The Program on
Human Rights and
the Global Economy
NORTHEASTERN UNIVERSITY
SCHOOL OF LAW

At What Cost?

The Charter School Model and the Human Right to Education

Boston, Massachusetts
November 2014

Table of Contents

Acknowledgements: PHRGE's Executive Director, Kevin Murray is principal author of this report, but it was a team effort throughout. Mariah McGill did foundational research for it, and then challenged the assumptions of each succeeding draft. Professor Martha Davis also reviewed drafts, holding the argument to her exacting standards. Boston Public School parents Megan Wolf and Odette Williamson gently helped the author avoid several pitfalls. Northeastern students and recent grads Sarah Spofford, David Rini, Sarah Gledhill and Shelbey Wolf all contributed invaluable research along the way, and Ellen Coletti edited the text. As always, the author bears the responsibility for all errors and shortcomings.

At what cost?
The charter school model and the human right to education

Over the past decade, charter schools have become the most visible expression of a powerful drive to reinvent public education. This bipartisan reform effort has emphasized school choice and competition, and made standardized test scores the primary arbiter of that competition. Since the emergence of these schools in the 1990s, a charter juggernaut has altered the educational landscape in nearly every U.S. state. The global financial collapse of 2008-09 has, however, undermined government support for public education and helped focus the attention of many public education advocates on the impact of the growth of the charter school enterprise.

Much of the ensuing debate on charters has accepted the notion that standardized test scores should determine the success or failure of any educational initiative. Civil rights-based challenges to continuing charter school expansion remain in their infancy. To date, the question of the human rights impact of the emergence and growth of charter schools has been little explored.

The analysis that follows presents the international standards that define the human right to education. It then examines the experience of charter schools from the perspective of those standards. It is our contention that the human rights analysis that serves as the basis of effective educational advocacy in a variety of international contexts might well play the same role in this country.

Background

In 1974, Ray Budde, an assistant professor of education at the University of Massachusetts/Amherst, delivered a paper entitled, "Education by Charter" to the Society for General Systems Research.[1] For Budde, it was time to consider a new kind of school, started by groups of teachers, with independence from local school districts in return for more accountability for student achievement. The paper, which received little notice at the time, originated the idea that now stands at the center of discussions of education reform across the United States.[2]

However, the idea did not gain significant momentum until 1988, when Budde – now working as an educational administrator -- updated and republished his earlier paper as a book and distributed it much

[1] Ted Bolderie, *Ray Budde and the Origins of the Charter Concept*, EDUCATION EVOLVING (June 2005), http://www.educationevolving.org/pdf/Ray-Budde-Origins-Of-Chartering.pdf .
[2] Susan Saulny, *Ray Budde, 82, First to Propose Charter Schools Dies*, THE NEW YORK TIMES (June 21, 2005), http://www.nytimes.com/2005/06/21/national/21budde.html?_r=2&.
[3] Ray Budde, *Education by Charter: Restructuring School Districts*, THE REG'L LAB. FOR EDUC. IMPROVEMENT OF THE NORTHEAST & ISLANDS (1988), http://files.eric.ed.gov/fulltext/ED295298.pdf.
[2] Susan Saulny, *Ray Budde, 82, First to Propose Charter Schools Dies*, THE NEW YORK TIMES (June 21, 2005), http://www.nytimes.com/2005/06/21/national/21budde.html?_r=2&.

more widely.[3] The book caught the attention of Albert Shanker, President of the American Federation of Teachers, who had a strong interest in autonomous schools started by teachers. Within a few months, Shanker presented the concept at the National Press Club. He referenced Budde in advocating for the idea of teachers starting such schools. He also adopted Budde's name for the schools—charter schools.[4]

Subsequently, a group called the Citizen's League of Minnesota made the idea of charter schools a political reality. The League engaged Shanker to work with a bi-partisan group of state legislators to develop a state policy framework for charter schools and to create legislation to allow the implementation of such a framework. After a few false starts, the legislation passed in 1991 and charter schools—very much like those envisioned by Budde and Shanker -- were legal in Minnesota.

Other states quickly followed suit and within the year, Minnesota's Republican Senator David Durenberger introduced the idea in the U.S. Congress. With the help of Connecticut's Senator Joe Lieberman, Durenberger built significant support for a Federal program to support charter schools. In 1994, the Clinton Administration guided a bill through Congress that created strong Federal incentives for states to pass laws authorizing charter schools at the state level. A cornerstone of what would become a powerful educational reform was solidly in place. The administration of George W. Bush continued Federal support for the education reform launched by his predecessor, and promotion of charter school expansion was an important element of Bush's *No Child Left Behind* policy.[5]

More recently, public education advocates who hoped for a reorientation of education policy under Barack Obama have faced a series of disappointments. While increasing Federal support to education and giving his program to support public education a more compelling identity—*Race to the Top*—President Obama and his Secretary of Education, Arne Duncan, have been even more active and effective supporters of charter schools than their predecessors.[6] The Obama Administration signaled its positioning on the issue soon after taking office when it announced that states removing legislative caps on charter school growth would have preferential access to $5 billion in *Race to the Top* funds.[7]

The federal sanctioning of this new model of schooling has spawned an intense, decentralized wave of activity to create charter schools that has some of the characteristics of a social movement. The movement analogy may be overstated, but neither elite commitment to the idea nor the accompanying availability of funds can explain the unlikely mass adoption of the charter school concept across the

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[3] Ray Budde, *Education by Charter: Restructuring School Districts*, THE REG'L LAB. FOR EDUC. IMPROVEMENT OF THE NORTHEAST & ISLANDS (1988), http://files.eric.ed.gov/fulltext/ED295298.pdf.

[4] Ted Bolderie, *Ray Budde and the Origins of the Charter Concept*, EDUCATION EVOLVING (June 2005), http://www.educationevolving.org/pdf/Ray-Budde-Origins-Of-Chartering.pdf.

[5] Diane Ravitch, THE DEATH AND LIFE OF THE GREAT AMERICAN SCHOOL SYSTEM: HOW TESTING AND CHOICE ARE UNDERMINING EDUCATION 138 (Basic Books 2012).

[6] The clearest evidence for this assertion is the accelerated growth of the charter sector during the Obama-Duncan years. *See* Joy Resmovits, *Charter Schools Grow Rapdily, Adding 200,000 Students: Report*, HUFFINGTON POST (Nov. 14, 2012, 1:00 AM), http://www.huffingtonpost.com/2012/11/14/charter-schools-growth_n_2125286.html.

[7] Michele McNeil, *Racing for an Early Edge*, EDUCATION WEEK (July 9, 2009), http://www.edweek.org/ew/articles/2009/07/09/36stimulus_ep.h28.html.

country. After slow growth throughout the 1990s, charter school growth rates took off in the first decade of the new millennium and have further accelerated in recent years. According to the National Alliance for Public Charter Schools, in the 2013-14 school year, over 2.5 million students were attending approximately 6,400 charter schools across the U.S.[8]

For some analysts, it is precisely the social movement character of the charter school phenomenon that explains its ascendancy in such a short period of time. After noting the great difficulty faced by any group wishing to connect educational outcomes to a particular policy initiative, Professor Derek Black of the University of South Carolina School of Law points out an important difference between reform movements based on civil rights and the charter school movement:

> *Charter schools suffer from the same causal weakness [as the civil rights reform movement], but it is not impeding their expansion because the charter movement, unlike civil rights, is not based primarily on evidence. Instead, charter school advocates emphasize ideological values that appeal to broad constituencies. These value-based constituencies form a movement that forces the expansion of charter schools and is undeterred by evidentiary critique.*[9]

Whether or not it was the result of a values-based social movement, the growth of charter schools has been neither accidental nor random. Parents and teachers interested in new approaches to curriculum and innovative efforts to involve parents in schools drove early charter formation. But the concept quickly became part of a much broader ideological critique of public education.[10] Charters emerged in the context of a growing sense that the deteriorating quality of the U.S. education system was threatening both social stability in U.S. cities and the country's competitiveness in the global economy.[11]

While critics noted problems across the educational landscape, public education in many of the country's urban centers came in for the most intense criticism. This line of thinking identified excessive centralization and regulation, the power of teachers unions and a general lack of school accountability for educational outcomes as the roots of the perceived "crisis" of public education.[12] Regardless of whether or not such a crisis existed, the common perception of a crisis in urban education—with charter schools as an important part of the response to the crisis—became a powerful driver of charter school

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[8] *Details from the Dashboard: Estimated Number of Charter Schools & Students, 2013-2014*, NAT'L ALLIANCE FOR PUB. CHARTER SCHOOLS (Feb. 2014), http://www.publiccharters.org/wp-content/uploads/2014/02/New-and-Closed-Report-February-20141.pdf.

[9] Derek W. Black, *Civil Rights and Charter Schools: Lessons to Be Learned*, 64 FLA. L. REV. 1723 (2012).

[10] Boston Teachers Union, *Charter Schools: The Promise, the Hype, the Reality,* http://www.btu.org/hot-issues/charter-schools (last visited Sept. 24, 2014).

[11] This sense of gathering doom actually began a few years prior to the emergence of charter schools with the release of a key report by a commission created by the Reagan Administration in 1983. *See A Nation at Risk: The Imperative for Educational Reform*, THE NAT'L COMM'N ON EXCELLENCE IN EDUC. (April 1983), http://datacenter.spps.org/uploads/sotw_a_nation_at_risk_1983.pdf.

[12] Lisa Snell, *Fix the City Schools: Moving All Schools to Charter-Like Autonomy*, REASON FOUNDATION POLICY BRIEF 87 (March 2010), http://reason.org/files/pb87_fix_schools_charters.pdf.

growth. Echoing Professor Black's assessment of the charter movement, a prominent analyst of the charter school debate noted, "an unfortunate shift of some charter school advocacy from a pragmatic question to identify school improvement strategies to an ideological prejudice against regular public schools."[13]

Given the racial and cultural composition of the urban school districts under discussion, debates on the crisis in public education have had strong racial and cultural overtones. Charter school growth has been most dramatic in precisely those urban school districts where African-American students and English Language Learners often make up the majority of public school students. As of the 2012-13 school year, Los Angeles had more than twice as many charter students as any other district in the nation. New York, Philadelphia, Detroit and Chicago, in that order, followed Los Angeles on the list of U.S. school districts with the greatest number of charter students. New Orleans, which rebuilt its district on the charter model after Hurricane Katrina, led the country in the percentage of charter students, followed by Detroit and Washington, DC.[14] In communities where many African-American families felt poorly served by traditional public schools, charters schools emerged as an important educational alternative.

As the charter school sector has grown and broadened its base of social and political support, so has the controversy over the performance of these schools and the impact of charter expansion on the overall quality of education in those districts in which charters are taking hold. A number of studies conclude that students attending charter schools are achieving better academic outcomes than similar students in nearby traditional public schools.[15] Often using the same data, other researchers reach very different conclusions concerning charter effectiveness.[16] Clearly, the evidence-based social science debate on charters is not settled, and will not be settled in the near future. Many observers have suggested that the positioning of those questioning the charter alternative has become just as ideological as the thinking that is driving charter expansion.[17]

The following analysis examines the charter school phenomenon from a human rights-based perspective, a perspective that we believe is complementary to, rather than contradictory to or competitive with, the more commonly voiced civil rights perspectives. The concrete policy option under discussion in many states is continued charter school expansion, but the only way to project the likely

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[13] Diane Ravitch, THE DEATH AND LIFE OF THE GREAT AMERICAN SCHOOL SYSTEM: HOW TESTING AND CHOICE ARE UNDERMINING EDUCATION 139 (Basic Books 2012) (citing an opinion from Martin Carnoy et al., *The Charter School Dust-Up: Examining the Evidence on Charter School Enrollment*, ECONOMIC POLICY INSTITUTE (2005)).

[14] Valerie Strauss, *The 10 school districts with the most charter school students*, THE WASHINGTON POST (Dec. 11, 2013), http://www.washingtonpost.com/blogs/answer-sheet/wp/2013/12/11/the-10-school-districts-with-the-most-charter-school-students/.

[15] One such study that received particular attention was conducted in 2013 by the Center for Research on Educational Outcomes (CREDO) at Stanford University. *See National Charter School Study 2013*, CENTER FOR RESEARCH ON EDUC. OUTCOMES (2013), http://credo.stanford.edu/documents/NCSS%202013%20Final%20Draft.pdf.

[16] *See* Andrew Maul & Abby McClelland, *Review of National Charter School Study 2013*, NAT'L EDUCATIONAL POLICY CENTER (Jul. 16, 2013), http://nepc.colorado.edu/thinktank/review-credo-2013.

[17] Conor P. Williams, *How the Debate Over Charter Schools Makes Us Dumber*, TALKING POINTS MEMO (Feb. 5, 2014), http://talkingpointsmemo.com/cafe/how-the-debate-over-charter-schools-makes-us-dumber.

human rights effect of such expansion is to analyze the experience to date through a human rights lens. While much analysis of the policy issues surrounding charter schools has overlooked this perspective, we believe that human rights analysis has the potential to provide positive guidance to the policy discussion.

Our approach is evidence-based. Employing a human rights lens implies viewing charter school practice from the vantage point of the variety of treaties and other international agreements that establish the right to education in international law.[18] Such analysis cannot escape the weight of the abundant evidence regarding the impact of charter schools in the lives of children inside and outside of those schools. At the same time, the human rights framework rests on a set of human values that the international agreements and treaties seek to express and support. We believe that the human rights approach has the potential to both assess the evidence regarding experience of charter schools and help empower a strong values- based effort to reform education in ways that are consistent with the human rights framework.

For practical reasons, we focus our analysis on a case study of charter school practice in a single state, Massachusetts. While the state is not among those with the highest number of charter school students or schools, the growth of the charter school sector there has been the object of considerable national attention.[19] In addition, the growth of charter schools in the Bay State has been the subject of a lively political debate. According to a 2011 study of Massachusetts charters by Harvard's Center for Education Policy Research, "The question of whether charter schools boost achievement has been at the heart of the education policy debate statewide and nationwide, with special attention to the role that charter schools might play in disadvantaged urban communities."[20] Furthermore, an influential 2013 study finds particularly high levels of performance at Massachusetts charters, and singled out Boston charter schools as among the highest performing charter schools in the nation.[21]

In July 2014, after two decades of virtually uninterrupted support for gradual expansion of the charter school sector in the state, the Massachusetts Senate defeated an initiative to further enable charter school growth.[22] While a single action certainly does not signal a turning point in the political debate around charters, it does suggest a shift in the terms of that debate.[23]

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[18] See *International Law*, RIGHT TO EDUCATION PROJECT, http://www.right-to-education.org/page/international-law (last visited Sept. 24, 2014), for a summary of international law sources establishing the right to education.
[19] *Charter School Performance in Massachusetts*, CENTER FOR RESEARCH ON EDUC. OUTCOMES (Feb. 28, 2013), http://credo.stanford.edu/documents/MAReportFinal_000.pdf.
[20] Joshua D. Angrist et al., *Student Achievement in Massachusetts' Charter Schools*, CENTER FOR EDUC. POLICY RESEARCH AT HARVARD UNIVERSITY (Jan. 2011), http://economics.mit.edu/files/6493.
[21] CENTER FOR RESEARCH ON EDUC. OUTCOMES, *supra* note 19.
[22] Claire McNeill, *Mass. Senate rejects bill to raise charter school limit*, THE BOSTON GLOBE (Jul. 16, 2014), http://www.bostonglobe.com/metro/2014/07/16/senate-rejects-bill-raise-charter-school-limit/OVCWaku4zU7hDFNYy1IiTM/story.html.
[23] *Id.*

In the analysis that follows, we establish the definition of charter schools and describe their legal foundations in Massachusetts. On that basis, we describe the elements of the charter school experience that are most relevant to a human rights analysis of the phenomenon and then suggest the likely human rights effects of continued expansion of the charter school sector. While our examination of charter schools focuses on Massachusetts, throughout the analysis we reference developments in other states to suggest that the dynamics described in Massachusetts are not unique and that the conclusions drawn may well have broader relevance.

What is a Charter School?

The charter school model is not easily defined. Since the legislation enabling charters occurs at the state level, the resulting schools can differ significantly from state to state. These schools do, however, share certain characteristics across state experiences. The National Conference of State Legislatures cites the following commonalities of all charter schools:

- They are public schools - free to attend, publicly funded, part of the state school system, and accountable to public bodies for their results.
- They are schools of choice, so they do not enroll students solely based on where they live.
- They are privately managed by an organization that has a charter, or contract, with an authorizer.[24]

Whether or not charter schools are "public" is debatable. The genius of their design is that they combine elements of public and private education in a package that has been able to access public funding. They do possess the public characteristics noted by the National Conference, but they are also privately governed and often operate quite independently of public authority. If they are to be known as "public" schools, then the charter movement has succeeded in broadening the definition of public schools.

The process of creating a charter school begins with an organization proposing a concept for a school and taking responsibility for the implementation of that concept. The organization must present that concept to an entity with the legal authority to authorize charter schools in that state. Once the organization gains approval of its application, its board and school leadership operate with much more flexibility than the leadership of traditional public schools.

Many charter schools are not bound by collective bargaining agreements covering the districts in which they are located. They exert considerable control over curriculum development, and usually exercise a great deal more freedom to allocate funds in accord with local conditions. Most importantly, the

[24] *Charter Schools*, NATIONAL CONFERENCE OF STATE LEGISLATURES, http://www.ncsl.org/research/education/charter-schools-overview.aspx (last visited Sept. 24, 2014).

trustees governing charter schools almost always operate independently of local school boards.[25] States grant charter schools this independence with the expectation that the resulting schools will face a higher level of accountability for educational outcomes. In most states, the organization proposing the charter is free to sub-contract the actual operation of the school to another entity.

In the early days of the charter experiment, groups of parents or teachers who wanted to use a particular educational technique to improve the outcomes for underserved students applied to start schools. Over time, a variety of actors have become involved in developing and in managing charter schools. Grassroots groups still propose and operate charter schools, but today, charters are often run through education management organizations (EMOs). Some EMOs are national, for-profit corporations.[26]

The Legal Foundations of Charter Schools in Massachusetts

Massachusetts joined the wave of states passing legislation to enable charter school formation in the years immediately after the passage of the original Minnesota charter bill. *The Education Reform Act of 1993* allowed for the creation of up to 25 charter schools in Massachusetts, provided that total charter enrollment did not pass .75% (3/4 of one per cent) of total public school enrollment.[27] That law also permitted two types of charter schools: Commonwealth Charters, which are almost entirely independent of local school districts, and Horace Mann or "in-district" charters. Horace Mann charters are governed by independent boards, but remain nominally under the financial oversight of the local school board and the supervision of school district leadership.[28] Teachers and other staff in Horace Mann charters are generally members of the district's collective bargaining unit. Commonwealth charters, on the other hand, are essentially separate, independent school districts over which the local public school district exerts no control. Teachers and staff may unionize, but they are not automatically part of the local bargaining unit.

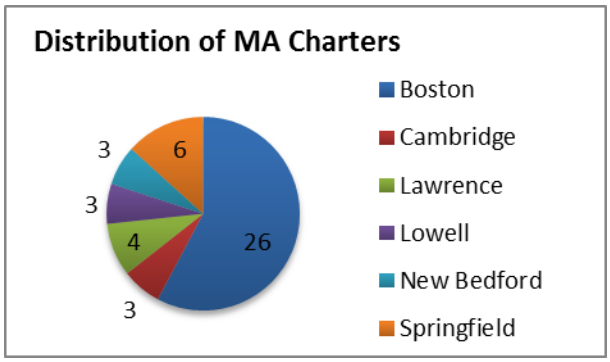
Following the 1993 statute, the Massachusetts Legislature relaxed limits on charters gradually, through a number of measures until, in 2010, Governor Deval Patrick signed into law *An Act Relative to the Achievement Gap.* That sweeping education reform removed the overall cap on the percentage of public school students that could be enrolled in charters statewide. It also encouraged the formation of more

[25] See Adam Emerson, *Governance in the Charter School Sector: Time for a Reboot*, THE FORDHAM INSTITUTE (2013), for a discussion of this and other aspects of charter school governance.
[26] See Sarah Carr & Annie Gilbertson, *New Skepticism of for-profit companies managing public schools,* THE HECHINGER REPORT (February 1, 2013), http://hechingerreport.org/content/new-skepticism-of-for-profit-companies-managing-public-schools_11028/, for an analysis of these for-profit operators.
[27] Mass. Gen. Laws Ann. chs. 70, 71 (West 2014).
[28] Each Horace Mann charter reaches a Memorandum of Understanding with its district detailing the degree and forms of district oversight. Generally, Horace Mann employees remain within the district bargaining unit. Funds are allocated to the school based on the same formula used for other district schools, but school leadership exerts significant autonomy regarding the allocation of the funds received from the district.

charter schools in "low performing"[29] districts by not counting those schools against the statewide cap on the total number of charters. Similarly, the law retained a maximum percentage of public school district budgets (9%, generally, but 18% in low performing districts) that could be diverted to charter school tuition, but does not count Horace Mann charters in low performing districts against that percentage.[30] The law set an overall cap of 120 charter schools in the state (72 Commonwealth, 48 Horace Mann) but because of the various exclusions favoring charters in struggling districts, there is no effective limit on the growth of charter schools in districts deemed to be low performing. While Massachusetts law permitted the creation of charter schools before 2010, *An Act Relative to the Achievement Gap* made it state policy to encourage the expansion of the charter sector in what the Commonwealth deemed to be low-performing districts.[31]

The 2010 law and continuing demand for charter seats among parents stimulated a new wave of charter school growth in the state. By 2013, there were 80 charter schools in the state, 70 Commonwealth and 10 Horace Mann charters.[32]

Figure 1: **Distribution of Charter Schools in Massachusetts Cities and Towns**
(Of cities hosting more than two charter schools, 2014)



Source: DESE

As Figure 1 shows, 45 charters operate in just six Massachusetts urban centers. A further 21 municipalities host one charter school, and eight host two.[33] One-third of the state's charter schools are

[29] For DESE, low performing districts are those 10% of districts that perform worst on the Commonwealth's "Massachusetts Comprehensive Assessment System" (MCAS). Until 2014, DESE made this determination strictly based on raw test scores. In 2014, the Department integrated a consideration of a district's growth in test scores into this determination, but MCAS scores remain the sole basis upon which district performance is assessed in determining low performing districts.

[30] Dan French, Ed.D. et al., *Twenty Years After Education Reform: Choosing a Path Forward to Equity and Excellence for All*, CITIZENS FOR PUBLIC SCHOOLS 57 (June 2013), http://www.citizensforpublicschools.org/wp-content/uploads/2013/06/CPS-report-online-draft-6-10-13_reduced_2.pdf.

[31] The law explicitly calls for the formation of 14 new Horace Mann charters in low-performing districts and puts in place a number of incentives for doing so.

[32] *Massachusetts Charter Schools Fact Sheet*, MASSACHUSETTS DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION, http://www.doe.mass.edu/charter/factsheet.pdf (last visited Sept. 25, 2014).

in Boston, home to less than 6% of Massachusetts public school students.[34] The vast majority of Massachusetts's cities and towns do not host any charter schools. The Department of Elementary and Secondary Education (DESE) estimates that statewide, roughly 3.6% of K-12 students attend a charter school, or approximately 34,600 students. In those urban districts where charters are concentrated, however, the numbers look different: in Boston, about 15% of students are in a charter school,[35] in Springfield, about 8%,[36] and in Lawrence, about 9%.[37]

Because of this uneven pattern, even while overall charter school growth was still comfortably under legislative limits at the state level, growth approached legal limits in key urban districts, most notably Boston. This situation, in combination with continuing demand for charter seats among parents[38] created pressure for legislative action to ensure that more Commonwealth charters could be created in Boston. Growth in Commonwealth charters in urban districts outside of Boston suggested that charters would soon approach legal limits in some of those districts, as well.

New legislation proposed in 2013 responded to this situation by lifting the percentage of any district's budget that could be diverted to charter schools. It would also have allowed the creation of more Commonwealth charters in districts considered to be low performing, including Boston. Furthermore, the law would have unified charter and district school assignment processes in Massachusetts, and put forth a number of other changes to encourage the creation of more charter schools.

Charter advocates enthusiastically supported the proposed legislation, but the bill was also met by strong opposition from parent groups, school administrators and other advocates of public education, in addition to the teachers' unions that had opposed most charter expansion measures over the past two decades. Those opposing the bill argued that further charter growth would undermine the quality of traditional public schools in districts with large numbers of charters. This opposition had the effect of increasing the number of legislators raising questions about the reform legislation. In July 2014, the Massachusetts Legislature for the first time defeated a measure designed to encourage charter

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[33] Calculation by author, from information provided by the Department of Elementary and Secondary Education (DESE). *See id.*

[34] Based on enrollment data provided by DESE and the Boston Public Schools, in 2013, there were 953,369 public school students in Massachusetts, 57,100 of whom attended school in Boston.

[35] Boston has the highest concentration of students in charter schools across the state, and also six of the 10 Horace Mann charter schools.

[36] Of the six charters in Springfield, both Phoenix Academy and Springfield Preparatory were recently granted charters, and do not have enrollment data yet. They are licensed for a combined 736 students.

[37] The numbers here are a rough estimate – not every student in a charter in Boston, Springfield or Lawrence lives in those cities and would go to those public schools otherwise. Many charters accept students from other districts.

[38] That there is demand for charter seats in Boston is beyond dispute. The dimensions of that demand are hotly debated. Charters claim waiting lists of thousands of students, while the data suggests that those claims are overstated. *See* James Vaznis, *Charter school demand in Mass. disputed,* THE BOSTON GLOBE (April 8, 2013), http://www.bostonglobe.com/metro/2013/04/07/waiting-lists-for-charter-schools-overstate-demand-review-shows/Zg0HPk9JtVhebUfUBT9ePP/story.html.

expansion.[39] Speaking on the floor of the State Senate, where the bill went down to defeat, members cited the drain on district resources resulting from charter schools, questions about the efficacy of charter schools as a strategy to narrow the school achievement gap, and concern with the possibility that continuing charter expansion was creating a "two-tiered" educational system in the State as reasons for their opposition to the bill.[40]

Despite this unprecedented action by the Legislature, Massachusetts continues to create new charter schools. Current law still establishes no legal limit on the creation of Horace Mann charters in low performing districts and several such projects, including two in Boston, emerged in the immediate aftermath of the July vote,[41] suggesting that, despite an important legislative setback, charter school expansion remains an important part of the education agenda in Massachusetts.[42]

As in other states, Massachusetts charters receive core operating support from State funds, including direct allocations from Chapter 70 funds, based on the number of students they serve.[43] Chapter 70 is a local aid fund established in the wake of *McDuffy vs. Secretary* (1993), a case in which the Supreme Judicial Court of Massachusetts found that, because public education is funded almost exclusively from local property taxes, students in less affluent communities "are not receiving their constitutional entitlement of education as intended and mandated by the framers of the Massachusetts Constitution."[44]

The *McDuffy* decision mandated the establishment of a pool of state funds designed to supplement the resources available in local budgets to support public education. For districts in particularly distressed urban areas (Lawrence and Springfield, for example), Chapter 70 allotments can support well over 50% of the local school budget. Given the mandated purpose of Chapter 70 monies, funding charter schools directly out of this fund positions charter school creation as a key state strategy to ensure that students in less affluent communities have equitable access to quality education. The mechanisms for funding

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[39] Matt Murphy, *Effort to lift cap on charter schools dies in Senate,* WORCESTER TELEGRAM & GAZETTE (Jul. 16, 2014), http://www.telegram.com/article/20140716/NEWS/140719944/1116.

[40] *See* Claire McNeill, *supra* note 22; Matt Murphy, *Massachusetts Senate votes to reject bid to lift cap on new charter schools*, MASS LIVE (July 16, 2014, 7:49 PM), http://www.masslive.com/news/index.ssf/2014/07/massachusetts_senate_votes_to_3.html.

[41] Steven A. Rosenberg, *Eight new area charter schools are proposed*, THE BOSTON GLOBE (Aug. 12, 2012), http://www.boston.com/news/local/massachusetts/articles/2012/08/12/eight_new_charter_schools_proposed_for_north/.

[42] Interestingly, just before the July Senate vote the Commonwealth's Board of Elementary and Secondary Education (BESE) changed the formula by which the Commonwealth identifies the lowest-performing districts in Massachusetts. This decision to take into account growth in test scores (as well as raw test scores) in evaluating district performance removes some districts with high charter growth potential from the list of low performing districts. *See* James Vaznis, *Panel's vote reaffirms charter school formula,* THE BOSTON GLOBE (June 24, 2014), http://www.bostonglobe.com/metro/2014/06/24/state-education-panel-refuses-abandon-formula-for-charter-school-formula/h1JCq8RoEiL69Z6Cb2qYoI/story.html.

[43] Mass. Gen. Laws Ann. ch. 70 (West 2014).

[44] *Id.*; McDuffy v. Sec'y of Executive Office of Educ., 615 N.E.2d 516 (1993); *Litigation: Massachusetts*, NATIONAL EDUC. ACCESS NETWORK (last updated Feb. 2008), http://www.schoolfunding.info/states/ma/lit_ma.php3.

charter schools are critical to a human rights analysis of the charter phenomenon, and we will return to these mechanisms in a later section on school financing.

The Civil Right to Education

In the 1973 *Rodriguez* case, the U.S. Supreme Court held that education "is not among the rights afforded specific protection under the Federal Constitution."[45] The decision undermined efforts to establish a Federal right to education in the United States, and shifted the focus of debates about equal education to the States. The result is a patchwork of education rights, with 22 states defining education as a fundamental right and the other 28 recognizing that students have this right, in some form.[46] As stated above, it was a 1993 right to education case (*McDuffy)* that led to the dramatic change in public education funding that eventually made possible public support for charter schools.

Subsequent state court decisions, however, have significantly narrowed this right in Massachusetts by holding that there is no fundamental right to education in the Commonwealth. For example, in the case *Jane Doe vs. Superintendent of Schools of Worcester,* a student expelled for having a lipstick-knife in school claimed that the decision to expel her violated her right to education because Worcester did not provide any alternative education to expelled students, unless they were Special Education students.[47] The judge ruled that the decision to expel was rational, given the obligation of officials to protect other students, and that the fact that Worcester offered no alternative placement to the student did not violate any fundamental right to education in this case.[48]

This tendency is not limited to Massachusetts courts. One legal scholar finds that this narrowing has been almost universal in state courts, and he attributes the failure to protect the individual right to education to a judicial tendency to take a systemic approach to influencing education practice:

> *In all such cases [involving "educational rights" claims], though, both the evidence presented and the remedies the courts order focus on the state education system as a whole, rather than on any individual student rights-holders. Thus, other than as a means of surmounting threshold obstacles to relief, an individual right to education under state constitutions is more rhetoric than reality.*[49]

[45] San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 30-35 (1973).
[46] Trish Brennan-Gac, *Educational Rights in the States*, 40:2 AMERICAN BAR ASS'N HUMAN RIGHTS MAGAZINE, 2014, at 12-14; *See generally* Lee C. Bollinger, *Educational Equity and Quality: Brown and Rodriguez and Their Aftermath*, THE COLLEGE BOARD FORUM, COLUMBIA UNIVERSITY (Nov. 3, 2003), http://www.columbia.edu/node/8247.html.
[47] Doe v. Superintendent of Sch. of Worcester, 653 N.E.2d 1088 (1995).
[48] *Id.*
[49] Scott R. Bauries, *A Common Law Constitutionalism for the Right to Education*, 48 GA L. REV. 949, 953 (Summer 2014).

It is in this context of weak support for the individual right to education in domestic law that the human right to education, rooted in international law, becomes important to a discussion of charter schools.

The Human Right to Education

Human rights are internationally recognized, universal rights, with sources in international standards contained in treaties and other agreements. Human rights standards establish a fundamental right to education, which is not always the case in domestic law. The Universal Declaration of Human Rights (UDHR) began the acknowledgment of education as a human right in 1948.[50] The declaration affirms that, "Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory."[51]

Several international instruments have subsequently reinforced this right, including the International Covenant on Civil and Political Rights (ICCPR), the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the Convention on the Rights of the Child (CRC) and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). The CRC, for example, specifically states that "Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall… [m]ake primary education compulsory and available free for all."[52] The United Nations General Assembly, for its part, passed a resolution declaring that member States must "ensure that education is aimed at strengthening respect for human rights and fundamental freedoms."[53]

The most robust and often cited support for the international human right to education comes, however, from Article 13 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), which the UN General Assembly passed in December of 1966.[54] The United States signed this treaty in October of 1977, but has never ratified it.[55] Article 13 of the ICESCR states that education is a universal right and it must be "directed to the full development of human personality and the sense of dignity, and shall strengthen the respect for human rights and fundamental freedoms."[56] More specifically, article 13(1) of the ICESCR requires that primary education must be compulsory and free to all;

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[50] Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).
[51] *Id.* at art. 26.
[52] United Nations Convention on the Rights of the Child art. 28, Nov. 20, 1989, 1577 U.N.T.S. 3.
[53] G.A. Res. 66/137, U.N. Doc. A/RES/66/137 (Feb. 16, 2012).
[54] International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3.
[55] Although the United States has not ratified the ICESCR and is therefore not bound to comply with all of its terms nor to report progress on implementing the treaty to the UN, under the Vienna Convention on the Law of Treaties which the United States has signed and ratified, the US must refrain from acts that would defeat the object and purpose of the treaty. *See* Gillian MacNaughton & Mariah McGill, *Economic and Social Rights in the United States: Implementation Without Ratification*, 4:2 NORTHEASTERN UNIV. L.J. 365, 374 (2012) (citing the Vienna Convention on the Law of Treaties art 18., *Opened for signature* May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980)). The right to education is also included in several treaties that the United States.
[56] International Covenant on Economic, Social and Cultural Rights art. 13, Dec. 16, 1966, 993 U.N.T.S. 3.

secondary education must be generally available and accessible to all; education must be available for those who were not able to finish their primary schooling; and that the state will continue to develop a system of schools that improves the material conditions of teaching staff.[57]

In 1999, the UN Committee on Economic, Social and Cultural Rights provided practical guidance for the implementation of the rights outlined in the Covenant.[58] This guidance included the so-called "4A Principles," which establish the basis for determining progress on implementation of the right to education.

The 4A Principles are:

Availability: educational services must be available in sufficient quantity to serve the students that use them. School systems must have enough school buildings, classrooms, teachers, and supplies to ensure that all students can partake in the education offered.
Accessibility: students must be able to make practical use of the education that is available. Barriers that prevent students from accessing education – intentional discrimination, cost barriers, structural issues, commuting distances, etc. – must be removed.
Acceptability: the quality of education must meet minimum standards. In the context of the international human right, this does not relate specifically to test scores or outcomes; rather, this is a requirement that education is relevant to students, culturally appropriate, and of good quality;
Adaptability: educational systems must be flexible enough to serve the changing needs of society and the communities they serve, and to respond to the needs of a diverse student body (culturally, economically, and socially).

We use these criteria to examine the experience of charter schools to date and, eventually, to discern the human rights impact of the emergence of this sector. In addition to this specific guidance, a few key concepts underlie the implementation of all rights. One such concept is the *universality* of rights. According to this concept, human rights apply to all people, without discrimination in any form.[59] Policies intended to advance human rights should work to extend the right in question to all persons.

Attempts to implement this guidance must also take into account the concept of "*intersectionality*": the social reality that, due to systematic patterns of discrimination, members of society face differential barriers to the realization of their human rights, including the right to education. While the human right to education is an individual right, different groups of people in society face unequal barriers to the fulfillment of their rights. The "*intersectionality*" frame provides support to the related idea that rights-

[57] *Id.*
[58] United Nations, Econ. & Soc. Council, Comm. on Econ., Soc. and Cultural Rights, Implementation of the International Covenant on Economic, Social and Cultural Rights, U.N. Doc. E/C.12/1999/10 (Dec. 8, 1999).
[59] Dr. Peter Kirchschlaeger, *Universality of Human Rights*, THE EUROPEAN WERGELAND CENTRE STATEMENT ISSUES 1 22-25 (2011), http://www.theewc.org/uploads/files/Universality%20of%20Human%20Rights%20by%20Peter%20Kirchschlaeger2.pdf.

friendly policies might be targeted in an affirmative way toward a specific group of people facing particular obstacles to accessing that right.

According to the report of the Expert Group Meeting held in preparation for the World Conference Against Racism, in Zagreb, Croatia in 2000, intersectionality,

"*…specifically addresses the manner in which racism, patriarchy, and economic disadvantage and other discriminatory systems contribute to create layers of inequality that structures the relative positions of women and men, races and other groups. Moreover, it addresses the way that specific acts and policies create burdens that flow amongst these intersecting axes contributing effectively to create a dynamic of disempowerment."*[60]

Education and other social policies must take this dynamic of disempowerment into account if they are to effectively protect and advance the right to education or other human rights in any social context.

International law, then, provides the overarching framework for human rights, including the right to education, but the standards for assessing realization of this right are very much determined by local conditions. Recognizing this, the Special Rapporteur on the Right to Education calls for the application of the general principle of "*progressive realization*" of the right.[61] This means that governments must make the best possible use of available resources to protect and gradually fulfill the right to education in their countries. The best possible use of resources includes refraining from actions, such as arbitrary budgetary cuts, that undermine the implementation of the right. A rights-friendly policy need not achieve the full implementation of a given human right, but should be able to demonstrate meaningful progress toward the right, in the local/national conditions in which the policy is implemented.

Critical among those local conditions that define the right to education in any context are local laws and public policies. Also Important are the ways in which local *rights holders*—students and their families, in the case of the right to education—understand and define their right. In the case of Massachusetts, the complex and contentious public discussion about charter schools leading to the July 2014 legislative decision was an important step in the definition of the Commonwealth's right to education. In describing a "people-centered" approach to human rights, the former Executive Director of the United States Human Rights Network makes the point in this way:

> *While this approach recognizes the importance of these [international law] texts and the legal and ethical principles implied in them, the ultimate meaning of the language in the texts, the*

[60] U.N. Div. for the Advancement of Women, Office of the High Comm'r for Human Rights, U.N. Dev. Fund for Women, Report of the Expert group Meeting on Gender and Racial Discrimination (Nov. 21-24, 2000), http://www.un.org/womenwatch/daw/csw/genrac/report.htm.

[61] *Special Rapporteur on the right to education*, OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, http://www.ohchr.org/EN/issues/Education/SREducation/Pages/SREducationindex.aspx, (last visited August 8, 2014).

scope of the rights that will be recognized, and the modalities for rights implementation are dependent on popular political struggles and societal dispensations of power. [62]

Charter School Practice in Massachusetts

The core objective of this analysis is to assess the human rights impact of charter school practice and, based on that assessment, project the likely effect of continued expansion of the charter school sector on the realization of the right to education in Massachusetts. Given the scope and complexity of the experience in dozens of schools over two decades, the exercise involves some choices concerning the data that is most relevant to a human rights assessment of that experience. The presentation that follows focuses on four elements of the charter school experience:

1. Trends in charter school enrollment and possible barriers to enrollment faced by certain groups of public school students;
2. The particular approaches of charter schools to the use of school discipline and student exclusion as means of establishing an appropriate learning environment;
3. The quality of the educational experience of students attending charter schools; and
4. The financing of the charter school system and the possible impacts of charter school growth on the resources available for traditional public schools.

There are certainly other elements of the charter school experience that could be examined—teacher recruitment and labor relations, school culture, and financial accountability, to name three—but we believe that an examination of the four aspects of the experience listed above provide the basis of the human rights analysis that is our goal.

While acknowledging the diversity of the charter school experience and the dangers involved in generalizing about such a diverse body of experience, the track record of charters is now substantial and lengthy enough to confirm the existence of certain important patterns in that experience. While our own analysis principally focuses on Massachusetts, these patterns are not unique to the Commonwealth.

Trends in charter school enrollment

An important factor in a human rights analysis of charters schools is who attends the schools. If charters serve individuals or groups of students who are not being well-served by traditional public schools, then they are making an important contribution to the realization of the right to education. By the same token, if there are barriers to enrollment in charter schools for students with certain characteristics, that could raise human rights concerns.

[62] Ajamu Baraka, *"People-centered" human rights as a framework for social transformation*, A VOICE FROM THE MARGINS (Dec. 10, 2013), http://www.ajamubaraka.com/the-human-rights-project-determined-by-the-needs-of-the-powerful/.

As mentioned above, the UN has offered four criteria upon which the implementation of the right to education in any context can be assessed. These four criteria: availability, accessibility, acceptability and adaptability are all of use in understanding the practice of charter schools and the possible impact of the expansion of the sector.

For example, the standard of educational "accessibility" does not refer solely to the physical accessibility of school facilities, although this is an important part of the right to education. Accessible education removes any and all barriers to the participation of all groups of students in the education experience.

Similarly, an education that is "adaptable" does not pursue a "one size fits all" approach to teaching and learning. It is flexible in response to the needs of different communities and students with different needs related to their education. The existence of obstacles to the inclusion of any particular group of students would certainly be considered a barrier to the realization of the human right to education.

DESE estimates that 34,311 students will attend Massachusetts charter schools in the 2014-15 school year. That total continues to increase rapidly. As recently as 2011, the DESE enrollment calculation was 26,025, suggesting growth of 32% over three years.[63]

Among those students are a large number of students of color, especially African-American students. Not surprisingly, given the districts in which charters are concentrated, the percentage of African-American students in charter schools is much greater than in the public school population, as a whole, in Massachusetts. But even the more relevant district-level comparison in urban districts such as Boston suggests that African-American families are particularly drawn to charters as an alternative learning environment for their children.[64] The same data that indicate higher African American participation in charter schools also indicate that Latino and Asian children are less likely to attend charter schools than they are traditional public schools.

For charter advocates, the reason for this preference is clear: African-American children perform better in charter schools than they do in traditional schools, a fact that, for these advocates, is evident to

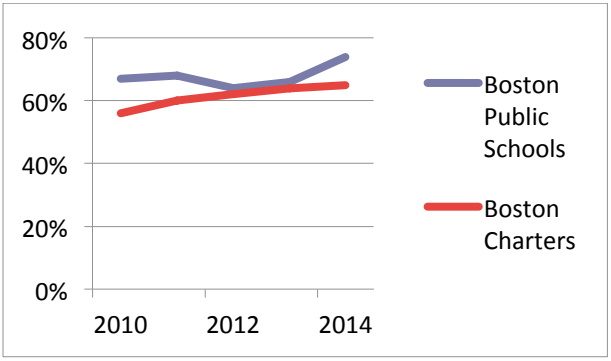
[63] Author's calculation, based on data from *Massachusetts Charter Schools: Tuition, Reimbursements and Enrollment*, MASSACHUSETTS DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION, http://www.doe.mass.edu/charter/finance/tuition/ (last visited Oct. 4, 2014).

[64] Data samples collected for a study commissioned by the Boston Foundation show that, during the ten-year period between 2003 and 2012, fifth, sixth and ninth grade students in charter schools were substantially more likely to be African American than students in traditional Boston Public Schools. *See* Sarah Cohodes et al., *Charter School Demand and Effectiveness: A Boston Update*, THE BOSTON FOUNDATION & NEWSCHOOLS VENTURE FUND 5 (Oct. 2013), http://www.tbf.org/~/media/TBFOrg/Files/Reports/Charter%20School%20Demand%20and%20EffectivenessOctober2013.pdf.

discerning parents.[65] A more systematic study of parent choice of charters in Indianapolis, IN, affirms that this perception that charter schools serve African-American children better than traditional public schools drives the choice of charters for many African-American families. The study also suggests that the racial composition of schools is an important determining factor in the school choices of African-American families.[66]

Most public school districts and charter schools gather data about students' family income to determine whether or not students are eligible for free or reduced-price school lunches.[67] Both charter schools and traditional public schools serve roughly equal percentages of low-income students eligible for reduced-price lunch. As shown in Figure 2, however, analysis of the presence of children eligible for free school lunch (because of family income under 130% of the poverty level) reveals a noteworthy difference. Traditional public schools serve a higher percentage of students in the free-lunch-eligible category. This suggests that, while both charters and traditional public schools are serving an economically disadvantaged population, charters attract more students coming from families living in slightly more stable economic conditions. While anyone can apply to charter schools, there are apparently some obstacles to the enrollment of children from families from the lowest income groups.[68]

Figure 2:
Percentage of Students Receiving Free Lunch,
Boston Public Schools and Boston Charter Schools



Source: DESE

[65] Ronald W. Holmes, PhD, *Why Do Some Parents Choose Charter Schools for Their Children?* CHARTER ADVOCATE, http://www.charteradvocate.org/charter-opponents/107-why-do-some-parents-choose-charter-schools-for-their-children%20consulted%20August%2010 (last visited Oct. 4, 2014).
[66] Marc L. Stein, Who Chooses and Why? Charter School Choice Patterns Among Indianapolis Parents, Paper presented at the Annual Conference of the American Education Research Association (April 2009), *available at* http://www.vanderbilt.edu/schoolchoice/documents/who_chooses.pdf.
[67] According to Federal guidelines, students from families reporting income of between 130% and 185% of the Federal poverty level are eligible for reduced-price lunch delivered in public schools. Students whose families earn below 130% of the poverty level are eligible to receive free lunch.
[68] *See* Stephanie Simon, *Special Report: Class Struggle – How charter schools get the students they want*, REUTERS (Feb. 15, 2013, 08:42 AM), http://www.reuters.com/article/2013/02/15/us-usa-charters-admissions-idUSBRE91E0HF20130215.

Public education advocates raise more questions regarding charter school enrollment of English Language Learners (ELLs) and Students with Special Needs (SSNs). English-language learners are students "who are unable to communicate fluently or learn effectively in English, who often come from non-English-speaking homes and backgrounds, and who typically require specialized or modified instruction in both the English language and in their academic courses."[69] Students with Special Needs are those students "that require assistance due to physical, mental, behavioral, or medical disabilities or delays. This term is used in clinical diagnostics as well as in functional and educational settings. Autism, learning disabilities, and Down syndrome are all examples of 'special needs'."[70]

Over the past two decades, Boston and other urban districts in Massachusetts have experienced an influx of English Language Learners, mainly as the result of high rates of migration from non-English speaking countries to the United States. Between 2001 and 2012, the number of ELL students in Massachusetts public schools increased by 64% to a total of 7.9% of all students.[71] While this growth has occurred across the state, it has been concentrated in those urban school districts where charter school growth has been most pronounced.

During the same period, school districts have identified increasing numbers of Students with Special Needs within the public education system. This is likely the result of increasing awareness of the special learning obstacles faced by some children and more determined advocacy on behalf of those children. As the courts have defined the responsibilities of school districts in relation to students with special needs (and school districts have slowly begun to assume those responsibilities), the costs associated with educating these children have increased dramatically. Between 2006 and 2012, while overall public education costs increased by 36% in Massachusetts, the costs of educating Students with Special Needs increased by 56%.[72]

The tendency of charter schools in the Commonwealth to enroll proportionately less students in each of these groups has been the subject of considerable discussion in policy circles. In 2009, roughly 15 years after charter schools came into existence in Massachusetts, the Boston Teachers Union (BTU) released a study on the composition of charter school enrollment.[73] In addition to making the aforementioned

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[69] *English-Language Learner*, THE GLOSSARY OF EDUCATION REFORM (Aug. 29, 2013), http://edglossary.org/english-language-learner/.

[70] *Parents of Children with Special Needs*, PARENTLINK, http://education.missouri.edu/orgs/parentlink/Parents%20of%20children%20with%20Special%20Needs.php, (last visited Oct. 4, 2014).

[71] *English language learners need help, not an inflexible state mandate*, THE BOSTON GLOBE (Apr. 20, 2014), http://www.bostonglobe.com/opinion/editorials/2014/04/19/english-language-learners-need-help-not-inflexible-immersion-mandate/5kdgJetLpPCYQH6wLiHJtM/story.html.

[72] *The Bottom Line Report: Understanding Rising Special Education Costs in Massachusetts and the Real Cost to State Taxpayers*, THE MASSACHUSETTS ASSOCIATION OF 766 APPROVED PRIVATE SCHOOLS (MAAPS) 1 (Dec. 2012), https://netforum.avectra.com/temp/ClientImages/MAAPS/717afa75-ee78-4e64-82a8-40bb81eb7d95.pdf.

[73] Kathleen J. Skinner, *Charter School Success or Selective Out-Migration of Low-Achievers? Effects of Enrollment Management on Student Achievement*, BOSTON: MASSACHUSETTS TEACHERS ASSOCIATION (Sept. 17, 2009), http://www.btu.org/sites/default/files/MTA_Charter_School_Report_%209_09.pdf.

point about reduced-price vs. free lunch eligible students, the research found that charters enrolled fewer ELLs and SSNs – a finding that echoes national trends.[74]

Following on the heels of the BTU report, the 2010 law that loosened the cap on charter school growth included a set of new accountability measures for charter schools.[75] Several of these measures spoke specifically to the need to bring charter school enrollment of the aforementioned groups more in line with that of traditional public schools. If fully implemented, these measures would likely narrow the "enrollment gap" between charters and traditional public schools, but BESE, the body responsible for holding charters accountable to these measures has shown little appetite for enforcing them. As shown in Figures 3 and 4, below, there have been some improvements in the enrollment of SSNs and ELLs in charter schools since the passage of the 2010 law, but the enrollment gap that gave rise to accountability measures persists.

Figure 3:

Percentage of English-Language Learners, Boston Public Schools and Boston Charter Schools[76]

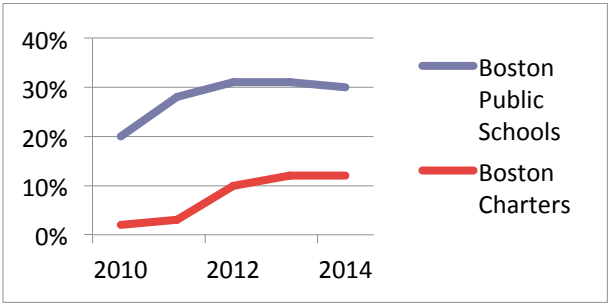
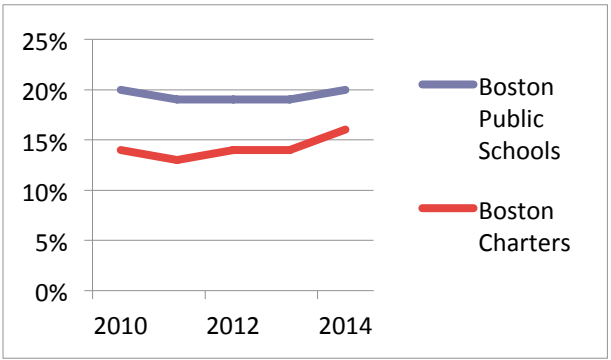


Figure 4:

Percentage of Students with Disabilities, Boston Public Schools and Boston Charter Schools



Source: DESE

[74] *Death By a Thousand Cuts: Racism, School Closures, and Public School Sabotage*, JOURNEY FOR JUSTICE ALLIANCE 11 (May 2014), http://www.empowerdc.org/uploads/J4JReport-Death_by_a_Thousand_Cuts.pdf.

[75] Elizabeth Pauley, *Toward Closing the Achievement Gap: A One-Year Progress Report on Education Reform in Massachusetts*, RACE TO THE TOP COALITION 11 (November 2011), http://www.tbf.org/~/media/TBFOrg/Files/Reports/RTTTReport_Nov2011.pdf.

[76] The Boston Charter percentages in Figures 3 and 4 are summed averages for each of the 27 charters each year.

Obviously, not all Students with Special Needs or English Language Learners are alike in their educational requirements: There is a spectrum of needs in each case, and students with more severe special needs require specialized attention in the schools they attend. Data provided by DESE shows that, in the 2011 school year, Commonwealth charter schools actually served a slightly higher percentage of SSNs in the "full inclusion" category than did district schools across Massachusetts. These are SSNs who can be taught in a regular classroom environment. In the category of SSNs requiring "substantially separate" accommodations—the students with needs that cannot be addressed fully in the classroom—Massachusetts district schools serve a much higher percentage than Commonwealth charters. This disparity is even more dramatic in the Boston district.[77]

Among the possible reasons advanced for this persistent enrollment gap are:

Lack of Experience and Resources: Successful education of SSNs and ELLs often requires teachers and other professional staff with specific qualifications and experience. It also implies a major resource commitment with some relatively high fixed costs. Charters, each of which functions as a separate school district, may not have easy access to such specialized staff and may not reach a scale of service where the necessary high fixed investments are viable. Public school districts may have a strong comparative advantage in serving certain students, and once they become aware of this advantage, parents of ELLs and, especially, SSNs tend not to apply to charter schools.[78]

Parental Contracts: Some charters require parental contracts that demand a high degree of formal participation by parents in school activities.[79] Such contracts may be a barrier to charter enrollment for families with parents who work one or two jobs, speak a different language, have cognitive, physical or behavioral challenges themselves, are incarcerated, or for myriad reasons are unable to assume a major time commitment related to the education of their children.[80]

"Counseling Out": As part of the school choice process, many parents seek opportunities to speak to staff and leadership of the schools they are considering for their children. These conversations allow staff to highlight the school's comparative advantages and challenges in serving certain types of students, and, therefore, might subtly discourage families of certain types of children from applying to that particular school. Exerting this sort of influence over the decisions of potential parents may be one

[77] Dan French, Ed.D. et al., *Twenty Years After Education Reform: Choosing a Path Forward to Equity and Excellence for All*, CITIZENS FOR PUBLIC SCHOOLS 61-62 (June 2013), http://www.citizensforpublicschools.org/wp-content/uploads/2013/06/CPS-report-online-draft-6-10-13_reduced_2.pdf.

[78] Kathleen Boundy, *Charter Schools and Students with Disabilities: Preliminary Analysis of the Legal Issues and Areas of Concern*, Center for Law and Education & Council of Parent Attorneys and Advocates (2012), http://c.ymcdn.com/sites/www.copaa.org/resource/collection/7D72B914-2EC7-4664-9124-A32598DA1ABE/Charter-Schools-and-Students-with-DisabilitiesFINAL.pdf.

[79] Hundreds of charter schools reference such contracts on their websites. See *Parent Contract*, KINGSLEY CHARTER ELEMENTARY SCHOOL (2014), http://www.kingsleycharter.org/parent-contracts.html, for an example of one such contract used by a school near Atlanta, GA.

[80] Simon, *supra* note 68.

reason that the composition of charter schools differs from what a random distribution of students would suggest.[81]

The enrollment gap among ELLs and SSNs has received considerable attention from policy makers, critics of charter schools, and charter school associations, alike.[82] The difference in terms of the enrollment of ELLs is particularly dramatic, despite the fact that some charter schools have been established with a particular focus on serving the local ELL population.[83] In Massachusetts, several provisions in the 2010 education reform legislation specifically attempted to empower BESE to hold charters accountable for enrolling more SSNs and ELLs.[84] Data from DESE show that the legislation has resulted in modest relative increases in the enrollment of Students with Special Needs in charter schools and more progress in relation to ELLs. However, due to the growth of the population in each of these areas, the enrollment gap between charter schools and traditional public schools persists.

New Orleans: Performing without a net

In late August 2005, the "hundred year storm" Hurricane Katrina made landfall along the U.S. Gulf Coast. Because of its vulnerability to flooding and its large population, New Orleans was one of the areas hardest hit by the storm. In the midst of the generalized devastation, the New Orleans public schools suffered massive damage, with the majority of school buildings seriously damaged, many beyond repair.

Some saw opportunity in the disaster. On September 21, before the city had even dried out, Paul T. Hill of the Center for Reinventing Public Education said, "In the case of post-hurricane New Orleans, American school planners will be as close as they have ever come to a green field opportunity…"[85] Hill meant that reformers would have the opportunity to rebuild the city's school system from the ground up, using a whole new set of principles.

Charter school advocates have taken full advantage of the green field, and nine years later the results are becoming clear. Charter advocates point to improved graduation rates and test scores. Critics of the charter wave say that it is impossible to compare pre- and post-Katrina

[81] See Alleen Brown, *Counseled Out: How some Twin City charter schools push kids with disabilities toward district schools*, TWIN CITIES DAILY PLANET (September 30, 2012), http://www.tcdailyplanet.net/news/2012/09/30/counseled-out-how-some-twin-cities-charter-schools-push-kids-disabilities-towards-di. While there exists abundant anecdotal evidence of such "counseling out" on the part of charters, the few studies that exist offer starkly different conclusions concerning the impact of this factor on the charter enrollment gap.

[82] *See* Carolyn Sattin-Bajaj & Marcelo Suárez-Orozco, *English Language Learner Students and Charter Schools in New York State: Challenges and Opportunities*, N.Y. GOVERNOR'S LEADERSHIP TEAM FOR HIGH QUALITY CHARTER PUB. SCHOOLS (2012), http://centerforschoolchange.org/wp-content/uploads/2012/09/ELL-Report-.pdf.

[83] Sunil Mansukhani, *Serving English Language Learners: A Toolkit for Public Charter Schools*, NATIONAL ALLIANCE FOR PUBLIC CHARTER SCHOOLS (Apr. 2013), http://www.publiccharters.org/wp-content/uploads/2014/01/NAPCS_ELL_Toolkit_04.02.13_20130402T114313.pdf (highlighting the Folk Arts Cultural Treasures Charter School in Philadelphia, which serves a predominantly Asian immigrant population in that city).

[84] *Summaries of Bills Regarding Charter Schools and Accountability*, CITIZENS FOR PUBLIC SCHOOLS, http://www.citizensforpublicschools.org/charter-schools/summaries-of-bills-regarding-charter-schools-and-accountability/ (last visited Oct. 5, 2014).

[85] Leigh Dingerson, *Dismantling a Community Timeline*, 90:2 High School Journal 8 (Jan. 2007).

New Orleans in this way due to the mass displacement of students and the resulting change in the composition of the student population. Race continues to be a huge factor in access to quality education as the best-performing charters tend to attract many more white students and struggling schools continue to be composed almost entirely of African Americans.[86] The city continues to be home to many of the lowest-performing schools in the Louisiana.

In May 2014, the closure of the last traditional public schools in New Orleans made the city school district the first all-charter district in the nation. An important part of the charter model to date has been the existence of a system of traditional public schools as a kind of safety net. With charters operating alongside a traditional district, students expelled or otherwise excluded from charter schools can always return to the public schools. That safety net no longer exists in New Orleans. The lack of a traditional public school system mandated to serve all children has been particularly problematic for some families of Students with Special Needs, who insist that they are having a hard time finding appropriate placements for their children.[87]

This problem was evident even before New Orleans became fully "charterized." In July 2010, the Southern Poverty Law Center (SPLC) filed a lawsuit claiming that New Orleans schools were excluding some Students with Special Needs and not responding to the educational needs of many such students who do gain entrance to schools. The suit further points to data showing that students with an Individual Education Plan (IEP) are being disciplined, suspended and expelled at much higher rates than other students.[88] That lawsuit is still pending, but, as of May 2014 efforts were underway to settle it.[89] It should also be said that many major urban public school districts in the U.S., including Boston, have faced lawsuits regarding the education they provide to Students with Special Needs, but this fact in no way excuses the problem as it is manifested in charters schools around the country.[90]

[86] For a particularly rich discussion of the historical context of racial factors in public education in New Orleans, see Sarah LeBlanc Goff, *When Education Ceases to Be Public: The Privitization of the New Orleans School System After Katrina*, UNIVERSITY OF NEW ORLEANS SCHOLARWORKS@UNO (May 15, 2009), http://scholarworks.uno.edu/cgi/viewcontent.cgi?article=1892&context=td.

[87] *See* Shakti Belway, *Access Denied: New Orleans Students and Parents Identify Barriers to Public Education*, SOUTHERN POVERTY LAW CENTER (Dec. 2010), http://www.splcenter.org/sites/default/files/downloads/publication/SPLC_report_Access_Denied.pdf.

[88] Brentin Mock, *New Orleans Accused of Failing Disabled Students*, NEWSWEEK (Oct. 6, 2010, 4:00 PM), http://www.newsweek.com/new-orleans-accused-failing-disabled-students-73991.

[89] Associated Press, *Settlement effort to begin in 2010 New Orleans schools special education lawsuit*, THE TIMES-PICAYUNE (May 24, 2014, 8:55 PM), http://www.nola.com/education/index.ssf/2014/05/settlement_effort_to_begin_in.html.

[90] *See* M.M. v. Lafayette Sch. Dist., 767 F.3d 842 (9th Cir. 2014), as amended (Oct. 1, 2014); Reyes ex rel. R.P. v. New York City Dep't of Educ., 760 F.3d 211 (2d Cir. 2014); and Jefferson Cnty. Bd. of Educ. v. Lolita S., 977 F. Supp. 2d 1091, 1129 (N.D. Ala. 2013) (Three examples of lawsuits in which parents sued their local school district for failure to provide Free Appropriate Public Education (FAPE) to their children with special needs. The suits were filed in California, New York, and Alabama respectively.).

In its 2013 report on the State of Public Education in New Orleans, Tulane University points to the omnipresent problem of charter accountability: "Without an accountability system that takes disability into account, schools have a disincentive to enroll students with disabilities."[91] In the nation's first all-charter district, every student is performing without a net and this can be especially dangerous for Students with Special Needs.

Approaches to school discipline

Regulatory frameworks in all states establish the parameters of appropriate school discipline procedures in those jurisdictions. School districts then fashion their own discipline policies in accord with those regulations. Since they often function as independent school districts, charter schools exercise considerable autonomy in the creation of their discipline policies.[92]

Many charter schools have adopted an approach to school discipline that seeks to create a positive learning environment in the school through the establishment and persistent enforcement of strict disciplinary codes, with escalating consequences to the student for even minor infractions. Disciplinary actions against students are increasing in all schools yet, in general, disciplinary action occurs at a higher rate in charter schools than in traditional public schools. In Boston, during the 2012-13 school year, students in charter schools were almost three times more likely to be subject to suspension, permanent expulsion, or removal to alternative facilities than students in traditional Boston Public Schools.[93] A recent national study on public accountability for charter schools indicates that Boston is not alone in this discipline disparity.[94]

A report published in 2014 by the U.S. Department of Education Office of Civil Rights affirms the existence of alarming racial and other disparities in discipline in the nation's public schools.[95] Independently managed charter schools were not included in the survey, so it is not possible to determine with certainty that these disparities also exist in charter schools. Increasingly, states are requiring charter schools to collect and report detailed discipline data,[96] which will enable the creation

[91] *The State of Public Education in New Orleans, 2013 Report*, THE SCOTT S. COWEN INSTITUTE FOR PUBLIC EDUCATION INITIATIVES 26 (June 2013), http://www.coweninstitute.com/wp-content/uploads/2013/07/2013_SPENO.pdf.
[92] In-district charter schools, like Horace Mann charters in Massachusetts, are more accountable to local school districts in establishing their discipline policies, but still exercise some autonomy in this regard. Independent charters, such as Commonwealth charters, can establish any discipline policy that is not in violation of state law.
[93] *2012-13 Student Discipline Data Report*, MASS. DEP'T OF ELEMENTARY AND SECONDARY EDUC., http://profiles.doe.mass.edu/state_report/ssdr.aspx (last visited Nov. 4, 2014).
[94] Leigh Dingerson, *Public Accountability for Charter Schools: Standards and Policy Recommendations for Effective Oversight*, ANNENBERG INSTITUTE FOR SCHOOL REFORM 9 (2014), http://annenberginstitute.org/sites/default/files/CharterAccountabilityStds.pdf.
[95] *Civil Rights Data Collection: Data Snapshot (School Discipline)*, U.S. DEP'T OF EDUC. OFFICE FOR CIVIL RIGHTS (Mar. 21, 2014), http://www2.ed.gov/about/offices/list/ocr/docs/crdc-discipline-snapshot.pdf.
[96] Cassandra West, *In the News: Strict reporting on discipline targets racial disparities*, CATALYST CHICAGO (June 4, 2014), http://www.catalyst-chicago.org/notebook/2014/06/04/65981/in-news-strict-reporting-discipline-targets-racial-disparities.

of a more complete picture of the incidence of charter school discipline, and, therefore, allow for more confident comparison of charters and public schools in this regard.

What can be determined with certainty is that, unlike traditional public schools, charter schools can carry out serious disciplinary actions unilaterally, without due process.[97] The disciplinary approach of charter schools may very well contribute to the lower numbers of SSNs enrolling in them. The data suggesting that this may the case for SSNs also indicate that the disciplinary approach is less likely to be a factor in the enrollment decisions of ELLs.[98]

The discipline approach in charter schools in one contributor to the high rates of student attrition often referred to as the "pushout" effect in charter schools. Attrition refers to the rate of departure of students from a school over the period of time that they would normally attend that school. All schools lose some students and some traditional schools have alarmingly high rates of attrition, but a number of the best-known charter schools in Massachusetts lose startling numbers of students through a combination of administrative exclusion and family withdrawal.[99] In Massachusetts, as in many other states, charter schools are not required to enroll new students to "back-fill" vacancies created by the departure of former students. A high rate of student departure—without the necessity of admitting new students—certainly influences the test results achieved by some schools, and attrition rates also affect the student composition of these schools over time.

From a human rights perspective, charter school discipline is not solely a factor in the low levels of SSN enrollment. An expanding body of data and analysis connects these "zero-tolerance" approaches with the increasing likelihood that youth excluded from schools will eventually face incarceration of some form.[100] Aggressive discipline policies are being implemented in traditional public schools, as well as charters, but because of their particularly strict discipline codes and liberal use of student exclusion as a remedy for violations of those codes, charter schools are seen by some analysts as making an important contribution to the construction of this "school-to-prison" pipeline.[101]

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[97] Court decisions have upheld the right of charter schools to dismiss students without due process, on the assumption that those students can immediately re-enroll in a local public school. *See generally* Rosa K. Hirji, *Are Charter Schools Upholding Student Rights?*, AMERICAN BAR ASSOCIATION (Jan. 14, 2014), http://apps.americanbar.org/litigation/committees/childrights/content/articles/winter2014-0114-charter-schools-upholding-student-rights.html.

[98] U.S. DEP'T OF EDUC. OFFICE FOR CIVIL RIGHTS, *supra* note 95.

[99] Like virtually every other characteristic of charter schools, attrition rates are a matter of dispute between the schools and their critics. At least in Massachusetts, data provided by the Department of Education clearly show that some of the highest performing charter schools loose students at extraordinarily high rates. *See* French, *supra* note 81.

[100] *School-to-Prison Pipeline*, AMERICAN CIVIL LIBERTIES UNION, https://www.aclu.org/school-prison-pipeline (last visited Nov. 4, 2014).

[101] Julianne Hing, *Race, Disability and the School-to-Prison Pipeline*, COLORLINES (May 13, 2014, 7:00 AM), http://colorlines.com/archives/2014/05/race_disability_and_the_school_to_prison_pipeline.html.

The quality of education provided by charter schools

While a human rights analysis of charter schools need not devolve into an unproductive debate about "who does it better," it is clear that the right to education includes access to education of acceptable quality, so the question of quality is a matter of human rights concern.

Understanding whether or not the education provided by charter schools is of acceptable quality requires some definition of the meaning of quality education. Among human rights documents, it is the Convention on the Rights of the Child that goes furthest in providing such a definition. It defines five "aims of education," as follows:

1. The development of the child's personality, talents and mental and physical abilities to their fullest potential;
2. The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;
3. The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own;
4. The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin; and
5. The development of respect for the natural environment.[102]

Subsequent human rights treatments of education quality have often used these aims of education and defined quality education as education that achieved, or at least demonstrated significant progress toward, these aims.[103]

The entire debate about charter school quality in the United States has used a very different definition of quality education. In this context, quality education is teaching that imparts basic cognitive skills, primarily English language skills and mathematical abilities. Standardized test scores have become the gold standard—virtually the only standard—for the measurement of educational quality.[104]

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[102] United Nations Convention on the Rights of the Child art. 29, Nov. 20, 1989, 1577 U.N.T.S. 3; *See also* U.N. Committee on the Rights of the Child, *CRC General Comment No. 1: The Aims of Education*, April 17, 2001, CRC/GC/2001/1.

[103] *Education for All Global Monitoring Report: The Quality Imperative*, U.N. EDUC., SCIENTIFIC AND CULTURAL ORG. (UNESCO) 27-37 (2004), http://unesdoc.unesco.org/images/0013/001373/137333e.pdf.

[104] The Boston Public School commissioned a School Quality Working Group, a gathering of outside experts who worked for a year to define measures of school quality that would go beyond MCAS scores. The SQWG presented its findings to the Boston School Committee in September 2104 and the majority of the recommended indicators were based on the most easily accessible data set, MCAS scores. See *Measuring Quality*, Boston School Quality,

The most substantial review of U.S. public education from a human rights perspective was the aforementioned 2001 Report of the Special Rapporteur on the Right to Education on her visit to the United States. That report, while rich in its analysis of the human rights challenges facing the U.S. education system, did not focus on the question of the quality of U.S. education as defined by the CRC. Similarly, a serious review of the quality of education provided by charter schools from the perspective of the aims of education framework has not yet been undertaken, and such a review, while certainly needed, is beyond the scope of this analysis.

It is, therefore, difficult to compare educational quality in charters and in traditional public schools using a more holistic notion of quality education, but comparisons are available using the narrower notion of quality as indicated by test scores. Some researchers assert that charter schools deliver education of higher quality, when compared with the traditional public schools in the relevant geographical area.[105] More sophisticated comparisons devise a statistical "virtual twin" to represent a comparable student that stays in the public schools, and then make the comparison between the real scores of the charter student and the scores of the virtual twin.[106] Other researchers raise important questions about the methodology used in such studies and, therefore, the conclusions about the superiority of charter performance. [107]

The job of education policy makers might become less complex if the data could resolve the debate over charter school vs. traditional school quality, but there is no such solution in sight. One analyst summarizes the results of the national charter school study carried out by Stanford's CREDO in the following way:

[The study's] school-level achievement numbers are particularly amenable to ideological massaging. On one hand, they clearly show that a majority of charter schools perform the same or worse than traditional public schools in math (40 percent the same + 31 percent worse) and reading (56 percent the same + 19 percent worse)...It's settled: charter schools are a disaster!

But wait! The data also clearly show that a majority of charter schools perform the same or better than traditional public schools in math (40 percent same + 29 percent better) and reading (56 percent same + 25 percent better)...It's settled: charter schools are a triumph![108]

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http://bostonschoolquality.org/measuring-quality/ (last visited Nov. 4, 2014), for indicators presented by the Working Group.

[105] *See generally* Cohodes et al., *supra* note 66.

[106] *Charter School Performance in Massachusetts*, CENTER FOR RESEARCH ON EDUC. OUTCOMES 8-11 (Feb. 28, 2013), http://credo.stanford.edu/documents/MAReportFinal_000.pdf.

[107] See Andrew Maul & Abby McClelland, *Review of National Charter School Study 2013*, NAT'L EDUCATIONAL POLICY CENTER (Jul. 16, 2013), http://nepc.colorado.edu/thinktank/review-credo-2013, for a review which considers CREDO's methodology in a national study completed at the same time as the Massachusetts study, using the same methodology.

[108] Conor P. Williams, *How the Debate Over Charter Schools Makes Us Dumber*, TALKING POINTS MEMO (Feb. 5, 2014), http://talkingpointsmemo.com/cafe/how-the-debate-over-charter-schools-makes-us-dumber.

Most of this comparative discussion has involved the comparison of student experiences across large numbers of schools. It is important to note, however, that while aggregating the performance of large numbers of schools may be the best way to analyze their statistical performance, the right to education of individual children is not realized at that aggregate level. When parents of individual children assess the quality of charters vs. traditional public schools, they choose, to the extent that school quality drives their choice, on the basis of a comparison of the quality provided by their *actual* public school options vs. the perceived quality of education in charter schools potentially available to their child. That often means a comparison between struggling traditional schools and the best charter schools in their area. That complex "choice" is quite different than a comparison of test scores at groups of schools over a broad geographic area.

Charter school finance and the right to education

The allocation of sufficient public funds to public education is one of the primary ways that government expresses its support for that service and advances the right to education. The human right to education does not specify a "right to adequately funded education," but the progressive realization of each of the 4As requires the provision of adequate funding by the State. Adequate funding is a necessary, but not sufficient, condition for the realization of the human right to education. In fact, requiring additional, targeted public funding is one of the primary levers by which courts have sought to mandate more effective and more equitable state intervention in support of education. The aforementioned *McDuffy* case is only one example of how the courts have attempted to influence public funding of education.[109] Twelve years after *McDuffy*, the Massachusetts Supreme Judicial Court decision in the *Hancock vs. Driscoll* case suggested that the Commonwealth was still falling short of its obligations in this respect.[110]

In the two decades prior to 2008, Massachusetts' spending on K-12 education grew by 10% as a percentage of state GDP, but the fiscal crisis resulting from the financial crisis of 2007-2008 abruptly reversed this trend. By 2010, the year in which Massachusetts passed the education reform bill mandating further incentives for the creation of charter schools, the state revenue shortfall was 20% of the total projected state budget. [111]

The impact of the crisis on state support of education at the local level was dramatic. In the years immediately after 2008, 34 states and the District of Columbia made cuts to K-12 education programs,

[109] McDuffy v. Sec'y of Executive Office of Educ., 615 N.E.2d 516 (1993).
[110] Hancock v. Comm'r of Educ., 822 N.E.2d 1134 (2005); *See* Norma Shapiro, *The state still doesn't provide equal education*, COMMONWEALTH (Dec. 1, 2004), http://www.commonwealthmagazine.org/Voices/Forums/2004/Fall/THE-HANCOCK-CASE-The-state-still-doesnt-provide-equal-education.aspx.
[111] John Hood, *The States in Crisis*, 6 NATIONAL AFFAIRS (Winter 2011), http://www.nationalaffairs.com/publications/detail/the-states-in-crisis.

even as the need for such services increased.[112] Massachusetts cut $115.6 million from its K-12 education budget in 2011 (3%) and also cut early intervention services designed to prepare SSNs for school by 16%.[113] The growth of the charter school sector after the 2010 passage of *An Act Relative to the Achievement Gap* took place in an extremely difficult budgetary context for public education in Massachusetts. The question, of course, is whether or not charter expansion exacerbated—and continues to exacerbate—the financial squeeze on traditional public schools, thereby undermining their ability to provide adequate services to those children remaining in traditional schools. If so, such a "degradation effect" would be a human rights concern, not for the children who are able to attend charter schools—and stay in them—but for the much larger group of students remaining in traditional public schools.

As mentioned in the earlier list of characteristics that define charter schools, all charters receive public funds in some form. This is a critical element of the business model of charters. As the charter sector has grown, the dedication of public funds to charters has increased accordingly. This budgetary shift has occurred precisely at the same time that many of the public school districts that send children to charters are facing extraordinary budgetary constraints, so the question of whether or not charter growth is "draining" resources from public schools quite naturally arises. Answering the question requires an examination of the ways in which both charters and traditional schools are financed. The way states fund charters differs quite a bit, from state to state. Once again, our focus is on how this dynamic unfolds in the case of Massachusetts.

How Massachusetts Finances Education

In 1993, the Massachusetts Supreme Judicial Court decided that the property-tax based system used to fund schools violated the state's constitutional right to education. Legislators created a new funding system to attempt to create more equity in schools across Massachusetts.

The core of this new system was the creation of district-specific **foundation budgets**: what districts must spend in order to satisfy the Commonwealth's education funding requirement. The foundation budget is a combination of several different calculations:

Base Rate: a calculation for the raw amount of money a district should be spending on each *type* of student (high school, middle school, English-language learners, etc). These numbers do not vary by district – they are consistent throughout the state. The base rate also includes certain categories of students who require additional funding; primarily special education students.

Foundation Enrollment: the number of students the district educates.

[112] Nicholas Johnson et al., *An Update on State Budget Cuts: At Least 46 States Have Imposed Cuts That Hurt Vulnerable Residents and the Economy*, CENTER ON BUDGET AND POLICY PRIORITIES (Feb. 9, 2011), http://www.cbpp.org/cms/?fa=view&id=1214.
[113] *Id.*

Wage Rate: a calculation that determines the cost of labor in a particular section of the state. It applies a multiplier to the base rate.

Not every district contributes the same *percentage* to its foundation budget, however. DESE considers a district's size, its property tax base, and overall ability to contribute to meeting its foundation budget, and determines its "net minimum contribution." Districts with limited tax bases and low property tax income relative to school population contribute less to the foundation budget. Lawrence, Massachusetts, for example, only contributes about 8% of the total foundation budget for its school district. Boston's assessment in 2014 was $604 million out of a foundation budget of roughly $750 million – about 80%.[114]

The gap between what a district has to pay towards its foundation budget and the budget itself is funded by the state in the form of **local aid.** This state support to local education comes almost entirely from Chapter 70 funds. Chapter 70 is the state law that mandates state spending to supplement the funding that municipalities can provide to their public schools.

Public funding of charter schools

Massachusetts treats charters as essentially a subset of a district's school system. The Commonwealth diverts to charter schools a portion of the local aid it would ordinarily transfer to the local municipality for its district school system, in order to pay for charter student tuition. Charters send enrollment projections to the state, and using the same foundation base rates, DESE calculates the amount of local aid a sending district would normally receive to educate those particular students in district schools, and allocates that amount to charters instead. This reduction in local aid to the public school district is automatic under the 2010 law. This funding is referred to as a district's **charter tuition, but it is important to note that the district never sees this tuition. The transfer is made directly from the Commonwealth to each charter school.**

Charter School Financing and Public School Budget Cuts

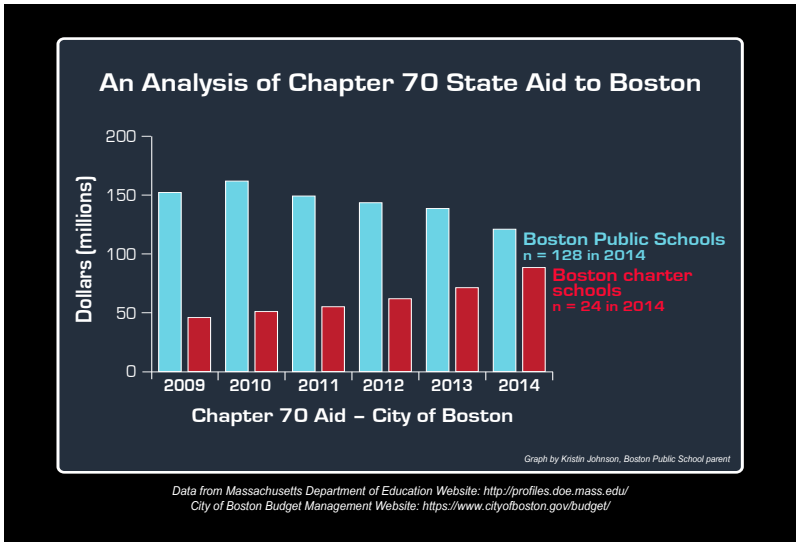
In short order, Chapter 70 funding (see box) became an important part of the Commonwealth's school funding picture. This state aid to local school districts was most important in districts with little local capacity to fund their schools, but it became a significant source of school funding for all but the state's wealthiest cities and towns. The decision to use Chapter 70 funds to finance charter schools—made virtually at the same time as Chapter 70 came into existence—set up a latent conflict between the growth of the charter sector and public school funding, especially in poorer cities and town. As long as

[114] See *School Finance: Chapter 70 Program – FY14 Chapter 70 Aid and Net School Spending Requirements*, Massachusetts Department of Elementary and Secondary Education (July 12, 2013), http://www.doe.mass.edu/finance/chapter70/chapter_14.html, to download a copy of the "Summary chart" spreadsheet which includes the foundation budget numbers for Boston and all other Mass. school districts.

the charter sector remained small, and the Chapter 70 pot grew steadily, this contradiction was not evident and, therefore, was not a cause of great concern to traditional public schools or education advocates. Predictably, the tension created by this funding strategy for charter schools began to intensify in the face of the difficult combination of fiscal pressure on public education budgets and legislative reforms encouraging charter school expansion. As the charter sector began to grow more quickly than the size of the Chapter 70 appropriation, charter school tuition payments became an ever-greater percentage of Chapter 70 aid.

Over time, this has meant less local aid for school districts, especially those, such as Boston, which have some financial capacity to support their own schools. In Boston, Chapter 70 funds accounted for 31% of the BPS budget in 1999. In the new 2014-15 budget, those funds accounted for only 13% of projected public school outlays. Boston is gradually returning to the property tax-based system of funding traditional schools that was struck down by the *McDuffy* decision. So clear is the trend that Interim BPS Superintendent John McDonough remarked to the Boston Globe that he could envision a day when all Chapter 70 funding will end up in charter schools.[115] Figures 2 & 3, below, illustrate the double-whammy of the decline in overall Chapter 70 allocations to Boston and the accelerated diversion of that shrinking piece of the pie to charter schools.

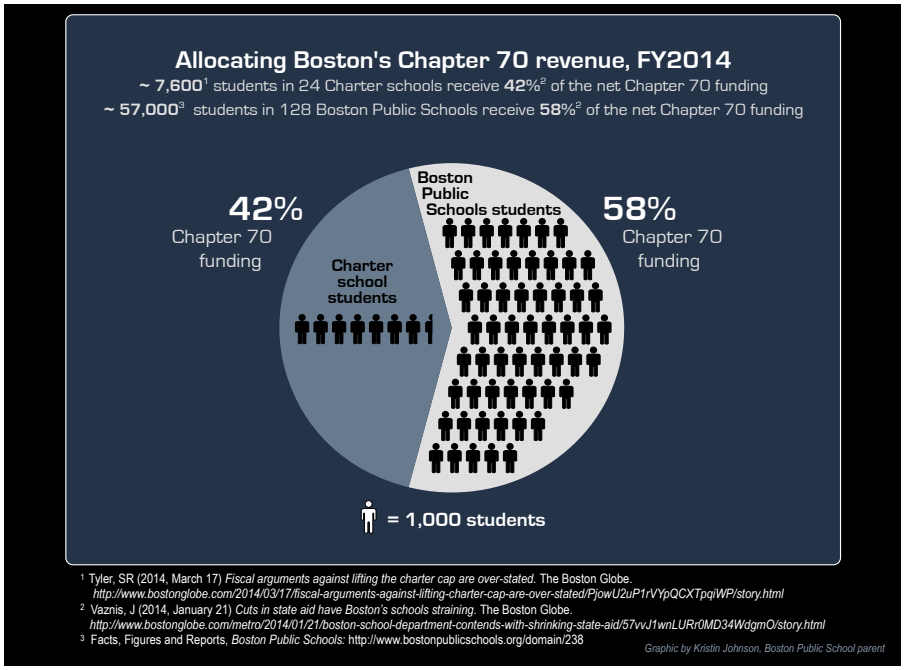
Figure 5
Trends in Chapter 70 aid to Boston 2010-14[116]



[115] James Vaznis, *Cuts in state aid have Boston's schools straining*, The Boston Globe (Jan. 21, 2014), http://www.bostonglobe.com/metro/2014/01/21/boston-school-department-contends-with-shrinking-state-aid/57vvJ1wnLURr0MD34WdgmO/story.html.

[116] Graphic created by Boston Public Schools parent, Kristin Johnson, from data published by Mass. Dep't of Elementary and Secondary Educ. and the City of Boston Office of Budget Management. *See Profiles*, MASS. DEP'T OF ELEMENTARY AND SECONDARY EDUC., http://profiles.doe.mass.edu/ (last visited Nov. 5, 2014); *FY15 Adopted Budget (July 1, 2014-June 30, 2015)*, CITY OF BOSTON OFFICE OF BUDGET MANAGEMENT, http://www.cityofboston.gov/budget/ (last visited Nov. 5, 2014).

Figure 6
Allocation of Chapter 70 Funds to Boston
charter schools and traditional public schools[117]



The decline in Chapter 70 funding for Boston's traditional public schools is beyond dispute. For charter advocates, however, this does not mean that charter growth is undermining the traditional public schools. They base this argument on two main points:

1. When Chapter 70 funds "go with the student" to charters, the expenses related to educating that child also go with the student since the sending school no longer has to educate that child. As a result, there is no net financial loss to the sending school; and
2. Even if some expenses don't "go with the student," the Commonwealth has established a separate fund (*Chapter 46: An Act Relative to Charter Schools*[118]) to reimburse public school districts for the funds they lose in charter tuition.[119]

[117] Graphic created by Boston Public Schools parent, Kristin Johnson, based on information from The Boston Globe and Boston Public Schools. *See* Samuel R. Tyler, *Fiscal arguments against lifting the charter cap are over-stated*, THE BOSTON GLOBE (March 17, 2014), http://www.bostonglobe.com/2014/03/17/fiscal-arguments-against-lifting-charter-cap-are-over-stated/PjowU2uP1rVYpQCXTpqiWP/story.html; Vaznis, *supra* note 115; *Facts, Figures and Reports*, BOSTON PUBLIC SCHOOLS, http://www.bostonpublicschools.org/domain/238 (last visited Nov. 5, 2014).
[118] Chapter 46 was passed in 1997, after the Legislature realized the financial problems created by the way charters were financed. The primary result of the bill was the creation of a reimbursement formula through which the Commonwealth would reimburse school districts losing charter schools for a part of the revenues lost when funding "went with the student." Effectively, Chapter 46 shifts a part of the burden of funding charters to the State, via a source separate from local aid to schools.

The first point is clearly not the case, and the existence of the Chapter 46 reimbursement program suggests that the legislature is aware of the management problem posed by the loss of revenue to charter tuition. The reimbursements help, but both their structure and the fact that they do not occur every year mean that they do not eliminate the financial problems caused by charter growth.

In fact, the decline in Chapter 70 funds to schools sending students to charters leaves districts with a major management challenge. Most districts in which the exodus to charters has been relatively small—the vast majority of public districts—have generally been able to manage around the loss. The urban districts that have lost the most students to charters have faced the biggest financial challenge due to charter expansion. The challenge has come at a time of generalized financial stress, when these districts have been least able to deal with it. The closing of multiple schools has been the only way that such districts can cut expenses on a scale that begins to match lost revenues. While this appears as a perfectly obvious solution, in real life it has been a painful and contentious process that takes time and creates tremendous dislocation in the lives of people connected to schools selected for closure.[120]

In 2013, Moody's Investor Services conducted a study of the financial risks to municipalities resulting from the growth of the charter sector. Moody's purpose was to comment on the credit worthiness of the municipalities funding school districts. The report, entitled "Charter Schools Pose Growing Risks for Urban Public Schools,"[121] suggests that charter advocates may be underestimating the impact of charter growth on traditional schools. Moody's own press release on the report quotes one of the authors of the report saying:

> *"While the vast majority of traditional public districts are managing through the rise of charter schools without a negative credit impact, a small but growing number face financial stress due to the movement of students to charters."*[122]

The report's co-author continues:

> *"Shifts in student enrollment from district schools to charters, while resulting in a transfer of a portion of district revenues to charter schools, do not typically result in a full shift of operating costs away from district public schools."*[123]

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[119] For the perspective of the Massachusetts Charter Public School Association on charter school impact on public school financing, see *Charter School Myths and Realities*, MASS. CHARTER PUBLIC SCH. ASS'N, http://masscharterschools.org/myths?field_issues_tid=4 (last visited Nov. 5, 2014).

[120] *See* Valerie Strauss, *A dozen problems with charter schools*, THE WASHINGTON POST (May 20, 2014), http://www.washingtonpost.com/blogs/answer-sheet/wp/2014/05/20/a-dozen-problems-with-charter-schools/; Steven Yaccino & Motoko Rich, *Chicago Says It Will Close 54 Public Schools*, THE NEW YORK TIMES (March 21, 2013), http://www.nytimes.com/2013/03/22/education/chicago-says-it-will-close-54-public-schools.html?_r=0.

[121] Global Credit Research, *Moody's: Charter schools pose greatest credit challenge to school districts in economically weak urban areas*, MOODY'S INVESTORS SERVICE (Oct. 15, 2013), https://www.moodys.com/research/Moodys-Charter-schools-pose-greatest-credit-challenge-to-school-districts--PR_284505.

[122] *Id.*

Six months after the Moody's report was released, a Washington Post blogger summarized its findings as follows:

> *While charters are everywhere — in at least 41 states — they tend to make up a bigger share of total enrollment in urban areas. And some urban districts face a downward spiral driven by population declines. It begins with people leaving the city or district. Then revenue declines, leading to program and service cuts. The cuts lead parents to seek out alternatives, and charters capture more students. As enrollment shifts to charters, public districts lose more revenue, and that can lead to more cuts. Rinse, repeat.*[124]

Massachusetts districts have had many advantages in this regard over those in other states. When the financial crisis hit, state education budgets had been on a steep increase for several years. Boston's economy was in better fiscal shape than other cities, such as Detroit of Philadelphia. And, finally, not all states put in place a reimbursement plan like the Chapter 46 bill. While the fiscal crisis in Boston's schools has been slower to unfold and less severe than that of some other cities, the diversion of Chapter 70 funds to charter schools has helped create financial problems in the urban school districts, very much as Moody's describes.

Many expenses associated with public education are either fixed or inelastic, declining very little with the departure of small numbers of students. Such expenses do not simply vanish when a number of students depart for charter schools. Chapter 46 reimbursements, even when they are fully funded by the Legislature, do not cover those fixed expenses.

Personnel costs, capital outlays and transportation costs are among the costs that operate in this way. In the case of transportation, the law requires districts to provide the same transportation to charter school students within the district as they provide to public school students. Charters do not reimburse districts for this expense.

Using Boston as an example, it costs the district $1,343 per capita, annually, to transport students. As of September of FY14, 3,847 charter school students were transported by the BPS at a cost of roughly $5 million.[125] When a student transfers to a charter, there is no cost saving unless that student was eligible for transport when attending a traditional public school, but lives so close to the charter school that s/he is no longer eligible for district transportation. Transportation is an unusual case because the school district must continue to absorb the costs of charter students by law, but there are many other costs for

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[123] *Id.*

[124] Niraj Chokshi, *Charter schools are hurting urban public schools, Moody's says*, THE WASHINGTON POST (October 15, 2013), http://www.washingtonpost.com/blogs/govbeat/wp/2013/10/15/charter-schools-are-hurting-urban-public-schools-moodys-says/.

[125] Boston Mun. Research Bureau, SPECIAL REPORT: CHARTER SEAT GROWTH SHOULD DRIVE BPS REFORM 5 (Sep. 18, 2013). The BMRB notes that it would be conservative to use the same cost per pupil estimate for BPS and charter school students, because charter students do not necessarily live near their schools and account for a higher number of miles traveled in the district than they do seats on the buses.

which operational, rather than legal, imperatives lead to a similar result. If three students leave a district school to attend a charter school for Grade 6, the district cannot lay off a sixth grade teacher: the school operates the sixth grade class with three fewer students, and proportionally less revenue to cover its expenses for Grade 6. The same argument applies to all fixed costs related to the school building, which do not automatically decline when a few students leave the school.

When charter schools expand in size and number, therefore, the sending district loses more in tuition payments than it gains from cost savings. The tuition goes with the student, but many of the costs do not. In the beginning, this is not a significant factor for a large school district, but as the charter sector grows, this resource drain has more of an effect.

As suggested above, many charter supporters acknowledge that school districts cannot recover all lost tuition payments in cost savings, but they insist that Chapter 46 funding comes to the rescue.[126] Under Chapter 46, the Commonwealth reimburses sending districts for 100% of lost tuition for the first year that a student leaves for a charter and then replaces 25% of those losses for years 2-5. After that, the sending district receives no reimbursement via Chapter 46.

Chapter 46 reimbursements address some of the financial issues created by charter growth, but they do not solve the problem. The original formula for reimbursement was 100-60-40, meaning that districts would receive full payment for lost tuition in the first year, 60 percent of that amount in year 2, and 40 percent in year 3. All reimbursement would stop after year three, on the assumption that districts would have restructured to eliminate all of the necessary expenses by that time. Districts made a strong case that it was impossible to restructure away expenses in that short time frame, so the legislature changed the formula to the current arrangement (100-25-25-25-25). This extended the timeframe of reimbursements, but lowered reimbursements in years two and three. This obviously makes the equally questionable assumption that districts can restructure away 75% of the expenses related to charter tuition losses in the first year after the losses. An occasional district may be able to do this, but this is certainly not the case for the majority of urban school districts losing significant number of students to charters each year.

While these reimbursements are legally mandated, they are not automatic. The legislature must approve a special appropriation for this purpose, and that approval is never straightforward. In at least four separate years since the program began, including 2014, the Legislature failed to approve the full reimbursement appropriation, and municipalities and school districts simply operated without those funds. One way or another, such shortfalls eventually increase pressure on school district budgets. Chapter 46 is an important program and the Legislature should approve these legally mandated reimbursements. They are not, however, a panacea for the financial problems created by the way charter schools are financed in Massachusetts. A better solution would be to simply finance charter schools out of a separate appropriation like Chapter 46, rather than deduct the funds directly from flows

[126] MASS. CHARTER PUBLIC SCH. ASS'N, *supra* note 119.

designated for public schools.[127] That would shift the burden for charter schools directly to the Commonwealth, and would certainly change the nature of the debate about charter school expansion.

In 2014, as the Massachusetts Legislature considered proposals to loosen the cap on charter school growth in the State, Boston was in the midst of a painful budget cutting exercise. In its 2013-14 fiscal year, the Boston Public Schools lost $84 million to charter tuition payments (net, after reimbursements). For the 2014-15 year, the system faces a budget shortfall of $107 million.

Far from unrelated, these two facts—the loss of public education funds to charter tuition payments and the fiscal shortfall—are intimately connected. To the extent that Chapter 46 does not fully reimburse districts for funding diverted to charter school tuition, those tuition payments are one source of the fiscal shortfall. The analysis above suggests that this is very likely the case. The budget shortfall is forcing the BPS to cut personnel and programs, including the projected loss of 250 jobs, among them 89 teachers and 113 para-professionals. All this is taking place in the Massachusetts city best equipped to deal with the loss of funds diverted to charter schools. The so-called "gateway" cities, such as Worcester, Springfield and Lawrence, have many fewer resources with which to compensate for the loss of Chapter 70 funds to charter tuition payments.

The financial challenges faced by urban public school districts are systemic in nature and have no single source. A complex range of external forces (immigration, increasing inequality, standardized test "fever," increasing numbers of students with special needs, etc.) are multiplying the demands on public school districts at precisely the moment when government, at all levels, is trying to recover from a major financial crisis. As the "jobless" recovery shuffles along, legislators face powerful political pressures to reduce spending.

The decision to finance charter schools from the same pool of funds through which the Commonwealth supports public school districts has created a conflict between the two. As the charter sector has grown and pressure on all public budgets has increased, this conflict has intensified. Lawmakers and regulators have tried to take steps to limit the damage to public school districts from charter growth, but these steps (such as charter growth caps and Chapter 46 reimbursements) have been inadequately researched, inconsistently supported and only partially successful.

The finding that charter schools have a negative effect on the financial capacity of traditional public schools in certain Massachusetts districts has implications for availability, accessibility, acceptability and adaptability of education–and, therefore, the realization of the human right to education—in those districts. The fact that charter enrollment patterns tend to concentrate ELLs and SSNs in traditional public schools only exacerbates this trend. This financial effect of charter schools on the realization of the human right to education for all students is not immediate or abrupt, but expresses itself in a

[127] At a public education conference hosted by Harvard Law School, former Massachusetts Secretary of Education, Paul Reville (a strong supporter of charters as Secretary) hinted at such a solution when he insisted that if the Legislature had wanted to create charters as centers of innovation to stimulate change in the public schools, it would not have funded them by taking funds from the very traditional public schools they were meant to "inspire." Paul Reville, panelist at Harvard Law School Conference, *Serving All Students: Examining Innovative School Models*, (Mar. 26, 2013), http://educationconference.brownpapertickets.com/.

gradual erosion of the capacity of traditional public schools to provide adequate educational services to their students.

Philadelphia: A Formula for Disaster

Philadelphia's school district is substantially larger than Boston's, but similar in the composition of its students: the public schools serve large numbers of students living in poverty, English Language Learners and special needs students.[128] From 2000 to 2014-15 (projected), Philadelphia's charter population grew from 12,000 students to close to 40,000, or from 6% to 22% of the district's total students.[129] Philadelphia also experienced a serious budget crisis; starting in the late 1990s, Philadelphia Mayor Ed Rendell sued the state of Philadelphia for failing to fund the district at a level necessary to meet the needs of students.[130] In 2001, the state took over the school district due to its financial issues and its poor academic results on standardized tests. The state organization tasked with running the schools oversaw the expansion of charter schools. In 2012, the district (under state control) cut 3,800 employees. The next year, it closed 20 schools.[131] The closings forced students to move into crowded schools, and the budgetary and logistical difficulties threatened to prevent schools from opening on time or with enough staff.[132]

As elsewhere, Philadelphia's budget woes are due to a confluence of factors – the city's high poverty rate, low available tax base due to that poverty, major cuts from federal and state funding sources, but superintendent William Hite also identified charter schools, stating that ***"Given the structure of the school code, unmanaged, self-directed charter school growth could force the District into a perpetual deficit…"***[133] Hite also noted that the Philadelphia school code did not make it easy for the district to hold charters accountable on academic issues or questions of financial propriety.[134]

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[128] Claudio Sanchez, *Kids Pay The Price In Fight Over Philadelphia Schools*, NAT'L PUBLIC RADIO (Nov. 21, 2013, 3:25 AM), http://www.npr.org/2013/11/21/246193561/kids-pay-the-price-in-fight-over-fixing-philadelphia-schools. Philadelphia's school budget is about $2.4 billion, about a third of which goes to charter schools.

[129] *Policy Brief: From Neighborhood Schools to Charter Schools*, Metropolitan Philadelphia Indicators Project 3 (Feb. 28, 2012), http://mpip.temple.edu/mpip/documents/Policy_Brief_Charter_Schools.pdf.

[130] Marrero ex rel. Tabalas v. Com., 739 A.2d 110 (Pa. 1999) (case dismissed as non-justiciable).

[131] Sanchez, *supra* note 128.

[132] Dale Mezzacappa, *Over jeers and shouts, SRC suspends parts of school code*, PHILADELPHIA PUBLIC SCHOOLS: THE NOTEBOOK (Aug 15, 2013), http://thenotebook.org/blog/136312/over-jeers-and-shouts-src-suspends-parts-school-code.

[133] *Id.*

[134] A new report by Integrity in Education, an advocacy organization promoting school reform, found that charter schools are vulnerable to financial fraud and abuse due to poor state and federal oversight. The US Department of Education's Office of the Inspector General reported similar issues in its October 2012-March 2013 Semiannual Report to Congress. *See Charter School Vulnerabilities to Waste, Fraud, And Abuse*, THE CENTER FOR POPULAR DEMOCRACY & INTEGRITY IN EDUCATION (May 2014), http://integrityineducation.org/charter-fraud/; U.S. Dep't of Educ. Office of the Inspector General, *Semiannual Report to Congress, No. 66, Oct. 1 2012-March 31, 2013* (May 2013), available at: http://www2.ed.gov/about/offices/list/oig/semiann/sar66.pdf.

One media report points to the Simon Gratz Mastery Charter High School as an example of how the charter model has been able to turn around struggling schools. At the Gratz, a charter management company has used private funds to demonstrate that "poverty is not destiny" as it revitalizes a high school in one of Philadelphia's poorest neighborhoods.

While lauding the progress made at the Gratz, University of Pennsylvania historian Tom Sugrue, views the experience in the context of the entire Philadelphia experience.

"Are some of the experiments successful? Yes. Have they proved to be that silver bullet for transforming urban public education? No... The funding formula, along with persistent racial segregation, is a formula for disaster. Concentrate poor, disadvantaged, minority students together in school districts with crumbling infrastructure, with large classes. And then give them less money to do the job." [135]

Sugrue also questions the relevance of the Gratz model for the district as a whole, since private foundations invested $1.5 million in the turnaround there, at the same time that the State of Pennsylvania was making massive cuts to its K-12 budget.

Charter Schools: At What Price?

Our examination of key aspects of charter school practice suggests that the experience has resulted in some important achievements, from a human rights perspective. Alongside these achievements, the growth of charters has also placed some obstacles in the way of the realization of the right to education for many children. These obstacles are sources of concern, from a human rights perspective. Given the qualitative nature of many of the variables under discussion, traditional cost-benefit analysis, based on comparisons of quantifiable values, is impossible. Instead, we conclude by characterizing the positive and negative human rights impacts and then draw a few conclusions about the human rights effect of charter schools to date, and the likely effects of the further expansion of the charter sector.

The 4As framework has been used throughout the analysis to guide our assessment of how the human right to education ought to be implemented. This framework also provides a useful structure for assessing human rights impacts.

Availability: educational services must be available in sufficient quantity to serve the students that use them. School systems must have enough school buildings, classrooms, teachers, and supplies to ensure that all students can partake in the education offered.

The growth of the charter school sector has increased the range of options available to families in some school districts, but that does not necessarily mean that this growth has made educational services

[135] Eric Westervelt, *Charter Schools In Philadelphia: Educating Without A Blueprint*, NAT'L PUBLIC RADIO (Nov. 22, 2013, 2:58 AM), http://www.npr.org/2013/11/22/246413696/charter-schools-in-philadelphia-educating-without-a-blueprint.

more available. Those districts in which large numbers of children have opted to enroll in charter schools have eventually needed to close schools in order to operate within their new budgetary reality. Students in traditional schools face declines in the level of services provided, while services available in the charter sector increase as the sector expands. Charter schools certainly leverage some private funds in support of education, and these funds might well not have been available in the absence of the charter alternative. These resources, specifically directed to charter schools, produce some increase in the capacity of the charter sector, but it is difficult to argue that this substantially increases the availability of public education to all families in need of that service.

The school closings necessary to deal with the financial losses to charter schools complicate the issue of availability of education for many families. To the extent that charter school expansion requires the closing of traditional public schools, such expansion is of concern from the perspective of the availability of education.

Considerations of the availability of education raise a question that recurs continuously in discussions regarding charter schools. Charter school practice and, therefore, a policy of charter school expansion affects the children attending charter schools very differently than it impacts those in the traditional public schools. A human rights analysis must take into account the effect of a policy on children within charters, but based on the notion of the human rights as universal, such an analysis must also consider the impact of charters on the typically larger group of children who continue to attend traditional public schools.

<u>Accessibility</u>: students must be able to make practical use of the education that is available. Barriers that prevent students from accessing education – intentional discrimination, cost barriers, structural issues, commuting distances, etc. – must be removed.

By law, charter schools are free to all attendees and they may not discriminate against a student on any grounds. Research analyzed in this report suggests that, as a practical matter, some groups of students have more difficulty accessing the services of charter schools than those provided by traditional public schools. English Language Learners enroll in Massachusetts charter schools at rates significantly lower than their presence in the overall student population. Students with special needs and students from the most economically disadvantaged families (free lunch-eligible families) show the same tendency, albeit to a lesser extent than ELLs. Data from other states suggest that Massachusetts is not alone in its patterns of charter school vs. traditional public school enrollment. Certainly, some of this enrollment gap is due to personal preferences of students and families, while charter schools' own policies and actions (including "counseling out" of some students) also have an impact.

If some groups are under-represented in charter schools, other groups are proportionally over-represented in those schools. In the sector as a whole, African-American students and students whose family income makes them eligible for reduced-price lunch are more present in charter schools than in the general school population of their sending districts. Families eligible for reduced-price lunch have low-incomes, but do not fall into the lowest income category, according to Federal standards. If families

in under-represented groups face some sort of barriers to access, then families in these over-represented categories must experience a certain ease of access to charter schools.

On balance, charter schools in Massachusetts demonstrate higher rates of attrition than traditional public schools. These high rates of departure—both by student choice and by disciplinary exclusion—also bear on the question of the accessibility of charter schools.

Not all groups of students have had equal access to charter schools, and this differential access is an issue from a human rights perspective. Massachusetts and other states have put in place regulations designed to hold charter schools accountable for their legal responsibility to serve students from all groups in an equitable manner, without discrimination of any sort. Despite these regulations, the enrollment gap persists. Until charter schools make additional progress on this important accessibility issue, the dedication of public resources to the schools will be a concern from a human rights perspective.

Acceptability: the quality of education must meet minimum standards. In the context of the international human right, this does not relate specifically to test scores or outcomes; rather, this is a requirement that education is relevant to students, culturally appropriate, and of good quality;

Much of the charter school debate has taken place on the terrain of school quality. A human rights analysis of the question of charter schools and educational quality suggests that the policy may benefit the human rights of some people while undermining those of other groups within society. Such analysis requires careful consideration of these rights "tradeoffs" to discern whether or not the implementation of a given policy represents the progressive realization of the right to education.

In the United States, educational reform advocates have largely succeeded in focusing the debate around school quality on a consideration of comparative student performance on standardized tests. A genuine human rights analysis must, ultimately, operate with a more holistic notion of educational quality than test results. But even analysis based strictly on test scores suggests that charter schools vary widely in quality, as do traditional public schools. There is little evidence that, in general, charter schools provide education of demonstrably higher quality than traditional public schools.

That said, a significant number of families enter charter school lotteries based on the sense—certainly true, in some cases—that charter schools offer their children the possibility of education of higher quality than the traditional public schools available to them through the school assignment process in their communities. A percentage of these families enroll in charter schools, while others remain on waiting lists, hoping for seats to open up. Charters overstate this "pent-up demand" for their services, but some excess demand for charter schools certainly exists.

High attrition rates suggest that many charter students leave those schools in the first few years after enrollment, but other students are able to adapt to the charter environment and some thrive there. For the families of these students, the charter option provided an opportunity to access education of a

quality that may not have been available to them in traditional public schools. They may not express their experience in human rights terms, but the existence of the charter schools allowed their child to realize an important aspect of the right to education.

Given the composition of charter school enrollment, many of these charter school success stories involve African-American children from families of limited economic means. Children living at this intersection of race and poverty have faced historic discrimination in public schools in Boston and across the United States. That these children and their families can find education that they consider to be of high quality in charter schools is a human rights accomplishment from any perspective. But at what cost do charter schools deliver this important accomplishment?

Massachusetts and most other states have decided to finance charter schools directly out of budgets destined for traditional public schools. Unlike many other states, Massachusetts, through its Chapter 46 charter reimbursement law, has attempted to recognize the effect of this financing strategy on traditional public schools. The research analyzed for this report suggests that charter school growth has had the effect of concentrating students requiring higher levels of educational services (ELLs and SSNs, for example) in traditional public schools. Unless trends in charter enrollment change quite dramatically, expansion of the sector will continue to have this effect on the composition of traditional public schools.

Furthermore, because of the way in which charters are financed, the growth of the sector has gradually degraded the financial capacity of public school districts with high charter density to provide services of acceptable quality for their students. This effect is most visible in large districts that send high numbers of students to charter schools. The experiences of districts such as Philadelphia suggest that this gradual erosion of capacity may reach a critical point beyond which the district is unable to provide services of even minimally acceptable quality to large numbers of the students they serve.[136]

On the one hand, charter schools advance the human right to education by providing high quality education to a relatively small number of students who may not have been able to access that education in traditional public schools. Those students and their families have become powerful advocates for a system that has worked for them, and demand that the charter school option be opened to more children. On the other, the expansion of the charter "system" undermines that same right for many students who remain in the same traditional public schools from which the charter students came. The group whose rights are undermined includes many students who were once enrolled in charter schools, but who, for whatever reason, did not thrive there and have ended up back in traditional schools. A complete human rights analysis would require a more granular, data-based analysis of the details of this complex tradeoff, but the tradeoff remains a concern from a human rights perspective, in any case.

[136] For a discussion of this dynamic, which involves not just the degradation of financial capacity, but also the loss of political support from lawmakers, see Sanchez, *supra* note 128.

Adaptability: educational systems must be flexible enough to serve the changing needs of society and the communities they serve, and to respond to the needs of a diverse student body (culturally, economically, and socially).

Charter schools were originally designed to give groups of teachers and parents the autonomy to provide new options to children, in terms of curriculum, teaching style, school environment, and other educational components. In short, it was hoped that charters would lead to educational innovation that could eventually be implemented, at scale, in school districts.

To an extent, charters have fostered higher levels of adaptability in the educational systems of the areas in which they have flourished. Ironically, however, charters themselves have shown little adaptability. They have often adopted rigid curricula, policies and procedures that have been slow to adapt, even in the face of apparent shortcomings. For example, many charter associations have identified the low levels of ELL enrollment as a serious problem in their member schools, but schools have been slow to adapt to meet the needs of this population. Similarly, charter advocates have acknowledged that relatively low student retention is an issue in some charter schools, but schools have had a hard time identifying and adopting policies and approaches that could make student retention a high priority of the schools' pedagogical practice.

As in the case of the other implementation criteria of the right to education, charters have had a mixed impact on the adaptability of education. By their nature, charter schools are adaptations to the conditions in public school districts. At the same time, many charters have shown the same difficulty in adapting to local conditions for which traditional public schools are often criticized. Since these institutional rigidities seem to be shared by all sorts of schools, and the specific lack of adaptability of charters affect only the minority of students who attend them, we find less cause for human rights concerns related to adaptability than to some of the other criteria.

Conclusion

As suggested above, the multi-faceted policy approach that has allowed the creation and expansion of charter schools in Massachusetts has had contradictory effects on the realization of the right to education. While the policy most certainly advances the right to education for a portion of the students able to enroll in charter schools, that realization of rights takes place at a cost. The ongoing expansion of the charter sector, along with the accompanying pressure on public school budgets, undermines the ability of some local districts to preserve and protect the rights of the larger group of children remaining in traditional public schools. School closings, the primary tool available to districts to restructure budgets to deal with charter school expansion, often require devastating adjustments for the districts in which they take place.

Because charter schools do not serve English Language Learners and Students with Special Needs at the levels those groups are present in the overall school population, the dedication of public funds to these

schools undermines the realization of the human right to education for children in those groups. Furthermore, the disciplinary approaches of charter schools and their liberal use of student exclusion as a response to student behavior issues is a human rights concern for students attending (and excluded from) charter schools. [137]

For practical reasons, our analysis of these effects has focused on Massachusetts, and our conclusions pertain to that state. There is ample evidence to suggest, however, that the trends identified in the Bay State are also present in other states with large urban school districts that have experienced rapid growth of charter schools over the past two decades. Continued growth of the charter sector will require decisions in many states to loosen current legal restrictions on charter expansion. Policy makers in those states would do well to carefully consider the full impact of charter school expansion on the human right to education of children inside and outside of those schools before encouraging such expansion. Charter schools were originally established with the promise that, in return for being released from many of the regulations applicable to public school districts, charter schools would be more accountable to public authorities. State actors responsible for charters schools must ensure that accountability, both on academic issues and on social issues, such as the composition of school enrollment.

A human rights analysis of the charter school experience to date does not justify an "anti-charter" position that sees the existence of the schools as inherently inconsistent with human rights standards, or reflexively opposes the expansion of the schools in any circumstance. The analysis, however, does affirm the wisdom of the choice made by the Massachusetts Senate when, in July 2014, it opted not to loosen the cap on charter school growth without first achieving a deeper understanding of the impact of such expansion on education outcomes across the entire public education system. Far from being irrelevant to discussions of education in the United States, the human rights framework promotes and contributes to just such an understanding.

[137] In addition to the right to education concerns that are the focus of this analysis, the liberal use of exclusion without due process also raises concerns regarding the civil and political rights of excluded students. For a discussion of the impact of some charter discipline policies in New York City, see Sarah Tan, *Pushed Out: Charter Schools Contribute to the City's Growing Suspension Rates,* School Stories: education reporting in New York City, (May 11, 2012), http://school-stories.org/2012/05/pushed-out-charter-schools-contribute-to-the-citys-growing-suspension-rates/.