

Growing Charter School Segregation and the Need for Integration in Light of Obama’s Race to the Top Program

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I. INTRODUCTION

In 1954, the United States Supreme Court announced its landmark *Brown v. Board of Education* decision. Thurgood Marshall, who was later named to the Supreme Court in 1967, argued the case before the Court on behalf of the plaintiffs as a lawyer from the National Association for the Advancement of Colored People.¹ Following the Court’s decision, which effectively ruled that separate is not equal, Marshall predicted that segregation

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1. *Brown v. Bd. of Educ.*, 347 U.S. 483, 485 (1954).

in schools would be eliminated within five years.² It would likely shock Marshall to learn that today, more than sixty years after *Brown v. Board of Education*, schools still remain very much segregated.³

Growing evidence shows that segregation is worse in United States' public school systems today than it was in 1954 when *Brown* was decided.⁴ In fact, politicians and activists have thrust education reform into the forefront as one of the biggest civil rights concerns of this generation.⁵ While education reforms purport to be aimed at closing the racial and economic achievement gap,⁶ mounting research shows that segregation in schools has steadily increased over the past quarter century and that segregation is strongly correlated with unequal education opportunities

2. *Id.* at 495; see Brenna Lermon Hill, Comment, *A Call to Congress: Amend Education Legislation and Ensure that President Obama's "Race to the Top" Leaves No Child Behind*, 51 HOUS. L. REV. 1177, 1178 (2014).

3. GARY ORFIELD & JOHN T. YUN, THE CIVIL RIGHTS PROJECT, HARVARD UNIV., RESEGREGATION IN AMERICAN SCHOOLS 13–15 (1999); Damon T. Hewitt, *Reauthorize, Revise, and Remember: Refocusing the No Child Left Behind Act To Fulfill Brown's Promise*, 30 YALE L. & POL'Y REV. 169, 190–91 (2011); Christopher Lubienski & Peter Weitzel, *Choice, Integration, and Educational Opportunity: Evidence on Competitive Incentives for Student Sorting in Charter Schools*, 12 J. GENDER, RACE & JUST. 351, 353 (2009).

4. Evan Horowitz, *If Segregation Ended 60 Years Ago, How Come It's Getting Worse?*, BOS. GLOBE (May 19, 2014), <https://www.bostonglobe.com/news/politics/2014/05/19/segregation-ended-years-ago-how-come-getting-worse/qbvuuqM0yLcWrNOB VIMC6zH/story.html> [<https://perma.cc/FS2J-VJTP>]; Richard Rothstein, *For Public Schools, Segregation Then, Segregation Since: Education and the Unfinished March*, ECON. POL'Y INST. (Aug. 27, 2013), <http://www.epi.org/publication/unfinished-march-public-school-segregation> [<http://perma.cc/XB2C-QGEF>].

5. See e.g., President Barack Obama, Remarks by the President in State of Union Address (Jan. 25, 2011), <http://www.whitehouse.gov/the-press-office/2011/01/25/remarks-president-state-union-address> [<http://perma.cc/XZ7W-KUER>]; Arne Duncan, U.S. Sec'y of Educ., Remarks at the National Urban League Centennial Conference (July 27, 2010), <http://www.ed.gov/news/speeches/secretary-arne-duncans-remarks-national-urban-league-centennial-conference> [<http://perma.cc/D2JZ-TTWT>]. Achievement gap refers to the difference in academic achievement between minority groups and their white counterparts and between students from low-income families compared to their peers from middle and upper-class families. DEBORA BOECK, WASH. ST. SCH. DIRS.' ASS'N, CLOSING THE ACHIEVEMENT GAP: A POLICY ACTION GUIDE FOR WASHINGTON STATE'S SCHOOL DIRECTORS 7–8 (2002), <http://www.wssda.org/Portals/0/Resources/Publications/agtfd.pdf> [<http://perma.cc/LJ8Z-6GBT>].

6. See 20 U.S.C. § 6301 (2012) (stating that the goal of President George W. Bush's No Child Left Behind program was "closing the achievement gap between high- and low-performing children, especially the achievement gaps between minority and nonminority students, and between disadvantaged children and their more advantaged peers."); see also *Race to the Top Fund*, U.S. DEP'T OF EDUC., <http://www2.ed.gov/programs/racetothetop/index.html> [<http://perma.cc/ND2U-YWXW>] (last modified Mar. 25, 2014).

and achievement.⁷ A major contributor to this problem is the failure to integrate schools across the country.⁸ The Obama administration's latest attempt to reform public schooling is unlikely to remedy this problem as its well-known Race to the Top (RTT) initiative attempts to improve education in part by championing an increase in charter schooling, which is arguably the most segregated sector of schools in the United States.⁹ Notably, the RTT initiative makes no mention of integration as a priority nor does it place any regulations on student enrollment.¹⁰

Integration is important. Integration allows students to meet people from different backgrounds and cultures and exposes students to diverse experiences. Integration in schools helps prepare students for a future working in environments with people of different races and socioeconomic backgrounds. When students learn in diverse environments, they are more likely to lead integrated lives when they are adults.¹¹ Studies

7. GARY ORFIELD ET AL., THE CIVIL RIGHTS PROJECT, UCLA, E PLURIBUS . . . SEPARATION: DEEPENING DOUBLE SEGREGATION FOR MORE STUDENTS 7–8 (2012), http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/mlk-national/e-pluribus...separation-deepening-double-segregation-for-more-students/orfield_epluribus_revised_omplete_2012.pdf [<http://perma.cc/RBL6-JQBY>].

8. According to a 2014 study by the UCLA Civil Rights Project, African American and Latino students are more likely to attend schools with mostly poor students, while white and Asian students are more likely to attend middle-class schools. Press Release, Jessica Epperly, The Civil Rights Project, UCLA, UCLA Report Finds Changing U.S. Demographics Transform School Segregation Landscape 60 Years After Brown v Board of Education (May 15, 2014), <http://civilrightsproject.ucla.edu/news/press-releases/2014-press-releases/ucla-report-finds-changing-u.s.-demographics-transform-school-segregation-landscape-60-years-after-brown-v-board-of-education/National-report-press-release-draft-3.pdf> [<http://perma.cc/Z2SP-FRAT>]. For example, in New York, California, and Texas, more than 50% of Latino students attend schools that are made up of at least 90% minority students while in New York, Illinois, Maryland, and Michigan, more than 50% of black students are enrolled in schools that are made up of at least 90% minority students. Janet Loehrke & Jolie Lee, *Still Apart: Map Shows States with Most-Segregated Schools*, USA TODAY (May 15, 2014, 6:04 PM), <http://www.usatoday.com/story/news/nation-now/2014/05/15/school-segregation-civil-rights-project/9115823> [<http://perma.cc/H4D9-EQEN>].

9. Race to the Top Fund, 74 Fed. Reg. 59,688 (Nov. 18, 2009) (to be codified at 34 C.F.R. Subtitle B, Chapter II); Race to the Top Fund Assessment Program, 75 Fed. Reg. 18,171 (Apr. 9, 2010); ORFIELD ET AL., *supra* note 7, at xvi.

10. See Olatunde C.A. Johnson, *Stimulus and Civil Rights*, 111 COLUM. L. REV. 154, 179 (2011).

11. GARY ORFIELD & CHUNGMEI LEE, THE CIVIL RIGHTS PROJECT, HARVARD UNIV., BROWN AT 50: KING'S DREAM OR PLESSY'S NIGHTMARE? 24 (2004), <http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/brown-at-50-king2019s-dream-or-pleddy2019s-nightmare/orfield-brown-50-2004.pdf> [<http://perma.cc/N2B4-DRZT>];

show that “students who attend diverse schools are more likely than students from homogeneous schools to choose diverse colleges, neighborhoods and workplaces later in life.”¹² Integration also helps to reduce racial prejudice and stereotypes.¹³ “[S]tudents who learn in racially diverse environments harbor fewer feelings of intergroup hostility, distrust, and fear.”¹⁴ Further, integrated schools result “in higher perceptions of safety and lower perceptions of vulnerability, all the while positively influencing attitudinal and civic outcomes in ways that are important for an increasingly diverse society.”¹⁵

Researchers like Dr. Gary Orfield have found that minority students educated in integrated learning schools have increased levels of academic achievement.¹⁶ The students who attend integrated schools also tend to have higher high school graduation rates¹⁷ and higher rates of college attendance.¹⁸ The Supreme Court has even recognized this in its 2003 *Grutter v. Bollinger* decision finding that integrated classrooms promote “cross-racial understanding” and “better prepares students for an increasingly diverse workforce and society” at the higher education level.¹⁹ These classrooms also “provide minority students access to intangible educational benefits ranging from scholarship and job information to new and more beneficial social networks and opportunities.”²⁰ Integration clearly is a vital part of education and is necessary to uphold the legacy of *Brown*’s holding that separate is not equal.

This Article contends that increasing the number of charter schools across the United States per the Obama administration’s RTT initiative is

Amy Stuart Wells & Robert L. Crain, *Perpetuation Theory and the Long-Term Effects of School Desegregation*, 64 REV. EDUC. RES. 531, 534 (1994).

12. *Why is school integration important?*, ONE NATION INDIVISIBLE, <http://www.onenationindivisible.org/resources/resource-library/why-is-school-integration-important/#sthash.UQcOd0wF.dpuf> [<http://perma.cc/ZN7B-XQA2>] (last visited Oct. 22, 2015).

13. Eboni S. Nelson, *Examining the Costs of Diversity*, 63 U. MIAMI L. REV. 577, 587, 591 (2009).

14. *Id.* at 587; see J. Eric Oliver & Janelle Wong, *Intergroup Prejudice in Multiethnic Settings*, 47 AM. J. POL. SCI. 567, 567–69 (2003).

15. Osamudia R. James, *Opt-Out Education: School Choice as Racial Subordination*, 99 IOWA L. REV. 1083, 1125 (2013); see Jaana Juvonen et al., *Ethnic Diversity and Perceptions of Safety in Urban Middle Schools*, 17 PSYCHOL. SCI. 393, 396 (2006).

16. ORFIELD & LEE, *supra* note 11, at 23–24; Nelson, *supra* note 13, at 590–91.

17. Brief of 553 Social Scientists as Amici Curiae in Support of Respondents at 8, *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (Nos. 05-908 & 05-915), 2006 WL 2927079.

18. GARY ORFIELD, THE CIVIL RIGHTS PROJECT, HARVARD UNIV., *SCHOOLS MORE SEPARATE: CONSEQUENCES OF A DECADE OF RESEGREGATION 9–10* (2001), <http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/schools-more-separate-consequences-of-a-decade-of-resegregation/orfield-schools-more-separate-2001.pdf> [<http://perma.cc/A6G7-5247>].

19. *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003).

20. Nelson, *supra* note 13, at 591.

not the answer to closing the racial and economic achievement gap, at least not without significantly more accountability and oversight. Part II describes the RTT initiative and its promotion of more charter schools. This Article suggests that advocating for charter schools may be problematic without proper supervision put in place by the government. Charter schools are privately managed schools that receive public funding, yet they are exempt from some rules that all other taxpayer-funded schools must abide by that are “designed to protect students, families, communities, and taxpayers.”²¹ Part III summarizes the history and evidence of segregation in charter schools while also arguing that segregation has negatively impacted student achievement. Part IV explores New Orleans’ decision to become an all charter school district as a case study that highlights the issues described in Part III. Part V proposes that the federal government put an emphasis on integration by prohibiting subjective admissions policies for charter schools and by implementing a more effective system to monitor charter schools’ compliance with civil rights regulations.

II. THE RACE TO THE TOP PROGRAM

In 2009, shortly after President Barack Obama took office, Congress passed the American Recovery and Reinvestment Act.²² Part of the Act was a plan to reform the United States’ various public school systems, coined as the “Race to the Top.”²³ The RTT initiative includes giving states financial incentives to convert some struggling schools into charter schools.²⁴ The RTT initiative does not guarantee funding to all states but rather, the program has states competing to earn funds in a contest of innovation and ingenuity.²⁵ The competition is based on nineteen categories from which

21. *Charter Schools 101*, NAT’L EDUC. ASS’N, <http://www.nea.org/home/60831.htm> [<http://perma.cc/CH6A-6DCG>] (last visited Oct. 22, 2015).

22. American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115.

23. Race to the Top Fund, 74 Fed. Reg. 59,688 (Nov. 18, 2009) (to be codified at 34 C.F.R. Subtitle B, Chapter II); Race to the Top Fund Assessment Program, 75 Fed. Reg. 18,171 (Apr. 9, 2010).

24. Monica Teixeria de Sousa, *A Race to the Bottom? President Obama’s Incomplete and Conservative Strategy for Reforming Education in Struggling Schools or the Perils of Ignoring Poverty*, 39 STETSON L. REV. 629, 645 (2010).

25. *Id.* at 638, 645.

states can earn points toward obtaining additional funds for their schools.²⁶ One of these sections awards a significant amount of points for past or future efforts to spur the growth of charter schools.²⁷ Additionally, states can lose points for having laws restricting the number of charter schools allowed to operate within the state.²⁸ Thus, the program seeks to use public funding to incentivize the growth of charter schools without requiring any efforts be made towards integration.

Under the RTT initiative, a state receives financial assistance by showing “its past efforts and success in building its capacity to intervene in its lowest-achieving schools and districts, and its future plans to identify its persistently lowest-achieving schools and to support its school districts in turning around these schools.”²⁹ Under several of the various intervention models to achieve this goal, the Obama administration promotes an increase in the number of charter schools across the nation in hopes of producing higher performing schools.³⁰ For example, the school closure model asks states to close poor-performing schools and enroll the students in higher-achieving charter schools.³¹ Similarly, the restart model requests school districts to convert persistently lowest-achieving schools into charter schools.³² Further, the RTT initiative specifically demands a state to demonstrate any steps taken to lift any caps the state may have on charter school growth as well as show a lift on any legal restrictions on student enrollment in charter schools.³³ Because of the RTT initiative, it seems states have begun to race to be the quickest to close schools across their districts and open more charter schools in order to increase their levels of federal funding.

III. CHARTER SCHOOLS AND INCREASED SEGREGATION

To many, charter schools are the answer to fixing the United States education system.³⁴ However, the drive under the RTT initiative to increase

26. U.S. DEP’T OF EDUC., RACE TO THE TOP PROGRAM: GUIDANCE AND FREQUENTLY ASKED QUESTIONS 5 (2010), <http://www2.ed.gov/programs/racetothetop/faq.pdf> [<http://perma.cc/R94K-WCJD>].

27. Race to the Top Fund, 74 Fed. Reg. at 59,691, 59,804.

28. See Hill, *supra* note 2, at 1194.

29. Sousa, *supra* note 24, at 646.

30. President Barack Obama, Remarks by the President on Strengthening America’s Education System (Nov. 4, 2009), <http://www.whitehouse.gov/the-press-office/remarks-president-strengthening-americas-education-system> [<http://perma.cc/W3UT-PADQ>].

31. Race to the Top Fund, 74 Fed. Reg. at 59,829.

32. Sousa, *supra* note 24, at 646.

33. Race to the Top Fund, 74 Fed. Reg. at 59,691.

34. See e.g., Joel Klein et al., Opinion, *How to Fix Our Schools: A Manifesto* by Joel Klein, Michelle Rhee and Other Education Leaders, WASH. POST (Oct. 10, 2010),

the number of charter schools seems to ignore research “suggest[ing] that converting district-administered schools into charter schools has had uneven results” and that “[c]harter schools also tend to show up on states’ lists of failing schools in larger proportions than regular public schools.”³⁵ From 2009 to 2010, charter schools served approximately 1.5 to 1.7 million students across the United States and the annual growth of student enrollment remained steady at about 9%.³⁶ That same year, the Center for Research on Education Outcomes (CREDO) conducted a study that looked at the impact of charter schools on over 70% of the students enrolled in such schools in the United States.³⁷ CREDO found that almost half of charter schools are no better than traditional public schools and 37% of charter schools actually had worse statistics.³⁸ With this type of data, it is difficult to understand why the federal government is pushing an increase in charter schools as the answer to improving education systems nationwide.³⁹

Not only do charter schools fail to have more impressive statistics than traditional public schools, but charter schools also typically tend to be more segregated.⁴⁰ This has been supported by numerous studies in recent years.⁴¹

<http://www.washingtonpost.com/wp-dyn/content/article/2010/10/07/AR2010100705078.html> [<http://perma.cc/KSU5-2Z2A>]; Jeevan Vasagar, *Romney and Obama Hail New Orleans’ Charter Schools as a Model for America*, THE GUARDIAN (Oct. 26, 2012, 3:07 PM), <http://www.theguardian.com/world/2012/oct/26/new-orleans-charter-schools-model> [<http://perma.cc/B42J-RW9K>].

35. Heinrich Mintrop, *Low-Performing Schools’ Programs and State Capacity Requirements*, in HOLDING NCLB ACCOUNTABLE: ACHIEVING ACCOUNTABILITY, EQUITY & SCHOOL REFORM 137, 143 (Gail L. Sunderman ed., 2008).

36. James, *supra* note 15, at 1096; *see also* CTR. FOR EDUC. REFORM, ANNUAL SURVEY OF AMERICA’S CHARTER SCHOOLS 3 (Jeanne Allen & Alison Consoletti eds., 2010), http://www.edreform.com/wp-content/uploads/2011/09/CER_Charter_Survey_2010.pdf [<http://perma.cc/L8V4-5V99>] (charting the expansion in enrollments at charter schools).

37. CTR. FOR RESEARCH ON EDUC. OUTCOMES, MULTIPLE CHOICE: CHARTER SCHOOL PERFORMANCE IN 16 STATES 1, 45–47 (2009), http://credo.stanford.edu/reports/MULTIPLE_CHOICE_CREDO.pdf [<http://perma.cc/WS7E-VDJU>].

38. *Id.*

39. This Article recognizes that not all charter schools result in poor performance and not all charter schools result in increased levels of segregation. However, this Article proposes that the large majority do, and that tendency is unfavorable.

40. Leland Ware & Cara Robinson, *Charters, Choice, and Resegregation*, 11 DEL. L. REV. 1, 4–5 (2009).

41. James, *supra* note 15, at 1101 (citing NAT’L ASSESSMENT OF EDUC. PROGRESS, U.S. DEP’T OF EDUC., AMERICA’S CHARTER SCHOOLS: RESULTS FROM THE NAEP 2003 PILOT STUDY 1 (2004), <http://nces.ed.gov/nationsreportcard/pdf/studies/2005456.pdf> [<http://perma.cc/X8BV-D5B9>]); *see also* ERICA FRANKENBERG ET AL., THE CIVIL RIGHTS PROJECT, UCLA, CHOICE WITHOUT EQUITY: CHARTER SCHOOL SEGREGATION AND THE

On the whole, researchers have found that charter schools “exacerbate current school segregation and, in more heterogeneous settings, lead to the stratification of students who were previously in integrated environments.”⁴² For example, “in all states, the percent of black students attending highly segregated charter schools is greater (in some cases, over 50 percent greater) than the percentage of black students attending highly segregated traditional public schools.”⁴³ Researchers at the Harvard Civil Rights Project found that segregation is more prominent in charter schools compared to public schools, in part because charter schools are often found in racially segregated neighborhoods and because they have a tendency to “target specific racial or ethnic groups.”⁴⁴ Charter schools also can choose to limit services they provide in order to exclude certain students, while some schools offer specific programs that appeal only to a select number of families.⁴⁵ Some charter schools even “exclude students from consideration because their parents can’t meet the demanding parent involvement requirements, or they expel students who haven’t met the school’s academic or behavioral

NEED FOR CIVIL RIGHTS STANDARDS 4 (2010), <http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/choice-without-equity-2009-report/frankenberg-choices-without-equity-2010.pdf> [<http://perma.cc/K85K-WMT4>] (“Our analysis of the 40 states, the District of Columbia, and several dozen metropolitan areas with large enrollments of charter school students reveals that charter schools are more racially isolated than traditional public schools in virtually every state and large metropolitan area in the nation.”); GARY MIRON ET AL., *SCHOOLS WITHOUT DIVERSITY: EDUCATION MANAGEMENT ORGANIZATIONS, CHARTER SCHOOLS, AND THE DEMOGRAPHIC STRATIFICATION OF THE AMERICAN SCHOOL SYSTEM 1* (Feb. 2010), <http://www.epicpolicy.org/files/EMO-Seg.pdf> [<http://perma.cc/F6CQ-8Y2B>] (“Charter schools operated by [Education Management Organizations] tend to be strongly racially segregative for both minority and majority students as compared with the composition of the sending district.”); ORFIELD ET AL., *supra* note 7, at xvi (reporting that charter schools are the most segregated public schools in the U.S. for African American students); INST. ON RACE AND POVERTY, UNIV. OF MINN., *THE STATE OF PUBLIC SCHOOLS IN POST-KATRINA NEW ORLEANS: THE CHALLENGE OF CREATING EQUAL OPPORTUNITY 1*, 3, 8 (2010), http://www.irpumn.org/uls/resources/projects/THE_STATE_OF_SCHOOLS_IN_NEW_ORLEANS.pdf [<http://perma.cc/D78E-MPZW>] (reporting that charter schools in New Orleans are more segregated than public schools).

42. Iris C. Rotberg, *Charter Schools and the Risk of Increased Segregation*, EDUC. WK. (Mar. 27, 2014), http://www.edweek.org/ew/articles/2014/02/01/kappan_rotberg.html [<http://perma.cc/5LNN-HBMJ>].

43. Alyssa M. Simon, Note, “Race” to the Bottom?: Addressing Student Body Diversity in Charter Schools After Parents Involved, 10 CONN. PUB. INT. L.J. 399, 411 (2011).

44. Regina Ramsey James, *How To Fulfill a Broken Promise: Revisiting and Reaffirming the Importance of Desegregated Equal Educational Access and Opportunity*, 68 ARK. L. REV. 159, 183 (2015) (citing Laura Hibbard, Myron Orfield, *Scholar, Says Ethnicity-Targeted Charter Schools Feel Like ‘Jim Crow Segregation’*, HUFFINGTON POST (Dec. 23, 2011, 2:31 PM), http://www.huffingtonpost.com/2011/12/23/myron-orfield-scholar-say_n_1167984.html [<http://perma.cc/U4DR-BA4E>]).

45. Rotberg, *supra* note 42.

requirements.”⁴⁶ Notably, charter schools also have the ability to pick where to locate, which impacts enrollment specifically because low-income families may experience transportation difficulties as many are without a vehicle.⁴⁷

Therefore, it seems that the way some charter schools organize and operate has a disparate impact on minority students and lower socio-economic students. Proponents of the charter school system attempt to refute this claim by arguing that the lottery system ensures fairness.⁴⁸ However, the lottery systems that charter schools utilize do not prevent the likelihood of segregation.⁴⁹ Allowing parents to choose which schools they send their child to may in fact be a causal factor leading to de facto school segregation, helping make the United States school system more segregated now than it was at the time of *Brown v. Board of Education*.⁵⁰

This increasing problem of segregation in some charter schools seems to be a result of the fact that charter schools are not forced to comply with

46. *Id.*

47. *Id.* This Article recognizes that in many cases parents voluntarily choose charter schools as an alternative to their local public schools system and thereby know the logistical challenges. *Id.* However, this Article argues that this is vastly different in cities that are primarily charter school or even 100% charter school, like New Orleans, where parent choice is not so seemingly voluntary anymore. *Id.*

48. Many charter schools have adopted a lottery system where students apply for charter schools and then are chosen via a random selection process. See Fiona O’Sullivan, *Charter School Lotteries Leave Many Kids Behind*, CARE2 (June 21, 2010, 1:30 PM), <http://www.care2.com/causes/charter-lotteries-leave-lots-behind.html> [<http://perma.cc/5CYU-55DT>] (explaining that the lottery system is hardly random because this system “automatically excludes children who might not find their way to apply”).

49. Ramsey James, *supra* note 44, at 183. For example, some charter schools only allow applications into the lottery system if certain criteria are met, leading some students to benefit from the system while others suffer. J. Celeste Lay, *Guest Commentary: Charter Experiment in New Orleans a Failure*, THE ADVOCATE (June 15, 2014), <http://theadvocate.com/news/opinion/9419324-123/guest-column-charter-experiment-in> [<http://perma.cc/W5GJ-DSES>]. In contrast, there are a number of charter schools such as Community Roots Charter School and Brooklyn Prospect Charter School in Brooklyn, High Tech High in San Diego, and Larchmont Charter School in Los Angeles, that use a weighted lottery system that gives more clout to certain disadvantaged groups, resulting in a more socioeconomically diverse enrollment. Halley Potter, *Is There Political Support for Integrated Charter Schools?*, THE CENTURY FOUND. (Apr. 8, 2015), <http://www.tcf.org/work/education/detail/is-there-political-support-for-integrated-charter-schools> [<http://perma.cc/TEV6-HJ4N>].

50. James, *supra* note 15, at 1117; Cory Koedel et al., *The Social Cost of Open Enrollment as a School Choice Policy* (Univ. of Mo. Dep’t of Econ., Working Paper No. 09-10, 2010), https://economics.missouri.edu/working-papers/2009/wp0910_koedel.pdf [<https://perma.cc/UNR6-9VJJ>].

all the same requirements of the other United States' public school systems. Even though charter schools are subject to federal civil rights law, charter schools can waive out of certain district and state laws.⁵¹ Additionally, despite receiving public funding, "charter schools are independent from the school district and are given a higher degree of autonomy in managing the school . . ."⁵² Because charter schools are public entities, ran primarily by private actors, they are also not subject to many of the restrictions traditional district schools must abide by.⁵³ This is of high concern. On average, segregated schools are "'inferior in terms of the quality of their teachers, the character of the curriculum, the level of competition, average test scores, and graduation rates.'"⁵⁴ Federal policies promoting charter schools are only making this problem worse, seeing as there is a growing amount of evidence that charter schools are the most segregated schools across the United States.

If a school receives public funding, it should be forced to comply with uniform standards to ensure all students have access to equal educational

51. Katrina Bulkley & Jennifer Fisler, *A Decade of Charter Schools: From Theory to Practice*, CPRE POLICY BRIEFS (CONSORTIUM FOR POLICY RESEARCH IN EDUC.), Apr. 2002, at 1, http://www.cpre.org/images/stories/cpre_pdfs/rb35.pdf [<http://perma.cc/CKR2-N9SJ>]. For example, charter schools may waive regulations regarding teacher certifications, academic curriculum standards, and collective bargaining laws. See e.g., ABBY R. WEISS & NANCY SCONYERS, INST. FOR RESPONSIVE EDUC., A NATIONAL SURVEY AND ANALYSIS OF CHARTER SCHOOL LEGISLATION, at I-1 to -2 (1996); *Automatic Exemptions from Many State and District Laws and Regulations*, NAT'L ALLIANCE FOR PUB. CHARTER SCHOOLS, www.publiccharters.org/law-database/automatic-exemptions-state-district-laws-regulations [<http://perma.cc/UR93-PH93>] (last visited Oct. 22, 2015); *Charter Schools - What Rules Are Waived for Charter Schools?*, EDUC. COMMISSION OF THE STATES (June 2014), www.ecs.force.com/mbdata/mbquestNB2?rep=CS1419 [<http://perma.cc/K9EV-UAAX>].

52. Jamie Gottlieb, *Harmonizing No Child Left Behind's Restructuring Provision and State Charter School Laws: The Need for Autonomy, Flexibility, and Adequate Resources*, 39 SETON HALL L. REV. 191, 206 (2009).

53. Danielle Holley-Walker, *The Accountability Cycle: The Recovery School District Act and New Orleans' Charter Schools*, 40 CONN. L. REV. 125, 137-39, 148 (2007). Because charter schools receive public funding, they should be forced to comply with state and federal standards to ensure that the right to education is available to all students regardless of race or economic status. According to the UCLA Civil Rights Project, approximately one in four charter schools does not report data on low-income students and there is a severe lack of information on English Language Learners (ELL) as well. FRANKENBERG ET AL., *supra* note 41, at 5. Unlike other public schools, charter schools are not forced to comply with state and federal standards to provide certain programs such as the free lunch program or for enrolling ELL students. *Id.*

54. Hill, *supra* note 2, at 1184 (quoting GARY ORFIELD & CHUNGMEI LEE, THE CIVIL RIGHTS PROJECT, UCLA, HISTORICAL REVERSALS, ACCELERATING RESEGREGATION, AND THE NEED FOR NEW INTEGRATION STRATEGIES 5 (2007), <http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/historic-reversals-accelerating-resegregation-and-the-need-for-new-integration-strategies-1/orfield-historic-reversals-accelerating.pdf> [<http://perma.cc/62P8-KB8W>]).

opportunities.⁵⁵ Because parents are given the choice of which charter schools to apply, parents are able to choose schools with student bodies that are similar to their child racially or socio-economically.⁵⁶ This results in a competition between schools to attract students, leading some charter schools to be willing to “adopt policies that favor more advantaged families while avoiding disadvantaged or minority students.”⁵⁷ For example, although charter schools are required to accept all students, a sizeable number of schools often avoid accepting special education students citing a lack of resources to respond to special needs.⁵⁸ Additionally, it has been reported that charter schools sometimes specifically fail to provide promotional material in Spanish⁵⁹ and some schools make their application available only for short periods of time or only in a specific location that targets certain groups of people.⁶⁰ Because of a lack of oversight, charter schools

55. For example, under the Equal Educational Opportunities Act, no state can deny equal educational opportunities to any person and no state can force the assignment of a student to a school that promotes further segregation. 20 U.S.C. §§ 1701–1721 (2000).

56. Lubienski & Weitzel, *supra* note 3, at 355. For example, professors at Duke have recently discovered that parent preferences in choosing which charter schools to send their children has led to a complete resegregation of schools in North Carolina, stating that “[o]nce a school becomes ‘too black,’ it becomes almost all black as white parents avoid it.” Jeff Guo, *White Parents in North Carolina Are Using Charter Schools To Secede from the Education System*, WASH. POST, (Apr. 15, 2015), <http://www.washingtonpost.com/blogs/govbeat/wp/2015/04/15/white-parents-in-north-carolina-are-using-charter-schools-to-secede-from-the-education-system/> [<http://perma.cc/S8Y3-HFWL>]. Notably, North Carolina received a \$400 million Race to the Top grant in 2010 after promising to eliminate its cap on charter schools leading to an influx of charter schools in the state. *Id.*

57. Lubienski & Weitzel, *supra* note 3, at 355.

58. U.S. GOV’T ACCOUNTABILITY OFF., GAO-12-543, CHARTER SCHOOLS: ADDITIONAL FEDERAL ATTENTION NEEDED TO HELP PROTECT ACCESS FOR STUDENTS WITH DISABILITIES 6–7, 11–13 (2012), <http://www.gao.gov/assets/600/591435.pdf> [<http://perma.cc/DRP6-V7YX>] (stating that “[c]harter schools enrolled a lower percentage of students with disabilities than traditional public schools” in the 2008–2009 and 2009–2010 school years and that administrators at these schools have discouraged special needs students from enrolling partially due to limited resources at the schools); *see also* Kevin G. Welner & Kenneth R. Howe, *Steering Toward Separation: The Policy and Legal Implications of “Counseling” Special Education Students Away from Charter Schools*, in SCHOOL CHOICE AND STUDENT DIVERSITY: WHAT THE EVIDENCE SAYS 93, 103 (Janelle T. Scott ed., 2005) (explaining that “budgetary considerations” cause many charter schools to steer away special education students).

59. Christopher Lubienski, *Marketing Schools: Consumer Goods and Competitive Incentives for Consumer Information*, 40 EDUC. & URB. SOC’Y 118, 132 (2007).

60. Daniel Simmons-Ritchie, *What Are Charter Schools and Why Are They Controversial?* Q&A, PENNLIVE (Jan. 29, 2015, 8:15 AM), <http://www.pennlive.com/>

that choose to enact these types of policies are being held unaccountable for failure to comply with protections that the government has specifically put in place to ensure a more fair education system.

IV. NEW ORLEANS: THE FIRST CITY TO BECOME 100% CHARTER SCHOOL

The segregation problem in charter schools across the nation has become an issue that should be of larger concern, now that a prominent city like New Orleans has chosen to become the first major city in the nation with a 100% charter school district.⁶¹ After Hurricane Katrina, with the entire city evacuated, New Orleans' 117 schools remained closed until the fall of 2005.⁶² With most of the city's buildings destroyed or in poor condition, the Department of Education offered \$20.9 million for charter schools.⁶³ With the need for funds in mind, New Orleans announced plans to convert the city's schools into an "all-charter district."⁶⁴

Prior to Hurricane Katrina, the Orleans Parish School District (OPSD) oversaw the public school system in New Orleans. After the destruction of Hurricane Katrina, it became apparent to the Louisiana government that OPSD would not be able to re-open its schools for the following 2005–2006 school year.⁶⁵ In an effort to save the New Orleans school system, Governor Blanco proposed that Louisiana use the charter school model and all schools with performance scores below the state average be placed in the Recovery School District (RSD), where third parties would have control over each charter school.⁶⁶ On November 30, 2005, this plan was

midstate/index.ssf/2015/01/charter_school_takeover_what_i.html [http://perma.cc/Z7PL-DZ5U] (sharing that a charter school in Philadelphia only made its enrollment applications available for one day a year at a local country club).

61. Nicole Stelle Garnett, *Disparate Impact, School Closures, and Parental Choice*, 2014 U. CHI. LEGAL F. 289, 305.

62. Daniel Kiel, *It Takes a Hurricane: Might Katrina Deliver for New Orleans Students What Brown Once Promised?*, 40 J.L. & EDUC. 105, 130 (2011); Michael Schwam-Baird & Laura Mogg, *Is Education Reform in New Orleans Working?: A Few Facts Swimming in a Sea of Unknowns*, 11 LOY. J. PUB. INT. L. 163, 166 (2010).

63. Catherine Gewertz, *New Orleans Adopts Plan for Charters*, EDUC. WK., Oct. 19, 2005, at 1, 15.

64. Danielle Dreilinger, *Recovery School District Will Be Country's First All-Charter District in September 2014*, THE TIMES-PICAYUNE (Dec. 19, 2013, 3:04 PM), http://www.nola.com/education/index.ssf/2013/12/recovery_school_district_will_3.html [http://perma.cc/V2UQ-MDKN].

65. Robert Garda, *The Politics of Education Reform: Lessons from New Orleans*, 40 J.L. & EDUC. 57, 70 (2011); Holley-Walker, *supra* note 53, at 136.

66. Laura Maggi, *Blanco Backs State Takeover of N.O. Schools*, TIMES-PICAYUNE, Nov. 2, 2005, at A11; Laura Maggi, *N.O. Schools Takeover Idea Has Legs*, TIMES-PICAYUNE, Nov. 9, 2005, at A2.

signed into law as Act 35, allowing Louisiana to take control of schools that were not “academically unacceptable.”⁶⁷ With regard to the plan, 60% of voters statewide and 56% of voters in New Orleans were in favor, but notably, predominately African American voting districts voted against the measure.⁶⁸ The Act eradicated the authority of local school boards, including OPSD, which retained only the power to convert existing schools into charter schools.⁶⁹ By the end of 2005, OPSD only operated four schools in the entire city.⁷⁰ This severely diminished the role of the OPSD in the school system and essentially led to the end of the Unified Teachers of New Orleans union, as charter schools and the RSD were not subject to the union.⁷¹

By the end of the summer of 2010, 61% of New Orleans public school students were enrolled in charter schools, which was indisputably the highest percentage of any urban school district in the United States.⁷² During the 2010–2011 school year, almost 40% of teachers had been teaching for a mere three years or less and the number of white teachers had doubled.⁷³ That same year, Louisiana issued letter grades for all of its schools. In New Orleans, 79% of charter schools received a “D” or “F.”⁷⁴

Critics have accused charter schools throughout New Orleans of “shepherding white students into the best charter schools while sending African American students into poorly resourced ones.”⁷⁵ In 2008, only

67. Act of Nov. 30, 2005, No. 35, § 1, 2005 La. Acts 2538, 2539 (codified at LA. STAT. ANN. § 17:10.7(A)(1) (2001 & Supp. 2010)).

68. Kiel, *supra* note 62, at 140.

69. Act of Nov. 30, 2005, No. 35, § 1, 2005 La. Acts 2538, 2539 (codified at LA. STAT. ANN. § 17:3982 (2001 & Supp. 2010)).

70. Kiel, *supra* note 62, at 132.

71. Steve Ritea, *Teachers Union Loses Its Force in Storm’s Wake*, TIMES-PICAYUNE, Mar. 6, 2006, at 1.

72. Kiel, *supra* note 62 at 135.

73. Kristen Buras, *Charter Schools Flood New Orleans*, THE PROGRESSIVE (Dec. 26, 2014), <http://www.progressive.org/news/2014/12/187949/charter-schools-flood-new-orleans> [<http://perma.cc/5R7U-KSK8>]. This was largely due to New Orleans’ decision to rely heavily on groups such as Teach for America and to lay off about 7,000 of its current teachers post-Katrina. Danielle Dreilinger, *7,000 New Orleans Teachers, Laid Off After Katrina, Win Court Ruling*, THE TIMES PICAYUNE (Jan. 16, 2014, 1:36 PM), http://www.nola.com/crime/index.ssf/2014/01/7000_new_orleans_teachers_laid.html [<http://perma.cc/P427-5ZDC>].

74. Buras, *supra* note 73, at 25.

75. Sarah Lazare, *New Orleans Nearly Finished Killing Off Its Public Schools*, COMMON DREAMS (May 29, 2014), <http://www.commondreams.org/news/2014/05/29/new-orleans-nearly-finished-killing-its-public-schools> [<http://perma.cc/7RQS-5W4S>].

57% of parents in New Orleans thought they had meaningful options when enrolling their children⁷⁶ as many RSD charter schools “require[d] parent contracts, minimum GPAs, lengthy admission applications, foreign language proficiency, or admission essays and ha[d] caps on the number of students they enroll[ed].”⁷⁷ Even with a lottery system, these admission practices are a way to selectively admit students with informed parents that have resources and time.⁷⁸ These admission practices “allegedly ‘cream’ students by race, class, and level of parental involvement.”⁷⁹

Not only are the New Orleans charter schools effectively re-segregating the New Orleans school district, but the charter schools are also underperforming.⁸⁰ For example, most of the graduating class of 2014 did not meet the minimum requirements to get into any of Louisiana’s colleges

76. Garda, *supra* note 65, at 89 (citing THE SCOTT S. COWEN INST., TULANE UNIV., THE STATE OF PUBLIC EDUCATION IN NEW ORLEANS 14 (2008), <http://www.coweninstitute.com/wp-content/uploads/2010/03/SPENO2008.pdf> [<http://perma.cc/9AC4-USRV>]).

77. *Id.* at 90; see BOS. CONSULTING GRP., THE STATE OF PUBLIC EDUCATION IN NEW ORLEANS 9, 14 (2007), <http://www.bcg.com/documents/file15048.pdf> [<https://perma.cc/454W-7PFU>]; Sarah Carr, *School Choice Is a Real Test for Parents in New Orleans*, THE TIMES-PICAYUNE (Nov. 8, 2009, 1:40 PM), http://www.nola.com/education/index.ssf/2009/11/post_42.html [<http://perma.cc/QG56-FKGS>]; Lesli Maxwell, *Up from the Ruins*, EDUC. WK., Oct. 3, 2007, at 27–30.

78. See Lubienski & Weitzel, *supra* note 3, at 363.

Although most charter schools are prohibited from non-random selection of students, charter schools might make efforts to shape their pool of applicants, so even “random” approaches like lotteries will be more likely to admit better students.

In such instances, disadvantaged students . . . may in fact end up with fewer, less desirable options than more advantaged students

Id. See also Steve Ritea, *Natural Selection*, TIMES-PICAYUNE, Oct. 23, 2006, at 1 (“Using subtle cues to motivate parents to get involved is one thing, but overtly sorting kids is another . . .”).

79. Garda, *supra* note 65, at 90. See also Colleen Kimmett, *10 Years After Katrina, New Orleans’ All-Charter School System Has Proven a Failure*, IN THESE TIMES (Aug. 28, 2015), <http://inthesetimes.com/article/18352/10-years-after-katrina-new-orleans-all-charter-district-has-proven-a-failur> [<http://perma.cc/M2FL-2RCB>] (citing a 2015 report funded by the Education Research Alliance for New Orleans, which found that about a third of charter schools in the city screen out undesirable students, with one school not advertising open spots and another school creating a “Do Not Call List” for families they did not wish to have attend for the following school year).

80. This underperformance issue is not just a problem in New Orleans, but throughout the state of Louisiana according to results of a study released by the Network for Public Education in August 2015 comparing charter schools throughout Louisiana to public schools throughout the state. Julian Vasquez Heilig, *Policy Brief: Should Louisiana and the Recovery School District Receive Accolades for Being Last and Nearly Last?*, THE NETWORK FOR PUB. EDUC. (Aug. 28, 2015), http://www.networkforpubliceducation.org/2015/08/policy_brief_louisiana/ [<http://perma.cc/HR54-PDJH>]. This research showed that charter school students performed two to three standard deviations worse than public school students on standardized reading and math tests. *Id.* Notably, approximately 70% of Louisiana’s charter schools are located in New Orleans. *Id.*

because students could not achieve the minimum ACT score.⁸¹ Only about 6% of high school seniors scored high enough on the ACT to qualify for admission into a Louisiana college.⁸² Additionally, five of the sixteen high schools in New Orleans did not even have a single student who met these requirements.⁸³ It appears evident that the idea of a 100% charter school district is simply not working in New Orleans.

V. CONCLUSION

With the federal government promoting charter schools, more cities may follow New Orleans' lead and choose to become 100% charter school districts.⁸⁴ This is a potential problem. Charter schools may seem like the way to improve the United States education system, but the fact is that a noteworthy percentage of charter schools exude a trend of underperformance and increased segregation. In New Orleans, there is essentially no choice for parents. With the end of neighborhood schools, parents of students in New Orleans have a choice only between charter schools and high-cost private schools. Because these charter schools are underperforming on average, students, especially those of a lower socio-economic background, are left with a sub-par education. The federal government should not be promoting a system that is not working, especially at the expense of segregating schools in direct contradiction to the Court's decision in *Brown v. Board of Education*. The federal government should be promoting integration of schools instead of allowing integration to be simply voluntary.⁸⁵

81. Mercedes Schneider, *New Orleans RSD: Far from Meeting Louisiana Four-Year College Admission Requirements*, HUFFINGTON POST (Feb. 9, 2015, 8:40 AM), http://www.huffingtonpost.com/mercedes-schneider/new-orleans-rsd-far-from-b_6642278.html [<http://perma.cc/Y5QP-HJJB>].

82. *Id.*

83. *Id.*

84. Enrollment in charter schools has become more prevalent in many U.S. cities. For example, in 2014, between 44% and 55% of students in two Michigan school districts were enrolled in charter schools, 44% of students in Washington D.C. were enrolled in charter schools, and 39% of students in Cleveland were enrolled in charter schools. NAT'L ALL. FOR PUB. CHARTER SCH., A GROWING MOVEMENT: AMERICA'S LARGEST CHARTER SCHOOL COMMUNITIES 4 (9th ed. 2014), http://www.publiccharters.org/wp-content/uploads/2014/12/2014_Enrollment_Share_FINAL.pdf [<http://perma.cc/H6HR-3WE5>].

85. See Wendy Parker, *From the Failure of Desegregation to the Failure of Choice*, 40 WASH. U. J.L. & POL'Y 117, 149 (2012) (explaining that charter schools that attempt integration get only a mere five additional points on their application for public funding from the government).

Rather than shifting the focus on how to better integrate, the RTT initiative advocated by the Obama Administration has given money to states that do little to help minority and low socio-economic students.⁸⁶ In essence, the Obama Administration has completely disregarded the legacy of *Brown v. Board of Education*.⁸⁷ With a presidential election forthcoming in November 2016, integration should be the focus of any candidate's education reform plan. The promise of additional funds to states that change their laws to spur charter school growth should be abandoned. In its place, additional funds should be promised to states that make meaningful efforts to integrate its schools. This Article proposes laws be enacted that prohibit charter schools from receiving public funding if the school is in violation of civil rights laws either in policy or practice. To do this, both federal and state governments need to hold accountable the third parties responsible for running charter schools. Further, both local and state governments should require that charter schools receiving public funding be more accommodating to all students. For example, charter schools should be forced to enact certain measures such as providing multi-lingual application materials, having uniform application procedures, and adopting enrollment periods for designated lengths of time across all charter schools in order to ensure that all students have a more equal chance of receiving a more quality education. Local school districts should also consider adopting moratoriums preventing new charter schools from being formed and refusing to renew current charters until all charter schools within the district get rid of their practices that segregate based on race or class, as well as those policies that discriminate against children that are special needs or ELL.

Charter schools need more oversight in order to be successful. A mass creation of school districts that are primarily or 100% charter school is not a path any government should want to go down. We cannot allow our nation to turn into a 100% charter school system if it will function similarly to the system currently in place in New Orleans. We cannot continue to allow charter schools funded by public tax dollars to operate in such a way that is leading to rising segregation of our school systems when integration is

86. For example, Tennessee and Delaware were selected as the two winners of the first round of the RTTP, "meaning that the Race to the Top Fund currently impacts only 2.5% of the students in the United States eligible for free and reduced lunch, three percent of the nation's African American students, and less than one percent of Latino, Native American, and Hmong students." Jamie Gullen, *Colorblind Education Reform: How Race-Neutral Policies Perpetuate Segregation and Why Voluntary Integration Should Be Put Back on the Reform Agenda*, 15 U. PA. J.L. & SOC. CHANGE 251, 265 (2012).

87. Jeff Bryant, *Who Betrayed the Legacy of Brown v. Board?*, COMMON DREAMS (May 13, 2014), <http://www.commondreams.org/views/2014/05/13/who-betrayed-legacy-brown-v-board> [<http://perma.cc/TJ8D-C33F>].

so vital to an educational experience. Currently, the limited funding the federal government provides for public education is being used to subsidize charter schools that segregate and underperform. This needs to be changed if the federal government is serious about closing the achievement gap and upholding the spirit of *Brown v. Board of Education*.

