

# APPROVING CHARTER SCHOOLS: THE GATE-KEEPER FUNCTION

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*Charter schools are autonomously operated public schools, run pursuant to the terms of a limited-duration charter, or contract, granted by a designated sponsoring organization, typically a local school district or the state board of education. Hence, chartering bodies are the "gate-keepers" for charter schools—deciding who initially gets charters and whether or not they can keep them. This Article examines the administrative aspects of that gate-keeping process and recommends new arrangements that will allow the public values underlying the gate-keeping function to be better served.*

## INTRODUCTION

A few years ago, charter schools were just an idea.<sup>1</sup> Now there is a charter school movement. Very quickly, nearly forty states and other American jurisdictions passed legislation authorizing the creation of charter schools.<sup>2</sup> Nationally, more than two thousand charters have rapidly been

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1. See generally JOE NATHAN, CHARTER SCHOOLS: CREATING HOPE AND OPPORTUNITY FOR AMERICAN EDUCATION 1 (1996) (introducing the charter school concept and explaining the model structure, strategy and major differences between charter schools and traditional public schools).

2. See CTR. FOR EDUC. REFORM, ANSWERS TO FREQUENTLY ASKED QUESTIONS ABOUT CHARTER SCHOOLS, at [http://edreform.com/school\\_reform\\_faq/charter\\_schools.htm](http://edreform.com/school_reform_faq/charter_schools.htm) (last visited Aug. 7, 2001) (listing states that have passed charter school legislation as of June

granted.<sup>3</sup> President Clinton strongly promoted charter schools, and during the 2000 presidential campaigns, both candidates Bush and Gore warmly endorsed charter schools.<sup>4</sup> Charter schools are intensively covered by the media, the largest national teachers' union now runs its own charter schools, and charter schools are already the subject of several books and many research efforts. At their current rate of expansion, as many as ten percent of American pupils could conceivably attend charter schools before too long.

Yet, despite all this activity, by the end of the 2000-2001 school year, charter schools actually served fewer than one percent of the nation's school children,<sup>5</sup> and "public schools currently outnumber charter schools by more than forty to one."<sup>6</sup> Indeed, like many other "hot" reforms before it, the charter school movement might well fizzle out. If nothing else, there is a risk that scandal or perceived ineffectiveness will undermine their political support. Or perhaps the financial terms on which charter schools run, combined with the difficulties of finding buildings for new schools, will sharply limit the growth of the movement.<sup>7</sup>

Nevertheless, we assume here that charter schools are going to be around for at least a while, that policy makers are generally positively disposed

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1999).

3. See CTR. FOR EDUC. REFORM, SURVEY OF CHARTER SCHOOLS, 2000-2001 INTRODUCTION, at [http://edreform.com/charter\\_schools/report/survey01.html](http://edreform.com/charter_schools/report/survey01.html) (last visited Aug. 7, 2001) (summarizing responses from 346 of the more than 2,030 operating charter schools pertaining to questions about the charter's programs, operations, tests given, and populations served).

4. President Clinton, in his January 19, 1999, State of the Union address stated, "When I became President, there was just one independent public charter school in all of America. With our support, on a bipartisan basis, today there are 1,100. My budget assures that early in the next century, there will be 3,000." Address Before a Joint Session of the Congress on the State of the Union, 35 WEEKLY COMP. PRES. DOC. 78, 81 (Jan. 19, 1999). During their presidential campaigns, candidate Bush introduced his Charter School Homestead Fund to "support \$3 billion in loan guarantees for charter schools during its first two years, providing enough money for 2,000 schools - 'double the existing number,' he promised," while candidate Gore "called for [the] tripling [of] the number of charter schools" in the United States. *Gore, Bush Pause From Sniping to Outline School Plans*, BALT. SUN, May 5, 2000, at 5A.

5. See Jeffrey R. Henig & Stephen D. Sugarman, *The Nature and Extent of School Choice*, in SCHOOL CHOICE AND SOCIAL CONTROVERSY: POLITICS, POLICY, AND LAW 13, 29 (Stephen D. Sugarman & Frank R. Kemerer eds., 1999) (outlining percentage of student population attending schools alternative to traditional public education).

6. CTR. FOR EDUC. REFORM, CHARTER SCHOOLS: TODAY CHANGING THE FACE OF AMERICAN EDUCATION, at [http://www.edreform.com/charter\\_schools/today/index.html](http://www.edreform.com/charter_schools/today/index.html) (last visited Aug. 7, 2001).

7. See Paul T. Hill, *The Supply-Side of School Choice*, in SCHOOL CHOICE AND SOCIAL CONTROVERSY: POLITICS, POLICY, AND LAW 140, 153-54 (Stephen D. Sugarman & Frank R. Kemerer eds., 1999) (noting high start-up costs).

towards them, and that Americans are at least hopeful that charter schools will be successful (although we acknowledge disagreement over how to measure success).

The growing charter school literature tends to focus on quantitative aspects of the charter school movement: how, if at all, these schools differ from traditional schools, how well their students are doing academically, who charter schools are actually serving, legal issues confronting the charter school movement, political aspects of the charter school movement, and some of the growing pains the movement faces.<sup>8</sup> Some recent work provides insightful case studies of the experiences of specific charter schools.<sup>9</sup> By contrast, rather little attention has been paid to the structure and process of chartering (although some effort has been made to describe, categorize, and sometimes evaluate different state charter laws and to propose “model” charter school legislation).<sup>10</sup> This Article aims to fill a portion of the gap we see.<sup>11</sup>

We will describe what we consider key features of existing school chartering regimes, with emphasis on California, one of the most active charter schools states. We also give some attention to variations found in other states, especially Arizona, Michigan, and Massachusetts. In conclusion, we offer some recommendations about ways in which the chartering system might be improved.

#### *A. How the Charter School Idea Differs from Other School Choice Schemes*

Before turning to the main subject of this Article, we offer some background context in which we see our inquiries situated. We will briefly discuss our understanding of the broad vision behind charter schools, and then

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8. See generally MICH. DEP'T OF EDUC., *MICHIGAN'S CHARTER SCHOOL INITIATIVE: FROM THEORY TO PRACTICE* (1999) (reporting evaluations on Michigan charter schools, and giving recommendations on how better to address the difficulties of running a charter school).

9. See, e.g., Bruce Fuller, *Introduction: Growing Charter Schools, Decentering the State*, in *INSIDE CHARTER SCHOOLS: THE PARADOX OF RADICAL DECENTRALIZATION* 2-9 (Bruce Fuller ed., 2000) (providing an overview of six different charter schools and their development); CHESTER E. FINN, JR. ET AL., *CHARTER SCHOOLS IN ACTION: RENEWING PUBLIC EDUCATION* (2000).

10. See Frank R. Kemerer, *The Legal Status of Privatization and Vouchers in Education*, in *PRIVATIZING EDUCATION: CAN THE MARKETPLACE DELIVER CHOICE, EFFICIENCY, EQUITY, AND SOCIAL COHESION?* 39 (Henry M. Levin ed., 2001).

11. A recent presentation was made that addressed some of the same issues explored here. See SRI International, *Charter School Authorizers and Charter School Accountability*, Presentation at the Annual Meeting of the American Education Research Association (Apr. 2001) (addressing charter school accountability and the role of charter school authorizers).

provide an introduction into the question of the precise purposes the charter system is supposed to serve.

Charter schools are clearly understood to be “public” schools, and all state laws deem them so. But, going behind the label, in what senses are they really “public?” At a minimum, we see several important features of nearly all charter school laws that reflect the key public value of open access. Perhaps this open access value best reflects charter school design features concerning tuition and admissions. First, charter schools are publicly funded, and they do not charge tuition in addition to the public funds they receive. In this essential respect, they are just like traditional public schools. Second, at least in most states (and in the eyes of many charter school advocates) charter schools, like traditional public schools, do not have selective admissions practices.

To be sure, charter schools are quite unlike conventional neighborhood public schools to which students are assigned. This is because children only attend charter schools if their parents sign them up. For charter schools, therefore, the open access principle means they are expected to accept all students who apply—and if there are more applicants than seats for them, neutral and fair procedures, such as selection by lot, are to be employed. This is not to say that everyone is satisfied with charter school admissions practices. For example, some complain that the demands that the charter school makes on pupils and/or their parents, the type of curriculum offered, their enrollment outreach practices, the counseling of potential applicants they engage in, and so on, make access not “equal” in fact—at least as compared with the image of “equally” forced assignment to the neighborhood public school.<sup>12</sup>

We next contrast charter schools, as so far described, and two very different forms of school voucher programs that have been proposed. In what might be termed the libertarian-Milton Friedman voucher plan,<sup>13</sup> public funding would typically be expected, on average, to pay for around half the cost of a child's schooling, any individual school could charge whatever it wanted for tuition (and most would charge a substantial amount), and participating schools would be largely unrestricted in their ability to select among applicants (apart from basic civil rights provisions prohibiting se-

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12. See Amy Stuart Wells et al., *Diversity and Inequality: Montera Charter High School*, in *INSIDE CHARTER SCHOOLS: THE PARADOX OF RADICAL DECENTRALIZATION* 144, 152-57 (Bruce Fuller ed., 2000); see also *UCLA CHARTER SCH. STUDY, BEYOND THE RHETORIC OF CHARTER SCHOOL REFORM: A STUDY OF TEN CALIFORNIA SCHOOL DISTRICTS* (1998).

13. See generally MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 10 (1982) (characterizing competitive capitalism as a device for achieving economic freedom and “a necessary condition for political freedom.”).

lection on the basis of race and the like). Voter initiatives proposing Friedman-like voucher plans were soundly defeated in California in both 1993 (Proposition 174) and 2000 (Proposition 38).<sup>14</sup> The differences between this sort of school voucher proposal and charter schools are obvious and substantial.

However, some “liberals” have proposed school voucher plans that look much more like charter schools on the dimensions so far discussed.<sup>15</sup> These voucher plans would forbid the charging of tuition beyond the value of the voucher, or at a minimum they would forbid charging tuition to working class and poor families so as to assure that their children’s access is not blocked by financial hurdles. Moreover, these liberal school voucher proposals insist that the vouchers provided be large enough in value so as to pay fully for good quality schools attended by families of modest means. So, too, these voucher proposals would demand some sort of equal access approach to admissions. For example, some advocates of liberal school voucher plans, like most charter school supporters, call for lotteries to be held to deal with excess demand; others would specially protect the access rights of the poor by, for example, holding open a significant share of places (perhaps, fifteen to twenty-five percent) for their children (if they apply),<sup>16</sup> or more stringently, by permitting schools to accept a voucher from anyone only if they actually enroll more than a certain proportion of children from low-income families.<sup>17</sup>

Notwithstanding these “public value” features, a school participating in this latter sort of liberal school voucher program usually is not meant to be a “public school” in the way charter schools are. For one thing, by common understanding, charter schools are intended to be strictly non-sectarian schools. A religious group seeking a charter for a religious school would

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14. See Jo Ann Bodemer, Note, *School Choice Through Vouchers: Drawing Constitutional Lemon-Aid From the Lemon Test*, 70 ST. JOHN’S L. REV. 273, 285-86 (1996) (recounting the “overwhelming” defeat of Proposition 174 in 1993); see also CAL. SEC’Y OF STATE, STATEMENT OF THE VOTE: STATEWIDE MEASURES SUBMITTED TO A VOTE OF VOTERS, 54-56 (2000) (certifying the defeat of Proposition 38 in 2000 by a margin of twenty-nine percent to seventy-one percent).

15. See generally JOHN E. COONS & STEPHEN D. SUGARMAN, *EDUCATION BY CHOICE: THE CASE FOR FAMILY CONTROL* (1978) (exploring education choices for ordinary families).

16. See John E. Coons & Stephen D. Sugarman, *Pacific Research Institute, Making School Choice Work for All Families*, at <http://www.pacificresearch.org/issues/edu/choice/main2.html> (last visited Aug. 7, 2001) (discussing the need to consider policy arguments such as fair access to charter schools in order for charter schools to gain wider political success and public support).

17. See Frank R. Kemerer, *School Choice Accountability*, in *SCHOOL CHOICE AND SOCIAL CONTROVERSY: POLITICS, POLICY, AND LAW 174* (Stephen D. Sugarman & Frank R. Kemerer eds., 1999) (describing admissions controls as a component of accountability in charter schools).

be turned down instantly. As an aside, we note that some charter schools have in fact opened in premises that are owned by religious groups, and although their curriculum are officially non-religious, some observers are concerned about the reality of life in the school, especially if the pupils wind up being largely drawn from the congregation of the landlord.<sup>18</sup> By contrast, a central tenant of nearly all school voucher advocates is that religious choice is one of the family choices that should be respected. Whether the Supreme Court will eventually permit school voucher plans to aid families sending children to religious schools is an unresolved and highly contested matter.<sup>19</sup> But, assuming this is allowed, the point is that the participating religious schools would clearly be understood to be “private” not “public” schools. The same, however, is also true for a non-religious “private” school that participates in a liberal school voucher plan.

What accounts for the different understanding as compared with “public” charter schools? Although a hallmark of private schools (at least in the United States) is that they have great autonomy in their operations, autonomy is also understood to be a central characteristic of charter schools. Like private schools, charter schools are supposed to have great freedom in determining their educational philosophy and mission, their pedagogical style, the details of their curriculum, the length of the school day and year, who their teachers are, their approach to school management, and so on. Furthermore, although it is usually assumed that private entrepreneurs would be permitted to start and run voucher schools, in fact a significant number of charter schools are similarly managed (EMO, or educational management organization, is the label now frequently given to these profit-making entities who run charter schools).<sup>20</sup>

Rather, the key difference we see between the two schemes is this:

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18. See e.g., Luis A. Huerta, *Losing Public Accountability: A Home Schooling Charter*, in *INSIDE CHARTER SCHOOLS: THE PARADOX OF RADICAL DECENTRALIZATION* 177, 178-79 (Bruce Fuller ed., 2000) (recounting a specific instance in which a California charter school reached its maximum capacity for students within one year largely with support by parents of a Christian home school program).

19. See Jesse H. Choper, *Federal Constitutional Issues*, in *SCHOOL CHOICE AND SOCIAL CONTROVERSY: POLITICS, POLICY, AND LAW* 235, 236 (Stephen D. Sugarman & Frank R. Kemerer eds., 1999) (describing evolution of Supreme Court tests regarding separation of church and state matters).

20. According to the Center for Education Reform, an estimated 19,000 children were educated by EMOs by Summer of 1998, and “[b]y the fall of 1998, EMOs . . . operate[d] nearly 100 charter schools in Arizona, California, Colorado, Michigan, Minnesota, Massachusetts, North Carolina, Illinois, New Jersey, and Pennsylvania, and the District of Columbia.” *CTR. FOR EDUC. REFORM, CREATING A REVOLUTION FROM THE BOARDROOM TO THE CLASSROOM; NEW PARTNERS IN EDUCATION*, at <http://www.edreform.com/pubs/revolut.htm> (last visited Aug. 7, 2001).

voucher schools (like other private providers of goods and services in the American economy) are most importantly held accountable to the public via the market place. If enough families support them by sending their children, the schools will be able to keep their doors open (unless mismanagement brings it down despite a sufficiency of customers). Of course, legislative conditions contained in the statutes that would create a liberal voucher plan would impose some additional regulatory controls on voucher schools. For example, these laws would probably forbid certain types of discrimination in the treatment of pupils, require certain sorts of disclosure (e.g., teacher qualifications), and insist that all pupils take certain kinds of tests (e.g., statewide achievement tests given to public school pupils as well). The general understanding, however, is that these regulations are meant to be fairly minimal, designed primarily to help the market work better and to prevent certain egregious misconduct.

Generally speaking, therefore, a successful voucher school would be one that continues to attract a full complement of satisfied customers. To be sure, many have promoted the school voucher idea on the theory that competition through private providers will yield greater educational attainment for pupils than occurs in public schools today. Yet, others favor school vouchers for altogether different reasons, such as, they empower parents, they allow parents to match home and school values, or they promote diversity in educational mission. For those who care about the latter goals, higher test scores and graduation rates may be largely irrelevant in deciding whether a school voucher plan is successful. The point is that the main public goal of the voucher idea is to enable all families to make informed educational choices for their children.

By contrast, in order to both start and run, charter schools must pass through the chartering process. It is not enough that they can demonstrate they have (or will have) satisfied customers. Charter schools must also satisfy the public body that grants them their charter. The charter grantor, therefore, necessarily serves some sort of gate-keeping function.

The existence and role of a chartering body is also what distinguishes charter schools from certain other kinds of public schools that enroll pupils on the basis of choice. For example, long before charter schools were invented, many public school districts allowed choice among some or all of their existing schools (and increasingly states now insist that school districts permit their children to attend public schools located in other districts).<sup>21</sup> Hence, choice alone is not what distinguishes charter schools from the rest of public schools.

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21. See Henig & Sugarman, *supra* note 5, at 29 ("Nearly 60 percent of all schoolchildren in the United States attend schools of choice.").



This is most evident when we focus on the magnet, specialty and alternative schools that many districts have created.<sup>22</sup> Many of these are extremely close cousins to charter schools; they too enroll pupils on the basis of choice, and yet they are not given the charter school label. Perhaps most important, these other schools arise from the initiative of the school district itself (its superintendent, board, or the like), and in that sense are managed and staffed by (or at least under the direction of) the district's central office. While in practice, of course, these schools might be given a great deal of autonomy and might well have come about from initial local pressures in the community, they are nonetheless understood to be "owned" by the district as a whole, to be altered and used in furtherance of district-wide purposes. They do not apply or answer to a chartering agency, and this in turn means that they are not understood to have the same degree of autonomy that charter schools are meant to have once the charter has been granted.

### *B. The Special Role of Charter-Granting Bodies*

The foregoing discussion brings us close to the core of this Article's focus. If the truly distinctive feature of charter schools is that they have been granted a charter by a chartering body, exactly how should such bodies be constituted and function? Precisely what is their gate-keeping role? How should they go about deciding who to let in and who to keep out, and, after the school comes into existence, who to keep in and who to toss out?

We believe that designing the administration of this gate-keeping function is one of the hardest problems facing creators of charter schools schemes. Some outside parameters are reasonably clear. If everyone who merely asks for a charter gets one, then the charter school system becomes largely indistinguishable from the liberal sort of voucher school plan described above (putting aside the issue of religious schools) because charter-granting would become a ministerial act and in no way would serve the additional public values that we believe the basic chartering concept necessarily envisions.

At the other extreme, even if the education code (or most of it) is formally waived for charter schools (as is provided in most state charter school laws), the autonomy of charter schools would be completely sapped and their unique character undermined if, in the charter document itself, schools are by contract subjected to all or most of the very regulations from which the system meant to free them. At that point charter schools would become largely indistinguishable from alternative, specialty, or magnet schools.

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22. *See id.* (detailing the numbers of students in magnet, specialty, and alternative schools).

Instead, charter schools are supposed to wind up somewhere in between these poles—just where in between depends on how the gate-keeping function is understood and implemented. If charter schools are not to become effectively voucher schools on the one hand, or effectively captive alternative schools on the other, their distinctiveness will arise from the way the gate-keeping function is carried out. Speaking abstractly, most would probably agree that the gate-keeper's most critical roles are turning away at the outset schools that are very likely to ill serve their pupils or society as a whole, and revoking the charters of those who turn out to do so despite their initial promise. But converting these generalities into a functioning system is much more problematic. Precisely what are the public values that the gate-keepers are supposed to serve? Exactly what, beyond keeping their clientele, should charter schools achieve in order to be considered successful?

Are chartering bodies, for example, supposed to think of themselves as public versions of the long-standing school accreditation bodies that now exist and are widely used by private and public schools both to help themselves improve, and to provide evidence to potential customers and outsiders of the quality of their product?<sup>23</sup> Accrediting bodies focus on more than merely whether or not the school has filled all of its places. They worry about "quality." One difficulty with this analogy is that at least some charter-granting bodies today conceive themselves as simultaneously having the jobs of deciding which schools should be chartered, and promoting the development of new charter schools. Many charter school friendly public school districts are in this posture. We will return to this mixed role below, but the point for now is that accrediting bodies do not perform this dual function. A different problem with the accreditation analogy is that those bodies do not generally accredit new schools, but instead require that a school have a record of performance first. Chartering bodies, of course, have no such luxury—though perhaps the "charter renewal" process could be seen as more analogous to the accreditation (and re-accreditation) process, a point to which we return at the end of this Article.

A different analogy to consider is the school "takeover" or "reconstitution" movement.<sup>24</sup> While this type of public school reform is typically directed at entire school districts, sometimes it focuses on individual schools. In either case, the general vision here is that some schools are failing their pupils, and if after sufficient warning and perhaps the infusion of new

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23. See CTR. FOR EDUC. REFORM, ACCREDITATION: WHAT DOES IT MEAN?, at <http://www.edreform.com/parentpower/00dec/accreditation.html> (last visited Aug. 7, 2001) (explaining accreditation process).

24. See generally Liam Garland, *Navigating Treacherous Waters: A State Takeover Handbook* (Apr. 2001) (unpublished manuscript, on file with author).

funding and other resources, the school (or district) continues to fail, it will be taken over and dramatic change will occur. At the extreme, schools simply will be closed. Lesser changes might involve a large turnover in school personnel, or at least, a change in the school principal(s). The point for our purposes here is to raise the question of whether school chartering agencies ought to think about their role and relationship to charter schools analogously to the way public school authorities think about deciding whether to reconstitute schools under their jurisdiction. We return to this analogy as well at the end.

As a final analogy, are charter grantors supposed to think of themselves as public sector venture capitalists? Private sector venture capitalists often provide financial support for, and take a partial "ownership" position in, new enterprises that promise innovation. Note further that if the entrepreneur makes a success of it, everyone is happy, but if things do not go so well, the venture capitalists may either replace the CEO or pull the plug on the entire operation. Evidently there are certain similarities between venture capitalists and school chartering bodies, and perhaps charter grantors could learn something from venture capitalists about how to select which start-up schools to support.

For now, having set the stage in this way, we turn in the upcoming parts of this Article to what we see as the key features and steps in the gate-keeping process involving charter schools. Specifically, we will address: (1) who might be and is allowed to charter schools; (2) what might and does the charter school approval process look like; (3) what criteria might be and are applied in determining whether a charter is granted; (4) what might and does happen if a charter applicant is turned down (this involves re-considerations, appeals, and the like); (5) how might and does the monitoring process work, both right after the charter is granted and before the school is in operation, and after the school is open and running; and (6) how might and does the charter revocation and renewal process work.

We confess at the outset that by the time we are finished we will have more to say about what is and what might be than what precisely should be. Nonetheless, we believe that an examination of these specific aspects of the chartering process is critical to forming a sound judgment about what the gate-keeping function should and can be. Because chartering agencies have the ability to cultivate innovation by identifying what they view as promising candidates, while weeding out those they see as unqualified, how they carry out this responsibility determines the number, nature and quality of charter schools. If chartering bodies perform their jobs poorly, they may, on the one hand, improperly deny some charters, impose burdensome requirements on applicants, and have an undesirable chilling effect on legitimate petitioners. On the other hand, if these bodies are lax and apply

low or indiscriminate criteria or standards, they may stimulate the creation of poorly conceived charter schools.

## I. WHO CHARTERS?

Charter school authorizers are generally public entities that sponsor individuals or groups to operate charter schools for a specific duration of time, which is subject to renewal. A state must make a critical, initial choice in deciding who should be allowed to grant charters—whether it wants to rely upon bodies that already perform central functions in elementary and secondary education, such as local school districts or the state board of education, or whether it wants to employ other bodies, such as public universities, a new statewide chartering agency, or private institutions, or both. In fact, the District of Columbia and the thirty-six states that currently have charter laws on the books have developed a variety of combinations and permutations of chartering sponsors.

### A. Chartering Bodies

#### 1. Local Educational Agencies

The great majority of states currently provide for charter sponsorship by local education agencies. As of 2000, thirty of the thirty-six states and the District of Columbia entrust chartering authority in whole or in part to local school boards.<sup>25</sup> In seventeen of these jurisdictions, the local school board has sole discretion to grant or deny initial petitions.<sup>26</sup> In some others, local school boards may only conditionally grant charters. For instance, in Minnesota, New Hampshire, and North Carolina, local school board sponsorship is contingent upon state board approval. Conversely, in Mississippi, the State Board of Education may grant charters subject to local school board approval.<sup>27</sup>

A primary rationale for entrusting chartering authority to local school boards is that districts are believed to possess the administrative and educational expertise to best serve their local constituents. Local school boards are also accountable to their local electorate. However, many charter school advocates express concern that local school boards may be the

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25. See CTR. FOR EDUC. REFORM, CHARTER SCHOOL LAWS: ACROSS THE STATES 2000 RANKING SCORE CARD AND LEGISLATIVE PROFILES, at [http://www.edreform.com/charter\\_schools/laws/index.html](http://www.edreform.com/charter_schools/laws/index.html) (last visited Aug. 7, 2001) (providing a detailed accounting of education agencies role in chartering).

26. See *id.*

27. See *id.*

worst agency to entrust such responsibility since, in some circumstances, they have little incentive to properly fulfill this role. Districts may view charter schools as drawing resources from, and competing for students, with their traditional district schools. In addition, union pressures may add to the disincentive in states where charter schools are exempt from collective bargaining and other union requirements that apply to other public schools.<sup>28</sup>

## *2. County Boards of Education, State Boards or Departments of Education, and Specially Created State Agencies*

Although the local school board is the most common charter-granting entity, some states also (or instead) look to other existing and newly created agencies to review initial charter applications. In California, a petitioner may file his initial application either with his local school board, or, in some circumstances, directly with the County Board of Education.<sup>29</sup> In ten states and the District of Columbia,<sup>30</sup> the State Boards of Education may receive and review initial applications. Indeed, in Massachusetts and Utah, the State Boards of Education have exclusive authority to grant charters. In an effort to go outside traditional education establishments, jurisdictions such as Arizona and the District of Columbia have, in addition, created special agencies for this purpose.<sup>31</sup>

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28. Reflecting a commonly held belief, a 1997 report issued by RAND and the University of Washington's Center on Reinventing Public Education stated that, "[a]gencies that consider themselves to be in direct competition with independent charter schools (i.e., school boards), and agencies whose main constituencies are agencies that consider themselves to be in direct competition (i.e., state departments of education), are less likely to grant charters than agencies that have no conflicting mission." MARC DEAN MILLOT & ROBIN LAKE, SUPPLYING A SYSTEM OF CHARTER SCHOOLS: OBSERVATIONS ON EARLY IMPLEMENTATION OF THE MASSACHUSETTS STATUTE 39 (RAND 1997).

29. See CAL. EDUC. CODE §§ 47605, 47605.5 (West 1993 & Supp. 2001) (authorizing applicants to file petitions with local school boards or with the appropriate County Board of Education respectively).

30. The District of Columbia Board of Education is essentially both the "local" and the "state" board of education.

31. See CTR. FOR EDUC. REFORM, CHARTER SCHOOL LEGISLATION: PROFILE OF ARIZONA'S CHARTER SCHOOL LAW, at [http://edreform.com/charter\\_schools/laws/Arizona.htm](http://edreform.com/charter_schools/laws/Arizona.htm) (last visited Aug. 7, 2001) (stating Arizona has created a state board for charter schools); CTR. FOR EDUC. REFORM, CHARTER SCHOOL LEGISLATION: PROFILE OF THE DISTRICT OF COLUMBIA'S CHARTER SCHOOL LAW, at [http://edreform.com/charter\\_schools/laws/District.htm](http://edreform.com/charter_schools/laws/District.htm) (last visited Aug. 7, 2001) (stating District of Columbia has created the Public Charter School Board as the chartering authority for that jurisdiction).

### 3. *Universities and Community Colleges*

Post-secondary institutions, particularly those with schools of education or teacher-training programs, are considered by some to possess the educational expertise to serve as effective gate-keepers. States such as Michigan, Wisconsin, and New York have assigned sponsorship authority to public universities and/or community colleges, while Minnesota has also delegated that authority to private colleges.<sup>32</sup> However, the experience of some universities provides a cautionary story. These institutions of higher education have come to question whether granting charters and overseeing charter schools fit into their traditional goals and mission, and some wonder whether they have the administrative expertise and personnel to tackle such a responsibility.<sup>33</sup>

### 4. *Other Options*

A number of states have granted chartering authority, within a limited scope, to certain specially identified elected and appointed officials. In Missouri, for example, the Mayors of Kansas City and St. Louis may grant charters.<sup>34</sup> In New York, the Board of Trustees of the State University of New York (SUNY) and the Board of Regents have been given that authority.<sup>35</sup> In Ohio, the joint vocational board in the counties with the eight biggest districts may sponsor a charter school.<sup>36</sup>

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32. CTR. FOR EDUC. REFORM, CHARTER SCHOOL LEGISLATION: PROFILE OF MICHIGAN'S CHARTER SCHOOL LAW, at [http://edreform.com/charter\\_schools/laws/Michigan.htm](http://edreform.com/charter_schools/laws/Michigan.htm) (last visited Aug. 7, 2001); CTR. FOR EDUC. REFORM, CHARTER SCHOOL LEGISLATION: PROFILE OF WISCONSIN'S CHARTER SCHOOL LAW, at [http://edreform.com/charter\\_schools/laws/Wisconsin.htm](http://edreform.com/charter_schools/laws/Wisconsin.htm) (last visited Aug. 7, 2001); CTR. FOR EDUC. REFORM, CHARTER SCHOOL LEGISLATION: PROFILE OF NEW YORK'S CHARTER SCHOOL LAW, at [http://edreform.com/charter\\_schools/laws/NewYork.htm](http://edreform.com/charter_schools/laws/NewYork.htm) (last visited Aug. 7, 2001); CTR. FOR EDUC. REFORM, CHARTER SCHOOL LEGISLATION: PROFILE OF MINNESOTA'S CHARTER SCHOOL LAW, at [http://edreform.com/charter\\_schools/laws/Minnesota.htm](http://edreform.com/charter_schools/laws/Minnesota.htm) (last visited Aug. 7, 2001).

33. See *infra* notes 53-54.

34. See CTR. FOR EDUC. REFORM, CHARTER SCHOOL LEGISLATION: PROFILE OF MISSOURI'S CHARTER SCHOOL LAW, at [http://edreform.com/charter\\_schools/laws/Missouri.htm](http://edreform.com/charter_schools/laws/Missouri.htm) (last visited Aug. 7, 2001).

35. See CTR. FOR EDUC. REFORM, CHARTER SCHOOL LEGISLATION: PROFILE OF NEW YORK'S CHARTER SCHOOL LAW, at [http://edreform.com/charter\\_schools/laws/NewYork.htm](http://edreform.com/charter_schools/laws/NewYork.htm) (last visited Aug. 7, 2001).

36. See CTR. FOR EDUC. REFORM, CHARTER SCHOOL LEGISLATION: PROFILE OF OHIO'S CHARTER SCHOOL LAW, at [http://edreform.com/charter\\_schools/laws/Ohio.htm](http://edreform.com/charter_schools/laws/Ohio.htm) (last visited Aug. 7, 2001).

*B. Chartering Regimes*

In deciding who should be permitted to charter schools, states must also decide whether to establish an exclusive charter-granting agency or whether more than one body should be permitted to do so. In fact, as intimated in the prior discussion, states have developed a number of solutions to this question. Some states rely on a very centralized, regulated, single sponsorship arrangement, while others have opted for multiple agency schemes.

*1. Single Sponsor*

Utah and Massachusetts, the two states, as noted above, that have chosen single sponsorship regimes also have a “go slow” approach. Both have not only given exclusive chartering authority to a traditional state education agency, but also both states have imposed statutory caps on the number of charter schools allowed.<sup>37</sup> Utah permits the State Department of Education to charter no more than eight schools, and it currently has reached this maximum.<sup>38</sup> The Massachusetts legislature authorized the State Board of Education to issue no more than 120 charters, and, as of the 2000-2001 school year, Massachusetts expected to have forty-three charter schools in operation.<sup>39</sup>

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37. See K. LLOYD BILLINGSLEY & PAMELA A. RILEY, PACIFIC RESEARCH INSTITUTE, EXPANDING THE CHARTERING IDEA: A TEMPLATE FOR LEGISLATIVE & POLICY REFORM 39, 54 (1999).

38. See UTAH STATE OFFICE OF EDUC., UTAH CHARTER SCHOOLS DIRECTORY, at <http://www.usoe.k12.ut.us/charterschools/directory.htm> (last visited Aug. 7, 2001) (listing the eight Utah charter schools allowed for by state law).

39. See MASS. GEN. LAWS ch. 71, § 89(i) (West 1996 & Supp. 2000). See also MASS. OFFICE OF THE INSPECTOR GEN., COMMONWEALTH OF MASSACHUSETTS, A MANAGEMENT REVIEW OF COMMONWEALTH CHARTER SCHOOLS (Nov. 1999), at <http://www.state.ma.us/ig/publ/chscx.htm> (last visited Aug. 7, 2001) (focusing on the business operations of twenty-four Massachusetts charter schools). Massachusetts law provides for two types of charter schools, “Commonwealth charter schools,” which operate independently from any local school committee and “Horace Mann charter schools,” which are conversions, in whole or in part, of existing public schools. Applicants for Horace Mann schools must be approved, as well, by the local school committee and the local collective bargaining agent. See MASS. GEN. LAWS ch. 71, § 89(a)-(b) (West 1996 & Supp. 2000). Seventy-two of those slots are reserved for Commonwealth charter schools and forty-eight are reserved for Horace Mann conversions. See *id.* § 89(i). Before being rewritten under section 2 of § 2000, c. 227, the original legislation set the total number of charter schools allowed in the Commonwealth of Massachusetts at fifty (thirteen Horace Mann schools and thirty seven commonwealth schools). It also allowed for redistribution (using a statutory formula) of these original limits if fewer than thirteen Horace Mann proposals were submitted. According to the Massachusetts Department of Education, by September 2000, thirty-seven Commonwealth charter schools and six Horace Mann charter schools were scheduled to be opened.

We note that having a single exclusive chartering agency need not necessarily be tied to a cautious approach. After all, that agency (even if it is the existing State Board of Education) could be wildly enthusiastic about chartering schools and, assuming there is no legislative cap on the number of charters it may grant, such a body could be highly pro-active in generating a large number of charter schools. Nonetheless, we have not found any state that fits this pattern.

## 2. *Local School Districts*

As noted above, local public school districts are allowed to charter schools in most states, and in nearly twenty of them they are the only body to which one may apply initially for a charter.<sup>40</sup> However, even in this setting, there are important policy choices for a designer of the chartering regime to make. First, and perhaps most importantly, must an applicant seek a charter from the district in which the school is to be physically located, or, for example, should public school districts be allowed to grant charters to schools located anywhere in the state?

On this dimension the California history is instructive. Nearly from the outset, some enterprising school districts started granting charters to schools located far from the sponsoring district.<sup>41</sup> Some view this as a desirable way for pro-charter public authorities to launch schools that might be resisted in recalcitrant communities. Others see this as irresponsible sponsoring of schools that cannot realistically be monitored by the sponsor, and worse, critics saw some of the sponsors to be granting charters, not for educational reasons, but rather for the financial gain of the chartering district (which imposed what some saw as extravagant administrative fees on the charter schools). The doubters were fortified in their concerns when it appeared that some of these schools were not really enrolling the pupils they claimed. For example, some pupils were actually attending private schools, while others were being home schooled and were receiving virtually no services from the charter school that claimed them as pupils.<sup>42</sup> Partly as a result of these concerns, a bill was introduced that would have required local school districts to charter only those schools that are located in the chartering school district. But this bill failed, and one of the most

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40. See CTR. FOR EDUC. REFORM, CHARTER SCHOOL LAWS ACROSS THE STATES 2000: RANKING SCORE CARD AND LEGISLATIVE PROFILES, at [http://www.edreform.com/charter\\_schools/laws/index.html](http://www.edreform.com/charter_schools/laws/index.html) (last visited Aug. 7, 2001).

41. See BILLINGSLEY & RILEY, *supra* note 37, at 34-35.

42. See Howard Blume & Kevin Uhrich, *Charter School for Scandal: How a Controversial Academy Scored Millions in State Education Funds*, available at <http://www.laweekly.com/ink/98/38/blume1.shtml> (examining how a public charter school had used its location to exploit millions of dollars in state apportionment money).



active chartering districts in California continues to have thirteen charter schools around the state under its sponsorship, only two of which are located inside the sponsoring district.<sup>43</sup>

A second issue is whether an applicant who is turned down by one district may then freshly apply, without prejudice, to another district. Obviously, some groups wanting to start a charter school have a specific tie to a particular community and have in mind a specific location and specific target audience. For them to apply elsewhere after they have been turned down by their local school district would make sense only if a more distant school district were legally able and willing to sponsor them. Yet, other charter school developers may be driven more by a philosophy of education, a mission, or a teaching style that might be compatible with several locations. This sort of applicant might well wish to try again in a second district (and could promise to locate in that district) if its original target district turns it down. Indeed, such a proposed school might find it attractive simultaneously to apply to several districts, thereby raising the further question of whether such multiple simultaneous applications are to be allowed.

We can think of two possible analogies here from the world of higher education. On the one hand, it is conventionally all right to submit the same research grant application to several different funding agencies at the same time. Yet, in many fields it is conventionally quite inappropriate to submit an article for publication to a second journal before one's first choice journal has had the opportunity to accept or reject it.

In California, it now appears that, although it is legal for a charter school applicant to apply to more than one district at the same time, this practice is frowned upon by chartering officials, who probably do not welcome the prospect of doing the necessary review only to find that the applicant has accepted a charter from some place else. Hence, those wishing to obtain charters generally have only a single request for a specific school pending at any one time.<sup>44</sup>

### 3. *Multiple Sponsors*

Several states have adopted a multiple sponsor regime, which proponents believe promotes the formation of charter schools, first, because if one sponsor turns an applicant down, he may apply with another, and second, because an applicant can select a more promising sponsor to which to

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43. See Sarah Melvoin, *Frequently Asked Questions*, CHARTER CURRENTS 10, 11 (Mar. 2001) (discussing whether a charter can be granted in one district and be located in another).

44. See E-mail from Eric Premack, Co-Director, Charter School Development Center, California State University, Sacramento, to authors (Apr. 5, 2001) (on file with author).

apply in the first place. Different chartering agencies within a state may well have diverse philosophies, goals, or standards. We refer here not to the possibility of applying to different local school districts, already discussed above, but rather to the opportunity to apply to different types of chartering bodies.

For example, under California's original charter school law, initial applications could be filed only with local school districts (albeit, as just noted, with districts located anywhere in the state). County Boards of Education had the authority only to hear "appeals" and to grant charters as a result of the appeals process (more on this below). Under the amended charter law, however, some applicants may now go initially to County Boards of Education in pursuit of a charter.<sup>45</sup> Nevertheless, as of late 1999, nearly all of the 261 charters that had been awarded in California were granted by local school districts.<sup>46</sup>

Arizona, which passed its charter school law in 1994, at a time of considerable discontent with public education in that state, adopted a different approach. Arizona had a Republican governor and conservative legislature. Vouchers were then a hot topic, and market-based reforms were seen by many as the key to school improvement. Moreover, charter school supporters sought and continue to support a limited role for charter-granting agencies and a larger role for parent choice.<sup>47</sup> The result was an expansive parallel sponsorship scheme both within and outside of established education channels, as the legislature created a State Board of Charter Schools that, along with both local school districts and the State Board of Education, was empowered to grant school charters.<sup>48</sup>

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45. See CAL. EDUC. CODE §§ 47605(j)(1), 47605.5 (West 1993 & Supp. 2001). California's amended law also eliminates both statewide and per district caps that were contained in the original charter school legislation.

46. See CHARTER SCH. DEV. CTR., CALIFORNIA "CHARTER PAGES," at [http://www.csus.edu/ier/charter/charter\\_pages.html](http://www.csus.edu/ier/charter/charter_pages.html) (last visited Aug. 7, 2001) (listing information on 265 California school districts). "The [Charter Schools Development Center at California State University, Sacramento's Institute for Education Reform] provides experience and expert technical assistance, training, and resources to California charter school developers, operators, charter-granting agencies, and policy makers CHARTER SCH. DEV. CTR., ABOUT THE CHARTER SCHOOLS DEVELOPMENT CENTER, at <http://www.csus.edu/ier/charter/center.html> (last visited Aug. 7, 2001).

47. See generally Katrina Bulkley, *Charter School Authorizers: A New Governance Mechanism?*, 13 EDUC. POL'Y 674 (1999) (exploring the practices of charter school authorizers in Arizona and Michigan).

48. See Kurt A. Luther, Note, *Legislative Review: The School Improvement Act*, 27 ARIZ. ST. L.J. 389, 391 (1995); see also CTR. FOR EDUC. REFORM, CHARTER SCHOOL LAWS ACROSS THE STATES 2000: RANKING SCORE CARD AND LEGISLATIVE PROFILES, at [http://edreform.com/charter\\_schools/laws/](http://edreform.com/charter_schools/laws/) (last visited Aug. 7, 2001) (noting the Center for Education Reform publication *Charter School Laws Across the States 2000* ranked Arizona

In 1995, the year following the enactment of charter school legislation, the State Board of Education had sponsored twenty schools, the State Board for Charter Schools had sponsored twenty-five schools, and local school district governing boards had sponsored five schools.<sup>49</sup> Since then, the numbers have grown significantly. By February 2001, the State Board of Education was the sponsor of ninety-four schools, the State Board for Charter Schools was the sponsor of 268 schools, and local school boards were sponsors of ninety-three schools.<sup>50</sup>

In 1993, with the strong support of its Governor, Michigan adopted a still different multiple sponsor arrangement, in the aftermath of a legislative decision to eliminate the use of property tax as the primary method for public school funding and over the opposition of the Michigan Education Association.<sup>51</sup>

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as the state with the “strongest” law). According to the Center for Education Reform’s *Charter School Laws Across the States 2000*, the authors identify the goal of charter laws as seeking to “provide the maximum capacity and flexibility within a state to yield the establishment of highly successful charter schools.” *Id.* Therefore under their definition, a “strong” law is “one that fosters the development of numerous, genuinely independent charter schools” whereas a “weak” law is “one that provides few opportunities or incentives for charter school development.” *Id.* According to the Goldwater Institute’s Center for Market Based Education’s five-year study of Arizona charter schools, the State Board for Charter Schools (SBCS) is currently comprised of:

[T]he superintendent or the superintendent’s designee, six members of the general public, at least two of whom must reside in a school district where at least sixty per cent of the children who attend school in the district meet the eligibility requirements established under the national school lunch and child nutrition Acts for free lunches and who are appointed by the governor, and two members of the business community, also appointed by the governor. These voting members serve for four years. In addition, three members of the legislature are appointed jointly by the president of the senate and the speaker of the house of representatives to serve in an advisory capacity. Advisory members serve two year terms. The superintendent serves a term that is concurrent with their terms in office.

MARY GIFFORD ET AL., GOLDWATER INST. CTR. FOR MARKET BASED EDUC., ARIZONA EDUCATION ANALYSIS: FIVE YEAR CHARTER SCHOOL STUDY 26 (2000). In practice, the appointed directors of the SBE and the SBCS have come primarily from the business, private school, or media communities rather than from the traditional public education community. See Bulkley, *supra* note 47, at 681 (detailing a case study of Arizona charter schools).

49. See GIFFORD ET AL., *supra* note 48, at 23 (discussing charter school sponsorship).

50. See ARIZ. DEP’T OF EDUC., WELCOME TO CHARTER SCHOOLS, at <http://www.ade.state.az.us/charterschools/search/SiteList.asp> (last visited Aug. 7, 2001). Moreover, during the 2000 legislative session, the Arizona legislature lifted the prior cap on the number of charters that may be sponsored by SBE and SBCS, which are now able to sponsor as many schools as the boards are able to oversee.

51. According to one report, “[i]n the process of restructuring the entire school finance system, Governor John Engler proposed a variety of quality-oriented reforms to be implemented in conjunction with the finance changes, including public school choice and charter schools. Although school choice was not passed at that time, a charter school bill . . . was

Michigan authorizes local school boards, intermediate school boards, community college boards, and the governing board of public universities to sponsor charters. Universities may grant charters anywhere in the state, while other sponsors are limited to authorizing schools within their service areas.<sup>52</sup> Each university authorizing body has developed its own unique philosophy about the type of school it is willing to charter, as well as its oversight role over such schools.<sup>53</sup> However, since the pro-charter school Governor and his appointed trustees have had different views than some university administrators, there has been internal controversy over chartering at Eastern Michigan University, Central Michigan University, and Northern Michigan University.<sup>54</sup> As of 1999, 137 charter schools were in

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successful.” Bulkey, *supra* note 47, at 685 (exploring a case study of Michigan charter schools). See also 1976 Mich. Pub. Acts 451 § 502(1).

52. If an authorizing body fails to properly oversee one or more public school academies it sponsors, the state board may suspend the power of that authorizing body to issue new charter contracts, although those contracts issued prior to suspension remain unaffected. See 1976 Mich. Pub. Acts 451 § 502(5).

53. For instance, Saginaw Valley State University only charters programs that are not available in surrounding areas. Eastern Michigan University considers whether a school:

- 1) Has a sound, innovative curriculum and philosophy,
- 2) has a sound organizational structure (and diverse board),
- 3) has diversity in staff, students (if possible), and targeted student/parent population,
- 4) fills an unmet need (i.e., offer a program not currently offered by community school districts),
- 5) has geographic proximity (i.e. serves “natural” EMU communities and constituents),
- 6) has a specific building and site that fits program and philosophy,
- 7) has a strong parent/community initiative with blend of “independent” and management companies, and
- 8) does not exceed in number that sanctioned by the EMU regents/president.

MICH. DEP’T OF EDUC., *supra* note 8, at 25.

54. Like Arizona, Michigan offers another example of the influence of politics on the structure of charter authorizing regimes. Michigan’s governor at the time the charter school law was passed was a strong charter school supporter, and by authorizing public universities to become charter-granting bodies, most of which had board members appointed by the governor, he leveraged his power to promote the development of charter schools in the state. The use of this political pressure is illustrated by the turn of events in several universities.

Eastern Michigan University’s President stated in 1998 that he was opposed to charter schools. However, under threat of a curtailment of university funding, he changed his stance. See *id.* at 60-61 (citing W. Shelton’s opening address at the first annual charter school conference in Ypsilanti, Michigan on December 1, 1998).

Similarly, Northern Michigan University was prodded to begin sponsoring charter schools after newly appointed board members urged them to take action. See *id.* at 61.

Likewise, Central Michigan University (CMU) experienced significant pressure to sponsor a number of charter schools immediately. As a result, before its application procedures were fully developed, CMU found itself contending with a large number of applications, and its handling of them was harshly criticized. In response to these early problems, CMU

operation in Michigan, of which 109 were authorized by universities, one by a community college, fifteen by intermediate school districts, and twelve by local school districts.<sup>55</sup> Yet, despite the activism by some Michigan public universities, there is a notable absence of the state's other major universities. For example, the University of Michigan, Michigan State University, and Wayne State University, whose board members are not appointed by the governor, have not sponsored any charter schools.<sup>56</sup>

## II. THE APPLICATION PROCESS

Charter-granting bodies must establish standards and procedures by which to evaluate applications. In the section following this one, we focus on the extremely important issue of the substantive criteria to be used in evaluating charter applicants. In this section we explore the steps in the application process.

The application process is important both because it is likely to require substantial investments of time and money from both sides of the application, and because a fair process provides the best chance that the substantive criteria will be fairly applied and charters properly awarded or denied.

### A. Initial Steps in the Process

Some of the typical steps in the application process that must be developed are illustrated by this example from Massachusetts, where an annual process is administered in two stages. Applicants must submit a prospectus to the Board of Education no later than November 15.<sup>57</sup> Board guidelines set out not only deadlines and content, but also the format (i.e. margin, font size) of the application documents. Satisfying the format requirements can be crucial for an applicant, since the chartering agency could be very particular and use these procedural requirements as a filter in determining which applications move on to the substantive consideration stage of the process.

By the first week of December, the Massachusetts Commissioner of Education "invite[s] selected applicants to submit a [more] comprehensive

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developed a "detailed, highly legalistic charter contract that is several inches thick." Bulkley, *supra* note 47, at 688. CMU also created a matching "bureaucratic structure that includes professional educators (along with other personnel) and a set of formalized policies and for the schools it has sponsored. . . ." *Id.* at 691.

55. See MICH. DEP'T OF EDUC., *supra* note 8, at 60; see also CTR. FOR EDUC. REFORM, CHARTER SCHOOL LEGISLATION: PROFILE OF MICHIGAN'S CHARTER SCHOOL LAW, at [http://edreform.com/charter\\_schools/laws/Michigan.htm](http://edreform.com/charter_schools/laws/Michigan.htm) (last visited Aug. 7, 2001) (noting that 173 charter schools were operating in Michigan by 2000).

56. See MICH. DEP'T OF EDUC., *supra* note 8, at 60.

57. See MASS. REGS. CODE tit. 603, § 1.04(1) (2001).

proposal.”<sup>58</sup> The Department of Education reviews each full prospectus and conducts interviews with all finalists. The Board of Education then holds a public hearing to solicit and review comments on the application from the school committees of the district from which students will be drawn. The Board may be assisted in its review and decision making process by review panels comprised of individuals appointed by the Commissioner. These reviewers serve solely in an advisory role.<sup>59</sup>

Although the Massachusetts statute substantially determines the process just described, in Arizona the charter grantors can pretty much decide for themselves how to set up their application review process. This is because state law gives the authorized public bodies—the State Board of Education (SBE), the State Board for Charter Schools (SBCS), as well as all public school districts—great leeway to establish whatever application review process they wish.<sup>60</sup> Consistent with Arizona’s general pro-charter outlook, if a local school board rejects an application, the board will notify the applicant in writing of the reasons for the rejection and the applicant will usually be invited to request technical assistance from the district on how to improve the application and then submit a revised application for reconsideration.<sup>61</sup> The SBE and the SBCS are even more solicitous, as they are required by statute to offer suggestions for improving the application to any applicant who is preliminarily turned down.<sup>62</sup>

### B. Guidance to Applicants

In California, charter-granting agencies often publish their own guidelines to explain the process to interested applicants. The guidelines may include a checklist of the required documentation<sup>63</sup> and a timeline of stages

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58. *Id.*

59. *See id.* (setting forth the charter review process).

60. While local school boards generally rely on their members’ expertise, the Arizona State Board of Education (SBE) relies on appointed subcommittees to review and provide recommendations to the full board. Review committees are comprised of: one representative with architectural experience, two curriculum experts, one successful charter school operator, one SBE board member, and one member from a city planning and zoning department. The SBE’s charter division director attends the meetings and acts as a facilitator, but does not vote. Charter applicants go before the subcommittee to answer questions and provide any needed clarification. While the subcommittee votes to recommend approval or denial, the final decision is made by the SBE Board. *See GIFFORD ET AL.*, *supra* note 48, at 26 (noting the role of sponsors in the chartering process).

61. *See ARIZ. REV. STAT. ANN.* § 15-183(C)(1) (West 1991 & Supp. 1999).

62. *See id.* § 15-183(C)(2).

63. *See FRESNO UNIFIED SCH. DIST., GUIDELINES FOR CHARTER DEVELOPERS FOR SUBMITTAL OF A CHARTER PETITION TO THE FRESNO UNIFIED SCHOOL DISTRICT* (adopted in 1999).

in the application process.<sup>64</sup> Some school districts even offer workshops to introduce the application process and to give interested parties an opportunity to make suggestions and to ask questions about the process.<sup>65</sup> Some guides are more comprehensive than others and convey to the applicants the precise type of information and showings that the chartering bodies expect in viable applications.

While such guides may be informative, applicants still often need further assistance in preparing the required documents to effectively satisfy the expectations of the chartering body. This process can be particularly difficult and time consuming when the charter grantors insist on substantial information about the educational soundness and the likely effectiveness of the proposed school. In practice, the need for and availability of technical and financial assistance during the preparatory phase is likely to vary depending on the type of applicant. Resources may be more abundant, for example, for applicants supported by well-funded private for-profit entities, especially if those supporters have helped other applicants win charters previously. Conversely, essential outside resources may be less accessible to newly formed, community group applicants who are not backed by larger and more experienced non-profit organizations.

This problem is being reduced somewhat in states like California where an active organization of charter school providers has been created, the California Network of Educational Charters (CANEC), which holds meetings and provides written information to would-be applicants as to how to proceed.<sup>66</sup> Moreover, an active charter school development project has been created at California State University, Sacramento, which has a rich website, holds many conferences, and has experts on charter schools available for consultation. Furthermore, as discussed in the next section, the federal government and some states have appropriated financial assistance to help applicants with both the preparation of applications and some of their other start-up costs.<sup>67</sup>

### C. *Reaching a Decision*

As illustrated by the Massachusetts example noted above, the substan-

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64. See SACRAMENTO CITY UNIFIED SCH. DIST., BOARD WORKSHOP ON CHARTER SCHOOL PROCESS (Mar. 27, 2000).

65. See *id.*

66. See California Network of Educational Charters, *Mission Statement*, at <http://www.canec.org/about.html> (last visited Aug. 7, 2001).

67. See Press Release, U.S. Dep't of Educ., Charter Schools Get Boost from Federal Start-Up Funds (Feb. 11, 2000), at <http://www.ed.gov/PressReleases/02-2000/211.html> (last visited Aug. 7, 2001) (discussing federal financial commitments of \$175 million to support the development of charter schools).

tive review process often begins with an initial screening stage. At this stage, applicants may be required to demonstrate only that they understand the objectives set forth by the state in areas such as finance, accountability, and curriculum, and that they intend to follow requirements specified by state law. Materials submitted at this stage may include mission statements, assurances that the applicant will abide by the state policy on matters such as discrimination, and an acknowledgment of the authority of the review board in setting deadlines and accepting or rejecting an application. This stage aims to ensure that the applicants meet the minimum eligibility requirements, understand the general purposes of charter schools, have some plans concerning the implementation of the proposed school, and understand the application process itself.<sup>68</sup>

After an initial screening, the reviewing body will decide whether a particular applicant should move onto the next stage. At each stage, the chartering board may also exercise discretion in granting an applicant an opportunity to remedy defects in the application so as to continue in the process. Grantors vary in the number of stages in their process, but all reach a final stage where the applicant's proposal undergoes close and qualitative scrutiny. Again, at this final stage, the review board can exercise discretion in rejecting an application or granting the applicant an opportunity to remedy defects or to resolve disputes with the board. Charter grantors then have two choices: they can provide applicants an opportunity to have a public hearing, or, acting more like charitable foundations making grants, they can act on the basis of written submissions alone.

In many local school districts, although the final decision as to whether or not to grant a charter is officially made by the Board of Education, the applicant's file is earlier reviewed by specially assigned district staff (who may well meet in person with the applicant in a sort of preliminary hearing). Staff then will typically make recommendations to the Board, and in some districts these recommendations will be the most important predictor as to how the board will decide.<sup>69</sup>

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68. See D.C. PUB. CHARTER SCH. BD., APPLICATION GUIDELINES, APPENDIX B: REVIEW PROCESS (1999-2000) (explaining first and second stage review processes); LOS ANGELES UNIFIED SCHOOL DISTRICT, CHARTER SCHOOL GUIDELINES CHECKLIST – INITIAL SCREENING (2000), at <http://www.lausd.k12.ca.us/lausd/offices/reform/cs07-guide-checklist-summay.doc> (last visited Aug. 7, 2001); OAKLAND UNIFIED SCH. DIST.: GUIDELINES AND REQUIREMENTS OF CHARTER SCHOOL PETITIONS: PHILOSOPHY-GOALS-OBJECTIVES AND COMPREHENSIVE PLANS (1999).

69. In 2000-2001 in Oakland, California, for example, charter seekers were told that they could approach the Assistant Superintendent Jose Martinez prior to submitting a formal petition to the district. Martinez' job is to informally review drafts of proposals, consult with the district's Charter Review Committee, and provide feedback as to the likely success or failure of the petition. Martinez reported that in his first five months in this role, all but



In this respect, the charter school screening process is not unlike what occurs in many communities with respect to the way the city planning commission handles requests for zoning variance. Those variance applications are also typically reviewed in advance by professional city planning staff members who make recommendations to the city planning board, and those staff recommendations on zoning issues are typically, although not invariably, determinative. Obviously, it is important to a school board that any professional staff put in charge of reviewing charter applications share the general outlook toward charter schools that the board itself has. However, sometimes this may be difficult to achieve, for example, if the board itself is badly divided over how to approach charter school applications, or if the superintendent and the board are at odds over this issue.

### III. CRITERIA FOR APPROVAL

#### A. *General Considerations and Variations from Place to Place*

Some criteria for the approval (or denial) of charter school applications are generally set out by the state legislature as part of the relevant charter school legislation. However, the content of state laws varies considerably from jurisdiction to jurisdiction. Perhaps most importantly, some states statutorily establish detailed criteria governing eligibility to apply, and may include rules governing teacher qualifications, student admission practices, facilities, and other provisions to which charter school applicants must agree if they are to be approved.<sup>70</sup> By contrast, other state legislation only establishes broad educational objectives for charter schools and authorizes the chartering agencies to identify the specific approval criteria that they find appropriate to ensure that a charter school applicant will be able to achieve those state-determined objectives.<sup>71</sup>

The criteria that applicants must meet to obtain a school charter can not

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one of those who formally applied for charters had earlier approached him. See E-mail from Jose Martinez, Assistant Superintendent in Charge of Reforms, Oakland Unified School District, to Tanya Russell, Oakland Unified School District (Mar. 15, 2001) (on file with author).

70. See generally BILLINGSLEY & RILEY, *supra* note 37.

71. See *id.* As was readily predictable, organized interest groups have proposed for consideration charter school selection criteria that reflect their members' special interests. And in many states, teachers' unions are the most powerful of these interest groups. Thus, for example, at the behest of the California Teachers Association, the California legislature recently insisted that charter school applicants agree to engage in collective bargaining with their teachers, at least if that is what the teachers want. Another unsurprising development is that the criteria applied in approving charter school applicants evolve overtime, often becoming more specific, as chartering bodies gain more experience with the process.

only influence the degree of autonomy the successfully chartered school will enjoy, but also the criteria itself can make it easier or harder to obtain a charter in the first place. Clearly in some states like Arizona, the charter school idea has been widely embraced by most, if not all, of the key players in the political process, and the general outlook of the legislative scheme is pro-charter schools with the approval criteria not intended to make obtaining a charter a terribly difficult matter.<sup>72</sup> In other states, however, the legislation reflects much greater caution. Perhaps the legislature is just more skeptical about how this development will unfold; perhaps it wants to go slow and make it hard to win a charter in the hopes that nearly all early charter schools will be resounding successes that will set a positive pattern for the future; or perhaps, to the contrary, the legislature is not very keen on charter schools at all, but has only half-heartedly signed on to the nationwide bandwagon, perhaps in part to stave off efforts to enact private school voucher plans in that state.<sup>73</sup> In fact, a handful of states—Arizona, California, Florida, Michigan, and Texas—account for a majority of all the charter schools in the nation as of 2000.<sup>74</sup> Yet, the extent to which the formal criteria for approval account for the much greater incidence of charter schools in these few states is not entirely clear.

Adding to the complexity of the picture, whenever at least some of the criteria for approval for charter schools are left to local determination (or the application of broad state criteria to the facts of each charter school proposal is done locally), this paves the way for local variation. For example, California law requires that applicants provide a “reasonably comprehensive” description of various aspects of the proposed charter school.<sup>75</sup> Because the legislature left the term ambiguous, local school districts have considerable discretion in determining whether or not a particular application meets this standard.

Because districts are differentially situated, it should not be surprising if they take different stances toward charter schools. For example, certain smaller districts in need of students are more likely to grant charters if the applicant is likely to bring new students into the district and qualify the district for additional state and federal funds. Other districts are likely to

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72. See *id.* at 30-31.

73. See generally Robert C. Bulman & David L. Kirp, *The Shifting Politics of School Choice*, in *SCHOOL CHOICE AND SOCIAL CONTROVERSY: POLITICS, POLICY, AND LAW* 36 (Stephen D. Sugarman & Frank R. Kemerer eds., 1999).

74. See U.S. DEP'T OF EDUC., OFFICE OF EDUCATIONAL RESEARCH AND IMPROVEMENT, *THE STATE OF CHARTER SCHOOLS: NATIONAL STUDY OF CHARTER SCHOOLS 11* (2000) [hereinafter U.S. DEP'T OF EDUC. CHARTER SCHOOL STUDY] (listing operating charter schools by year and state).

75. See CAL. EDUC. CODE § 47605 (b)(5) (West 1993 & Supp. 2000).

welcome charter applicants who bring new facilities with them when this increase in capacity helps the district avoid having to build a costly, new regular public school. By contrast, in still other districts there is hostility toward charter applicants because they are seen as unwelcome competition that will draw enrollment away from the existing public schools, perhaps forcing some of them to close.

Sometimes differences from place to place in the awarding of school charters reflect ideologically driven views that are held by individual members of local school board majorities, sometimes influenced by key local political interest groups. Other times there are genuine differences in public attitudes toward charter schools from one community to the next—differences which may reflect, say, how well regular public schools are regarded in the community or, say, how much the community is open to experimentation or innovation in the delivery of public services in general. Indeed, in order to tap into local public opinion, many local school boards or other chartering authorities have responded to the authority they have been given by formally soliciting the views of local parents and teachers concerning their visions of what charter schools in their area should be like. These views are sometimes obtained, for example, in town hall meetings or roundtable discussions.<sup>76</sup>

### *B. Minimum Criteria*

Formal criteria for approval of a charter school application can cover just about every aspect of the school's establishment and operation. As noted already, one risk in this is that before long, in response to ever more elaborate criteria, the charter contract will effectively reincorporate the key aspects of the Education Code from which the basic philosophy underlying the movement had initially sought to free the charter schools. To us, this suggests that hard and careful thinking is needed about both what are the important gate-keeping functions that chartering bodies are supposed to serve and how can the criteria for approving a charter application be best tailored to further those functions.

As explored in the Introduction, it is clear that some criteria need to be

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76. See PATTY YANCEY, PARENTS FOUNDING CHARTER SCHOOLS: DILEMMAS OF EMPOWERMENT AND DECENTRALIZATION 65-66, 119-25 (2000). At least some of the experience with that process suggests that many community members are likely to talk about the things they believe makes for a good school, such as class size and cultural sensitivity in the curriculum. By contrast, concerns about legal liability and teacher credentialing are more typically raised at such meetings by parties with more focused interests and expertise. Not surprisingly, some key participants in establishing criteria for approving charter schools focus on what they believe to be undesirable practices of existing public school systems and seek to push charter schools in directions that will avoid those shortcomings.

designed to further what are considered to be the essential "public" aspects of charter schools. These could include requirements as to student fees, criteria for the admission of student applicants, fair and non-discriminatory treatment of enrollees, and the like.

But not everyone will agree as to what all of those essential public aspects of charter schools are. For example, some argue that the charter school reform effort should focus on low-income urban communities, where children in public schools are considered by many to be often failed by traditional public schools. To these advocates, if charter schools are to promote important public values, then "equality" in educational opportunity should be at or near the top of the list. If, instead, charter schools wind up primarily as another benefit for well-off suburbanites, or worse, a vehicle for the well-heeled to escape having their children educated with other families' children, the "public" values underlying charter schools will be perverted. Others see greater academic achievement for all school children as the central public goal behind charter schools, and hence they have a very different view as to the proper focus of the chartering process.

A related dispute concerns the criteria that determine what sort of groups should be eligible to apply for charter school status. Some states, like California, forbid existing private schools to apply. At the other end, nearly all states permit existing public schools to convert to charter school status, although Nevada law prohibits conversion of any kind.<sup>77</sup> Most controversial, however, are the criteria applied to schools started "from scratch." To some, if charter schools are to be truly democratic (and hence "public"), they must in some important sense represent and be controlled by the local community they are designed to serve. This is a much "thicker" notion of "public" than that held by others who would only insist that charter schools pay lip service to "public access" values. The result of this disagreement is that at the local level there has been considerable heat over who should be allowed into the charter school game.

As a legislative matter, some states, such as Hawaii, Arkansas, and New Mexico, only permit existing public personnel to apply for a school charter.<sup>78</sup> Other states are less stringent. For example, Arizona law allows both public and private parties to apply for charters. In some states, however, those private bodies must be non-profit organizations and even more im-

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77. See BILLINGSLEY & RILEY, *supra* note 37, at 55. States vary as to the mechanism by which it is decided whether an existing public resource is converted. Notice how requiring approval by the school board and/or the central administration as compared with requiring approval by the local teachers and/or parents reflects differing notions of the existing public "ownership" of the potentially converted school. Of course, approvals at both levels can be required.

78. See *id.* at 58-59.

portantly, the proposed charter schools must actually be actively managed by the non-profit charter-holder. By contrast, in other states for-profit entities are permitted to directly apply for a charter, or if not, then to contract with the non-profit charter-holder to run the school. As noted above, these private operators are often termed EMOs (educational management organizations) and they now appear to dominate the charter school landscape in Michigan.<sup>79</sup> In such places, the political balance has been struck in favor of what are hoped to be the innovations and management efficiencies that advocates claim will be achieved from this sort of involvement of the private sector.

The conflict over for-profit charter school operators recently surfaced in both San Francisco and New York City. In San Francisco, a former school board majority had awarded a charter to Edison Schools, the largest private for-profit school operator in the nation, to take over the operation of a troubled public elementary school. Even though, by some accounts, Edison had made great improvements at the school and had the strong support of a large share of the families whose children were enrolled in the school, newly elected board members sought to yank the charter. Although claims were made about contract violations, it seems clear from press accounts that, most fundamentally, the new members were ideologically opposed to private companies serving in this role. In March 2001, board officials began the process to terminate Edison's charter. Because in this instance the school's building had been provided by the district, it initially appeared that if the charter were revoked the management of the school would revert to the district. On March 26, 2001, the San Francisco Board of Education issued a report accusing Edison of numerous violations of the state Education Code and voted 6-to-1 to give Edison ninety days to fix the violations or lose its contract.<sup>80</sup> In the end, this controversy was resolved when Edison won a new charter from the State Board of Education on terms that are intended to permit it to continue the school's operation at its existing location.<sup>81</sup>

In New York, the Chancellor of the public school system proposed that Edison be chartered to run five of the lowest performing public schools in

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79. While less than fifty percent of schools were contracting out services to EMOs in the 1997-1998 school year, approximately seventy percent of schools were doing so by 1998-1999. See JERRY HORN & GARY MIRON, THE EVALUATION CENTER, WESTERN MICHIGAN UNIVERSITY, EVALUATION OF THE MICHIGAN PUBLIC SCHOOL ACADEMY INITIATIVE 67 (1999). There also appears to be a trend that a great number of new applicants that receive a charter already have agreements with EMOs. See *id.*

80. See Julian Guthrie, *Scathing Report Card for Edison School: Board Gives Charter 90 Days to Comply*, S.F. CHRON., Mar. 28, 2001, at A15.

81. See *Edison Wins Charter to Keep School Open*, S.F. CHRON., July 17, 2001, at A12.

the city. But this arrangement was made conditional, on a school-by-school basis, upon Edison receiving a positive vote of support from a majority of the parents of children attending those designated schools. A furious local political campaign ensued, and in the end Edison was unable to win the support of a majority of parents in any of the five contested schools.<sup>82</sup>

Another controversial issue concerning the "public" character of charter schools involves the racial balance in student bodies. In those public school districts that have striven for and achieved reasonably well-balanced enrollments by race throughout their traditional public schools, it is quite understandable that there would be great concerns about the approval of charter schools that might wind up, largely or exclusively, serving children of one race. Nonetheless, even in that context, some African-American families, whose children are now involuntarily bussed out of their neighborhoods to racially balanced traditional public schools, may prefer to send their children to a neighborhood charter school, even if its pupils are all or mostly African-American. Some parents may also object that a student body racial balance criterion is unfairly unrealistic if, for example, the charter school adopts an Afro-Centric curriculum.

In contexts in which the local public schools are themselves substantially racially unbalanced, or at least many of them are, it becomes much less clear what social objective is sought to be served by insisting that any charter school seeking approval must achieve a level of integration beyond that achieved by the rest of the public schools.

State laws have in fact treated the public value of "racial integration" in charter schools differently, some formally requiring a racial enrollment pattern in every charter school that reflects the overall district enrollment by race and others merely requiring that charter applicants disclose what sort of admissions policy and outreach scheme they will adopt in furtherance of racial balance in their school. The South Carolina Charter School Act of 1996, for example, contains a provision that dictates "under no circumstances may a charter school enrollment differ from the racial composition of the school district by more than ten percent."<sup>83</sup> This issue be-

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82. See Abby Goodnough, *Scope of Loss for Privatizing By Edison Stuns Officials*, N.Y. TIMES, Apr. 3, 2001, at B4 (reporting that eighty percent of the parents who voted rejected a plan to allow Edison Schools to privatize five failing schools in New York City).

83. S.C. CODE ANN. § 59-40-50(B)(6) (Law Co-op. 1976 & Supp. 2000). In *Beaufort County Board of Education v. Lighthouse Charter School Committee*, 516 S.E.2d 655, 656 (S.C. 1999), the South Carolina Supreme Court upheld the denial of a charter application for several requirement violations of the Act, but remanded the case for a ruling on the constitutionality of the racial balancing requirement. See John G. Moore, *Beaufort County Board of Education v. Lighthouse Charter School Committee: Racial Balancing Provision in South Carolina Charter School Act Flunks the Strict Scrutiny Test*, 51 S.C. L. REV. 823 (2000).

comes even more complex in communities that are still under federal court supervised desegregation decrees.

Other criteria for approving charter schools serve certain “consumer protection” values that are necessarily implicated when families choose schools (as they do with charter schools) instead of having their children assigned to schools. These measures might deal with required information disclosure to help assure that families know what sort of school they are selecting. They might also deal with worries about financial fraud that could quickly and unexpectedly throw a school into bankruptcy and force it to close, thereby badly disrupting the educational experiences of the students. Hence, criteria for charter approval frequently require making certain representations about what user and applicant families will be told about the school’s operation, and presenting a comprehensive financial plan for the school’s first year or two of operation as part of the charter application.<sup>84</sup>

Many charter grantors appear to require more than a budget, however, insisting as well on a clear path to sustained financial solvency before granting a charter. Although this is understandable in certain respects, it can become an insuperable hurdle for small community based start-up charter school applicants. Many start-ups count on outside financial assistance such as grants and loans, and yet, financial sponsors may also be risk-averse and want the applicant to secure a charter before they commit funds. If the charter-granting body insists on unconditional financial commitments before it approves a charter, the would-be applicant may simply have to give up. In a parallel vein, some chartering bodies require applicants to submit building permits or leases and other operational licenses. But obtaining permits, leases, and licenses requires money, and may become sunk costs that cannot be recovered if the applicant does not succeed in getting a charter. Moreover, certain landlords and landowners will simply be unwilling to make a binding commitment to a financially precarious applicant before the charter is granted. Our point here is that charter-granting agencies must be aware that over emphasis on achieving financial security and preventing financial fraud as a way of protecting families interested in a charter school may lead to the result that charters become restricted to the affluent or independently financed applicants.

There are also legitimate public concerns about what might be termed fraud of a different sort. Is this proposed charter school really a “school,” or it is rather better understood to be some sort of nefarious, zany, disrepu-

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84. See CAL. EDUC. CODE § 47605(a)(3) (West 1993 & Supp. 2001) (stating the petition for a charter school must include comprehensive descriptions of the educational program and the manner in which annual financial audits will be conducted).

table, or otherwise dangerous indoctrination center and not really something that could legitimately be deemed a school at all? "Hate schools," "witches schools," and the like are labels that come to mind here, and they are the sort of nightmare applicants that many charter school legislation drafters surely want the gate-keeping chartering bodies to exclude from participation.

Of course, it may not always be easy to tell, or there may understandably be bona fide differences of opinion, whether an applicant actually falls into this extremist category, and hence should be turned down. For example, in Oakland, California, recently, the school board refused to grant a charter to a proposed military academy-based school that was supported by Mayor Jerry Brown. The board's view, at least in part, was based on the ideological perspective that the military and military values should have no place in schooling the city's children.<sup>85</sup> (Mayor Brown later convinced the State Board of Education to grant the charter; more on this below.) In any event, we think that the underlying philosophy of charter schools assumes that aberrant applicants will be few, and so, if a large share of applicants is turned down on this basis, then either the criteria or their application are being applied much too stringently, or perhaps the whole idea is a bad one because all too many dangerous extremists are coming forward.

Some chartering bodies insist on proof from the charter applicant that there is community support for the school, especially in the form of parents who agree that their children will enroll in the school (or at least that they are seriously interested in applying). When there is a legislative cap in the state on the number of charters that may be granted, this sort of requirement may be specially justified on the ground that charters should not be squandered on schools that cannot show reasonable prospects of substantial enrollment. Also, local chartering bodies invest time and effort in deciding whether to grant a charter and then on monitoring schools once chartered. They might understandably not want to devote resources to schools with hardly any pupils.

Yet, faced with a substantial signature requirement, charter applicants can suffer from something of the chicken and the egg problem. Before the charter is granted, parents may well be hesitant to sign on in support of a school. Moreover, some argue that very successful schools can start out quite small and should not be precluded from getting underway on a limited scale, especially since these schools might often be ones sought to be started by a few local parents and teachers. Because of the opposing pres-

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<sup>85</sup> See Meredith May, *Military Charter School Defeated: Oakland Proposal Dies in Tie Vote by Board*, S.F. CHRON., June 8, 2000, at A17 (reporting on the Oakland school board's vote to deny a charter for the National Guard College Preparatory Academy).



tures related to the number of committed students, charter applicants may feel unduly straight jacketed. If they do not promise to have a school of a minimum size, they may fear they will not obtain a charter, and yet if they promise too much, they become at risk of losing their charter even if the school is quite successful with those who do enroll.

Sometimes charter applicants are further required to make representations about the types of pupils they seek to serve (including, for example, disabled or limited English speaking students). While this may sometimes amount to requiring predictions from start-up schools in the application stage that are little more than wild guesses, it may also force the charter applicant to demonstrate how it plans to target such pupils for recruitment—pupils that the school might otherwise all too easily ignore.

### *C. Criteria for Success*

The criteria so far discussed are meant to reflect either essential matters that all charter schools must have or basic features that no charter school should be allowed to have. But many designers of charter school regimes and many chartering bodies may seek to go further in order to try to assure that the educational program proposed by a charter school applicant will be educationally “successful.” This is where trying to assure the public that the charter school will provide their children with a good education might conflict with the autonomy promised to charter schools. Most charter school developers, at least before they know anything about the rules applicable to them, probably think that they ought to have (and will have) considerable freedom as to their mission, their educational philosophy, their pedagogical approach, their curriculum, their teacher staffing patterns and hiring practices, their mix of materials (including technology) and human services, their facilities, and so on. But if the charter applicant (and the families who will send their children to the school) want to experiment with a very different approach to schooling than we now see in conventional public schools, they could find themselves at loggerheads with chartering bodies that have their own ideas as to what works best.

One way to try to give charter schools considerable autonomy on these fronts and yet still press these schools for evidence of educational success is to impose some sort of accountability system on the charter schools that looks, not at programmatic inputs, but rather at outcomes. This issue will be discussed at length below. For now, we note that a charter school might, for example, be required to agree to have its students take certain tests (like those imposed on regular public school children), and then either (less coercively) make the test results public by informing the families of the children in the school, or (more coercively) agree that certain results deemed by the charter to be inadequate would eventually put the school on

probation and ultimately cause it to forfeit its charter.<sup>86</sup>

This tension having been exposed in the abstract, we now turn to describe in more detail some chartering criteria that have been used thus far by focusing on rules and practices in California. In considering whether charter criteria leave much autonomy for charter schools, we note that the important variable is the quality, rather than the quantity, of the imposition. The state law or the chartering body can impose numerous requirements and restrictions that may, in the end, add up to little more than a pile of forms and a significant amount of inconvenience. On the other hand, close regulation in a single area that is at the heart of the charter school operation, such as curriculum, could significantly reduce the likelihood that the charter school would be able to offer something noticeably different from the traditional public schools.

#### *D. California's Approach and the Translation of Law Into Practice*

California's current law places the obligation on the chartering body to which an application has been made to grant a charter unless it makes at least one of the five following written factual findings. That the:

- 1) Petition does not contain the requisite number of signatures;
- 2) Petition does not contain an affirmation that it will be non-sectarian in its admissions, programs and practices, shall not charge tuition, shall not discriminate, and its admissions shall not be determined by place of residence except in the case of a conversion school;
- 3) Petition does not contain a reasonably comprehensive description of 15 enumerated items related to the educational program and administration of the school;
- 4) Petition presents an unsound educational program; or
- 5) Petitioners are demonstrably unlikely to successfully implement the program.<sup>87</sup>

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86. See Kemerer, *supra* note 17, at 199 (discussing different approaches to accountability and performance assessment). Although many have advocated this outcomes-oriented, accountability approach, some charter school applicants contend that they are in fact being judged in advance on the specifics of many educational inputs and will be denied the right to become a charter school unless they embrace features concerning staffing, facilities, program and the like that are contrary to their preferences. While some observers are critical of this state of affairs, it is important to acknowledge that some chartering bodies may in good faith be trying only to assure families who select the school that the promoters have a genuine and reasonably well thought out educational plan of operation in mind. In other words, they seek to close the gates in front of those the chartering body believes are so unprepared that they would have to make up most of what they do as they go along.

As indicated by the first item on the above list, like other states as noted earlier, California requires, as a prerequisite for seeking a charter, some showing of community support. California law specifically provides that for a new charter school, a petition may be submitted to the school district's or county's governing board after either: "[t]he petition has been signed by a number of parents or guardians of pupils that is equivalent to at least one-half of the number of pupils that the charter school estimates will enroll in the school for its first year of operation [or] the petition has been signed by a number of teachers that is equivalent to at least one-half of the number of teachers that the charter school estimates will be employed at the school during its first year of operation."<sup>88</sup> Note well that signatory teachers and families are not formally committed to become a part of the charter school if the charter is granted. Nevertheless, the legislation apparently assumes that many of them do intend to participate in the school (or at least that is their intent at the time of signing); and in any event, requiring signatures prevents a school proponent from coming out of nowhere with a plan for a charter school that no teachers or parents have endorsed.

Assuming an application complies with the signature requirement and that it contains the affirmations required by the second item on the list, then the chartering body is supposed to direct its attention to the third item—whether the application contains a “reasonably comprehensive” description of the fifteen required items, which include the educational program of the school, qualifications to be met by individuals to be employed by the

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87. See CAL. EDUC. CODE § 47605(b) (West 1993 & Supp. 2001). By contrast, the prior law merely permitted, rather than mandated, that a governing body grant a charter if it was satisfied that the charter contained the required number of signatures, a statement of public operating principles and a description of the original fourteen (now fifteen) statutorily required elements. “A school district governing board *may* grant a charter for the operation of a school under this part if it determines that the petition contains the number of signatures required in subdivision (a), a statement of each of the conditions described in subdivision (d), and descriptions of all of the following: . . .” *Id.* § 47605(b) (West 1993 & Supp. 2001) (emphasis added). Current law added a fifteenth element, “[A] declaration whether or not the charter school shall be deemed the exclusive public school employer of the employees of the charter school for the purposes of the Education Employment Relations Act . . .” *Id.* § 47605(b)(5)(O). Therefore, it would appear that this new legislation, effective January 1, 1999, marks a shift in legislative intent. The amendment certainly contains a clear statement favoring the establishment of charter schools. “In reviewing petitions for the establishment of charter schools pursuant to this section, the chartering authority shall be guided by the intent of the Legislature that charter schools are and should become an integral part of the California educational system and that establishment of charter schools should be encouraged.” *Id.* § 47605(b) (West 1993 & Supp. 2001). How much of a difference it has and will actually make is unclear, however, for reasons discussed next.

88. CAL. EDUC. CODE § 47605(a)(1)(A)-(B) (West 1993 & Supp. 2001). For the conversion of existing public schools, not less than fifty percent of permanent status teachers currently employed there must sign on.

school, and admission requirements. If an applicant does provide the necessary “reasonably comprehensive” description, then the charter is to be granted unless the chartering board finds that the applicant fails one or both of the final two items on the list.

Just as California law does not further define what a “reasonably comprehensive” description is, it also contains no further explication of what it means for a program to be “unsound” or on what basis a chartering body might conclude that the applicant is “demonstrably unlikely to successfully implement the program.” Therefore, absent judicial or other official interpretation, districts across the state have no standardized guidelines to follow in applying those criteria, and are currently free to consider different facts and make different judgments.

In the hopes of providing some uniformity, the California School Board Association (CSBA)—a voluntary, private, non-profit body to which nearly one thousand elected members of California’s school boards, superintendents, and other senior staff belong—has issued guidelines to assist districts in applying the amended law, and these guidelines have been formally adopted by some districts and partially adopted by others.<sup>89</sup>

The CSBA guidelines read like a set of agency regulations construing the authorizing legislation. For each element that requires interpretation, CSBA recommends particular components that it believes would best meet the vague standard set out by the statute. The CSBA also strongly encourages school boards to articulate reasons for denial with objective “factual” findings so as to comply with state law in the event a denial is challenged and the school board needs to defend its findings.<sup>90</sup>

For example, in determining whether an educational program is “sound,” CSBA recommends several specific elements for the districts to consider. First on the list is the school’s standards and curriculum, including whether the school’s program “aligns with district and statewide academic content standards.”<sup>91</sup> This suggests that the district should consider the proposed charter school program in terms of its conformity with and deviation from the existing public school curriculum. This approach is also followed by some districts in their own guidelines. Sacramento City Unified School District, for example, considers whether the required showing of school standards are “as clear, precise, detailed, useable by classroom teachers, as-

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89. See CAL. SCH. BD. ASS’N, CRITERIA FOR APPROVAL OF CHARTER PETITIONS UNDER REVISIONS TO CALIFORNIA’S CHARTER SCHOOLS ACT: TOOLS FOR GOVERNING BOARDS, at [http://www.csba.org/issues/charter\\_schools2.htm](http://www.csba.org/issues/charter_schools2.htm) (last visited Aug. 7, 2001) (providing “tools necessary to evaluate charter school petitions for educational soundness and likeliness of implementation”).

90. See *id.*

91. *Id.*

sessable and rigorous *as those adopted by the State Board* (emphasis added).<sup>92</sup>

CSBA guidelines also invite districts to examine the “theoretical basis” for the proposed educational program, which may concern any claimed special mission or unique methodology the applicant has in mind. Here districts are encouraged to ask for “valid evidence” in support of the proposed program or theoretical basis for the program. Additionally, applicants are asked to show how the theoretical projections are to be evaluated and tested for effectiveness. As noted earlier, this type of inquiry might create particular difficulties for schools with experimental approaches, or approaches that substantially differ from general practices found in existing public or private schools since “valid evidence” might be difficult to secure before the school is in operation. On the other hand, it is important to recognize that the CSBA is not suggesting that only applicants proposing conventional school programs with conventional pedagogical styles be approved as charter schools.

The CSBA recommendations with respect to the “implementation” criterion call for an examination of staff qualifications, including the ability of the teaching staff to meet state standards. The CSBA recommendations also speak to school facilities, but only in terms of health and safety accommodations.<sup>93</sup>

Some districts ask for information from, or actions by, applicants that are not required by the state Charter School Act. Los Angeles Unified, for example, requires charter applicants to post a bond for \$250,000 and to respond to a lengthy packet of materials covering information that would appear to be more than necessary to satisfy the fifteen statutory elements.<sup>94</sup> The Los Angeles Unified guidelines also require applicant schools to provide various showings that the applicant has established procedures to deal with various aspects of its operation.<sup>95</sup> For example, the applicant school is asked to describe how its annual independent financial audit will be conducted and each applicant school must require its employees to furnish a criminal record summary. Although California’s amended charter school law puts the burden of proof on the board denying the charter, it is by no

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92. See SACRAMENTO CITY UNIFIED SCH. DIST., *supra* note 64.

93. The CSBA is not the only source of advice for school chartering bodies in California. A prominent school district consulting company, School Services of California, Inc., for example, offers workshops to help school agencies develop policies regarding standards and requirements for charter school petitions. SEE SCH. SERVS. OF CAL., EVALUATING NEW AND RENEWAL CHARTER SCHOOL PROPOSALS, at [http://www.sscal.com/chart\\_wks.htm](http://www.sscal.com/chart_wks.htm) (last visited Aug. 7, 2001).

94. See LOS ANGELES UNIFIED SCHOOL DISTRICT, *supra* note 68 (providing an extensive checklist and summary of necessary requirements).

95. See *id.*

means clear that the “extra requirements” just noted would be rejected were an appeal filed. After all, with the help of a careful lawyer, districts determined to reject an applicant might well offer reasons why the additional information and actions it requires are essential for a “sound” and “successfully implemented” program.

State law does require chartering bodies to issue written factual findings to support denials of charters. However, as noted already, due to the leeway the districts have in interpreting what constitutes a “reasonably comprehensive description” of the fifteen required items, districts need not actually base their decisions on substantive findings that a particular educational program is “unsound,” even if that was the intuitive basis for their decision. That is, when they do issue written findings, the findings might not necessarily reflect the actual considerations taken into account by the chartering body in their decision making process.

For example, in the statement issued by the Alpine County Office of Education in its decision to deny a charter to Blue Mountain Wilderness Charter School, the basis of the denial was almost entirely the failure of the applicant to provide “reasonably comprehensive descriptions” of nine of the (then) fourteen criteria.<sup>96</sup> The same applicant was turned down by several other districts as well, some of them arguing that they would find it difficult to provide adequate oversight of a school physically located outside their borders.<sup>97</sup> But Jake Wallace, the developer of Blue Mountain Wilderness Charter School, is convinced that his application has been denied by various districts primarily due to board members’ discomfort with the at-risk youths his residential school proposes to serve.<sup>98</sup> Wallace also claims that politics played a role, asserting that each subsequent district to which he applied did not want to offend the previous district by approving a charter previously rejected by professional colleagues.<sup>99</sup>

In Sierra Sands, California, the local district rejected a charter application from a community group that sought to start a back-to-basics school in a building that the district announced that it was closing due to declining enrollment in the district. It is easy to imagine in such a setting that district authorities, convinced that it was financially unsound to try to keep all of

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96. See ALPINE COUNTY OFFICE OF EDUC., FINDINGS OF FACT AND RECOMMENDATION REGARDING PROPOSED BLUE MOUNTAIN WILDERNESS CHARTER SCHOOL PETITION 2-9 (1999).

97. See Letter from Laura D. Alvarenga, Alameda County Office of Education, to Jake Wallace, Blue Mountain Wilderness Program, Inc. (Oct. 21, 1999) (on file with author) (explaining the issues discussed during a review of the charter school proposal and reasons for denial of petition).

98. Interview by Shelley Mack with Jake Wallace, Blue Mountain Wilderness Program, Inc. (2000).

99. See *id.*

their schools open, would be adamantly opposed to parents turning the site into a charter school funded by the district and thereby preventing the closure. Even if the charter school could survive on its own, district officials would probably not want to lose those pupils for re-distribution among the district's other schools. In fact, the Ridgecrest Charter School, having been denied by the Sierra Sands Unified School District, subsequently won its charter from the State Board of Education.<sup>100</sup>

It is not our purpose here to take a position on these controversies. But we include them simply to give examples in which the reasons actually stated for the denial of a charter application could be a pretext for other non-statutory reasons why a chartering body did not want to award a particular charter.

### *E. The Role of the Federal Government in Imposing Selection Criteria*

Although the federal government does not charter schools, it participates in the charter school process by providing financial support to both state educational agencies (SEAs) and to independent charter schools.<sup>101</sup> The federal contribution is small as compared with total spending on charter schools, but this funding gives leverage to the federal government to influence the development of charter schools nationwide.

#### *1. Public Charter Schools Program*

In practice, federal leverage on charter schools is probably strongest in the award of competitive discretionary grants through the Public Charter Schools Program (PCSP). These grants are awarded based on the states' or independent applicants' ability to meet the competitive requirements set forth by the authorizing federal legislation.<sup>102</sup> PCSP has grown from \$6

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100. See Charter Schools Development Center, *State Board Steps Up to Charter-Granting Plate*, CHARTER CURRENTS, Mar. 2001, at 5-6.

101. See generally U.S. DEP'T OF EDUC., ACCESSING FEDERAL PROGRAMS: A GUIDEBOOK FOR CHARTER SCHOOL OPERATORS AND DEVELOPERS (Mar. 1999) [hereinafter U.S. DEP'T OF EDUC. GUIDEBOOK] (providing information to assist charter schools in accessing federal programs that would be helpful to them).

102. More specifically, in 1994, Congress created the Public Charter Schools Program (PCSP) under the Improving America's Schools Act, to assist new or recently started charter schools with planning, design, initial implementation, and dissemination of information. As amended in 1998, PCSP emphasizes performance. It gives priority to states that meet particular assessment/review processes and to states that meet progress goals. PCSP also provides funding for successful charter schools to assist other schools in adapting their charter school program, and to disseminate information about their charter school by providing advice, materials, and other information relevant to the charter school's success. See 20 U.S.C. § 8064(f)(6)(B) (1994 & Supp. V 2000). The Secretary of Education awards PCSP

million in FY 1995 to \$145 million in FY 2000. Currently, PCSP supports schools in twenty-nine states, the District of Columbia, and Puerto Rico.<sup>103</sup> Conditions that the federal government attaches to PCSP funding are evident in its priority criteria, selection criteria, and definition of a charter school. For instance, the Secretary gives priority to states that provide for the periodic review and evaluation (at least every five years) of each charter school by its sponsoring agency to determine whether it is meeting the terms of its charter, the state's academic performance requirements, and can establish at least one of the following three things:

- 1) progress in increasing the number of high quality charter schools that are held accountable according to the terms of the schools' charters for meeting clear and measurable objectives;
- 2) one authorized public chartering agency that is not a local educational agency, or in the case of a State in which local educational agencies are the only authorized public chartering agencies, allows for an appeals process for the denial of an application for a charter school; or
- 3) each charter school has a high degree of autonomy over its budgets and expenditures.<sup>104</sup>

Moreover, the subjective selection criteria also may affect a state's chartering process and will affect who benefits from this funding. The criteria include things such as "degree of flexibility afforded under the state's charter school laws," "the quality of the proposed curriculum and instructional practices," "the quality of the strategy for assessing achievement of objectives," "the extent of community support for the application," and "the ambitiousness of the objectives of the charter school."<sup>105</sup>

Furthermore, the definition of a "charter school" under PCSP requires that in exchange for accepting the money, a recipient agrees that its programs, policies, and practices will be nonsectarian, it will abide by certain health and safety requirements, it will agree to comply with federal and state audit requirements, and if the program is oversubscribed, it will con-

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funds through a competitive grant process to SEAs (which sub-award the money to eligible applicants), or in the event that an SEA elects not to participate or does not have an application approved, directly to eligible applicants. *See id.* § 8062(a)-(b) (1994 & Supp. V 2000).

103. The amount awarded to each state can vary depending on the strength of its application, the type of charter school program it establishes, and the amount of funding required. The average size of an award a state received in FY 2000 was \$3 million. *See U.S. DEP'T OF EDUC. GUIDEBOOK, supra* note 101, at 4.

104. 20 U.S.C. § 8062(e) (1994 & Supp. V 2000) ("[T]he Secretary shall give priority to States to the extent that the States meet the criteria described in [20 U.S.C. § 8062(e)(3)].").

105. *Id.* § 8064(a)-(b).



duct admissions based on a lottery.<sup>106</sup> Finally, an “eligible applicant” is defined as “an authorized public chartering agency participating in a partnership with a [charter school] developer. . . .”<sup>107</sup> A “developer” is in turn defined as “an individual or group of individuals (including a public or private nonprofit organization). . . .”<sup>108</sup> This, therefore, excludes for-profit companies from eligibility.

Assuming that all of the federal requirements attached to the PCSP program are understandable and coherent, it remains somewhat murky as to why an experimental deregulatory policy initiative like charter schools should everywhere be subjected to these same rules and priorities. That is, even though the federal government has the legal authority to attach conditions to the financial grants it makes, it is not altogether clear why, as a policy matter, the federal government should attach conditions that limit the autonomy of either charter schools or the states in the running of their charter school programs. Where federal restrictions duplicate state restrictions, these strings are probably unnecessary—at least if the state restrictions are actually enforced. More important are federal conditions or priorities that differ from those that the states would adopt or impose on either themselves or their charter schools. In a society in which elementary and secondary education has long been viewed as primarily a state and local matter, the justification for such federal controls lies in the claim that important national values are being furthered. Perhaps the political reality is that if entrepreneurial federal politicians and administrators are going to provide federal tax dollars in support of charter schools, then they are also going to insist upon setting some of the rules of the game.

## 2. *Other Federal Controls*

Even if a charter school is not a recipient of discretionary competitive grant money under PCSP, it will likely be a recipient of other federal funds, and this money will bring other federal controls with it. First, we have in mind those funds awarded to local school districts for special categories of children. One example is the Title I program, the largest federal educational scheme.<sup>109</sup> These funds are aimed at educationally disadvantaged youths from low-income families and carry many restrictions on how the money is to be spent. Another federal program which provides financial assistance for disabled children is the second largest federal K-12 program

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106. *See id.* § 8066(1).

107. *Id.* § 8066(3).

108. *Id.* § 8066(2).

109. *See id.* §§ 6301-6514 (outlining the provisions to improve schools with high concentrations of children from low-income families).

in terms of dollars spent.<sup>110</sup> It also incorporates a complex and prescriptive federal regulatory scheme. The restrictions contained in these two federal programs have been based on the belief that, without federal conditions, states and localities could not be trusted to properly spend federal money on the children to whom it is targeted.<sup>111</sup> When charter schools accept children with disabilities or children from low income families, these schools are supposed to receive their fair share of federal funding; and with that money will come additional federal strings. Furthermore, charter schools, like traditional public schools, must abide by other general federal civil rights laws.<sup>112</sup> These laws, of course, reflect important national values as to fair treatment. In response to early uncertainty in the charter school and legal community about exactly how these federal laws would be applied to charter schools, the U.S. Department of Education's Office for Civil Rights in June 2000, published *Applying Federal Civil Rights Laws to Public Charter Schools: Questions and Answers*.<sup>113</sup> This publication, while not having the force of law, suggests how the U.S. Department of Educa-

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110. See 20 U.S.C. § 1400 (1994 & Supp. V 2000) (outlining the provisions to improve education of individuals with disabilities).

111. See Stephen D. Sugarman, *Two School-Finance Roles for the Federal Government: Promoting Equity and Choice*, 17 ST. LOUIS U. PUB. L. REV. 79, 80-81 (1997).

112. Because they receive federal funds, charter schools are subject to Title VI of the Civil Rights Act of 1964, which prohibits discrimination based on race, color, and national origin, Title IX of the Education Amendments of 1972, which prohibits discrimination based on gender in education programs, the Age Discrimination Act of 1975, which prohibits discrimination based on age, and section 504 of the Rehabilitation Act of 1973, which prohibits exclusion, denial of benefits, and discrimination on the basis of disability. Furthermore, all public schools, regardless of whether they are recipients of federal funds, must comply with Title IV of the Civil Rights Act of 1964, which prohibits discrimination based on race, color, national origin, sex, or religion by public elementary and secondary schools and public institutions of higher learning, and Title VII of the Civil Rights Act of 1964, which prohibits discrimination in employment on the bases of race, sex, national origin, and religion. Furthermore, the Equal Educational Opportunities Act of 1974 (EEOA) prohibits specific discriminatory conduct, such as segregating students on the basis of race, color or national origin, and discrimination against faculty and staff. Finally, Title II of the Americans with Disabilities Act of 1990 provides that no individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, program, or activities of a public entity, or be subjected to discrimination by any such entity.

113. See generally U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, *APPLYING FEDERAL CIVIL RIGHTS LAWS TO PUBLIC CHARTER SCHOOLS: QUESTIONS AND ANSWERS* (May 2000). Local school districts are normally responsible for ensuring that traditional public schools comply with federal civil rights laws. However, in the case of charter schools, responsibility may be shared by the charter school, the local education agency (LEA) such as the district, the state educational agency (SEA), or other authorized chartering agency based on the receipt of federal funds.

tion and the U.S. Department of Justice will likely construe these laws, and it seeks to put charter school developers and operators on notice of their expectations. It covers topics with far reaching effect in areas such as outreach (if conducted, disabled or non-English speaking parents must have a meaningful opportunity to understand the information), admissions (prohibits the categorical denial of admissions to students with disabilities), and selection of facilities (choice of facility may not result in excluding or limiting the enrollment of people with disabilities from any school program or activities). With charter schools just getting started, often it is not until a complaint is filed and an investigation is launched by the U.S. Department of Education or U.S. Department of Justice that charter sponsors and charter school managers have become aware of their responsibilities. This problem should be somewhat reduced as charter schools and their sponsors become more familiar with publications like the one described above.

#### IV. THE APPEALS PROCESS

##### A. *Administrative Appeals*

Suppose a charter applicant is turned down. As discussed earlier, in some places the charter-granting bodies readily accept re-applications and may even provide technical support in furtherance of such re-applications. Also, as noted above, in many states it may well be possible for a rejected applicant to take its petition and present it afresh to a different charter-granting body (and in Arizona and Ohio, for example, this appears to be the only avenue available to a rejected applicant). However, a different possible next step is to file an "appeal," and those designing school chartering regimes have to decide what sort of appeals process, if any, should be made available.

In fact, the charter school laws of most states do specify a process by which local school board decisions to deny charters may be "appealed"—typically to the county board, state board, or other entities established specifically to review charter approval/denials.<sup>114</sup> A Colorado State Senator articulated the reason for that state's appeals provision, "[i]f there is a school district that is arrogant and chooses to ignore the law, there is a way to go around that school district."<sup>115</sup> Yet, more than a dozen state charter

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114. For a summary of statutorily provided appeals process, see CTR. FOR EDUC. REFORM, CHARTER SCHOOL LAWS ACROSS THE STATES 2000: RANKING SCORE CARD AND LEGISLATIVE PROFILES, at [http://www.edreform.com/charter\\_schools/laws/index.html](http://www.edreform.com/charter_schools/laws/index.html) (last visited Aug. 7, 2001).

115. Peter J. Perla, Comment, *The Colorado Charter Schools Act and the Potential for Unconstitutional Application Under Article IX, Section 15 of the State Constitution*, 67 U.

school laws do not appear to have provided a specific method of appeal from an initial denial of charter.

In any event, we believe there is some confusion as to what it means to file an "appeal." This is illustrated by the California scheme. The statute provides that should a governing board deny a petition, an applicant may, within 180 calendar days following the denial by a local school district, "appeal" to either the County Board of Education or the State Board of Education.<sup>116</sup> Should the applicant elect to appeal to the County Board of Education and again be denied, the applicant may then "appeal" to the State Board of Education.<sup>117</sup>

Notice, however, that when an applicant, who has been denied at the local board level, takes the matter to either the County Board of Education or the State Board of Education, when those bodies overrule the local district, they charter the school themselves. To us, this is better understood, not as an appeals process, but rather as a system of multiple sponsors. Indeed, as indicated earlier, under California's amended law, the application, in some cases, may be initially filed with the County Board of Education.

In any event, so far in California it appears that only a handful of counties have granted charters following a denial by a local district.<sup>118</sup> And, in

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COLO. L. REV. 171, 173 (1996).

116. According to state law, the applicant must provide:

- a complete copy of the charter petition as denied;
- a copy of the governing board's written factual findings;
- a signed certification of compliance with applicable law; and
- a description of any changes to the petition to reflect either the County or State Board as the chartering entity.

CAL. CODE REGS. tit. 5, § 11967 (1999).

117. See *id.* (explaining the appeals process for charter petitions that have been denied by the County Board of Education). Should either the County Board of Education or the State Board of Education fail to act within 120 days of receipt of a petition, the original decision of the local school district governing board shall be subject to judicial review. See CAL. EDUC. CODE § 47605(j)(4) (West 1993 & Supp. 2001).

118. Odyssey Charter School of South Pasadena, for example, was denied a charter by the Pasadena School District. The school district had submitted over one hundred questions for Odyssey to address at the petition hearing, many of which the Odyssey attorney did not feel to be germane to the grounds for denial specified in the Charter School Act. The applicant apparently believed that the denial was actually based on the fact that the school was to be located in South Pasadena rather than in Pasadena, and thus outside the boundaries of the school district, even though Pasadena had the legal authority to charter a school in such a location. Odyssey then appealed to the Los Angeles County Board, which eventually approved Odyssey's charter. This occurred under the old law, and the County Board found that the Pasadena School District exceeded the scope of the inquiry that should have been conducted. Odyssey currently enrolls more than 200 pupils, apparently with good results. Interview by Shelley Mack with Sue Bragato, Executive Director, California Network of Educational Charters (2000).

The New Village Charter School was twice denied a charter by the Berkeley Unified

December 2000, the State Board of Education had granted its first two charters—the Ridgecrest Charter School (which the local parent community created after the local district slated the school for closure) and the Oakland Military Institute (championed by Oakland Mayor Jerry Brown). Nonetheless, this development may signal the beginning of a substantial new role for the State Board of Education under California's amended charter school law, since the Board had been quite unwilling to award charters in the three appeals it heard under the original law.<sup>119</sup>

Many other state so-called "appeals" processes appear to be like California's, although often the appeal from the local district goes directly to the State Board of Education, without the option of going first to the county.

By contrast, Colorado's system provides for an arrangement that, in our view, is much more like the conventional appellate process in administrative law. There, the State Board of Education has the authority on appeal to decide that the local district was wrong to turn down the applicant and to direct the local district board to issue the charter.<sup>120</sup>

Because states like California have given "appellate" bodies roles that are unconventional, this has also made murky the standard of review that these "appellate" boards are supposed to apply when they consider applications that have been turned down by local boards. In other areas of administrative law, it is common that administrative appeals bodies (e.g., an

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School District. After the local board's preliminary hearing on the application, teachers who had signed the petition withdrew their signatures. This was apparently in response to Berkeley Teacher Federation literature that urged the teachers not to support the proposed school. The district then refused to consider the application further on the grounds that the application lacked the necessary signatures. The applicants then appealed to the Alameda County Board of Education, which first ordered Berkeley Unified to reconsider the matter. Berkeley Unified then rejected the charter petition a second time. The applicants re-appealed to Alameda County, and the County finally granted New Village its charter. This applicant later encountered many operating problems and has since had its charter revoked by the County. See Meredith May, *Oakland Charter School Put On Notice: Finances in Disarray, Policies Often in Dispute*, S.F. CHRON., Nov. 11, 1999, at A25.

The experience of Odyssey and New Village suggests that the County Board of Education's ability to overrule local decisions helps applicants to overcome local political problems and other biases that lead to denials that are arguably not connected to the merit of the application. On the other hand, the New Village experience may also show either that the local district was wiser than the county in initially rejecting the charter, or as some have claimed, that the delay and appeals process so sapped the energy of the applicant that the school never had a chance to get off the ground on the promising basis initially envisioned.

119. See Charter School Development Center, *State Board Steps Up to Charter-Granting Plate*, CHARTER CURRENTS, Mar. 2001, at 3-5 (discussing the Board's history of denials).

120. See CTR. FOR EDUC. REFORM, CHARTER SCHOOL LEGISLATION: PROFILE OF COLORADO'S CHARTER SCHOOL LAW, at [http://edreform.com/charter\\_schools/laws/Colorado.htm](http://edreform.com/charter_schools/laws/Colorado.htm) (last visited Aug. 7, 2001) (describing Colorado's charter school law).

unemployment compensation appeals board) will defer to the written findings of fact that justify the initial determination. California charter school law, for example, provides that the written findings in support of the local school board's denial are to be submitted with the "appeal." It is not obvious to date, however, that the appellate bodies actually give the sort of deference that traditional appellate bodies do, granting charters only when they have been denied on arbitrary grounds not justified on the record. Rather, at least according to some observers of these cases, there is some reason to believe that the reviewers, in effect, consider the matter *de novo*, and decide for themselves whether the charter should have been granted.<sup>121</sup>

Michigan's statutory scheme includes yet another approach. As noted earlier, Michigan's primary strategy has been to create multiple sponsors. But in addition, Michigan law provides that if a local school board denies an application, the applicant may petition the local board to place the question of issuing the charter on the ballot of its next annual school election, held at least sixty days after receipt of the petition, so that the voters may render a decision.<sup>122</sup> In addition to the information required in the original application, the petition must also include signatures from at least fifteen percent of the total number of school electors in that district.<sup>123</sup> The state's other authorizing bodies do not have similar appeals processes, and it does not appear that any local school district denial has yet been appealed to the voters in the way described above.

### B. Appeals to Court

According to conventional legal doctrine, claimants are normally supposed to exhaust administrative remedies before going to court. As we have explained above, many state charter school laws specify an administrative appeals process to be used when a chartering body rejects an applicant. Therefore, in such states it seems likely that the main role of the courts, if any, in the routine charter school appeals process will not be di-

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121. See SHELLEY MACK, STANDARDS FOR REVIEW OF CHARTER SCHOOL APPLICATIONS (2000) (unpublished paper on file with author). By June 30, 2001, the State Board of Education is scheduled to adopt criteria for its review and approval of petitions. See CAL. EDUC. CODE § 47605(j)(2) (West 1993 & Supp. 2001).

122. See Jennifer J. Ridley, Note, *Chartering a New Course for Public Education in Michigan—Charter Schools: A Significant Step Toward Meaningful Education Reform*, 76 U. DET. MERCY L. REV. 607, 630 (1999) (explaining Michigan's current charter school legislation); see also 1976 Mich. Pub. Acts 451 § 503(2) ("[T]he board shall place the question of issuing the contract on the ballot at its next annual school election held at least 60 days after receiving the petition.").

123. See 1976 Mich. Pub. Acts 451 § 503(1)-(2) (explaining issuance of public school academy contracts and petition process).

rectly to review the decisions of the local school boards. Rather the courts will serve as a further reviewer of the decisions of administrative bodies to which appeals are first brought. Notice too that this implies that appeals to courts might come from both local chartering agencies and from applicants, depending upon the decision of the administrative appeals agency.

A brief review of the limited number of charter school cases that have gone to court reveals just this mixed pattern. For example, in *West Chester Area School District v. Collegium Charter School*,<sup>124</sup> a local Pennsylvania school board appealed a state board decision to grant a charter to an applicant that was earlier denied by the local board,<sup>125</sup> and in a New Jersey case a trial court affirmed the state board's award of charters to schools in three districts over the objections of the local boards.<sup>126</sup> Applicants, on the other hand, appealed a state board decision to affirm a local board denial of charter in, for example, *Shenango Valley Regional Charter School v. Hermitage School District*.<sup>127</sup>

In essence, parties seeking judicial review of charter denials or awards appear to have two grounds for appeal to court. One rests upon objections that are made to the findings of fact below. The other objections raise questions of law, such as the legality of the way some administrative body exercised its authority or applied the facts to the law.

Consistent with the general principles of administrative law, courts seem reluctant to overrule fact-based chartering decisions made by administrative agencies. Traditionally, this goes under the label of the "substantial evidence" rule, or the "clearly erroneous" standard. In *Shenango Valley*,<sup>128</sup> for example, the Commonwealth Court of Pennsylvania first held that since the State Charter School Appeal Board is the administrative agency charged with exclusive review of an appeal of a local school board decision not to grant charter school application under the state's charter school statute, the court's jurisdiction is appellate, and as such, the standard of review is limited. The court then upheld the State Charter School Appeal Board's affirmance of a school district's decision to deny a charter on the ground that the factual findings below were supported by substantial evidence.<sup>129</sup> Similar deference to the designated administrative appellate body was accorded in *Board of Education of Community Consolidated School*

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124. 760 A.2d 452 (Pa. Commw. Ct. 2000).

125. *See id.* at 454-55 (explaining the procedural history of the charter denial).

126. *See In re Grant of the Charter Sch. Application of Englewood on the Palisades Charter Sch.*, 727 A.2d 15, 20 (N.J. Super. Ct. App. Div. 1999) (providing a consolidated ruling on cases in Bergen, Passaic, and Somerset Counties).

127. 756 A.2d 1191 (Pa. Commw. Ct. 2000).

128. *See id.* at 1193 (explaining the court's standard of review).

129. *See id.*

*District No. 59 v. Illinois State Board of Education.*<sup>130</sup> Notice how the body truly being deferred to might be the initial chartering body or the state administrative appeals body depending upon what standard of review state law imposes on the latter in administratively reviewing the former.

Courts generally review questions of law under a *de novo* standard. This was the approach of an Illinois appeals court in *Board of Education of Community Consolidated School District No. 59 v. Illinois State Board of Education.*<sup>131</sup> In *Board of Education of School District No. 1 in City and County of Denver v. Booth*,<sup>132</sup> for example, the Colorado Supreme Court first determined what was the allocation of authority between State Board of Education and local school boards established by the state Charter Schools Act, then determined for itself that the allocation did not violate control of instruction constitutional provision. Similarly, in *Beaufort County Board of Education v. Lighthouse Charter School Committee*,<sup>133</sup> the South Carolina Supreme Court affirmed an appellate court's reversal of a state board's ruling on the basis of its own determination that the state board adopted the wrong standard of review in overruling decisions made by the local board.

Drawing on some issues raised earlier in this Article, one important legal dispute under California law relates to the definition of "reasonably comprehensive" and what makes an educational program "unsound." State courts might not be deferential to administrative bodies on these questions. On the other hand, we note that in the federal system at least, if administrative agencies have adopted regulations that seek to spell out the meanings of unclear statutory phrases, then federal courts often defer to such admin-

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130. 740 N.E.2d 428 (Ill. App. Ct. 2000). In this case, a local school board appealed the decision of the Illinois State Board of Education to grant a charter, overruling the school board's rejection of the application. *See id.* at 431. The court rejected the school board's contention that the State Board exceeded its statutory authority under the state charter school act, stating that "the authority of the State Board to reverse the decision of District 59 may be implied from the terms of the Act." *Id.* at 433.

131. The court stated, "[w]here the authority of an administrative body is in question, the determination of the scope of its power and authority is a judicial function which is decided as a matter of law . . . . Accordingly, we review *de novo* the question of whether the State Board had the statutory authority to reverse the decision of District 59." *Id.* at 432 (citations omitted).

132. 984 P.2d 639 (Colo. 1999). In this case, the appellant school board claimed that the Colorado state agency exceeded its statutory grant of authority, unlawfully interfered with local control of instruction, and misinterpreted the state law in deciding what constitutes an adequate charter application. *See id.* at 644. The court cast such challenges as questions of law and determined that while the State Board does not have the authority to grant a charter directly, it did not exceed its authority in ordering the local board to grant the charter. *See id.* at 652.

133. 516 S.E.2d 655, 656 (S.C. 1999).



istrative interpretations, at least if longstanding.<sup>134</sup> It does not appear that much state law doctrine in the charter law arena has yet developed along these lines, but that could be forthcoming.

In this discussion of the relationship between courts and agencies, we are putting aside cases, for example, that challenge the legality of the entire charter school law or of one or more of its specific provisions.<sup>135</sup> In one such case, for example, a New Jersey court rejected a challenge to charter schools, which claimed that the statutory system for funding them was illegal.<sup>136</sup>

#### V. THE OVERSIGHT AND CHARTER REVOCATION AND RENEWAL PROCESSES

Applicants who are granted a charter typically sign a contract with the chartering body. A charter typically specifies the terms of operation, identifies how success will be defined and measured, and ultimately may play a key role in determining whether such performance merits continuation or revocation of the charter. This section explores the accountability schemes chartering bodies and state laws have established for charter schools, looking to the ways that schools with charters are monitored and the ways in which it is determined whether to renew a school's charter, or even to revoke the charter during its term.

We note in passing, however, that one needs to look at specific school charter contracts to see the extent to which the deregulation principle of the charter school movement may have been seriously undermined. As mentioned earlier, in the criteria they employ for awarding charters and in the conditions they impose on charter winners, chartering bodies have the potential of re-imposing much of the regulation from which the charter school

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134. See *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 844 (1984) (holding that in interpreting a statute governing agencies, "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.") (footnote omitted).

135. See e.g., *Wilson v. State Bd. of Educ.*, 75 Cal. App. 4th 1125 (Cal. Ct. App. 1999) (upholding the Charter School Act on the basis that charter schools were determined to be public schools under the jurisdiction of public school systems over which the legislature had plenary power), *reh'g denied*, 2000 Cal. Lexis 684 (Cal. Jan. 25, 2000); *In re Grant of the Charter Sch. Application of Englewood on the Palisades Charter Sch.*, 727 A.2d 15, 50-51 (N.J. Super. Ct. App. Div. 1999) (rejecting the argument that the New Jersey Charter School Program Act was unconstitutional because it breached the equal protection rights of parents and students in the existing school districts, to the advantage of the charter schools).

136. See *Jersey City Educ. Ass'n v. City of Jersey City*, 720 A.2d 356, 357 (N.J. Super. Ct. App. Div. 1998) (holding that using bond money not associated with public funds in support of a charter school was legal), *cert. denied*, *Jersey City Educ. Ass'n v. City of Jersey City*, 726 A.2d 935 (N.J. 1999).

idea initially sought to relieve this new type of public school. We have been unable to examine actual charters as part of the research undertaken for this Article.

#### *A. Some Possible Analogies*

When thinking about the monitoring functions of school chartering bodies, we note that many different analogies may be drawn between those duties and similar roles played by other actors in other settings. For example, state law typically gives the state attorney general (or a similar official) oversight responsibility for all non-profit organizations incorporated under that state's laws or who carry out their operations in that state or have their headquarters in that state. Traditionally, these non-profit organizations may be required to file modest annual reports of their activities, and they are generally left alone unless a complaint is made about their activities. If the complaint is serious, an investigation might be launched, and if misconduct or other irregularities are detected, proceedings might be started that could penalize the non-profit group or its leaders and could conceivably lead to the revocation of its non-profit status, the loss of control of its operations and assets, etc. Charter school sponsors could decide to function in this sort of complaint-driven way.

By contrast, other administrative bodies much more carefully and continuously watch what those under their sphere of responsibility are doing, relying on pro-active procedures as well as relying upon complaints to drive their supervision. For example, the Securities and Exchange Commission (SEC) requires substantial disclosures from companies contemplating certain conduct (requiring advance agency approval) and insists upon substantial after-the-fact reporting of other conduct through documents that agency staff routinely examine to see whether those who are reporting are behaving properly.

In the academic world, we see similarly divergent approaches. For example, some grant-making organizations essentially demand a final report of the research findings that were funded by the grant and pay little attention to the grantee's conduct barring a complaint about misconduct. By contrast, other grant-making organizations engage in much closer ongoing monitoring. For example, they may send representatives out to observe how grantees are carrying out their research, insist on substantial interim reports, and the like. These examples provide very different models that charter-granting bodies might choose to follow.

There are many other areas as well in which government agencies or private funding organizations provide a grantee service-provider with money for a limited period of time with the understanding that the grant will be renewable on certain conditions. Consider a publicly funded "soup

kitchen” run by a non-profit organization, or an experimental day care center, or a non-profit legal aid office, in each case these organizations run with grants received from a state social services agency. Sometimes, renewals of these programs are rather routinely made; in other settings renewals are rare; and sometimes renewals depend upon demonstrated success of a specified sort. The latter, especially, could provide a model for charter-granting bodies.

### *B. What to Monitor*

When deciding what to put in the contract, a charter grantor will surely want to make arrangements designed to assure that the charter school does not substantially violate any of the minimum essential features of charter schools—that it not charge tuition, that it not impermissibly discriminate, that it abide by the agreed upon admissions policies, and so on. In addition, there are core matters related to the school’s funding that require reporting and monitoring arrangements. For example, the sponsor must have assurance that those claimed to be students of the school are actually enrolled (and probably that they are regularly attending as well). This is vital, if for no other reason, than the number of pupils in the school will almost certainly determine how much funding it is to receive from the sponsor. Moreover, the sponsor probably will feel itself entitled to know about how the funds it provides are spent, if for no other reason than to try to head off the risk that the charter school operators might pocket the funds they receive rather than spend them on their pupils, with the likelihood of going bankrupt and leaving the students in the lurch. Besides, assuring the charter school’s financial integrity is a consumer protection function that the sponsoring body can help to provide for families who choose to or may choose to send their children there.

Of greater interest, and ultimately probably far more important, is the matter of monitoring the learning of the charter school’s pupils. Many charter school advocates talk in terms of these schools obtaining autonomy in exchange for accountability. What they have in mind here, first, is that a charter school’s program and approach to teaching will be given relatively less attention, but in return its results will be given relatively more attention. This usually translates into having the school’s pupils take some agreed upon tests, and it makes good sense for the charter contract itself to specify precisely what is expected along this dimension.

But, as suggested earlier, it is not at all clear whether newly chartered schools should be pressed, on the one hand, in the direction of promising actual results in terms of their student academic achievement, or whether, on the other hand, they should be pushed, at least initially, primarily in the direction of widespread disclosure of whatever results are achieved. An-

other way to address this question is to focus on what should be the consequences of poor academic results for some or most of a charter school's pupils. One strict "performance contracting" approach is to insist upon clear outcomes, and if the school fails to reach those goals, then to deem it in breach of its contract and immediately put it at great risk of forfeiting its charter. A potentially very different approach is to treat student performance results as a basis, at least at the outset, for interventions (perhaps both optional and coercive) by the sponsor into the operation of the school.

Either way, careful attention will have to be given to how high a level of academic achievement is to be the school's goal, and whether it should be some sort of school-wide or grade-wide average or whether it should be set in terms of individual pupils, such as seventy-five percent of them reaching a specified level of achievement. Plainly, any educational achievement goal should in some way take into account the students' situation when coming into the school, especially since a start-up charter school is likely to immediately fill up with children at many grade levels and not just at, say, kindergarten.

*C. Accountability/Monitoring Requirements in Practice With Some Illustrative States*

With these general considerations in mind, we turn now to actual practice. In terms of specifics, and in keeping with the general principle of autonomy in exchange for accountability, we find that charter statutes and the charter contracts themselves commonly contain four types of accountability provisions: student assessment; financial management; basis for charter revocation during the term of the charter; and a process by which charters may be renewed.<sup>137</sup>

While specific reporting requirements vary by state and among schools, virtually every school surveyed by the U.S. Department of Education indicated that, in the 1998-1999 school year, they had reported or planned to report to their charter-granting agency, school governing board, or parents about their progress toward their goals as expressed in their charter contract. This sample reported that the top areas of external monitoring were in the areas of school finance (94%), compliance with federal and state regulations (88%), student achievement (87%) and attendance (81%).<sup>138</sup>

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137. See generally, U.S. DEP'T OF EDUC., OFFICE OF EDUCATIONAL RESEARCH AND IMPROVEMENT, THE CHARTER SCHOOL ROADMAP (1998) (discussing students, finance and fundraising, and oversight, renewal and revocation of charters) [hereinafter U.S. DEP'T OF EDUC. CHARTER SCHOOL ROADMAP].

138. See U.S. DEP'T OF EDUC. CHARTER SCHOOL STUDY, *supra* note 74 at 50 (providing estimated percentages of charter schools that are externally monitored on accountability measures).

While compliance with regulations and attendance are a part of a charter school's reporting responsibility, the core of most states' charter accountability plan is generally focused on pupil outcomes, progress toward other charter specified goals, and financial management.

With respect to student achievement, the vast majority of charter school grantors rely at least in part on standardized tests. In addition, however, an overwhelming number of charter schools say that they also use non-standardized assessment tools—such as student demonstrations of their work (89%), portfolios (81%) and performance assessments (74%)—to measure student achievement. Furthermore, tools such as student and parent surveys were utilized to gage progress toward other school goals.<sup>139</sup>

In the paragraphs that follow more details are spelled out for certain key states. Just as states have developed an assortment of initial chartering regimes that reflect specific political, historical and philosophical contexts, they likewise have adopted a variety of accountability systems. For example, given differences already described, it is not surprising that Arizona has instituted more of a *laissez-faire*, “market-based” accountability system, that Massachusetts relies on a much more “centralized” system, and that California generally depends on local “district-based” accountability.

### *I. Arizona*

Arizona, the state sometimes referred to as the “Wild West” of the charter school movement, has one of the longest charter periods.<sup>140</sup> Whereas most states grant initial charters for a period of between three and five years, Arizona and the District of Columbia initially grant charters for fifteen years.<sup>141</sup> Even so, both of these jurisdictions require a review of compliance with the terms of the charter every five years.<sup>142</sup>

Although Arizona grants significant discretion to determine the administration of its application and monitoring process to its various chartering bodies, its statute nonetheless lays out some specific parameters related to the information a school must provide to the state and its sponsor, and how that information must be recorded and reported. Indeed, Arizona's initial charter application is quite extensive with respect to both the school's educational and financial plans. It requires information such as a curricular

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139. *See id.* at 54.

140. *See, e.g.,* FINN ET AL., *supra* note 9, at 129 (discussing Arizona's approach to charter schools).

141. *See* CTR. FOR EDUC. REFORM, CHARTER SCHOOL LAWS ACROSS THE STATES 2000: RANKING SCORE CARD AND LEGISLATIVE PROFILES, at [http://edreform.com/charter\\_schools/laws/index.html](http://edreform.com/charter_schools/laws/index.html) (last visited Aug. 7, 2001).

142. *See* ARIZ. REV. STAT. ANN. § 15-183(I) (West 1991 & Supp. 1999); D.C. CODE ANN. § 31-2853.22(a) (1981).

spreadsheet detailing goals, objective outcomes and measurement criteria, and beginning in 2000, it also requires a three year business plan of all new (and renewing) applicants.<sup>143</sup>

As with its application, Arizona's monitoring of its charter schools focuses on student achievement, financial accountability, and meeting other terms of the charter contract. In addition to any additional assessment system a charter school chooses to implement, it must at a minimum administer and report on state mandated norm-referenced tests given annually for grades three through twelve, and state standards-based tests given in at least four grades designated by the chartering body.<sup>144</sup> This testing information is then compiled and analyzed by the Arizona Department of Education to produce further measures of student achievement<sup>145</sup> and ultimately a school-by-school annual "report card."<sup>146</sup> Generally, each school also attempts to measure its success in areas outside of achievement, such as student behavior and socialization.

With respect to finances and reporting requirements, all charter schools in Arizona are generally required to comply with Arizona's Uniform System of Financial Records for Charter Schools (USFRCS) unless granted an exception by either the State Board of Education (SBE) or the State Board for Charter Schools (SBCS).<sup>147</sup> The state's Auditor General is responsible for monitoring charter school compliance with USFRCS.

This description combined with the various discussions of the Arizona plan earlier in this Article suggest that in Arizona even if the substantive bar to obtain a charter may not be terribly high, once a charter is granted, then a considerable amount of information is gathered and disseminated, in

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143. See GOLDWATER INST., CENTER FOR MARKET BASED EDUCATION, FIVE YEAR CHARTER STUDY 28 (2000) (discussing Arizona's charter application).

144. See ARIZ. REV. STAT. ANN. § 15-741 (West 1991 & Supp. 2000) (discussing assessment standards to measure student achievement).

145. According to the FIVE YEAR CHARTER STUDY by the Goldwater Institute:

The Measure of Academic Progress [MAP] . . . analyz[es the] Stanford 9 test scores by grade level. Students are included in the analysis if they were tested at the same school for two consecutive years. One year of growth indicates whether a grade level achieved one year of academic growth . . . . The standard is based on the amount of growth in the scale score points that are necessary to remain in the 50th percentile from one grade to the next higher grade. A 'Yes' means the grade level either met or exceeded the standard and achieved one year of growth.

GIFFORD ET AL., *supra* note 48, at 13 n.4.

146. See ARIZ. REV. STAT. ANN. § 15-743 (West 1991 & Supp. 2000) (outlining annual report requirements).

147. See GIFFORD ET AL., *supra* note 48, at 21 n.5. While the SBCS has granted a number of exceptions, these schools must still comply with Generally Accepted Accounting Procedures and Generally Accepted Auditing Standards and remain subject to the same reporting and auditing requirements. See *id.*

large part, to help parents decide whether they want to continue to send their children to the charter school (and to help other parents to decide whether they want to enroll their children in the school).

## 2. *Massachusetts*

In Massachusetts, charters are granted for a term of five years, and schools must report annually on their performance. Like Arizona, the Massachusetts system focuses on three key questions: "Is the school's academic program a success? Is it a viable organization? And, is it faithful to the terms of its charter?"<sup>148</sup> While the determination and measurement of the answers to these questions is dictated by the terms of the charter contract, Massachusetts at a minimum requires each charter school to meet the state's performance standards and testing requirements, publish an annual report, and secure an independent financial audit. In addition, each site is subject to an annual day-long site visit conducted by a contingent of Massachusetts citizens unconnected to the school.<sup>149</sup> Like Arizona, once a school is granted a charter, accountability focuses on the maintenance of sound finances, and the evaluation of educational results, or outputs, rather than on school inputs.<sup>150</sup> However, relative to Arizona, a much higher proportion of schools in Massachusetts reported that they were externally monitored on student achievement, instructional practices, and school governance.<sup>151</sup> It appears that a disparity between the two states that may account for this difference in perception is that the intensity of site visits, and therefore, personal oversight, is much greater in Massachusetts.

## 3. *California*

Since the vast majority of charter schools approved in California are approved by local districts, the state's accountability system is by and large "district-centered" and tied to the state's testing framework. Like Massachusetts, California's initial charter term may not exceed five years. The charter-granting entity reserves the right to inspect or observe any part of the school at any time,<sup>152</sup> yet it is unclear how often this occurs unilaterally,

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148. FINN ET AL., *supra* note 9, at 130 (citing Scott W. Hamilton, former Associate Commissioner for Massachusetts charter schools).

149. *See id.* at 131.

150. *See id.*

151. *See* U.S. DEP'T OF EDUC., OFFICE OF EDUCATIONAL RESEARCH AND IMPROVEMENT, THE STATE OF CHARTER SCHOOLS, THIRD YEAR REPORT (1999), available at <http://www.ed.gov/pubs/charter3rdyear> (last visited Aug. 7, 2001) (providing information on charter schools that were operating in the 1997-1998 school year).

152. *See* CAL. EDUC. CODE § 47607(a)(1) (West 1993 & Supp. 2001).

absent the catalyst of a complaint. Like traditional schools, charter schools must report on their participation in the state-wide standards and testing programs.<sup>153</sup> However, apart from reporting related to securing funding allocations, the statute requires little more in the way of financial record keeping and reporting. Of course, such provisions may be added to the individual charter contract.

#### D. School Closures

According to the Center for Education Reform, eighty-six schools, or four percent of charter schools nationwide had failed, as of December 2000. In addition, twenty-six other charter schools were consolidated into their local school districts, while another fifty never opened their doors.<sup>154</sup>

153. See *id.* §§ 47605(c)(1), 47612.5(a).

154. See CTR. FOR EDUC. REFORM, CHARTER SCHOOLS TODAY: CHANGING THE FACE OF AMERICAN EDUCATION, at [http://www.edreform.com/pubs/cs\\_closures.htm](http://www.edreform.com/pubs/cs_closures.htm) (last visited Aug. 7, 2001) (providing data on charter school closures due to failures and consolidations). The table below provides a state-by-state summary of closures nationwide:

State	Number of Schools	Number of Closed Schools	Percent of Total
United States	2150	86	4.0
Alaska	18	1	5.6
Arizona	451	21	4.7
California	282	6	2.1
Colorado	82	2	2.4
Connecticut	17	1	5.9
Delaware	8	1	12.5
D.C.	40	2	5.0
Florida	160	7	4.4
Illinois	24	1	4.2
Massachusetts	43	2	4.7
Michigan	191	6	3.1



School failures and closures occur for several reasons. Some schools that have been awarded charters may elect not to ever open. Other schools may begin operations but unilaterally decide to shut down before the end of the contract term. Still, others may exist for the period of the charter and then close. Each of these actions are voluntary.

On the other hand, schools may also be involuntarily closed (or sometimes taken over) by their sponsors. Involuntary closure may occur when the charter is revoked during its term or when the school seeks to have the charter renewed, but that request is denied.

#### *E. Charter Revocations During the Contract*

All states give chartering bodies the authority to revoke a charter and close a school prior to the end of the contract.<sup>155</sup> Earlier data collected by the Center for Education Reform suggested that, as of the end of 1999, only 2.3% of the 1,713 charter schools that had come into existence had closed, and only a fraction of that small percentage closed due to revocation of charters.<sup>156</sup> In short, it appears that most states have had little experience to

State	Number of Schools	Number of Closed Schools	Percent of Total
Minnesota	74	6	8.1
Nevada	8	1	12.5
New Jersey	57	2	3.5
North Carolina	98	8	8.2
Ohio	72	2	2.8
Oklahoma	7	1	14.3
Pennsylvania	66	1	1.5
South Carolina	11	3	27.3
Texas	169	10	5.9
Wisconsin	91	2	2.2

155. See U.S. DEP'T OF EDUC. CHARTER SCHOOL ROADMAP, *supra* note 137, at 32.

156. See CTR. FOR EDUC. REFORM, CHARTER SCHOOLS TODAY: CHANGING THE FACE OF AMERICAN EDUCATION, at [http://edreform.com/charter\\_schools/today/](http://edreform.com/charter_schools/today/) (last visited Aug. 7,

date with revoking charters.

The statutory basis for revocation varies somewhat from state to state. In most states, a sponsor may revoke a charter for violations of law or the charter, financial mismanagement, failure to fulfill student outcome goals, or other "good cause" reasons.<sup>157</sup> In the District of Columbia, for example, the 1998 school board revoked the charter of the Marcus Garvey Charter School, in part, in response to the conviction of the principal for assaulting a newspaper reporter and two police officers.<sup>158</sup> In California, one school district revoked the charter of a home schooling/independent study school following charges that the school was collecting public funds for students who were not enrolled in their program.<sup>159</sup> Overall, in California it appears that nine charters may have been revoked as of March, 2001.<sup>160</sup>

In other states, charter school laws provide additional bases for revocation. In both Georgia and Mississippi, a charter may be revoked if a majority of staff and parents vote to end the charter. In Arkansas and North Carolina, a charter may be revoked if two-thirds of the instructional staff vote to do so. In Illinois, a district may revoke a charter if it determines that the charter is not in the best interest of district students. Finally, a few state statutes are silent with respect to bases for revocation. As of 1998, for example, the statutes of Hawaii, Nevada, and New Mexico did not specify the grounds for revocation.<sup>161</sup>

Despite the rhetoric, however, fiscal accountability appears to take precedent over academic accountability. A UCLA charter school study found that districts were far more likely to hold schools accountable for financial outcomes rather than student outcomes. In the ten California districts studied, all but one of the schools that had their charters revoked (or not renewed) resulted from financial or legal/contractual reasons even though not all schools met other goals specified in the charter contract.<sup>162</sup>

#### F. Charter Renewals

At the end of the charter term, a school may apply for renewal of the charter or elect to discontinue operation. Generally, the school returns to

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2001) (providing statistics on charter schools that were unable to remain open).

157. See U.S. DEP'T OF EDUC., OFFICE OF EDUCATIONAL RESEARCH AND IMPROVEMENT, A NATIONAL STUDY OF CHARTER SCHOOLS SECOND YEAR REPORT 22 (1998) [hereinafter U.S. DEP'T OF EDUC. CHARTER SCHOOLS SECOND YEAR REPORT].

158. See FINN ET AL., *supra* note 9, at 139.

159. See UCLA CHARTER SCH. STUDY, *supra* note 12.

160. See Tendisai Chigwedere, *California Charter School Vital Statistics*, CHARTER CURRENTS 22 (Mar. 2001).

161. See U.S. DEP'T OF EDUC. CHARTER SCHOOLS SECOND YEAR REPORT, *supra* note 157, at 22.

162. See UCLA CHARTER SCH. STUDY, *supra* note 12, at 23.

the entity that granted the charter to seek a renewal. There are two different potentially competing data sets that might be brought to bear at the time of renewal that were not present at the time the charter was initially granted. On the one hand, substantial enrollment, or at least maintaining steady enrollment, is a strong sign that parents are reasonably satisfied (all things considered) and a good indication that refusing to renew the charter will cause an outcry of objections (if enrollment dwindles, this could be a basis for non-renewal, of course). On the other hand, after several years of operation, the sponsor will have information about the educational outcomes of the charter school. Typically, this information comes from scores on standardized tests that can be compared with the scores attained by regular public school pupils. It may also be obtained from other assessments of student work and surveys of families' satisfaction that the school may offer. Moreover, to the extent that the charter itself contains any special goals concerning its pupils' educational outcomes, it is likely that the school's actual achievements can be measured against those goals. If the school has strong enrollment and its achievement is strong both by state norms and the school's own goals, it will obviously be difficult and perhaps unwise and unfair not to promptly renew its charter. But a healthy enrollment combined with weak test scores, especially if those scores are well below set goals for the school, puts the charter renewing body in something of a bind.

As a procedural matter, states have somewhat differing approaches to charter renewals. Many states' renewal procedures simply mirror their charter-granting process. California typifies this strategy. California law provides for the possibility of an unlimited number of five-year renewals that, in principle, use the same standards, procedures, and appeal provisions as are used for new applications.<sup>163</sup> A second statutory approach is to simply allow renewal at the discretion of the sponsor. In Arizona, for instance, a sponsor has the discretion to renew a charter for successive periods of fifteen years,<sup>164</sup> although each sponsor may establish additional renewal requirements.<sup>165</sup> For example, the State Board of Education, which is one of several sponsors, requires a specific showing by the school regarding student achievement, financial management, enrollment, complaints, and other information pertinent to the charter school.<sup>166</sup>

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163. See CAL. EDUC. CODE §§ 47607(a)(2), 47605 (West 1993 & Supp. 2000) (providing provisions for the grant, renewal, and revocation of charters).

164. See ARIZ. REV. STAT. ANN. § 15-183(J) (West 1991 & Supp. 1999) (providing renewal provision for charters that have been in existence for fifteen years).

165. See *id.* § 15-183(I) (providing renewal provision for charters that are nearing fifteen years of existence).

166. See Ariz. Admin. Reg. 3211, 3220-21 (Sept. 17, 1999).

Louisiana's process mirrors its charter-granting process and also requires schools to demonstrate improvement in student achievement according to the terms of the charter. Arkansas, which as of spring 2000 had no charter schools operating, requires that the charter actually spell out the process for renewal.<sup>167</sup> Finally, the legislation of several states fails to specify a renewal process, but requires the sponsor to issue such guidelines.

To date, studies have found few examples of closures resulting from educational inadequacies. One study identified only three schools nationwide which had their charters either revoked or not renewed for failing to meet educational goals.<sup>168</sup> A recent report suggests that there were seven such non-renewals by the end of 2000.<sup>169</sup> Interviews with school board members conducted by UCLA researchers confirmed that school board members were more comfortable with strictly enforcing fiscal issues with charter schools since it mirrored their accountability role for traditional schools in their districts.<sup>170</sup> While some school board members reported tension between charter school independence and their monitoring role, others felt they lacked adequate information about a school, or were confused about student outcomes. Thus, these problems hindered the school board members' ability to determine whether schools were meeting their goals.<sup>171</sup> While this may explain what is seen in states like California or Massachusetts, which rely on traditional education agencies to serve as chartering agencies, it does not explain the lack of educational outcome accountability in states such as Arizona which have created new entities specifically for the purpose of approving and monitoring charter schools.

In sum, this experience shows that charter-granting bodies have yet to precisely determine what their gate-keeping role should be once a charter school is launched, is financially sound, and has the support of the families whose children attend. Some would argue that these schools should just be allowed to continue their activities, at least in the early years of the charter school experiment. Others, however, contend that this shows that chartering bodies are not taking seriously the autonomy-accountability trade-off. To them, charter schools were supposed to bring about markedly better

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167. See U.S. DEP'T OF EDUC. CHARTER SCHOOLS SECOND YEAR REPORT, *supra* note 157, at 23.

168. See FINN ET AL., *supra* note 9, at 136 (identifying Georgia's Midway Elementary School, Michigan's Turtle Island, and Minnesota's Dakota Open as schools which failed for not meeting educational goals).

169. See Kate Zernike, *Charting the Charter Schools*, N.Y. TIMES, Mar. 25, 2001, § 4, at 3. See also Chigwedere, *supra* note 160, at 22 (finding that in California, it appears that, regardless of the reason, only four charters have not been renewed, in addition to the nine charters that were revoked).

170. See UCLA CHARTER SCH. STUDY, *supra* note 12, at 23.

171. See *id.* at 2-25.

educational results or be shut down, and so far no state is close to insisting on that.

## VI. RECOMMENDATIONS

Based upon our review of experiences around the nation, we have reached several, at least tentative, conclusions. We have grouped them here into four headings: chartering bodies and dealing with initial denials; standards for chartering; monitoring, revocations, and renewals; and involving private accrediting associations.

### *A. Chartering Bodies and Dealing with Initial Denials*

We believe that states should give local school districts authority to grant charters, but not exclusive authority. Rather, local districts should probably be restricted to chartering schools that are physically located inside their boundaries. Although, perhaps, they might also be allowed to charter out-of-district schools, typically located nearby, that expect to enroll a significant portion of their students from families who live in the sponsoring district. If, by contrast, local districts are allowed to charter distant schools that are unrelated to pupils who live in their community, the rationale for local chartering is lost. No longer would the chartering body be responding to local community needs and desires or taking advantage of its expertise with respect to local conditions. Worse, California's experience suggests that chartering of unrelated schools may be motivated either by financial reasons or by an excessively permissive attitude towards chartering that is not likely to be backed up with adequate monitoring. If so motivated, the chartering body is unlikely to take seriously its gate-keeping role.

It is also true that local chartering of local applicants could be done in an inappropriately lenient manner. Yet, we find no evidence to date that this is a serious problem that necessitates routinely imposing the requirement of a second approval by an agency beyond the local district (such as the State Department of Education), as is current policy in a few states. A better role here for the state department, we believe, is to monitor local chartering activity. If it turns out that one or more districts are chartering too many schools that fail (especially if those failing schools have engaged in misconduct), then perhaps the state department should obtain and exercise special supervisory authority over the poorly acting district(s).

A larger concern remains that some local districts are thought to be erecting inappropriate barriers to obtaining a charter. To be sure, local opinion could be the statewide philosophical approach to charter schools. Under this vision, a state legislature could conclude that trying out charter

schools is not a good idea for the entire state, but decide to provide local districts with the sole discretion of whether to promote charter schools. Under this approach, if a local district declines to charter any applicants, it is not clear that those denied applicants would have much to complain about (assuming that the local district does not violate its own procedures and standards). But this does not seem to be the basis upon which states have thus far enacted charter school laws.

By our interpretation of the literature, statutes, and legislative records, charter schools are generally understood to be an experiment of sorts to which the state as a whole has committed. Therefore, local districts are not supposed to make up their own minds as to whether charter schools are generally a good idea. Rather, they are supposed to follow state criteria and direction, albeit drawing upon their own specialized knowledge of the local situation.

The problem is that, despite being assigned this duty by the state, some districts have shown themselves to be indifferent or hostile to charter schools. In some places, the school board has chosen to give priority to other items, rather than focus on the creation of charter schools and the subsequent monitoring of the progress of those to whom a charter might be awarded. Elsewhere, the leaders of some local districts simply reject the charter school concept, choosing to exercise their powers in a manner that avoids having to charter any schools (and certainly not schools with specific approaches that the state allows but the district especially dislikes, such as schools run by for-profit EMOs).

One way to deal with local district intransigence is to afford denied applicants an appeals system, as many state charter school laws now claim to provide. Based upon experience to date, however, we think it might be more appropriate to adopt a multiple sponsor approach, as several states have, that would permit would-be charter schools to apply to a charter-granting body other than their local school district.

Many states, especially outside the South, have separate county-level public education agencies that might perform the chartering function, as reflected in the California practice (in the South, local school districts themselves are typically organized on a county basis). However, we believe that county boards of education are often largely invisible groups that typically have expertise in only specialized areas, such as vocational schools, special schools for severely disabled children, and the like, which is generally the case in California. It is therefore by no means obvious that these bodies are likely to be especially good at performing the gate-keeping function with respect to general charter school applicants.

Universities, especially those with schools of education, might seem in the abstract to be very appealing candidates to charter schools, and, as we

have discussed, they currently play a key role in Michigan, for example. Yet the Michigan experience is not altogether satisfying. In the first place, there is reason to believe that many universities do not actually have the experience and personnel to perform the selection and monitoring functions very well. Just because you train teachers does not mean that you are well equipped to sponsor schools. Second, the Michigan experience suggests that, absent substantial political pressure, many universities might turn out to be not very interested in performing this task.

This leads us to conclude that while empowering universities to charter might be a good idea for other states to try, universities should not be required to go into the charter-granting business, nor should they be the only alternative available to an applicant beyond the local school district. Rather, we suggest that some statewide body be assigned the chartering function on a non-exclusive basis.

It is not clear to us if it matters very much whether this statewide chartering body is the state board of education, the state department of education, or a special agency whose only role is to charter. Although Arizona has followed the latter course by creating a specialized body that has proven to be very active in chartering, it nevertheless seems to us that a state board or department with a similarly pro-active chartering philosophy could well wind up with the same record. Moreover, as we have also seen from the Arizona experience (where both the new chartering agency and the state board can charter), the state board or department itself, if given this role, is likely to create a separate unit that, in many respects, is likely to behave much like a special new chartering agency would act. Since Arizona uses both agencies, it is difficult to rely upon its experience to predict how using only one of them would have turned out. We have heard that on occasion the special chartering agency and the state board have competed to become the sponsor of a promising charter school, although it has been difficult to document this claim.

Although it is perhaps wise to preclude an applicant seeking a charter for a specific school from seeking that charter simultaneously from more than one chartering body, under the regime we have just suggested, we envision that an applicant could elect to go first either to the local school district or to the state agency, and if turned down by one, it could then apply afresh to the other. Most importantly, this would permit an applicant to go directly to the state level body at the outset and not have to apply to and be rejected by a local school district first. This is especially helpful to applicants from districts that have shown themselves to be hostile to similar applicants in the past.

We further note that, under such a scheme, the need for a structured administrative appeals process would probably become much less important.

For example, suppose an applicant applied first locally and was turned down. If it then applied to the state agency, that agency need not act only as a deferential reviewer of the decision made by the local body, which we see as its appropriate role if it were serving only as an appellate body. Instead, the state body could take up the application afresh and make what it believes is the right decision altogether apart from the previous decision. Indeed, when making its second application, the would-be charter school might decide to revise its application based upon written feedback that it received when it was turned down. Whereas in a true appeal setting, the state body, we think, should act only on the basis of the application as originally filed and the record created below.

Indeed, if this multiple sponsor system were combined with a willingness by chartering bodies to receive and consider timely revised applications from those they turn down, this more welcoming process could make any sort of "appeal" largely unnecessary. This is by no means to say that all who apply would or should get charters. Rather, we argue that charter seekers would be assured of a fair hearing, which is probably beyond what they can expect to receive in a single sponsor system with a right of administrative appeal.

There remains the potential problem of chartering bodies acting in bad faith and failing to discharge their chartering duties as so directed by the state law. But it is not clear whether having a hostile school district serve as your sponsor is very desirable anyway. Yet that is the logical implication of an appellate body reversing a local denial in the "appellate model" that we find less attractive (and probably explains why many states already ask the "appellate" agency to issue charters that it concludes were wrongly denied at the local level). Being able to obtain a charter based upon a new application made elsewhere should be more attractive. To be sure, if all the agencies assigned the chartering role oppose this reform, then the state legislature will need to intervene so that those in charge will faithfully implement the statutory commands.

We recognize that under our proposed multiple sponsor scheme some local districts that are cool to charter schools may quickly seek to divert applicants to the state chartering body. This is arguably what has happened in Arizona where the state level agencies have chartered the lion's share of the successful applicants and only three districts are responsible for more than ninety percent of those schools chartered locally. But, again, having to apply to and win a charter from a local school district that is indifferent at best may not be in anyone's interest. The implication of this, however, as we have witnessed in Arizona, is that the state chartering agency (or agencies) has to be prepared to take on a substantial bureaucratic burden, and that implies that the state legislature has a duty to provide the necessary



staff and other funding.

We mention here in passing that state funding of the charter school itself is yet another argument in support of state-level chartering. Today, the local school districts of many states have either far more or far fewer dollars per pupil to spend than neighboring districts have. These inequalities arise from the local property tax based system of public school finance that still exists in most states, even though these inequalities have attracted lawsuits in more than forty states over the past four decades.<sup>172</sup> Although judicial decrees in nearly twenty successful suits have brought about some narrowing of spending differentials in a number of states, funding inequalities remain in most places.<sup>173</sup> However, if charter schools begin to attract substantial numbers of pupils who live in several school districts, then local funding of their operations becomes incoherent, i.e. how much money do they get, and from whom?<sup>174</sup> Instead, permitting them to get both state approval and state funding makes much more sense. This digression also makes clear that state chartering requires a method for direct state funding, something that would be novel in most jurisdictions.

### B. Standards for Chartering

If charter applications may be made to alternative chartering bodies, then some of the problems of the inconsistent application of state legislative standards may also be minimized. Nonetheless, based upon the California experience, we think more attention should be given to setting out clearer statutory standards for the approval of charter school applications. We are not convinced of the wisdom of California's current approach, which tells a district that, provided the application is complete, it must grant the charter unless it finds the educational program is "unsound" or the school is "demonstrably unlikely" to succeed.

These phrases are problematic in that they are too elastic and give too little guidance to chartering bodies as to their proper application. Some district officials may think they could never carry the burden of proof placed on them, feeling obligated to rubber stamp any completed application they receive. Other district leaders with a strong sense of what sort of

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172. See Paul A. Minorini & Stephen D. Sugarman, *School Finance Litigation in the Name of Educational Equity: Its Evolution, Impact, and Future*, in EQUITY AND ADEQUACY IN EDUCATION FINANCE 34, 35 (Helen F. Ladd et al. eds., 1999).

173. See William N. Evans et al., *The Impact of Court-Mandated School Finance Reform*, in EQUITY AND ADEQUACY IN EDUCATION FINANCE 72 (Helen F. Ladd, et al. eds., 1999).

174. See Stephen D. Sugarman, *School Choice and Public Funding*, in SCHOOL CHOICE AND SOCIAL CONTROVERSY: POLITICS, POLICY, AND LAW 111, 122 (Stephen D. Sugarman & Frank R. Kemerer eds., 1999).

education is best for children could be all too quick to find a program “unsound” or likely to fail. For example, in districts that, after long battles, are now strongly committed to teaching reading by way of “phonics,” a charter school that proposes teaching by the so-called “whole word” method could be considered “unsound.” A similar point could be made about disputes over teaching limited-English speaking children. But if districts are permitted to reject charter applications from those who have not made the same judgments about pedagogy, curriculum, and the like, as the sponsoring district has made, this is surely contrary to the basic philosophy underlying charter schools in the first place. Yet, if comparing the educational judgments of the proposed charter school with the educational judgments of the would-be sponsor is not the right approach, then the California language itself gives no meaningful guidance.

That is why we suggest that chartering bodies should be given clearer instructions. Perhaps they should be told that their first job, where necessary, is to assist would-be applicants in improving their applications. If there is something problematic about an application, the staff of the chartering body should point out ways in which it could be made better, and federal and other start-up funds could be provided in support of the applicant (this assumes that there is not a cap on the number of charters that may be awarded so that applicants are not considered to be in competition with one another). This supportive attitude towards applicants is consistent with a policy of receptivity to resubmissions suggested above.

Then, sponsoring bodies could be instructed to award charters to completed applications that are not “over the edge” or some similar metaphor, but the key is to more fully detail what constitutes an unacceptable proposal. Some points seem clear to us. If a charter school proposes to teach racial hatred or some similar evil, it should be rejected; the principle here is the rejection of extremist curricula. If a charter school is likely to defraud the state of its money without actually providing genuine educational services, it should be denied. One principle here is the rejection of proposals that are financially incompetent and lacking proper auditing controls. Another principle is the rejection of proposals that lack a coherent educational plan. If a charter school is likely to defraud families because they are not adequately informed as to what is planned for and delivered to their children, then it should be denied. The principle here is the rejection of proposals that do not contemplate effective disclosure to families of what the school is about and how the students are faring. Other similar examples and principles could be developed.

We emphasize that the reason why chartering bodies must engage in more than ministerial acts is because it requires the exercise of judgment to determine whether a charter application is consistent with the principles of

the sort described above. Put differently, the core gate-keeping function is to make those judgments on an individualized basis after scrutinizing each application. But that judgment must be exercised on the understanding that, if charter schools are to be allowed to be truly different from alternative, magnet, or specialty schools that might be started by the district itself, then substantial leeway needs to be given to applicants along the domains of mission, curriculum, pedagogy, facilities, staffing, and the like.

Evidence to date suggests that most charter schools starting from scratch begin with relatively small numbers of students, often arising from some pre-existing community of families. This evidence is not surprising. Not only are many parents looking for a small school as an alternative to the school their children now attend, but perhaps more important, new schools are usually going to have trouble attracting a large number of families before they establish a track record. Apart from insiders who may have played a role in starting a charter school (and their personal contacts or members of their local “community”), those venturesome enough to try out such a school may often be especially unhappy with their child’s current school (or the school to which he or she would otherwise be assigned). Hence, while no one is happy if a charter school starts up and fails, the costs to the children are likely to be less than if a larger randomly-selected school fails.

In this respect, many charter supporters say it is desirable that charter schools fail and cease operating—at least in comparison to what they see as failing public schools that continue on indefinitely. Whatever the merits of this comparison, it would certainly be better if those charter schools that do get up and running are successful and are not failures. As noted earlier, it appears as though around four percent of the ever-chartered schools have closed, and those probably can be considered failures. But this does not mean that all charter schools that are continuing are successful. In the first place, some of them may well be on the road to closure right now. And secondly, many people would not consider continued enrollment by itself as sufficient evidence of success.

### *C. Monitoring, Revocations, and Renewals*

This takes us to the monitoring, charter revocation and charter renewal process. It appears to us that too many chartering agencies are now just beginning to realize the importance of their role after the charter is granted, and perhaps states have been insufficiently attentive to the financial and staff requirements needed to perform these functions properly.

As discussed earlier, there are very different jobs involved here. First, sponsoring bodies need to be alert to gross misconduct that could come about from abuse of the children, financial fraud, reckless financial mis-

management, or gross deviation from promises made in the chartering agreement. These sorts of faults, after proper notice and hearings, should lead to revocation of the charter during its term (if necessary) and some sort of equitable relief for the children who had been enrolled in the particular school. This relief might involve taking over the school's operation by someone else. It could even mean some sort of insurance-funded compensation payment to the families involved that facilitates the transfer of their children to another available school. Indeed, we believe that more attention should be given to the appropriate remedies afforded to the children who lose out when these abuses occur. Many likely find it insufficient to place the children into any existing public school that might take them.

In performing the oversight function for the grossly administrative or financial malfunctioning charter schools, we think that chartering authorities might benefit, as suggested in the Introduction, from the experience of public school "takeover" regimes. In fact, despite talk about academic failure, school takeovers have also mostly focused on financial and management misconduct. While the narrowness of this response has disappointed some, there is some reason to believe that this sort of administrative intervention can substantially cure the problem, at least in the takeover context. To be sure, in the chartering setting, as contrasted with the takeover situation, interventions prompted by severe misconduct could well mean not merely completely ousting the leadership and imposing new systems, but also perhaps revocation of the charter and closure of the school.

In any event, detecting this sort of wrongdoing during the period of the charter grant is only a small part of the monitoring role. Chartering bodies surely also need to pay attention to how the school's pupils are doing and at a minimum make sure that their families are well appraised on this dimension. Apart, perhaps, from gross declines in student academic performance, we think it is probably inappropriate to revoke the charter of a newly chartered school during its first chartering period. Indeed, we think it is probably unwise and unfair to insist that the charter document mandate that the school meet strict student achievement benchmarks from year to year. This is especially so if those achievements are substantially greater than would have been predicted for the school's pupils had they remained in the regular public schools. For one thing, many parents will select a particular charter school primarily for reasons other than improved academic performance of their children. For another, a start-up school should probably be given a reasonable period of time to demonstrate the success of its program, and it is to be expected that some will have difficulties at the outset that they ought to be given a chance to solve.

Nevertheless, new charter schools should be carefully monitored and if educational achievement problems are noted early on, the sponsoring body

should at least offer to provide technical assistance to the school, and it should insist that families using the school are made aware of the problems. One way to do this is to create a professional inspectorate for charter schools. Indeed, perhaps professional statewide inspectors could be selected who could be drawn upon by many chartering bodies. These inspectors could go into schools at the first sign of disappointing academic results, as judged in comparison with either goals the school set for itself in its charter document or student achievement in comparable regular public schools. The extent of the inspectors' involvement and the nature of their intervention could in turn be increased the longer or larger the problem continues or grows. Not only might these experts consult with the school's managers, but they might also interact with teachers and could even speak with individuals or groups of parents and students. One purpose of this intervention would be for the inspectors to assure themselves that the school community itself was widely aware of the disappointing educational outcomes of the pupils. The inspector could also try to determine what the school community thought should be done about the matter and what the managers planned. These determinations could then be reported back to the school sponsor. Among other things, the inspector could also examine how the school is doing in terms of other goals it might have, such as providing a safe environment, achieving regular attendance by most children, and specialized learning goals like two-language proficiency or teaching tolerance.

Once a charter school's initial charter period has run out, if the school's trustees want it to continue, the charter will have to be renewed. But clearly, the charter renewal process will have to begin long before the end of the chartering period. This will give sponsors adequate time to gather information, to hear from interested parties, to announce their decision (to submit to an appeal if the decision is negative and the charter school trustees wish to appeal), and to give families plenty of time to find another school for their children if the charter is not renewed.

However, we want to re-emphasize here that as the end of the initial charter period looms the sponsor is not in the same position as it was when first chartering the school. In the case of start-up schools, it will now possess a track record of the school's performance, and the school may well have enrolled families who are eager for the school to be allowed to continue. Refusing to renew a charter will become a difficult matter politically for the sponsor. Yet, most charter school supporters would probably agree that the gate-keeping role requires that body count alone should not suffice. One possible way to deal with this delicate situation is to ask a charter school nearing the end of its first charter period to seek accreditation from an independent accrediting body.

Of course, if at the time of renewal, the sponsor discovers that the school has substantially violated one of the principles for initial chartering, that could be deemed a basis for non-renewal, or at least for putting the school on a tighter leash by subjecting it perhaps to a shorter subsequent renewal period and more intensive monitoring. But a more difficult case is perhaps illustrated by a school that neutral outside experts would describe as not doing very well, i.e. a school that is struggling, possesses sub-par academic results, and experiences occasional crises. This is a school that the district would surely not be proud of. Suppose further that the chartering body has adopted an inspection system of the sort suggested above, that the inspector has been reporting on the school's shortcomings for some time, and that the record shows little in the way of improvement, at least so far.

The issue is compounded, we believe, depending upon whether many charter schools are like this, or only the occasional one is. If the former is true, then that may cause reformers to wonder whether charter schools overall are serving the school improvement function that many people hope for them. This does not necessarily mean that charter schools are a failure to be abandoned, but it will mean that many people who had been caught up in the charter school movement are likely to look to other reforms. On the other hand, if most charter schools seem to be doing pretty well, then the few that are not can be looked at differently. Maybe research can help tell us whether it is a problem with the originators, the program, the sponsors, or something else that is causing them to be below the norm. In turn, maybe some ways of helping those schools to improve can be developed. If, however, a charter school is at odds with its sponsor over change, or if it will not cooperate with the sponsor in trying out any of the suggested improvements, then perhaps it could be encouraged to seek new chartering from a different sponsor, provided a sponsor on the other track is so willing. This dual-track opportunity can also help guard against the risk that a deserving charter school is not inappropriately refused renewal.

A further complication is the nature of the opportunities available to the charter school's pupils should the charter not be renewed. If there are other public schools with spaces available that are plainly more successful with the sorts of children who are not thriving in the charter school, this might be a reason for bolder action by the charter sponsor. If, on the other hand, non-renewal would mean shifting the pupils to an equally so-so, or even worse, public school alternative, that argues in favor of the sponsor continuing to work with the disappointing charter school rather than terminating it.

#### *D. Involving Private Accrediting Organizations*

We believe that in addition to the deployment of charter school inspec-

tors, both chartering bodies and charter schools might benefit from involving private accrediting bodies in their work. Indeed, we noted in the Introduction that charter sponsors and accrediting organizations serve analogous functions in many ways. To further explain the parallels, we present a description of some aspects of the major accrediting body that serves California schools.

The Western Association of Schools and Colleges (WASC) is one of six regional associations<sup>175</sup> that accredits public and private schools in the United States. WASC's three Commissions carry out its accrediting function, each addressing a different level of education. The Accrediting Commission for Schools (ACS) is responsible for the accreditation of all schools below the college level.<sup>176</sup>

According to its bylaws, ACS's purpose is to "foster excellence in elementary [and] secondary . . . education by encouraging school improvement through a process of continuing evaluation and to recognize, by accreditation, schools which meet an acceptable level of quality, in accordance with established criteria."<sup>177</sup> ACS's membership is voluntary. Through accreditation it seeks to promote school improvement and provide "certification to the public that the school is a trustworthy institution of learning."<sup>178</sup> WASC points out the important distinction between approval and trust. Like a school that succeeds according to the terms of its charter, an "accredited" school is trusted to be what it claims to be and to do what it claims it does. Today, included in the signal conveyed by accreditation is the added notion of continuous improvement. Accreditation is an on-going activity and not a static status. Indeed, the process for seeking accreditation is data driven and includes periodic site visits and regular self-study.

The value of accreditation is indicated by the number of schools that seek, and are granted, this voluntary distinction. In California alone, over eleven hundred public schools are either candidates for accreditation<sup>179</sup> or

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175. The others include the Middle States Association of Colleges and Schools, the New England Association of Schools and Colleges, the North Central Association of Colleges and Schools, the Northwest Association of Schools and Colleges, and the Southern Association of Colleges and Schools. See Western Association of Schools and Colleges, at <http://www.wascweb.org> (last visited Aug. 7, 2001).

176. See *id.* (noting that such responsibility includes "elementary, junior high, middle, high and adult schools, whether public, private, or church-related").

177. Accrediting Commission for Schools, Bylaws § 2, *Purpose*, at <http://www.acswasc.org/bylaws/bylaws.html> (last visited Aug. 7, 2001).

178. Accrediting Commission for Schools, Bylaws § 4(2), *Basis for Accreditation*, at <http://www.acswasc.org/bylaws/bylaws.html> (last visited Aug. 7, 2001).

179. See Accrediting Commission for Schools, Bylaws § A2(1), *Candidates for Accreditation*, at <http://www.acswasc.org/bylaws/policies.html> (last visited Aug. 7, 2001) (providing that candidate status is conferred on schools that are progressing toward meeting

are fully accredited.<sup>180</sup>

As with the renewal of a charter, the criteria for accreditation is shaped by the degree to which a school is accomplishing the purposes and functions expressed in its statement of purpose and on the appropriateness of those purposes and functions for an institution of that type.<sup>181</sup> General criteria used by ACS include consideration of the organization for student learning, curriculum and instruction, support for student personal and academic growth, and resource management and development.<sup>182</sup> Some state departments of education have jointly developed additional criteria for public schools in its particular state. For instance, California has added criteria such as vision, leadership and culture, curricular paths, powerful teaching and learning, support for student personal and academic growth, and assessment and accountability.<sup>183</sup>

The terms of ACS accreditation range from one to six years, based on the recommendation of the visiting committee and the content of their report.<sup>184</sup> A school may appeal the decision to grant a limited term of three years or less, or to deny accreditation. The decision of the ACS with respect to an appeal of a limited term of accreditation is final, whereas a denied school may further appeal ACS's decision to WASC's Board of Directors.<sup>185</sup> Institutions which receive an accreditation term of three years

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criteria for full accreditation and can be expected to meet those criteria within three years).

180. See International Council of School Accreditation Commissions, Inc., *Search Registry*, at <http://www.icsac.org/icsac1/search1.htm> (last visited June 24, 2001) (maintaining a searchable database of all schools that are accredited or candidates for accreditation).

181. See Accrediting Commission for Schools, Bylaws § B1, *Criteria for Accreditation*, at <http://www.acswasc.org/bylaws/criteria.html> (last visited Aug. 7, 2001) (providing list of general criteria used by ACS and explanations for each).

182. See *id.*

183. See Accrediting Commission for Schools, Bylaws § B2, *Criteria for California Public High Schools*, at <http://www.acswasc.org/bylaws/criteria.html> (last visited Aug. 7, 2001) (noting additional criteria that California has provided).

184. See Accrediting Commission for Schools, Bylaws § A3, *Terms of Accreditation*, at <http://www.acswasc.org/bylaws/policies.html> (last visited Aug. 7, 2001) (listing different types of terms of accreditation).

185. See Accrediting Commission for Schools, Bylaws § A6, *Appeal Procedures*, at <http://www.acswasc.org/bylaws/policies.html> (last visited Aug. 7, 2001) (stating that appeals to the Commission must be based on at least one of the following grounds:

- 1) there were errors or omissions in carrying out prescribed procedures on the part of the evaluation team and/or the Commission;
- 2) there was demonstrable bias or prejudice on the part of one or more members of the evaluation team or Commission which materially affected the Commission's decision;
- 3) the evidence before the Commission prior to and on the date when it made the decision which is being appealed was materially in error; or
- 4) the decision of the Commission was not supported by substantial evidence.)



will receive an unannounced visit by the Commission sometime in the second year,<sup>186</sup> while institutions that receive an accreditation term of one or two years will receive an unannounced visit during the first year,<sup>187</sup> approximately nine months after the site review visit.<sup>188</sup>

We believe two ideas emerge from this description of WASC. First, and less innovative, charter school sponsors might learn a great deal from WASC standards and practices and incorporate them into their own mechanisms for charter school renewal and monitoring. Second, and more daring, charter sponsors might substantially delegate the renewal process to groups like WASC. Indeed, relying on a private, external accrediting organization like WASC could be an extremely attractive option for charter sponsors. Not only does such an organization possess the expertise, but unlike many chartering agencies, it has no apparent conflict of interest.

Simply put, charter schools might pursue accreditation as evidence of their “success” as a part of the renewal process. If the school does so and is accredited, then that should probably create a strong presumption in favor of charter renewal on academic grounds.<sup>189</sup> In a system that relied upon professional inspectors as well as private accrediting bodies, the charter grantor could ask the inspector to make a recommendation about renewing the charter based upon the successful accreditation, and presumably future re-accreditations could be sought at intervals that meshed with subsequent periods for charter renewal.

Some schools might have reasonable grounds for not wanting to seek accreditation, and there is always the risk of accreditation bodies themselves becoming politicized, imposing ideologically-driven conditions on their applicants that are not fairly part of an appraisal of the school’s qual-

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186. See Accrediting Commission for Schools, Bylaws § A3, *Terms of Accreditation*, at <http://www.acswasc.org/bylaws/policies.html> (last visited Aug. 7, 2001) (noting that institutions with a three year term must file a Progress Report on critical areas of improvement and action plans demonstrating that school has done the following: improved student achievement relative to the school-wide learning expectations; made substantial progress toward correcting the critical areas for improvement; and made appropriate progress on implementation of school-wide action plans).

187. See *id.* (indicating that institutions with a one or two year term must complete a Progress Report and Revisit to serve as “warning” that unless prompt attention is given to major recommendations, accreditation may be denied).

188. See Accrediting Commission for Schools, Bylaws § C5, *Unannounced Visitations*, at <http://www.acswasc.org/bylaws/processes.html> (last visited Aug. 7, 2001) (stating that in addition to unannounced visits, the Commission has reserved the right to request specific reports from any institution at any time).

189. In effect, chartering regimes could use accreditation as a universal signal to the public about quality and data driven evaluation and self reflection, similar to the National Association for the Education of Young Children (NAEYC) accreditation given to pre-school, kindergarten and child care programs.

ity. While public chartering bodies are certainly subject to these same political pressures, at least their activities are more open to public scrutiny. For these reasons, if a school seeks accreditation and fails, or if it refuses to seek accreditation, that should not create a presumption of non-renewal. However, it would invite more careful scrutiny by the professional inspector and sponsoring body's staff.

#### CONCLUSION

In most states that have charter schools today, charter-granting agencies have, and are likely to retain, substantial discretion in deciding which schools to charter, regardless of the statutory rules. Therefore, the processes they use, the standards they officially or informally apply, and the mechanisms that are available to those whose applications are initially turned down will strongly shape the reality on the ground, in terms of how many charter schools there are and who gets to run them. Nevertheless, we believe that the fairness and consistency with which this gate-keeping function is performed could be improved if policy-makers and charter sponsors more clearly set out the public values and child protection values upon which charter denials are to be based. Clearer articulation of values along with the use of a multiple sponsor regime, could help promote the encouragement and approval of a wide range of "from scratch" charter schools that are not clearly headed for failure. Once new charter schools have a chance to establish something of a track record, charter sponsors should not view their gate-keeping job as finished merely if the school has substantial enrollment. Yet, in deciding which schools it should renew, and the terms of renewal, sponsors could do well to involve both professional charter school inspectors and the private accrediting agencies that could bring to the process their long-term expertise in academic certification.