KNOWLEDGE IS POWER: ASSESSING THE LEGAL CHALLENGES OF TEACHING CHARACTER IN CHARTER SCHOOLS

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"Persistence looks like not giving up when you try to sound out a word!"

"That's right, Camilla![1] Persistence means stretching out that word long, like a piece of bubble gum from your mouth, till you figure out all the sounds! Persistence means never, ever giving up. What else does persistence look like?" The students share some more ideas. Each time a student speaks the word "persistence," he pounds one fist into the palm of his other hand, like a hammer steadily pounding a nail.

During my recent school visit to Los Sueños Academy, one of nine schools in the Rocketship Charter Network, kindergarten teacher Chelsea Graff's dedicated lesson on character proved but one of many means of teaching the school's core values of persistence, respect, responsibility, empathy, and environmental stewardship. Teachers refer to these character traits when disciplining students and mention the school's character values in students' report cards.[2] Posters detailing the school's core values line the hallways. Baskets of plush animals sit in the corners of each classroom. These are Kimochis, an Australian brand of educational toys that employ seven different stuffed animal characters to teach emotional intelligence and self-awareness, both important components of empathy. Each stuffed toy comes with a distinct personality description and representations of its most frequently experienced emotions in a pocket in its belly. Throughout the day, students are encouraged to go to the Kimochi corner to hold Bug—if feeling afraid[3]—or Huggtopus—if feeling excluded.[4] A student self-identifying with Huggtopus has a "big, friendly personality" that at times may overwhelm others.[5] If the student is feeling her usual exuberant self, she may select Huggtopus' happy emotion.[6] If she is feeling ignored by students annoyed by her loud personality, she may select Huggtopus' frustrated emotion.[7]

At KIPP Washington Heights Middle School in Manhattan, character is taught even more overtly. In addition to dedicated bi-weekly character lessons, teachers provide students with regular character growth cards.[8] Modeled on traditional grades-focused report cards, these track student progress along each

1. Student name has been changed to protect anonymity.

2. Telephone Interview with Kristoffer Haines, Senior Vice President, Growth, Development & Policy, & Caryn Voskull, Manager of Teaching and Learning, School Model Innovation, Rocketship Education (Apr. 3, 2014).

3. *BUG*, KIMOCHIS, http://www.kimochis.com.au/index.php?PCID=16171&PSO=333&PSID=2000&PSV=Primary&CDO= (last visited Apr. 1, 2015).

4. *HUGGTOPUS*, KIMOCHIS, http://www.kimochis.com.au/index.php?PCID=16171&PSO=333&PSID=2024&PSV=Primary&CDO= (last visited Apr. 1, 2015).

5. *Kimochis Feel Guide, Teacher's Edition*, KIMOCHIS, http://issuu.com/kimochis/docs/kimochis_curriculum_exceprt/22?e=0 (last visited Apr. 10, 2015).

6. *Id*.

7. *Id*.

8. Telephone Interview with Ian Willey, Dean, KIPP Washington Heights Middle School (Apr. 1, 2014).

of seven character strengths: grit, zest, self-control, optimism, gratitude, social-intelligence, and curiosity.[9] Students work from their character report cards to develop goals. For instance, "bring in pencils every day" to demonstrate self-control, "raise my hand three times in class" to show zest.[10] Students celebrate one another for exhibiting the school's character values and ponder over their implementation during weekly small group meetings called trust circles.[11] Teachers also incorporate character strengths while teaching traditional subject areas; for instance, during a discussion in social studies of the Vietnam War, teachers ask why optimism might be at once a valuable *and* risky quality in a leader.[12] KIPP Washington Heights also incorporates character discussion into student discipline. Sixth grader Lilliana[13] used to sulk and talk back every time she was reprimanded in class, so Dean Ian Willey began bringing her to his office to discuss her behavior.[14]

> I had her go through the character strengths that are on my wall and helped her to figure out what she needs to work on. We identified that grit means getting over things quickly. So today when she got [detention] . . . I asked her if she sulked. She told me she was upset but didn't sulk or talk back. That's growth.[15]

In many charter systems, administrators have also developed school policies that reflect the core values they seek to teach students. In lieu of at-home suspensions or out-right expulsions, deans now endeavor to use a so-called inclusive education model—employing detention and in-school suspension[16]—to address problematic school behavior, modeling persistence[17] and grit,[18] respectively. Character education therefore encompasses not only

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9. *CHARACTER COUNTS*, KIPP, http://www.kipp.org/our-approach/character (last visited Apr. 1, 2015).

10. Interview with Ian Willey, *supra* note 8.

11. *Id*.

12. KIPP, *supra* note 9.

13. Name has been changed to protect the student's anonymity.

14. Interview with Ian Willey, *supra* note 8.

15. *Id*.

16. It is not within the scope of this Note to evaluate the claims made by charter school administrators with whom I spoke that, in recent years, charter schools have pursued alternatives to expulsions and out-of-school suspensions, employing instead detention and in-school suspension. Many—critics and proponents of charter schools alike, including Stanford's own Bill Koski—contend that charter schools continue to enforce stringent expulsion policies but avoid the associated reporting by working with parents to "counsel problem students out." In this Note, I assess the legal implications relevant to charter school disciplinary procedures on the basis of what administrators told me: consistent with the character values they seek to imbue, charter schools are also doing all they can to avoid expelling students. In so doing, these organizations seek to model the grit and persistence that they seek for their students.

17. Telephone Interview with Preston Smith, Co-Founder, CEO, and President, Rocketship Education (Mar. 21, 2014).

18. Interview with Ian Willey, *supra* note 8.

the teaching of specific character traits but also the policies schools adopt to encourage and exemplify character.

KIPP and Rocketship are not the only programs focused on character education. Since Paul Tough's article in the *New York Times Magazine* in September 2011 discussing KIPP's motivations and methods for teaching character in its classrooms,[19] character has pervaded the national discussion of elementary school pedagogy. In both private[20] and public schools,[21] mission statements now reflect the view that character traits can be taught. Many state legislatures have also adopted policies encouraging character education in public schools.[22] Little attention has been paid, however, to the legal questions associated with teaching character, in part because charter schools have, consciously or otherwise, been strategic in their promotion of character education and in part because reaction to character education has, thus far, been overwhelmingly positive. Moreover, many perceive character education as limited to the instruction of values themselves; such perception precludes focus

19. Paul Tough, *What if the Secret to Success is Failure?*, N.Y. TIMES (Sept. 14, 2011), http://www.nytimes.com/2011/09/18/magazine/what-if-the-secret-to-success-is-failure.html?pagewanted=all&_r=0.

20. S.F. DAY SCHOOL, EIGHT HABITS OF MIND (November 2012) (on file with author). ("Habits of Mind are developmental capacities . . . learned over time, similar to the developmental growth of cognitive, social, and emotional capacities.") The Eight Habits of Mind include: curiosity, zest, perseverance/resilience, growth mindset/risk taking, craftsmanship, striving for accuracy, precision and completeness, self-control/self-understanding, empathy, and appreciation and gratitude.

21. *CHARACTER*, *supra* note 9.

22. These include: Alabama (see ALA. CODE § 16-6B-2 (West, Westlaw through 2014 Sess.)), Arizona (see ARIZ. REV. STAT. ANN. § 15-154.01 (West, Westlaw through 2015 Sess.)), California (see CAL. WELF. & INST. CODE § 1120.1 (West, Westlaw through 2014 Sess.)), Colorado (see COLO. REV. STAT. ANN. § 22-29-103 (West, Westlaw through 2015 Sess.)), Georgia (see GA. CODE ANN. § 20-2-145 (West, Westlaw through 2014 Sess.)), Illinois (see 105 ILL. COMP. STAT. 5 / 27-12 (West, Westlaw through 2014 Sess.)), Indiana (see IND. CODE ANN. § 20-26-15-8 (West, Westlaw through 2015 Sess.)), Iowa (*see* IOWA CODE ANN. § 256.18 (West, Westlaw through 2015 Sess.)), Kentucky (see KY. REV. STAT. ANN. § 158.005 (West, Westlaw through 2014 Sess.)), Louisiana (see LA. REV. STAT. ANN. § 17:282.2(c) (Westlaw through 2014 Sess.)), Minnesota (see MINN. STAT. ANN. § 120B.232 (West, Westlaw through 2015 Sess.)), Mississippi (see MISS. CODE. ANN. § 37-13-181 (West, Westlaw through 2014 Sess.)), Nebraska (see NEB. REV. STAT. ANN. § 79-725 (West, Westlaw through 2014 Sess.)), New Jersey (see N.J. STAT. ANN. § 18A:37-29 (West, Westlaw through 2015 Sess.)), New York (see N.Y. EDUC. LAW § 801-a (McKinney, Westlaw through 2015 Sess.)), North Carolina (see N.C. GEN. STAT. ANN. § 115C-81 (West, Westlaw through 2014 Sess.)), Oklahoma (see OKLA. STAT. ANN. tit. 70, § 1210.229-6 (West, Westlaw through 2014 Sess.)), Pennsylvania (see 24 PA. STAT. ANN. § 15-502-E (West, Westlaw through 2014 Sess.)), South Carolina (see S.C. CODE ANN. § 59-17-135 (Westlaw through 2014 Sess.)), Tennessee (see TENN. CODE ANN. § 49-6-1007 (West, Westlaw through 2014 Sess.)), Texas (see TEX. EDUC. CODE ANN. § 29.906 (West, Westlaw through 2013 Sess.)), Utah (see UTAH CODE ANN. § 53A-13-109 (West, Westlaw through 2014 Sess.)), Virginia (see VA. CODE ANN. § 22.1-208.01 (West, Westlaw through 2014 Sess.)), West Virginia (see W. VA. CODE ANN. § 18-2-13 (West, Westlaw through 2015 Sess.)).

on the modes, including disciplinary policies, through which schools teach character traits, further explaining the failure to consider legal liabilities.

In this Note, I focus on two areas of legal concern prompted by conversations with administrators at various charter schools: First Amendment challenges regarding character education, and liability associated with so-called "inclusive" education. I focus in particular on liabilities associated with inclusion because I believe they are not only oft overlooked but present bigger risks to charter organizations.

I proceed in three Parts, discussing in Part I the charter schools' posture within the public school district system and potential legal concerns related to character education, in Part II charter schools' unique immunity to suit, due in part to the ancillary and immunizing benefits of their policies and in part to systemic challenges potential plaintiffs face, and in Part III the limitations on any remaining common tort claims plaintiffs may seek to bring against charter organizations. I conclude that, while charters may face injunctions or revocation of their charters should their character teachings be challenged on First Amendment grounds, charters are frequently protected from civil liability for a variety of reasons. In addition to the unique immunities that derive from policies unrelated to character education, sovereign immunity and the difficulties of proving school negligence most likely protect charters from conventional tort claims. Nonetheless, charters possess opportunities through which they might better protect themselves from civil action. Throughout this Note, I strive to highlight means by which charter schools might more proactively shield themselves from suit given their unique existence as part of and apart from the public school system.

I. TEACHING CHARACTER AND CHARTER EDUCATION: THE LEGAL FRAMEWORK

The first law allowing charter schools was passed in Minnesota in 1991,[23] with the goal to "improve pupil learning," "encourage the use of different and innovative teaching methods," and "create new professional opportunities for teachers, including the opportunity to be responsible for the learning program at the school site."[24] Since then, Washington DC and forty-two states have passed laws permitting the creation of charter schools,[25] many of these laws explicitly articulating a similar commitment to charter schools' innovative programming

23. *Fast Facts: Charter Schools*, NAT'L CENTER FOR EDUC. STATS., https://nces.ed.gov/fastfacts/display.asp?id=30 (last visited Apr. 1, 2015).

24. 1991 Minn. Laws 1123 (codified as MINN. STAT. ANN. § 124D.10 (West, Westlaw through 2015 Sess.)).

25. Alabama, Kentucky, Montana, Nebraska, North Dakota, Vermont, and West Virginia have not adopted charter school legislation; South Dakota has passed legislation allowing for the creation of a pilot charter school program only.

and related autonomy.[26] As such, while charter laws vary by state, charter schools are largely exempt from laws governing typical public school districts, allowing charter school teachers and administrators the independence to create and enact their own policies in keeping with a charter pre-approved by the state's relevant authority.[27] Furthermore, charter schools are schools of choice, meaning that parents elect to send their children there,[28] unlike traditional district public school districts that largely determine student attendance based on geography. Both characteristics serve to place charters in a legal category of their own, somewhere between public and private schools.

Despite differentiation between traditional public and charter schools, certain restraints remain. Because charters are public schools, they are technically subject to the same constitutional limitations and federal law imposed on public school systems. In this Part, I explore two such restraints: the First Amendment prohibition on religious indoctrination and the statutory reporting and expulsion requirements related to school safety. In turn, I explore

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26. *See, e.g.*, IND. CODE ANN. § 20-24-2-1 (West, Westlaw through 2015 Sess.) ("A charter school may be established under this article to provide innovative and autonomous programs."); IOWA CODE ANN. § 256F.1 (West, Westlaw through 2015 Sess.) ("The purpose of a charter school or an innovation zone school established pursuant to this chapter shall be to accomplish the following . . . . Encourage the use of different and innovative methods of teaching."); MD. CODE ANN., EDUC. § 9-101 (West, Westlaw through 2014 Sess.) ("[G]eneral purpose of the Program is to establish an alternative means within the existing public school system in order to provide innovative learning opportunities."); MISS. CODE. ANN. § 37-28-3 (West, Westlaw through 2014 Sess.) ("To allow public schools freedom and flexibility in exchange for exceptional levels of results driven accountability"); OR. REV. STAT. ANN. § 338.015 (West, Westlaw through 2014 Sess.) ("It is the intent of this chapter that . . . public charter schools . . . be created as a legitimate avenue for parents, educators and community members to take responsible risks to create new, innovative and more flexible ways of educating children within the public school system.").

27. Connecticut's definition of a charter school—"a public, nonsectarian school which is . . . operated independently of any local or regional board of education in accordance with the terms of its charter"—is typical of many states. CONN. GEN. STAT. ANN. § 10-66aa (West, Westlaw through 2015); *see also, e.g.*, COLO. REV. STAT. ANN. § 22-30.5-104 (West, Westlaw through 2015 Sess.) ("Pursuant to contract, a charter school may operate free from specified school district policies and free from state rules."); D.C. CODE § 38-1802.04 (Westlaw through 2015) ("Shall be exempt from District of Columbia statutes, policies, rules, and regulations established for the District of Columbia public schools by the Superintendent, Board of Education, Mayor, District of Columbia Council, or Authority, except as otherwise provided in the school's charter or this subchapter."); ME. REV. STAT. tit. 20-A, § 2412 (Westlaw through 2015 Sess.) ("Except as provided in this chapter and its charter contract, a public charter school is exempt from all statutes and rules applicable to a noncharter public school, a local school board or a school administrative unit."); N.M. STAT. ANN. § 22-8B-5 (West, Westlaw through 2014 Sess.) ("A state-chartered charter school is exempt from school district requirements. A state-chartered charter school is responsible for developing its own written policies and procedures in accordance with this section."); WYO. STAT. ANN. § 21-3-304 (West, Westlaw through 2014 Sess.) ("Pursuant to contract, a charter school may operate free from specified school district policies and state regulations.").

28. *Frequently Asked Questions About Public Charter Schools*, UNCOMMON SCHOOLS, http://www.uncommonschools.org/faq-what-is-charter-school (last visited Apr. 1, 2015).

the impact each restraint might have on both the explicit content of and broader operational policies related to character education.

A. *Practice, Don't Preach: First Amendment Challenges*

While charter schools enjoy broad independence, certain limits on traditional public schools extend, including a First Amendment prohibition on religious education. As a result, were character education ever construed as religious in nature, it would be prohibited. In fact, initial attempts at legislating character education in public schools failed in the 1990s because the word "character" carried moralistic or religious connotations. Despite President Clinton's multiple speeches on the importance of character education, public school districts hesitated to implement programs for fear of offending parents or inspiring constitutional complaints.[29] Nor, for the most part, did state legislative action prompt implementation: the political right considered Democrats' attempts to teach character a guise for indoctrinating students in political correctness, while the left assumed Republicans desired to use character education to spread Christianity.[30] As a result, few states adopted policies in the 1990s relating to character education.[31]

Research, not politicians, prompted renewed focus on character education in the 2000s. New studies suggested the importance of non-cognitive skills to student achievement and longer-term fulfillment, causing educators to look beyond the bounds of traditional curricula to focus on character education.[32] Yet, even as charter schools and states alike have adopted character education policies, religion remains taboo. The Establishment Clause of the First Amendment prohibits Congress from making any "law respecting an establishment of religion, or prohibiting the exercise thereof."[33] Commitment to nonsectarian education reflects twentieth century jurisprudence, which has interpreted the Establishment Clause as a ban on religious activity in public schools.

Such interpretation departs from nineteenth-century case law, which suggested that public schools had the freedom to facilitate religious practice so long as children were not compelled to participate.[34] Today, school districts are

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29. Abby Goodnough, *Newark to Teach Reading, Writing and Right from Wrong*, N.Y. TIMES (Aug. 24, 1997), http://www.nytimes.com/1997/08/24/nyregion/newark-to-teach-reading-writing-and-right-from-wrong.html.

30. PAUL TOUGH, HOW CHILDREN SUCCEED: GRIT, CURIOSITY, AND THE HIDDEN POWER OF CHARACTER 59-60 (2012).

31. These include: Alabama in 1995, California in 1999, Georgia in 1999, Louisiana in 1998, and Mississippi in 1999.

32. The recent understanding of and related renewed focus on non-cognitive skills is summarized in TOUGH, *supra* note 30.

33. U.S. CONST. amend. I.

34. *See, e.g.*, Moore v. Monroe, 20 N.W. 475, 476 (Iowa 1884) (holding that "so long as the plaintiff's children are not required to be in attendance at the exercises, we cannot regard the objection as one of great weight").

prohibited from enacting "policy that has the purpose and perception of government establishment of religion."[35] In *School District of Abington Township, Pennsylvania v. Schempp*, the public-school-district defendants asserted that daily Bible readings and prayer recitations were not unconstitutional because the school employed them to promote "moral values," not for purposes of indoctrination, and, moreover students could opt out of them.[36] Because the activities employed the Bible without comment and not as a catalyst for discussion, the Supreme Court held the acts unconstitutional under the First Amendment.[37] Following *Schempp*, in *Stone v. Graham*, the Court held the posting of the Ten Commandments in public school classrooms unconstitutional: an "avowed secular purpose" was insufficient "to avoid conflict with the First Amendment."[38]

The Supreme Court has also extended the *Schempp* line of cases so far as to rule unconstitutional the government funding of nonpublic, sectarian schools. In *Lemon v. Kurtzmann*, the Supreme Court held unconstitutional statutory programs funding nonpublic schools in Pennsylvania and Rhode Island; these programs provided, respectively, financial support for "teachers' salaries, textbooks, and instructional materials in specified secular subjects" and a fifteen percent supplement of annual teacher salaries.[39] Though the statutes neither advanced a non-secular purpose nor advanced or inhibited religion, the statutes "involve[d] excessive entanglement between government and religion."[40] This so-called *Lemon* test was modified to assess the constitutionality of state funding for parochial schools in a plurality opinion in *Mitchell v. Helms*, in which the Supreme Court held constitutional federal and state funding of non-secular materials for parochial and private schools. In his majority opinion, Justice Thomas wrote that the relevant criteria for determining whether state funding violates the Establishment clause includes whether such funding (i) causes "governmental indoctrination," (ii) defines "its recipients by reference to religion," or (iii) creates "an excessive entanglement" between government and religion.[41]

As a result of *Schempp* and its progeny, states permitting charter education universally prohibit charter schools from promulgating sectarian programs

35. Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 314 (2000).

36. 374 U.S. 203, 223-25 (1963).

37. *Id*. at 224.

38. Stone v. Graham, 449 U.S. 39, 40-41 (1980) (quotations omitted). In addition to the prohibition on daily Bible recitation, school prayer, and the posting of the Ten Commandments, the Supreme Court struck down the teaching of Creation Science under the Louisiana Balanced Treatment for Creation-Science and Evolution-Science in Public School Instruction Act in *Edwards v. Aguillard*, 482 U.S. 578 (1987), and student-led, student-initiated invocations announced over loud-speaker prior to football games in *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000).

39. 403 U.S. 602, 607 (1971).

40. *Id*. at 612-14.

41. 530 U.S. 793, 808 (2000) (quoting Agostini v. Felton, 521 U.S. 203, 234 (1997)) (internal quotation marks omitted).

despite charters' otherwise broad autonomy.[42] Charter schools suggesting any theologically based character education would therefore not be granted charters. If, once a school had received its charter from the state, a party contested the school's character teachings on First Amendment grounds, the school would risk losing its charter in violation of state law. Furthermore, the court would most likely grant injunctive relief to the plaintiffs if it found the charter school's character education to be religious in purpose, holding such education unconstitutional.

Even were a court to analogize a charter to a parochial or private school on account of parents' role in school selection, application of the *Mitchell* criteria would make religious education in a charter school unconstitutional. Because charter schools must submit a charter to the relevant state authority, any public funding of a self-identified secular charter school could violate the second of the *Mitchell* criteria. Furthermore, because charters receive such a large amount of government funding relative to parochial and private schools, courts would also likely deem the funding unconstitutional based on "excessive entanglement" between government and religion.

Fortunately, the First Amendment challenges to character education remain highly speculative at best. For a variety of reasons discussed further in Part III, in developing their character curricula, charter schools have steered clear of religious language. Instead of faith or justice,[43] KIPP focuses on seven "highly predictive character strengths," including zest, grit, optimism, self-control, gratitude, social intelligence, and curiosity.[44] Instead of fostering character through Torah readings,[45] Rocketship fosters persistence, respect, responsibility, and empathy in students through secular language arts classes and conversations about student behavior.[46] In reality, parochial or private

42. *See, e.g.*, NEV. REV. STAT. ANN. § 386.555 (West, Westlaw through 2014 Sess.) ("A charter school shall not be supported by or otherwise affiliated with any religion or religious organization or institution."); OKLA. STAT. ANN. tit. 70, § 3-136 (West, Westlaw through 2014 Sess.) ("A charter school shall be nonsectarian in its programs, admission policies, employment practices, and all other operations."); 24 PA. STAT. ANN. § 17-1715-A (West, Westlaw through 2014 Sess.) ("A charter school shall not provide any religious instruction, nor shall it display religious objects and symbols on the premises of the charter school."); WASH. REV. CODE ANN. § 28A.710.040 (West, Westlaw through 2015 Sess.) ("No charter school may engage in any sectarian practices in its educational program, admissions or employment policies, or operations.").

43. See, for example, St. Ignatius College Preparatory, "San Francisco's Jesuit School Since 1855," which places its religious principles and spiritual guides throughout its website. *About Us*, ST. IGNATIUS COLLEGE PREPARATORY, http://www.siprep.org/page.cfm?p=5117 (last visited Apr. 2, 2015).

44. *CHARACTER*, *supra* note 9.

45. See, for example, Beth Yeshurun Day School, a Jewish Elementary School in Houston, Texas, which endeavors "to foster confidence, leadership, a love of learning, and a sense of responsibility in students by honoring individual strengths in an environment dedicated to academic excellence, Jewish teachings, and the continuity of Jewish values." *About*, BETH YESHURUN DAY SCH., http://byds.org/about (last visited Apr. 2, 2015).

46. Interview with Preston Smith, *supra* note 17.

secular and charter schools may share much in common in terms of their values. KIPP's social intelligence and Rocketship's empathy are not so different from the compassion or service that Jesuit and Jewish schools seek to impart in their students. However, by carefully defining the values they seek to impart, charters like KIPP and Rocketship have protected their charters from state reprisal and avoided constitutional litigation.

B. *The Risks of Inclusive Education: Statutory Challenges*

In the third week of March 2014, a second grader at a charter school with whom I spoke pulled out a gun while in class.[47] His action was apparently casual, not threatening, a kid being a "stupid kid" and nothing more.[48] The teacher did not see the boy pull the gun from his pocket.[49] Faculty only learned about the incident later, when they overheard students discussing the matter.[50] The administration also found bullets scattered on the playground.[51] The episode is the fourth of its kind in the past year[52] and serves to highlight the challenges some charter schools face in enforcing more flexible disciplinary procedures.

As the co-founder of one of the charter school notes, "Ejecting kids is the most conservative model."[53] Instead, many charter schools seek "full inclusion" on the theory that such inclusion will have better long-term outcomes for both their students and the communities in which they live. At the same time, when I press administrators about Newtown-like incident after discussing such inclusion, I put a name to the horrific specter the tale prompts in their minds. At the very least, the inclusive model presents liability risks for charter schools, exposing them to tort claims discussed further in Part III. However, inclusion policies may also put schools at risk of losing their charters by violating the likes of the federal Gun Free School Zones Act or state zero tolerance laws. In this Subpart, I assess the risks of each in turn.

1. *Gun-Free School Zones*

Outside the First Amendment prohibition on religious education, states are largely free to operate their school systems as they choose. As such, states develop their own policies on discipline and expulsion in the course of developing general school operations, either requiring collaboration between

47. Notes on file with author.
48. *Id*.
49. *Id*.
50. *Id*.
51. *Id*.
52. *Id*.
53. *Id*.

statewide policies and individual school boards, as in Maryland,[54] or relinquishing any statewide control to individual districts, as in Texas.[55] Since states leave charter organizations to determine their own operations, they generally exempt charters from district-wide disciplinary policies.[56] At the most, some states require charters to articulate their discipline policies in writing or in their charters.[57]

The advent of zero tolerance legislation in recent years complicates the independence to determine school discipline policies that charters have held to date. In this Part, I evaluate the impact of federal zero tolerance legislation on charter schools.

Zero tolerance legislation evolved from the 1980s war on drugs when Congress passed the Drug-Free Schools and Communities Act as part of the broader Anti-Drug Abuse Act of 1986.[58] The Drug Free Schools and Communities Act required schools to enact policies forbidding students' use of drugs and alcohol and paved the way for the passage of the Safe and Drug-Free Schools Act and the Gun-Free Schools Act in 1994.[59] The Gun-Free Schools Act established the first zero tolerance policy: a state would only receive federal education funding after passing a law mandating a one-year expulsion for any "student who is determined to have brought a firearm to a school, or to have possessed a firearm at a school."[60]

Since passing the Gun-Free Schools Act in 1994, Congress has softened the language of the act in response to critics' concerns.[61] Today's Gun-Free

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54. MD. CODE ANN., EDUC. § 7-306 (West, Westlaw through 2014 Sess.) ("The State Board of Education shall: (1) Establish guidelines that define a State code of discipline for all public schools with standards of conduct and consequences for violations of the standards . . . each county board shall adopt regulations designed to create and maintain within the schools under its jurisdiction the atmosphere of order and discipline necessary for effective learning.").

55. TEX. EDUC. CODE ANN. § 37.102 (West, Westlaw through 2013 Sess.) ("The board of trustees of a school district may adopt rules for the safety and welfare of students, employees, and property and other rules it considers necessary to carry out this subchapter and the governance of the district.").

56. *See* 1991 Minn. Laws 1123 (codified as MINN. STAT. ANN. § 124D.10 (West, Westlaw through 2015 Sess.)); *supra* text accompanying note 25.

57. *See, e.g.*, LA. REV. STAT. ANN. § 17:3991 (Westlaw through 2014 Sess.) ("Each proposed charter shall contain or make provision for the following: . . . . [s]chool rules and regulations applicable to pupils including disciplinary policies and procedures that incorporate research-based discipline programs, such as positive behavioral interventions and supports and restorative justice principles.").

58. Shawn Malia Kana'iaupuni & Miriam Gans, *How Effective Is Zero Tolerance? A Brief Review*, POL'Y ANALYSIS & SYS. EVALUATION 1-2 (2005), *available at* http://www.ksbe.edu/_assets/spi/pdfs/reports/educational_policy/04_05_23.pdf.

59. *Id*.

60. 20 U.S.C. § 7151(b)(1) (2013).

61. Zero tolerance policies are controversial: their efficacy is uncertain, Joseph Lintott, *Teaching and Learning in the Face of School Violence*, 11 GEO. J. ON POVERTY L. & POL'Y 553, 565 (2004), they disproportionately affect minority students, Brooke Grona, *School Discipline: What Process Is Due? What Process Is Deserved?*, 27 AM. J. CRIM. L., 233, 240

Schools Act, effective January 8, 2002,[62] leaves ample room to accommodate the individual circumstances of students facing expulsion. Though it requires any state receiving federal education funds to adopt zero-tolerance policies regarding firearm possession, the statute permits discretion in allowing "the chief administering officer of a local educational agency to modify such expulsion requirement for a student on a case-by-case basis if such modification is in writing."[63] Most states therefore empower local school authorities to apply discretionary judgment, with only some states requiring explanation in writing.[64] Such discretion not only permits leniency to public

(2000), and they incite constitutional due process concerns in response to punishments that are perceived as disproportionate to student infractions, James M. Pedan, *Through A Glass Darkly: Educating with Zero Tolerance*, 10 KAN. J.L. & PUB. POL'Y 369, 370 (2001).

62. *Guns in Schools Policy Summary*, LAW CTR. TO PREVENT GUN VIOLENCE, http://smartgunlaws.org/guns-in-schools-policy-summary (last visited Apr. 24, 2015).

63. 20 U.S.C. § 7151(b)(1) (2013).

64. Charter school states requiring written justification of discretionary policies include: Colorado (see COLO. REV. STAT. ANN. § 22-33-106(1.5) (West, Westlaw through 2015 Sess.)), Florida (see FLA. STAT. ANN. § 1006.07(2)(l) (West, Westlaw through 2014 Sess.)), Nevada (see NEV. REV. STAT. ANN. § 392.466(2)(b) (West, Westlaw through 2014 Sess.)), North Carolina (see N.C. GEN. STAT. ANN. § 115C-390.10(a) (West, Westlaw through 2014 Sess.)), and Oregon (see OR. REV. STAT. ANN. § 339.250(7)(c) (West, Westlaw through 2014 Sess.)).

Charter school states that do not require written explanation of discretionary policy include: Alaska (see ALASKA STAT. ANN. § 14.03.160(b) (West, Westlaw through 2014 Sess.)), Arizona (see ARIZ. REV. STAT. ANN. § 15-841(G) (Westlaw through 2015 Sess.)), Arkansas (see ARK. CODE ANN. § 6-23-101), California (see CAL. EDUC. CODE § 48915(a)(1) (West, Westlaw through 2015 Sess.)), Connecticut (see CONN. GEN. STAT. ANN. § 10-233d(i) (West, Westlaw through 2014 Sess.)), Delaware (see DEL. CODE ANN. tit. 11, § 1457(j)(5) (West, Westlaw through 2015 Sess.)), the District of Columbia (see D.C. CODE § 38-231 (Westlaw through 2015 Sess.)), Georgia (see GA. CODE ANN. § 20-2-751.1(b) (West, Westlaw through 2014 Sess.)), Hawaii (see HAW. REV. STAT. § 302A-1134(b) (West, Westlaw through 2014 Sess.)), Idaho (see IDAHO CODE ANN. § 33-205 (West, Westlaw through 2014 Sess.)), Illinois (see 105 ILL. COMP. STAT. ANN. 5/10-22.6(d)(1) (West, Westlaw through 2014 Sess.)), Indiana (see IND. CODE ANN. § 20-33-8-16 (West, Westlaw through 2015 Sess.)), Iowa (see IOWA CODE ANN. § 280.21B (West, Westlaw through 2015 Sess.)), Maine (see ME. REV. STAT. tit. 20-A, § 1001(2) (Westlaw through 2014 Sess.)), Maryland (see MD. CODE ANN., EDUC. § 7-305(f)(1) (West, Westlaw through 2014, Sess.)), Minnesota (see MINN. STAT. ANN. § 121A.44(a) (West, Westlaw through 2014 Sess.)), Mississippi (see MISS. CODE. ANN. § 37-11-18 (West, Westlaw through 2014 Sess.)), New Hampshire (see N.H. REV. STAT. ANN. § 193:13(III) (Westlaw through 2015 Sess.)), New Jersey (see N.J. STAT. ANN. § 18A:37-8 (West, Westlaw through 2015 Sess.)), New Mexico (see N.M. STAT. ANN. § 22-5-4.7(A) (West, Westlaw through 2014 Sess.)), New York (see N.Y. EDUC. LAW § 3214 (McKinney, Westlaw through 2015 Sess.)), Oklahoma (see OKLA. STAT. ANN. tit. 70, § 24-101.3(C)(2) (West, Westlaw through 2014 Sess.)), Pennsylvania (see 24 PA. STAT. ANN. § 13-1317.2(c) (West, Westlaw through 2014 Sess.)), Rhode Island (see R.I. GEN. LAWS ANN. § 16-21-18 (West, Westlaw through 2014 Sess.)), Tennessee (see TENN. CODE ANN. § 49-6-3401(6)(g) (West, Westlaw through 2014 Sess.)), Texas (see TEX. EDUC. CODE ANN. § 37.007 (West, Westlaw through 2013 Sess.)), Utah (see UTAH CODE ANN. § 53A-11-904(2)(b)(ii)(C) (West, Westlaw through 2014 Sess.)), Virginia (see VA. CODE ANN. § 22.1-277.07(A) (West, Westlaw through 2014 Sess.)), and Washington (*see* WASH. REV. CODE ANN. § 28A.600.420(1) (West, Westlaw through 2015 Sess.)).

school superintendents but also to charter programs seeking to avoid mandatory expulsion policies.

Furthermore, the federal government has been slow to censure any states failing to require written explanation of discretionary procedures. Nonetheless, because charter schools receive a mix of federal and state funds, charter schools would be well advised to require written documentation of any exceptions made to federal zero-tolerance mandates. Such documentation would lessen charters' vulnerability should the federal government become more stringent in its enforcement of the Gun-Free Schools Act.[65]

Though Congress softened the mandatory expulsion language when it re-authorized the Gun-Free School Act in 2002 under No Child Left Behind, it also added a mandatory reporting requirement.[66] Pursuant to the act, local educational agencies must refer to criminal authorities "any student who brings a firearm or weapon to a school served by such agency."[67] Contrary to their incorporation of zero-tolerance policies, states have been slow to adopt laws mandating reporting to criminal authorities.[68] Furthermore, there is little case

65. Of those states allowing charter schools, Michigan and Louisiana are the only two to maintain strict zero-tolerance policies. Michigan not only requires mandatory expulsion for any pupil possessing "a weapon in a free school zone," but also any pupil committing arson or engaging in sexual conduct on school grounds. MICH. COMP. LAWS. ANN. § 380. 1311(2) (West, Westlaw through 2014 Sess.). Note that the statute permits some explicit exceptions, including a pupil's "not knowingly" possessing the weapon. Moreover, students expelled under Michigan's zero-tolerance statute are expelled from *all* Michigan public schools and may not be reinstated until approved by the school board of the district from which the student was initially expelled. MICH. COMP. LAWS ANN. § 380.1311(5) (West, Westlaw through 2014 Sess.). Louisiana's statute is even stricter, requiring immediate suspension and recommended expulsion for any student carrying a firearm or "controlled dangerous substance" on school property. LA. REV. STAT. ANN. § 17:416(B)(1)(b)(i) (Westlaw through 2014 Sess.). Furthermore, the statute forbids any student so-expelled from *any* school in *any* state from admission to a Louisiana public school until that student has completed the required minimum period of expulsion and provided written proof of participation in a relevant rehabilitation or counseling program. LA. REV. STAT. ANN. § 17:416(C)(2)(d)(i) (Westlaw through 2014 Sess.). As they pertain to charter schools, these statutes not only preclude charter administrators' discretion, but also have implications for charter schools' admissions procedures. Charter schools in Michigan and Louisiana that seek disciplinary liberties need therefore negotiate them during the charter application process or risk losing their charters if they violate the statutes subsequently.

66. Kaitlyn Jones, *#zerotolerance #keepingupwiththetimes: How Federal Zero Tolerance Policies Failed to Promote Educational Success, Deter Juvenile Legal Consequences, and Confront New Social Media Concerns in Public Schools*, 42 J.L. & EDUC. 739, 742 (2013).

67. 20 U.S.C. § 7151(f) (2013).

68. A search of relevant statutes revealed that only the following states appear to have adopted mandatory reporting laws: Alabama (see ALA. CODE § 16-1-24.3(c) (Westlaw through 2015 Sess.)), Connecticut (see CONN. GEN. STAT. ANN. § 10-233d(e) (West, Westlaw through 2015 Sess.)), New York (see N.Y. EDUC. LAW § 3214(3)(c)(2)(d) (McKinney, Westlaw through 2015 Sess.)), North Carolina (see N.C. GEN. STAT. ANN. § 115C-390.10(c) (West, Westlaw through 2014 Sess.)), Washington (see WASH. REV. CODE ANN. § 9.41.280(2) (West, Westlaw through 2015 Sess.)).

law or research[69] on the impact of mandated reporting, making it difficult to understand which states are in fact enforcing it and how. Additionally, given the decision in *National Federation of Independent Business v. Sebelius*,[70] the current Supreme Court might well invalidate the mandatory reporting provision, holding the contingency of federal funds unconstitutional. As with the Patient Protection and Affordable Care Act's conditioned Medicaid funding, the Court might perceive the provisioning of federal funding for education as a "gun to the head" that violates Congress' spending power.[71] However, whereas federal funding for Medicare contributes between ten and seventeen percent of a state's *total* annual budget,[72] federal funding for education contributes roughly three percent of a state's annual budget,[73] leaving the U.S. government room to argue that the education funding provisioned is not sufficiently sizeable so as to be coercive.

Because charter schools receive federal funds[74] and certainly fall within those for which mandatory reporting is required,[75] charter school boards therefore must balance the pros and cons of mandatory reporting. For many charter administrators, mandatory reporting seems a sure hurdle to the promising futures charters envision for their students. Furthermore, because charter schools are ultimately accountable to state governments for funding and compliance and not to the federal government if reported for failure to refer, they are unlikely to risk the revocation of their charters unless they operate in states in which referral to criminal authorities is required by law. So long as states continue to ignore the Gun-Free School Act's mandatory reporting requirement, charters should be safe to do so also.

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69. *See generally* Michael Krezmien et al., *Juvenile Court Referrals and Public Schools: Nature and Extent of the Practice in Five States*, 26 J. CONTEMP. CRIM. JUST. 273 (2010), *available at* http://www.suspensionstories.com/wp-content/uploads/2010/10/juvenile-referrals-to-court-from-schools.pdf.

70. *See generally* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012) (holding that the statutory provision of ACA, which gave the Secretary of Health and Human Services the authority to penalize States that opted out of the Act's expansion of Medicaid, exceeded Congress' power under the spending clause because the federal inducement of Medicaid funding was coercive).

71. *Id*. at 2604.

72. *Id*. ("Medicaid spending accounts for over 20 percent of the average State's total budget, with federal funds covering 50 to 83 percent of those costs.").

73. *Policy Basics: Where Do Our State Tax Dollars Go?*, CENTER ON BUDGET & POL'Y PRIORITIES (Apr. 14, 2015), http://www.cbpp.org/cms/index.cfm?fa=view&id=2783.

74. 20 U.S.C. § 7221b(b)(1) (2013).

75. 20 U.S.C. § 7151(h)(1) (2013) ("No funds shall be made available under any subchapter of this chapter to any local educational agency unless such agency has a policy requiring referral to the criminal justice or juvenile delinquency system of any student who brings a firearm or weapon to a school served by such agency."); 18 U.S.C. § 921(26) (2013) ("The term 'school' means a school which provides elementary or secondary education, as determined under State law.").

2. *Expanding "Zero Tolerance"*

In addition to federal zero-tolerance mandates, states have employed the Gun-Free Schools Act as justification for passage of other so-called "zero tolerance" legislation, including mandatory suspensions or expulsions for on-campus drug or alcohol use,[76] cell phone use at school,[77] general disrespect, disruption, or noncompliance,[78] kissing a kindergarten classmate on the cheek,[79] and, most recently, anti-bullying legislation. Because anti-bullying legislation has been such a priority for many state legislatures in recent years,[80] I will use it as a case study for charter vulnerability to state zero tolerance law.

While legislatures have not, for the most part, mandated expulsion as punishment for bullying, all states that permit charter schools[81] (and all states,

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76. Am. Psychologist Ass'n Zero Tolerance Task Force, *Are Zero Tolerance Policies Effective in Schools? An Evidentiary Review and Recommendations*, 63 AM. PSYCHOLOGIST 852, 852 (2008).

77. *Id*.

78. Jones, *supra* note 66, at 739.

79. Marsha B. Freeman, *Bringing Up Baby (Criminals): The Failure of Zero Tolerance and the Need for A Multidisciplinary Approach to State Actions Involving Children*, 21 QUINNIPIAC L. REV. 533, 537 (2002) (describing how a six-year-old was expelled for sexual harassment after he gave his kindergarten classmate a peck on the cheek).

80. Montana, the last remaining state with no anti-bullying bill, passed its anti-bullying bill, House Bill 284, in April 2015. *Montana Legislature Passes Anti-Bullying Bill*, NBC MONT. (Apr. 13, 2015), http://www.nbcmontana.com/news/Montana-Legislature-passes-anti-bullying-bill/32348210.

81. For relevant law, see: Alaska (see ALASKA STAT. ANN. § 14.33.200 (West, Westlaw through 2014 Sess.)), Arizona (see ARIZ. REV. STAT. ANN. § 15-341(37) (Westlaw through 2015 Sess.)), Arkansas (see ARK. CODE ANN. § 6-18-514 (West, Westlaw through 2014 Sess.)), California (see CAL. EDUC. CODE § 234 (West, Westlaw through 2015 Sess.)), Colorado (see COLO. REV. STAT. ANN. § 22-32-109.1 (West, Westlaw through 2015 Sess.)), Connecticut (see CONN. GEN. STAT. ANN. § 10-222d (West, Westlaw through 2015 Sess.)), Delaware (see DEL. CODE ANN. tit. 14, § 4112D(b)(1) (West, West law through 2015 Sess.)), District of Columbia (see D.C. CODE § 2-1535.03 (Westlaw through 2015 Sess.)), Florida (see FLA. STAT. ANN. § 1006.147 (West, Westlaw through 2014 Sess.)), Georgia (see GA. CODE ANN. § 20-2-751.4 (West, Westlaw through 2014 Sess.)), Idaho (see IDAHO CODE ANN. § 18-917A (West, Westlaw through 2014 Sess.)), Illinois (see 105 ILL. COMP. STAT. ANN. 5/27-23.7 (West, Westlaw through 2014 Sess.)), Indiana (see IND. CODE ANN. § 20-33-8-13.5 (West, Westlaw through 2015 Sess.)), Iowa (see IOWA CODE ANN. § 280.28 (West, Westlaw through 2015 Sess.)), Kansas (see KAN. STAT. ANN. § 72-8256 (West, Westlaw through 2014 Sess.)), Louisiana (see LA. REV. STAT. ANN. § 17:416.13(B)(1) (Westlaw through 2014 Sess.)), Maryland (see MD. CODE ANN., EDUC. § 7-424.3(b) (West, Westlaw through 2014 Sess.)), Massachusetts (see MASS. GEN. LAWS ANN. ch. 71, § 37O (West, Westlaw through 2014 Sess.)), Michigan (see MICH. COMP. LAWS ANN. § 380.1310b (West, Westlaw through 2014 Sess.)), Minnesota (see MINN. STAT. ANN. § 121A.0695 (West, Westlaw through 2015 Sess.)), Mississippi (see MISS. CODE. ANN. § 37-11-67 (West, Westlaw through 2014 Sess.)), Missouri (see MO. ANN. STAT. § 160.775 (West, Westlaw through 2014 Sess.)), New Hampshire (see N.H. REV. STAT. ANN. § 193-F:2) (Westlaw through 2015 Sess.)), New Jersey (see N.J. STAT. ANN. § 18A:37-15 (West, Westlaw through 2015 Sess.)), New Mexico (see N.M. STAT. ANN. § 22-2-21 (West, Westlaw through 2014 Sess.)), New York (see N.Y. EDUC. LAW § 12 (McKinney, Westlaw through 2015 Sess.)),

save for Montana)[82] have mandated certain administrative action. In addition to requiring the development and implementation of policy prohibiting bullying, anti-bullying statutes share many other policy components in common: model reporting procedures (forty-one states);[83] communication guidelines notifying constituents of relevant bullying policies and consequences (forty-five states);[84] proscribed training in bullying prevention (forty-one states);[85] recommended sanctions (thirty-nine states);[86] maintenance of written records (twenty-two states);[87] and annual or bi-annual reporting on bullying incidents and school response (twenty states).[88] Unlike gun-free school zone legislation, anti-

Nevada (see NEV. REV. STAT. ANN. § 388.132(4)(b) (West, Westlaw through 2014 Sess.)), North Carolina, (see N.C. GEN. STAT. ANN. § 115C-407.16 (West, Westlaw through 2014 Sess.)), Ohio (see OHIO REV. CODE ANN. § 3313.667 (West, Westlaw through 2013-14 Sess.)), Oklahoma (see OKLA. STAT. ANN. tit. 70, § 24-100.4 (West, Westlaw through 2014 Sess.)), Oregon (see OR. REV. STAT. ANN. § 339.356 (West, Westlaw through 2014 Sess.)), Pennsylvania (see 24 PA. STAT. ANN. § 13-1303.1-A (West, Westlaw through 2014 Sess.)), Rhode Island (see R.I. GEN. LAWS ANN. § 16-21-34 (West, Westlaw through 2014 Sess.)), Tennessee (see TENN. CODE ANN. § 49-6-4503 (West, Westlaw through 2014 Sess.)), Texas (see TEX. EDUC. CODE ANN. § 37.0832 (West, Westlaw through 2014 Sess.)), Utah (see UTAH CODE ANN. § 53A-11a) (West, Westlaw through 2014 Sess.)), Virginia (see VA. CODE ANN. § 22.1-291.4 (West, Westlaw through 2014 Sess.)), Washington (see WASH. REV. CODE ANN. § 28A.300.285 (West, Westlaw through 2015 Sess.)), Wisconsin (see WIS. STAT. ANN. § 118.46 (West, Westlaw through 2013 Sess.)), and Wyoming (see WYO. STAT. ANN. § 21-4-314 (West, Westlaw through 2014 Sess.)). Hawaii also passed legislation in 2011 with the enactment of Hawaii H.B. No. 688. *Hawaii Anti-Bullying Laws & Policies*, STOPBULLYING.GOV, http://www.stopbullying.gov/laws/hawaii.html (last visited Apr. 17, 2014).

82. *Policies & Laws*, STOPBULLYING.GOV, http://www.stopbullying.gov/laws/hawaii.html (last visited Apr. 17, 2014). Montana passed its anti-bullying bill in April of 2015. *Montana Legislature Passes Anti-Bullying Bill*, *supra* note 80.

83. *See, e.g.*, ARIZ. REV. STAT. ANN. § 15-341(37) (West, Westlaw through 2015 Sess.) (requiring "that school district employees report in writing suspected incidents of harassment, intimidation or bullying to the appropriate school official and a description of appropriate disciplinary procedures for employees who fail to report suspected incidents that are known to the employee").

84. *See, e.g.*, FLA. STAT. ANN. § 1006.147(4)(i) (West, Westlaw through 2014 Sess.) (requiring districts to develop a "procedure for providing immediate notification to the parents of a victim of bullying or harassment and the parents of the perpetrator of an act of bullying or harassment, as well as notification to all local agencies where criminal charges may be pursued against the perpetrator").

85. *See, e.g.*, CONN. GEN. STAT. ANN. § 10-220a (West, Westlaw through 2015 Sess.) (mandating training for staff that includes "school violence prevention, conflict resolution, the prevention of and response to youth suicide and the identification and prevention of and response to bullying").

86. *See, e.g.*, IND. CODE ANN. § 20-33-8-13.5(B)(i) (West, Westlaw through 2015 Sess.) (requiring description of "appropriate responses to bullying behaviors, wherever the behaviors occur").

87. *See, e.g.*, CAL. EDUC. CODE § 234.1(e) (West, Westlaw through 2015 Sess.) (requiring maintenance of "documentation of complaints and their resolution for a minimum of one review cycle").

88. *See, e.g.*, N.J. STAT. ANN. § 18A:17-46 (West, Westlaw through 2015 Sess.) (requiring "two times each school year, between September 1 and January 1 and between January 1 and June 30, at a public hearing, the superintendent of schools shall report to the

bullying legislation does not permit discretion in the development and execution of anti-bullying policy and many states specifically include charter schools in their anti-bullying legislation.[89] In those states that do not, whether a charter's broad autonomy exempts it from a state's anti-bulling law thus depends on the specific construction and interaction of that states' relevant laws. When legislative intent is unclear, a charter facing revocation for failure to enforce anti-bullying policy would have to prove its exemption in court. To avoid the risk of revocation, charters should strive to comply with state bullying legislation unless specifically exempted by state law or by their individual charters.

However, though revocation of its charter is arguably the most severe consequence a charter school can face for failure to follow a state or federal law, civil litigation could also be crippling to a school's financial prospects or reputation. Indeed, though anti-bullying statutes do not grant explicit causes of action, twenty-two states indicate that such laws should not be interpreted to preclude plaintiffs' seeking other means of civil or criminal redress.[90] In the next Parts, I explore charter schools' unique immunity to civil suit resulting from the ancillary benefits of non-legal policies as well as broader societal and structural barriers plaintiffs face in bringing suit.

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board of education all acts of violence, vandalism, and harassment, intimidation, or bullying which occurred during the previous reporting period"). Data compiled based on analysis of state-by-state summary information available at http://www.stopbullying.gov/laws/#listing.

89. These include: Delaware (see DEL. CODE ANN. tit. 14, § 4112D(b)(1) (West, Westlaw through 2015 Sess.)), North Carolina (see N.C. GEN. STAT. ANN. § 115C-407.16 (West, Westlaw through 2015 Sess.)), Louisiana (see LA. REV. STAT. ANN. § 17:3996(B)(32) (Westlawt through 2015 Sess.)), Massachusetts (see MASS. GEN. LAWS ANN. ch. 71, § 37O (West, Westlaw through 2014 Sess.)), Minnesota (see MINN. STAT. ANN. § 121A.0695 (West, Westlaw through 2015 Sess.)), Nevada (see NEV. REV. STAT. ANN. § 388.132(4)(b) (West, Westlaw through 2014 Sess.)), North Carolina (see N.C. GEN. STAT. ANN. § 115C-407.16 (West, Westlaw through 2014 Sess.)), and Rhode Island (see R.I. GEN. LAWS ANN. § 16-21-34 (West, Westlaw through 2014 Sess.)). Colorado has a statute for charter schools in particular (see COLO. REV. STAT. ANN. § 22-30.5-116 (West, Westlaw through 2015 Sess.) ("On or before October 1, 2011, each charter school shall adopt and implement a policy concerning bullying prevention and education. Each charter school's policy, at a minimum, shall set forth appropriate disciplinary consequences for students who bully other students and for any person who takes any retaliatory action against a student who reports in good faith an incident of bullying, which consequences shall comply with all applicable state and federal laws.")). Maryland's anti-bullying law even extends to private schools (see MD. CODE ANN., EDUC. § 7-424.3(b) (West, Westlaw through 2014 Sess.) ("By March 31, 2012, each nonpublic school shall adopt a policy prohibiting bullying, harassment, and intimidation.")).

90. Data compiled based on analysis of state-by-state summary information available at http://www.stopbullying.gov/laws/#listing. *See, e.g.*, OR. REV. STAT. ANN. § 339.364 (West, Westlaw through 2014 Sess.) (stating that Oregon's school harassment, intimidation and bullying law "may not be interpreted to prevent a victim of harassment, intimidation or bullying or a victim of cyberbullying from seeking redress under any other available law, whether civil or criminal." But collectively these laws "do not create any statutory cause of action.").

II. PLAYING THE LOTTERY: CHARTER SCHOOLS' UNIQUE IMMUNITY

Despite the constitutional and legal challenges charter schools could face as a result of their progressive policies, charters have avoided suit thus far for a variety of reasons. In Subpart A, I describe the ways charter organizations have steered clear of any religious language in describing the character values they strive to inculcate in their students; instead, charters rely on extensive research to justify the values chosen before working closely with parents to ensure alignment. In Subpart B, I investigate other systemic factors—including parents' fears of reprisal, the cost barriers impoverished litigants face, and the legal protection afforded government in the form of sovereign immunity—that also insulate charters from suit.

A. *Ancillary Benefits of Results-Driven Decision-Making and Parental Inclusion*

Dave Levin, the co-founder of the KIPP national network and former Superintendent of the network's New York schools, has always avoided moralizing: KIPP's values in part reflect an obsessive commitment to data-driven analysis and in part Levin's self-consciousness of projecting his own middle class background onto his students. Though KIPP had always focused on more than test scores, proffering its "Work hard, be nice" mantra since its founding, Levin initiated the focus on character in 2005 following disappointing college graduation rates of KIPP's earliest classes.[91] While eighty percent of KIPPsters reached college, only thirty-three percent actually graduated.[92] Working with Doctors Seligman, Peterson, and Duckworth,[93] Levin identified the character traits most closely linked to life fulfillment and began implementing their instruction to help KIPPsters not only get *to* college but *through* college. Though KIPP's official focus on character is recent, in 2012 KIPP's college graduation rate was up to forty percent,[94] an early data point that zest, grit, and the five other traits are indeed important to student success.

Despite the grounding in data, Levin remained wary of hawking middle-class values. "The thing that I think is great about the character-strength approach is that it is fundamentally devoid of value judgment. The inevitable problem with the values-and-ethics approach is you get into, well, 'Whose values? Whose ethics?'"[95] Instead of preaching values from on high, Levin has employed the same commitment to parent involvement that has been a

91. Tough, *supra* note 19.

92. *Id*.

93. KIPP, 2012 REPORT CARD 19 (2012) [hereinafter 2012 REPORT CARD], *available at* http://www.kipp.org/reportcard/2012.

94. *Id*. at 10.

95. TOUGH, *supra* note 30, at 60.

hallmark since KIPP's founding.[96] When KIPP rolled out the growth card in 2011, Levin was particularly focused on communication: the contents revealed teachers' *subjective* assessment of children's demonstrated in-class behavior, not commentary on parenting.[97] Instead of character values, KIPP now refers to its seven character pillars as character strengths, further limiting any implication of moral judgment.[98] Though KIPP's official focus on character is recent, in 2012 KIPP's college graduation rate was up to forty percent,[99] a good indication that they are focusing on the right traits.

Though Rocketship has taken a different approach, it has similarly endeavored to avoid any moralizing language. Across Rocketship's nine schools, four of the five values—persistence, respect, responsibility, empathy—are the same, chosen primarily based on co-founder Smith's years in the classroom. The fifth value is unique to each school and is not chosen until the first meeting with the parents in a new school community, which occurs just prior to the school's launch.[100] At Los Sueños, the founding parents chose environmental stewardship, a value reflected in gardening plots behind the school and paper cut-outs of flowers posted all over the walls. Other examples of the fifth value include community and healthy choices.[101] Each September, teachers hold a community meeting, during which they review a school's core values with parents.[102] Haines and Smith hypothesize that parents' participation in school meetings and purchases of Kimochi animals for at-home use indicate their support of Rocketship's approach to character. While Rocketship was founded too recently to permit longitudinal studies similar to those completed by KIPP, anecdotal evidence—in the form of glowing reports from the middle schools to which Rocketeers graduate and the coaches of community basketball teams—suggests to Smith and Haines that the focus on character is paying off: Rocketeers are reportedly respectful, self-motivated team players.[103]

Though KIPP, Rocketship, and other charter schools with whom I spoke have focused on results and parental involvement for reasons entirely unrelated to legality, such focus provides ancillary benefits, potentially insulating the schools from litigation. Most clearly, results-based decisions show that charter school values are selected to help students achieve, not for the religious purpose prohibited by *Lemon* and its progeny. Moreover, because First Amendment claims against public schools are almost always brought by

96. KIPP is known for requiring its teachers to do home visits throughout the school year. *For Families (Enroll)*, KIPP, http://www.kipp.org/schools/for-families-enroll (last visited June 9, 2015).

97. Interview with Ian Willey, *supra* note 8.

98. *Id*.

99. 2012 REPORT CARD, *supra* note 93, at 10.

100. Interview with Preston Smith, *supra* note 17.

101. Interview with Kristoffer Haines & Caryn Voskull, *supra* note 2.

102. *Id*.

103. Interview with Preston Smith, *supra* note 17.

parents, parents' inclusion in character education and resultant support limit the likelihood of parents' lodging First Amendment claims.

Disciplinary decisions may be more difficult to defend. Smith has received multiple calls from parents demanding expulsion of students they perceive as disruptive to their own children's education.[104] "They threaten lawsuits, to call the charter authorizer, to call the media, but we stay firm."[105] Strong relationships with parents have, to date, prevented them from following through on their complaints.

B. *Systemic Barriers to Suit*

While charter schools deserve to benefit from the good relationships they foster with their constituents, other—less positive—societal factors prevent charter school parents from bringing suit. Namely, parents have fought hard to get their kids out of public schools and in to charters, often times crossing their fingers as they waited and prayed through lottery processes that make college acceptance rates look easy.[106] Parents do not want to jeopardize their children's education.

Furthermore, though little research has been done on the obstacles to general civil litigation against schools,[107] fear of reprisal—from school administrators and, more prevalently, from the community—may also play a prominent part in deterring parents from bringing claims against schools.[108] Courts have recognized such fear by protecting the anonymity of parents bringing suit. In *Doe v. Stegall*, the Fifth Circuit held that the plaintiffs should be permitted to proceed under pseudonyms in their suit challenging the constitutionality of prayer in Mississippi schools because i) they were suing to challenge governmental activity; ii) the suit required them to disclose "information 'of the utmost intimacy'"; and iii) the plaintiffs were children.[109]

Parents seeking to sue charters over their disciplinary policies are unlikely to proceed anonymously. Though such suits arguably meet the first and third of

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104. *Id*.

105. *Id*.

106. In 2014, KIPP NYC admitted 903 of 10,891 applicants, or 8.3%. Interview with Brooke Connolly, Director of Individual Giving and Special Events, KIPP NYC (Apr. 21, 2014).

107. *See generally* Jamie Darin Prenkert et al., *Retaliatory Disclosure: When Identifying the Complainant Is an Adverse Action*, 91 N.C. L. REV. 889 (2013); Benjamin P. Edwards, *When Fear Rules in Law's Place: Pseudonymous Litigation as a Response to Systematic Intimidation*, 20 VA. J. SOC. POL'Y & L. 437 (2013) (both discussing the necessity and allowance of pseudonyms in the context of First Amendment claims brought against school districts).

108. Doe v. Stegall, 653 F.2d 180, 185 (5th Cir. 1981).

109. *Id*.; *see also* Doe v. Harlan Cnty. Sch. Dist., 96 F. Supp. 2d 667, 670 (E.D. Ky. 2000) (assessing anonymity on the *Stegall* criteria and permitting plaintiffs to proceed anonymously in raising First Amendment challenge to display of Ten Commandments and other religious documents in Kentucky public schools).

the *Stegall* criteria, it is unlikely that disciplinary concerns would satisfy the "utmost intimacy" criterion granted in cases involving religion. As a result, parents may elect not to bring suit, not only for fear of reprisal by school administrators but also by members of the community who are invested in the school's continued existence.

Finally, most of the families served by charter schools lack resources, financial and otherwise. For example, ninety percent of Rocketship's San Jose students receive free and reduced price meals,[110] provided to children of families that make up to 185% of the federal poverty guideline.[111] Seventy-five percent are English Language Learners.[112] Eighty-eight percent of KIPP's New York City school students qualify for reduced price meals and forty-nine percent are Latino.[113] Because there is no right to counsel in civil cases, most charter families thus fall within the forty percent of low-income households in America that require legal counsel but cannot obtain it.[114] Language barriers only augment the challenges of retaining counsel.[115] Thus, even those families who accept potential school and community reprisal might be unable to bring suit.

Despite the systemic barriers, recent bullying legislation may incite a cottage industry of lawyers eager to help indigent parents bring suits against school districts. Thus far, the industry has not taken off. Out of seventy-five bullying cases on record since January 2009, twenty-three were dismissed outright; of the remaining fifty-two, eight were awarded damages of one million dollars or more.[116] These statistics understate the number of claims brought, as even in situations as devastating as Columbine or Newtown, cases may ultimately be dismissed[117] or dropped before they even begin.[118]

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110. *Bay Area Region*, ROCKETSHIP, http://www.rsed.org/bayarea/index.cfm (last visited Apr. 14, 2015).

111. *Income Eligibility Guidelines*, USDA, http://www.fns.usda.gov/cnd/Governance/notices/iegs/IEGs.htm (last visited Apr. 21, 2015).

112. *Bay Area Region*, *supra* note 110.

113. 2012 REPORT CARD, *supra* note 93, at 72.

114. Joan Grace Ritchey, *Limits on Justice: The United States' Failure to Recognize a Right to Counsel in Civil Litigation*, 79 WASH. U. L.Q. 317, 329 (2001).

115. *See* Charles M. Grabau & Llewellyn Joseph Gibbons, *Protecting the Rights of Linguistic Minorities: Challenges to Court Interpretation*, 30 NEW ENG. L. REV. 227, 264 (1996) (discussing the necessity of translators to fair adjudicatory proceedings, and in particular the barriers to client-attorney communication when translators are not provided).

116. Based on WestLaw search of jury verdicts and settlements relating to bullying in schools performed across states dating back to January 1, 2009.

117. Castaldo v. Stone, 192 F. Supp. 2d 1124 (D. Colo. 2001) (dismissing complaints brought against the Jefferson County School district following the Columbine High School massacre).

118. Ellen Wulfhorst, *Newtown Shooting Lawsuit: $100M Claim Against Connecticut in School Shooting Is Dropped*, HUFFINGTON POST (Jan. 1, 2013), http://www.huffingtonpost.com/2013/01/01/100m-newtown-shooting-lawsuit-dropped_n_2392690.html.

The limited number of successful settlements may in part be explained by judicial hesitancy: a bias against judicial activism, the influence of community politics, and political pressures imposed by the legislature's role in judicial appointments encourage judges to avoid decisions that go against the grain.[119] Moreover, judges are most likely aware that, when plaintiffs seek damages in addition to injunctive relief, the damage awards they enforce take money from already impoverished school districts.

Nonetheless, as parents more frequently seek civil action for harm suffered by their children while at school, school administrators' understanding legal vulnerabilities becomes all the more important. In the final Part, I examine charter schools' protections against and exposure to suit and the implications of such for administrators. Because, for the aforementioned reasons, I believe First Amendment claims provide infertile grounds for civil litigation, I focus the remaining discussion on suits related to the inclusive education polices administrators adopt as a means of modeling and encouraging character values.

III. DISCIPLINE & PUNISH: LIABILITIES OF INCLUSION

Assume for a moment the nightmare occurred: an ABC charter[120] student brought a gun to school and opened fire on his classmates. Subsequently, in addition to the tragedy itself, grieving parents, teachers and students, and a fractured school community, ABC would likely face litigation. Parents might make a constitutional claim that ABC deprived their children of life. Or they might bring tort claims, alleging that lax school discipline policy caused an unsafe environment for their children or, more generally, that ABC's disciplinary policies were unreasonable. However, even if parent plaintiffs were inspired to bring suits against charter schools and judges were open to deciding in their favor, sovereign immunity and case precedent still create barriers to successful suit in even the most appalling circumstances.[121] Furthermore, charter schools likely enjoy immunities even more extensive than do public schools given that parents have not only chosen to send their children to such schools rather than home school them but also gone to such great efforts to ensure their child's attendance.

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119. *See generally* William S. Koski, *The Politics of Judicial Decision-Making in Educational Policy Reform Litigation*, 55 HASTINGS L.J. 1077, 1097, 1100, 1110 (2004).

120. Example name provided for ease of reference; this name is not meant to represent any charter school in particular.

121. *See Bay Area Region*, *supra* note 110; *Income Eligibility Guidelines*, *supra* note 111.

A. *Protect Our Children?: Barriers to Constitutional Claims Against Schools*

The landmark decision in *DeShaney v. Winnebago County Department of Social Services* suggest that the state's general duty to protect individuals is limited. In March 1984, Randy DeShaney beat his four-year old son Joshua within an inch of his life.[122] Joshua "suffered brain damage so severe" as to confine him "to an institution for the profoundly retarded."[123] Joshua and his mother subsequently brought a Fourteenth Amendment claim against the Winnebago, Wisconsin Department of Social Services, asserting that DSS' failure to intervene to protect Joshua from his father deprived Joshua of liberty without due process of law.[124] Though the facts of the case were indeed heartwrenching, the Court held that the state's failure to protect Joshua from his father's violence did not constitute a due process violation because the state had no general duty to protect an individual's life, liberty, or property.[125]

The *DeShaney* decision marked a departure from prior cases in which the Court had recognized a state duty to protect individual rights when there existed a special relationship imposed by the state's deprivation of individual liberty[126] and suggests the unlikelihood of success for plaintiffs pursuing due process claims against schools. For example, in *Vernonia School District v. Acton*, citing *DeShaney*, the Court stated in dicta that the school did not possess an affirmative duty to protect its students from harm.[127] Furthermore, the circuits that have considered the question have declined to impose affirmative protective duties on school districts even in the most egregious of cases, maintaining that mandatory school attendance does not restrict a student's liberty to such a degree as to prevent the student or her parents from tending to her basic needs.[128] For instance, in *Maldonado v. Josey*, the Tenth Circuit

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122. DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 193 (1989).

123. *Id*.

124. *Id*.

125. *Id*. at 202.

126. *See* Youngberg v. Romeo, 457 U.S. 307, 324 (1982) ("The State . . . has the unquestioned duty to provide reasonable safety for all residents" involuntarily committed to a mental institution); Estelle v. Gamble, 429 U.S. 97, 103 (1976) (establishing "government's obligation to provide medical care for those whom it is punishing by incarceration").

127. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 655 (1995) ("We do not, of course, suggest that public schools as a general matter have such a degree of control over children as to give rise to a constitutional 'duty to protect.'").

128. *See, e.g*., Doe *ex rel*. Magee v. Covington Cnty. Sch. Dist. *ex rel*. Keys, 675 F.3d 849, 859 (5th Cir. 2012) (barring constitutional claim against school in case of nine-year old girl's rape, molestation, and sodomy after she was taken from the school; "anything less than such a total restriction is sufficient to create a special relationship with the state, regardless of the age or competence of the individual"); Patel v. Kent Sch. Dist., 648 F.3d 965, 974 (9th Cir. 2011) (barring parents' constitutional claim in case of developmentally disabled child's sexual abuse by other student because no special-relationship unless "the state has so restrained the child's liberty that the parents cannot care for the child's basic needs"); Wyke v. Polk Cnty. Sch. Bd., 129 F.3d 560 (11th Cir. 1997) (holding that no special relationship existed between school board and student so as to impose an affirmative constitutional duty

denied a Fourteenth Amendment claim to a parent bringing a wrongful death action after her child died from strangulation in a school cloakroom, holding that compulsory school attendance law did not impose on state-run schools an affirmative duty to protect school children.[129] The First Circuit has suggested that, "in narrow circumstances there might be a 'specific duty'"; for instance if a student suffered a heart attack and a teacher failed to respond.[130] Yet, repeatedly, Courts have failed to find that school behavior is so "outrageous, uncivilized, and intolerable" as to indicate the violation of such duty,[131] in part perhaps for fear of opening schools to innumerable suits.[132]

Some courts have also interpreted *DeShaney* to impose a duty in cases wherein the state played a "part in [the danger's] creation" or acted affirmatively to render the deprived individual "more vulnerable to" such dangers, but even in this looser interpretation, courts have not found schools liable.[133] In *Graham v. Independent School District No. I-89*, the Tenth Circuit considered two separate cases of school violence, one brought by the mother of a student who had been shot by a fellow student and one brought by the mother of a student who had been stabbed by a fellow student.[134] The Court held that the schools were not liable for creating the hazardous situations despite "knowledge of the propensities of the aggressors": in cases of state-created danger, the harms caused must be a direct consequence of state action, necessarily limited in "range and duration."[135] As stated by the First Circuit, recovery under a state-created danger theory is limited to cases in which the

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to prevent student's suicide); Sargi v. Kent City Bd. of Educ., 70 F.3d 907 (6th Cir. 1995) (holding that no special relationship existed between school district and student who died from heart failure while on school bus); Dorothy J. v. Little Rock Sch. Dist., 7 F.3d 729 (8th Cir. 1993) (barring parent from bringing constitutional claim against school district following sexual assault of mentally retarded child by fellow student); D.R. by L.R. v. Middle Bucks Area Vocational Technical Sch., 972 F.2d 1364 (3d Cir. 1992) (barring female students' constitutional claim against school district resulting from sexual molestation claims against male classmates because no special relationship existed between school district and students); J.O. v. Alton Cmty. Unit Sch. Dist. 11, 909 F.2d 267 (7th Cir. 1990) (holding that school authorities did not have affirmative duty under due process clause to prevent alleged sexual abuse of student by teacher).

129. Maldonado v. Josey, 975 F.2d 727 (10th Cir. 1992).

130. Hasenfus v. LaJeunesse, 175 F.3d 68, 72 (1st Cir. 1999).

131. *See Bay Area Region*, *supra* note 110; *Income Eligibility Guidelines*, *supra* note 111.

132. *See, e.g.*, Theno v. Tonganoxie Unified Sch. Dist. No. 464, 377 F. Supp. 2d 952, 970 (D. Kan. 2005) ("As a practical matter, imposing upon public schools the duty to supervise students in such a manner as to prevent emotional harm to other students would undoubtedly subject Kansas schools to an enormous number of lawsuits. This court is unwilling to impose a rule of such broad liability . . . ."). Though this case considered recurring verbal harassment, courts appear similarly reticent to find negligence in cases of physical harm.

133. DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 201 (1989).

134. Graham v. Indep. Sch. Dist. No. I-89, 22 F.3d 991 (10th Cir. 1994).

135. *Id.* at 995 (citing Martinez v. California, 444 U.S. 277, 285 (1980); Dorothy J. v. Little Rock Sch. Dist., 7 F.3d 729, 733 (8th Cir. 1993)).

defendant showed "deliberate indifference," failing "to do the obvious" despite the high risk of harm and knowledge of such risk.[136] Proving that students' constitutional deprivations result from the "obvious, deliberate indifference" of school administrators is consequently quite difficult.[137]

In the case of the hypothetical school shooting in a charter school, parents would be unlikely to succeed in constitutional claims related to either of the *DeShaney* exceptions. Though school attendance is mandatory, parents have *chosen* the charter schools that their students attend, frequently going to great lengths to secure their children's admission, thereby severely undermining the allegation that charter schools are restricting students' liberty. Furthermore, parents seeking to demonstrate that school-wide policies deprived their children of constitutional rights would struggle in the face of documented action by the school, once again suggesting the importance of both written procedures by which administrators handle disciplinary matters and justification when exceptions to such policies are granted. Even without documentation of school action, parent plaintiffs would probably struggle to prove that student deprivations, even in the case of death, resulted from school disciplinary policy unless the school had truly taken *no* action in response to student misconduct. Total failure to act might (and probably should) qualify as deliberate indifference.

B. *Compensating "Grievous Harm": Tort Claims Against Schools*

Though *DeShaney* surely limited constitutional claims relating to states' affirmative duty to protect against loss of life, in his majority opinion, Chief Justice Rehnquist left open the possibility for common tort relief. The Chief Justice wrote:

> Judges and lawyers, like other humans, are moved by natural sympathy in a case like this to find a way for Joshua and his mother to receive adequate compensation for the grievous harm inflicted upon them. The people of Wisconsin may well prefer a system of liability which would place upon the State and its officials the responsibility for failure to act in situations such as

136. Manarite v. City of Springfield, 957 F.2d 953, 956 (1st Cir. 1992) (holding that state's failure to prevent suicide of minor in protective custody did not indicate deliberate indifference, therefore barring § 1983 claim); *see also* Johnson v. Dallas Indep. Sch. Dist., 38 F.3d 198, 201 (5th Cir. 1994) (holding that, in in death of high school student shot on campus by a nonstudent, plaintiff failed to prove liability under state-created danger theory because i) school environment was not necessarily dangerous, ii) school officials did not know of risk of armed non-student invader, and iii) school administrators did not create the dangerous situation that resulted in the student's death).

137. *See, e.g.*, Doe v. Claiborne Cnty., Tennessee, 103 F.3d 495, 508 (6th Cir. 1996) (holding that high school student failed to show that school board, as an official policymaking body, had a "'custom' that reflected a deliberate, intentional indifference to the sexual abuse of its students").

> the present one. They may create such a system . . . . by changing the tort law of the State in accordance with the regular lawmaking process.[138]

Despite Chief Justice Rehnquist's nod to tort relief, many states' tort law serves to limit public schools' liability. Even when that is not so, parents struggle to win tort claims because it is difficult to prove that schools should have foreseen certain harms or that school policies proximately caused them.

Though state policies regarding government liability differ structurally, they generally function to immunize public schools from suit,[139] and a number of states have adopted laws that explicitly extend government immunity to charter entities.[140] However, courts have split in the few cases that have arisen in states in which immunity is not granted to charters by law. Federal district courts in Hawaii,[141] Colorado[142] and Ohio[143] have extended immunity to

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138. *DeShaney*, 489 U.S. at 203.

139. Peter J. Maher et al., *Governmental and Official Immunity for School Districts and Their Employees: Alive and Well?*, 19 KAN. J.L. & PUB. POL'Y 234, 245-46 (2010) (compiling first comprehensive assessment of public school immunity and concluding that, despite variance in approach, states generally grant "robust" immunity to both public school districts and employees through outright immunization or "discretionary purpose" exception).

140. These include: Arkansas (see ARK. CODE ANN. § 21-9-301 (West, Westlaw through 2014 Sess.)); Connecticut (see CONN. GEN. STAT. ANN. § 10-235 (West, Westlaw through 2015 Sess.)); District of Columbia (see D.C. CODE § 38-1802.11) (Westlaw through 2015 Sess.)); Florida (see FLA. STAT. ANN. § 1002.33(h) (West, Westlaw through 2014 Sess.)); Idaho (see IDAHO CODE ANN. § 33-5204(2) (West, Westlaw through 2014 Sess.)); Indiana (see IND. CODE ANN. § 34-13-3-3(8)(b) (West, Westlaw through 2015 Sess.)); Mississippi (see MISS. CODE. ANN. § 11-46-1 (West, Westlaw through 2014 Sess.)); New Hampshire (see N.H. REV. STAT. ANN. § 194-B:3 (Westlaw through 2014)); New York (see N.Y. EDUC. LAW § 2853 (McKinney, Westlaw through 2015)); North Carolina (see N.C. GEN. STAT. ANN. § 115C-238.29F (West, Westlaw through 2014 Sess.)); Oregon (see OR. REV. STAT. ANN. § 338.115 (West, Westlaw through 2014 Sess.)); Pennsylvania (see 24 PA. STAT. ANN. § 17-1727-A (West, Westlaw through 2014 Sess.)); South Carolina (see S.C. CODE ANN. § 59-40-50 (Westlaw through 2014 Sess.)); Tennessee (see TENN. CODE ANN. § 49-13-125 (West, Westlaw through 2014 Sess.)); Texas (see TEX. EDUC. CODE ANN. § 12.1056 (West, Westlaw through 2013 Sess.)); Virginia (see VA. CODE ANN. § 22.1-212.16 (West, Westlaw through 2014 Sess.)); Utah (see UTAH CODE ANN. § 53A-1a-514 (West, Westlaw through 2014 Sess.)); and Wisconsin (see WIS. STAT. ANN. § 895.523 (West, Westlaw through 2013 Sess.)); and Wyoming (see WYO. STAT. ANN. § 21-3-304 (West, Westlaw through 2014 Sess.)).

141. Lindsey v. Matayoshi, 950 F. Supp. 2d 1159 (D. Haw. 2013) (holding that charter schools are state agencies for the purposes of 11th Amendment immunity because Hawaii charter law identifies them as state entities based on application of the five *Mitchell* criteria).

142. King v. United States, 53 F. Supp. 2d 1056, 1065-66 (D. Colo. 1999) (holding that, under Colorado law, charter school—despite operational autonomy—was ultimately accountable to the public school district, and therefore an "agency, instrumentality or political subdivision" of school district and thus "public entity" under Colorado Governmental Immunity Act (CGIA)), *rev'd on other grounds*, King v. United States, 301 F.3d 1270 (10th Cir. 2002).

143. Hope Acad. Broadway Campus v. Integrated Consulting & Mgmt., Nos. 96100, 96101, 2011 WL 6780186, at *3-4 (Ohio Ct. App. Dec. 22, 2011) (holding that, as agents and employees of a political subdivision, charter school board members were entitled to governmental immunity).

charters while the state Supreme Court in California[144] has not. In *Wells v. One2One Learning Foundation*, the California Supreme Court examined, among other claims, breach of contract and negligent misrepresentation claims brought by the parents of students enrolled in One2One's distance learning charter programs.[145] The plaintiffs claimed that One2One had not delivered promised computers or learning materials.[146] Ultimately, the Court held that because charter schools were operated by "distinct outside entities . . . given substantial freedom to achieve academic results free of interference by the public educational bureaucracy," they were not entitled to immunity.[147] Though the charter operator's actions in *Wells* were particularly unconscionable, it is difficult to see how California courts will justify a departure from such precedent henceforward. Nonetheless, it certainly seems contradictory to hold California charter schools accountable to public school law while denying them public school immunity.

Even if a state does not immunize a charter school from suit, courts are generally reticent to hold schools or their officials responsible for students' "unpredictable and hidden actions."[148] To prove negligence, a plaintiff must show that (i) the school owed the injured party a duty of reasonable care, (ii) the school breached that duty, and (iii) the breach caused the injury. Many negligence claims fail at the first element because schools do not have duties to protect against intentional torts perpetrated by third parties.[149] Claims may also fail because the injury was unforeseeable, another defense against the first required element.[150] Even when a court determines the harm foreseeable, the plaintiff may struggle to prove the third element, that the school's action or inaction caused the harm.[151]

There are, of course, exceptions, particularly when the children involved have been the subjects of repeated disciplinary intervention, making the harm sufficiently foreseeable as to indicate negligence.[152] In *J.N. v. Bellingham*

144. Wells v. One2One Learning Foundation, 39 Cal. 4th 1164, 1181-82 (Cal. 2006).

145. *Id.* at 1201.

146. *Id.* at 1181.

147. *Id.* at 1181-82.

148. Daniel B. Weddle, *Bullying in Schools: The Disconnect Between Empirical Research and Constitutional, Statutory, and Tort Duties to Supervise*, 77 TEMP. L. REV. 641, 687 (2004); *see, e.g.*, Wallmuth v. Rapides Parish Sch. Bd., 813 So. 2d 341, 348 (La. 2002) (holding the school board not liable for injuries caused to student during locker room fight because, though there was history of fighting in the locker room, the students involved had no history of violence individually or conflict between them).

149. Carly Silverman, *School Violence: Is It Time to Hold School Districts Responsible for Immediate Safety Measures?*, 145 EDUC. LAW REP. 535, 537-38 (2000).

150. Weddle, *supra* note 148, at 687.

151. *See, e.g.*, Skinner v. Vacaville Unified Sch. Dist., 43 Cal. Rptr. 2d 384, 392 (Cal. App. 1995) (holding that school district's failure to provide disciplinary record was not the cause of plaintiff's harm, a broken jaw inflicted by a student with an extensive history of physical violence).

152. Though less relevant to inclusive schooling liability, courts have also found schools liable when supervision is so lacking as to fall short of the reasonable care required.

School District No. 501, the Washington Court of Appeals remanded for trial a case in which a first grader had been sexually abused by a fourth grader at recess. Because the school knew of "the disturbed, aggressive nature" of the assaulter, the court found that a reasonable jury could find the school negligent for failing to take action to protect other children from "harm caused by such behavior."[153] In *Frazer v. St. Tammany Parish*, the Louisiana Court of Appeal, First Circuit, found the school twenty-percent liable for failure to follow its own policies to prevent a fight in which a freshman student suffered injuries.[154]

Negligence cases are usually highly fact-sensitive, and, given the complexity of interests at stake, perhaps that is even truer in negligence claims against schools. However, the proliferation of statutes mandating certain disciplinary action may make courts more amenable to finding contrary policies unreasonable. And, as with mandatory referral policies, in cases where statutes conflict or are unclear, courts will be left to decide whether public school disciplinary policies apply to charter schools or whether charter school autonomies permit discretion. Together with the potential for a jury to perceive a charter school's inclusive model as unreasonable, this once again suggests that charter schools should clearly document the rationale for and detail of their policies as well as the steps they take to address behavior problems in lieu of suspension.

CONCLUSION

The above analysis could of course be construed as an anti-charter story: Charter schools are legally unaccountable because low-income, largely minority parents are barred from suit due to administrators' strategic adoption and communication of school policies. Moreover, as public schools, charters for the most part enjoy immunities that private schools do not; even in states such as California where sovereign immunity does not extend, judges are largely unwilling to find schools negligent in common tort claims.

I do not endorse such a depiction. The legal immunities charters enjoy are ancillary to their true purposes: eliminating the achievement gap[155] by developing in students the "knowledge, skills, character and habits needed to

See, e.g., Titus v. Lindberg, 228 A.2d 65, 70 (N.J. 1967) (holding that jury could reasonably find school liable for injury caused to nine year old by fellow student's shooting of a paper clip in his eye because teachers failed to explain or enforce any sort of supervisory policy); *see also* Charonnat v. S.F. Unified Sch. Dist., 133 P.2d 643, 645 (Cal. App. 1943) (affirming judgment for plaintiff whose leg was broken by another student during recess because school's provision of one supervisor for 150 students across a large recess yard was unreasonable).

153. J.N. v. Bellingham Sch. Dist. No. 501, 871 P.2d 1106, 1113 (Wash. Ct. App. 1994).

154. Frazer v. St. Tammany Parish Sch. Bd., 774 So. 2d 1227, 1233 (La. App. 2000).

155. *Who We Are*, ROCKETSHIP, http://www.rsed.org/who-we-are.cfm (last visited Apr. 21, 2015).

succeed in college and the competitive world beyond."[156] Charter schools can and do have profound influence on student achievement. For instance, on the 2012-13 California Standards Test, Rocketship performed in the top five percent of school districts serving low-income students.[157] In 2012 on the New York state assessment, KIPP students scored more than twenty points higher than their district peers in both English and math and ten points higher than the state average.[158] Nonetheless, critics remain. Successful civil suits against charter schools would not only divert money from the schools' core mission but would also fuel such criticism of the charter movement.

Comprehending charters' own unique vulnerabilities, whether relating to character or more broadly, will require time and financial investment, necessitating knowledge of education, charter, and tort law on a state-by-state basis. But the investment is well worth the effort: in understanding the legal vulnerabilities relating to character education and taking proactive action to avoid them, charter schools can not only better protect themselves from litigation but, in so doing, better protect the students whom they serve.

156. *About KIPP*, KIPP, http://www.kipp.org/about-kipp (last visited Apr. 21, 2015).
157. *Results*, ROCKETSHIP, http://www.rsed.org/results.cfm (last visited Apr. 21, 2015).
158. 2012 REPORT CARD, *supra* note 93, at 72.