEAs or districts, and that practice is not questioned by the courts. *See Hudson ex rel. Hudson v. Bloomfield Hills Public Sch.*, 108 F.3d 112, 113 (6th Cir. 1997) (child placed in public school outside of district and court held that IDEA does not require placement in a neighborhood school but did not discuss if the district must create program within the district); *Oberti ex rel. Oberti v. Bd. of Educ.*, 995 F.2d 1204, 1218–20 (3d. Cir. 1993) (where the child contested placement in segregated special education classroom outside of the district, but the court only addressed the segregated placement and not whether the district had to create a placement within the district); *Wilson v. Marana Unified Sch. Dist. No. 6*, 735 F.2d 1178, 1180, 1184 (9th Cir. 1984) (holding that IDEA does not require placement in a neighborhood school but not discussing if the district must create a program within the district). State law determines whether the charter school remains financially and legally responsible for that child. If the charter is part of an LEA, this typically means that the LEA, rather than the individual charter school, maintains legal and financial responsibility for the student. If the charter is an LEA, the charter schools typically maintain legal and financial responsibility for the student. Put simply, the fact a charter school cannot appropriately serve a student with a disability on-site, as determined by the IEP team, usually does not absolve it of legal and financial responsibility for the child.

49. *See Gillerman, supra* note 26, at 122–25 (discussing expense and challenges for charter schools in creating a full continuum of alternative placements).

50. *See Garda, supra* note 3, at 695–96 (highlighting that expensive placements can bankrupt charter schools that are LEAs).

also require money and personnel.<sup>51</sup> It is clear why Congress compels small LEAs without sufficient size and scope to jointly apply for special education funding. What is less clear is why it exempts Charter School LEAs from this requirement.

### *B. Charters Schools Often Lack Sufficient Capacity*

The IDEA mandates that the state is the guarantor of compliance with the Act but contemplates that the actual education and service providers are LEAs.<sup>52</sup> States typically classify charter schools as part of an existing LEA or as their own LEA. The IDEA expressly contemplates both of these designations.<sup>53</sup> No matter the designation, charter schools are required to comply with the IDEA. If a charter school is designated as part of an LEA it has no entitlement to IDEA funds but also carries no ultimate responsibility for complying with FAPE, unless provided otherwise by state law or its operating agreement.<sup>54</sup> On the other hand, if the charter school operates as its own LEA, it is entitled to IDEA funding directly from the state and is responsible to comply with the IDEA obligations identified above, just like any typical school district.<sup>55</sup> These “independent” charter schools that are LEAs (Charter School LEAs) have sole responsibility for compliance with IDEA. Unless state law or charter agreements say otherwise, school districts have neither the responsibility to provide students in Charter School LEAs with special education nor to ensure the charter school’s compliance with IDEA.<sup>56</sup> They are islands with no connection to a centralized bureaucracy or network of schools. The lack of human and fiscal resources, as well as expertise and knowledge, are the biggest “barriers

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51. See, e.g., 34 C.F.R. § 300.43 (2019) (defining the transition services requirements); *id.* at § 300.34(c)(12) (describing vocational services defined under rehabilitation counseling services); *id.* § 300.304 (describing the requirement of evaluation procedures); *id.* § 300.530–36 (describing discipline procedures and safeguards).

52. See 20 U.S.C. § 1413(a) (2018) (requiring LEAs to meet the conditions of the Act in order to be eligible for assistance).

53. *Id.* § 1413(a)(5), (e)(1)(B).

54. See IMPLICATIONS FOR STUDENTS WITH DISABILITIES, *supra* note 7, at 28–30, 34–35 (distinguishing the responsibilities and funding between charter schools that are a part of an LEA and those that are its own LEA).

55. *Id.* at 34.

56. See *id.* at 45 (highlighting that it is the state educational agency, and not the school district, that is responsible for the charter’s compliance with IDEA).

to independent charter schools building programs of sufficient capacity to [appropriately] serve students with disabilities.”<sup>57</sup>

### 1. Fiscal and Human Capital Capacity

Providing students with a FAPE is costly for all schools, but the cost can be prohibitive for Charter School LEAs.<sup>58</sup> This is because such schools cannot benefit from the economies of scale found in large school districts.<sup>59</sup> For example, Charter School LEAs must hire a special education director for one school whereas districts composed of multiple schools can employ one special education director that oversees numerous schools.<sup>60</sup> The is true for all personnel necessary to make a viable special education program, such as specialized therapists, special educators and evaluation teams. Traditional school districts can efficiently deploy all these people, resources, and technology

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57. Garda, *supra* note 3, at 695. See also AHEARN ET AL., PROJECT SEARCH: FINAL REPORT OF A RESEARCH STUDY 53 (2001) [hereinafter AHEARN ET AL., PROJECT SEARCH] (finding that charter schools struggle to create capacity to provide special education); Cheryl Lange, *Special Education in Charter Schools: The View from State Education Agencies*, 21 J. SP. ED. LEADERSHIP 12, 19 (2008); Margaret J. McLaughlin & Lauren Morando Rhim, *Accountability Frameworks and Children with Disabilities: A Test of Assumptions About Improving Public Education for All Students*, 54 INT’L. J. DISABILITY, DEV. & EDUC. 25, 39 (2007) (same); Lauren Morando Rhim & Margaret McLaughlin, *Students with Disabilities in Charter Schools: What We Now Know*, FOCUS ON EXCEPTIONAL CHILD., Jan., 2007 at 1, 9 [hereinafter Rhim & McLaughlin, *Students with Disabilities*] (highlighting that one of the core principles of charter schools is autonomy); Lauren Rhim & Margaret McLaughlin, *Special Education in American Charter Schools: State Level Policy, Practices and Tension*, 31 CAMBRIDGE J. EDUC. 374 (2001) (concluding that charters that are LEAs do not have sufficient depth and breadth of human and fiscal resources).

58. Mary Bailey Estes, *Choice for All?: Charter Schools and Students with Special Needs*, 37 J. SPECIAL EDUC. 257, 258 (2004) [hereinafter Estes, *Charter Schools*] (detailing the financial concerns of charter schools); Rebekah Gleason, *Charter Schools and Special Education: Part of the Solution or Part of the Problem?*, 9 UDC L. REV. 145, 158 (2007) (highlighting the costs of FAPE in charter schools); Joseph R. McKinney, *Charter Schools’ Legal Responsibilities Toward Children with Disabilities*, 126 EDUC. L. REP. 565, 569 (1998) (comparing the burdensome costs of special education at Charter School LEAs to the likes of that of small rural school districts).

59. Garda, *supra* note 3, at 695.

60. *Id.*

across numerous schools. Charter School LEAs cannot capitalize on these efficiencies.<sup>61</sup>

Sufficient capacity is particularly important for fulfilling the IDEA's "continuum of placements" obligation.<sup>62</sup> Large districts are able to either create the full continuum of placements within the district as a whole or pay for placements they are unable to create, such as residential treatment facilities. Small LEAs are challenged to do either because they lack the necessary personnel and sufficient resources.<sup>63</sup> Without a large number of students to spread the risk of the high costs of more restrictive settings, the cost of one or two students with low-incidence disabilities can put serious financial strain on a small LEA. For example, a traditional school district that includes numerous students with autism can efficiently create and staff a regional center to serve these students. Its large population base provides both the sufficient funding and economies of scale that justify the creation of a specialized program. A Charter School LEA with only a few autistic

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61. See GARY MIRON ET AL., SCHOOLS WITHOUT DIVERSITY: EDUCATIONAL MANAGEMENT ORGANIZATIONS, CHARTER SCHOOLS, AND THE DEMOGRAPHIC STRATIFICATION OF THE AMERICAN SCHOOL SYSTEM 16 (2010) ("Districts are more capable than charter schools of cost effectively serving students with special needs, given their economies of scale, deeper staffing and administrative support systems."); LISA SNELL, REASON PUB. POLICY INST., SPECIAL EDUCATION ACCOUNTABILITY: STRUCTURAL REFORM TO HELP CHARTER SCHOOLS MAKE THE GRADE 2 (2004) ("Most charters are small and do not have economies of scale to reduce the cost of special education services."); Jay P. Heubert, *Schools Without Rules? Charter Schools, Federal Disability Law, and the Paradoxes of Deregulation*, 32 HARV. C.R.-C.L. L. REV. 301, 320–21 (1997) ("Since school districts typically serve more students than a single autonomous charter school does, they usually have larger budgets and larger 'cushions' with which to pay for unusually costly or unanticipated special education placements."); Timothy E. Morse, *New Orleans Unique School Reform and Its Potential Implications for Special Education*, 42 EDUC. & URB. SOC'Y 168, 177 (2010) ("Research has revealed that charter schools often are not able to realize economies of scale with respect to the provision of special education services due to these schools' small size."); Paul O'Neill et al., *Serving Students with Disabilities in Charter Schools: Legal Obligations and Policy Options*, 169 ED. L. REP. 1, 3–4 (2002) ("Districts, particularly larger ones, generally have greater resources than charter schools and can often economize by spreading specialized resources among their schools").

62. 34 C.F.R. § 300.115 (2019).

63. See Gillerman, *supra* note 26, at 113 (highlighting that "robust" programs for special education in charter schools "is only feasible in large LEAs, such as DCPS.").

students lacks the economies of scale to justify a program, the personnel, and financial resources to create an adequate program. It would most likely have to pay for an appropriate placement elsewhere. Charter School LEAs have no “budgetary cushion for private school placements, litigation, or expensive treatments.”<sup>64</sup>

Consequently, Congress recognized that Charter School LEAs are “more exposed to varying and unforeseen costs than most traditional LEAs”<sup>65</sup> The U.S. Government Accountability Office found that approximately half of the charter school officials interviewed cited insufficient resources as a major barrier to serving students with significant disabilities, particularly in “self-contained classroom[s].”<sup>66</sup> The NCD similarly concluded:

[B]ecause charter schools that operate as their own LEA are typically not able to take advantage of economies of scale, they may find it difficult to provide the range of services and supports that are required under IDEA, including the continuum of alternative placement options. The limited availability of resources is sometimes given as one reason why charter schools tend to have high percentages of students with disabilities who are educated in the general education classroom.<sup>67</sup>

Because many charter schools lack capacity to create sufficient specialized programs, they are often not a viable option for students with disabilities. The NCSECS concluded that:

[W]e know that charter schools often struggle to leverage economies of scale and experience challenges in

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64. Garda, *supra* note 3, at 696.

65. S. REP. NO. 108-185, at 22 (2003). *See also* LAUREN M. RHIM & MARGARET J. McLAUGHLIN, CHARTER SCHOOLS AND SPECIAL EDUCATION: BALANCING DISPARATE VISIONS 3 (2000) [hereinafter RHIM & McLAUGHLIN, CHARTER SCHOOLS AND SPECIAL EDUCATION] (charters are disproportionately affected by special education costs because they are small).

66. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-543, CHARTER SCHOOLS 17 (2012).

67. IMPLICATIONS FOR STUDENTS WITH DISABILITIES, *supra* note 7, at 76. *See also id.* at 74 (“The limited availability of resources is sometimes given as one reason why charter schools tend to have high percentages of students with disabilities who are educated in the general education classroom.”).

developing adequate capacity to meet the often diverse and complex learning needs of students with disabilities. . . . [This, and other] factors may make parents less likely to consider charter schools for their child with disabilities.<sup>68</sup>

It is interesting to note that “charter schools that are their own LEA enroll a larger proportion of students with disabilities (11.28%) compared to charter schools that are part of an LEA (10.17%). However, this number is still lower than overall enrollment of students with disabilities in traditional public schools.”<sup>69</sup> This apparent statistical anomaly is contrary to what one would expect if LEA charters lack sufficient capacity to serve students with disabilities. But it can be explained by several factors. First, “traditional LEAs that have charter schools under their governance umbrella may be directing some students with disabilities, most notably students who require more significant supports, to existing LEA programs rather than creating or allocating resources to create programs in new charter schools.”<sup>70</sup> This makes sense considering that most charters—LEAs or non-LEAs—lack capacity to create specialized programs due to a lack of economies of scale. Second, and directly related, Charter School LEAs are more likely to educate students in the general education classroom rather than in more restrictive settings.<sup>71</sup> This data led the NCSECS to conclude:

[T]raditional LEAs that operate as the LEA for charter schools in their area may be directing some students to existing traditional school district programs rather than creating and/or locating new programs in charter schools. Conversely, charter schools that are their own LEAs may struggle to allocate enough resources needed to create new programs for students with disabilities.<sup>72</sup>

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68. RHIM ET AL., KEY TRENDS, *supra* note 17, at 25. See also IMPLICATIONS FOR STUDENTS WITH DISABILITIES, *supra* note 7, at 56; Gillerman, *supra* note 26, at 125–26.

69. RHIM ET AL., KEY TRENDS, *supra* note 17, at 12.

70. *Id.*

71. *Id.* at 19.

72. *Id.* at 26.

## 2. Knowledge Base and Expertise

The lack of knowledge of special education laws, practices, and procedures also poses a significant barrier to Charter School LEAs being able to properly educate students with disabilities. The IDEA's procedural requirements alone require a significant knowledge base. The IDEA meticulously identifies the "policies and procedures" states and LEAs must create and implement to be eligible for federal funding.<sup>73</sup> These procedures are "as detailed and far-reaching as any set of rules to which public schools are subject."<sup>74</sup> Special education has always been a complex maze of procedures and paperwork that is difficult to navigate and implement.<sup>75</sup> Traditional school districts have nearly fifty years of experience, practiced bureaucracies, and service providers that have learned how to comply with the detailed procedures and onerous paperwork demanded by the IDEA.

In contrast, charter school personnel are often unaware of their obligations to students with disabilities and are unfamiliar with special education services in general.<sup>76</sup> The NCD found that limited knowledge and understanding of special education responsibilities is a primary reason it is difficult for charter schools to provide services to

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73. The statute mentions "procedure" over 100 times. *See* 20 U.S.C. § 1400 (2018). The specific "policies and procedures" that states and LEAs must create to be eligible for funding are set forth in 20 U.S.C. §§ 1412–14.

74. Heubert, *Schools Without Rules*, *supra* note 61, at 302. *See also* PRESIDENT'S COMMISSION ON EXCELLENCE IN SPECIAL EDUCATION, A NEW ERA: REVITALIZING SPECIAL EDUCATION FOR CHILDREN AND THEIR FAMILIES 7 (2002) [hereinafter A NEW ERA] ("The system is driven by complex regulations, excessive paperwork and ever-increasing administrative demands at all levels . . .").

75. A NEW ERA, *supra* note 74, at 20–21 (2002) (describing the complex nature of special education law and its challenges); McLaughlin & Rhim, *Accountability Frameworks*, *supra* note 57, at 38 (2007) (same); Patrick Wolf, *Sisyphian Tasks*, 3 EDUC. NEXT 24, 27 (2003) (discussing the amount of paperwork required for IDEA compliance).

76. *See* AHEARN ET AL., PROJECT SEARCH, *supra* note 57, at 28–29 (2001); MARGARET J. McLAUGHLIN ET AL., CTR. FOR POLICY RESEARCH, CHARTER SCHOOLS AND STUDENTS WITH DISABILITIES 10 (1996) [hereinafter McLAUGHLIN, ET AL., STUDENTS WITH DISABILITIES]; Heubert, *Schools Without Rules*, *supra* note 61, at 322; *see also* RHIM & McLAUGHLIN, CHARTER SCHOOLS AND SPECIAL EDUCATION, *supra* note 65, at 10–11, 31; McLaughlin & Rhim, *Accountability Frameworks*, *supra* note 56, at 38 (2007).

students with disabilities.<sup>77</sup> Even when properly informed, charter schools have little experience of practice in IDEA compliance and the provision of special education.<sup>78</sup> This ignorance and inexperience can translate into poor service provision.<sup>79</sup>

In sum, charter schools, particularly Charter School LEAs, often lack sufficient capacity to comply with their obligations to students with disabilities. They lack sufficient financial resources, human capital, and a depth of knowledge and expertise necessary to properly serve students with disabilities. This lack of capacity partly explains why students with disabilities do not choose to attend charter schools, why charter schools educate more students in the general education environment, and why suspension rates are higher in charter schools. As noted by the NCSECS, “[t]hese data points raise questions regarding how a school’s access to the resources of large districts (or lack thereof), or its use of the same policies and practices as its overarching traditional LEA, affect its capacity to meet students’ individual needs.”<sup>80</sup>

### C. Some LEAs Lack Sufficient Capacity

For charter schools in some states, neither the school itself nor the district may serve as the LEA.<sup>81</sup> That role is filled in some or all charter schools by a third-party entity, most frequently a non-district authorizer.<sup>82</sup> For example, one authorizer option for charter schools across Nevada is the State Public Charter School Authority (the NV

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77. IMPLICATIONS FOR STUDENTS WITH DISABILITIES, *supra* note 7, at 68 (“[C]harter school operators do not always possess the requisite knowledge and skills to provide appropriate special education and related services to their students with disabilities . . . in particular those working as standalone schools that operate as independent LEAs.”).

78. Garda, *supra* note 3, 695–96.

79. Lauren M. Rhim et al., *Charter School Statutes and Special Education: Policy Answers or Policy Ambiguity*, 41 J. OF SPECIAL EDUC. 50, 53–54 (2007).

80. RHIM ET AL., KEY TRENDS, *supra* note 17, at 26. *See also id.* (“The fact that, on average, charter schools also suspend students with and without disabilities at a higher rate than do traditional public schools surfaces notable questions related to their capacity to meet their students’ needs in the general classroom.”).

81. For a discussion of the different state structures for charter authorizers, see IMPLICATIONS FOR STUDENTS WITH DISABILITIES, *supra* note 7, at 30–32.

82. *See generally id.* at 30–31.

Charter School Authority).<sup>83</sup> That state entity has the authority to create and oversee charter schools and also functions as the LEA for those schools. The NV Charter School Authority does not serve any other purpose beyond charter school authorizing. It employs roughly two dozen staff members and oversees thirty-four schools, some of which have multiple campuses.<sup>84</sup> Similarly, the Colorado Charter School Institute (CSI) is a statewide authorizing option that exists only to create and oversee charter schools.<sup>85</sup> Like the NV Charter School Authority, CSI's team consists of about two dozen staff members; its portfolio currently consists of forty schools across the state.<sup>86</sup>

The primary benefit of independent charter school authorizing entities may be their singular focus. Unlike a school district that serves as an authorizer, an independent chartering board devotes all its time and expertise to the work of identifying strong charter applicants, approving promising applications to open schools, monitoring those schools, and deciding whether they have earned renewal or closure. But that also means that independent chartering boards do not directly run any schools. They do not employ educators or service providers. In states like Nevada and Colorado, where such entities also serve as the LEA for the schools in their portfolios, this may present a capacity problem, particularly with regard to special education.

Most authorizing offices that are not school districts and not state governmental entities do not also serve as LEAs for the schools they oversee.<sup>87</sup> This includes statewide chartering boards, such as the District of Columbia Public Charter School Board (DCPCSB),<sup>88</sup> university authorizers such as the State University of New York

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83. NEV. STATE PUB. CHARTER SCH. AUTH., <http://charterschools.nv.gov/> (last visited Mar. 21, 2019).

84. *See Our Schools*, NEV. STATE PUB. CHARTER SCH. AUTH., [http://charterschools.nv.gov/ForParents/Our\\_Schools/](http://charterschools.nv.gov/ForParents/Our_Schools/) (last visited Mar. 21, 2019).

85. COLO. CHARTER SCH. INST., <https://www.csi.state.co.us/> (last visited Mar. 21, 2019).

86. *Id.*

87. For a discussion of the different state structures for charter authorizers, see IMPLICATIONS FOR STUDENTS WITH DISABILITIES, *supra* note 7, at 30–32.

88. *Who We Are*, D.C. PUB. CHARTER SCH. BD., <https://dcpcsb.org/> (last visited Mar. 21, 2019).

(SUNY),<sup>89</sup> and not for profit organizations such as the Thomas B. Fordham Institute (Fordham)—which serves as an authorizer for charter schools in Ohio.<sup>90</sup> Schools overseen by DCPCSB and Fordham are their own independent Charter School LEAs; SUNY schools are all part of district's LEAs.<sup>91</sup>

Under federal law, and state laws that track it, the LEA has primary responsibility for providing a full range of special education placements for students with IEPs. When a non-district, non-state authorizer also has the role of LEA, it may be difficult for the authorizer to meet that standard because the authorizer itself runs no schools nor programs; it likely employs no service providers, such as occupational or speech-language therapists. Such authorizers have to take steps to ensure that schools for which they are responsible as the LEA serve students appropriately, and this can be challenging given their administrative limitations.

Generally speaking, charter school authorizers may have limited expertise with regard to special education. The National Association of Charter School Authorizers (NACSA) and the NCD have both expressed concerns about this, with NCD stating in a recent report that “[w]hile charter authorizers are in a position to help build the capacity of the operators whose schools they oversee, the authorizers themselves do not always possess sufficient knowledge and do not always view special education as part of their responsibility.”<sup>92</sup> A lack of special education expertise at the authorizer level is a serious problem in any context, but particularly so for an authorizer that has also been designated as the LEA for schools that it serves. Simply put, LEAs must

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89. SUNY CHARTER SCHS. INST., <https://www.newyorkcharters.org/> (last visited Mar. 21, 2019).

90. THOMAS B. FORDHAM INST., <https://fordhaminstitute.org/ohio> (last visited Mar. 21, 2019).

91. See NAT'L ASS'N OF CHARTER SCH. AUTHORIZERS, SPECIAL EDUCATION TOOLKIT: GUIDANCE FOR CHARTER SCHOOL AUTHORIZERS 21, 34 (2017) [hereinafter SPECIAL EDUCATION TOOLKIT].

92. IMPLICATIONS FOR STUDENTS WITH DISABILITIES, *supra* note 7, at 73. For a NACSA study on special education and authorizers, see Karega Rausch, *One Set of Data/Four Unique Perspectives on Authorizing and Special Education*, NAT'L ASS'N OF CHARTER SCH. AUTHORIZERS (Apr. 20, 2016), <https://www.qualitycharters.org/2016/04/one-set-datafour-unique-perspectives-authorizing-special-education/>.

fully understand special education and be able to take appropriate action to make sure that students are properly served.

*D. Charter School Authorizers Are Critical to Ensuring Charter Schools Have Sufficient Capacity to Serve Students with Disabilities*

A charter authorizer is an entity delegated by state law to grant charters to applicants—the gatekeeper function—and to oversee and monitor the schools it has authorized—the oversight function—and “[e]ach state has its own process for [the] authorization of charters.”<sup>93</sup> Depending on the state, these authorizers can be traditional school districts, “institutions of higher education,” or nonprofit organizations to state educational agencies.<sup>94</sup>

The importance of authorizers in ensuring quality charter schools cannot be overstated. Quality authorizing and oversight is the primary, if not the only, means to ensure that charter schools are of high quality and comply with federal and state law.<sup>95</sup> CREDO found a strong correlation between state law, authorizer practices, and student performance.<sup>96</sup> It concluded that stringent oversight, leading to closure, and selectivity for charter granting in the first instance were critical practices correlated to school quality.<sup>97</sup> In fact, it found that the recent improvement in student outcomes in charter schools is “not because existing schools are getting dramatically better; it is largely

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93. IMPLICATIONS FOR STUDENTS WITH DISABILITIES, *supra* note 7, at 30.

94. *Id.* at 31. For a discussion on the different state structures in the authorization system, see *Id.* at 30–32.

95. Robert Garda, *Searching for Equity Amid a System of Schools: The View from New Orleans*, 42 FORDHAM URBAN L. J. 613, 666 (2016); Osamudia R. James, *Opt-Out Education: School Choice as Racial Subordination*, 99 IOWA L. REV. 1083, 1104-05 (2014).

96. CTR. FOR RESEARCH ON EDUC. OUTCOMES, MULTIPLE CHOICE: CHARTER SCHOOL PERFORMANCE IN 16 STATES 9, 45 (2009) [hereinafter CREDO, MULTIPLE CHOICE].

97. *Id.* at 8. See also Trip Gabriel, *Despite Push, Success at Charter Schools is Mixed*, N.Y. TIMES (May 1, 2010), <http://www.nytimes.com/2010/05/02/education/02charters.html?scp=1&sq=Despite+Push%2C+Success+at+Charter+Schools+Is+Mixed&st=nyt> (“Charter school quality . . . is often associated with the rigor of the authorities that grant [and monitor] charters.”).

driven by the closure of bad schools.”<sup>98</sup> This is particularly true in the special education context. As the NCD found, “[c]harter authorizers, as key policymakers, have a critical role to play in improving the education provided to students with disabilities in charter schools.”<sup>99</sup>

Congress expressly recognized the importance of authorizers in the Every Student Succeeds Act (ESSA). The charter school grant program under the ESSA identifies that one of its primary purposes is to “support efforts to strengthen the charter school authorizing process to improve performance management, including transparency, oversight and monitoring (including financial audits), and evaluation of such schools.”<sup>100</sup> Grant applications must identify how states “will help ensure better authorizing, such as by establishing authorizing standards that may include approving, monitoring, and re-approving or revoking the authority of an authorized public chartering agency . . . .”<sup>101</sup>

However, authorizers are notoriously bad at oversight of special education compliance.<sup>102</sup> As NCD recognized,

there is too little evidence that charter authorizers are fulfilling their oversight responsibilities to hold charter schools accountable for ensuring open and fair enrollment of students with disabilities, providing specialized instruction and related services through a continuum of alternate placements, or helping to ensure improved academic performance outcomes of students with disabilities through effective intervention, renewal, or revocation of the charter.<sup>103</sup>

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98. CTR. FOR RESEARCH ON EDUC. OUTCOMES, NATIONAL CHARTER SCHOOL STUDY EXECUTIVE SUMMARY 24 (2013).

99. IMPLICATIONS FOR STUDENTS WITH DISABILITIES, *supra* note 7, at 117.

100. 20 U.S.C. § 7221(7) (2018).

101. 20 U.S.C. § 7221b(f)(1)(A)(xii) (2018).

102. *See* NAT’L ASS’N OF CHARTER SCH. AUTHORIZERS, 2015 STATE OF CHARTER AUTHORIZING REPORT 43–47 (2015) [hereinafter NACSA, 2015 REPORT] (compiling data on charter school authorizer practices in special education oversight).

103. IMPLICATIONS FOR STUDENTS WITH DISABILITIES, *supra* note 7, at 108. *See also id.* at 104 (“Limited research exists regarding the extent to which charter authorizers are carrying out their monitoring and oversight responsibilities in special education.”); *id.* at 15 (“Research is limited with respect to how well charter authorizers are carrying out their monitoring and oversight responsibilities for ensuring the delivery of special education programming and services by charter operators and holding them

In fact, the National Association of Charter School Authorizers (NACSA) conducted a study and found that many authorizers are typically not monitoring special education or punishing schools for persistent violations of federal law.<sup>104</sup> Lauren Morando Rhim, the Executive Director of NCSECS, identified that the NACSA survey identified

three data points caus[ing] concern: in combination, they indicate that many of the responding authorizers do not 1) require special education outcomes as part of charter performance contracts; 2) see persistent failure to serve students with disabilities as a behavior that merits serious consequence; or 3) identify themselves as responsible for enforcing special education enrollment proportionality.<sup>105</sup>

Robin Lake, the Director of the Center on Reinventing Public Education, similarly commented that “authorizers are generally unwilling to close a school that is failing to comply with federal or state law, but they are also unwilling to require the school to make changes to its special education program, presumably because the authorizers see this as infringement on charter autonomy.”<sup>106</sup>

Because of these oversight failures, many experts suggest changing authorizers’ oversight functions with respect to special education.<sup>107</sup> This is certainly an important step, but it is much easier said than done. As already noted, authorizers often lack oversight capacity and will. More importantly, though, “state charter school statutes are often vague and contain minimal information regarding specific roles

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accountable for the education of students with disabilities in these schools consistent with the requirements of state special education and charter school laws and IDEA.”); *id.* at 70 (“Moreover, research has pointed to the fact that state charter school statutes are often vague and contain minimal information regarding specific roles and responsibilities for the education of students with disabilities.”).

104. See generally NACSA, 2015 REPORT, *supra* note 102.

105. Karega Rausch, *One Set of Data/Four Unique Perspectives on Authorizing and Special Education*, NAT’L ASS’N OF CHARTER SCH. AUTHORIZERS (Apr. 20, 2016), <https://www.qualitycharters.org/2016/04/one-set-datafour-unique-perspectives-authorizing-special-education/>.

106. *Id.*

107. See, e.g., IMPLICATIONS FOR STUDENTS WITH DISABILITIES, *supra* note 7, at 15, 116–17; Garda, *supra* note 3, at 715–16; Naclerio, *supra* note 10, at 1188–90.

and responsibilities for the education of students with disabilities.”<sup>108</sup> Authorizers are uncertain *how* to oversee special education and *what* standards to employ to ensure a charter is in compliance.

In terms of the gatekeeping function, most commenters suggest that applicants include detailed special education plans and budgets.<sup>109</sup> These are critical steps, but they do not ensure that charter schools can, and will, follow their initial plans. Further, some “state charter authorizing statutes do not include quality standards to help guide the school authorizing process.”<sup>110</sup> In other words, applicants may present detailed plans and budgets, but authorizers must have standards to determine whether they are sufficient.

### III. ENSURING THAT CHARTER SCHOOLS HAVE SUFFICIENT CAPACITY

Because capacity is the primary reason charter schools struggle with enrolling and serving students with disabilities, this Article’s proposal is two-fold. First, states should compel charter schools to demonstrate that they have the sufficient capacity to fulfill all of the mandates of the IDEA. Many charter schools will be able to fulfill this capacity mandate and for these schools no further action is necessary. Secondly, for charter schools that are unable to demonstrate sufficient capacity, states should compel that they link to larger special education infrastructures. But rather than mandate a single type of linkage or infrastructure, states should take advantage of the flexibility in federal law and create a variety of pathways for charter schools to establish sufficient capacity.

For these reasons, this Article argues that the best way to ensure that charter schools appropriately enroll and serve students with disabilities is for authorizers to (1) require charter schools to demonstrate

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108. IMPLICATIONS FOR STUDENTS WITH DISABILITIES, *supra* note 7, at 70.

109. *Id.* at 116; Garda, *supra* note 3, at 715–16; Robert A. Garda, Jr., *The Mississippi Charter School Act: Will it Produce Effective and Equitable Charter Schools?*, 36 MISS. C. L. REV. 265, 285–88 (2018).

110. IMPLICATIONS FOR STUDENTS WITH DISABILITIES, *supra* note 7, at 29. *See also id.* at 32 (“While there appears to be widespread consensus that high-quality charter authorizers lead to high-quality charter schools, an understudied piece of the reform process is the authorizers’ decision-making process for differentiating which, among charter school applicants, are allowed into the market.”).

sufficient capacity for special education, and (2) if they are unable to do so, compel them to link to larger special education infrastructures.

*A. States Should Compel Charter Applicants to Demonstrate Sufficient Capacity to Fulfill All the Mandates of the IDEA*

States should compel charter applicants to demonstrate sufficient capacity to appropriately serve students with disabilities. Charter schools can fulfill this mandate by showing that they have access to sufficient financial resources, personnel, and expertise, as well as the requisite knowledge, to fulfill *all* the mandates of the IDEA.<sup>111</sup> This can be shown in a variety of ways.

First, a charter operator may have sufficient size and experience to establish capacity. Some charter operators are quite large because they run multiple schools or campuses. For example, the Chicago International Charter School is comprised of more than a dozen schools<sup>112</sup> and, working with school management organizations, may run schools with sufficient capacity to meet the mandates of IDEA. Team Academy in Newark not only has 8 schools within Newark, it is also a part of the national non-profit network of charter schools, “Knowledge is Power Program,” serving over 240 schools nationwide.<sup>113</sup> This vast network of schools allows each school to access more resources than would be available in a single Charter School LEA. Charter Management Organizations (CMOs) that provide significant special education support to their independent schools may fulfill the capacity requirement. If the CMO operates its schools like a traditional school district for purposes of special education, a school within this network may fulfill the capacity mandate.<sup>114</sup> As NCD found, “[m]any of the charter school networks that were examined represent

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111. Mr. Gillerman suggests a capacity review for purposes of ensuring charter schools can provide a full continuum of alternative placements. While this is a critical component of capacity, there are many other deficits in charter schools that result from lack of capacity. *See generally* Gillerman, *supra* note 26.

112. *See generally Our Core Purpose*, CHI. INT’L CHARTER SCHS., <https://www.chicagointl.org/discover-cics> (last visited Mar. 23, 2019).

113. KIPP N.J., <http://kippnj.org/about-kipp-nj/> (last visited Mar. 23, 2019).

114. For example, the CMO utilizes one special education coordinator, one back office for special education, and centralized hiring and disbursement of service providers to the various schools.

sophisticated organizations responsible for managing more schools than the average-sized school district.”<sup>115</sup> It is not surprising that CREDO found that students with disabilities that attended CMO charter schools outperformed students in LEA charter schools.<sup>116</sup>

One example of a CMO that has demonstrated considerable capacity to serve students with disabilities is Achievement First (AF). AF “is a public charter school management organization that operates 25 charter schools in three northeastern states: Connecticut, New York, and Rhode Island.”<sup>117</sup> AF provides its schools significant special education support, such as printed materials, templates, and guidance. It also addresses “big picture” considerations at the network level, such as establishing the philosophical approach and policies for educating students with disabilities, establishing metrics for assessing the success of students with disabilities within AF schools, and providing the professional development needed to support staff and empower students to reach their goals.<sup>118</sup> AF also provides professional development training for each school’s special education coordinator.<sup>119</sup> AF also provides in-house legal support to its schools, including an attorney who focuses specifically on special education.<sup>120</sup> Taken together, AF’s support at the network, region, and school levels may establish that it has sufficient size and capacity to deliver quality special education.<sup>121</sup>

Second, it may even be possible that a single-school independent Charter School LEA educates enough students, or has access to sufficient funding through grants, to fulfill the capacity requirement. If a single school, or a collection of schools under one charter, can establish sufficient economies of scale and expertise to meet the FAPE, LRE,

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115. IMPLICATIONS FOR STUDENTS WITH DISABILITIES, *supra* note 7, at 36.

116. See JAMES L. WOODWORTH & MARGARET E. RAYMOND, CTR. FOR RESEARCH ON EDUC. OUTCOMES, CHARTER SCHOOL GROWTH AND REPLICATION, VOL. 2 13–14 (2013) (comparing data on the “full effects of math and reading growth” for special education students in the different types of school settings).

117. PAUL T. O’NEILL & LAUREN MORANDO RHIM, NAT’L ALL. FOR PUB. CHARTER SCHS., EQUITY AT SCALE: HOW PUBLIC CHARTER SCHOOL NETWORKS CAN INNOVATE AND IMPROVE SERVICES FOR STUDENTS WITH DISABILITIES 5 (2015) [hereinafter O’NEILL & RHIM, EQUITY AT SCALE].

118. See *id.*

119. See *id.*

120. See *id.*

121. See *id.*

and other obligations of the IDEA, it can satisfy the sufficiency mandate.

Finally, charter schools may be able to demonstrate sufficient capacity by showing they are linked or partnered with a larger special education infrastructure that creates adequate economies of scale. The traditional example is charter schools that are part of an existing LEA. If the Charter School LEA is treated like traditional schools within the district for purposes of special education in terms of funding and service provision, the charter likely has sufficient capacity to comply with the IDEA because it can take advantage of the overall district capacity. This may not be the case, however, if the charter school is inadequately funded, provided inadequate services by the LEA, or is otherwise rendered “independent” by its operating agreement, as can often occur.<sup>122</sup>

One prerequisite to establishing sufficient capacity is compelling “applicants to produce detailed plans and budgets for serving disabled students . . . .”<sup>123</sup> Merely requiring charter applicants to check a box on an application that they will fulfill federal mandates respecting students with disabilities is insufficient. Authorizers should demand that an applicant explain how it will educate students with disabilities, including a budget, staffing information, suspension and expulsion procedures for students with disabilities, and how it plans to fulfill the full continuum of alternative educational placements requirement.<sup>124</sup> Requiring a detailed special education plan prevents authorizers and applicants from treating students with disabilities as an afterthought in the authorizing process.

Authorizers should judge these budgets and plans based on whether they establish the charter school has sufficient capacity to serve students with disabilities. There may be some variety of methods by which states allow charters to demonstrate sufficient capacity, but they should at their core boil down to requiring proof of sufficient size, or sufficient linkage to an entity with sufficient size, to ensure adequate resources, personnel, and expertise to fulfill the IDEA mandates.

### *B. States Should Compel Charter Schools with Insufficient Capacity*

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122. CTR. FOR LAW & EDUC., CHARTER SCHOOLS AND STUDENTS WITH DISABILITIES 21–22 (2012).

123. Garda, *supra* note 3, at 713.

124. IMPLICATIONS FOR STUDENTS WITH DISABILITIES, *supra* note 7, at 118–19.

*to Link to Larger Special Education Infrastructures and Provide a Variety of Pathways for Charters to Establish Sufficient Capacity*

If a charter school cannot establish sufficient capacity to fulfill all the mandates of the IDEA, the state should compel it to link or partner with a larger special education infrastructure to achieve capacity. This Part explains the importance of linkages between charter schools and larger special education infrastructures to create capacity and how federal law is permissive of such linkages. This Part then discusses a variety of pathways charter schools could pursue to establish sufficient capacity.

Every major study conducted on charter schools, most of them funded by the Department of Education, concludes that charter schools that are linked with a special education infrastructure better serve students with disabilities.<sup>125</sup> “One clear finding” of the research “is that charter schools benefit from affiliation with a special education ‘infrastructure’ that supports the provision of special education and related services in individual schools.”<sup>126</sup> As one charter school special education administrator explained:

a charter school operating as its own LEA that is part of a broader charter network can experience benefits with respect to resource availability: “I think us being a network—a small network, but a network—has been really helpful in terms of pooling resources, and I collaborate with a ton of other . . . charters [in the area].”<sup>127</sup>

The reason is simple: linkages enable capacity-building through the sharing of resources and knowledge.<sup>128</sup> First, as explained above,

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125. See AHEARN ET AL., PROJECT SEARCH, *supra* note 57, at 13–14, 50; TERRY L. JACKSON, PROJECT FORUM AT NAT’L ASS’N OF STATE DIRS. OF SPECIAL EDUC., CHARTER SCHOOLS: RESEARCH ON SPECIAL EDUCATION 13–15 (2003) [hereinafter JACKSON, CHARTER SCHOOLS]; see also RHIM & MCLAUGHLIN, CHARTER SCHOOLS AND SPECIAL EDUCATION, *supra* note 61, at 41; Lange, *supra* note 65, at 14; Morse, *supra* note 61, at 176; O’Neill et al., *Serving Students With Disabilities*, *supra* note 61, at 7.

126. Rhim & McLaughlin, *Students with Disabilities*, *supra* note 57, at 9.

127. IMPLICATIONS FOR STUDENTS WITH DISABILITIES, *supra* note 7, at 75.

128. AHEARN ET AL., PROJECT SEARCH, *supra* note 57, at 16; JACKSON, CHARTER SCHOOLS, *supra* note 125, at 13 (2003).

linkage helps defray costs, spread risks, and provide more financial security. Second, linkage helps build knowledge and experience capacity. Independent charters with insufficient capacity and knowledge will be challenged to succeed unless given access to strategies for coping with procedural and administrative aspects of special education law and mechanisms devised for compliance with the legal mandates.<sup>129</sup>

But states should not compel particular linkages or infrastructures. Rather, states should take advantage of the flexibility the IDEA allows states in structuring special education governance and provide a variety of pathways for charters to establish sufficient capacity. States should offer a menu of special education infrastructures that charters can affiliate with or link to in order to establish sufficient capacity to properly educate students with disabilities. This “capacity pathway” approach to compliance shifts the conversation away from the notion that smaller boutique charter schools have less or no accountability for special education, but offers a solution as to how their legal obligations can be met while preserving mission integrity.

1. Federal Law Permits States Tremendous Flexibility in Creating Special Education Infrastructures.

The binary approach that states have taken with charter schools—they are either LEAs or part of LEAs—stem from tradition and not federal mandate. Many innovative governance structures are permissible under the IDEA, and many of these alternative structures may allow charter schools to better educate students with disabilities while maintaining their essential hallmarks of accountability, autonomy, and mission.

The traditional model of special education governance is that LEAs/school districts are primarily responsible for educating students with disabilities, and the state acts as a backstop, only occasionally providing special education directly.<sup>130</sup> This traditional model is not mandated by the IDEA; it is simply a byproduct of the education structures in existence at the time the IDEA was passed. Federal law grants

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129. See Lange, *supra* note 57, at 19; Rhim & McLaughlin, *Students with Disabilities*, *supra* note 57, at 8.

130. See Garda, *supra* note 3, at 670–73, 677–79 (discussing the model of schools that the predecessor to IDEA was enacted and geared towards).

states great flexibility in how to structure its provision and oversight of special education.

The IDEA provides that the state educational agency (SEA) has the primary responsibility to ensure that the obligations of the IDEA are met by LEA in its state.<sup>131</sup> The IDEA contemplates that the primary providers of special education and services are not the state, but rather LEAs and Educational Service Agencies (ESAs).<sup>132</sup> These entities, though traditionally considered as simply school districts, are defined broadly, and may encompass a wide range of educational institutions. The definitions are as follows:

- Local Educational Agency means
  - public boards of education or
  - other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public elementary schools or secondary schools in a city, county, township, school district, or other political subdivision of a state or
  - for such combination of school districts or counties as are recognized in a State as an administrative agency for its public elementary schools or secondary schools or
  - an Educational Service Agency and other public institutions or agencies.<sup>133</sup>
- Educational Service Agency
  - a regional public multiservice agency authorized by state law to develop, manage, and provide services or programs to local educational agencies and recognized as an administrative agency for purposes of the provision of special education and related services provided within public elementary schools and secondary schools of the State or

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131. *Id.* at 700.

132. 20 U.S.C. § 1413(a)(1) (2018); *see also* Garda, *supra* note 3, at 670 (discussing the primary responsibilities of the LEAs in a state).

133. 20 U.S.C. § 1401(19) (2018).

- any other public institution or agency having administrative control and direction of a public elementary school or secondary school.<sup>134</sup>

These definitions are not intended to limit state options for special education infrastructures, but expand them.<sup>135</sup> Plainly stated, the state can authorize almost any entity to carry out the provisions of the IDEA to meet the state's obligation to ensure compliance. It could create an entirely new "public authority" and identify it as an LEA or identify a "public institution" as an ESA, which would entitle the entity to eligibility for assistance just like traditional LEAs and require the entity to comply with the IDEA just like traditional LEAs.<sup>136</sup>

## 2. Pathways to Achieving Sufficient Capacity

With IDEA flexibility in mind, there are numerous special education infrastructures states could implement to ensure charter schools and authorizers that are not traditional LEAs have sufficient capacity to comply with the IDEA. This Article recommends that states offer a variety of these pathways to capacity so that charter schools can decide which best allows them to properly serve students with disabilities while maintaining its mission and autonomy. The following is a list of pathways permitted by federal law that states could take to achieve sufficient capacity, highlighting the advantages and disadvantages of each.

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134. *Id.* at § 1401(5).

135. *See* Letter from U.S. DEP'T OF EDUC., OFFICE OF SPECIAL. EDUC., *Dear Colleagues* (28 Sept. 2015), <https://sites.ed.gov/idea/files/finalsignedcsp.pdf> (reminding the SEAs of their role in monitoring public charter schools to ensure they are using federal funding in a way that it is designed.).

136. LEAs are the only entities identified as "eligible for assistance" under Part B of the IDEA. *See* 20 U.S.C § 1413(a) (2018). But other types of public agencies are also responsible for complying with the IDEA. *See* 34 C.F.R. § 300.33 (2019) ("Public agency includes the SEA, LEAs, ESAs, nonprofit public charter schools that are not otherwise included as LEAs or ESAs and are not a school of an LEA or ESA, and any other political subdivisions of the State that are responsible for providing education to children with disabilities.").

*i. Charter as Part of an Existing LEA*

One pathway is for states to permit charter schools to forego their LEA status and join an existing LEA that already provides special education, such as a school district. Creating this pathway is permissible under the IDEA, which allows states to designate charters as LEAs or part of LEAs,<sup>137</sup> but most states would need to change their law to allow charters that are already designated as LEAs to join an existing LEA. For example, Louisiana recently passed legislation allowing the charter schools in New Orleans that are LEAs to opt-in to the Orleans Parrish School Board LEA for purposes of special education.<sup>138</sup>

This option allows charter schools access to a large and established infrastructure that is experienced with IDEA compliance and has sufficient economies of scale to ensure adequate personnel and resources. As noted above, this option virtually guarantees that charters will fulfill the sufficiency requirement. It provides the additional benefit of charter schools not being ultimately responsible and insulates schools from liability for compliance with the IDEA (though this default rule may be changed in the operating agreement). This advantage is most clearly seen when it comes to making available the full continuum of placements. Charter schools that are part of LEAs can rely on the entire LEA to provide the full continuum of placements, such as specialized programs for low incidence disabilities. It is likely that a robust district LEA has regional or “cluster” programs to address specific disabilities, such as an autism center. This relieves the charter school from having to create specialized programs or pay for residential or private placements—that obligation falls to the LEA. Of course, the LEA may compel the charter school to create a specialized program to ensure it is carrying the same burden as traditional public schools.

However, there are several reasons why charter schools may not choose this option. First, the relationships between traditional school districts and charter schools is often contentious. Despite the IDEA mandate that LEAs provide their charter schools with the same level of special education funding and services provided to traditional schools,<sup>139</sup> it does not always happen.<sup>140</sup> Second, such a relationship

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137. 20 U.S.C. § 1413(e)(1)(A)–(B) (2018).

138. LA. STAT. ANN. § 17:3995 (2019).

139. 20 U.S.C. § 1413(a)(5)(A) (2018).

140. Garda, *supra* note 3, at 673, 708–09.

reduces charter autonomy and may infringe on a charter's mission and pedagogy. Charter schools carefully cultivate their mission and character, ensuring that every aspect of the curriculum and every teacher is mission-aligned. When school districts provide personnel and methods that are not aligned, the resulting mismatch degrades the mission and lessens autonomy. It must be noted, however, that while charter schools cherish their autonomy, there is no evidence that increased autonomy improves student performance.<sup>141</sup>

*ii. Multi-Charter LEA*

Another pathway states could create to ensure charters create sufficient capacity is to allow independent charters to join together and become a single LEA. This pathway is permissible under the IDEA, which allows states to constitute any "public authority . . . to perform a service function for . . . schools" and designate it as an LEA.<sup>142</sup> Such multi-charter LEAs could be organized in any number of ways, such as geographically, by charter type, or by CMO schools. The minimum requirement would be that any resulting LEA would have sufficient capacity to meet its IDEA obligations. For example, all of the charter schools in a city could be part of a centralized LEA, or LEAs based on smaller geographic regions could be created for fewer charter schools. Or various affinity LEAs could be created based on charter type, such as an LEA for college preparatory charter schools, Montessori charters, or CMO charters, without regard to geography.

However, state law would need to be changed to allow such multi-charter LEAs. State law could determine the membership and structure of the LEA, or it could merely constitute the entity by law but allow charter schools to determine the membership and structure of the final LEA. For example, a state could simply require that charters partner or link with other charter schools so that the collective whole educates X number of students and designate the collective whole as an LEA. This would allow charters to decide which other charters to partner with or link to in order to create the LEA. The resulting multi-charter LEA would be entitled to IDEA funding and would operate much like a traditional LEA. The level of special education funding

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141. Garda, *Mississippi Charter School Act*, *supra* note 109, at 267–70.

142. 20 U.S.C. § 1401(19) (2018).

and services the member charters receive from the LEA could be determined by state law or agreement among the member charters.

This pathway to capacity creates significant benefits to students with disabilities and schools. First, it ensures the necessary finances and personnel are available to properly comply with the IDEA because it creates sufficient economies of scale. Second, it eliminates the inherent tension between traditional school district LEAs and charters. Because the new LEA is an entity comprised exclusively of charter schools, there is no concern of funding and service favoritism for traditional schools that pervades district LEAs. Third, multi-charter LEAs can limit infringement on their members' mission and autonomy, particularly if it is an affinity LEA. Because the LEA will serve exclusively charter schools, and is governed by its members, it should be more attuned to providing services in a way that is compatible with the pedagogy of the charter schools and be more willing to take member autonomy into account. Fourth, LEAs made up exclusively of charter schools can allocate resources more effectively, such as on the start-up training necessary in charter schools to create special education programs—an unnecessary cost in traditional schools. This provides a significant advantage when fulfilling the full continuum requirement. Multi-charter LEAs can provide the full continuum of placements among their entire membership. Strategic planning will allow different schools to provide specialized programs to address certain low-incidence disabilities. And if a residential or private placement is necessary, the LEA, rather than the individual school, bears the cost.<sup>143</sup> This pathway means that charter schools are not individually liable for compliance with the IDEA. In sum, LEAs made up exclusively of charter schools remove many of the barriers created by the inherent conflict between charter schools and traditional schools that are both served in traditional LEAs but achieves all of the benefits of collective action.

There are several disadvantages to this approach. First, there is no guarantee that the resulting LEA will have sufficient expertise to comply with the IDEA. Unlike traditional school district LEAs that have provided services for nearly fifty years, a new LEA made up entirely of charters may lack this knowledge base. If a state creates this pathway, it cannot simply assume that the resulting LEA and members have the requisite capacity. Second, multi-charter LEAs result in a

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143. 20 U.S.C. § 1412(a)(10) (2018).

moderate loss of autonomy for the member charter schools. Under this model, individual charter schools would not be entitled to direct IDEA funding—the new LEA would receive the funding—but the charters could conceivably control how the funding is distributed, or services are provided, by mutual agreement (unless state law provides otherwise). Third, charter schools that select this pathway would lose their LEA status, which many covet for reasons other than special education, such as eligibility for grants.

*iii. Multi-Charter Educational Service Agency*

An Educational Service Agency (ESA) is a regional agency “authorized by state law to develop, manage, and provide services . . . to local educational agencies; and [is] recognized as an administrative agency for purposes of the provision of special education . . . .”<sup>144</sup> States could create an ESA (or ESAs) and allow LEA charters to join an ESA. Like multi-charter LEAs, ESAs can be organized in any number of ways, such as geographically, by charters that serve similar grades, by charters with similar missions or pedagogies, or by CMOs. An independent entity could act as the ESA. The form, composition, and structure of the ESA would be determined by state law, or state law could set outer parameters and leave such form and structure in the hands of the members of the ESA.<sup>145</sup>

California provides one example of how ESAs can be structured. In California, all LEAs must join a Special Education Local Plan Area (SELPA), which is an ESA.<sup>146</sup> The California Department of Education’s website explains that SELPAs were mandated to ensure “sufficient size and scope to provide for all special education service needs of children.”<sup>147</sup> While membership in a SELPA is mandatory, LEAs

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144. 20 U.S.C. § 1401(5) (2018).

145. For an in-depth discussion of how ESAs could work for charter schools, see generally Garda, *supra* note 3, at 709–10.

146. CAL. EDUC. CODE §§ 56195, 56205 (West 2008); see also *id.* at § 56146 (regarding SELPAs and charter schools); AHEARN ET AL., PROJECT SEARCH, *supra* note 57, at 24, 81 (describing California law).

147. CAL. DEP’T OF EDUC., *California Special Education Local Plan Areas*, <https://www.cde.ca.gov/sp/se/as/caselpas.asp> (last visited Mar. 25, 2019).

can choose which SELPA to join.<sup>148</sup> There are three SELPAs in California that serve charter schools exclusively: El Dorado County Office of Education Charter SELPA,<sup>149</sup> Los Angeles County Charter SELPA,<sup>150</sup> and Sonoma County Charter SELPA.<sup>151</sup> The relationship between the SELPA and its LEA charter members is determined by a Special Education Local Plan and an Agreement for Participation executed between the LEA charter and the SELPA.<sup>152</sup> The relationship between SELPAs and their LEAs—the level of oversight and service provision by the SELPA—is worked out jointly by the SELPA and its members.<sup>153</sup> California state law merely provides general requirements for Local Plans.<sup>154</sup>

The ESA option has the same advantages of the multi-charter LEA discussed above, with the additional benefit that charter schools do not lose their LEA status. In addition, ESAs have significant flexibility in how they are structured and how they serve their member schools. ESAs could be structured as merely an oversight and service coordination agency for their schools, or they could be a robust ESA that also provides direct services. For example, state law could require, or the ESA members could agree, that the ESA performs all special education evaluations and assessments, or provides occupational therapists, or handles certain suspensions and expulsions, or provides legal representation.

This option has the same disadvantages as the multi-charter LEA (minus the loss of LEA status) but adds one significant downside—a new layer of bureaucracy. Under federal law the ESA is treated

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148. AHEARN ET AL., PROJECT SEARCH, *supra* note 57, at 81; *What is a SELPA?*, CAL. CHARTER SCH. ASS'N, <http://library.ccsa.org/2010/05/what-is-a-selpa.html> (last visited Mar. 25, 2019).

149. EL DORADO CHARTER SELPA, <http://charterselpa.org/> (last visited Mar. 25, 2019).

150. L.A. CTY CHARTER SELPA, <https://www.lacountycharterselpa.org> (last visited Mar. 25, 2019).

151. SONOMA CTY CHARTER SELPA, <https://www.sonomaselpa.org> (last visited Mar. 26, 2019).

152. *See, e.g.*, AHEARN ET AL., PROJECT SEARCH, *supra* note 57, at 81; *Local Plan for Special Education*, SONOMA COUNTY SELPA (July 1, 2011), [http://www.sonomaselpa.org/res\\_files/local\\_plan.pdf](http://www.sonomaselpa.org/res_files/local_plan.pdf).

153. AHEARN ET AL., PROJECT SEARCH, *supra* note 57, at 81.

154. CAL. EDUC. CODE § 56205 (West 2008).

as a type of LEA.<sup>155</sup> So instead of a direct link between the LEA charter schools and the state, a new LEA is inserted in the middle—the ESA. The ESA is entitled to funding just like a traditional LEA, but what portion of that is taken from its member LEAs is likely determined by the agreement of the members.<sup>156</sup>

*iv. Joint Applications for Eligibility*

Yet another pathway to capacity states could offer independent charter schools is the same option it provides its other small LEAs—joint applications for IDEA funding. Federal law permits SEAs to require small traditional LEAs with insufficient size and scope, such as rural LEAs, to establish eligibility for IDEA funding jointly with another LEA.<sup>157</sup> But SEAs may not compel charter schools to establish joint eligibility “unless the charter school is explicitly permitted to do so under the State’s charter school law.”<sup>158</sup> State law should permit charters to file joint applications to fulfill the capacity mandate. These joint applications could be with other charter schools or with school district LEAs, assuming they are amenable to such an arrangement.

If the joint applications include only charter schools that are LEAs, this pathway provides many of the same benefits as the multi-charter ESA and multi-charter LEA options without the disadvantage of creating a new intermediate level of bureaucracy (multi-charter ESAs) or requiring charters to lose their LEA status (multi-charter LEAs). An additional benefit is that the process and practice of joint applications is already known to states and need not be invented whole-cloth. The IDEA even mandates how such partnerships are funded (the same as if each were applying individually) and how responsibility is divided (jointly).<sup>159</sup>

But the disadvantages may be significant. Joint liability and responsibility for co-applicants, without any commensurate control over their practices, is fraught with risk. Further, joint responsibility for implementing programs, without any single entity in control, could create chaos rather than reap the benefits of coordinated action. While joint

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155. 20 U.S.C. § 1401(5) (2018).

156. *Id.* § 1413(e)(4).

157. *Id.* § 1413(e).

158. *Id.* § 1413(e)(1)(B).

159. *Id.* §§ 1413(e)(1)–(3).

applications may create economies of scale to ensure sufficient financial resources, without a single oversight entity there is no guarantee that personnel and expertise will be evenly distributed among members. There is also no guarantee the full continuum of placements will be provided among the partner schools, leaving them in the same position of having to pay for specialized placements. Many of these disadvantages could be resolved with thorough requirements placed on joint applicants—such as mandating a central special education office and direct service provision—which may already exist in several states.

v. *Pooling Resources*

Another pathway to capacity that states could recognize is pooling arrangements between charter schools. Charter schools that enter into contractual arrangements with other schools to share costs, expertise, and service providers may be able to create sufficient capacity. This would require a significant number of schools in the pool in order to create economies of scale and robust sharing of expertise in order to fulfill the capacity mandate. This pathway is one step short of permitting independent charters to apply for joint eligibility but has nearly the same effect on capacity.

Many states permit charter schools to use IDEA funds to implement “cost or risk sharing funds, consortia, or cooperatives working in a consortium with other LEAs to pay for high cost special education and related services.”<sup>160</sup> These arrangements can take many different forms. For example, LEA charters can pool IDEA resources to create “purchasing collaboratives” for the purpose of creating economies of scale in the purchase of services, such as occupational and speech therapists, experts on program creation and implementation, and assessment and evaluation teams.<sup>161</sup> While one school may be burdened by hiring an expensive service provider for very few children, or providing its teachers significant training and technical assistance, a purchasing collaborative of schools can spread this cost across many schools.<sup>162</sup>

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160. D.C. Mun. Regs. tit. 5-E, § 3019.6 (2020).

161. AHEARN ET AL., PROJECT SEARCH, *supra* note 57, at 25.

162. For a discussion of the benefits of LEA charters creating special education networks and examples of schools that have done this, see generally O’NEIL & RHIM, EQUITY AT SCALE, *supra* note 117.

Contractual arrangements for service provision between LEAs could also create more efficient allocation of resources. For example, if one charter school has a built-out program for students with autism, another charter could purchase services from that school rather than create an entire program from scratch. As discussed below, this could also be done with traditional LEAs, as they likely already have expertise and programs for many low-incidence disabilities. This creates efficiencies in both economies of scale and knowledge sharing.

While purchasing collaboratives and contractual arrangements allow Charter School LEAs to create economies of scale and share knowledge, creation of high-risk pools reduce risks associated with high-cost, high-needs students.<sup>163</sup> Essentially, risk sharing funds operate as insurance against extremely costly placements. Because effective risk-pooling requires a large number of participants, most risk pooling arrangements occur at the SEA level,<sup>164</sup> but it can also be done between groups of LEAs.<sup>165</sup>

Encouraging cooperative arrangements between schools has several advantages. First, it permits charters to retain their autonomy and advance their mission. LEA charters would have the choice whether to enter into cooperative arrangements and which schools to cooperate with. For example, several affinity schools could cooperatively purchase or provide services to ensure mission-compliant service provision.

While this option has the possibility of increasing scale and knowledge, it is insufficient to address the challenges associated with creating and coordinating a full continuum of alternative placements equitably across schools. Solving this problem requires system-wide coordination and planning, which is difficult, if not impossible, without a centralized office. Cooperative arrangements also leave schools independently liable for IDEA violations and does little to address the

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163. See AHEARN ET AL., PROJECT SEARCH, *supra* note 57, at 25 (describing this “risk-pooling” approach as an “insurance model”).

164. See 20 U.S.C. § 1411(e)(3) (2018) (permitting states to use Part B funds for risk pools). For a general discussion of SEA level high risk funds, see CONG. RESEARCH SERV., THE INDIVIDUALS DISABILITIES EDUCATION ACT (IDEA) FUNDING: A PRIMER 24–26 (2019). See also *Risk Pool Program*, PUB. SCHS. OF N.C. <https://ec.ncpublicschools.gov/finance-grants/applications/risk-pool-program> (last visited Mar. 26, 2019).

165. See 20 U.S.C. § 1413(a)(4)(A)(iii) (2018).

challenges of ensuring compliance with onerous procedural requirements. These arrangements will require careful scrutiny by the state to ensure they are a viable pathway to achieve capacity.

*vi. Special Education Cooperatives*

Charter schools could also join special education cooperatives—entities that provide expertise, consulting and a la carte services to their members—to fulfill the capacity mandate. Numerous special education cooperatives exist around the country, but they are often small and limited in the services they offer.<sup>166</sup> For cooperatives to be a viable pathway, they must be large enough to capitalize on economies of scale and provide a rich array of services, consulting, and expertise to their members. Shasta County Cooperative<sup>167</sup> in California and the True Measure Collaborative<sup>168</sup> in Washington are examples of robust cooperatives that may fulfill the capacity mandate for its members.

Cooperatives have many of the same advantages of pooling arrangements and may even provide superior services and expertise because these are entities created exclusively for this purpose. But cooperatives do nothing to alleviate the burden associated with providing a continuum of alternative placements. Cooperatives can help staff, and possibly create, a specialized program, but they do not offer coordination of services between independent charter schools to ensure that a collective whole fulfills the continuum requirement. Independent charter schools that are part of cooperatives will still need to create, or pay for, specialized placements. This option also leaves schools independently liable for IDEA violations and does little to address the challenges of ensuring compliance with onerous procedural requirements.

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166. Special education collaboratives for charter schools exist in some form in New York City, Washington D.C., Massachusetts, New Orleans and Denver, for example. See O'NEIL & RHIM, EQUITY AT SCALE, *supra* note 117, at 7.

167. *Co-Op Services*, SHASTA CTY. OFFICE OF EDUC., <https://www.shastacoe.org/instructional-services-division/curriculum-instruction-department/co-op-services> (last visited Mar. 26, 2019).

168. True Measure Collaborative, <http://www.truemeasuretraining.org> (last visited Mar. 26, 2019).

*vii. Purchasing Services from District LEAs*

Another pathway for charters to establish sufficient capacity would be to permit independent charters to purchase services from existing school district LEAs. This is already permitted in many states.<sup>169</sup> For example, charters could pay district LEAs to do special education assessments and evaluations, assist in IEP creation, provide related services, psychologists, or even lease assistive technology. This option allows independent charters to take advantage of the expertise and economies of scale that already exist in surrounding district LEAs. This pathway enjoys the same advantages as the cooperative option. Depending on the size of the district LEA, it may provide even greater economies of scale than cooperatives and be able to provide cheaper services. The disadvantages to the two options are also similar, but in the case of purchasing services from an LEA there is a greater chance of infringement on autonomy and mission. Unlike a cooperative that is geared toward providing services to charter schools, district LEAs are inflexible in how they provide services on-site. In this respect, this option suffers from some of the same problems identified when charter schools are part of LEAs.

*C. States Must Ensure LEAs Have Sufficient Capacity*

Even in instances where states assign LEA responsibilities to an entity other than a charter school or the district where it sits, it is essential that the LEA have sufficient capacity to serve effectively in that role. As noted above, this can be challenging because such entities—usually third-party authorizers of some sort—generally lack the programs and educational personnel of a traditional district or even a school. Whether the LEA is an independent chartering board, higher education institution, not for profit organization, or some other entity, the common denominator is that the LEA is a step removed; it does not generally provide educational services to students. Special education is likely the most challenging part of making that scenario work.

States should be thoughtful about structuring such LEA allocations in a viable way. At a minimum, states should require third-party LEAs for charter schools to hire or contract with a special education

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169. See, e.g., *supra* note 160.

director who has considerable expertise in the field. This director should have the ability to effectively monitor and assess charter school special education programs, staffing, funding levels, programmatic offerings, and other key aspects of services for students with disabilities. These LEAs should also be required to demonstrate the necessary expertise to know whether an applicant seeking to create a charter school has adequately thought through how special education considerations will play out in the proposed school. Unless applicants can articulate a particularized plan for meeting the needs of all their students, there may be no reason to believe that those needs are even understood. The same is true with assessing whether special education problems warrant intervention by the LEA or non-renewal of the school's charter. The LEA must have sufficient expertise on staff in order to make these calls.<sup>170</sup>

Employing a competent special education director, while crucial, will not transform a purely administrative entity into an LEA that can offer a full range of special education placements, carry out IEP meetings, or provide services such as occupational or speech-language therapy as required by student IEPs. These sorts of LEA responsibilities are a poor fit with a non-school, non-district LEA. Some kind of work-around is needed in order to meet student needs and comply with applicable law. One option would be for the third-party LEA to hire a range of service providers and make them available to the charter schools it oversees. But this would be costly and could be quite difficult to orchestrate. Another possibility would be for the LEA to enter into a contractual arrangement with each charter school, assigning to the school the authority and obligation to handle special education that would ordinarily fall to the LEA. This would include holding IEP meetings, conducting Manifestation Determination Reviews, and generally ensuring that a FAPE is being provided to each student with an IEP. Such contractual arrangements have been used in a number of states, including Colorado, Nevada, and Tennessee for just this purpose. Under such contracts, the LEA retains ultimate responsibility for all of its legal obligations, but essentially assigns certain functions to the schools because they are simply better able to carry them out.<sup>171</sup> The IDEA

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170. NACSA has produced an extensive toolkit for charter school authorizers that addresses relevant best practices. See SPECIAL EDUCATION TOOLKIT, *supra* note 91, at 15.

171. See O'NEILL & RHIM, *supra* note 117, at 11.

does not directly address this sort of assignment of LEA functions, and courts have yet to weigh in on such arrangements.

Perhaps the biggest challenge for third-party LEAs with regard to special education in charter schools is providing for students with low incidence, severe disabilities. When a student enrolled at a charter school demonstrates needs that may not be within the capacity of the school to meet, what happens next? And who makes that call—the LEA or the school? Under the IDEA, the LEA has an obligation to ensure that every student with an IEP is provided with an appropriate placement.<sup>172</sup> Where the LEA has no placements to offer, it is not clear what the viable options are. It is possible that the LEA could direct that the student be transferred to another charter school within the LEA's portfolio that is able to meet the needs of the student, but that may run afoul of state charter school law relating to admissions and enrollment. It is also possible that the LEA could determine that a private placement in a specialized, non-public school is needed. If so, it seems likely that the LEA would be responsible for paying the tuition at such a school.

In order to serve effectively as a LEA, non-district, non-charter LEAs need to grapple with these issues and put in place clear, explicit practices that work within a reasonable interpretation of federal and state law. The other option would be to avoid this tricky set of challenges by not allocating LEA responsibilities to third party entities.

*D. All Special Education Infrastructures Must Have Clear Lines of Funding, Authority and Responsibility Between the Authorizer, State, School and Parents*

States should offer a wide variety of pathways to charters to create sufficient capacity. No matter which linkages or infrastructures states elect to offer, though, it must ensure there are transparent lines of funding, authority, and responsibility that are clear to authorizers, schools, the state, and parents. The uncertainty regarding the entity or entities responsible for providing special education often leads to non-compliance with the law.<sup>173</sup> Uncertain lines of authority and control over special education programming result in confusion and poor education for students with disabilities. For example, if a charter school is

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172. 20 U.S.C. § 1413 (2018).

173. Lange, *supra* note 57, at 1.

part of an LEA or ESA, which entity hires the special education staff? Is legally liable for violations of the law? Supervises the staff? Conducts evaluations? Drafts the IEPs? Determines when, where and how much services will be provided? There is already significant confusion within states, LEAs, and charter schools about the locus of responsibility and funding, and it leads to poor provision of special education and expensive litigation.<sup>174</sup> This sort of disagreement was the source of a complaint recently filed by an advocacy group in New York against Success Academy charter schools there, alleging that the schools and their charter management organization overstepped their authority to make changes to special education services, and that the district failed to take appropriate action. The state's Office of Special Education agreed with some of the allegations, finding fault with the school and with the district, which serves as LEA for special education. This scenario called out a baseline lack of clarity about who is responsible for doing what where a charter school is part of the district LEA.<sup>175</sup> In New Jersey, charter schools are LEAs that are responsible for special education, but the law has a carve out for high-needs students. It requires districts to fund full-time private day programs for students whose needs cannot met by the charter school.<sup>176</sup> But the law doesn't say what happens if the district believes it can provide a viable placement within the district. Can it insist on that? Can it charge the school for providing such a placement? How much can it charge? Who decides? Who controls the process? Leaving these questions unresolved leads to confusion and inaction, both of which can have negative consequences for students with disabilities.

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174. *Id.* at 13–17; Rhim & McLaughlin, *Students with Disabilities*, *supra* note 57, at 6; Lauren Rhim & Margaret McLaughlin, *Special Education in American Charter Schools: State Level Policy, Practices and Tension*, 31 CAMBRIDGE J. OF EDUC. 377 (2001); McLAUGHLIN ET AL., *supra* note 76, at 9.. See generally Friendship Edison Pub. Charter Sch. Chamberlain Campus v. Smith, 561 F.Supp.2d 74 (D.D.C. 2008); Hyde Leadership Pub. Charter Sch. v. Clark, 424 F.Supp.2d 58 (D.D.C. 2006).

175. Written Decision, *Advocates for Children of New York v. New York City Dep't of Educ.*, (Dec. 4, 2018), [https://www.advocatesforchildren.org/sites/default/files/on\\_page/success\\_complaint\\_nysed\\_decision.pdf?pt=1](https://www.advocatesforchildren.org/sites/default/files/on_page/success_complaint_nysed_decision.pdf?pt=1). See also Paul O'Neill, *The Murkiness of Special Education in New York City Charter Schools*, NAT'L CTR. FOR SPECIAL EDUC. IN CHARTER SCHS. (Jan. 14, 2019), <https://www.ncsecs.org/news/murkiness-of-special-education-in-nyc-charter-schools/>.

176. N.J. STAT. ANN. § 18A:36A-11(b) (West 2017).

The contrast between New York City and Denver is useful in highlighting the varied ways that LEA obligations can be interpreted in instances where the district is the LEA for charter schools. Both Colorado and New York treat charters as schools within a district LEA for special education.<sup>177</sup> In New York, the Department of Education takes assertive control over LEA functions such as conducting evaluations, holding IEP meetings, Manifestation Determination Reviews, and other core administrative functions.<sup>178</sup> Schools cannot do any of these things themselves and must defer to the determinations made by the district. Operating under the same federal special education laws, Denver simply defers these functions to the schools to carry out.<sup>179</sup> They do not do so by assigning such tasks to the schools under a contract—the District just treats this as the role of each school. Each of these districts pass along some, but not all, of the relevant IDEA funds according to their own formulas.<sup>180</sup>

Some of the pathways identified above lend themselves to clearer lines of authority and funding. The cooperative, pooling, and service purchase options, for example, do not alter traditional funding streams or lines of responsibility. A Charter School LEA in these arrangements remains entitled to full funding and is the sole entity obligated to comply with the IDEA. But when the charter is linked by law to another entity, whether it be an ESA, district LEA, multi-charter LEA, or partners in a joint application, funding and authority can quickly become murky.

In the context of charter schools as part of district LEAs, the IDEA provides clear lines of funding and responsibility, but states and authorizers often create ambiguity through laws and operating agreements. Under the IDEA, LEAs are entitled to IDEA funding determined by a formula.<sup>181</sup> But how these LEAs distribute these funds to their schools is determined by state law, which often leaves it to the discretion of the LEA.<sup>182</sup> Charter school operating agreements, which

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177. NY EDUC. LAW § 2854 (McKinney 2015).

178. O'Neill, *supra* note 176.

179. SPECIAL EDUCATION TOOLKIT, *supra* note 91.

180. *See id.*

181. *See* LAUREN MORANDO RHIM ET AL., NAT'L ALL. FOR PUB. CHARTER SCHS., GETTING LOST WHILE TRYING TO FOLLOW THE MONEY: SPECIAL EDUCATION FINANCE IN CHARTER SCHOOLS 5 (2015).

182. *See id.*

often further delineate money divisions, compound the confusion about sources and streams of money.<sup>183</sup> The same is true of responsibility—the IDEA places the entire locus on the LEA and not individual schools of the LEA, but many operating agreements make charter schools liable for certain violations and their LEAs liable for others. States should use the opportunity presented by the creation of new special education infrastructures to create uniformity among charter schools and between charter schools and traditional schools for the distribution of IDEA funds and ultimate responsibility.

In the context of multi-charter LEAs, multi-charter ESAs, and joint applications, the distribution of funds will likely be governed by the agreement of the member entities. This must be transparent and understood by all—as well as the exact services that the member schools are entitled to receive from the larger infrastructure. State law could easily identify ultimate responsibility for compliance with the IDEA—preferably the ESA, LEA, or joint entity—to ensure transparency and uniformity across the state.

Introducing numerous pathways to capacity and a slew of new special education infrastructures should be used as a justification to clarify funding, authority, and responsibility and not as an excuse to further cloud the waters. These proposed reforms will be undermined without absolute clarity, transparency, and a clear understanding of how schools are funded, which services they will be provided, which services they must provide themselves, and who is ultimately responsible for failure to fulfill the IDEA.

#### IV. CONCLUSION

Charter schools and special education do not mix well for a variety of reasons.<sup>184</sup> The primary reason is the charter movement's emphasis on independence and autonomy. These foundational principles run headlong into what Congress and experts have recognized for nearly fifty years—fulfilling the mandates of the IDEA requires significant capacity achieved through collective action. This Article proposes a solution that best serves both interests: it demands that charter

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183. *See id.* at 10–11.

184. For an explanation of all the reasons charter schools and special education are an uncomfortable fit, see IMPLICATIONS FOR STUDENTS WITH DISABILITIES, *supra* note 7, at 52–56, 69–82; Garda, *supra* note 3, at 712.

schools have sufficient capacity to properly enroll and serve students with disabilities but allows them to select their method of achieving sufficient size and scope.