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Unchartered: The Future of Pennsylvania's Public Schools Depends on the Elimination of Charter Schools from System

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The Covid-19 pandemic uniquely burdened school districts across the country and exposed the weaknesses of many public-school systems and facilities. In Philadelphia, traditional public schools (TPSs) remained closed until April 2021 because most of the aging buildings lacked the space, ventilation systems, or adaptability to allow the students to return safely. Although the pandemic was surely unusual, the school district's inadequacy in the face of the challenge was not an aberration. Historically, Philadelphia's public schools have struggled. At the turn of the century, Philadelphia's public school system was in such bad shape that the state took over the management of the schools. The state, which had passed legislation creating a charter school system in 1997, assumed control of the struggling Philadelphia public school system in 2001.¹ For seventeen years, from 2001 until 2018, when control was returned to the Philadelphia school board, the state government operated the School District of Philadelphia. The temporal proximity of the state's passing of the charter school law and the state's takeover of the Philadelphia schools resulted in the state, not the city, establishing and rapidly expanding the charter school system in the city, granting dozens of charters in Philadelphia during the seventeen years of state control.

The irony is that the state granted a proliferation of charters while it acted to improve the management of the city public school system. This article will argue that the Pennsylvania charter school law and the system it created are inherently flawed, and, as a result, the increase in the number of charter schools in relation to public schools has since tragically and increasingly crippled the TPSs that the state purportedly attempted to save. Charter schools are unlike public schools in that they accept and deny students based on self-determined, often arbitrary standards, and, although they are funded equally to public schools, they do not assume the same

¹ *The History of the State Take Over of the School District of Philadelphia*, SAVE OUR SCHOOLS PENNSYLVANIA <https://www.pa-sos.org/history-of-pa-takeover-of-phil/> (last visited July 29, 2021).

responsibilities, mandates, or costly burdens of that funding. Although they pose as public schools and operate on the taxpayer dime, they function largely as state-funded private schools, selecting and rejecting students based on ability, socioeconomic status, race, and value in terms of how much the state will pay for each student.² This examination of the system will establish that charter schools are really the worst of both worlds, operating with little regulation as exclusive, arguably for-profit entities while being funded by the public they fail to equitably serve.

The charter school system as it currently exists in Pennsylvania denies economically disadvantaged and minority students their right as established in the education clause of the state constitution that “The General Assembly shall provide for the maintenance and support of a thorough and efficient system of public education to serve the needs of the Commonwealth.”³ Across the state, in financially challenged rural and urban districts, schools that were chartered to alleviate the failings of the public schools have exacerbated them instead. The establishment of charter schools in Pennsylvania has increased racial and socioeconomic segregation in the schools; that segregation has crippled the TPSs. The demographics of public schools, particularly in Philadelphia, have shifted negatively as charter schools skim both funding and whiter, wealthier, abler students from the public schools. Studies prove that segregation itself results in lower academic achievement in public school students, particularly for low-income and racial minority students.⁴ Charter schools also largely fail to adequately and equitably provide special education although they benefit financially from public funds allocated to special education

² Elizabeth Behrman, *Landmark Lawsuit Challenges How Pennsylvania Funds its Public Schools*, POST GAZETTE, Sept. 3, 2019. <https://www.post-gazette.com/business/bop/2019/09/03/Debate-continues-over-public-school-funding-in-Pennsylvania/stories/201908050109>.

³ CONSTITUTION OF THE COMMONWEALTH OF PENNSYLVANIA, art. III, section B, §14 (amended May 16, 1967, P.L.1037, J.R.3).

⁴ Emma Garcia, *Schools are Still Segregated, and Black Children are Paying a Price*, ECONOMIC POLICY INSTITUTE Feb 12, 2020, <https://www.epi.org/publication/schools-are-still-segregated-and-black-children-are-paying-a-price/>.

students and services. Charter schools invest less in students even as they evince financial failures worse than those they were intended to address. Charter school administrative salaries are bloated, and although the schools themselves are ostensibly non-profit entities, they often pay into for-profit organizations or simply enrich the school administrators at the expense of taxpayers and the state. The increased segregation and inequity, financial waste, and failure to remedy the problems of public schools are costly shortcomings that burden state taxpayers, the state itself, and, critically, the students and communities who are victimized by the system as it exists. Accordingly, this article concludes that the state must immediately cease the granting of charters, particularly in Philadelphia, and phase out the charter school system entirely, replacing it with meaningful reinvestment in traditional public schools.

HISTORY AND PURPOSE OF CHARTER SCHOOLS

Minnesota was the first state to authorize charter schools in 1991, In similar attempts to improve failing school systems in predominantly urban areas, other state governments passed similar state charter bills throughout the 1990s, with Pennsylvania passing a charter school bill in 1997.⁵ In 1994, the federal government created and provided \$4.5 million in federal funding for the Charter School Program (CSP) as part of the Improving American Schools Act, which revised and updated the Elementary and Secondary Education Act (ESEA) of 1965.⁶ By 2019, federal funding for charter schools had expanded to \$440 million, with each succeeding presidential administration requesting congressional authorization of increases to this broadly popular program.⁷ Just as the funding and proliferation of charters grew exponentially across the

⁵ Maia Cucchiara, *Charter Schools*, THE ENCYCLOPEDIA OF GREATER PHILADELPHIA, (2017), <https://phila.delphiaencyclopedia.org/archive/charter-schools/>.

⁶ Neil Campbell, *Modernizing the Federal Charter Schools Program Center for American Progress*, AMERICAN PROGRESS, Oct. 28, 2019, <https://www.americanprogress.org/issues/education-k-12/news/2019/10/28/475994/modernizing-federal-charter-schools-program/>.

⁷ *Id.*

nation, so did the breadth and elasticity of the structures and controls within which the states allowed charter schools to operate.

In many states, charter schools are free from the strict fiscal expenditure reporting and contracting regulations that control the operations of TPSs, meaning that they function wholly outside of the business or ethical standards required of other public enterprises.⁸ Exemption from reporting and compliance standards lowers the costs of operating charter schools, but they are generally funded equally to the TPSs in their districts. Many states allow charter schools to run surpluses or tap public emergency funds for discretionary use, and many charter schools are statutorily permitted to keep private all use and budgeting of public funds.⁹ The comparative lack of accountability that distinguishes charter schools from TPSs not only creates an unfair advantage for the schools, but, because charter schools are moving quickly towards the complete replacement and elimination of TPSs in many places, the modified structure under which they operate ultimately threatens the very existence of public access to and control of the public education that is guaranteed by the constitutions of all fifty states.¹⁰

Charter schools threaten the constitutional right to a public education in important ways distinct from the lack of transparency and accountability in their use of public funds. Because neither the charter schools nor the funds they receive are regulated or monitored as they are in the TPSs, special education students are particularly vulnerable to the failings of the “schools without rules,” as President Bill Clinton called them.¹¹ Charter schools, by their very nature, are uniquely ill-suited to provide special education, one of the most highly regulated components of

⁸ Derek W. Black, *Preferencing Educational Choice: The Constitutional Limits*, 103 CORN. LAW REV. (2018).

⁹ *Id.*

¹⁰ *Id.*

¹¹ Katharine Parnham, *Charter Schools and Special Education: Institutional Challenges and Opportunities for Innovation* (National Center for the Study of Privatization in Education Teachers College, Columbia University, Working Paper 242, Aug. 10, 2020).

public education.¹² Many charter schools, particularly those in urban areas, are strategically situated so as to make themselves accessible to a targeted and distinct population of students. A pattern among charter schools is to locate in economically disadvantaged districts, but in the most economically stable neighborhoods within those districts.¹³ Using that strategy, schools access funding tied to the broader area while making themselves most easily accessible to the wealthiest students within that particular district.¹⁴ A study of charter schools found that, from 2000-2010, the average increase in charter school enrollment in districts across the nation corresponded to a 12% increase in black-white school segregation in those districts, an increase six times higher than the associated neighborhood segregation of the districts.¹⁵

The segregative effects of the charter schools results in inferior educational outcomes, particularly for black and low-income students. Black children who attend high-poverty, predominantly black schools score an average of 20 points lower on standardized math tests than their counterparts who attend low-poverty, predominantly white schools.¹⁶ Significantly, studies have shown that socioeconomic and racial desegregation of schools significantly closes such achievement gaps, particularly between low-income black students and high-income white students.¹⁷ Studies in Maryland and Pennsylvania have found that demographically equivalent students randomly assigned to low-poverty schools achieve greater academic success than their peers assigned to high-poverty schools, and students in racially diverse elementary schools have

¹² *Id.*

¹³ Neubia L. Harris, *Adequate Education: The Disregarded Fundamental Right and the Resurgence of Segregation of Public Schools*, 45 MITCHELL HAMLINE L. REV. (2019).

¹⁴ *Id.*

¹⁵ Peter Rich, Jennifer Candipan, and Ann Owens, *Segregated Neighborhoods, Segregated Schools: Do Charters Break a Stubborn Link?* 58 (2) DEMOGRAPHY, 482, 471-98, Apr. 1, 2021. <https://read.dukeupress.edu/demography/article/58/2/471/169350/Segregated-Neighborhoods-Segregated-Schools-Do>

¹⁶ Emma Garcia, *Schools are Still Segregated, and Black Children are Paying a Price*, ECONOMIC POLICY INSTITUTE Feb 12, 2020, <https://www.epi.org/publication/schools-are-still-segregated-and-black-children-are-paying-a-price/>.

¹⁷ *Id.*

better short- and long-term academic success than similarly situated students who attend racially segregated schools.¹⁸ The fact that charter schools increase both socioeconomic and racial segregation in public schools has resulted in the crippling of the vulnerable schools they were intended to improve. The state argued that charter schools would improve academic outcomes for the most vulnerable of the city's students, but those students are now achieving less academic success and accessing fewer resources and programs in increasingly segregated and financially strapped schools.¹⁹

In 2001, in response to failing schools in poor and urban communities, President George W. Bush championed and Congress passed No Child Left Behind (NCLB), which not only exempted most charter schools from federal regulations if they achieved standards that were easier to achieve given the exemption itself and the fact that they could practice selective admission, it also offered students at failing schools the opportunity to transfer to the selective charter schools.²⁰ NCLB forced districts where TPSs were failing to provide transportation for selected students to their schools of choice.²¹ Struggling schools had their strongest students skimmed by charter schools that were not required to meet the federal, state, or local regulations imposed upon the TPSs. That skimming produced lower national test scores for the regulated public schools and all but ensured their decline. Nationwide, school districts that had for decades dragged their feet on intentional desegregation after *Brown v. Board of Education*²² used NCLB, voucher programs, and charter schools to reverse any progress that had been made towards the integration of schools. Title I funding was diverted to both for-profit management companies and

¹⁸ Neubia L. Harris, *Adequate Education: The Disregarded Fundamental Right and the Resurgence of Segregation of Public Schools*, 45 MITCHELL HAMLINE L. REV. (2019).

¹⁹ *Id.*

²⁰ *No Child Left Behind and Charter Schools: Giving Parents Information and Options*, U.S. DEPT. OF EDUCATION, (May 2007), <https://www2.ed.gov/nclb/choice/charter/nclb-charter.html>.

²¹ *The Facts about Supporting Charter Schools*, NO CHILD LEFT BEHIND, <https://www2.ed.gov/nclb/choice/charter/charters.pdf>. (last visited July 29, 2021).

²² *Brown v. Board of Education* 347 U.S. 483 (1954).

nonprofit charters, and, by 2009, when NCLB was falling out of favor, Congress passed and 46 states adopted the Common Core Standards, which prevented individual states from setting their own testing standards.²³ In 2015, Congress passed the Every Student Succeeds Act (ESSA), which still requires result reporting for vulnerable student groups, but gives the states broad latitude in enforcing accountability.²⁴ That latitude has enabled states like Pennsylvania to largely exempt charter schools from regulation and oversight.

By making outcome achievement a more important priority than civil rights reform, Congress and state legislatures have shifted their focus and the required reporting from equitable access to and facilities in the TPSs to benchmark establishment through standards, enforcement, and, ultimately, charter schools and voucher programs; this shift is arguably a result of the impossibility of directly linking student civil rights advancements to academic outcomes.²⁵ There is, however, this article argues, crucially a demonstrable link between the percentage of charter schools in urban districts and a consistent triad of negative outcomes: racial and socioeconomic segregation, underfunding of special education programs and services, and the rapid deterioration of the existing TPSs. The civil rights of minority students and particularly special education students must not be violated by the private use, misuse, or waste of federal, state and local funding. Special education funding was not traditionally tied directly to student outcomes, and while that has resulted in special education students being arguably the most poorly served by charters, public and Congressional focus on access and equity as established by special education needs may well model a necessary shift in the focus of the charter school funding determinations away from test scores and towards equity of access, opportunity, resources, and

²³ Kevin Carey, *The Demise of the Great Education Saviors*, THE WASHINGTON POST MAGAZINE, March 18, 2020, <https://www.washingtonpost.com/magazine/2020/03/18/charter-schools-testing-were-supposed-save-american-education-now-theyve-run-out-political-steam-what-went-wrong/>.

²⁴ *Id.*

²⁵ Derek W. Black, *Civil Rights, Charter Schools, and Lessons to be Learned*, 64 FLORIDA LAW REVIEW, 1723, 1727 (2013).

responsibility. Such an evolution is critically necessary to the future of TPSs and to economically disadvantaged, racial minority, and special education students in Pennsylvania.

PENNSYLVANIA

In Pennsylvania, charter schools were created to strengthen the TPSs by offering alternatives and facilitating competition, but they have instead skimmed the most stable student population and drained public resources from increasingly imperiled public schools that continue to serve the most vulnerable students with budgets that have been depleted by the funding of charter schools. The Pennsylvania legislature passed Charter School Law 1949 Act 14 in 1997; the Act as written was intended to accomplish six goals that focused on providing improved educational opportunities and innovations for students and teachers, choice for families, and assistance for the schools in establishing and meeting standards for outcomes and accountability.²⁶ The law allowed charters to be established by for-profit companies²⁷ and established charter appeal boards (CABs) with the power to reverse school districts' rejection of charters and conduct de novo reviews.²⁸ The state law also allows charter schools to set criteria consistent with the charter to evaluate and admit or reject prospective students.²⁹ Despite the state's efforts, in 2015, Pennsylvania ranked 47th in the nation in teacher-to-student fairness ratio

²⁶ Act 14 PA General Assembly, Art. XVII-A, Charter Schools, (1949). (Art. XVII-A added June 19, 1997, P.L.225, No.22, Amended July 9, 2008 P.L. 846, No. 61 § 10, retroactive effective July 1, 2008). <https://www.legis.state.pa.us/cfdocs/legis/LI/uconsCheck.cfm?txtType=HTM&yr=1949&sessInd=0&smthLwInd=0&act=014&chpt=17A>

²⁷ 24 Pa.Stat. §17-1701-A, Act 14 PA General Assembly, Art. XVII-A, Charter Schools, (1949). (Art. XVII-A added June 19, 1997, P.L.225, No.22, Amended July 9, 2008 P.L. 846, No. 61 § 10, retroactive effective July 1, 2008).

²⁸ Charter School Law 24 Pa.S. §17-1732-A, Act 14 PA General Assembly, Art. XVII-A, Charter Schools, (1949). (Art. XVII-A added June 19, 1997, P.L.225, No.22, Amended July 9, 2008 P.L. 846, No. 61 § 10, retroactive effective July 1, 2008).

²⁹ Ron Zimmer & Cassandra Guarino, *Is There Empirical Evidence Consistent with the Claim that Charter Schools "Push Out" Low-Performing Students?* (Assoc. for Education Finance and Policy and Assoc. for Public Policy Analysis and Management, Working Paper, Jan. 31, 2013).
National Center on School Choice, Vanderbilt University Peabody College

at 20% poverty with 6.9 teachers per 100 students and state school staffing fairness that is regressive.³⁰ The state also ranked 47th in state funding for public schools, and, although Pennsylvania Act 35 of 2016 provided for fairer distribution of the funds, the state contribution remains insufficient.³¹ In 2015, the state legislature established a basic funding formula to alleviate the inequity of the state's education funding, but only new state funds are processed through the new formula, meaning the better than 90% of state funding is not subject to the new formula.³² Compounding the strain of the broad funding inequity and inadequate state funding of Pennsylvania's schools, the charter school tuition payments increasingly drain school district budgets.³³

In August 2019, Pennsylvania Governor Tom Wolf created a controversy by referring to charter schools as private schools. His remarks, though not technically true, reflected an ongoing problem with charter schools across Pennsylvania in general and in Philadelphia in particular.³⁴ In one academic year, the pandemic increased the number of Pennsylvania students attending charter schools by sixty percent, increasing from 38,000 in 2020 to 60,000 in 2021.³⁵ This rapid increase in charter enrollment more than doubled taxpayer and school district dollars to charter schools in just one year, including a whopping \$350 million increase (a one-year, 75% total

³⁰ Bruce D. Baker, Danielle Farrie, & David Sciarra, *Is School Funding Fair? A National Report Card*, EDUCATION LAW CENTER, RUTGERS UNIVERSITY GRADUATE SCHOOL OF EDUCATION, 7th ed., Feb. 2018, at 27.

³¹ *A Study of Pennsylvania Public School Budgets, 2018-19*, PENNSYLVANIA SCHOOL BOARDS ASSOCIATION, June 2018. <https://www.psba.org/report/budgets-annual-study-public-school/a-study-of-pennsylvania-public-school-budgets-2018-19/>.

³² *#1 Issue in Education - PA's Unequal Education Funding! Worst in the Nation!*, ON THE ISSUES: SEN. VINCENT HUGHES, https://www.senatorhughes.com/enews/2017_5_12_EducationFunding.htm (last visited Aug. 7, 2021).

³³ *A Study of Pennsylvania Public School Budgets, 2018-19*, PENNSYLVANIA SCHOOL BOARDS ASSOCIATION, June 2018. <https://www.psba.org/report/budgets-annual-study-public-school/a-study-of-pennsylvania-public-school-budgets-2018-19/>.

³⁴ Jan Murphy, Gov. Tom Wolf Calls Charter Schools 'Private,' Draws Heated Response from their Largest Advocacy Group, PENNSYLVANIA REAL-TIME NEWS, (Aug. 5, 2019) <https://www.pennlive.com/news/2019/08/gov-tom-wolf-calls-charter-schools-private-draws-heated-response-from-their-largest-advocacy-group.html>.

³⁵ Elizabeth Hardison, *Students Flocked to Cyber-Charter Schools This Year, So Did District Revenue and Federal Relief Funds*, PENNSYLVANIA CAPITAL-STAR April 14, 2021, <https://www.penncapital-star.com/covid-19/students-flocked-to-cyber-charter-schools-this-year-so-did-district-revenue-and-federal-relief-funds/>.

increase) in tax dollar payments to cyber charter schools alone.³⁶ In February 2021, the governor introduced a bipartisan charter school reform plan designed by the state legislature to bolster failing TPSs, save taxpayer money, and increase the transparency of for-profit organizations that run charter schools in the state.³⁷ The reform is imperative. In 2021, \$2.1 billion in Pennsylvania taxpayer dollars went directly to charter schools, and that is projected to increase to \$2.5 billion in 2021.³⁸ That burdensome price tag returns comparatively little value to the residents of Pennsylvania, where TPSs spend more of their budget on instruction overall, and gifted and special education in particular, whereas charter schools spend far more on administrative costs and administrators' salaries.³⁹ TPSs spend less than \$50/pupil annually on their chief executive while charter schools spend \$130/pupil on theirs.⁴⁰ Charter school administrative expenditures are nearly double that of TPSs, and the highest level charter administrators earn salaries far higher than top-level administrators in their host districts.⁴¹

Pennsylvania charter schools receive an automatic waiver from most district and state laws.⁴² Despite the lack of accountability, charter schools sop up state and district funds, few of which must be allocated to statutory or regulatory compliance or reporting.⁴³ Traditional public school systems spend more than 5% of their per-student costs in collecting the school taxes and

³⁶ *Id.*

³⁷ *Governor Wolf Unveils Plan Aimed at Holding Pennsylvania Charter Schools Accountable*, CBS 21 NEWS, (Feb. 26, 2021) <https://local121news.com/news/local/governor-wolf-to-unveil-plan-aimed-at-holding-pennsylvania-charter-schools-accountable>.

³⁸ *Id.*

³⁹ Martin Levine, *Pennsylvania Study Contrasts Charter and Public School Spending*, NON-PROFIT QUARTERLY (Aug. 19, 2016), <https://nonprofitquarterly.org/pennsylvania-study-contrasts-charter-and-public-school-spending/>.

⁴⁰ Elizabeth Behrman, *Landmark Lawsuit Challenges How Pennsylvania Funds Its Public Schools*, POST GAZETTE (2019), <https://www.post-gazette.com/business/bop/2019/09/03/Debate-continues-over-public-school-funding-in-Pennsylvania/stories/201908050109>.

⁴¹ *Id.*

⁴² *Charter School Policies*, EDUCATION COMMISSION OF THE STATES, <https://reports.ecs.org/comparisons/charter-school-policies-14> (last visited May 18, 2021).

⁴³ *A Study of Pennsylvania Public School Budgets, 2018-19*, PENNSYLVANIA SCHOOL BOARDS ASSOCIATION, June 2018. <https://www.psba.org/report/budgets-annual-study-public-school/a-study-of-pennsylvania-public-school-budgets-2018-19/>.

transporting students to charter schools, even those outside the district.⁴⁴ Charters have no such financial burdens, which allows them to keep a higher percentage of the per-student funding. Although the Commonwealth Charter School Law requires that charters be nonprofits, many hire for-profit management companies that direct the day-to-day functioning of the schools.⁴⁵ Charter management companies like Imagine Schools, which is based in Virginia and operates over 70 charters nationwide, control the financial transactions of the schools, ultimately limiting expenditures on students and services and writing management-fee checks to themselves.⁴⁶ The very structure of the charter school law and system in Pennsylvania incentivizes graft by failing to place limits on what charter management organizations (CMOs) like Imagine can charge for services to the “nonprofit” schools.⁴⁷ A 2014-15 state report revealed that the Chester Community Charter School, which had the highest annual expenditure in the state (>\$56 million), spent 46% of that budget on administration and just 33% on instruction.⁴⁸ This abuse of the system and the resulting, congregate financial strains on districts are intensified by the fact that charters are more likely to be granted in and draw students from the most economically disadvantaged districts in a state that, in 2015, the federal Secretary of Education identified as having the nation’s worst, meaning broadest, per-student spending gap between the wealthiest and poorest school districts.⁴⁹

⁴⁴ Gretchen Van der Van der Veer et al., *Pennsylvania Study Contrasts Charter and Public School Spending*, NON PROFIT NEWS, NONPROFIT QUARTERLY (2018), <https://nonprofitquarterly.org/pennsylvania-study-contrasts-charter-and-public-school-spending/>.

⁴⁵ Steven M. Singer, *Pittsburgh Charter Schools Take Federal Bailout Money Meant for Small Businesses*, GADFLY ON THE WALL BLOG (2020), <https://gadflyonthewallblog.com/2020/07/15/pittsburgh-charter-schools-take-federal-bailout-money-meant-for-small-businesses/> (last visited May 25, 2021).

⁴⁶ *Id.*

⁴⁷ Valerie Strauss, *A Severely Troubled School District in Pennsylvania Faces Takeover by For-Profit Organization*, WASHINGTON POST (Aug. 21, 2020), <https://www.washingtonpost.com/education/2020/08/21/severely-troubled-school-district-pennsylvania-faces-takeover-by-for-profit-charter-organization/>.

⁴⁸ *Id.*

⁴⁹ Elizabeth Behrman, *Landmark Lawsuit Challenges How Pennsylvania Funds its Public Schools*, POST GAZETTE, Sept. 3, 2019. <https://www.post-gazette.com/business/bop/2019/09/03/Debate-continues-over-public-school-funding-in-Pennsylvania/stories/201908050109>.

The impact of that funding disparity is aggravated by the burden of funding charter schools, particularly given the spike in that funding in the wake of the pandemic. These factors are making a bad situation worse across the state. During the Covid-19 pandemic, because TPSs struggled to open, many Pennsylvania students enrolled in cyber charters. Mid-pandemic, the Susquehanna Township School District urgently notified district parents of the “overfunding” of cyber charters with district dollars.⁵⁰ In Pennsylvania, cyber charters receive 75% of the per-student public funding as brick-and-mortar charters.⁵¹ Even prior to the pandemic, cyber charters in the state were already receiving over \$500 million annually in local taxpayer dollars, resulting in increases in taxes and decreases in faculty and programs.⁵² The Pittsburgh School District reported that charter schools exploited the Covid crisis, not only siphoning students and funding from TPSs that could not reopen, but double dipping on relief funds. Four Pittsburgh charter schools took not only federal CARES Act funds which were available to both TPSs and charters, but they also took PPP funds for which they, but not TPSs, were eligible.⁵³ The Bethlehem Area School District has publicized its struggles to fund salaries, pensions, special education, security and transportation in conjunction with the financial drain of funding the charter schools.⁵⁴ A 2014 report found that the school districts of Reading and Allentown were among the most funding disparate not only in the state, but in the nation.⁵⁵ The two districts, situated northwest of

⁵⁰ Jim Hanak, Here’s Critical Information for Parents Seeking the Best Virtual Education for Their Children, PENNLIVE PATRIOT NEWS (Dec 11, 2020), <https://www.pennlive.com/opinion/2020/12/heres-critical-information-for-parents-seeking-the-best-virtual-education-for-their-children-opinion.html>.

⁵¹ *Id.*

⁵² Susan Spicka, *Cyber Charter Schools are Awash in Money They Waste*, PENN LIVE PATRIOT-NEWS (Jan. 31, 2020), <https://www.pennlive.com/opinion/2020/01/cyber-charter-schools-are-a-wash-in-money-they-waste-opinion.html#:~:text=Because%20the%20tuition%20school%20districts%20pay%20cyber%20charter,evidence%20of%20this%20waste%20is%20in%20plain%20sight>.

⁵³ Steven M. Singer, *Pittsburgh Charter Schools Take Federal Bailout Money Meant for Small Businesses*, GADFLY ON THE WALL BLOG (2020), <https://gadflyonthewallblog.com/2020/07/15/pittsburgh-charter-schools-take-federal-bailout-money-meant-for-small-businesses/> (last visited May 25, 2021).

⁵⁴ Sarah M. Wojcik & Jacqueline Palochko, Segregation in Pennsylvania Schools: How a ZIP Code Determines the Quality of a Child’s Education, MCALL.COM (2019), <https://www.mcall.com/news/education/mc-nws-education-poverty-20191030-uexghohk6jdoxovj56hsuxxrwe-story.html>.

⁵⁵ *Id.*

Philadelphia in the easternmost region of central Pennsylvania, report a combination of among the lowest school district tax revenue bases and among the neediest student populations in the country.⁵⁶ Charter schools drain those thin budgets even as they fail to deliver adequate special education, increase racial and socioeconomic segregation, and therefore deny equal access to quality public education and facilities across the state, particularly in Philadelphia.

SPECIAL EDUCATION

The abject failure Pennsylvania's charter school funding and regulatory structures are most evident and abhorrent in the charter school special education programs. Quite simply, the state's charter schools do not spend the funds they receive for special education on special education.⁵⁷ In the academic year 2014-15, charter schools in the state collected \$466.8 million in state and district funds for special education tuition payments but reported special education expenditures of only \$93.1 million.⁵⁸ Charter schools retain that surplus with no accountability for the use of the funds. The state system incentivizes the manipulation for profit of the special education system by charters and their management companies.⁵⁹ Pennsylvania has a three-level structure Special Education Funding Formula: Tier 1, minimal intervention; Tier 2, moderate intervention; and Tier 3, intense intervention.⁶⁰ Regardless of the level of intervention required, from weekly therapy sessions to full-time nurses or separate-setting needs, the sending district is

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ Elizabeth Behrman, *Landmark Lawsuit Challenges How Pennsylvania Funds its Public Schools*, POST GAZETTE (2019), <https://www.post-gazette.com/business/bop/2019/09/03/Debate-continues-over-public-school-funding-in-Pennsylvania/stories/201908050109>.

⁵⁹ Susan L. DeJamatt, *A Legal Mandate that Authorizers Consider Fiscal and Other Impacts of Charter School Expansion*, 121 WEST VIRGINIA LAW REVIEW vol. 121, issue 3 (2019), <https://researchrepository.wvu.edu/cgi/viewcontent.cgi?article=3386&context=wvrl>.

⁶⁰ Peter Greene, *PA Charters Game the Special Education System*, FORBES (July 2, 2020), <https://www.forbes.com/sites/petergreene/2020/07/02/report-pa-charters-game-the-special-education-system/?sh=23998f187828>.

responsible for the accommodations.⁶¹ The formula is based on a divisor that assumes the 16% of students at both TPSs and charters receive special education; however, 20% of special education students are enrolled in TPSs, which means that districts are paying charters 25% more than they should for services that are not required.⁶² The glaring disparity is that, while TPSs receive funding based on the cost of actual services provided, charter schools are funded at a flat rate, regardless of what the individual student needs or services provided may be.⁶³

Because TPSs receive funds based on the specific services provided to each special education student while charters receive flat-rate special education funding, charter schools are incentivized to select special education students who require the least accommodations and reject those special education students who require the costliest accommodations. As evidence of another profit-over-taxpayer strategy, charter schools enroll half of the special-needs students that TPSs do; shockingly, in nine counties in Pennsylvania, not one charter school enrolls a single Tier 2 or Tier 3 student, although those schools collect the flat fee for the minimum accommodations they provide to Tier 1 students. In Pittsburgh, 22 charters enroll no Tier 2 or Tier 3 students, and in Philadelphia, 24 charters enroll no Tier 2 or Tier 3 students.⁶⁴ Overall, a Pennsylvania special education student who costs the taxpayer \$15,000 in a TPS costs the taxpayer \$27,000 in a charter school, where the services required and those offered are distinctly inferior to those required in and provided by the public school.⁶⁵ In February 2021, Governor Wolf proposed a new system that promises to finally the massive overpayments by districts to

⁶¹ *Id.*

⁶² *Fixing the Flaws in PA's Special Education Funding System for Charter Schools: How an Outdated Law Wastes Public Money, Encourages Gaming the System, and Limits School Choice*, EDUCATION VOTERS OF PENNSYLVANIA (2020), <http://educationvoterspa.org/wp-content/uploads/2020/06/Complete-and-Final-Ed-Voters-charter-special-ed-report.pdf>.

⁶³ Peter Greene, *PA Charters Game the Special Education System*, FORBES (July 2, 2020), <https://www.forbes.com/sites/petergreene/2020/07/02/report-pa-charters-game-the-special-education-system/?sh=23998f187828>.

⁶⁴ *Id.*

⁶⁵ *Id.*

both cyber and brick-and-mortar charters for services they do not provide; the change will save state taxpayers \$99 million/year in overpayments for special education and another \$130 million in overpayment to cyber charters.⁶⁶ The savings to Pennsylvania taxpayers and to the school districts are long overdue, but the fleecing of special education funds is not the only way in which charters benefit at the expense of the TPSs.

SEGREGATION

Charter schools in Pennsylvania racially and socioeconomically segregate student populations. Where charter schools are established, student mobility increases, and, ultimately, the population of existing TPSs becomes and blacker and more economically disadvantaged.⁶⁷ Across the state, both wealthier and white students are far more likely to transfer from low-achieving schools into charter schools, and the less advantaged, black students in the smaller subset who do transfer are more likely to transfer back, thereby concentrating the low-income, black student population in the TPSs.⁶⁸ The cruel irony of the broad effect of charter schools on school districts, particularly urban districts, and on poorer and blacker students and schools is that the charter school project, particularly as it developed in Pennsylvania, was largely intended to save the failing schools at which those vulnerable student populations were concentrated. Instead, charter schools in Pennsylvania gradually evolved into the most recent iteration of segregation rather than into the meaningful avenues to equity that they were imagined to be. School choice as actuated in charter schools and voucher systems has become a new vehicle for

⁶⁶ *Governor Wolf Unveils Plan Aimed at Holding Pennsylvania Charter Schools Accountable*, CBS 21 NEWS (Feb. 26, 2021), <https://local21news.com/news/local/governor-wolf-to-unveil-plan-aimed-at-holding-pennsylvania-charter-schools-accountable>.

⁶⁷ Stephen Kotok et al., *School Choice, Racial Segregation, and Poverty Concentration: Evidence from Pennsylvania Charter School Transfers*, SAGE JOURNALS (Oct. 1, 2015), <https://journals.sagepub.com/doi/10.1177/0895904815604112>.

⁶⁸ *Id.*

white flight from underperforming schools.⁶⁹ Charter schools themselves, I maintain, are complicit in the fluctuation of their effect from desegregation to resegregation; moreover, that effect cannot be divorced from the twin plagues of selective admissions standards and lack of regulatory structure that were written into the charter law at inception.

State courts have relied on the text of the law in rejecting challenges to charter school policies as violative of the civil rights of poor, black, and special education students. The Pennsylvania Supreme Court, in adherence with the Statutory Construction Act, has five times upheld challenges to the inequities and costs of charter schools in practice.⁷⁰ The court held in all five cases that the funding and policies of the state's charter schools failed to violate the law as written, although changes to the law may be necessary to protect school districts and students.⁷¹ Furthermore, the court held that it could not amend the Charter School Law because "the CSL as drafted by [the Pennsylvania] legislature does not provide for amendments."⁷² The court's textual interpretation of the law and its acknowledged inability to expand or alter the law despite the unintended inequities of the law in practice indicate a reasonable deference to the state legislature, but also they require that the legislature act. As a bulwark against the failings of the charter schools in terms of equal access and the drain they impose on federal, state, and local school funding coffers, scholars have suggested that the state legislature require of charter school administrators and management companies concrete diversity policies and procedures as requisites for recertification or authorization of charters.⁷³ Although it would not rectify funding

⁶⁹ Erika K. Wilson, *The New White Flight*, 14 DUKE JOURNAL OF CONSTITUTIONAL LAW & PUBLIC POLICY, vol. 14, no. 1 (2019), <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1157&context=djclpp>.

⁷⁰ Susan L. DeJamatt, *A Legal Mandate that Authorizers Consider Fiscal and Other Impacts of Charter School Expansion*, 121 WEST VIRGINIA LAW REVIEW vol. 121, issue 3 (2019), <https://researchrepository.wvu.edu/cgi/viewcontent.cgi?article=3386&context=wvlr>.

⁷¹ *Id.*

⁷² *Discovery Charter School v. Sch. District of Philadelphia*, 166A.3d. 304, 320 (Pa. 2017).

⁷³ Stephen Kotok et al., *School Choice, Racial Segregation, and Poverty Concentration: Evidence from Pennsylvania Charter School Transfers*, SAGE JOURNALS (Oct. 1, 2015), <https://journals.sagepub.com/doi/10.1177/0895904815604112>.

abuses, that policy would decrease the segregative effects of charter schools across the state, particularly in Philadelphia, where more than half of the charter schools are hyper-segregated (more than $\frac{2}{3}$ of the student population belongs to one race) whereas only 9% of the Philadelphia TPSs are so categorized.⁷⁴

PHILADELPHIA:

Pennsylvania's public schools as both the inspiration for the Charter School Law through their failings and the victim of the law through the intensification of their most pernicious challenges, are best exemplified on both counts by the state's largest public system, the School District of Philadelphia. In 2001, in a deal negotiated between Philadelphia Mayor John Street and Pennsylvania Governors Thomas Ridge and Mark Schweiker, the state took over the city's failing public school system, returning it to the control of the city's newly reformed school board in 2018.⁷⁵ In 1997, the state passed legislation creating a charter school system. During the years that the state administered the Philadelphia public schools, approximately eighty charters were granted across the district, and they served roughly 30% of the city's students.⁷⁶ By the fall of 2016, more than half of the charters issued by the state were in the city of Philadelphia.⁷⁷ The establishment of charter schools in the city has increased in direct proportion with the number of TPS closures in black neighborhoods.⁷⁸ From 2012 to 2013, for example, 22 TPSs closed; 17

⁷⁴ Dale Mezzacappa, *ELC Report Says Charters are More Segregated, Serve Relatively Fewer Students with the Highest Needs*, CHALKBEAT PHILADELPHIA (2019), <https://philadelphia.chalkbeat.org/2019/3/5/22186364/elc-report-says-charters-are-more-segregated-serve-fewer-of-the-of-the-highest-need-students>.

⁷⁵ *The History of the State Take Over of the School District of Philadelphia*, DEFEND PUBLIC EDUCATION!: SAVE OUR SCHOOLS, <https://www.pa-sos.org/history-of-pa-takeover-of-phil/> (last visited Aug. 7, 2021).

⁷⁶ Maria Cucchiara, *Charter Schools*, THE ENCYCLOPEDIA OF GREATER PHILADELPHIA, <https://philadelphiaencyclopedia.org/archive/charter-schools/> (last visited Aug. 7, 2021).

⁷⁷ *Id.*

⁷⁸ Julia A. McWilliams & Erika Kitzmiller, *Mass School Closures and the Politics of Race, Value, and Disposability in Philadelphia*, ERIC: TEACHERS COLLEGE RECORD, vol. 121, no. 1 (Jan. 2019), <https://eric.ed.gov/?redir=http%3a%2f%2fwww.tcrecord.org%2fContent.asp%3fContentId%3d22475>.

were in districts that were >64.7% black, but none of the 22 were in neighborhoods that were <14% black.⁷⁹ The state's efforts to save the Philadelphia public schools consisted of a two-prong approach. The state issued dozens of charters to schools that could both spend public funds and select/reject students without accountability. The state also shuttered struggling schools, leaving students who were not accepted into charter schools without neighborhood schools and forcing those students to travel to other struggling TPSs farther from home. This article recognizes that the state ultimately failed in its effort to save the Philadelphia public schools and identifies the rapid growth of unregulated and selective charter schools as well as the state's "closure-as-reform" tactics as the central contributors to that failure.

Charter school proliferation encourages white flight and resegregation and has been connected with gentrification, racial isolation, and poverty concentration in city neighborhoods.⁸⁰ The charter schools in Philadelphia enroll significantly lower percentages of poverty-stricken students, English-language learners, and special needs students than TPSs do, and charters in the city are deeply segregated: 12% of the city's charter schools have enroll populations that are >50% white although 15% of the school district's students are white.⁸¹ Black children in Philadelphia public schools are five times more likely to be in deeply segregated schools than their white counterparts, and students in those schools score lower on standardized tests, experience less long-term academic success.⁸² Troublingly, research indicates that the associations between the revitalization of select city neighborhoods and the emergence of

⁷⁹ *Id.*

⁸⁰ Tomeka Davis & Deirdre Oakley, *Linking Charter School Emergence to Urban Revitalization and Gentrification: A Socio-Spatial Analysis of Three Cities*, JOURNAL OF URBAN AFFAIRS, vol. 35, issue 1, 2013, at 81, 92.

⁸¹ Dale Mezzacappa, *ELC Report Says Charters are More Segregated, Serve Relatively Fewer Students with the Highest Needs*, CHALKBEAT PHILADELPHIA (2019), <https://philadelphia.chalkbeat.org/2019/3/5/22186364/elc-report-says-charters-are-more-segregated-serve-fewer-of-the-of-the-highest-need-students>.

⁸² Emma Garcia, *Schools are Still Segregated, and Black Children are Paying a Price*, ECONOMIC POLICY INSTITUTE (Feb. 12, 2020), <https://www.epi.org/publication/schools-are-still-segregated-and-black-children-are-paying-a-price/>.

selective charter schools in those neighborhoods appear to have been formally coordinated.⁸³

Regardless of whether or not the result is intentional, the selectivity of the city's charter schools creates overwhelmingly negative segregative effects on both the TPSs and the charter schools.

City charter schools not only skim whiter and wealthier students from the TPSs, they generally enroll low numbers of Tier 2 and Tier 3 special education students, exploiting the state's flawed compensation scheme by cherry-picking low-cost, Tier 1 students for admission.⁸⁴ Since 2017, the number of special education students in the city's charter schools have grown at three times the rate of those in the TPSs, but the students in charter schools have significantly less severe disabilities.⁸⁵ In Philadelphia's public schools, 80% of special education students are categorized as Tier 1; in the charter schools in the district, 93% are Tier 1.⁸⁶ I propose that the disparity indicates an intention on the part of Philadelphia's charters to exploit special education as a source of revenue. Special education costs have been identified as a central contributor to the debilitating funding deficit that has plagued the city as well as the state.⁸⁷ Under the current funding system, since 2015, the Philadelphia School District has paid 50% of its new revenue to the charter schools, which enroll only 37% of the city's students.⁸⁸ The clear injustice of the state's funding system as well as the disservices to poor, black, and special education students in Philadelphia are reflective of serious problems and abuse in the charter school system across the state.

⁸³ *Id.*

⁸⁴ Bill Hanglely Jr., *Charters Deny 'Cherry Picking' Students, but Data Show Special Ed Disparities with a New Report, Advocates Seek Fresh Leverage in Long-Running Battle over Special Ed Payments to Charters*, CHALKBEAT PHILADELPHIA (June 30, 2020), <https://philadelphia.chalkbeat.org/2020/6/30/22186748/charters-deny-cherry-picking-students-but-data-show-special-ed-disparities>.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ Maddie Hanna & Kristen A. Graham, *Philly Schools Overpaying Charters Millions of Dollars for Special-Education Students, District Says*, THE PHILADELPHIA INQUIRER Feb 12, 2020, <https://www.epi.org/publication/schools-are-still-segregated-and-black-children-are-paying-a-price/>.

⁸⁸ *Id.*

The charter schools have failed the students, the taxpayers, and the state. The Philadelphia public schools are clinging to life. The TPSs are drowning under the weight of “stranded costs,” a term for the loss the school district endures each time a student and his tuition are sent to a charter school.⁸⁹ The district does not experience an equivalent saving for every such loss to the district budget. When a charter school draws several students from a number of schools, the district may experience no savings at all in terms of the ability to constrict staff, close facilities, or reduce transportation or resources and any existing sites; however, the tuitions are paid in full to the charters and the costs of transportation, sometimes at great distance, can increase. A Research for Action (RFA) study calculates that Philadelphia experiences a stranded cost of \$8,125 per student in the first year of a charter school’s operation. That number decreases by about half over five years, but the total loss remains immense. RFA’s lowest estimate of Philadelphia’s stranded costs in the 2017-18 academic years totaled at least \$266,210,000, an astounding figure for a struggling school district to bear. The center cannot hold. The emergency requires immediate action.

CONCLUSIONS

The overfunding and underreporting advantages from which charter schools benefit must be eliminated as must for-profit charter schools nationwide. Congress must halt the annual increases in unrestricted charter school funding and demand transparency and accountability identical to the public schools. If charter schools cannot maintain academic achievement standards from a level playing field, then they cannot be funded as public alternatives. Critically, in struggling cities such as Philadelphia, charter issuance must be frozen, and existing charter

⁸⁹ Susan L. DeJammatt, *A Legal Mandate that Authorizers Consider Fiscal and Other Impacts of Charter School Expansion*, 121 WEST VIRGINIA LAW REVIEW vol. 121, issue 3 (2019), <https://researchrepository.wvu.edu/cgi/viewcontent.cgi?article=3386&context=wvllr>.

schools must be immediately reformed, ultimately transforming the charter schools into true, equal public schools. Regulations and accountability must be imposed upon the charters as they are on the TPSs, and management companies must be eliminated. Strict guidelines for equity and in enrollment should be mandated so as to eliminate publicly funded schools with exclusive, segregative enrollment policies that result in school populations demographics well outside the overall student population of a region in terms of race, socioeconomic status, and severity of disability. All admissions should be by lottery limited only by the demographics of each school's target demographic (high school boys, etc). In the transformation, charter schools must assume responsibilities and costs for tax collection, regulatory compliance, and transportation. School choice and equitability of access need not be mutually exclusive. Only to the extent that they can coexist as true peer schools should charter schools survive. They must be radically transformed or eliminated.

Governor Wolf's new proposal will require that charter school boards, committees, and administrators all comply with the requirements of the state's ethics commission.⁹⁰ It also makes the funding formula for special education more equitable, but it does nothing to stop the abuse of the special education system as it currently exists. It also does little to correct the segregated populations that are negatively affecting the academic outcomes for Pennsylvania's and Philadelphia's most vulnerable students. As the Pennsylvania Supreme Court has indicated, reform must be legislated. Article III, Section 14 of the Pennsylvania Constitution states, "[t]he General Assembly shall provide for the maintenance and support of a thorough and efficient system of public education to serve the needs of the commonwealth."⁹¹ The current system,

⁹⁰ *Governor Wolf Unveils Plan Aimed at Holding Pennsylvania Charter Schools Accountable*, CBS 21 NEWS (Feb. 26, 2021), <https://local21news.com/news/local/governor-wolf-to-unveil-plan-aimed-at-holding-pennsylvania-charter-schools-accountable>.

⁹¹ CONSTITUTION OF THE COMMONWEALTH OF PENNSYLVANIA, art. III, section B, § 14 (amended May 16, 1967, P.L.1037, J.R.3).

burdened financially as it is by the charter schools, is no longer thorough or efficient. The residents of Pennsylvania have a constitutional right to a better system, and the legislature is obliged to provide it.

At a Philadelphia School Board meeting in March 2021, the board was considering the applications for five new city charter schools that would have enrolled 4,000 students.⁹² At the meeting, Victor Kagan, a 2020 graduate of Philadelphia’s prestigious Central High School addressed the board, asserting, “Charter schools are a business built on stripping money from disadvantaged public-school students.”⁹³ He told the board that his parents had entered him and his siblings in charter school lotteries repeatedly throughout his years in the Philadelphia public schools.⁹⁴ Despite his parents’ best efforts, none of their children had ever won a seat in a charter school.⁹⁵ In the meantime, Victor said, he and his siblings attended struggling schools with inadequate resources.⁹⁶ Despite the misfortunes of his family and his schools, both produced an insightful young man who can see clearly what the state legislature must accept: charter schools are a business, and they have no business in the public domain.

⁹² Maddie Hanna & Kristen A. Graham, *Philly School Board Unanimously Rejects Five New Charter Schools*, THE PHILADELPHIA INQUIRER Mar 5, 2021, <https://www.msn.com/en-us/news/us/philly-school-board-unanimously-rejects-five-new-charter-schools/ar-BB1eg84W>.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*