

Fordham Urban Law Journal

Volume 42

Number 3 *Colloquium - Financing and Fairness:
Implementation and Equity in the Urban Charter
School*

Article 1

April 2016

Searching for Equity Amid a System of Schools: The View from New Orleans

Robert Garda

Loyola University of New Orleans College of Law

Follow this and additional works at: <https://ir.lawnet.fordham.edu/ulj>

 Part of the [Education Law Commons](#), [Law and Politics Commons](#), [Law and Race Commons](#), and the [Law and Society Commons](#)

Recommended Citation

Robert Garda, *Searching for Equity Amid a System of Schools: The View from New Orleans*, 42 Fordham Urb. L.J. 613 (2015).
Available at: <https://ir.lawnet.fordham.edu/ulj/vol42/iss3/1>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Urban Law Journal by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

SEARCHING FOR EQUITY AMID A SYSTEM OF SCHOOLS: THE VIEW FROM NEW ORLEANS

*Robert Garda**

ABSTRACT

Hurricane Katrina leveled both the buildings and governance structure of the New Orleans school system. The system was transformed from one elected school board controlling nearly all the schools to a system of schools with sixty-three school districts operating within the city's geographic boundaries that are run by forty-four independent school boards. There is not a more decentralized school governance structure in the United States. This Article discusses how this new system of schools is attempting to achieve equal educational opportunities for its most vulnerable and at-risk student populations: the poor, minorities, students with disabilities, and English Language Learners.

For the first seven years after Katrina, the system of schools operated with virtually no centralized planning or unified services, instead pushing all decision-making and service provision down to the autonomous schools. With little oversight, the schools became balkanized by race, class, and ability because of unequal access, retention, and service provision, and because certain schools are specialized for discrete student populations. It became apparent that centralizing certain services and unifying policies was essential to creating equal opportunities for vulnerable students, which slowly began occurring in 2012.

* Fanny Edith Winn Distinguished Professor, Loyola University of New Orleans College of Law. I appreciate the valuable feedback I received at the Cooper-Walsh Colloquium at Fordham Law School, particularly the insightful commentary from Professor Eloise Pasachoff. I would also like to thank Renita Thukral and Josh Densen for their input on earlier drafts of this Article. Finally, special thanks go to Blake Crohan and Drew Morock for their tireless research assistance.

Today, New Orleans education stands at a crossroads in deciding how to achieve equity for its vulnerable student populations. One route relies on centralizing services, planning, and oversight to ensure that every school provides an appropriate education to any type of student that walks through the schoolhouse door. This path embraces the version of inclusion equality set forth in *Brown v. Board of Education*: “separate educational facilities are inherently unequal.” The other route relies on the market driven reform underlying the charter movement to create specialized schools to fill the unmet demands of vulnerable populations. This route embraces an emerging view of equality—where separate can be equal, possibly even superior, if parents are empowered to maximize their child’s academic outcomes in specialized settings. This Article argues that New Orleans is headed down this latter route and identifies the lessons that can be learned from its evolution to a system of schools.

TABLE OF CONTENTS

Introduction	614
I. The Education Landscape of New Orleans	620
A. The Evolution of a System of Schools	620
B. The System of Schools Today	622
II. Equity in the New Orleans System of Schools	625
A. Race and Class Equity	625
1. Access Equity	630
2. Retention Equity	639
3. Choice	643
B. Equity for Students with Disabilities	646
C. Equity for English Language Learners	652
III. The Impact of Moving to a System of Schools on Equity	655
A. Centralized Planning or the “Invisible Hand”	655
B. Lessons from New Orleans	665
Conclusion	670

INTRODUCTION

New Orleans has been the epicenter of education reform since Hurricane Katrina decimated the city and its schools in August of

2005.¹ In the storm's aftermath, New Orleans schools were remade based on the education reforms of the day: charter schools, choice, and state takeover of failing schools. The Recovery School District (RSD), an arm of the state Department of Education, wrested control of over ninety percent of the schools from the Orleans Parish School Board (OPSB) and chartered these schools to private operators over the course of the next nine years. In the 2014–15 school year, the RSD became the first district in the United States to have one hundred percent charter schools.² With seventy-four charter schools, sixty-seven private schools, and only six traditional schools run directly by an elected school board, New Orleans is “reinventing itself as a decentralized system of schools.”³

The changes in New Orleans are called a “grand experiment in urban education for the nation”⁴ that could “shake the foundation of American education.”⁵ While the reforms are touted as a “roadmap” and a “model” for other cities to follow,⁶ and many are in fact

1. Walter Isaacson, *The Greatest Educational Lab*, TIME, Sept. 17, 2007, at 47; Patrik Jonsson, *As New Orleans Restarts its Schools, Most are Now Charter Schools*, CHRISTIAN SCI. MONITOR, Sept. 4, 2007, at 1 (positing that New Orleans is the “proving ground” for charter schools); Lesli A. Maxwell, *City Yearns for Rebirth Among Ruin*, EDUC. WK. (Aug. 14, 2007), <http://www.edweek.org/ew/articles/2007/08/15/45nolaoverview.h26.html> (explaining that the efforts to rebuild New Orleans's education system is “one of the nation's most important education stories”).

2. PATRICK SIMS & DEBRA VAUGHAN, THE COWEN INST., THE STATE OF PUBLIC EDUCATION IN NEW ORLEANS 2014 REPORT 8 (2014) [hereinafter THE COWEN INST., 2014 REPORT], available at <http://www.speno2014.com/wp-content/uploads/2014/08/SPENO-Small.pdf>; Kari Dequine Harden, *New Orleans Nearing a 'Privatized' Public School System*, LA. WKLY. (June 2, 2014), <http://www.louisianaweekly.com/new-orleans-nearing-a-privatized-public-school-system/> (stating that RSD is the nation's first “completely privatized school system”); Lyndsey Layton, *In New Orleans, Major School District Closes Traditional Public Schools for Good*, WASH. POST, May 28, 2014, http://www.washingtonpost.com/local/education/in-new-orleans-traditional-public-schools-close-for-good/2014/05/28/ae4f5724-e5de-11e3-8f90-73e071f3d637_story.html.

3. John Ayers, *Introduction to THE COWEN INST., 2014 REPORT*, *supra* note 2; Anya Kamenetz, *The End of Neighborhood Schools*, NPR.ORG (Sept. 2, 2014), <http://apps.npr.org/the-end-of-neighborhood-schools/>; see also Dawn Ruth, *Amazing Recovery: Incredibly, a Model School System*, NEW ORLEANS MAG., Aug. 2014, <http://www.myneworleans.com/New-Orleans-Magazine/August-2014/Amazing-Recovery/> (explaining that the centralized school system in New Orleans is finished).

4. Layton, *supra* note 2.

5. DAVID OSBORNE, THIRD WAY, BORN ON THE BAYOU: A NEW MODEL FOR AMERICAN EDUCATION 2 (2012), available at http://content.thirdway.org/publications/579/Third_Way_Report_-_Born_on_the_Bayou-A_New_Model_for_American_Education.pdf.

6. *Id.*; Jeff Bryant, *Look out, Chris Christie: The New War on Public Schools Just Might Be Defeated*, SALON (June 3, 2014), http://www.salon.com/2014/06/03/look_out_chris_christie_the_new_war_on_public_schools_just_might_be_defeated/

emulating the reforms,⁷ the critical question is whether they are working.

In the modern-day accountability era, test scores and graduation rates are the primary measures by which to answer this question. Debate rages over whether the new system of schools in New Orleans has actually improved student academic gains. The state and charter proponents tout the growth rate of positive indicators for students and schools since Katrina,⁸ while opponents point to low benchmark performance,⁹ data showing there has been no growth,¹⁰ the

(noting that think tanks on both sides of the political spectrum have touted the New Orleans model as “what should come next” in school reform).

7. See Ayers, *supra* note 3 (explaining that many districts are beginning to try decentralization and a “mutilayered governance model”); Danielle Dreilinger, *Success of Recovery School District Considered at National Conference*, TIMES-PICAYUNE, July 28, 2014, http://www.nola.com/education/index.ssf/2014/07/challenge_of_recovery_school_d.html (showing that Michigan and Tennessee state takeover districts are modeled on RSD); Ingrid Jacques, *Column: A New Orleans Model for Detroit?*, DETROIT NEWS (Sept. 16, 2014), <http://www.detroitnews.com/story/opinion/editorials/2014/08/29/column-a-new-orleans-model-for-detroit/14817041/> (establishing New Orleans as a potential model for Detroit); OSBORNE, *supra* note 5, at 23.

8. See, e.g., THE COWEN INST., NOLA BY THE NUMBERS: SCHOOL ENROLLMENT AND DEMOGRAPHICS FROM OCT. 2013, at 1 (2014) [hereinafter THE COWEN INST., NOLA BY THE NUMBERS] (showing that the number of students in D or F schools decreased from 23% in the 2012–2013 school year to 14% in the 2013–2014 school year); Peter Cook, *When All Else Fails File a Civil Rights Complaint*, PE+CO (July 8, 2014), <http://peterccook.com/2014/07/08/when-all-else-fails/> (highlighting that student performance in New Orleans is improving at a much faster rate than in the rest of the state); Danielle Dreilinger, *John White: New Orleans Charter Civil Rights Complaint ‘a Joke’*, TIMES-PICAYUNE, May 15, 2014, http://www.nola.com/education/index.ssf/2014/05/john_white_new_orleans_charter.html [hereinafter Dreilinger, *New Orleans Charter Civil Rights Complaint ‘a Joke’*] (explaining that before Katrina, 35% of students attended nonfailing schools, and now that figure is at 92%); Danielle Dreilinger, *New Orleans High School Exam Results, Graduation Rate Near State Average*, TIMES-PICAYUNE, July 11, 2014, http://www.nola.com/education/index.ssf/2014/07/new_orleans_high_school_exam_r.html [hereinafter Dreilinger, *New Orleans High School Exam Results*] (reporting that student performance on end of course exams in New Orleans was approaching the state average); Kamenetz, *supra* note 3 (“[T]he city has posted the largest, fastest improvement in test scores ever produced in an urban public school system.”); Layton, *supra* note 2 (explaining that in 2007, only 23% of students tested at grade level in math, but in 2013 that percentage rose to 57%, and before Katrina the graduation rate was 54.4%, but in 2013 the graduation was 77.6%); OSBORNE, *supra* note 5 (noting that RSD schools have improved faster than any other schools in the state).

9. See, e.g., THE COWEN INST., 2014 REPORT, *supra* note 2, at 20 (noting that performance lags behind most other school districts); Harden, *supra* note 2 (pointing out that the average ACT score of students in RSD schools is not good enough to get into any Louisiana four year college, and is well below the state average; and noting that only four Louisiana school districts had a lower ACT average than the RSD).

10. See, e.g., Jeff Bryant, *The Truth About the New Orleans School Reform Model*, EDUC. OPPORTUNITY NETWORK (Aug. 6, 2014), <http://educationopportunity>

manipulation of state standards and data that create an illusion of improvement,¹¹ and the plateauing of student and school academic gains.¹² Both sides are correct: schools in New Orleans steadily improved after Katrina, but the district as a whole remains one of the lowest performing districts in one of the lowest performing states in the nation.¹³ Charter advocates emphasize the stronger performance

network.org/the-dishonest-case-for-the-new-orleans-school-reform-model/ (noting that RSD schools are in the seventeenth percentile among all Louisiana schools for performance on the state standardized LEAP test, which is about the same percentile ranking of the schools before the takeover, while student performance on the NAEP has remained static); Michael Deshotels, *LEAP Scores Manipulated*, LA. EDUCATOR (Aug. 17, 2014), <http://louisianaeducator.blogspot.com/2014/08/leap-scores-manipulated.html> (explaining that the percentage of students passing the LEAP remained steady despite the LEAP getting harder because the number of correct answers for a passing score was significantly reduced in three of four categories).

11. Beginning in the 2012–2013 school year, the Louisiana Department of Education changed the scale by which schools are given SPS scores. THE COWEN INST., 2014 REPORT, *supra* note 2, at 20. When the scale changed, there were fifty-five percent fewer F schools but also fewer A schools. *Id.* The grades converged towards the middle of the pack. *Id.* “[T]he main reason RSD has made such great strides in grade level performance is that from 2012 to 2013 the state changed the formula and scale for measuring school performance, which artificially inflated RSD’s score.” Bryant, *supra* note 10. Of thirty-seven RSD schools with complete information, twenty-six increased a letter grade due to change in the scoring system. *Id.* If the same standards had applied, fifteen schools would have received a D instead of a C, five would have received an F instead of a D, and five would have received a C instead of a B. *Id.* The district letter grade would have remained a D. *Id.*; see also Danielle Dreilinger, *New Orleans’ Recovery System Changes Heighten Charter School Debate*, NPR Reports, TIMES-PICAYUNE, http://www.nola.com/education/index.ssf/2014/08/new_orleans_recovery_system_op.html (explaining that the growth in non-failing schools is partly because failed schools recently turned over to new operators are not included in the statistics); Harden, *supra* note 2 (contrasting the state’s praise of school performance in New Orleans with the blogosphere’s “carefully documented details of the state’s systemic and persistent manipulation—and illegal withholding—of public data”).

12. See *School Performance Scores Released: 2013–14 Was a Stand Still Year*, EDUCATE NOW, <http://campaign.r20.constantcontact.com/render?ca=3d310f92-4d4b-4b3b-b8f5-5626177c4106&c=d405bca0-356d-11e3-b8bb-d4ae52a459cd&ch=d4dff000-356d-11e3-b928-d4ae52a459cd> (showing that after seven years of growth, the School Performance Scores and overall district score remained flat in the 2013–2014 school year).

13. PATRICK SIMS & DEBRA VAUGHAN, THE COWEN INST., BEATING THE ODDS: ACADEMIC PERFORMANCE AND VULNERABLE STUDENT POPULATIONS IN NEW ORLEANS PUBLIC HIGH SCHOOLS 9 (2014) [hereinafter SIMS & VAUGHAN, BEATING THE ODDS]; U.S. CHAMBER OF COMMERCE FOUND., LEADERS & LAGGARDS: A STATE-BY-STATE REPORT CARD ON K-12 EDUCATIONAL EFFECTIVENESS 63 (2014), available at <http://www.leadersandlaggards.org/sites/default/files/Leaders%20and%20Laggards%20A%20State-by-State%20Report%20Card%20on%20K-12%20Educational%20Effectiveness.pdf>; Jessica Williams, *New Orleans Public Schools Have Seen Successes, Challenges in Past Year*, New Report Says, TIMES-PICAYUNE, Aug. 6, 2014, http://www.nola.com/education/index.ssf/2014/08/new_orleans_public_schools_have_seen_successes_challenges_in_past_year_new_report_says.html

of students in charter schools than in traditional schools,¹⁴ while opponents claim that student demographic and school funding differences pre- and post-Katrina, and between charter and non-charter schools, make comparisons impossible.¹⁵ Again, there is an element of truth in each of these polar positions: a perfect apples-to-apples comparison is impossible, but the best available data indicates that charter schools are improving student performance in New Orleans.¹⁶ The schools are almost certainly better academically, but at what cost?

One of the most repeated “costs” of the new system of schools is that it does not respond to community and neighborhood needs. By divorcing school attendance from place of residence, New Orleans lost the neighborhood school that provided numerous support mechanisms to the surrounding community.¹⁷ In a city where the average student lives over three miles from school, and one in four travels over five miles, it is virtually impossible for the schools to be the community centers they were before the storm.¹⁸ Neighborhood schools were anchors binding small communities together; the charter schools that replaced them are not.¹⁹

(explaining that while there is academic progress, scores still lag behind other public school systems).

14. From 2005 to 2011, New Orleans charter schools performed significantly better than traditional public school counterparts. CTR. FOR RESEARCH ON EDUC. OUTCOMES, CHARTER SCHOOL PERFORMANCE IN LOUISIANA 7 (2013).

15. Layton, *supra* note 2; William J. Mathis & Andrew Maul, *New Orleans Charter School Study: Comparing Incomparables, Repeated Errors, and Small Differences*, NAT’L EDUC. POL’Y CENTER (Aug. 22, 2013), <http://nepc.colorado.edu/newsletter/2013/08/review-credo-2013-NOLA> (“But the evidence provided by the new CREDO study falls well short of Gov. Jindal’s ‘proof’ of the success of charter schools in either the city or the state.”).

16. PATRICK SIMS & VINCENT ROSSMEIER, THE COWEN INST., THE STATE OF PUBLIC EDUCATION IN NEW ORLEANS: TEN YEARS AFTER HURRICAN KATRINA 18–20 (2015), available at <http://www.speno2015.com/images/SPENO.2015.small.pdf>.

17. Layton, *supra* note 2; Daniel Kiel, *The Endangered School District: The Challenge and Promise of Redistributing Control of Public Education*, 22 B.U. PUB. INT. L.J. 341, 357–58 (2014) (explaining how a “portfolio” model of schools lessens democratic accountability).

18. Danielle Dreilinger, *How One New Orleans Neighborhood Worked to Reopen Its School—And Lost*, TIMES-PICAYUNE July 21, 2014, http://www.nola.com/education/index.ssf/2014/07/hollygrove_the_recovery_school.html; Kamenetz, *supra* note 3; Katy Reckdahl, *New Orleans’ Afterschool Scene Has a Transportation Problem*, NEXT CITY (Sept. 9, 2014), <http://nextcity.org/daily/entry/new-orleans-enviable-afterschool-scene-has-a-transportation-problem> (explaining that connections to community resources are made more easily in traditional neighborhood school systems).

19. Susan L. DeJarnatt, *Community Losses: The Costs of Education Reform*, 45 U. TOL. L. REV. 579, 586–88 (2014); Civil Rights Complaint from Journey for Justice

Another “cost”—one that often gets overshadowed by the loud debate about outcome data and community loss—is equity. While the entire system may be improving, it is important to understand whether it is at the expense of marginalized, subordinated, and vulnerable students, schools, or neighborhoods.²⁰ This Article focuses on equity when answering the question of whether the New Orleans system of schools is working.

New Orleans education stands at a crossroads in deciding how to achieve equity for its vulnerable student populations. Down the path to the right lies the market-driven reform that underlies the charter movement and reliance on specialized schools serving the unique needs of each student. This is the path New Orleans followed for seven years after the storm. Down the path to the left lie centralizing services, planning, and oversight to ensure that every school provides an appropriate education to any type of student that walks through every schoolhouse door. New Orleans has moved towards this route more recently, but political forces prevent the system from seeing the centralization path to the end. Or New Orleans could keep a foot in both approaches: some specialized schools but at least minimum services provided in every school with centralized oversight.

How equal education opportunity is defined is vital to determining which path New Orleans should ultimately choose. The traditional view of equality, rooted in the holding of *Brown vs. Board of Education of Topeka*²¹—that separate is inherently unequal—compels assurance that students of all types can be served properly at every school. Achieving “inclusion equality” requires centralizing services for the most vulnerable students. Even the staunchest supporters of charter schools recognize that the “decentralized nature of public education in New Orleans creates potential barriers for the system to equitably serve the needs of all students.”²² But the emerging view of

Alliance to Eric J. Holder, Attorney Gen., United States 15 (May 13, 2014) [hereinafter Civil Rights Complaint], available at http://b3cdn.net/advancement/24a04d1624216c28b1_4pm6y9lvo.pdf.

20. *Our Public Education System Needs Transformation, Not ‘Reform’*, NATION (Sept. 24, 2014), <http://www.thenation.com/article/181742/our-public-education-system-needs-transformation-not-reform#> (“Without education equity, we don’t have an educational system at all—we have a rigged rat race that starts in kindergarten.”); see also Eden B. Heilman, *Stranger than Fiction: The Experiences of Students with Disabilities in the Post-Katrina New Orleans Education System*, 59 LOY. L. REV. 355, 380 (2014) (“A true system of choice cannot be successful unless it includes and serves all students . . .”).

21. 347 U.S. 483 (1954).

22. THE COWEN INST., 2014 REPORT, *supra* note 2, at 3; see Scott Cowen, *The New Orleans Experiment in School Reform: Lessons Learned*, HUFFINGTON POST

equality in education is that separate *can be* equal if all students are performing better in specialized environments chosen freely by the parents. Under this “empowerment equality,” if vulnerable students perform better in specialized charter schools that are designed to serve them, and if overall student performance rises, then the system may be separate, but more equal. Whether the trajectory in New Orleans towards decentralization and specialization is “equitable” hinges on which version of equality is accepted.

This Article focuses on the barriers to achieving equity in a system of schools and the path New Orleans has chosen, and will likely pursue in the future, to overcome them. Part I describes the changes to the education system made after Katrina and the current education landscape from a governance perspective. Part II discusses the impact of decentralization on vulnerable populations—students with disabilities, English language learners, African-American students, and low-income students—and what New Orleans has done to address equity for these groups. Finally, Part III discusses how an all-charter system of specialized schools illuminates competing theories of equity in education. It argues that unless there is a concerted, collective effort to pursue inclusion equality—the equality envisioned in *Brown*—New Orleans will adopt the new “empowerment equality” perspective by default because it is an inherent and natural outgrowth of a decentralized system of schools.

I. THE EDUCATION LANDSCAPE OF NEW ORLEANS

A. The Evolution of a System of Schools

The path New Orleans followed to its current system of schools was uniquely shaped by natural disaster. Before Hurricane Katrina the OPSB looked like a typical urban district at the time: nearly all schools were directly operated by the centralized bureaucracy in the OPSB, there was a smattering of charter schools, and a few failing schools had been taken over by the state under accountability measures adopted to comply with the No Child Left Behind Act.²³ The OPSB made decisions for all of its schools—ranging from hiring,

(Aug. 25, 2014), http://www.huffingtonpost.com/scott-cowen/the-new-orleans-experimen_b_5702778.html (explaining that decentralization has significant costs).

23. Before Katrina there were 117 OPSB schools, 5 RSD schools, and 2 independent charters under BESE. Danielle Dreilinger, *New Orleans Public Schools Pre-Katrina and Now, by the Numbers*, TIMES-PICAYUNE, Aug. 29, 2014, http://blog.nola.com/education_impact/print.html?entry=/2014/08/new_orleans_public_schools_pre.html; see also Kiel, *supra* note 17, at 363–65.

to teacher placement, to curriculum, to purchasing—and the teacher’s union exerted considerable control.²⁴

While the governance structure was ordinary, the system was extraordinary for all the wrong reasons. Before Katrina, New Orleans was one of the worst urban school districts in the nation, and most of its schools were “academically unacceptable” under state standards.²⁵ The OPSB was plagued by corruption and financial mismanagement, with over \$265 million in debt and a Federal Bureau of Investigation task force housed in the district office to root out graft.²⁶ It was a school district in need of reform.

Hurricane Katrina flooded New Orleans on the second Monday of the 2005–06 school year. It caused the displacement of 64,000 students and \$800 million in damage to public school buildings.²⁷ Fewer than twenty of the 120 school buildings remained useable after the hurricane. Students, teachers, and administrators were all forced to evacuate, and the tax base supporting the schools was decimated.²⁸

Days after the storm, the OPSB placed thousands of its teachers on unpaid leave and fired them three months later.²⁹ The state legislature moved quickly and amended its accountability laws to remove 102 of 117 schools from the control of OPSB and place them

24. SARA CARR, HOPE AGAINST HOPE: THREE SCHOOLS, ONE CITY, AND THE STRUGGLE TO EDUCATE AMERICA’S CHILDREN 77–78 (2013).

25. See Paul Hill & Jane Hannaway, *The Future of Public Education in New Orleans*, in AFTER KATRINA: REBUILDING OPPORTUNITY AND EQUITY INTO THE NEW ORLEANS 27, 28 (Margery Austin Turner & Sheila R. Zedlewski eds., 2006), available at http://webarchive.urban.org/UploadedPDF/311406_after_katrina.pdf; Danielle Holley-Walker, *The Accountability Cycle: The Recovery School District Act and New Orleans’ Charter Schools*, 40 CONN. L. REV. 125, 127 (2007). “Academically unacceptable” is a school performance label used by the Louisiana Department of Education in assessing individual schools and districts. It is based on a School Performance Score, which is determined by dropout rates, attendance rates, and standardized exam scores. See LA. REV. STAT. ANN. §§ 17:3911–12 (2001).

26. Holley-Walker, *supra* note 25, at 127; SCOTT S. COWEN INST. FOR PUB. EDUC., CREATING A GOVERNING FRAMEWORK FOR PUBLIC EDUCATION IN NEW ORLEANS: SCHOOL DISTRICT POLITICAL LEADERSHIP 9–10 (2009), available at http://www.coweninstitute.com/wp-content/uploads/2009/11/gov.report1.final_revised.pdf (detailing corruption and mismanagement issues in OPSB prior to the storm); UNITED TEACHERS OF NEW ORLEANS ET AL., ‘NATIONAL MODEL’ OR FLAWED APPROACH?: THE POST-KATRINA NEW ORLEANS PUBLIC SCHOOLS 10–11 (2006), available at <http://www.naomiklein.org/files/resources/pdfs/aft-nov-2006.pdf>. The financial problems were so severe that the United States Department of Education threatened to discontinue educational funding to the entire state. See *Oliver v. Orleans Parrish Sch. Bd.*, 156 So. 3d 596, 600 (La. 2014).

27. Kathryn G. Newmark & Veronique De Rugy, *Hope After Katrina: Will New Orleans Become the New City of Choice?*, EDUC. NEXT, Fall 2006, at 14.

28. Hill & Hannaway, *supra* note 25, at 27.

29. *Oliver*, 156 So. 3d at 602–03.

in the hands of the RSD, an arm of the state Department of Education designed to take over failing schools.³⁰ The RSD immediately began operating the transferred schools directly, but it always had the intention of transferring governance to charter school operators.³¹

These critical decisions, made quickly after the storm, removed what many believed to be the two biggest obstacles, historically, to improving New Orleans' schools: the OPSB and the teachers' unions.³² The moves embodied the popular reforms across the country—state takeover of failing schools (stripping elected boards of power) and chartering schools (stripping teachers' unions of power).³³ But because of Katrina, it was done faster and more thoroughly in New Orleans than it had been done in any other city.

Since Katrina, the OPSB has managed the few schools it was left with—either directly running them or by charter oversight.³⁴ The RSD also directly ran numerous schools but steadily chartered them out to private operators.³⁵ The RSD was not prepared for the monumental task of operating schools in a decimated city, and the RSD direct run schools quickly became the worst schools in the city and the dumping ground for the students deemed most difficult to educate.³⁶

B. The System of Schools Today

Today there is a confusing patchwork of school governance in New Orleans.³⁷ As of the 2014–15 school year, there are eighty-three public schools educating 44,686 students.³⁸ Two bodies loosely govern these schools: the OPSB, and the Louisiana Board of Elementary and Secondary Education (BESE) through its administrative arm, the RSD.³⁹

30. *Id.*; Layton, *supra* note 2.

31. CARR, *supra* note 24, at 17; Layton, *supra* note 2; Civil Rights Complaint, *supra* note 19, at 10–11.

32. Robert A. Garda, Jr., *The Politics of Education Reform: Lessons Learned from New Orleans*, 40 J.L. & EDUC. 57, 65 (2011).

33. *Id.* at 68.

34. SIMS & ROSSMEIER, *supra* note 16, at 4–6.

35. *Id.* at 11.

36. CARR, *supra* note 24; OSBORNE, *supra* note 5, at 6.

37. Kevin McGill, *Hope, Resentment in New Orleans' Charter School Landscape*, ASSOCIATED PRESS (Aug. 20, 2014), <http://bigstory.ap.org/article/hope-resentment-new-charter-school-landscape>.

38. Dreilinger, *supra* note 23.

39. SIMS & ROSSMEIER, *supra* note 16, at 4–6.

As of the 2014–15 school year, the RSD no longer directly operates any schools.⁴⁰ Rather, the RSD oversees fifty-six charter schools that enroll sixty-seven percent of the student population.⁴¹ These “Type 5” charter schools, or “RSD charters” as they are known in town, are pre-existing public schools transferred to the RSD as failing schools after Katrina and later chartered with BESE.⁴² These charter schools are prohibited from using admission requirements and are considered their own freestanding school districts, or, in technical jargon, local educational agencies (LEAs).⁴³

LEAs, typically school districts overseeing numerous schools, are the primary government units responsible for education under state and federal law. It is the LEA, not individual schools within the LEA, which bears final responsibility for compliance with most state and federal laws. The RSD charter schools that are their own one-school LEAs are treated the same under state and federal law, as are school districts that usually contain numerous schools, such as the OPSB.⁴⁴

BESE directly oversees four charter schools, educating four percent of the student population.⁴⁵ These “Type 2” charter schools enroll students from across the state and are permitted to utilize admission requirements.⁴⁶ Like RSD charters, these charter schools are also independent LEAs.⁴⁷

OPSB enrolls twenty-eight percent of the student population in six schools it directly runs and the fourteen charter schools it oversees.⁴⁸ The OPSB direct-run schools are the only non-charter public schools in New Orleans. OPSB is the chartering and oversight agency for Type 1 (startup) and Type 3 (conversion) charter schools.⁴⁹ These charter schools are permitted to utilize admission requirements “that

40. Danielle Dreilinger, *Recovery School District Downsizes from 568 Employees to 92*, TIMES-PICAYUNE, Sept. 5, 2014, http://www.nola.com/education/index.ssf/2014/09/recovery_school_district_downs.html [hereinafter Dreilinger, *Recovery School District Downsizes from 568 Employees to 92*].

41. THE COWEN INST., NOLA BY THE NUMBERS, *supra* note 8, at 2.

42. LA. REV. STAT. ANN. § 17:3973(2)(b)(v) (2013).

43. LA. REV. STAT. ANN. § 17:3995(H) (2011).

44. *See, e.g.*, Thompson v. Bd. of Special Sch. Dist. No. 1, 144 F.3d 574 (8th Cir. 1998); Friendship Edison Pub. Charter Sch. Chamberlain Campus v. Smith, 561 F. Supp. 2d 74 (D.D.C. 2008).

45. THE COWEN INST., NOLA BY THE NUMBERS, *supra* note 8, at 2.

46. LA. REV. STAT. ANN. § 17:3973(2)(b)(ii).

47. LA. REV. STAT. ANN. § 17:3995(H).

48. THE COWEN INST., NOLA BY THE NUMBERS, *supra* note 8, at 2; Dreilinger, *supra* note 23.

49. LA. REV. STAT. ANN. §§ 17:3973(2)(b)(i), (ii).

are consistent with the school's role, scope and mission"⁵⁰ These schools are not independent LEAs, but instead are part of the OPSB LEA.⁵¹

New Orleans is far and away the most decentralized education governance system in the United States. There are six traditional direct-run schools and seventy-six charter schools. Of these seventy-six charter schools, sixty-two are LEAs. Put another way, there are sixty-three independent school districts (including the OPSB) within the city's geographic boundaries. Forty-four different school boards operate these LEAs: the OPSB, BESE (through the RSD), twelve charter management organizations, and thirty charter boards overseeing only one school each.⁵²

Compounding this fractured system is the fact that the two entities with the best ability to plan centrally for the school system—the OPSB and the RSD—essentially hate one another.⁵³ They often act more like competitors than governmental entities engaged in the common goal of educating students. They fight over school quality, control, facilities, and financing in meetings and the courts.⁵⁴

To charter and choice proponents, the New Orleans system of schools is a dream come true. Parents can choose any school in the city (almost) for their children, allowing the education market to weed out bad schools and support successful schools, thereby raising overall quality for all students. Teachers' unions and large command-and-control bureaucracies are practically gone.⁵⁵ To charter opponents, it could not be a worse nightmare. Democratic control and community have been thrown under the school bus, and the

50. LA. REV. STAT. ANN. § 17:3991(B)(3) (2011).

51. LA. REV. STAT. ANN. § 17:3995(I). There is also one independent public school operated under the jurisdiction of the state legislature. THE COWEN INST., NOLA BY THE NUMBERS, *supra* note 8, at 2.

52. THE COWEN INST., 2014 REPORT, *supra* note 2, at 6 (explaining that more than half the charter schools in the city are run by Charter Management Organizations).

53. Danielle Dreilinger, *In Move Towards Cooperation New Orleans' Two School Systems Consider Agreement with Millions for Troubled Youth*, TIMES-PICAYUNE, Mar. 13, 2014, http://www.nola.com/education/index.ssf/2014/03/new_orleans_two_school_systems_2.html [hereinafter Dreilinger, *In Move Towards Cooperation*].

54. THE COWEN INST., THE STATE OF PUBLIC EDUCATION IN NEW ORLEANS 2010 REPORT 30, 36 (2010) [hereinafter THE COWEN INST., 2010 REPORT].

55. See SIMS & ROSSMEIER, *supra* note 16, at 3; Marta Jewson, *Teachers Unions on the Rise Again in New Orleans, 10 Years After Charters Pushed Them Out*, HECHINGER REP. (Apr. 13, 2015), <http://hechingerreport.org/teachers-unions-on-the-rise-again-in-new-orleans-10-years-after-charters-pushed-them-out/>.

winner are the middle and high-income whites, while the losers are the vulnerable and historically subordinated student populations.

II. EQUITY IN THE NEW ORLEANS SYSTEM OF SCHOOLS

A decentralized, all-charter school system creates significant barriers to providing equity, especially to at-risk students such as English language learners, students with disabilities, poor students, and minorities. This Part will discuss the treatment of these marginalized groups, the barriers to achieving equality that inheres in a system of schools, and the steps that have been taken in New Orleans, both intentional and unintentional, to address equity.

A. Race and Class Equity

Race was an important subtext in the transformation of the New Orleans schools after Katrina. While the charter movement views itself as the new civil rights movement—bringing choice to families trapped in failing schools—post-Katrina events in New Orleans reveal why some view the movement as a plot to divest African-Americans of control of their schools.⁵⁶ The process by which New Orleans transformed itself to a system of schools laid the foundation on which today's allegations of discrimination are built.

The teaching force—mostly middle class African-American career teachers—was terminated after Katrina.⁵⁷ These teachers alleged that instead of receiving the legally mandated “priority consideration” for hire in the RSD schools, the state contracted with Teach for America (TFA) to fill the positions, and TFA'ers displaced much of the old teaching force.⁵⁸ The requirement that seventy-five percent of teachers in a charter school hold valid teaching certificates was repealed in 2012, further opening the door for an alternatively

56. CARR, *supra* note 24; *see, e.g.*, Kristen L. Buras, *Race, Charter Schools, and Conscious Capitalism: On the Spatial Politics of Whiteness as Property (and the Unconscionable Assault on Black New Orleans)*, 81 HARV. EDUC. REV. 296 (2011).

57. A Louisiana trial court and appellate court ruled that the termination was wrongful and awarded nearly \$1 billion damages, *Oliver v. Orleans Parish Sch. Bd.*, No. 2005-12244, 2012 WL 2648083, (La. Civ. Dist. Ct. June 20, 2012), *aff'd in part, rev'd in part*, 133 So. 3d 38 (La. Ct. App.), *writ granted*, 141 So. 3d 274 (La. 2014), but these decisions were overturned by the Louisiana Supreme Court, *Oliver v. Orleans Parrish Sch. Bd.*, 156 So. 3d 596, 623 (La. 2014).

58. *See Oliver*, 156 So. 3d at 622; *see also* THE COWEN INST., THE STATE OF PUBLIC EDUCATION IN NEW ORLEANS: FIVE YEARS AFTER HURRICANE KATRINA 15 (2010) [hereinafter THE COWEN INST., FIVE YEARS AFTER HURRICANE KATRINA]; CARR, *supra* note 24, at 36–39, 61, 84–85, 118–20 (2013); Buras, *supra* note 56, at 310; Civil Rights Complaint, *supra* note 19, at 14–15.

certified teaching force.⁵⁹ Today, only fifty-four percent of the teaching force is minority, and that number is declining.⁶⁰ The replacement of the teaching force was seen as “an attack on the city’s black middle class, even if not intended as such.”⁶¹ School administrators, again mostly African-American pre-Katrina, were also replaced by non-local whites. The army of TFA’ers has become so entrenched that they increasingly “run the show” in New Orleans.⁶²

Even charter authorization decisions were taken out of the hands of the local school board, which were long controlled by African-Americans. Act 235, the key legislation allowing the RSD to take over the OPSB schools and begin the chartering process, prohibited districts declared in academic crisis, e.g. New Orleans, from issuing new charters.⁶³ The Act also mandated that chartering decisions comply with Standards for Quality School Authorizing promulgated by the National Alliance of Charter School Authorizers (NACSA) and required authorizers to utilize independent evaluators such as NACSA.⁶⁴ Chartering decisions appeared removed not only from New Orleanians, but from Louisianans as well. Later, changes were made to the charter-enabling statute that permitted the state to

59. LA. ADMIN. CODE tit. 61, § 2903 (2012); Buras, *supra* note 56, at 309, 315.

60. THE COWEN INST., 2014 REPORT, *supra* note 2, at 19. In 2007, TFA predicted that one in three students in New Orleans would be taught by a TFA teacher. THE COWEN INST., STATE OF PUBLIC EDUCATION IN NEW ORLEANS: 2008 REPORT, at 27 (2008) [hereinafter THE COWEN INST., 2008 REPORT]. In the 2007–2008 school year, sixty percent of the RSD teachers had less than one year of experience, compared to only ten percent having less than one year of experience before the storm. THE COWEN INST., 2010 REPORT, *supra* note 54, at 24; THE COWEN INST., FIVE YEARS AFTER HURRICANE KATRINA, *supra* note 58, at 14. That general trend continues, though the teacher experience level is gradually increasing. See THE COWEN INST., THE STATE OF PUBLIC EDUCATION IN NEW ORLEANS 2012, at 20–21 (2012); THE COWEN INST., THE STATE OF PUBLIC EDUCATION IN NEW ORLEANS 2013, at 15–16 (2013) (“Many schools in New Orleans rely on new teachers recruited through programs like Teach For America and the New Teacher Project’s teachNOLA.”).

61. CARR, *supra* note 24, at 121.

62. *Id.* at 245.

63. 2005 La. Act 35 (codified as amended at LA. REV. STAT. ANN. 17:3982(b), 17:3983(2)(a)(ii)). This ban was not lifted until 2011. 2012 Act 2 (codified as amended at LA. REV. STAT. ANN. 17:3983(2)); Buras, *supra* note 56, at 308.

64. 2005 La. Act 35 (codified as amended at LA. REV. STAT. ANN. 17:3973(2)(b)(v)(aa)); 2009 La. Act 123 (codified as amended at LA. REV. STAT. ANN. 17:3981(4)); 2006 La. Act 123 (codified as amended at LA. REV. STAT. ANN. 17:3992(A)(1)(a); see also LA. ADMIN CODE tit. 126, 28 CXXXIX §§ 303(a)(2), 306(a)(2) (2012).

certify local charter authorizers other than elected school boards, further eroding the power of school boards.⁶⁵

With the African-American controlled OPSB cut-out of the chartering process, and charter creation and oversight moved to other entities often controlled by high income whites, such as BESE, NACSA, or non-profits, it is easy to see how blacks felt entirely removed from controlling the education of their children. As noted by Sara Carr—the education reporter for the local paper who wrote a moving and insightful book about New Orleans education—control over the schools has passed from “a predominantly black middle class to a largely affluent white business class.”⁶⁶

And there is concern that these new leaders are not responsive to community desires and that parents are disenfranchised.⁶⁷ When the charter applications of highly regarded local black educators were turned down by the state, it only added fuel to the cries of discrimination.⁶⁸ This disempowerment creates fertile ground for critics to view numerous practices as racially discriminatory, particularly when poor minorities are not proportionately enrolled in the best schools.

As in any school district across the country, there is a wide disparity in quality among the schools in New Orleans.⁶⁹ There is also a large disparity in student demographics among the schools. National studies indicate that charter schools nationwide segregate by race, ethnicity, and socioeconomic status.⁷⁰ This segregation exists in New Orleans, and it appears directly tied to school quality.⁷¹

65. 2012 Act 2 (codified as amended at LA. REV. STAT. ANN. 17:3973(2)(b)(vi), 17:3973(4), 17:3981.1, 3981.2); LA. ADMIN CODE tit. 126 § 403 (2013); Buras, *supra* note 56, at 314.

66. CARR, *supra* note 24, at 66, 197–99; *see also* Civil Rights Complaint, *supra* note 19, at 4–5.

67. Buras, *supra* note 56, at 300; DeJarnatt, *supra* note 19; Dreilinger, *supra* note 18 (telling the story of a neighborhood school that is a case study in how “the complex, undemocratic state-run school system makes key decisions about what schools will grow in which neighborhoods—with the community’s desires literally tied for the lowest priority”); Layton, *supra* note 2; *see also* Civil Rights Complaint, *supra* note 19, at 14 (“Parents have been excluded from the decision-making process to close schools and have few ways to hold State officials accountable.”).

68. CARR, *supra* note 24, at 197–98.

69. *See id.* at 254; Peter Cook, *Stop Saying Market-Based Reform. Please*, PETERCOOK.COM (Sept. 2, 2014), <http://peterccook.com/2014/09/02/enough-with-market-based-reform/>.

70. *See, e.g.*, ERICA FRANKENBERG ET AL., THE CIVIL RIGHTS PROJECT, CHOICE WITHOUT EQUITY: CHARTER SCHOOL SEGREGATION AND THE NEED FOR CIVIL RIGHTS STANDARDS 4 (2010), *available at* <http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/choice-without-equity-2009-report/>

Eighty-five percent of public school students in New Orleans are eligible for free and reduced lunch (FRL). This is the highest percentage of students in poverty in any major urban center in the country.⁷² These students are not distributed evenly across schools.⁷³ The highest performing schools enroll the fewest FRL students. The RSD schools have a rate of 95% FRL students, compared to a rate of 68% for OPSB schools.⁷⁴ The four BESE charter schools enroll an average of 56% FRL students, and the fourteen OPSB charter schools (many of which are selective admissions) enroll an average of 61% FRL students.⁷⁵

The racial compositions of schools are equally lopsided. The youth population in New Orleans is 73% African-American, but because of the high rate of privately educated white students, the public school population is 85% African-American.⁷⁶ But only 63% of students in the high performing OPSB charter schools are African-American, compared to a 96% rate in RSD charters and 95% rate in OPSB direct-run schools.⁷⁷ There are only two public schools in the whole of New Orleans that are representative of the racial composition of New Orleans' youth.⁷⁸

The impact this stratification has on academic outcomes can be viewed as grossly discriminatory or a huge success story, depending

frankenberg-choices-without-equity-2010.pdf (“[T]he charter sector continues to stratify students by race, class and possibly language.”); ROSLYN MICKELSON ET AL., SCHOOL CHOICE AND SEGREGATION BY RACE, ETHNICITY, CLASS AND ACHIEVEMENT 1 (2008), available at <http://nepc.colorado.edu/files/CHOICE-08-Mickelson-FINAL-EG043008.pdf> (“The preponderance of social science research indicates that students who participate in almost all forms of choice attend schools that are segregated”); Osamudia R. James, *Opt-Out Education: School Choice as Racial Subordination*, 99 IOWA L. REV. 1083, 1116 (2014).

71. See Buras, *supra* note 56, at 320–321.

72. THE COWEN INST., 2014 REPORT, *supra* note 2, at 11; Dreilinger, *supra* note 23; Kamenetz, *supra* note 3.

73. SIMS & VAUGHAN, *supra* note 13, at 1.

74. *Id.*; see also CARR, *supra* note 24; Letter from the Recovery School District to the Office of Civil Rights 2 (Oct. 8, 2014), http://educatenow.net/wp-content/uploads/2014/10/RSD_OCR_Letter_10-8-14.pdf.

75. THE COWEN INST., 2014 REPORT, *supra* note 2, at 11; see also CARR, *supra* note 24; Letter from the Recovery School District to the Office of Civil Rights, *supra* note 74, at 1.

76. THE COWEN INST., 2014 REPORT, *supra* note 2, at 10; THE COWEN INST., NOLA BY THE NUMBERS, *supra* note 8, at 6; Kamenetz, *supra* note 3.

77. THE COWEN INST., NOLA BY THE NUMBERS, *supra* note 8, at 5; see CARR, *supra* note 24, at 280; Letter from the Recovery School District to the Office of Civil Rights, *supra* note 74, at 2.

78. THE COWEN INST., 2014 REPORT, *supra* note 2, at 29; THE COWEN INST., NOLA BY THE NUMBERS, *supra* note 8, at 6.

on how the data is parsed. On the one hand, black students have made the most gains of any subgroup in New Orleans.⁷⁹ Before Katrina, only thirty-two percent of African-American students scored basic or above on state exams, which was well below the state average.⁸⁰ Now, fifty-eight percent score basic or above, which exceeds the state average for African-Americans.⁸¹ In fact, black students in New Orleans are outperforming their counterparts in other parts of the state for the first time.⁸² And the percentage of black students, and poor students, that attend F-rated schools has plummeted since Katrina.⁸³ The Center for Research on Education Outcomes, one of the leading research institutes in evaluating charter effectiveness, determined that charter schools in New Orleans had a positive impact for poor and African-American students.⁸⁴

On the other hand, there is little debate that higher income and white students disproportionately attend the best schools in New Orleans, while poor minorities almost exclusively attend the worst schools.⁸⁵ The total public school enrollment in New Orleans is seven percent white,⁸⁶ but the most successful public schools in New Orleans have a much higher percentage of white students. Of the seven highest rated schools, only one has more black students than the norm—the others are twenty-six to fifty-four percent white.⁸⁷ At the

79. OSBORNE, *supra* note 5, at 8–9 (“Indeed, the gains made by black students are the most impressive”); Cook, *supra* note 8 (“[L]ow-income and minority students have been the prime beneficiaries of the improvements in New Orleans schools.”).

80. Dreilinger, *supra* note 23.

81. *Id.*

82. CARR, *supra* note 24, at 280; Letter from the Recovery School District to the Office of Civil Rights, *supra* note 74, at 1.

83. See *School Performance Scores Released: 2013–14 Was a Stand Still Year*, *supra* note 12.

84. CTR. FOR RESEARCH ON EDUC. OUTCOMES, CHARTER SCHOOL PERFORMANCE IN LOUISIANA 7 (2013); Letter from the Recovery School District to the Office of Civil Rights, *supra* note 74, at 4. The methodology and conclusions of the CREDO study have been questioned by other researchers. See, e.g., Layton, *supra* note 2; William J. Mathis & Andrew Maul, *New Orleans Charter School Study: Comparing Incomparables, Repeated Errors, and Small Differences*, NAT’L EDUC. POL’Y CENTER (Aug. 22, 2013), <http://nepc.colorado.edu/newsletter/2013/08/review-credo-2013-NOLA> (“But the evidence provided by the new CREDO study falls well short of Gov. Jindal’s ‘proof’ of the success of charter schools in either the city or the state.”).

85. Layton, *supra* note 2.

86. THE COWEN INST., 2014 REPORT, *supra* note 2, at 10.

87. Danielle Dreilinger, *Civil Rights Complaint Alleges Unequal Treatment for New Orleans’ Black Public School Students*, TIMES-PICAYUNE, May 15, 2014,

other end of the spectrum, only two of the numerous D, F, and turnaround-rated schools have any white students at all.⁸⁸ Students in the higher-income, lower-minority OPSB schools are performing much better by all measures—ACT scores, graduation rates, end of course exams, LEAP tests, and college matriculation—than the RSD charter schools and OPSB direct-run schools.⁸⁹

Critics of the New Orleans system of schools allege that this balkanization is due to schools choosing whom they educate, either by selecting which students to admit or removing students they do not want.⁹⁰ But a third, and often-ignored, reason for this racial and socioeconomic stratification is parent choice.⁹¹ Each of these reasons is discussed next.

1. Access Equity

One of the biggest challenges since Katrina has been fair and equitable access to schools. Until 2012, parents had to apply directly to each separate school, and each school would control its own lottery, admissions, and wait-lists.⁹² This presented huge challenges to both parents and schools. The myriad of school options—RSD direct-run, OPSB direct-run, RSD charters, OPSB charters, BESE charters—overwhelmed parents because there was no central location at which to obtain information.⁹³ Once informed about the schools,

http://www.nola.com/education/index.ssf/2014/05/civil_rights_complaint_alleges.html; see also Civil Rights Complaint, *supra* note 19, at 16–17.

88. Dreilinger, *supra* note 87.

89. CARR, *supra* note 24, at 57; THE COWEN INST., 2014 REPORT, *supra* note 2, at 20–22; Dreilinger, *New Orleans High School Exam Results*, *supra* note 8.

90. See, e.g., UNITED TEACHERS OF NEW ORLEANS, LA. FED’N OF TEACHERS & AM. FED’N OF TEACHERS, ‘NATIONAL MODEL’ OR FLAWED APPROACH?: THE POST-KATRINA NEW ORLEANS PUBLIC SCHOOLS 10–11 (2006), available at <http://www.naomiklein.org/files/resources/pdfs/aft-nov-2006.pdf>; THE INST. ON RACE & POVERTY, THE STATE OF PUBLIC SCHOOLS IN POST-KATRINA NEW ORLEANS: THE CHALLENGE OF CREATING EQUAL OPPORTUNITY (2010), available at http://www.irpumn.org/uls/resources/projects/NEW_ORLEANS_FULL_REPORT.pdf; Jarvis DeBerry, *How Good are Schools if Students Can’t Get In?*, TIMES-PICAYUNE, Nov. 15, 2009, http://www.nola.com/opinions/index.ssf/2009/11/how_good_are_schools_if_studen.html; Bill Quigley, *Experimenting on Someone Else’s Children: Fighting for the Right to Learn in New Orleans*, COUNTERPUNCH (Aug. 6, 2007), <http://www.counterpunch.org/quigley08062007.html>.

91. Buras, *supra* note 56, at 307.

92. OSBORNE, *supra* note 5, at 20; THE COWEN INST., 2014 REPORT, *supra* note 2, at 17.

93. Cheryl Bratt et al., *N.O. Schools of No Schools?: Absolute Deprivation of Educational Opportunity in Post-Katrina New Orleans as a Violation of a Fundamental Right to a Minimally Adequate Education*, 2 HARV. L. & POL’Y REV. 407, 414 (2008); Garda, *supra* note 32, at 89–90.

parents had to engage in “a tiring scavenger hunt,” on different admission dates, and fill out numerous applications with no guarantee of getting into any school at all, let alone into any particular school.⁹⁴ Many parents lacked the skills and the time to negotiate several different registration processes.⁹⁵ Meaningful school choice during this period was reserved for well-informed, motivated parents with the time and resources to navigate the complex information gathering and registration process.⁹⁶ Even the state acknowledges, “real choice did not exist” during this time.⁹⁷ These enrollment barriers during the first seven years after Katrina played a major role in the balkanization of New Orleans schools.

Moreover, charter schools were often accused of massaging their student populations in a variety of ways during this period.⁹⁸ Aggressive charters worked to get good students, held early lotteries, and counseled out families they did not want. These tactics were successful in a decentralized admission system with little oversight and almost no transparency.⁹⁹ It is no surprise that inequities developed quickly under this free-for-all, eat-what-you kill system of

94. Danielle Dreilinger, *Anger, Frustration as Hundreds of New Orleans Parents Turned Away from Public School Enrollment Center*, TIMES-PICAYUNE, July 9, 2014, http://www.nola.com/education/index.ssf/2014/07/hundreds_of_new_orleans_parent.html [hereinafter Dreilinger, *Anger, Frustration as Hundreds of New Orleans Parents Turned Away from Public School Enrollment Center*]; see also THE COWEN INST., 2014 REPORT, *supra* note 2, at 17; Bryant, *supra* note 10; Layton, *supra* note 2.

95. JAN RESSEGER, PUBLIC EDUCATION IN NEW ORLEANS IN THE AFTERMATH OF KATRINA (2007); Bratt et al., *supra* note 93, at 414.

96. Sarah Carr, *School Choice is a Real Test for Parents in New Orleans*, TIMES-PICAYUNE, Nov. 8, 2009, http://www.nola.com/education/index.ssf/2009/11/post_42.html [hereinafter Carr, *School Choice is a Real Test for Parents in New Orleans*] (explaining that parental wherewithal, not geographic location, now determines the educational destiny of children); Sarah Carr, *School Choice Series: Grandmother Struggles to Navigate System*, TIMES-PICAYUNE, Nov. 10, 2009, http://www.nola.com/education/index.ssf/2009/11/post_44.html; Sarah Carr, *School Choice Series: Mother is Determined to Find Best Public Pre-K*, TIMES-PICAYUNE, Nov. 10, 2009, http://www.nola.com/education/index.ssf/2009/11/school_choice.html; Editorial, *Making New Orleans School Choices Easier*, TIMES-PICAYUNE, Nov. 15, 2009, http://www.nola.com/opinions/index.ssf/2009/11/making_new_orleans_school_choi.html; Maxwell, *supra* note 1; Steve Ritea, *Public Schools Compete for Kids: New Array of Choices Give Parents Power*, TIMES-PICAYUNE, Aug. 12, 2006, at 1 (“Parents willing to do their homework researching schools, state and charter officials say, will end up getting their children into the best ones.”).

97. Letter from the Recovery School District to the Office of Civil Rights, *supra* note 74, at 5.

98. Charter schools want to dictate student population. Harden, *supra* note 2.

99. OSBORNE, *supra* note 5, at 20; THE COWEN INST., 2014 REPORT, *supra* note 2, at 17.

school enrollment.¹⁰⁰ School choice during this period often meant schools were choosing students, not vice-versa.

In order to make the system easier to navigate for parents and prevent any gaming of enrollment by schools, the RSD introduced OneApp for the 2012–13 school year. OneApp allows parents to apply to nearly every charter school in New Orleans by completing only one application for each child and to get information on each charter school in one centralized location.¹⁰¹ In the November before the upcoming school year, parents list on OneApp their top eight school choices, in order of preference for each child. The RSD runs a complex algorithm that attempts to place students at their top choices and notifies parents of the school selected for their child in April. If the parent is dissatisfied they can re-apply through a second and third round of OneApp. If a parent is still dissatisfied with a child's placement, or is new to the system and has missed all OneApp deadlines, he or she can visit a resource center on a first-come, first-served basis to seek a placement.¹⁰² OneApp lists seventy schools available for the upcoming 2015–16 school year.¹⁰³

OneApp makes the iconic charter school lottery and waitlists a thing of the past in New Orleans. Students are simply placed at schools through the OneApp process. In the 2014–15 school year, 11,000 students filed through OneApp in the first two rounds. Eighty percent of students in these rounds received one of their top three choices.¹⁰⁴ Overall, OneApp handled 43,000 students.¹⁰⁵ Despite the

100. OSBORNE, *supra* note 5, at 20.

101. See *Learn About the Process*, NEW ORLEANS PUB. SCH. ENROLLMENT, <http://enrollnola.org/how-does-oneapp-work/>.

102. Dreilinger, *Anger, Frustration as Hundreds of New Orleans Parents Turned Away from Public School Enrollment Center*, *supra* note 94.

103. Danielle Dreilinger, *OneApp Lists More Than 130 New Orleans Public, Private and Prekindergarten Programs for 2015–16*, TIMES-PICAYUNE, Oct. 22, 2014, http://www.nola.com/education/index.ssf/2014/10/oneapp_lists_more_than_130_new.h tml [hereinafter Dreilinger, *OneApp Lists More Than 130 New Programs*].

104. Dreilinger, *Anger, Frustration as Hundreds of New Orleans Parents Turned Away from Public School Enrollment Center*, *supra* note 94; Kamenetz, *supra* note 3; THE COWEN INST., 2014 REPORT, *supra* note 2; Peter Cook, *This is NPR: Negatively Portraying Reform?*, PETERCOOK.COM (Aug. 14, 2014), <http://peterccook.com/2014/08/14/this-is-npr/>. In 2012, twenty-two percent of parents did not even complete OneApp, and the state placed these students. Mercedes Schneider, *New Orleans "Parental Choice" and the Walton-Funded OneApp*, DEUTSCH29 (July 5, 2013), <http://deutsch29.wordpress.com/2013/07/05/new-orleans-parental-choice-and-the-walton-funded-oneapp/>.

105. Daniele Dreilinger, *OneApp Serves 5,000 Families in Summer Enrollment*, TIMES-PICAYUNE, Aug. 14, 2014, http://www.nola.com/education/index.ssf/2014/08/oneapp_serves_5000_families_in.html [hereinafter Dreilinger, *OneApp Serves 5,000 Families in Summer Enrollment*]. Over seventy percent of students remained

apparent success of OneApp in placing students to their top choices, the resource centers set up for parents unhappy with their selection were overwhelmed this summer with parents seeking to change schools.¹⁰⁶ Over 5000 new or changed placements were made in July through the OneApp process.¹⁰⁷

While the centralization of enrollment through OneApp has solved many inequities arising from the old enrollment process, it has not fixed them all. The most obvious problem is that there are not enough high quality schools to meet the demand. There are 18,500 seats in schools rated A or B, but 45,000 students trying to get those seats, and the very top schools are far over-enrolled.¹⁰⁸ The odds of getting into one of the highest performing schools are astronomically small.¹⁰⁹ In the words of one parent activist, “[y]ou have a chance, not a choice.”¹¹⁰ Until the number of high quality schools increases, demand will necessarily continue to outstrip supply at these top schools.¹¹¹

Another continuing barrier to equal access is that not all schools participate in OneApp.¹¹² The holdouts are the OPSB selective

enrolled in their current school and did not have to complete the OneApp process. THE COWEN INST., 2014 REPORT, *supra* note 2, at 18.

106. Dreilinger, *Anger, Frustration as Hundreds of New Orleans Parents Turned Away from Public School Enrollment Center*, *supra* note 94; Danielle Dreilinger, *Hundreds of New Orleans Parents Try Again at Summer Enrollment Center After Wednesday Breakdown*, TIMES-PICAYUNE, July 10, 2014, http://www.nola.com/education/index.ssf/2014/07/hundreds_of_new_orleans_parent_1.html; Kamenetz, *supra* note 3.

107. Dreilinger, *OneApp Serves 5,000 Families in Summer Enrollment*, *supra* note 105.

108. Kamenetz, *supra* note 3; *see also* THE COWEN INST., 2014 REPORT, *supra* note 2, at 29.

109. Dreilinger, *OneApp Serves 5,000 Families in Summer Enrollment*, *supra* note 105.

110. Lyndsey Layton, *Are School Closings the ‘New Jim Crow’? Activists File Civil Rights Complaints*, WASH. POST, May 13, 2014, http://www.washingtonpost.com/local/education/2014/05/13/1a0d3ae8-dab9-11e3-b745-87d39690c5c0_story.html; *see also* Kamenetz, *supra* note 3 (arguing that it is not so much parental choice as it is taking what is available).

111. In 2012, there were so many poorly performing schools that the RSD fell short on its attempt to comply with federal policy requiring school districts to offer high quality alternatives to children in failing schools. *See* Heather Miller, *Parents Have Few Options When Moving Kids from Failing Public Schools*, LENS (Mar. 19, 2013), <http://thelensnola.org/2013/03/19/parents-have-few-options-when-moving-kids-from-failing-public-schools/>.

112. *See* THE COWEN INST., 2014 REPORT, *supra* note 2, at 27; Dreilinger, *Anger, Frustration as Hundreds of New Orleans Parents Turned Away from Public School Enrollment Center*, *supra* note 94; Dreilinger, *OneApp Lists More Than 130 New*

admission schools, discussed below, and the BESE charters—sixteen schools in 2014 that will decrease to ten schools in 2015.¹¹³ Most of the New Orleans A- and B-ranked schools still require their own admission applications, deadlines, and procedures.¹¹⁴ Parents hoping to get their children into these schools need to engage in the time-consuming scavenger hunt for schools and applications, meaning “[o]nly parents with the means to go through multiple, individual admission processes have access to those schools.”¹¹⁵ Recognizing this problem, the Louisiana Department of Education is attempting to require all schools to participate in OneApp upon each charter’s renewal, though this may be as far as a decade away for some schools.¹¹⁶

Schools utilizing selective admissions also hinder equitable access. Many of the OPSB schools—by far the best public schools in the city—were magnet schools before the storm; the state transformed them into charter schools that utilize selective admissions criteria, such as performance on standardized tests and grades.¹¹⁷ These schools have been a longstanding source of contention in New Orleans even before the storm.¹¹⁸ The controversy became more pronounced after Katrina because RSD charter schools are

Programs, supra note 103; Dreilinger, *OneApp Serves 5,000 Families in Summer Enrollment, supra* note 105.

113. See SIMS & ROSSMEIER, *supra* note 16, at 16–17; see also THE COWEN INST., 2008 REPORT, *supra* note 60, at 15; THE COWEN INST., FIVE YEARS AFTER HURRICANE KATRINA, *supra* note 58, at 21; Carr, *School Choice is a Real Test for Parents in New Orleans, supra* note 96; Carr, *School Choice Series: Mother is Determined to Find Best Public Pre-K, supra* note 96.

114. See Civil Rights Complaint, *supra* note 19, at 16; Cook, *supra* note 8; Letter from the Recovery School District to the Office of Civil Rights, *supra* note 74, at 5.

115. Letter from the Recovery School District to the Office of Civil Rights, *supra* note 74, at 5; see also Schneider, *supra* note 104.

116. THE COWEN INST., 2014 REPORT, *supra* note 2, at 4; Cook, *supra* note 8; see also LA. ADMIN. CODE tit. 28, § 2709(K) (2014) (making OneApp mandatory for type 2, 4, 5, and 1b charter schools only).

117. See THE COWEN INST., 2014 REPORT, *supra* note 2, at 18; Garda, *supra* note 32, at 67–69, 77; Civil Rights Complaint, *supra* note 19, at 16–17 (noting that six schools currently utilize foreign language or academic admission criteria). The Office of Civil Rights launched an investigation into whether OPSB admission policies are racially discriminatory, particularly at selective admission schools. Sarah Carr, *Feds Investigating Racial Discrimination Complaint Involving Some Orleans Charter Schools*, TIMES-PICAYUNE, Jan. 19, 2010, http://www.nola.com/education/index.ssf/2010/01/post_73.html.

118. Other parts of the country cite selective admission charter schools for racial and socioeconomic segregation as well. See, e.g., Complaint to Office of Civil Rights at 3–5, 17–18, ACLU Found. of Del. v. Delaware & Red Clay Consol. Sch. Dist. (Dec. 3, 2014), available at <http://www.aclu-de.org/wp-content/uploads/2014/12/ACLU-et-al-v.-State-of-Delaware-and-Red-Clay-Consolidated-03-Dec-14.pdf>.

prohibited from utilizing selective academic admissions.¹¹⁹ But any chance that academic selective admission criteria would be abolished was put to rest in 2012 when the legislature grandfathered the practice of selective admission schools based on academic performance.¹²⁰

Equity concerns over access will persist as long as admission barriers prevent some students from even being eligible to apply to the highest performing schools. The perception of poor African-Americans is that selective admission schools are reserved for more advantaged children, and that perception appears correct.¹²¹ The mere existence of selective admission schools that have a much higher proportion of whites than other schools confirms racial stratification to many black New Orleanians.¹²² Even John White, the state Superintendent and staunch supporter of charter schools and the New Orleans system of schools, agrees that exempting selective admission schools from OneApp creates access inequity.¹²³

The use of neighborhood preferences also inhibits fair and open access.¹²⁴ Charter schools are accused of controlling student demographics by including a preference in their admissions for students residing in the neighborhood. The OPSB schools have always been permitted to use neighborhood preferences and the legislature expressly permitted neighborhood preferences in RSD charter school admissions in 2010.¹²⁵ Neighborhood preferences could certainly be used as a tool of inclusion rather than exclusion, but that has not been the case in New Orleans. According to a recent civil rights complaint filed with the Department of Justice and the

119. LA. REV. STAT. ANN. tit. 17, § 3991(B)(1)(d) (2011); Carr, *School Choice is a Real Test for Parents in New Orleans*, *supra* note 96. No other state permits charter schools to utilize selective admission criteria. Sarah Carr, *National Charter Advocate Says He's Opposed to Selective Admissions During Talk in New Orleans*, TIMES-PICAYUNE, Sept. 11, 2009, http://www.nola.com/education/index.ssf/2009/09/national_charter_advocate_spea.html.

120. *See* LA. REV. STAT. ANN. tit. 17, § 3991; LA. ADMIN. CODE tit. 28, § 2705(B) (2014).

121. *See* Maxwell, *supra* note 1; Schneider, *supra* note 104.

122. Amy Waldman, *Reading, Writing, Resurrection*, ATLANTIC, Jan./Feb. 2007, available at <http://www.theatlantic.com/magazine/archive/2007/01/reading-writing-resurrection/305560/>.

123. Layton, *supra* note 2.

124. *See* THE COWEN INST., 2014 REPORT, *supra* note 2, at 18.

125. LA. REV. STAT. ANN. tit. 17, § 3991(B)(4)(b); *see also* LA. REV. STAT. ANN. tit. 17, § 3973(2)(a) (2013); LA. ADMIN. CODE tit. 28, § 2701(E) (2014); Andrew Vanacore, *Some New Orleans Charter Schools Allowed to Save Spots for Neighborhood Students*, TIMES-PICAYUNE, Apr. 8, 2011, http://www.nola.com/education/index.ssf/2011/04/some_new_orleans_charter_school.html.

Department of Education, discussed in detail below, “[t]he two schools in New Orleans that give preference to students living in surrounding neighborhoods are located in mostly White, middle class communities.”¹²⁶

Finally, student demographics can be manipulated by giving students in school-run, fee-based preschools preference in kindergarten admissions.¹²⁷ This practice ensures that a significant number of entering kindergarteners are middle- and high-income students. The use of preferences for students in the school’s pre-kindergarten program means there are fewer open seats in many kindergarten programs, and the odds of getting into a school after kindergarten become lower.¹²⁸ The Louisiana Department of Education, recognizing the troubling aspects of this practice, changed its regulations to permit lottery exemptions for children in pre-kindergarten programs that were provided free of charge. It also permitted charter schools that charge tuition for their preschool program to seek approval from the charter authorizer to exempt these students from the lottery for admission to kindergarten. “In such a case, the [authorizer] shall require the charter school to set enrollment targets that ensure the charter school provides equity of access for at-risk applicants to its kindergarten classes.”¹²⁹ Put simply, charter schools can still manipulate student demographics by using a

126. Civil Rights Complaint, *supra* note 19, at 7, 17, 22–23; *see also* Type 3 Charter School Operating Agreement Between Hynes Charter School Corporation and The Orleans Parish School Board (2011), *available at* <http://www.opsb.us/wp-content/uploads/2012/10/2011-Executed-Operating-Agreement-Hynes.pdf> (allowing neighborhood preferences); Type 3 Charter School Operating Agreement Between Advocates For Arts-Based Education Corporation and The Orleans Parish School Board (2011), *available at* <http://www.opsb.us/wp-content/uploads/2012/10/2011-Executed-Operating-Agreement-Lusher.pdf>. No RSD charter has chosen to utilize neighborhood preferences. THE COWEN INST., CASE STUDIES OF SCHOOL CHOICE AND OPEN ENROLLMENT IN FOUR CITIES 4 (2011), *available at* <http://www.cowen.institute.com/wp-content/uploads/2010/03/Intro-New-Orleans-Case-Study-11-2011.pdf>.

127. BARBARA FERGUSON & KARRAN HARPER ROYAL, THE DECEPTION OF THE “LOTTERY” AT LYCEE FRANCAIS AND AUDUBON SCHOOLS: THE MISUSE OF CHARTER SCHOOLS—PART II 1 (2011), *available at* <http://www.researchonreforms.org/html/documents/DeceptionoftheLottery.pdf>. *But see* Robert Morris, *French-Immersion Charter Schools Dispute Allegation that Their Admissions Favor the Wealthy*, UPTOWN MESSENGER (Nov. 19, 2011), <http://uptownmessenger.com/2011/11/audubon-charter-school-november-board-meeting/> (defending the practice).

128. Dreilinger, *OneApp Serves 5,000 Families in Summer Enrollment*, *supra* note 105.

129. LA. ADMIN. CODE tit. 28, §2711(B) (2014).

preference for their tuition paying preschool students, but the practice must be approved and is somewhat circumscribed.

These continuing barriers to equitable access led local and national organizations to file a complaint *alleging* discriminatory educational practices in violation of Titles IV and VI of the Civil Rights Act with the Department of Justice and the Office of Civil Rights in May of 2014.¹³⁰ It contains two claims: (1) African-American students are subject to school closures at a much higher rate than white students; and (2) the state discriminates against African-American students by failing to provide adequate educational alternatives for students in recently closed schools.¹³¹ The allegation is essentially that the RSD closes traditional, direct-run schools that are almost one hundred percent African-American at much higher rates than similarly performing schools with high percentages of white students.¹³² It then discriminates, according to the Complaint, against the African-American students from the closed schools “by implementing a confusing and biased enrollment system and by blindly allowing charter and OPSB public schools to institute admissions criteria . . . that disproportionately affect and exclude African-American students.”¹³³ The Complaint asked the Department of Justice (DOJ) to prevent the closing of the last five RSD direct-run schools and to put a moratorium on charter renewals, neither of which happened.¹³⁴

While the state considered the Complaint “a joke” and political maneuvering by teachers’ unions,¹³⁵ the DOJ has opened an investigation, and the RSD has officially responded to the Complaint.¹³⁶ It is highly unlikely that the DOJ will find any civil

130. See Civil Rights Complaint, *supra* note 19. Simultaneous complaints, with similar allegations, were filed in New Orleans, Chicago, and Newark—all school systems systematically closing schools and chartering them to private operators. See Dreilinger, *New Orleans Charter Civil Rights Complaint ‘a Joke’*, *supra* note 8.

131. Civil Rights Complaint, *supra* note 19, at 21–23.

132. *Id.* at 21–22.

133. Civil Rights Complaint, *supra* note 19, at 7; see also *id.* at 22–23.

134. Civil Rights Complaint, *supra* note 19, at 24; Dreilinger, *New Orleans Charter Civil Rights Complaint ‘a Joke’*, *supra* note 8.

135. Dreilinger, *New Orleans Charter Civil Rights Complaint ‘a Joke’*, *supra* note 8.

136. Danielle Dreilinger, *U.S. Education Department Opens Civil Rights Investigation of New Orleans Public School Closures*, TIMES-PICAYUNE, Sept. 24, 2014, http://www.nola.com/education/index.ssf/2014/09/us_education_department_opens.html [hereinafter Dreilinger, *U.S. Education Department Opens Civil Rights Investigation of New Orleans Public School Closures*]; see also Letter from the Recovery School District to the Office of Civil Rights, *supra* note 74, at 5.

rights violations in the school closing and OneApp process.¹³⁷ A federal district court recently rejected similar claims of discrimination based on school closures in Washington, D.C.¹³⁸ It held:

Few topics, understandably, incite our passions more than the education of our children. Toss into the mix the future of neighborhood institutions, whose familiarity and history may resonate deeply, and quite a volatile brew emerges. It is thus hardly surprising that assorted constituencies may possess varied opinions on the wisdom and necessity of the Plan and . . . strategy. Yet every adverse policy decision does not yield a constitutional claim. In this case, there is no evidence whatsoever of any intent to discriminate on the part of Defendants, who are actually transferring children out of weaker, more segregated, and under-enrolled schools. The remedy Plaintiffs seek—i.e., to remain in such schools—seems curious, given that these are the conditions most people typically endeavor to escape.¹³⁹

But the fact that the admissions process continues to produce skewed school demographics that are directly tied to school quality, combined with the racially charged history of post-Katrina school reform, means that allegations of access inequality will persist.

In sum, for seven years after Katrina, access to schools was a decentralized, uncoordinated, logistical nightmare for parents. This significantly contributed to the balkanization of the schools by race, socioeconomic status, and academic ability, because the most motivated and able parents were able to secure favorable placements for their children, leaving parents without resources or time for the dregs of the system. And with little to no oversight, charter schools were able to massage student enrollments through a variety of practices. It is no surprise that during this time fewer poor African-American parents believed their children were enrolled in their first choice schools than did white parents.¹⁴⁰

It was only in year eight, through a concerted and coordinated effort to centralize admissions through OneApp, that many of these problems were addressed, if not yet solved.¹⁴¹ Without this

137. OCR has resolved forty-two of seventy-six complaints alleging racially discriminatory changes but has required systemic changes in only one case. Dreilinger, *U.S. Education Department Opens Civil Rights Investigation of New Orleans Public School Closures*, *supra* note 136.

138. *Smith v. Henderson*, 944 F. Supp. 2d 89 (D.D.C. 2013).

139. *Id.* at 93.

140. *See THE COWEN INST., 2008 REPORT*, *supra* note 60, at 15.

141. Louisiana law also permits charter schools with corporate sponsors to reserve half of their seats for the children of employees of the corporate sponsor. *See LA.*

centralization, the schools would certainly be even more stratified by race, socioeconomic status, and ability. A critical lesson from New Orleans is that equal access demands a unified enrollment process overseen by a centralized authority. The system is far from perfect—circumscribing opportunities for students based on their place of residence, academic abilities, or capacity to pay for preschool can never achieve access equity or claim to be truly a free choice system¹⁴²—but it is a vast improvement over the previous decentralized system of enrollment.

2. Retention Equity

A common complaint against charter schools nationwide is that they utilize suspension and expulsion to push out students who are difficult to educate.¹⁴³ Enrolling at-risk and difficult students with bad behavior is risky for charter schools, whose very survival depends on high test scores and graduation rates.¹⁴⁴ One easy way to solve this problem is to cull these challenging students from their student bodies through suspension or expulsion. To this point, a nationwide study found that charter schools had overly harsh discipline policies.¹⁴⁵ This is certainly true in New Orleans, where many charter schools have adopted strict behavior policies with drastic consequences.¹⁴⁶ During

REV. STAT. tit. 17, § 3991(1). No school has taken advantage of this lottery preference.

142. Aaron Saiger, *What We Disagree About When We Disagree About School Choice*, 99 IOWA L. REV. BULLETIN 49, 54 (2014).

143. See ANNENBERG INST. FOR SCH. REFORM, PUBLIC ACCOUNTABILITY FOR CHARTER SCHOOLS: STANDARDS AND POLICY RECOMMENDATIONS FOR EFFECTIVE OVERSIGHT 8 (2014), available at <http://annenberginstitute.org/sites/default/files/CharterAccountabilityStds.pdf>; see also Noreen S. Ahmed-Ullah & Alex Richards, *CPS: Expulsion Rate Higher at Charter Schools: Disparity Sure to Become Fuel in Ongoing Education Debate*, CHI. TRIB. (Feb. 26, 2014), http://articles.chicagotribune.com/2014-02-26/news/ct-chicago-schools-discipline-met-20140226_1-charter-schools-andrew-broy-district-run-schools; Preston C. Green et al., *Having It Both Ways: How Charter Schools Try to Obtain Funding of Public Schools and the Autonomy of Private Schools*, 63 EMORY L.J. 303, 335 (2013); Harden, *supra* note 2. But see Jaclyn Zubrzycki et al., *Charter Schools' Discipline Policies Face Scrutiny*, EDUC. WK. (Feb. 20, 2013), http://www.edweek.org/ew/articles/2013/02/20/21charters_ep.h32.html (explaining that the expulsion rate for charter schools was generally similar to that of traditional public schools, which was one student in five hundred).

144. See CARR, *supra* note 24, at 235.

145. ANNENBERG INST. FOR SCH. REFORM, *supra* note 143, at 3.

146. Danielle Dreilinger, *New Orleans Schools Expel More Students, but Are More Accountable*, TIMES-PICAYUNE, Aug. 24, 2013, http://www.nola.com/education/index.ssf/2013/08/post_197.html [hereinafter Dreilinger, *New Orleans Schools Expel More Students*]; Andrew Vanacore, *Recovery School District to List Behaviors That*

the first seven years after Katrina, students were routinely expelled for minor offenses, such as uniform violations or carrying a cigarette lighter, and provided little to no due process.¹⁴⁷ This led to a high attrition rate in New Orleans schools, as many schools suspended, expelled, or transferred tough students, though precise data was hard to collect because there was no centralized student tracking.¹⁴⁸

The problem became so acute that students staged sit-ins and protests at several schools, challenging their harsh suspension and expulsion practices.¹⁴⁹ The dissatisfaction culminated in students, parents, and advocates filing a complaint with the Louisiana Department of Education, the Office of Civil Rights, and the Department of Justice in April of 2014, alleging that certain schools are “based on a harsh and punitive discipline culture . . . [that] endanger[s] the safety and welfare of students, violates students’ rights under state and federal laws [and] push[es] students out of school for minor infractions”¹⁵⁰ Suspension rates in the named schools ranged from thirty-eight to sixty-eight percent.¹⁵¹ The state has placed on hold the investigation of the Complaint.¹⁵²

Could Get Students Expelled, TIMES-PICAYUNE, July 16, 2012, http://www.nola.com/education/index.ssf/2012/07/recovery_school_district_lists_1.html.

147. Dreilinger, *New Orleans Schools Expel More Students*, *supra* note 146; see also Meredith Simons, *The Student Led Backlash Against New Orleans’s Charter Schools*, ATLANTIC (Feb. 5, 2014), <http://www.theatlantic.com/education/archive/2014/02/the-student-led-backlash-against-new-orleans-charter-schools/283597/>; Vanacore, *supra* note 146.

148. See CARR, *supra* note 24, at 159–61, 189, 263; Dreilinger, *New Orleans Schools Expel More Students*, *supra* note 146; see also Civil Rights Complaint, *supra* note 19, at 17.

149. See, e.g., Garry Boulard, *First All-Charter System Set to Debut in New Orleans*, NEW ORLEANS CITY BUS. (Aug. 1, 2014) (discussing sit-in student protests in November 2013 at FirstLine for suspension and expulsion policies); Danielle Dreilinger, *State Investigation of N.O.’s Collegiate Academies Charters on Hold Pending Further Documentation*, TIMES-PICAYUNE, May 15, 2014, http://www.nola.com/education/index.ssf/2014/05/state_investigation_of_new_orl.html [hereinafter Dreilinger, *State Investigation of N.O.’s Collegiate Academies Charters on Hold Pending Further Documentation*] (describing protests at Sci Academy regarding suspension policies); Simons, *supra* note 147.

150. Administrative Complaint Requesting Investigations into Three New Orleans Charter Schools Operated by Collegiate Academies—George Washington Carver Preparatory Academy, George Washington Carver Collegiate Academy, and Sci Academy [hereinafter Carver Complaint], available at http://media.nola.com/education_impact/other/4.15.2014%20Carver%20Complaint%20For%20Release.pdf.

151. *Id.* at 4; see also Kamenetz, *supra* note 3.

152. Dreilinger, *State Investigation of N.O.’s Collegiate Academies Charters on Hold Pending Further Documentation*, *supra* note 149.

The Complaint is an attack on the foundations of “no excuses” schools—behavior modification training and zero tolerance.¹⁵³ The ready defense of schools is that they are entitled to determine which offenses should be punishable, and that if parents do not like it, they can choose a school with less strict codes of conduct.¹⁵⁴ This exemplifies the current state of education in New Orleans—if you don’t like a particular practice, simply choose another school. The full range of schools exists, according to this theory, which permits parents who approve of tough discipline to select these schools and the parents who oppose harsh discipline to select other schools. Charter advocates take the position that parent choice, not school practice, is the primary form of accountability in a system of schools.¹⁵⁵

New Orleans has only partially embraced this ideology when it comes to suspension and expulsion. In 2012, the RSD created a centralized expulsion review board to prevent the alleged pushing out of unwanted students.¹⁵⁶ All RSD schools and OPSB direct-run schools now utilize the same expulsion policies and procedures that are processed through the RSD Student Hearing Office.¹⁵⁷ The RSD also created a unified list of expellable offenses that RSD charter schools must follow, thus ensuring that minor offenses would not lead to expulsion.¹⁵⁸ All RSD schools and OPSB direct-run schools must utilize this policy, while OPSB charter schools are exempt from its guidelines.¹⁵⁹ This was a rare instance of cooperation between the

153. See generally CARR, *supra* note 24 (describing the “no excuses” behavior model that is foundational at Sci Academy). Sci Academy is one of the schools identified in the Complaint. See Carver Complaint, *supra* note 150; see also Sarah Carr, *How Strict is Too Strict: The Backlash Against No-Excuses Discipline in High School*, ATLANTIC, Dec. 2014, <http://www.theatlantic.com/magazine/archive/2014/12/how-strict-is-too-strict/382228> [hereinafter Carr, *How Strict is Too Strict*].

154. See, e.g., Linda Lutton, *Chicago Charter Schools Struggle to Hold onto Weakest Students*, WBEZ.COM (Nov. 9, 2010), <http://www.wbez.org/story/news/education/charters-struggle-hold-their-weakest-students>.

155. The complainants contemplated precisely this argument in their complaint, alleging that “[t]he students at these schools . . . are not really empowered to be able to change schools.” Carver Complaint, *supra* note 150, at 10.

156. See Kamenetz, *supra* note 3.

157. THE COWEN INST., 2014 REPORT, *supra* note 2, at 4. OPSB charter schools do not have to use the RSD Student Hearing Office. *Id.* at 5.

158. RECOVERY SCH. DISTRICT, EXPULSION PROCESS AND PROCEDURES—2012–2013 SCHOOL YEAR, available at <http://rdschoolperformance.files.wordpress.com/2012/08/rsd-expulsion-process-and-standards-2012-13.pdf>; see also RECOVERY SCH. DISTRICT, RSD STUDENT EXPULSION PROCESS AND PROCEDURES, available at [http://www.boarddocs.com/la/bese/Board.nsf/files/8SYM75924D6/\\$file/Bulletin%20129%20Hearing%20Office%20backup.pdf](http://www.boarddocs.com/la/bese/Board.nsf/files/8SYM75924D6/$file/Bulletin%20129%20Hearing%20Office%20backup.pdf).

159. THE COWEN INST., 2014 REPORT, *supra* note 2, at 5.

RSD and the OPSB, and it shows the evolution of the RSD from granting complete autonomy to its charter schools to now retaining some centralized control over policies and practices.¹⁶⁰

But the OPSB and the RSD still refuse to control all aspects of student retention, as there are no plans to centralize suspension policies and practices. The line is drawn between suspension and expulsion, according to the RSD, because expulsions affect the entire school system whereas suspensions do not, and charter schools need to retain autonomy over internal discipline.¹⁶¹ Of course suspensions can be long enough to have the same deleterious effect as expulsions for students.¹⁶² This is a real danger in a city that has an “absurd” rate of suspensions: one quarter of schools have suspended more than twenty percent of their students in a school year.¹⁶³ The centralized expulsion system is not perfect, as schools still counsel-out difficult students, but “ever since the city started a centralized expulsion system last fall, more students are being formally expelled, rather than informally ejected.”¹⁶⁴ Despite the shortcomings, the centralization of expulsion policy and hearings is certainly better than leaving these decisions in the hands of autonomous school operators, and it is being mimicked by several cities with large charter school sectors.¹⁶⁵

The RSD and the OPSB also worked together to ensure a quality alternative placement while students were serving their expulsions.¹⁶⁶ In a traditional school district made predominately of schools run directly by the school board with only a couple of charter schools, the direct-run schools often end up as the repositories for expelled students. This was certainly the case in New Orleans when the RSD was running schools directly between 2006 and 2013. The RSD direct-run schools became the dumping grounds for the unruly and

160. Dreilinger, *New Orleans Schools Expel More Students*, *supra* note 146; Vanacore, *supra* note 146.

161. Dreilinger, *New Orleans Schools Expel More Students*, *supra* note 146.

162. *Id.*

163. See JUVENILE JUSTICE PROJECT OF LA., *SUSPENSIONS MATTER: BY THE NUMBERS 2012–2013* (2014), available at <http://jjpl.org/site/wp-content/uploads/2013/03/Suspensions-Matter.1213bythenumbers.pdf>; see also Carr, *How Strict is Too Strict*, *supra* note 153.

164. Danielle Dreilinger, *New Orleans Alternative School Suggests Neighboring School Improve Security*, *TIMES-PICAYUNE*, Dec. 6, 2013, http://www.nola.com/education/index.ssf/2013/12/new_orleans_alternative_school.html; Dreilinger, *New Orleans Schools Expel More Students*, *supra* note 146.

165. Dreilinger, *New Orleans Schools Expel More Students*, *supra* note 146.

166. *Id.*

difficult students that had been kicked out of charter schools.¹⁶⁷ Knowing that there would be no more direct-run schools, the RSD and OPSB created the Crescent Leadership Academy—a special charter school that would cater to suspended and expelled students.¹⁶⁸

The solution to preventing schools from massaging enrollments through student retention policies was the same solution to achieving equitable access: centralization of services and unification of policies.¹⁶⁹ And just as OneApp does not apply to all schools (OPSB) or all practices (selective admissions), the centralized expulsion hearings and unified expulsion rules do not apply to all schools or to any school's suspensions.¹⁷⁰ Unification and centralization in access and retention policies push up against political and autonomy barriers. The tension between centralization and specialization/autonomy is a recurring theme in the quest for retention equality in the New Orleans system of schools.

3. Choice

Much more is at work than just admission and retention policies leading to racially and socioeconomically skewed school enrollments. What is often ignored in this discussion is that many schools are designed for poor and minority students. For example, Knowledge is Power Program (KIPP) schools, of which there are ten in New Orleans, were founded on the belief that demographically challenging students could be educated in a segregated environment.¹⁷¹ These

167. See OSBORNE, *supra* note 5, at 5–6; CARR, *supra* note 24; see also Garda, *supra* note 32, at 78.

168. Danielle Dreilinger, *New Orleans School for Expelled Students Makes Changes for 2014–15*, TIMES-PICAYUNE, Sept. 24, 2014, http://www.nola.com/education/index.ssf/2014/09/new_orleans_school_for_expelle.html.

169. The state is also attempting to prevent unwarranted suspensions and expulsions through the chartering process. The charter-enabling statute was amended in 2010 to ensure that charter applicants include a “master plan for improving behavior and discipline” that incorporates restorative justice and positive behavior interventions. 2010 Act 756 (codified as amended at LA. REV. STAT. ANN. §§ 17:3981(4), 17:3982(A)(1)(a)(i), 17:3983(A)(3)(c), 17:3991(B)(14)) (requiring that each charter proposal be approved only if it includes “discipline practices and policies that incorporate positive behavior interventions and supports, restorative justice, and other research-based discipline practices and classroom management strategies . . .”); see also LA. ADMIN. CODE tit. 126 §§ 306(A), 701(B) (2012).

170. Dreilinger, *New Orleans Schools Expel More Students*, *supra* note 146.

171. *Frequently Asked Questions*, KIPP, <http://www.kipp.org/faq> (last visited Mar. 15, 2015); Michaela Krauser, *Dealing with Segregation in Urban U.S. Schools*, NEXT CITY (July 10, 2012), <http://nextcity.org/daily/entry/dealing-with-segregation-in-urban-us-schools>; Nina Rees, *KIPP Leads the Way: The Charter Network Turns 20 This Week*, U.S. NEWS & WORLD REP. (July 29, 2014), <http://www.usnews.com/>

schools accept the fact that racial and socioeconomic isolation exist—indeed public schools are more segregated by race than at the time of *Brown*¹⁷²—and implement a curriculum and methodology designed to provide a high level education to these demographically challenging students in their racially and socioeconomically isolated schools.¹⁷³ The “no excuses” model of education¹⁷⁴ created by KIPP, and popular in many other New Orleans charter schools,¹⁷⁵ appeals to many African-American students but is a turn-off to middle and upper class white parents.¹⁷⁶ “Because many choice schools seek to serve a particular population, their designs influence [racial and socioeconomic] demographics.”¹⁷⁷ Sci Academy—one of the schools with the harshest discipline policies and a strict “no excuses” approach—is the third most popular school in the city for ninth

opinion/blogs/nina-rees/2014/07/29/kipp-celebrates-20-years-of-educating-minority-and-low-income-students.

172. Erwin Chemerinsky, *Making Schools More Separate and Unequal: Parents Involved in Community Schools v. Seattle School District No. 1*, 2014 MICH. ST. L. REV. 633 (2014); James, *supra* note 70, at 1088.

173. Matthew Yglesias, *Charter Schools and Low-SES Students: Damned if They Do and Damned if They Don't?*, THINKPROGRESS (June 2, 2011), <http://thinkprogress.org/yglesias/2011/06/02/234962/charter-schools-and-low-ses-students-damned-if-they-do-and-damned-if-they-don%E2%80%99t/> (“We should think of these kind of schools as stopgaps, workable solutions to the difficult problem of running a school in an environment of concentrated poverty. . . . But given that concentrated poverty isn’t going to vanish next week, we should also be applauding people who are finding ways to make it work.”). Many believe the charter movement was founded on educating failing at-risk students. See, e.g., Carr, *How Strict is Too Strict*, *supra* note 153; Schneider, *supra* note 104.

174. For an explanation of the “no-excuses” charter school pedagogy, see Valerie Strauss, *Why ‘No Excuses’ Charter Schools Mold ‘Very Submissive’ Students—Starting in Kindergarten*, WASH. POST, Sept. 9, 2014, <http://www.washingtonpost.com/blogs/answer-sheet/wp/2014/09/19/why-no-excuses-charter-schools-mold-very-submissive-students-starting-in-kindergarten/>; *The No-Excuses Charter School Movement*, DEWEY TO DELPIT, <http://edcommentary.blogspot.com/p/no-excuses-charter-movement.html> (last visited Mar. 15, 2015).

175. Carr, *How Strict is Too Strict*, *supra* note 153; Simons, *supra* note 147; Vanacore, *supra* note 146; Eric Westervelt, *A New Orleans Charter School Marches to Its Own Tune*, NPR ED (Oct. 13, 2014), <http://www.npr.org/blogs/ed/2014/10/13/354090391/a-new-orleans-charter-school-marches-to-its-own-tune>.

176. CARR, *supra* note 24, at 102–04; Carr, *How Strict is Too Strict*, *supra* note 153 (“[L]ow-income parents as a group tend toward a firmly directive approach with their children, whereas middle-class parents typically favor a more solicitous tack”); Richard Kahlenberg, *Low-Income Students and KIPP Charter Schools*, WASH. POST, June 7, 2011, http://www.washingtonpost.com/blogs/answer-sheet/post/low-income-students-and-kipp-charter-schools/2011/06/06/AGquWhKH_blog.html; Yglesias, *supra* note 173.

177. MICKELSON ET AL., *supra* note 70, at 10.

graders.¹⁷⁸ The New Orleans system of specialized schools allows parents to choose segregation, and many parents are making this choice.

In addition, the uncomfortable truth may be that the old proverb “birds of a feather flock together” is correct:

[Nationwide e]thnic self-segregation is evident among many charter school populations. These trends are not due to white flight from charters, but to white, black, Native American, and Latino parents who choose schools based more on their racial composition than on the relative academic quality of the charter school. Parents often seek charter schools with a majority of students from their own race, schools that often have lower test scores than the school their children exit.¹⁷⁹

Whites choose to remain in schools with a majority of whites¹⁸⁰—it is no surprise that minorities would choose to do the same.

The parents provide the demand while foundation funding ensures an adequate supply of specialized schools focused on the poor and minorities. The large influx of foundation money to New Orleans charter schools creates incentives to keep schools socioeconomically segregated because the foundations are reticent to give money to schools with significant populations of middle- and high-income students.¹⁸¹ In the New Orleans school market, the supply of “no

178. Neerav Kingsland, *The Connection Between Choice and Humility*, EDUC. NEXT (Feb. 13, 2014), <http://educationnext.org/the-connection-between-choice-and-humility/>.

179. MICKELSON ET AL., *supra* note 70, at 10; *see also* Robert Bifulco & Helen F. Ladd, *School Choice, Racial Segregation, and Test-score Gaps: Evidence from North Carolina's Charter School Program*, 26 J. POL'Y ANALYSIS & MGMT. 31 (2007); David R. Garcia, *Charter Schools Challenging Traditional Notions of Segregation*, in THE CHARTER SCHOOL EXPERIMENT: EXPECTATIONS, EVIDENCE AND IMPLICATIONS 33 (Christopher A. Lubienski & Peter C. Weitzel eds., 2010); James, *supra* note 70, at 1104–05; Kelly E. Rapp & Suzanne E. Eckes, *Dispelling the Myth of “White Flight”*: *An Examination of Minority Enrollment in Charter Schools*, 21 EDUC. POL'Y 615 (2007); Linda A. Renzulli & Lorraine Evans, *School Choice, Charter Schools and White Flight*, 52 SOC. PROBS. 398 (2005); Salvatore Saporito, *Private Choices, Public Consequences: Magnet School Choice and Segregation by Race and Poverty*, 50 SOC. PROBS. 181 (2003); Gregory R. Weiher & Kent L. Tedin, *Does Choice Lead to Racially Distinctive Schools? Charter Schools and Household Preferences*, 21 J. POL'Y ANALYSIS & MGMT. 79 (2002); Kevin Booker et al., *The Effect of Charter Schools on School Peer Composition* (RAND Education, Working Paper No. 306, 2005).

180. *See* Robert A. Garda, Jr., *The White Interest in School Integration*, 63 FLA. L. REV. 599, 614–15 (2011).

181. CARR, *supra* note 24, at 103–04. New Orleans charter schools receive tens of millions of dollars from private organizations. Kamenetz, *supra* note 3.

excuses” schools is fostered by private donations, while the demand is primarily from black and low-income parents.¹⁸²

It is impossible to ignore that school design and parent choice play a large role in the racial and socioeconomic disparity among schools.¹⁸³ The inherent nature of an all-choice system of schools permits, if not exacerbates, segregation because it “facilitate[s] parents’ ability to dissent not just in word but in action against integration.”¹⁸⁴ As Professor Osamudia Jones puts it,

A turn to affinity charters or charter schools that are increasingly segregated may be the embrace of racial isolation as a virtue rather than a vice School choice plans only compound the de facto segregation that makes American public schools more segregated now than they were at the time of *Brown v. Board of Education*.¹⁸⁵

B. Equity for Students with Disabilities

Charter schools nationwide are accused of not properly educating students with disabilities.¹⁸⁶ They have long been blamed for denying admission to students with disabilities, “cherry-picking” students with mild disabilities, providing a one-size-fits-all program instead of a full continuum of placements, failing to follow proper disciplinary procedures, and failing to identify students as disabled.¹⁸⁷ These accusations are particularly strong in New Orleans.¹⁸⁸

There are numerous stories of students with disabilities being denied admission to charter schools or being “counseled out”—

182. See *supra* notes 176–78, 181.

183. Derek Black, *Charter Schools, Vouchers, and the Public Good*, 47 WAKE FOREST L. REV. 101, 124 (2013); Weiher & Tedin, *supra* note 179.

184. Black, *supra* note 183, at 120; see also Nick Lewin, *The No Child Left Behind Act of 2001: The Triumph of School Choice Over Racial Desegregation*, 12 GEO. J. ON POVERTY L. & POL’Y 95, 113 (“Multiple studies indicate that unregulated public school choice threatens to actually increase segregation.”).

185. James, *supra* note 70, at 1117.

186. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-12-543, CHARTER SCHOOLS: ADDITIONAL FEDERAL ATTENTION NEEDED TO HELP PROTECT ACCESS FOR STUDENTS WITH DISABILITIES 6–7, 11–13 (2012); ANNENBERG INST. FOR SCH. REFORM, *supra* note 143, at 7 (explaining that there is widespread use “of explicit or subtle barriers to enrollment” around the country); Robert A. Garda, Jr., *Culture Clash: Special Education in Charter Schools*, 90 N.C. L. REV. 655, 681–93 (2012) [hereinafter Garda, *Special Education in Charter Schools*].

187. ANNENBERG INST. FOR SCH. REFORM, *supra* note 143, at 7; MICKELSON ET AL., *supra* note 70; Garda, *Special Education in Charter Schools*, *supra* note 186, at 129.

188. THE COWEN INST., 2014 REPORT, *supra* note 2, at 4; Heilman, *supra* note 20, at 360–67.

convinced that the charter school could not serve their needs.¹⁸⁹ These practices are clear violations of the Americans with Disabilities Act, Section 504 of the Rehabilitation Act (Section 504), and the Individuals with Disabilities in Education Act (IDEA).¹⁹⁰ The data corroborates the anecdotal evidence. In 2010, charter schools educated sixty percent of the public school students in New Orleans, but enrolled only thirty-eight percent of the students with autism, thirty-seven percent of the students with severe emotional disturbances, and twenty-three percent of the students with multiple disabilities.¹⁹¹ Most of the students with disabilities were in the RSD direct-run schools, which were the “schools of last resort” and worst performing schools in the city.¹⁹² Even with the elimination of RSD direct-run schools, special education enrollment across school types continues to vary widely. The student populations in the BESE and OPSB charter schools—the highest performers in the city—include only between three to five percent of special education students, well below the city average. Every school rated A by the state has below average special education enrollments.¹⁹³ The RSD charter schools—most of which were formerly run directly by the RSD—enroll 9.4% special education students, the same as the citywide average.¹⁹⁴

There are several explanations for why charter schools turn away students with disabilities. First is the pressure to produce results on standardized tests in order to maintain the charter. Accountability requirements create strong incentives to deny admission to these lower performing students.¹⁹⁵ Second, the high costs of educating students with disabilities also provide a strong incentive to deny

189. CARR, *supra* note 24, at 139; Heilman, *supra* note 20, at 362–67; Garda, *Special Education in Charter Schools*, *supra* note 186, at 683–84.

190. Rehabilitation Act of 1973, Pub. L. No. 93-112, § 504, 87 Stat. 355 (codified as amended at 29 U.S.C. § 794 (2012)); Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213 (2012); Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400–1482 (2012). For discussion of the applicability of these statutes to charter schools in general, see Jay P. Heubert, *Schools Without Rules? Charter Schools, Federal Disability Law, and the Paradoxes of Deregulation*, 32 HARV. C.R.-C.L. L. REV. 301, 303, 315, 343–45 (1997); CATHERINE E. LHAMON ET AL., U.S. DEP’T OF EDUC., DEAR COLLEAGUE LETTER: SCHOOL ENROLLMENT PROCEDURES (2014), available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201405.pdf> (explaining that the U.S. Department of Education has made clear that charter schools must accept and provide English Language Learner and special education services).

191. CARR, *supra* note 24, at 130.

192. CARR, *supra* note 24, at 139; Heilman, *supra* note 20, at 363–65.

193. THE COWEN INST., 2014 REPORT, *supra* note 2, at 12.

194. OSBORNE, *supra* note 5, at 10.

195. Garda, *Special Education in Charter Schools*, *supra* note 186, at 688–89.

admission. Students with disabilities put a large strain on the budgets of charter schools and can threaten their viability, particularly charter schools that are their own LEAs and thus lack economies of scale.¹⁹⁶ In a traditional LEA—with numerous schools—paraprofessionals, psychologists, special education directors, and other necessary personnel can be used across many schools with the costs spread out evenly amongst them. In a system of schools where most charter schools are independent LEAs—essentially one-school school districts—it is too expensive to hire the necessary personnel to assist with what may amount to only a few students.¹⁹⁷

Finally, and maybe most importantly, special education often runs contrary to the mission and culture of charter schools. Many charter schools adopt a “hedgehog” approach to education: focus on one thing, and one thing only, in which to excel. As one school leader put it, the school should have a:

[S]ingle minded focus on student achievement. If the school tried to do too much—provide health care classes or parenting services, for example—it risked failure on its core mission . . . in the same way that the fox’s myriad plots are no match for the hedgehog’s obsession with a single strategy.¹⁹⁸

If the single-minded focus is college preparation, or academic achievement, a student with disabilities, particularly severe ones that require different services, may not fit in that mold. The school may feel that the student would not be well served and that accepting such students would divert its “hedgehog”-like, singular focus and degrade the quality of the program. The specialized nature of charter schools combined with the “hedgehog” strategy often leads to excluding students with disabilities.¹⁹⁹

Charter schools are also uniquely challenged to fulfill their obligation to locate, identify, and evaluate students with disabilities under the IDEA.²⁰⁰ This “child find” obligation compels LEAs to identify and evaluate all students within their jurisdiction, but Louisiana law defines “jurisdiction” for charter schools as “the boundary of the educational facility.”²⁰¹ In an all-charter school system where schools are compelled to identify only students within

196. *Id.* at 689, 695; Heilman, *supra* note 20, at 360, 371.

197. Garda, *Special Education in Charter Schools*, *supra* note 186, at 694–99.

198. CARR, *supra* note 24, at 41.

199. *Id.* at 42; Garda, *Special Education in Charter Schools*, *supra* note 186, at 689–90.

200. 20 U.S.C. § 1412(a)(3) (2012); 34 C.F.R. § 300.111 (2014).

201. LA. ADMIN. CODE tit. 28 § 1706 pt. XLIII, 230(A), (D)(4) (2013).

their four walls, there is no mechanism in place to locate those disabled students outside the public school system as required by the IDEA. “Because there is no centralized entity or authority responsible for child find across the city, children who are homeless, migrant, or simply not enrolled in public schools are not being found and evaluated in accordance with federal law.”²⁰²

Charter schools also struggle to provide appropriate related services and specialized instruction in violation of the IDEA.²⁰³ The treatment of students with mental health issues and behavioral problems is emblematic of the challenges in serving these students in a decentralized system. More children suffer from mental health issues in New Orleans than in any other part of the country.²⁰⁴ At the same time, the number of treatment facilities for these students has declined rapidly, and there is an extreme shortage of providers and facilities.²⁰⁵ The onus has fallen on the schools, more than ever, to either provide, or locate and pay for, proper treatment.

This is proving extremely difficult because students with severe behavioral and mental health problems are particularly expensive and difficult to educate. The prohibitive cost means some schools neglect mental health and counseling, and very few schools operate programs to address the needs of these students.²⁰⁶ The services once provided by a large multi-school LEA—the OPSB—now must be provided by single-school LEAs. The central office for social work and counseling services no longer exists, leaving each charter school as an island to provide these services.²⁰⁷ “New Orleans has become a case study in

202. Heilman, *supra* note 20, at 368.

203. See *id.* at 370–75; Jessica Williams, *With Help of School Counseling, New Orleans Family Tackles Mental Health Disorders of Three Siblings*, LA. WKLY. (July 7, 2014), <http://www.louisianaweekly.com/children-with-mental-illnesses-struggle-to-find-help-as-schools-hospital-systems-are-decentralized/> [hereinafter Williams, *With Help of School Counseling, New Orleans Family Tackles Mental Health Disorders of Three Siblings*] (claiming that many schools fail to properly educate students with disabilities).

204. See Sarah Carr, *Children with Mental Illnesses Struggle to Find Help as Schools, Hospital Systems Are Decentralized*, LENS (July 2, 2014), <http://thelens.nola.org/2014/07/02/children-with-mental-illnesses-struggle-to-find-help-as-schools-hospital-systems-are-decentralized/> [hereinafter, Carr, *Children with Mental Illnesses*].

205. See *id.*; Kamenetz, *supra* note 3; Williams, *With Help of School Counseling, New Orleans Family Tackles Mental Health Disorders of Three Siblings*, *supra* note 203.

206. See Carr, *Children with Mental Illnesses*, *supra* note 204; Williams, *With Help of School Counseling, New Orleans Family Tackles Mental Health Disorders of Three Siblings*, *supra* note 203.

207. See Carr, *Children with Mental Illnesses*, *supra* note 204.

how children and families are affected by rapid decentralization of public education and mental health systems.”²⁰⁸ It is no surprise that the Charter Management Organizations that run numerous schools, and can benefit from economies of scale, have been the first charter schools able to create programs for students with severe emotional and behavioral issues.²⁰⁹

The treatment of students with disabilities has improved over time, but much still needs to be done.²¹⁰ The problems of identification, exclusion, and service provision are the subject of a class action litigation filed by the Southern Poverty Law Center in 2010.²¹¹ The Complaint did not target individual charter schools, but instead faulted the state and the RSD for failing in their statutorily mandated oversight duties under the IDEA and Section 504.²¹² The Complaint was not so much a call for action by charter schools as it was a call for action by the state, the RSD, and the OPSB to create order out of the chaos resulting from a decentralized special education system.²¹³

The OPSB and the RSD recognized these problems and are pursuing two separate avenues to address them. The first is centralizing certain aspects of special education. In March of 2014, the OPSB and the RSD entered into a Cooperative Endeavor Agreement (CEA) to ensure shared responsibilities for programs targeted to high needs students, including students with disabilities.²¹⁴ Under the CEA, the OPSB and the RSD agree to open citywide therapeutic programs by 2015-16 to address the shortage in the private sector and within schools.²¹⁵ In addition, the CEA creates a citywide exceptional needs fund to help schools with the costs of

208. *Id.*

209. Williams, *With Help of School Counseling, New Orleans Family Tackles Mental Health Disorders of Three Siblings*, *supra* note 203.

210. CARR, *supra* note 24, at 142.

211. Complaint at 17–19, P.B. v. Pastorek, No. 2:10-cv-04049 (E.D. La. Oct. 26, 2010); THE COWEN INST., 2014 REPORT, *supra* note 2, at 12.

212. Complaint, *supra* note 211, at 17–19.

213. The lawsuit was recently settled. Danielle Dreilinger, *Landmark New Orleans Special Education Case Settled, Parties Say*, TIMES-PICAYUNE, Dec. 19, 2014, http://www.nola.com/education/index.ssf/2014/12/parties_ask_federal_judge_to_a.html.

214. Press Release, Orleans Parrish Sch. Bd. & Recovery Sch. Dist., Orleans Parrish School Board and Recovery District Collaborate to Expand Access to High Quality Programs and Facilities for All Students (Mar. 18, 2014), *available at* http://www.rsdl.net/ourpages/auto/2014/3/19/54148806/RSD_OPSB_Joint_Press_Release_3%2018%2014.pdf.

215. *Id.*; see Kamenetz, *supra* note 3; Williams, *New Orleans Public Schools Have Seen Successes, Challenges in Past Year, New Report Says*, *supra* note 13; Williams, *With Help of School Counseling, New Orleans Family Tackles Mental Health Disorders of Three Siblings*, *supra* note 203.

servicing students with the highest needs.²¹⁶ The CEA also divides up responsibility for certain legal obligations for which it was difficult to ascertain responsibility in a decentralized system of schools. The CEA clarifies that the OPSB will be responsible for “child find” for all students not within public schools, including preschools.²¹⁷ The OPSB will provide special education services to preschool students, and the parties will work together to place preschool students identified as disabled. The OPSB also committed to providing all special education services to students in private schools.²¹⁸ Finally, in the 2015-16 school year, the RSD will be piloting a project to ensure students receive out of school mental health services.²¹⁹

The importance of the CEA cannot be overstated—not only for the services it will provide to students with disabilities, but also for the ground-shaking paradigm shift it represents in New Orleans. For nine years after the storm, there was neither coordination nor oversight of special education services—an area of education that practically demands centralized planning and economies of scale.²²⁰ Instead, it was expected, or more likely hoped, that the market of school choice would fill any unmet demand. The recognition by the OPSB and the RSD that the unregulated system of schools would not step in to serve the needs of students with disabilities, and that oversight and centralization were necessary, was a major breakthrough in their relationship and a major break from the post-Katrina model.²²¹

But it is not a clean break. There is still hope that specialized schools designed to meet the demands of students with disabilities will spring out of the decentralized system. There are efforts to create entire schools for children with mental or behavioral health needs.²²² The OPSB recently approved a charter application for a school that specializes in serving students with reading disabilities such as dyslexia, and another is being planned to serve students with emotional needs.²²³ This follows a nationwide trend of creating

216. Press Release, Orleans Parrish Sch. Bd. & Recovery Sch. Dist., *supra* note 214; see THE COWEN INST., 2014 REPORT, *supra* note 2, at 5.

217. Press Release, Orleans Parrish Sch. Bd. & Recovery Sch. Dist., *supra* note 214.

218. *Id.*; see also THE COWEN INST., 2014 REPORT, *supra* note 2, at 5.

219. Kamenetz, *supra* note 3.

220. *Id.*; Garda, *Special Education in Charter Schools*, *supra* note 186, at 670–73, 694–710.

221. THE COWEN INST., 2014 REPORT, *supra* note 2, at 26.

222. Carr, *Children with Mental Illnesses*, *supra* note 204.

223. Danielle Dreilinger, *Orleans Parish School Board Votes to Ask for Return of John McDonough High*, TIMES-PICAYUNE, July 22, 2014, <http://www.nola.com/>

specialized schools for students with disabilities. There are over one hundred charter schools across the country focused exclusively on special education students, and their popularity is growing.²²⁴ Parents often select the disability focused charter schools because their specialization results in better services to their children.

New Orleans has steadily improved access, retention, and service provision for students with disabilities in the last couple of years. It has done so by centralizing services for students who need it and plans on specializing schools for students who want it.

C. Equity for English Language Learners

The growth in the number of English Language Learner (ELL) students is being felt in many charter schools nationwide because federal civil rights laws mandate that charter schools both identify ELLs and provide them with effective education.²²⁵ This challenge is on full display in New Orleans, where there has recently been a large influx of non-native English speakers, particularly of Central American and Vietnamese students. This puts tremendous strain on a charter school system ill-prepared to serve these students.²²⁶

A recent survey by the Southern Poverty Law Center (SPLC) and VAYLA (Vietnamese American Young Leaders Association) found that the enrollment and registration practices of more than half of the

education/index.ssf/2014/07/orleans_parish_school_board_as.html [hereinafter Dreilinger, *Orleans Parish School Board Votes to Ask for Return of John McDonough High*]. Cypress Academy, focusing on students with dyslexia, is scheduled to open in the Fall of 2015. *Thoughts on a Cypress Academy Education*, CYPRESS ACADEMY, <http://www.cypressacademy.org/thoughts-on-a-cypress-academy-education.html>. Noble Minds is a proposed school with an emotional health emphasis, specializing in addressing students with emotional needs. See Mark Waller, *Education Entrepreneur Vote Winner Looks to Build a School That Addresses Academics and Emotions*, TIMES-PICAYUNE, Sept. 26, 2014, http://www.nola.com/business/index.ssf/2014/09/education_entrepreneur_vote_wi.html.

224. MICKELSON ET AL., *supra* note 70, at 14–16; Arianna Prothero, *Special Education Charters Renew Inclusion Debate*, EDUC. WK. (Sept. 16, 2014), <http://www.edweek.org/ew/articles/2014/09/17/04specialneedscharters.h34.html>.

225. 20 U.S.C. § 1703(f) (2012); KEVIN MURRAY, PROGRAM ON HUM. RTS. & GLOBAL ECON., AT WHAT COST?: THE CHARTER SCHOOL MODEL AND THE HUMAN RIGHT TO EDUCATION 19, 21 (2014); Black, *supra* note 183, at 474 (discussing how charter schools nationwide are accused of denying admission to ELL students); *Charter Schools Face Challenge of English Language Learners*, NAT'L CHARTER SCH. RESOURCE CTR. (May 2012), <http://www.charterschoolcenter.org/newsletter/may-2012-charter-schools-face-challenge-english-language-learners>.

226. See Danielle Dreilinger, *New Orleans' Charter School System Ill-Prepared for Jump in Central American Immigrants*, TIMES-PICAYUNE, Aug. 22, 2014, http://www.nola.com/education/index.ssf/2014/08/central_american_immigrants_po.html [hereinafter Dreilinger, *Jump in Central American Immigrants*].

city's public schools "violate federal law and discourage enrollment of immigrant children and families."²²⁷ The lack of translated enrollment documents and services is also prevalent.²²⁸ The Vietnamese Young Leaders of New Orleans filed a complaint with the Department of Justice and the Office of Civil Rights against the RSD, the OPSB, and independent charter operators alleging that the failure of charter schools to provide interpretation and translation services, and important information in a language that could be understood by non-native speakers, violated Title VI of the Civil Rights Act by discriminating on the basis of national origin.²²⁹ The parties reached a Resolution Agreement wherein the schools agreed to provide the requested document translation and translation services.²³⁰

But translation services are the minimum legal requirement; schools are compelled to take "appropriate action" to educate ELL students,²³¹ and that has proven to be a challenge. ELL students are the most unevenly distributed of the vulnerable student populations in New Orleans. During the 2011–12 school year, 45% of the schools in the system had no ELL students, 50% had between 1% and 10%, and four schools had an ELL population of 15% or higher.²³² The likely reason for this vast disparity in numbers is because only a small number of schools have the capacity and programs to educate ELL students, and parents flock to those programs.²³³

The concentration of ELL students into a limited number of schools will continue so long as ELL programs remain uncoordinated and decentralized.²³⁴ Much like special education, provision of ELL

227. Kari Dequine Harden, *N.O. Public Schools Accused of Allegedly Violating Federal Law*, LA. WKLY. (Oct. 20, 2014), <http://www.louisianaweekly.com/n-o-public-schools-accused-of-allegedly-violating-federal-law/>.

228. Danielle Dreilinger, *Most New Orleans Public School Registration Forms May Have Discouraged Immigrants, Report Says*, TIMES-PICAYUNE, Oct. 15, 2014, http://www.nola.com/education/index.ssf/2014/10/most_new_orleans_public_school_2.html.

229. Complaint, Asian Am. L. Def. & Educ. Fund, Discrimination Against National Origin Minority Students and Parents Who Are Limited English (LEP) in Orleans Parish School Board (OPSB) and Recovery School District (RSD) Schools (Aug. 2, 2013), <http://aaldef.org/VAYLA%20AALDEF%20DOJ%20OCR%20Complaint.pdf>.

230. Resolution Agreement (No. 06131645), available at <http://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/06131645-b.pdf>.

231. 20 U.S.C. § 1703(f) (2012).

232. THE COWEN INST., 2014 REPORT, *supra* note 2, at 11.

233. See Dreilinger, *Jump in Central American Immigrants*, *supra* note 226.

234. See THE COWEN INST., 2014 REPORT, *supra* note 2, at 11; Dreilinger, *Jump in Central American Immigrants*, *supra* note 226.

services is expensive and requires a high level of expertise that is difficult to achieve in a one-school LEA. ELL students stretch resources, and the added cost is not covered by federal or state money.²³⁵ This makes it difficult, if not impossible, to create an effective ELL program in a single school that serves a limited number of ELL students.²³⁶ Like special education, the schools with the best ELL programs are part of charter networks that can leverage their budgets and services across numerous schools.²³⁷ Because most schools lack such services,²³⁸ parents are understandably drawn to the schools with any programs, creating a vicious circle of concentration of ELL students into a limited number of schools.

Despite commentators recognizing the growing need for the shared services of an outside agency to offer ELL to students in the various charter schools, it is not occurring.²³⁹ No mention of ELL services exists in the CEA, and there is no indication that the OPSB and the RSD are willing to work together to ensure ELL services are provided in each school instead of only in select schools.

Rather, the opposite approach is being taken, and specialization, rather than centralization, seems to be the route currently being pursued to ensure equality for ELL students. OPSB recently approved a new charter school, Foundation Prep, to cater to the ELL needs of the immigrant population in New Orleans East.²⁴⁰ The school was approved, in part, because it met “the needs of the targeted community.”²⁴¹ Unlike access, retention, and special education, where some centralization of planning and service

235. See Claudio Sanchez, *New Orleans Schools Face a Surge of Unaccompanied Minors*, NPR.ORG (Oct. 2, 2014), <http://www.npr.org/blogs/ed/2014/10/02/351438375/new-orleans-schools-face-a-surge-of-unaccompanied-minors>.

236. See MURRAY, *supra* note 225, at 20; THE COWEN INST., 2014 REPORT, *supra* note 2, at 11.

237. See Katy Reckdahl, *New Orleans Charter Schools Scramble to Teach Non-English Speakers*, HECHINGER REP. (Mar. 23, 2014), <http://hechingerreport.org/new-orleans-charter-schools-scramble-teach-non-english-speakers/>.

238. See VIETNAMESE AM. YOUNG LEADERS ASS'N OF NEW ORLEANS, *SIX PUBLIC HIGH SCHOOLS, SIX YEARS AFTER THE STORM 22* (2012), http://www.vaylano.org/wp-content/uploads/2012/05/VAYLA_Raise_Your_Hand_Campaign_Full_Report.pdf.

239. THE COWEN INST., 2014 REPORT, *supra* note 2, at 11.

240. Danielle Dreilinger, *Orleans Parish School Board Committee OK's Two New Charters for 2015*, TIMES-PICAYUNE, July 17, 2014, http://www.nola.com/education/index.ssf/2014/07/orleans_parish_school_board_co_12.html.

241. NAT'L ASS'N OF CHARTER SCH. AUTHORIZERS, *CHARTER SCHOOL APPLICATION RECOMMENDATION REPORT 6* (2014), <http://www.opsb.us/wp-content/uploads/2012/10/NACSA-Recommendation-Foundation-Prep.pdf>.

coordination is occurring, ELL service provision, up to this point, has been left to the system of schools to address unmet demand.

III. THE IMPACT OF MOVING TO A SYSTEM OF SCHOOLS ON EQUITY

Achieving equality for vulnerable students after Katrina has been an ongoing struggle in New Orleans. Equal educational opportunity was practically non-existent for vulnerable students during the first seven years when there was virtually no equality of access and little to no oversight over retention, special education, or ELL policies. The decentralized and loosely monitored system of schools created a balkanized system, with the needs of vulnerable students often left unmet. Parent choice also played a role in the concentration of students by abilities, class, and race, though parent choice was, and continues to be, circumscribed.

The two most powerful educational entities in town—the OPSB and the RSD—did not centralize any services until 2012, when access was mostly unified through OneApp, and expulsions were unified through the expulsion review board and policy. In 2014, with execution of the CEA, services were centralized for special education services, but at the same time specialized schools for students with disabilities and ELLs were opened. New Orleans’s dual approach to ensuring equity—centralizing and unifying services for all schools on the one hand while encouraging specialized schools to meet unmet demands of vulnerable students on the other—brings to the fore a debate that has occurred in education reform for two decades: how to define educational equity.

A. Centralized Planning or the “Invisible Hand”

New Orleans is the first city to stand at the precipice of deciding how best to ensure equity in a virtually all-charter school system. One route relies on centralized planning, coordination, and resource sharing to ensure each school provides equal access and education to all types of students. This is the accepted version of equality employed by schools since the Supreme Court uttered its most important phrase in the twentieth century: “separate educational facilities are inherently unequal.”²⁴² *Brown* was about anti-subordination and inclusion.²⁴³ This inclusion view of equality requires each school to serve students of all races and abilities.

242. *Brown v. Board of Education*, 347 U.S. 483, 495 (1955).

243. *See id.*; James, *supra* note 70, at 1128.

Nearly every civil rights statute in the field of education is founded on this principle. Title VI of the Civil Rights Act of 1964 prohibits segregation “in the schools of the local educational agencies of any State.”²⁴⁴ The Equal Education Opportunity Act of 1974 prohibits “segregation by an educational agency of students on the basis of race, color, or national origin among or within schools”²⁴⁵ The IDEA allows “separate schooling . . . only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.”²⁴⁶ The Americans With Disabilities Act and Section 504 of the Rehabilitation Act similarly require schools to educate students with disabilities in inclusive settings with general education students rather than in separate schools.²⁴⁷

The inclusion view of equality, which has endured for over sixty years, demands that every school attempt to educate every type of student regardless of ability, aptitude, behavior, race, or socioeconomic status. It requires massive coordination and economies of scale, especially to provide appropriate integrated services for ELLs, students with disabilities, and students that are particularly challenging.²⁴⁸

A few signs point to New Orleans pursuing inclusion equality through collective planning and centralized control: creation of OneApp, centralizing expulsions, and execution of the CEA. The RSD and the OPSB came to recognize the importance of cooperation

244. 42 U.S.C. § 2000d-6 (2012). Interestingly, the regulations under Title IX prohibiting gender discrimination in education were amended in 2006 to expressly permit single-sex schools. 20 U.S.C. §§ 1681–1688 (2012). For a discussion of this change, see David S. Cohen & Nancy Levit, *Still Unconstitutional: Our Nation’s Experiment with State-Sponsored Sex Segregation in Education*, 44 SETON HALL L. REV. 339 (2014); Diane Heckman, *Title IX Marks Its 35th Anniversary by Opening the Doors to Single-Sex Public Elementary and Secondary Schools*, 237 EDUC. L. REP. 1, 4 (2008).

245. 20 U.S.C. § 1703(a) (2012). For an explanation of the laws affecting English Language Learners, see Rosemary C. Salomone, *Educating English Language Learners: Reconciling Bilingualism and Accountability*, 6 HARV. L. & POL’Y REV. 115 (2012).

246. 20 U.S.C. § 1412(a)(5) (2012).

247. 34 C.F.R. § 104.34 (2014); 34 C.F.R. § 104 App’x A, Para. 24 (2014); *Essen v. Bd. of Educ.*, No. 92 CV-1164, 1996 WL 191948 (N.D.N.Y. Apr. 15, 1996) (denying motion to dismiss claim under section 504 of Rehabilitation Act of 1973 and the Americans with Disabilities Act based on policy of failing to modify curriculum to permit education in the least restrictive environment).

248. ANNENBERG INST. FOR SCH. REFORM, *supra* note 143, at 4; Cook, *supra* note 69.

and systemic planning to achieve equity²⁴⁹ and that the services for truants, special education students, and all at-risk youth were “scattershot, overlapping, or non-existent.”²⁵⁰ But it remains to be seen whether these are the first steps towards more centralization to ensure equality or merely a stop-gap measure until the system can create a thick “portfolio”²⁵¹ of autonomous and specialized schools to meet the unique demands of each student in the system. Even though the RSD no longer directly operates any schools, and is instead focusing on oversight of its charter schools and managing centralized services in New Orleans,²⁵² all signs point to the current centralization acting as a bridge to a more fully functioning decentralized system.

First, it is unlikely that one unified or even cooperative governance structure will exist in New Orleans for a very long time. The OPSB will not be granted its wish that all schools return to its control and the RSD cease operations in New Orleans.²⁵³ The OPSB asked the legislature to compel return of high performing RSD schools to its control but was rebuffed. Instead, the legislature gave each school a choice of whether to stay with the RSD or move to the OPSB, and even upon such a return, it would allow them to retain their LEA status.²⁵⁴ Only two schools have elected to return to OPSB control, and it is doubtful that many more will.²⁵⁵ In fact, there may be

249. Press Release, Orleans Parrish Sch. Bd. & Recovery Sch. Dist., *supra* note 214.

250. Dreilinger, *In Move Towards Cooperation*, *supra* note 53.

251. The term “portfolio school district” is often used to describe the emerging model of educational governance that relies on numerous autonomous and independent operators to run schools rather than a centralized school board. Daniel Kiel, *The Endangered School District: The Challenge and Promise of Redistributing Control of Public Education*, 22 B.U. PUB. INT. L.J. 341, 346–52 (2013).

252. Dreilinger, *Recovery School District Downsizes from 568 Employees to 92*, *supra* note 40.

253. Danielle Dreilinger, *New Orleans’ Two School Systems Close to Agreement to Transfer Shared Services*, TIMES-PICAYUNE, Feb. 17, 2014, http://www.nola.com/education/index.ssf/2014/02/new_orleans_two_school_systems.html; Daniele Dreilinger, *What’s the Point of the Recovery School District Now? Critics Wonder*, Sept. 26, 2014, http://www.nola.com/education/index.ssf/2014/09/whats_the_point_of_the_recover.html [hereinafter Dreilinger, *What’s the Point of the Recovery School District Now?*].

254. THE COWEN INST., 2014 REPORT, *supra* note 2, at 4.

255. Marta Jewson, *Second New Orleans Charter School Opts for Return to Local Control*, NEW ORLEANS ADVOC. (Jan. 15, 2015), <http://www.theneworleansadvocate.com/news/11237604-123/second-new-orleans-charter-school>; *see also* Danielle Dreilinger, *It’s a Wrap: 1 of 36 Recovery Charter Schools Wants to Transfer to Orleans Parish*, TIMES-PICAYUNE, Dec. 20, 2014, http://www.nola.com/education/index.ssf/2014/12/its_a_wrap_1_of_36_recovery_ch.html#incart_river; Jessica Williams, *More Charter Schools Now Eligible to Join Orleans Parish School Board, but Will They Take the Leap?*, LENS (Nov. 13, 2013), <http://thelensnola.org/2013/11/>

movement the other way—from OPSB control to state control—because, as of 2012, if OPSB charters do not like how they are treated by the OPSB they can petition to change to a charter under state control.²⁵⁶

Because of its failure to regain the schools via the legislature, the OPSB sought the help of the courts. This approach also failed, as the Louisiana Supreme Court rejected the OPSB’s lawsuit seeking return of all schools to its control in March of 2014.²⁵⁷ Despite the original intent of the RSD to be a stopgap measure to turn around schools and then return them to local control,²⁵⁸ it is now a permanent fixture in New Orleans.²⁵⁹

Because the RSD will not be displaced, cooperation between the OPSB and the RSD is necessary to achieve any centralized planning. Execution of the CEA is one step in this direction, but promising to do something and actually doing it are two very different things. Even after execution of the CEA, the OPSB and the RSD have fought more than cooperated.²⁶⁰ The two parties continue to battle

13/more-charter-schools-now-eligible-to-join-orleans-parish-school-board-but-will-anyone-take-the-leap/ (stating that Charter school operators are wary “of becoming part of a dysfunctional local school system” plagued by a feuding school board); Williams, *New Orleans Public Schools Have Seen Successes, Challenges in Past Year, New Report Says*, *supra* note 13 (“There is little desire (by charter schools) to return to the system of governance that previously existed.”).

256. 2012 Act 2 (codified as amended at LA. REV. STAT. ANN. 17:3983(B)(2)).

257. Danielle Dreilinger, *New Orleans’ State Takeover Schools Need Not Return to Local Control, Court Says*, TIMES-PICAYUNE, Apr. 1, 2014, http://www.nola.com/education/index.ssf/2014/04/new_orleans_state_takeover_sch.html.

258. DEBRA VAUGHAN ET AL., COWEN INST., TRANSFORMING PUBLIC EDUCATION IN NEW ORLEANS: THE RECOVERY SCHOOL DISTRICT 2003–2011 1, *available at* <http://www.coweninstitute.com/wp-content/uploads/2011/12/History-of-the-RSD-Report-2011.pdf> (“Intended as a mechanism for restructuring and reform, the RSD was never meant to be a permanent part of the public school governance landscape in New Orleans. Instead, the RSD was meant to take control of and turn around chronically failing schools for an initial period of five years. After that time, and assuming adequate school improvement, schools would be released from the jurisdiction of the RSD and returned to their local school board. Chartering schools became a strategy used by the RSD even before Katrina. In 2010, BESE approved a plan that allowed for the gradual transfer of some schools back to local control. As of 2011, the majority of schools in Orleans Parish are charter schools authorized by BESE under the auspices of the RSD, with the remainder being traditionally operated public schools directly run by the RSD and the OPSB and charter schools authorized by the OPSB.”); Bryant, *supra* note 10; Dreilinger, *What’s the Point of the Recovery School District Now?*, *supra* note 253.

259. Dreilinger, *What’s the Point of the Recovery School District Now?*, *supra* note 253.

260. Kari Dequine Harden, *Charter School Votes to Return to OPSB Governance*, LA. WKLY. (Dec. 14, 2014), <http://www.louisianaweekly.com/charter-school-votes-to-return-to-opsb-governance/> (explaining that OPSB recently considered suing RSD

over return of physical buildings from the RSD to the OPSB in spite of the CEA's promised cooperation.²⁶¹ The OPSB and the RSD still make decisions independent of one another, and ultimate unified governance seems unlikely, if not impossible.²⁶²

The second factor indicating that New Orleans is heading towards decentralization is that centralized services and unified planning run contrary to a fundamental underpinning of charter schools: site-level autonomy. The charter movement is founded upon freedom from regulations regarding budget, curriculum, and personnel.²⁶³ Autonomy and independence are the hallmarks of charter schools, and the charters in New Orleans have fought tooth and nail to retain them. If the RSD and the OPSB fail to cooperate moving into the future, the system of schools—those sixty-three LEAs and forty-four independent school boards—will certainly not seek service centralization or uniformity that infringe on autonomy. As stated by one of the most public and staunch charter supporters in New Orleans, Neerav Kingsland, “[t]he ultimate goal of the New Orleans public education system is not uniformity: it is diversity. And to misunderstand this is to misunderstand the fundamental design principle of our system.”²⁶⁴

Finally, it appears that the state legislature is expecting Charter Management Organizations, or CMOs, (non-profit organizations that operate multiple charter schools) to fill the centralized planning gap.²⁶⁵ CMOs educate over half the students in New Orleans.²⁶⁶ CMOs are not LEAs in the legal sense, but they often act like them in the practical sense, spreading costs and resources across the many schools they operate. The state has great confidence in CMOs, as seen by recent legislation making chartering easier for large CMOs with proven records of success.²⁶⁷ It is unknown if the state believes

about school openings and the relationship remains tense); Dreilinger, *In Move Towards Cooperation*, *supra* note 53.

261. Dreilinger, *Orleans Parish School Board Votes to Ask for Return of John McDonough High*, *supra* note 223; Danielle Dreilinger, *With John McDonough, All New Orleans' Takeover Schools Are on the Line, Supporters Say*, *TIMES-PICAYUNE*, Sept. 12, 2014, http://www.nola.com/education/index.ssf/2014/09/with_john_mcdonogh_all_new_orl.html.

262. Ayers, *supra* note 3; see THE COWEN INST., 2014 REPORT, *supra* note 2, at 4 (positing that long term shared governance seems unlikely).

263. Garda, *Special Education in Charter Schools*, *supra* note 186, at 663–66.

264. Kingsland, *supra* note 178.

265. 2012 Act 2 (codified as amended at LA. REV. STAT. ANN. 17:3983(3)(d)).

266. THE COWEN INST., 2014 REPORT, *supra* note 2, at 8.

267. 2012 Act 2 (codified as amended at LA. REV. STAT. ANN. 17:3983(3)(d)) (permitting successful schools meeting automatic renewal guidelines to open operate

that CMO centralized planning and service provision for the schools they control act as an adequate substitute for system-wide services, but it seems to be leaning that direction.

With cross-district and cross-school cooperation unlikely, it appears New Orleans is relying exclusively on the invisible hand of the market education system to create equity for at-risk students.²⁶⁸ This model requires belief in outcome or empowerment equality rather than inclusion equality.

While empowerment equality cannot necessarily be called “new”—it is possible to read *Brown* as simply empowering African-Americans to choose schools that were previously cut-off to them instead of compelling integration—it did not gain traction until the 1990s with the advent of outcome accountability and charter schools.²⁶⁹ This concept of equality found its popular roots in the influential government report, *A Nation at Risk*, concluding that there was a “rising tide of [educational] mediocrity that threatens our very future as a Nation and a people.”²⁷⁰ The implied message was that twenty-five years of striving for inclusion equality since *Brown* had yielded bad schools and that desegregation was mutually exclusive with quality.²⁷¹

In the push for improved performance during the decades that followed—the accountability and choice era—equality was repurposed from inclusion to outcomes and parental empowerment. When parents choose and student outcomes improve, the argument goes, equality is achieved irrespective of the demographics of the schools. Inclusion equality essentially transformed into equal access to quality schools through choice, and many embrace choice and specialized educational environments as the new civil rights

two additional schools without a formal charter application); see also LA. ADMIN CODE tit. 126 § 523 (2012).

268. The free-market education theorists believe that the marketplace is the ideal way to allocate resources because each individual will be led by the invisible hand to the social maximum position. James, *supra* note 70, at 1093–95.

269. See Robert A. Garda, Jr., *Coming Full Circle: The Journey from Separate but Equal to Separate and Unequal Schools*, 2 DUKE J. CONST. L. & PUB. POL’Y 1, 26–31 (2007).

270. NAT’L COMM’N ON EXCELLENCE IN EDUC., U.S. DEPT OF EDUC., *A NATION AT RISK* 1 (1983).

271. The implication is not true, as “the failures of integration have more to do with failures of implementation . . . than with the inherent failures of the concept of integration itself,” but the perception remains. James, *supra* note 70, at 1118.

movement.²⁷² Separate *but* equal became separate *and* equal, propped up by increasing liberty through choice.²⁷³

Many scholars argue that choice and equality cannot co-exist. Professor Osamudia James posits that “[i]f our goal is equality, then choice must be minimized,”²⁷⁴ while Professor Derek Black argues that the “individualized concept of education . . . lack[s] concern for equality[, and] inequality is a necessary ingredient to competition.”²⁷⁵ While it is true that inclusion equality and unmitigated school choice are likely mutually exclusive, market-based reforms certainly *can* advance empowerment equality. Even the staunchest opponents of choice recognize that “[i]n the abstract, choice can be an integral feature of law or policy that promotes equal rights and opportunities.”²⁷⁶

New Orleans may become the manifestation of this new equality. Achieving inclusion equity requires planning and centralization, while

272. See, e.g., Jonathan C. Augustine, *America's New Civil Rights Movement: Education Reform, Public Charter Schools and No Child Left Behind*, 59 LA. B.J. 340, 343 (2012); Heilig Vasquez, *Reframing the Refrain: Choice as a Civil Rights Issue*, 1 TEX. EDUC. REV. 83, 83 (2013), available at http://txedrev.org/wp-content/uploads/2013/11/Heilig_Reframing-the-Refrain_TxEDRev.pdf; Michelle Bernard, *School Choice Is the Most Critical Civil Rights Issue of Our Time: It's the Modern Extension of Brown v. Board of Education*, U.S. NEWS & WORLD REP. (Feb. 1, 2011), <http://www.usnews.com/opinion/articles/2011/02/01/school-choice-is-the-most-critical-civil-rights-issue-of-our-time>; Rand Paul, *PAUL: It's Time to Extend MLK's Dream to School Choice Aspirants and Nonviolent Offenders*, WASH. TIMES (Aug. 30, 2013), <http://www.washingtontimes.com/news/2013/aug/30/paul-extending-the-reach-of-kings-dream/#ixzz2dSXHp0Fy>; Reince Priebus, *Why School Choice is a Civil Rights Issue*, CNN.COM (May 17, 2014), <http://www.cnn.com/2014/05/17/opinion/priebus-school-choice/>; Diane Ravitch, *Julian Vasquez Heilig: Why School Choice Is NOT the Civil Rights Issue of Our Time*, DIANE RAVITCH'S BLOG (Dec. 2, 2013), <http://dianeravitch.net/2013/12/02/julian-vasquez-heilig-why-school-choice-is-not-the-civil-rights-issue-of-our-time/>. Even the NAACP has included choice and charter schools in its civil rights agenda. James, *supra* note 70, at 1099.

273. See, e.g., Derek W. Black, *Education's Elusive Future, Storied Past and the Fundamental Inequities Between*, 46 GA. L. REV. 557, 562–71 (2012); Susan E. Eaton & Gary Orfield, *Introduction to DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF BROWN V. BOARD OF EDUCATION* xiv (Gary Orfield & Susan E. Eaton eds., 1996); Garda, Jr., *supra* note 262, at 3–5; James, *supra* note 70, at 1115–16; Goodwin Liu, “History Will Be Heard”: *An Appraisal of the Seattle/Louisville Decision*, 2 HARV. L. & POL’Y REV. 53, 73 (2008); Daniel J. Losen, *Challenging Racial Disparities: The Promise and Pitfalls of the No Child Left Behind Act's Race-Conscious Accountability*, 47 HOW. L.J. 243, 244 (2004); Saiger, *supra* note 142, at 50 (“The choice debate, in many respects, instantiates the republic’s longstanding contest between equality and liberty.”).

274. James, *supra* note 70, at 1128.

275. Black, *supra* note 183, at 459.

276. James, *supra* note 70, at 1133; see also Kiel, *supra* note 17, at 377 (noting that portfolio school districts are at high risk of creating separate and unequal schools).

empowerment equality only requires entities to act in their own self-interest: parents choosing what is best for their children and schools specializing to meet their demands. This appears to be where New Orleans is headed—not by conscious choice but by default, an inherent outcome of the fractured governance in a system of schools. As Professor Julie Mead points out: “If you set up a system based on market principles that are designed to allow schools to serve particular interests, then we’re going to get pockets of interest.”²⁷⁷

This is already occurring in New Orleans. There are a wide variety of schools catering to numerous different types of students from which parents can choose.²⁷⁸ In high school alone, parents can select from schools focused on foreign language fluency,²⁷⁹ exposure to college courses,²⁸⁰ college preparation, STEM (science, technology, engineering, and math) for traditionally underserved students,²⁸¹ STEM for select students,²⁸² military and maritime studies,²⁸³ creative arts,²⁸⁴ and technical skills,²⁸⁵ as well as alternative schools designed for over-age and academically behind students,²⁸⁶ and a school

277. Prothero, *supra* note 224.

278. SIMS & VAUGHAN, BEATING THE ODDS, *supra* note 13, at 8. *But see* THE COWEN INST., 2014 REPORT, *supra* note 2, at 29 (“The quality and diversity of choices may be limited.”); Waller, *supra* note 223 (explaining that there has been a “proliferation of similar kinds of schools”).

279. *E.g.*, INT’L HIGH SCH. NEW ORLEANS, <http://www.ihsnola.org/about/> (last visited Mar. 15, 2015).

280. *E.g.*, BARD EARLY C. NEW ORLEANS, <http://www.bard.edu/ecno/> (last visited Mar. 15, 2015).

281. *E.g.*, NEW ORLEANS CHARTER SCI. & MATHEMATICS HIGH SCH., <http://www.noscihigh.org/about-sci-high.html> (last visited Mar. 15, 2015).

282. *E.g.*, *McDonogh 35 College Preparatory High School*, LA SCH. FINDER, <http://laschoolfinder.com/schools/detail/67/McDonogh-35-College-Preparatory-High-School> (last visited Mar. 15, 2015).

283. *E.g.*, NEW ORLEANS MILITARY & MARITIME ACADEMY, <http://nomma.net/> (last visited Mar. 15, 2015).

284. *E.g.*, *Academic Studio*, NOCCA, <http://www.nocca.com/academic-studio/> (last visited Mar. 15, 2015).

285. *E.g.*, *Innovations in Education*, FIRSTLINE SCH., <http://www.firstline.schools.org/innovations-in-education.html> (last visited Mar. 15, 2015) (“NOLA Tech will provide students the opportunity to earn a high school diploma and technical certificate concurrently.”).

286. *See, e.g.*, RENEW ACCELERATED HIGH SCH., http://www.renewschools.org/apps/pages/index.jsp?uREC_ID=182758&type=d&pREC_ID=457304 (last visited Mar. 15, 2015) (“ReNEW Accelerated High School . . . aims to push our most academically behind students by accelerating their graduation and becoming college ready. The innovative program is one-of-a-kind in the city, providing our over-age, under-credited students the ability to accelerate their high school course work and earning a true High School Diploma.”); THE NET CHARTER HIGH SCH., <http://thenetnola.org/> (last visited Mar. 15, 2015). The NET is an alternative

exclusively for expelled students.²⁸⁷ As noted above, there will soon be a school for dyslexic students and one for ELL students, and a proposed school will specialize in addressing students with emotional needs.²⁸⁸ There are even schools that promise diversity—not because they believe that separate is inherently unequal, but merely that parent-chosen integration is a superior education model.²⁸⁹ The education market continues to “recognize gaps in the city’s educational landscape and launch schools to meet these needs.”²⁹⁰

Moreover, the state is encouraging specialization. The RSD is recruiting charter operators to fill unmet needs.²⁹¹ The legislature is pushing for specialized charter operators as shown by their amendment to the charter-enabling statute in 2012 charging BESE with actively recruiting “chartering groups that offer a program of study or propose to offer a program of study that effectively addresses regional workforce needs, such as career and technical education, industry-based certifications, and vocational course work.”²⁹² The charter accountability system was also changed to encourage specialized charter schools by allowing for “alternative evaluation” of charter schools serving “unique populations.”²⁹³

Even when schools are not designed for specific student populations, the fact that few provide specialized services makes them popular for these types of students. For example, word spread about Esperanza Charter School’s ELL program, which has induced more

ungraded school designed to serve students who have dropped out, are over-age, have been expelled, or who struggle academically or behaviorally in a traditional high school setting. See *Louisiana Making Changes to Programs for At-Risk Students*, NO DROPOUTS, <http://www.nodropouts.org/blog/louisiana-making-changes-programs-risk-students?page=5> (last visited Mar. 15, 2015).

287. *E.g.*, CRESCENT CITY LEADERSHIP ACADEMY, <http://crescentleadershipacademy.com/> (last visited Mar. 15, 2015).

288. See Waller, *supra* note 223.

289. *E.g.*, BRICOLAGE ACADEMY OF NEW ORLEANS, <http://www.bricolagenola.org/> (last visited Mar. 15, 2015); MORRIS JEFF COMMUNITY SCHOOL, <http://www.morrisjeffschool.org/> (last visited Mar. 15, 2015); see also Leslie Jacobs, *New Orleans Charter Schools Are All The Same? Not True: Leslie Jacobs*, TIMES-PICAYUNE, Oct. 3, 2014, http://www.nola.com/education/index.ssf/2014/10/new_orleans_charter_schools_ar_1.html (“Morris Jeff Community School is purposefully attracting a diverse set of families to a school that is rooted in its surrounding Mid-City neighborhood.”).

290. Jacobs, *supra* note 289. There is also a school focused on computer literacy. See Dreilinger, *OneApp Lists More Than 130 New Programs*, *supra* note 103.

291. See SIMS & VAUGHAN, BEATING THE ODDS, *supra* note 13, at 8.

292. LA. REV. STAT. ANN. tit. 17, § 3981(8) (2012).

293. LA. ADMIN. CODE tit. 28, § 1103(B) (2014).

ELL students to apply.²⁹⁴ Any school that offers services for marginalized students can expect the same results. Whether a school is designed specifically for a student population or simply attracts particularized groups by providing services that do not exist elsewhere, the end result is concentrated student populations.

Of course, the current New Orleans schools are as far from achieving the new equality as the old New Orleans schools were from achieving inclusion equality. There is a full-throated debate about whether choice models improve student outcomes or narrow achievement gaps. Many believe school choice must be rejected because it will never achieve its promises.²⁹⁵ Others believe that inclusion equality also could not live up to its promises, and call for its abandonment.²⁹⁶ To some, “[t]he proper question is whether market based choice reduces equality *relative to* our already racialized and unequal system based upon geographic choice.”²⁹⁷

But in New Orleans, where the new system is still finding itself, the problem *should be* considered in the abstract. It is critical that the city decide if it wants empowerment equality or inclusion equality. Putting aside issues of implementation and assuming either model can achieve all that it promises, which should New Orleans strive to achieve? Inclusion equality promises diversity *in* schools; empowerment equality promises diversity *of* schools, but not within schools. Without a concerted effort to centralize services, the system will march automatically towards empowerment equality.

294. See Jacobs, *supra* note 289.

295. See, e.g., JEFFREY R. HENIG, *RETHINKING SCHOOL CHOICE: LIMITS OF THE MARKET METAPHOR* (1994); WHO CHOOSES? WHO LOSES? CULTURE, INSTITUTIONS AND THE UNEQUAL EFFECTS OF SCHOOL CHOICE 13-14, 189 (Bruce Fuller & Richard Elmore eds., 1996); Stephen Eisdorfer, *Public School Choice and Racial Integration*, 24 SETON HALL L. REV. 937, 943 (1993); Edward B. Fiske & Helen F. Ladd, *When Schools Compete: A Cautionary Tale*, 26 CAN. J. OF EDUC. 259, 261 (2000); James, *supra* note 70, at 1128.

296. See, e.g., *Missouri v. Jenkins*, 515 U.S. 70, 114 (1995) (Thomas, J., concurring); Derek A. Bell, Jr., *Brown v. Board of Education and the Interest Convergence Dilemma*, 93 HARV. L. REV. 518, 531 (1980); ROBERT L. CARTER, *A Reassessment of Brown v. Board*, in *SHADES OF BROWN: NEW PERSPECTIVE ON SCHOOL DESEGREGATION* 21 (Derrick Bell ed., 1980); Raneta J. Lawson, *The Child Seated Next To Me: The Continuing Quest For Equal Educational Opportunity*, 16 T. MARSHALL L. REV. 35, 37 (1991); LeRoy Parnell, *Suffering the Children: 35 Years of Suspension, Expulsion, and Beatings—The Price of Desegregation*, 7 HARV. BLACKLETTER J. 119, 125 (1990). For a thorough discussion of the critiques of *Brown*, see JAMES PATTERSON, *BROWN V. BOARD OF EDUCATION: A CIVIL RIGHTS MILESTONE AND ITS TROUBLED LEGACY* (2002).

297. Saiger, *supra* note 142, at 53–54.

B. Lessons from New Orleans

In some respects, drawing lessons from New Orleans to apply in other cities is difficult because its path has been so unique. While most major urban cities are slowly transitioning from a unified school system into a system of schools, New Orleans was catapulted into decentralization and is easing into centralization.

Transferrable lessons are also hard to glean because, unlike every other school system, New Orleans is almost all charter schools. Traditional arguments about “opt-out” and inequality between charters and traditional schools simply do not exist in a system that has collectively opted-out of traditional governance.²⁹⁸ There are no traditional schools on which to rely to educate the most challenging students. Instead of dumping difficult to educate students into the traditional schools, as happened in New Orleans directly after the storm and as occurs in many other cities, the charter system in New Orleans is now compelled to deal with them. The debate in New Orleans, as opposed to the rest of the country, is not *whether* to have charter schools, or how many to have, but *how* to make them work equally for all.

It is easy to argue that New Orleans is proof that equity cannot be found among decentralization, especially for vulnerable and subordinated groups. The unrestrained system of schools for the first seven years after Katrina almost completely failed special education students, English language learners, the poor, and the powerless. But such a conclusion, indeed any conclusion, from this time is too facile because the system was rebuilt virtually from scratch. During this period the school system was still physically rebuilding from tragedy, and the students were emotionally rebuilding.²⁹⁹ While Katrina’s waters receded quickly, the schools swayed and rocked for years, only recently stabilizing. The turbulence ebbed as the “portfolio” of schools grew, students found permanent schools, schools found permanent homes, and the RSD settled in. Lessons transferrable to other cities are difficult to glean from this unique rebuilding era. But a few things are certain.

298. Many critiques of charter school and choice presume their coexistence with traditional school districts and are hard to translate when the system is almost entirely charter schools. *See, e.g.*, Black, *supra* note 183; James, *supra* note 70.

299. Students in New Orleans are still suffering from high levels of Post-Traumatic Stress Disorder. *See* Jed Lipinski, *Black Teens in New Orleans Four Times as Likely to Have PTSD, Survey Shows*, TIMES-PICAYUNE, Nov. 18, 2014, http://www.nola.com/education/index.ssf/2014/11/black_adolescents_in_new_orlea.html.

First, the free market of schools does not operate like a free market in all respects. The reasons are many, but one critical reason displayed in New Orleans is that education consumers do not act rationally, or at least how economists expect them to act.³⁰⁰ Contrary to expectations, parents often keep their children in low-performing schools and do not initially select high-performing schools. The behavior has been shown in New York³⁰¹ and is certainly the case in New Orleans.³⁰² Very few schools in the city, no matter how consistently poor-performing, have closed due to insufficient students or funds.³⁰³ Because market forces do not send poorly performing schools out of business, the chartering authorities are the primary agents closing charter schools in New Orleans.³⁰⁴

With the government, more than market demand, controlling school quality, it is imperative that the charter authorization process be rigorous and the threat of closure meaningful.³⁰⁵ While this may not be happening nationally, it appears to be occurring in New Orleans, as a large majority of charter applications are denied and a dozen charters have been shut down by the state.³⁰⁶ Before 2008,

300. See Susan L. DeJarnatt, *School Choice and the (Ir)rational Parent*, 15 GEO. J. ON POVERTY L. & POL'Y 1, 5 (2008); James, *supra* note 70, at 1104–05.

301. See LORI NATHANSON ET AL., HIGH SCHOOL CHOICE IN NEW YORK CITY: A REPORT ON THE SCHOOL CHOICES AND PLACEMENTS OF LOW-ACHIEVING STUDENTS, iv (2013).

302. See Cook, *supra* note 69.

303. See *id.*

304. See *id.* This is true in any portfolio school district. See Kiel, *supra* note 17, at 388.

305. See NATL. ALLIANCE OF PUB. CHARTER SCH., THE HEALTH OF THE PUBLIC CHARTER SCHOOL MOVEMENT: A STATE-BY-STATE ANALYSIS 4 (2014) [hereinafter NATL. ALLIANCE OF CHARTER SCH. AUTHORIZERS, THE HEALTH OF THE PUBLIC CHARTER SCHOOL MOVEMENT] (“It is preferable to have a small and consistent percentage of schools close, but the percentage should not be too high as such a number reveals inadequate approval and oversight processes.”); NATL. ALLIANCE OF CHARTER SCH. AUTHORIZERS, THE STATE OF CHARTER SCHOOL AUTHORIZING 2 (2013), <http://www.pageturnpro.com/National-Association-of-Charter-School-Authorizers/58053-The-State-of-Charter-School-Authorizing-2013/index.html#1> [hereinafter NATL. ALLIANCE OF CHARTER SCH. AUTHORIZERS, THE STATE OF CHARTER SCHOOL AUTHORIZING]; Black, *supra* note 183, at 486; Dylan P. Grady, *Charter School Revocation: A Method for Efficiency, Accountability, and Success*, 41 J.L. & EDUC. 513, 518 (2012).

306. Black, *supra* note 183, at 486; Cook, *supra* note 69. Louisiana has had a five percent charter school closure rate between the 2008 and 2012 school years, which is the second highest rate in the country. NATL. ALLIANCE OF CHARTER SCH. AUTHORIZERS, THE HEALTH OF THE PUBLIC CHARTER SCHOOL MOVEMENT, *supra* note 305, at 78; see also NATL. ALLIANCE OF CHARTER SCH. AUTHORIZERS, THE STATE OF CHARTER SCHOOL AUTHORIZING, *supra* note 305, at 10 (showing that there has been a steep decline in the authorization rate in Louisiana). BESE has not

there were no charter revocations because of the intense politicization of closure decisions.³⁰⁷ The revocation process was de-politicized in 2008, when the Louisiana Department of Education issued bright line renewal and revocation standards for the charters it oversaw. This change insulated authorizers from outside pressures when making controversial revocation and renewal decisions.³⁰⁸ Accordingly, crystal rules for charter revocation and renewal are a critical component of any choice system.

One important aspect of the free-market analogy remains true though: schools will specialize to meet unmet demands, and parents will often prefer specialized schools. An ELL school was created because there were insufficient ELL services offered in the existing schools. A special education school was created for the same reason. Future specialized schools will continue to crop up because of “market” forces and because the state is pushing for it. Parents may not be selecting schools as an economist would expect them to—based on school performance scores alone—but they are selecting them based on the “fit” between the school and the child.³⁰⁹ Left unchecked, specialized schools will flourish and many parents will select segregation.

A second clear lesson is that a nascent, unrestrained system of autonomous schools will leave hard to educate students behind. Once the education system became stable, the OPSB and RSD recognized that the loosely regulated system of schools produced winners and losers, which is unacceptable for public schooling. Some level of centralization and planning is necessary to ensure equity when a majority of the charter schools are independent LEAs.

In order to achieve this, the chartering authority must act in a planning and centralizing role, not merely an authorizing and oversight role, especially for authorizers of charter schools that are independent LEAs. Charter authorizers traditionally review applications, approve charter schools, and then get out of the way until it is time to determine if the charter should be renewed or

renewed several charters for poor academic performance. OSBORNE, *supra* note 5, at 16–17; Danielle Dreilinger, *30% of New Orleans Schools Face Charter Renewal Decisions This Fall*, TIMES-PICAYUNE, Sept. 3, 2014, http://www.nola.com/education/index.ssf/2014/09/30_of_new_orleans_charter_scho.html [hereinafter Dreilinger, *30% of New Orleans Schools Face Charter Renewal Decisions This Fall*].

307. See Garda, *supra* note 32, at 93–95.

308. See LA. ADMIN. CODE tit. 28, §§ 1501, 1503, 1701, 1703 (2012); see also Dreilinger, *30% of New Orleans Schools Face Charter Renewal Decisions This Fall*, *supra* note 306.

309. See Saiger, *supra* note 136, at 56.

revoked. The National Alliance of Charter School Authorizers publishes what is considered the gold standard in authorizer practices, and none of these Essential Practices deal with provision of services or centralizing and planning for the system of schools.³¹⁰ The RSD operated under this traditional standard for authorizers for the first seven years after Katrina, and gross inequities developed within the system. It is only once the RSD and BESE expanded their role beyond mere authorizer and evaluator that the necessary centralized planning and services could begin.

There is a nascent national trend for charters to partner with their authorizing school districts for resource sharing and planning, especially for special education.³¹¹ New Orleans is proof that such partnering is essential to ensure vulnerable populations are properly served. This is why the Annenberg Institute calls for a unified school plan and minimum academic, social, and educational opportunities that all taxpayer funded schools should provide in a system of charter schools to ensure proper provision of specialized services.³¹² The authorizer is the best-positioned entity to provide this unification.

Directly related, charter school autonomy must be circumscribed to allow the authorizer to control certain services centrally. I have argued elsewhere that charter schools should not be permitted to be independent LEAs for special education purposes.³¹³ The same argument would apply for ELL services as well. Charter schools should be compelled to work with authorizers for provision of these key services that require economies of scale and high levels of expertise, at least until they prove they can provide these services independently. Charters should have to earn their autonomy when it comes to serving vulnerable groups, rather than being granted it and waiting to see if they fail.

A third important lesson—at least in districts where the state has taken over large swaths of schools—is that there must be either an exit strategy or a concrete division of responsibility between the state takeover district and the local school district. Having two powerful school districts in one geographic area has proven contentious and

310. See NATL. ALLIANCE OF CHARTER SCH. AUTHORIZERS, *THE STATE OF CHARTER SCHOOL AUTHORIZING*, supra note 305, at 14.

311. See Arianna Prothero, *Often Foes, Some Districts and Charters Forge Partnerships*, EDUC. WK. (Oct. 14, 2014), <http://www.edweek.org/ew/articles/2014/10/15/08collaboration.h34.html>.

312. ANNEBERG INST. FOR SCH. REFORM, supra note 143, at 4.

313. Garda, *Special Education in Charter Schools*, supra note 186, at 694–701.

confusing in New Orleans.³¹⁴ Uncertainty over how long the RSD would be present and when, and under what circumstances, schools would be returned to the OPSB inhibited by any centralized planning. There was no centralized planning in New Orleans until 2012, when it became apparent that the RSD was a permanent fixture. Once the legislature would not compel the RSD to turn its schools back over to the OPSB, and no RSD charter would voluntarily submit to OPSB control, the OPSB realized the RSD was here to stay and that all the schools would inevitably become charter schools. Only once the new system found firm footing was there any meaningful systemic planning, and that is when the education of vulnerable populations began to improve. This problem could have been solved up front, with a specific and enumerated plan for return of schools to local control.

It is also important that the exit and return plans hinge on the performance of the school board as well as the performance of the schools. It defies common sense for a state to take a failing school from a district, turn it around to a high performing school, and then turn it back over to the district that mismanaged it in the first place. But this is precisely how most state takeover plans are conceived—as stopgap measures until the school is turned around. It is much wiser to focus on the quality of the school *and* the quality of the return district. This was proposed, and rejected, in New Orleans. Instead, the decision has been left up entirely to the RSD charters on whether to return to the OPSB, and even if they return, they retain their independent LEA status.³¹⁵ Most in the city agree that the elected school board, rather than the state, should be in charge of the schools, but the RSD charters will not voluntarily return to the OPSB because they believe it is incompetent, divided, and contentious.³¹⁶ If specific and concrete school district performance benchmarks were created, just as specific and concrete school performance benchmarks exist, the return decision could be taken out of the hands of charter schools, and there would be a finite term on the state takeover school district.

Finally, and maybe most importantly, the system as a whole must decide what type of equality it wants to pursue: inclusion equality, empowerment and outcome equality, or some mix of the two. Without deliberate planning, outcome equality becomes the default mode that inevitably grows out of decentralization. Pursuit of

314. See Garda, *supra* note 32, at 80–87.

315. See LA. REV. STAT. tit. 17, § 3973(2)(b)(vii) (2013); Garda, *supra* note 32, at 82–86.

316. See THE COWEN INST., 2014 REPORT, *supra* note 2, at 4.

inclusion equality requires more planning and a conscious desire to pursue. New Orleans never had the opportunity for such planning on the heels of Katrina and has still not engaged in meaningful, coherent dialogue on this critical question. Without it, New Orleans is unwittingly choosing the outcome and specialization route to equality.

CONCLUSION

The charter school system in New Orleans is permanent and enduring. Vested interests in the city, most importantly parents, strongly support choice and charter schools.³¹⁷ The question in New Orleans is not whether to embrace or discard them, but how to ensure that they create equal educational opportunity within the system of schools.

The New Orleans system of schools lacks a uniform vision for achieving equity for its most challenging students. Without any single entity in control, there is no agreed-upon goal for where the system should stabilize. One endpoint is achieving equality through a thick market of schools serving the unique needs of individual students. While the city is *very* far from a system of high-quality, specialized schools serving the needs of all students, including vulnerable ones, it is unclear whether this is the vision of equality New Orleans is trying, or even wants, to achieve. But this is the method of achieving equality—concentrated and specialized—that New Orleans will fall into automatically because it happens by default, without planning, when parents and schools look after their own individual interests.

If New Orleans seeks to achieve inclusion equality, where each school can serve every type of student, much work needs to be done. The OPSB and the RSD must put aside their differences and work together to create uniform policies and centralized services. Charter schools must relinquish some of their cherished autonomy and accept that certain vulnerable students cannot be served properly in a single-school LEA. Coordination, cooperation, and unified vision must somehow be found in a decentralized system of schools.

317. Ninety percent of parents think choice is important, while sixty-six percent believe schools have improved, and seventy-eight percent support charter schools. OSBORNE, *supra* note 5, at 10; *see also* Stephanie Grace, *The Daily Beast Congratulates Mitch Landrieu on School Reform*, GAMBIT WKLY. (Dec. 18, 2012), <http://www.bestofneworleans.com/blogofneworleans/archives/2012/12/17/the-daily-beast-congratulates-mitch-landrieu-on-school-reform> (discussing how Mayor Landrieu champions charter schools).