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## Reforming the "Business" of Charter Schools in Pennsylvania

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## REFORMING THE “*BUSINESS*” OF CHARTER SCHOOLS IN PENNSYLVANIA

*Patrick J. Gallo, Jr.\**

### I. INTRODUCTION

Charter schools are “a good idea, a timely experiment—but one that unfortunately has run amok in Pennsylvania.”<sup>1</sup>

The concept of a charter school is derived from capitalistic ideals that school choice and competition will force the traditional American public school system to become more efficient and reform itself.<sup>2</sup> The Pennsylvania General Assembly was persuaded by this vision when it enacted its “Charter School Law” in 1997.<sup>3</sup> The Charter School Law was viewed as the lodestar for educational reform, furthering Pennsylvania’s Constitutional mandate, which requires “[t]he General Assembly . . . [to] provide for the maintenance and support of a thorough and efficient system of public education to serve the needs of the Commonwealth.”<sup>4</sup>

At some point, however, entrepreneurs motivated by profit hijacked the charter school movement. The Charter School Law itself has been equated to the California Gold Rush of 1849 (the mine being the charter school and the gold being tax dollars).<sup>5</sup>

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<sup>1</sup> Chris Satullo, *It’s a Shame Pa. Chose to Become a Wild West of Charter Schools*, CENTRE SQUARE BLOG (Jan. 27, 2013), <http://www.newsworks.org/index.php/local/education/50160-its-a-shame-pa-chose-to-become-wild-west-of-charter-schools>.

<sup>2</sup> See Dylan P. Grady, *Charter School Revocation: A Method for Efficiency, Accountability, and Success*, 41 J.L. & EDUC. 513, 521 (2012).

<sup>3</sup> 24 P.S. § 17-1701-A (1997), *et seq.* (amended 2002).. See 24 P.S. § 17-1741-A, *et seq.*

<sup>4</sup> PA. CONST. art. III & XIV.

<sup>5</sup> Karen Heller, *In Philly, the Fast Track to the Cyber-School Bottom*, PHILADELPHIA INQUIRER, Apr. 25, 2013, *available at* [http://articles.philly.com/2013-04-25/news/38793237\\_1\\_cyber-charters-schools-city-students](http://articles.philly.com/2013-04-25/news/38793237_1_cyber-charters-schools-city-students); *see also* Satullo, *supra* note 1 (equating charter school proliferation to the Wild West).

There are now more than 175<sup>6</sup> charter schools in Pennsylvania with over 105,000<sup>7</sup> students and approximately 44,000 more students on waiting lists.<sup>8</sup> In addition, roughly 25 percent of the student population in the Philadelphia School District attend public charter schools.<sup>9</sup> Moreover, government financed charter schools present a significant opportunity for profiteers looking to cash in on this modern day “gold rush,”<sup>10</sup> and, with very little oversight, Pennsylvania public charter schools have become fraught with “chicanery and greed . . . [,] excessive executive salaries . . . [,] nepotism, and [dubious] financial and real-estate transactions.”<sup>11</sup>

Part II of this article focuses on the charter school movement in Pennsylvania, and Part III discusses the creation and funding of charter schools under the Charter School Law. Part IV of this article explores the loopholes in the Charter School Law that allow entrepreneurs to squeeze profits and draw off tax dollars,<sup>12</sup> as well as the consequences of minimal charter school oversight. Finally, Part V provides an overview of the charter school “product” and Part VI examines the need to reform the “business” of charter schools and recent legislative efforts to do so.

## II. THE CHARTER SCHOOL MOVEMENT

Emerging in the 1970s,<sup>13</sup> the concept of a charter school<sup>14</sup> is

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<sup>6</sup> Eleanor Chute, *Charter Schools Now Big Business Nationwide: Management Firms Bring Money, Clout to Help Operate Them*, PITTSBURGH POST-GAZETTE, Dec. 30, 2012, available at <http://www.post-gazette.com/news/education/2012/12/30/Charter-schools-now-big-business-nationwide/stories/201212300213>.

<sup>7</sup> *What's a Charter School?*, PENNSYLVANIA COALITION OF PUBLIC CHARTER SCHOOLS, <http://pacharters.org/why-charters/> (noting that the number of Pennsylvania charter school students is approximately six percent (6%) of Pennsylvania's entire student population).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> See Heller, *supra* note 5.

<sup>11</sup> Holly Otterbein, *Who's Responsible for the Charter School Oversight Fiasco?*, IT'S OUR MONEY BLOG (Apr. 15, 2010), [http://www.philly.com/philly/blogs/ourmoney/Whos\\_responsible\\_for\\_the\\_charter\\_school\\_oversight\\_fiasco.html](http://www.philly.com/philly/blogs/ourmoney/Whos_responsible_for_the_charter_school_oversight_fiasco.html).

<sup>12</sup> See Stuart Knade, *Fix Pennsylvania's Charter School Law Now*, PITTSBURGH POST-GAZETTE, Apr. 4, 2013, available at <http://www.post-gazette.com/stories/opinion/perspectives/fix-pennsylvanias-charter-school-law-now-682032/>.

<sup>13</sup> Clarisse C. Casanova, *Charter Schools: A Step in the Right Direction or a Fourth Left Turn For Public Education?*, 7 WHITTIER J. CHILD & FAM. ADVOC. 231, 231

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based on the free market theories of Milton Friedman and the idea that school choice would foster competition.<sup>15</sup> In turn, such competition would ostensibly breed schools that were “more innovative, responsive, and efficient schools than government-run education ‘monopolies.’”<sup>16</sup>

Charter schools were initially regarded as a trailblazing alternative<sup>17</sup> and the answer to “a perceived need for diversity and innovation in [traditional] public schools.”<sup>18</sup> The charter school movement gained additional support from those who desired relief from the factory-style<sup>19</sup> educational environment in favor of a more individualized educational experience via “school choice.”<sup>20</sup> Teachers and administrators who wanted more autonomy and control over pedagogy and curriculum development were advocates for the charter school movement as well.<sup>21</sup> The free market approach to education also spurred the “open-enrollment plan, inter-district transfer programs, private school tuition vouchers, . . . and magnet schools.”<sup>22</sup>

The charter school movement, however, received some of its greatest support from the legislature.<sup>23</sup> Charter schools were viewed as cutting edge and a significant catalyst for redefining

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(2008).

<sup>14</sup> *Id.* at 234 (“Charter schools are publicly funded elementary or secondary schools that are accountable for producing specific results set forth in each school’s charter. These charters are essentially performance contracts that usually include provisions describing the school’s detailed instructional plan, the specific educational results to be achieved, and the precise ways in which such results will be measured, managed, and financed.”); *see also* 24 P.S. § 17-1703-A (“‘Charter school’ shall mean an independent public school established and operated under a charter from the local board of school directors and in which students are enrolled or attend. A charter school must be organized as a public, nonprofit Corporation. Charters may not be granted to any for-profit entity.”).

<sup>15</sup> Grady, *supra* note 2, at 520.

<sup>16</sup> Grady, *supra* note 2, at 520–21 (citation omitted); the “charter school market,” however, has been marked by inefficiencies “due to the presence of externalities and . . . high consumption of resources with inconsistent levels of output.” *Id.* at 538.

<sup>17</sup> Casanova, *supra* note 13, at 231.

<sup>18</sup> Kathryn Kraft, *Cyber Charter Schools—An Analysis of their Legality*, 56 SMU L. REV. 2327, 2329 (2003).

<sup>19</sup> *Id.* (“In a factory model education system, experts design the overall system and make decisions in a centralized method.”)

<sup>20</sup> *Id.*

<sup>21</sup> *See Id.*; *see also* Robert A. Garda, Jr., *Culture Clash: Special Education in Charter Schools*, 90 N.C. L. REV. 655, 688 (2012) (“The foundation of the charter movement is autonomy and independence: freedom from rules and regulations that govern traditional schools.”).

<sup>22</sup> Kraft, *supra* note 18, at 2329–30.

<sup>23</sup> Kraft, *supra* note 18, at 2330.

the traditional landscape of the American public school system.<sup>24</sup> Such an optimistic outlook offered bipartisan appeal and “[c]harter schools bask[ed] in the warm glow of positive rhetoric and political support.”<sup>25</sup> Particularly in the 1990s, Americans pushed for educational reform over growing concern for the public school system.<sup>26</sup> In 1997, Pennsylvania responded by enacting its own Charter School Law.<sup>27</sup>

In theory, the view of charter schools was plainly idealistic without any objective basis: “Independently operated public schools, freed from many of the regulations and mandates constraining traditional public school systems [which seemingly] would be laboratories for educational innovation, producing new strategies and methods that could benefit students in all schools.”<sup>28</sup> Legislators also considered charter schools a means of increasing learning opportunities for students, as well as professional opportunities for teachers.<sup>29</sup> It was intended as a mechanism for more accountability in student achievement.<sup>30</sup>

An intersection of the charter school movement and the Internet resulted in “the most recent evolution of the charter school movement”<sup>31</sup>—cyber charter schools.<sup>32</sup> Cyber charter

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<sup>24</sup> Kraft, *supra* note 18, at 2330–31.

<sup>25</sup> Susan L. DeJarnatt, *Follow the Money: Charter Schools and Financial Accountability*, 44 URB. LAW. 37 (2012).

<sup>26</sup> Kathryn M. Kraft, *The Commonwealth Court of Pennsylvania Holds that Cyber Charter Schools are Legal According to the Existing Charter School Law—Pennsylvania School Boards Ass’n, Inc. v. Zogby*, 56 SMU L. REV. 1039 (2003).

<sup>27</sup> 24 P.S. § 17-1701-A, *et seq.*; see also 24 P.S. § 17-1702-A(1)-(6) (charter schools are meant to “[i]mprove pupil learning,” “[i]ncrease learning opportunities for all pupils,” “[e]ncourage the use of different and innovative teaching methods,” “[c]reate new professional opportunities for teachers,” “[p]rovide parents and pupils with expanded choices in the types of educational opportunities that are available within the public school system,” and “[h]old the schools established under this act accountable for meeting measurable academic standards and provide the school with a method to establish accountability systems”); *Pa. Charter School Law Ranked 13th Nationally*, Pittsburgh Tribune-Review, Apr. 4, 2012, available at [http://triblive.com/x/pittsburghtrib/news/education/s\\_789730.html#axzz2RhQdyuqM](http://triblive.com/x/pittsburghtrib/news/education/s_789730.html#axzz2RhQdyuqM) (stating that “Pennsylvania’s charter school law earned a ranking of 13th nationally and a “B” grade in [an] annual report from the Center for Education Reform”); Kraft, *supra* note 26, at 1040.

<sup>28</sup> Stuart L. Knade, *Pennsylvania’s Charter School Law is Long Overdue for Reform: As I See It*, PATRIOT NEWS, Apr. 11, 2013, available at [http://www.pennlive.com/opinion/index.ssf/2013/04/pennsylvanias\\_charter\\_school\\_law\\_is\\_long\\_overdue\\_for\\_reform\\_as\\_i\\_see\\_it.html](http://www.pennlive.com/opinion/index.ssf/2013/04/pennsylvanias_charter_school_law_is_long_overdue_for_reform_as_i_see_it.html).

<sup>29</sup> Kraft, *supra* note 18, at 2330.

<sup>30</sup> *Id.*

<sup>31</sup> Kraft, *supra* note 18, at 2341.

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schools have never basked in the “warm glow”<sup>33</sup> of positive rhetoric and political support, but rather were met with heavy opposition and criticism from school districts and public school educators.<sup>34</sup> A further impediment has been that Pennsylvania’s Charter School Law initially failed to contemplate the existence of cyber charter schools,<sup>35</sup> leaving cyber charter schools vulnerable to challenges of illegality.<sup>36</sup>

One such challenge was the case of *Pennsylvania School Boards Association Inc. v. Zogby*.<sup>37</sup> In *Zogby* the court held, among other things, that school districts have no standing to challenge the legality of cyber charter schools.<sup>38</sup> The court in *Zogby* further noted in dicta that “[e]ven if [there was] standing to challenge the legality of cyber charter schools in this or another proceeding, we would conclude that the Charter School Law does not prohibit cyber schools.”<sup>39</sup> Soon after *Zogby*, the Pennsylvania legislature quickly responded by amending the Charter School Law in July of 2002 to include statutory provisions pertaining to cyber charter schools.<sup>40</sup>

Recently, *No Child Left Behind*<sup>41</sup> and *Race to the Top*,<sup>42</sup>

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<sup>32</sup> Kraft, *supra* note 18, at 2341. (“A cyber charter school is a charter school that operated almost exclusively over the Internet, providing all or most of its instruction over the Internet to students who log on from their homes using computers purchased with public funds.”); *see also* 24 P.S. § 17-1703-A (“Cyber charter school’ shall mean an independent public school establishment operated under a charter from the Department of Education and in which the school uses technology in order to provide a specific portion of its curriculum and to deliver significant portion of instruction to its students through the Internet or other electronic means. A cyber charter school must be organized as a public, nonprofit Corporation. A charter may not be granted to a for-profit entity”). Proponents of cyber charter schools maintain that such schools allow access to students under-served by brick and mortar schools, are flexible, modifiable, and adaptable to student needs. Kraft, *supra* note 18, at 2342.

<sup>33</sup> *See* DeJarnatt, *supra* note 25, at 37.

<sup>34</sup> Kraft, *supra* note 18, at 2343 (critics of cyber charter schools argued that the State could not adequately monitor cyber schools, the schools themselves could not provide an adequate education, and that the schools lacked statutory authorization); *see also* Kraft, *supra* note 26, at 1039 (critics of cyber charter schools also cited attendance verification issues and windfalls in funding because of relatively low operational costs).

<sup>35</sup> Kraft, *supra* note 18, at 2342.

<sup>36</sup> *See* *Pennsylvania Sch. Bds. Ass’n., Inc. v. Zogby*, 802 A.2d 6 (Pa. Commw. Ct. 2002).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 10.

<sup>39</sup> *Id.* at 11.

<sup>40</sup> 24 P.S. § 17-1741-A, *et seq.*

<sup>41</sup> 20 U.S.C. 70 § 6301, *et seq.* (2002).

<sup>42</sup> Sections 14005 and 14006 of the American Recovery and Reinvestment Act of 2009 (ARRA), Pub. L. No. 111-5, 123 Stat. 115.

federal programs that focus on school choice and accountability, “have created an environment for the expansion of charter schools.”<sup>43</sup> Although questions have surfaced about the viability and effectiveness of charter schools, the proliferation of charter schools throughout the Commonwealth of Pennsylvania does not appear to be slowing down, despite cries for reform.

To date, much of the case law concerning the Charter School Law turns on procedural technicalities.<sup>44</sup> Some have argued that “the charter concept was seized . . . by those who hated public schools simply because they were government-run and . . . unionized.”<sup>45</sup> In addition, it has been further argued that the charter school concept “was less about helping kids stuck in bad schools than it was about furthering an anti-government agenda. It was about . . . ‘ending the state-run monopoly on education.’”<sup>46</sup> Critics have maintained that charter schools and the Charter School Law present a significant opportunity for profiteers to capitalize on government financing.<sup>47</sup>

One thing is certainly clear, charter schools no longer bask in the warm glow of positive rhetoric or bipartisan political support that they enjoyed when the Charter School Law was enacted.<sup>48</sup> Nonetheless, charter schools have significant autonomy and independence with respect to operations<sup>49</sup> and virtually any person or entity can establish a charter school.<sup>50</sup>

### III. HANGING OUT A CHARTER SCHOOL SHINGLE

To set up shop and compete for tax dollars in the metaphorical “gold rush”<sup>51</sup> that is charter schools, charter

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<sup>43</sup> Grady, *supra* note 2, at 519–20.

<sup>44</sup> Robert J. Martin, *Chartering the Court Challenges to Charter Schools*, 109 PENN ST. L. REV. 43, 75 (2004).

<sup>45</sup> Satullo, *supra* note 1.

<sup>46</sup> Satullo, *supra* note 1.

<sup>47</sup> See Stephanie Saul, *Profits and Questions at Online Charter Schools*, NY TIMES, Dec. 12, 2011, available at [http://www.nytimes.com/2011/12/13/education/online-schools-score-better-on-wall-street-than-in-classrooms.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2011/12/13/education/online-schools-score-better-on-wall-street-than-in-classrooms.html?pagewanted=all&_r=0).

<sup>48</sup> See DeJarnatt, *supra* note 25, at 37.

<sup>49</sup> See generally, 24 P.S. § 17-1701-A, *et seq.*

<sup>50</sup> 24 P.S. § 17-1717-A(a).

<sup>51</sup> Heller, *supra* note 5.

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school applicants must be approved by either the local school board, or if denied by the local school board where they are based, then by appeal to the Pennsylvania Charter School Appeal Board.<sup>52</sup>

A charter school in Pennsylvania “may be established by any individual, teacher, parent, guardian, any nonsectarian college, university or museum located in Pennsylvania, any nonsectarian corporation not-for-profit, or any corporation, association, partnership or combination thereof.”<sup>53</sup> An application<sup>54</sup> to establish a charter school must be submitted to the local school board of the district where the charter school will be located prior to November 15th of the school year preceding the first operational school year of the proposed charter school.<sup>55</sup> Within forty-five days of receiving an application for a charter school, the local school board is to conduct a public hearing on the provisions of the charter school’s application<sup>56</sup> and within seventy-five days of the public hearing, the local school board must render a decision as to whether it will grant or deny the charter school’s application.<sup>57</sup> An application that is denied may be revised and resubmitted to the local school board or the denial may be appealed to the Pennsylvania Charter School Appeal Board pursuant to Section 17-1721-A of the Charter School Law.<sup>58</sup>

With respect to cyber charter schools, since they are statewide, an application<sup>59</sup> to establish a cyber charter school must be submitted to the Pennsylvania Department of Education, rather than the local school board, by October 1st of

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<sup>52</sup> See 24 P.S. § 17-1717-A; 24 P.S. § 17-1745-A.

<sup>53</sup> 24 P.S. § 17-1717-A(a); see also Kraft, *supra* note 18, at 2331.

<sup>54</sup> Section 17-1719-A of the Charter School Law governs the charter school applications for “brick and mortar” charter schools.

<sup>55</sup> 24 P.S. § 17-1717-A(c); see also 24 P.S. § 17-1718-A (requiring a regional charter school to submit applications to each local school board involved, who must act jointly in approving or denying the regional charter school); 24 P.S. § 17-1745-A (concerning the establishment of a cyber charter school); see also Kraft, *supra* note 18, at 2331.

<sup>56</sup> 24 P.S. § 17-1717-A(d); see also Kraft, *supra* note 18, at 2331.

<sup>57</sup> 24 P.S. § 17-1717-A(e)(1); see also Kraft, *supra* note 18, at 2331.

<sup>58</sup> 24 P.S. § 17-1717-A(f); see also Kraft, *supra* note 18, at 2331; Knade, *supra* note 12 (“A rigorous application process intended to provide quality control at the front end was gutted by an appeals process that routinely overturned school board denials of weak charter applications that were too poorly thought out to be trusted with tax dollars and the precious educational years of children.”).

<sup>59</sup> Section 17-1747-A of the Charter School Law governs the charter school applications for “cyber” charter schools.

the school year preceding the school year in which proposed cyber charter school intends to commence operation.<sup>60</sup>

Additionally, in what can only be described as a paradox, the Charter School Law requires charter schools to be organized as a non-profit organization under Pennsylvania law<sup>61</sup> but permits charter schools to be managed by for-profit educational management companies, also known as EMOs.<sup>62</sup> Furthermore, charter schools have the power to “[a]cquire real property from public or private sources by purchase, lease, lease with an option to purchase or gift for use as a charter school facility,”<sup>63</sup> “[r]eceive and disburse funds for charter school purposes,”<sup>64</sup> “[i]ncur temporary debts in anticipation of the receipt of funds,”<sup>65</sup> and “[s]olicit and accept any gifts or grants for charter school purposes.”<sup>66</sup>

#### IV. THE BUSINESS OF CHARTER SCHOOLS

There are over 105,000 charter school students in Pennsylvania,<sup>67</sup> 32,000 of which are cyber students,<sup>68</sup> and an estimated 44,000 more students are currently on charter school waiting lists.<sup>69</sup> In total, Pennsylvania has approximately 175 charter schools, including sixteen cyber charter schools.<sup>70</sup> The City of Philadelphia alone is home to an estimated eighty charter schools with approximately 46,000 students.<sup>71</sup>

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<sup>60</sup> 24 P.S. § 17-1745-A.

<sup>61</sup> 24 P.S. §§ 17-1717-A, 17-1718-A, and 17-1745-A; *see also* Collegium Charter School, 812 A.2d 1172.

<sup>62</sup> Anne E. Trotter, Suzanne E. Eckes, and Jonathan A. Plucker, *Education Management Organizations and Charter Schools: Serving all Students*, 213 ED. LAW REP. 935, 937 (2006).

<sup>63</sup> 24 P.S. § 17-1714-A(3).

<sup>64</sup> 24 P.S. § 17-1714-A(4).

<sup>65</sup> 24 P.S. § 17-1714-A(6).

<sup>66</sup> 24 P.S. § 17-1714-A(7).

<sup>67</sup> *What's a Charter School*, *supra* note 7.

<sup>68</sup> Diane Ratvich, *This is Unbelievable*, DIANE RATVICH'S BLOG, July 10, 2012, available at <http://dianeravitch.net/2012/07/10/this-is-unbelievable/>; Jason Tomassini, *After Closing Virtual Charter School, Pa. Authorizes Four More*, EDUCATION WEEK, July 10, 2012, available at [http://blogs.edweek.org/edweek/marketplacek12/2012/07/after\\_closing\\_virtual\\_charter\\_school\\_penn\\_authorizes\\_four\\_more.html](http://blogs.edweek.org/edweek/marketplacek12/2012/07/after_closing_virtual_charter_school_penn_authorizes_four_more.html).

<sup>69</sup> *What's a Charter School?*, *supra* note 7.

<sup>70</sup> Chute, *supra* note 6.

<sup>71</sup> Martha Woodall, *4 More Cyber Charters Set to Open as Lawmakers Debate Charter Funding*, PHILADELPHIA INQUIRER, Jun. 29, 2012, available at [http://articles.philly.com/2012-06-29/news/32457930\\_1\\_cyber-charters-charter-schools-](http://articles.philly.com/2012-06-29/news/32457930_1_cyber-charters-charter-schools-)

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Simply put, charter schools in Pennsylvania are big business and there are no signs of the business slowing down.<sup>72</sup> It is estimated that over the last decade \$4 billion dollars have gone to charter schools in Pennsylvania.<sup>73</sup> In the 2007–2008 school year alone, Pennsylvania school districts paid out \$627,984,205 in “tuition” payments to charter schools<sup>74</sup> and in the 2010–2011 fiscal year, \$1.129 billion, \$322.3 million of which went to cyber charter schools.<sup>75</sup>

The taxpayer-funded entrepreneurial exploits of some public charter schools have been plagued with profiteering, fraud, and chicanery.<sup>76</sup> Specifically, the loopholes within Pennsylvania’s flawed charter school funding formula and lack of fiscal oversight have presented an opportunity for profiteers.<sup>77</sup> Charter school profiteers have become proverbial parasites siphoning public funds meant for the education of Pennsylvania’s youth,<sup>78</sup> morphing the charter school movement into the “financialization of public education.”<sup>79</sup>

#### A. *The Revenue Stream*

Like any business, the first and foremost concern for

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funding-formula.

<sup>72</sup> See Pennsylvania School Boards Ass’n, *Pennsylvania Charter Schools: Charter/Cyber Charter Costs for Pennsylvania School Districts*, Education Research & Policy Ctr., Oct. 2010, p. 18 (“The number of students attending charter schools is continuing to increase. Between 2003–04 and 2008–09, the number of students increased at an annual average of 13.5%.”); see also Daniel Denvir, *Corbett’s Aggressive Charter School Push Could Cost Taxpayers Money—and Oversight*, Philadelphia City Paper, Sept. 6, 2012, available at <http://www.citypaper.net/news/2012-09-06-news-chartering-a-course-governor-corbett.html?c=r>.

<sup>73</sup> Lawrence A. Feinberg, *\$4 Billion Taxpayer Dollars with no Real Oversight, Charter Schools—Public Funding without Public Scrutiny*, May 21, 2012, available at <http://keystonestateeducationcoalition.blogspot.com/2012/05/pa-charter-schools-4-billion-taxpayer.html>; see also Knade, *supra* note 12 (“Over the years, billions of tax dollars have been redirected away from local school systems under a funding scheme fundamentally flawed at the outset, one that calculates payouts without regards to the actual cost of operating charter schools, permits far too many of those diverted dollars to be siphoned away from charter school classrooms by for-profit educational management companies and creates a zero-sum situation putting school districts and charter schools at odds instead of promoting collaborative partnerships.”).

<sup>74</sup> Pennsylvania School Boards Ass’n, *supra* note 72, at 9.

<sup>75</sup> Denvir, *supra* note 72.

<sup>76</sup> DeJarnatt, *supra* note 25, at 39; see also Otterbein, *supra* note 11.

<sup>77</sup> See Knade, *supra* note 12.

<sup>78</sup> *Id.*

<sup>79</sup> See Saul, *supra* note 47, (quoting Alex Molnar, a research professor at the University of Colorado Boulder School of Education) (“These folks are fundamentally trying to do to public education what the banks did with home mortgages.”).

charter schools is startup costs. Charter schools, however, can receive grants for planning and startup funding.<sup>80</sup> “Once a charter school is created and initially funded, it opens” for business.<sup>81</sup>

As a “private entit[y] funded by public money,”<sup>82</sup> the revenue streams for charter schools are based in law, specifically in the Charter School Law. Funding for charter schools in Pennsylvania, whether brick and mortar or cyber, is governed by Section 17-1725-A of the Charter School Law.<sup>83</sup> Section 17-1725-A states the following, in pertinent part, with respect to charter school funding in Pennsylvania:

(a) Funding for a charter school shall be provided in the following manner:

(1) There shall be no tuition charge for a resident or nonresident student attending a charter school.

(2) For non-special education students, the charter school shall receive for each student enrolled no less than the budgeted total expenditure per average daily membership of the prior school year, as defined in section 2501(20), minus the budgeted expenditures of the district of residence for nonpublic school programs; adult education programs; community/junior college programs; student transportation services; for special education programs; facilities acquisition, construction and improvement services; and other financing uses, including debt service and fund transfers as provided in the Manual of Accounting and Related Financial Procedures for Pennsylvania School Systems established by the department. This amount shall be paid by the district of residence of each student.

(3) For special education students, the charter school shall receive for each student enrolled the same funding as for each non-special education student as provided in clause (2), plus an additional amount determined by dividing the district of residence’s total special education expenditure by the product of multiplying the combined percentage of section 2509.5(k) times the district of residence’s total average daily membership for the prior school year. This

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<sup>80</sup> 24 P.S. §17-1731-A.

<sup>81</sup> Kraft, *supra* note 18, at 2332.

<sup>82</sup> DeJarnatt, *supra* note 25, at 39.

<sup>83</sup> 24 P.S. §17-1725-A.

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amount shall be paid by the district of residence of each student.

The foregoing per pupil funding scheme, however, is susceptible to and has been manipulated by profiteers. Under this scheme, the business model is simple—“[k]ids equal money.”<sup>84</sup> This is precisely why many charter schools in Pennsylvania are located in urban areas such as Philadelphia,<sup>85</sup> where charter schools have access to more resources (i.e. students) and where parents are willing to send their children to charter schools as a result of underperforming local schools.

When analyzing the Charter School Law, two glaring flaws in funding are evident. First, a charter school is receiving tuition payments for a local school district’s costs rather than the charter schools actual costs.<sup>86</sup> This is especially troubling considering that cyber charter schools actual costs are much lower than brick and mortar school costs.<sup>87</sup>

In a special report issued by Pennsylvania’s Auditor General, it was determined that Pennsylvania’s brick and mortar charter schools spent nearly all of the tuition payments they received, an average of \$13,411 per student, while its cyber counterpart spent on average \$10,145 per student.<sup>88</sup> The

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<sup>84</sup> Saul, *supra* note 47; *see also* 24 P.S. § 17-1723A(d)(1) (there is no enrollment cap for charter schools in Pennsylvania).

<sup>85</sup> Woodall, *supra* note 71 (the City of Philadelphia is home to around 80 total charter schools that are responsible for 46,000 students); *see also* Valerie Strauss, Pennsylvania School District on Verge of Collapse (and using Free Labor to Stay Open), WASHINGTON POST, Jan. 12, 2012, *available at* [http://www.washingtonpost.com/blogs/answer-sheet/post/pennsylvania-school-district-on-verge-of-collapse-and-using-free-labor-to-stay-open/2012/01/10/gIQAuXAgrP\\_blog.html](http://www.washingtonpost.com/blogs/answer-sheet/post/pennsylvania-school-district-on-verge-of-collapse-and-using-free-labor-to-stay-open/2012/01/10/gIQAuXAgrP_blog.html).

<sup>86</sup> Pennsylvania School Boards Ass’n, *supra* note 72, at 5.

<sup>87</sup> Kevin P. Brady, Regina R. Umpstead, Suzanne Eckes, *Uncharted Territory: The Current Legal Landscape of Public Cyber Charter Schools*, 2010 B.Y.U. EDUC. & L.J. 191, 202 (2010) (noting that cyber charter schools do not have the same operational costs as “brick and mortar” schools, but do have start-up costs not associated with “brick and Mortar” schools. Specifically, cyber charter schools employ less instructional staff, employ less administrators, transportation, extensive physical plant, food service, and extra-curricular activities, but do have start-up costs including the cost of computers, scanners, and printers for each student and teacher, as well as content-management systems); *cf* Jack Wagner, Pennsylvania Department of the Auditor General, Bureau of School Audits, Special Report, July 20, 2012, *available at* <http://www.auditorgen.state.pa.us/Department/Press/CyberCharterSpecialReport201206.pdf>; cyber charter schools also receive varying tuition payments because such payments are drawn statewide rather than from one particular district. *See* Pennsylvania School Boards Ass’n, *supra* note 72, at 1.

<sup>88</sup> Wagner, *supra* note 87, at 2.

national average for per pupil costs for brick and mortar and cyber charter schools was approximately \$10,000 and \$6,500 respectively.<sup>89</sup> Assuming such rates reflected actual costs, cyber charter schools stand to profit around \$3,500 for each regular education student it enrolls.

Many charter schools act simply as “a source of government-financed business, much as military contractors have capitalized on Pentagon spending.”<sup>90</sup> The Charter School Law funding formula encourages increased enrollment because each student equals profit, which is why many charter schools have launched aggressive advertising and recruiting campaigns as discussed *infra*, employed for the sheer purpose of raising enrollment.<sup>91</sup> Charter schools also “fail to filter out students who are not suited for the program,”<sup>92</sup> as it would result in a loss of funding. Profits can further be squeezed if charter schools minimize costs by lowering standards and increasing the teacher-student ratio<sup>93</sup> and teacher workload.<sup>94</sup>

The Wagner Report revealed a disparity between Pennsylvania and other states in annual per pupil charter school spending.<sup>95</sup> Collectively, Pennsylvania charter schools spent approximately \$12,657 per student, whereas Ohio charter schools averaged \$10,652 per pupil, Michigan averaged \$9,480 per pupil, Texas averaged \$8,954 per pupil, and Arizona averaged \$7,671 per pupil,<sup>96</sup> which suggests that Pennsylvania charter schools are inefficient.

The second glaring flaw in the funding scheme is the

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<sup>89</sup> Wagner, *supra* note 87, at 3–4.

<sup>90</sup> Saul, *supra* note 47; see also Martha Woodall, *Report Cites Questionable Charter School Practices*, PHILADELPHIA INQUIRER, Jun. 24, 2011, available at [http://www.philly.com/philly/education/20100405\\_Report\\_cites\\_questionable\\_charter\\_school\\_practices.html](http://www.philly.com/philly/education/20100405_Report_cites_questionable_charter_school_practices.html) (Alan Butkovitz, Controller for the City of Philadelphia, stated that “[c]harter [s]chools are an experiment in using private business models in the educational field, but this is not private money. . . . [c]harter schools are spending tax dollars as if it’s nobody’s business—as if they were private fiefdoms.”).

<sup>91</sup> See Saul, *supra* note 47.

<sup>92</sup> Saul, *supra* note 47.

<sup>93</sup> Saul, *supra* note 47 (noting that some high school teachers in the Agora Cyber Charter School were managing more than 250 students).

<sup>94</sup> Saul, *supra* note 47. Without a union, charter schoolteachers are powerless, especially with the over-saturated educator market. As a result, the Agora Cyber Charter School is in a bitter unionization battle in which unfair labor practices have been filed against the school. See also PENNSYLVANIA STATE EDUCATION ASSOCIATION, *available at* <http://www.agoraea.psealocals.org/>

<sup>95</sup> Wagner, *supra* note 87, at 2.

<sup>96</sup> Wagner, *supra* note 87, at 2.

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disparate treatment of special education students.<sup>97</sup> A greater windfall, and larger profit margins, can be obtained via special education students. “For special education students, payments are based on the prior year average daily membership multiplied by 16 percent (total estimated statewide special education enrollment in each local school district). The result is then divided into the special education program spending . . . to get an average cost per student.”<sup>98</sup> Thus, it can be more profitable for a charter school to have a student with relatively mild special education needs as opposed to a student with greater special education needs. Conversely, a student with greater special education needs could result in a deficit for charter schools, as students with more needs are more expensive to educate.<sup>99</sup> As a result, “charter schools struggle to enroll and appropriately serve students with disabilities such as mental retardation; serious emotional disturbance; autism; specific learning disabilities; and hearing, speech, language, or orthopedic or visual impairments.”<sup>100</sup>

Pennsylvania’s charter school funding scheme provides greater incentives for charter schools to “counsel out<sup>101</sup> students with disabilities or cherry-pick students with mild disabilities,”<sup>102</sup> in direct violation of their civil rights.<sup>103</sup> For instance, in the Chester-Upland School District, 40 percent of the special needs students in the Chester Community Charter

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<sup>97</sup> 24 P.S. §17-1725-A(a)(3).

<sup>98</sup> Pennsylvania School Boards Ass’n, *supra* note 72, at 5; *see also* 24 P.S. §17-1725-A(a)(3).

<sup>99</sup> Garda, *supra* note 21, at 688 (in addition to costs, charter schools are motivated to avoid enrolling disabled students for purposes of accountability).

<sup>100</sup> Garda, *supra* note 21, at 659.

<sup>101</sup> Counseling out is the practice of informing parents that the charter school cannot meet their child’s needs and that their child should attend another school instead. Casanova, *supra* note 13, at 243.

<sup>102</sup> Garda, *supra* note 21, at 688; *see also* Casanova, *supra* note 13, at 232 (“This is especially disconcerting considering the fact that these children, with their special individualized needs, are arguably the ones who could benefit from unique programs and innovative practices the most”).

<sup>103</sup> Garda, *supra* note 21, at 659; *see also* 24 P.S. § 17-1723-A(2) (“A charter school may limit admission to a particular grade level, a targeted population group composed of at-risk students, or areas of concentration of the school such as mathematics, science or the arts. A charter school may establish reasonable criteria to evaluate prospective students which shall be outlined in the school’s charter”); *Cent. Dauphin Sch. Dist. v. Founding Coal., of the Infinity Charter Sch.*, 847 A.2d 195 (Pa. Commw. Ct. 2004); Casanova, *supra* note 13, at 238 (providing that as a public school, charter schools must adhere to the Individuals with Disabilities Act, Section 504 of the Rehabilitation Act of 1973, and Title II of the 1990 Americans with Disabilities Act).

School were classified as speech or language-impaired, a significant percentage of special needs students in regards to a disability considered mild in terms of both costs and remediation.<sup>104</sup> Whereas, only 6.3 percent of the Chester Upland School District's special education students were classified as speech or language-impaired students, leaving Chester-Upland to educate a grossly disproportionate number of special education students that are more costly and difficult to educate.<sup>105</sup> Additionally, the special education formula also fails to compensate for those school districts whose special education enrollment is greater than 16 percent of its entire student population.<sup>106</sup>

"The true threat of charter schools to traditional public education is not their creaming effect—luring the best and brightest students away from public schools—but their sedimentary effect, leaving the most difficult and most expensive disabled students behind in public schools."<sup>107</sup> The charter school funding scheme and emphasis on performance tests creates an environment that deters the establishment of progressive charter schools specializing in the education of students with significant needs.

### B. *The Pinch*

Local school districts have particularly and inequitably felt the sting of the charter school funding formula.<sup>108</sup> Charter schools are funded by redirecting funds from local school districts to make tuition payments to charter schools on a per

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<sup>104</sup> Dan Hardy, *Chester Upland: State Special Ed Formula Drains Millions from District*, PHILADELPHIA INQUIRER, Feb. 6, 2012, available at [http://articles.philly.com/2012-02-06/news/31030424\\_1\\_charter-schools-special-education-cost-special-education](http://articles.philly.com/2012-02-06/news/31030424_1_charter-schools-special-education-cost-special-education).

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* ("The special-education cost used to calculate Chester Upland's payments to charters this year was \$17.3 million. The district could only count 16 percent of its students—1,182—in figuring its per-student special-education payments. That came out to \$14,670 per student, added to the regular education per student cost of \$9,858. If the actual number of Chester Upland's special-education students—more than 1,650—were used to figure the per-student cost, that figure would have been cut by more than \$4,000 per student, and the district's payments to charters would be millions less.") *Id.*

<sup>107</sup> Garda, *supra* note 21, at 718; see also David Lapp, *Problem of Charters Schools is Lack of Access for Vulnerable Students*, THE LEGAL INTELLIGENCER, Dec. 20, 2012 ("school choice' means parents and students choosing schools, not schools choosing students").

<sup>108</sup> See Pa. Sch. Bds. Ass'n, *supra* note 72, at 2.

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pupil basis.<sup>109</sup> Originally 25–30 percent of such tuition payments and charter school costs incurred by local school districts were subsidized by the Commonwealth of Pennsylvania (“Commonwealth”),<sup>110</sup> but recent budget cuts have done away with such reimbursements, leaving local school districts with a significant unreimbursed burden.<sup>111</sup> Moreover, the savings local school districts were supposed to see have not been realized because students have not been leaving in neat groups of thirty. Consequently, local school districts have not been able to cut costs as anticipated.<sup>112</sup>

*C. Additional Revenue Streams for Charter Schools*

The Charter School Law provides additional revenue streams beyond the fundamentally flawed funding structure. Among other provisions, Section 2574.3 of the Public School Code of 1949<sup>113</sup> provides state reimbursement to charter schools for leases of buildings or portions of buildings utilized by the charter school. Furthermore, pursuant to the Public School Employees’ Retirement Code,<sup>114</sup> the Commonwealth is required to reimburse “school entities” for contributions of one-half of the amount certified by the Public School Employees’ Retirement Board as necessary to provide to the Public School Employees’ Retirement Fund (“PSERF”).<sup>115</sup> Thus, charter schools are reimbursed 50 percent of their pension costs from the Commonwealth.<sup>116</sup> School districts, however, must include the pension payments they make in their calculations for charter school tuition payments, leaving charter schools with another windfall. In fact, charter schools stand to see increased

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<sup>109</sup> See 24 P.S. § 17-1725-A(a)(2)–(3).

<sup>110</sup> 24 P.S. § 25-2591.1; see also Pa. Sch. Bds. Ass’n, *supra* note 72 **Error! Book-mark not defined.**, at 1.

<sup>111</sup> Steve Esack and John L. Micek, *Corbett Takes Ax to Education Spending*, THE MORNING CALL, Mar. 8, 2011, [http://articles.mcall.com/2011-03-08/news/mc-pennsylvania-corbett-education-bud20110308\\_1\\_education-funding-basic-education-school-districts](http://articles.mcall.com/2011-03-08/news/mc-pennsylvania-corbett-education-bud20110308_1_education-funding-basic-education-school-districts); Knade, *supra* note 12.

<sup>112</sup> Pa. Sch. Bds. Ass’n, *supra* note 72, at 2 (“374 districts paid for fewer than 60 students to attend charter schools.”). In addition, students have been transferring to charter schools from all grade levels, at different times and from various districts. See *id.*

<sup>113</sup> 24 P.S. § 25-2574.3.

<sup>114</sup> 24 Pa.C.S.A. §§ 8101–8535.

<sup>115</sup> 24 Pa.C.S.A. § 8535(2); see also 24 Pa.C.S.A. § 8535(1) (requiring 100% reimbursement if a “member’s” effective date of employment is after June 30, 1994).

<sup>116</sup> *Id.*

revenue from PSERF rate increases via the foregoing “double dip.”<sup>117</sup>

Another issue concerns operating fund balances: “While the school code creates a cap of school districts’ operating fund balances of 8–12 percent, charter schools have no such cap.”<sup>118</sup> The total operating fund balance for charter schools for the 2007–2008 school year was \$110,386,040 and has increased \$47 million since the 2004–2005 school year.<sup>119</sup> Thus, charter schools are blatantly operating with significant surpluses, while school districts like the School District of Philadelphia are operating with what it deems a “catastrophic budget,”<sup>120</sup> or a significant deficit in funding.

#### D. Oversight Fiasco

The autonomy and independence of Pennsylvania’s public charter schools has extended beyond pedagogy. The Charter School Law bestows oversight power on local school districts for brick and mortar charter schools<sup>121</sup> and the Pennsylvania Department of Education for cyber charter schools.<sup>122</sup> There is, however, no state funding for this oversight, making such a task especially difficult for the School District of Philadelphia, which has to oversee approximately eighty charter schools.<sup>123</sup> State funding for oversight would ensure that financially struggling schools would have the resources to actually provide adequate oversight, or alternatively, the Commonwealth could provide such oversight.

In April of 2010, Philadelphia’s Office of the Controller issued a scathing report of the expenditures of Philadelphia’s charter schools revealing, among other things, excessive compensation packages, management agreements for percentages of charter school “profits,” and zero compliance

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<sup>117</sup> Pa. Sch. Bds. Ass’n, *supra* note 72, at 17; *see also* Wagner, *supra* note 87.

<sup>118</sup> Pa. Sch. Bds. Ass’n, *supra* note 72, at 16 (stating approximately 80% of cyber schools have fund balances exceeding the cap placed on school districts).

<sup>119</sup> Pa. Sch. Bds. Ass’n, *supra* note 72, at 16.

<sup>120</sup> Kristen A. Graham, ‘Catastrophic’ Budget Laid Out by Philly Schools, PHILADELPHIA INQUIRER, Apr. 20, 2013, [http://articles.philly.com/2013-04-20/news/38677018\\_1\\_budget-picture-summer-school-food-services](http://articles.philly.com/2013-04-20/news/38677018_1_budget-picture-summer-school-food-services).

<sup>121</sup> 24 P.S. § 17-1728-A.

<sup>122</sup> 24 P.S. § 17-1742-A.

<sup>123</sup> DeJarnatt, *supra* note 25, at 45. The School District of Philadelphia Charter School Office had a staff of four to carry out the oversight function for Philadelphia-based brick and mortar charter schools. *Id.*

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with Pennsylvania's Right to Know Law.<sup>124</sup> There were also issues with charter schools attempting to qualify employees for a PSERF pension, when such employees would not otherwise be eligible for a PSERF pension.<sup>125</sup> In addition, Form 990s<sup>126</sup> submitted by charter schools have raised many red flags.<sup>127</sup> For example, Form 990 entries for "other" expenses that were neither identifiable nor defined totaled \$912,274, \$1,071,755, and \$432,145 for some Philadelphia-based brick and mortar charter schools.<sup>128</sup>

Lack of any real or adequate oversight has also resulted in excessive compensation packages for charter school leaders.<sup>129</sup> During the 2007–2008 school year, the ten highest paid brick and mortar Philadelphia-based charter school CEOs, a public school equivalent to a superintendent, averaged approximately \$175,246 per year; whereas, the Assistant Superintendents for the entire School of District of Philadelphia averaged only \$133,889.<sup>130</sup> The CEO for the Multi-Cultural Academy Charter School, Vuong Thuy, received a base salary of \$206,342.<sup>131</sup> Even more troubling, the CEO for K12's<sup>132</sup> Pennsylvania-based cyber charter school, the Agora Cyber Charter School, was compensated \$5 million in 2011 alone.<sup>133</sup>

Charter schools also appear to have an inequitable and overabundance of administrators.<sup>134</sup> Administrative expenditures for brick and mortar charter schools in

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<sup>124</sup> Officer of the Controller, FRAUD & SPECIAL INVESTIGATIONS: REVIEW OF CHARTER SCHOOL OVERSIGHT, A FRAUD VULNERABILITY ASSESSMENT i-ii (2010), *available at* [http://www.philadelphiacontroller.org/publications/other%20reports/CharterSchoolInvestigation\\_FullReport.pdf](http://www.philadelphiacontroller.org/publications/other%20reports/CharterSchoolInvestigation_FullReport.pdf).

<sup>125</sup> *Id.* at M4.

<sup>126</sup> <http://www.guidestar.org/rxg/help/faqs/form-990/index.aspx#faq1942> ("Form 990 is an annual reporting return that certain federally tax-exempt organizations must file with the IRS. It provides information on the filing organization's mission, programs, and finances").

<sup>127</sup> DeJarnatt, *supra* note 25, at 64–65.

<sup>128</sup> *Id.*

<sup>129</sup> DeJarnatt, *supra* note 25, at 66.

<sup>130</sup> *Id.*

<sup>131</sup> DeJarnatt, *supra* note 25, at 67.

<sup>132</sup> *See* Saul, *supra* note 47 (K12 is a publicly traded for-profit education management company that runs Agora Cyber Charter School, a Pennsylvania public cyber charter school, which accounts for approximately ten percent (10%) of K12's revenue for the 2010–2011 school year).

<sup>133</sup> *Id.*; *see also* Feinberg, *supra* note 73 (noting that Pennsylvania's Budget Secretary, Charles Zogby, was a former K12 executive).

<sup>134</sup> *See* DeJarnatt, *supra* note 25, at 70.

Philadelphia averaged \$1,506 per pupil as compared to \$792 per pupil for the School District of Philadelphia.<sup>135</sup> Additionally, “Charter school boards often include people who were involved in the founding of the school and who have a strong relationship with the CEO.”<sup>136</sup> Thus, nepotism is not a foreign concept to charter schools and seems to be a component of the charter school hiring process.<sup>137</sup>

In regards to funding, some Philadelphia-based charter schools were operating with significant surpluses of \$1,035,467, \$1,833,291, \$1,427,451, and \$1,879,670,<sup>138</sup> while the School District of Philadelphia is facing a shortfall of \$300 million for the 2013–2014 school year.<sup>139</sup> Conversely, some Philadelphia-based charter schools have been operating with deficits of \$1,066,835, \$1,543,043, and \$219,291.<sup>140</sup>

The leasing reimbursement scheme<sup>141</sup> has also presented another opportunity for profiteers and entrepreneurs that have set up entities associated with the charter school in order to privately capitalize on the state reimbursements to charter schools for leasing properties.<sup>142</sup> The monthly lease payment for brick and mortar charter schools is, in many cases, excessive.<sup>143</sup> For example, one-third of the Multi-Cultural Academy Charter School’s revenue in 2011, \$516,000, went to pay the charter school’s building lease.<sup>144</sup> Similarly, Preparatory Charter School for Math, Science, Technology, and Careers purchased a property in 2003 for \$875,000 and expended \$2,637,968 in building costs that same year.<sup>145</sup> The property was then transferred for \$1 to an associated entity in which three of the

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<sup>135</sup> See DeJarnatt, *supra* note 25, at 70.

<sup>136</sup> See DeJarnatt, *supra* note 25, at 46.

<sup>137</sup> See DeJarnatt, *supra* note 25, at 70. For instance, the Community Academy Charter School, which was founded by Joseph Proietta, has six employees with the surname of Proietta.

<sup>138</sup> See DeJarnatt, *supra* note 25, at 72.

<sup>139</sup> Graham, *supra* note 120; see also Woodall, *supra* note 71 (The School District of Philadelphia spent \$356.7 million of its \$2.3 billion budget on charters schools in the 2010–2011 school year.); see also Strauss, *supra* note 85 (highlighting the potential financial collapse of the Chester-Upland School District in Chester, Pennsylvania, where forty-five percent (45%) of the students are served by public charter schools).

<sup>140</sup> DeJarnatt, *supra* note 25, at 71.

<sup>141</sup> 24 P.S. § 25-2574.3.

<sup>142</sup> DeJarnatt, *supra* note 25, at 72.

<sup>143</sup> See *id.*

<sup>144</sup> DeJarnatt, *supra* note 25, at 73.

<sup>145</sup> DeJarnatt, *supra* note 25, at 74.

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charter school's board members were connected.<sup>146</sup> The associated entity in that case received \$1,080,000 in lease payments from the charter school, which in turn was reimbursed by the state.<sup>147</sup>

Charter Schools are also vulnerable to fraud. Dorothy June Brown, founder of the Agora Cyber Charter School, was charged with defrauding three charter schools of more than \$6.5 million between 2007 and April of 2011, \$5.6 million of which purportedly was paid under a fabricated management contract to her private educational management company.<sup>148</sup> As of November 2012, nineteen Philadelphia charters schools were under investigation by federal authorities and there have been five convictions of charter school officials for, among other things, fraud and theft.<sup>149</sup> Additionally, more than 20 percent of all charter schools are or have been under investigation for, among other things, misappropriation of funds.<sup>150</sup>

Utilizing public funds, many charter schools also engage in aggressive advertising and lobbying campaigns.<sup>151</sup> For example, K12 Inc., a publicly managed company that manages schools like Agora, spent \$26.5 million on advertising in 2010 in an effort to recruit and enroll students through recruitment meetings in area hotels, as well as billboard, TV, and radio ads.<sup>152</sup> K12's recruitment call center has been characterized as a "high-pressured sales environment aimed at one thing: enrollment."<sup>153</sup> As of 2011, K12 had spent around \$681,000 on lobbying in Pennsylvania since 2007.<sup>154</sup> Pennsylvania Families for Public Cyber Schools, which receives money from charter schools, purportedly spent approximately \$250,000 on lobbying

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<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> Press Release, U.S. Attorney's Office, Charter School Founder Dorothy June Brown Charged in a \$6 Million Fraud Scheme (Jun. 24, 2012) *available at* <http://www.fbi.gov/philadelphia/press-releases/2012/charter-school-founder-dorothy-june-brown-charged-in-6-million-fraud-scheme>. (Dorothy June Brown is the founder of the Agora Cyber Charter School).

<sup>149</sup> DeJarnatt, *supra* note 25, at 49–50 (2012).

<sup>150</sup> Press Release, Representative James R. Roebuck, 44 Pa. cyber/charter schools with investigations or problems; Support grows for bill to return \$365 million in overpayments (Mar. 19, 2013) *available at* <http://www.pahouse.com/roebuck/PAHouseNews.asp?doc=29066>.

<sup>151</sup> Saul, *supra* note 47.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

in the past five years.<sup>155</sup> The founder of the for-profit management company that operates the Chester Community Charter School was the largest single contributor to Pennsylvania Governor Tom Corbett's campaign.<sup>156</sup>

For-profit educational management companies are also prevalent in many of Pennsylvania's charter schools. Pennsylvania's Auditor General determined that 42 percent of cyber charter schools and 30 percent of brick and mortar charter schools paid for-profit educational management companies and that 100 percent of the top five of Pennsylvania's largest charter schools utilized educational management organizations during the 2010–2011 school year.<sup>157</sup> The Pennsylvania Cyber Charter School, for instance, is the largest cyber charter school in Pennsylvania and pays “tens of millions of dollars a year to a network of nonprofit and for-profit companies run by former executives.”<sup>158</sup> All in all, according to Pennsylvania's Auditor General, Pennsylvania taxpayers are being overcharged \$365 million annually as a result of Pennsylvania's charter school funding scheme.<sup>159</sup> Adequate oversight would likely help reduce this number significantly.

## V. THE PRODUCT

“The deal struck between charter schools and their authorizers is simple: charter schools are freed from rules and

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<sup>155</sup> Saul, *supra* note 47.

<sup>156</sup> Tracie Mauriello, *Corbett's Team Jingles with Donors, Two-thirds of Members Have Financial Ties to Campaign*, PITTSBURGH POST-GAZETTE, Dec. 19, 2010, <http://www.post-gazette.com/stories/local/state/corbetts-team-jingles-with-donors-278351/#ixzz1KufEATau>; see also Denvir, *supra* note 72 (“Three members of Corbett's 2010 education transition team, including Budget Secretary Charles Zogby, have managed charters touched by accusations of excessive executive compensation, sketchy financial practices or corruption.”).

<sup>157</sup> Wagner, *supra* note 87, at 6.

<sup>158</sup> Rich Lord & Eleanor Chute, *Cyber Charter is a Magnet for Money: State's Largest Online Public School Pays Millions to Companies Run by its Former Executives*, PITTSBURGH POST-GAZETTE, July 17, 2012, [http://articles.philly.com/2012-07-17/news/32699011\\_1\\_cyber-charter-nick-trombetta-pa-cyber](http://articles.philly.com/2012-07-17/news/32699011_1_cyber-charter-nick-trombetta-pa-cyber).

<sup>159</sup> Wagner, *supra* note 87, at 1.; see also Steve Esack, *Charter School Reform Heating up as Part of State Budget Debate: State Senators Quiz Education Secretary on Governor's Appetite to Reform Charter School Law to Save Taxpayers Money*, THE MORNING CALL, Mar. 5, 2013, available at [http://articles.mcall.com/2013-03-05/news/mc-pa-senate-education-budget-hearing-0304-20130304\\_1\\_charter-schools-school-districts-education-secretary-ron-tomalis](http://articles.mcall.com/2013-03-05/news/mc-pa-senate-education-budget-hearing-0304-20130304_1_charter-schools-school-districts-education-secretary-ron-tomalis).

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regulations, but only if they improve student academic outcomes . . . determined by a combination of student performance on standardized tests and graduation rates.”<sup>160</sup> A recent report by Stanford University’s Center for Research on Education Outcomes, however, suggests that Pennsylvania charter schools have not been living up to their end of the bargain.<sup>161</sup>

The learning gains for students in brick and mortar charter schools was significantly less on average than traditional public schools in math from 2007–2010, but was nearly the same for reading.<sup>162</sup> Cyber charter schools, however, had significantly smaller gains in reading and math than those students in traditional public schools.<sup>163</sup> “Overall, charter school performance in Philadelphia lagged in growth compared to traditional public schools.”<sup>164</sup> A 2010 PEW Study revealed mixed results:

On the [Pennsylvania System of School Assessment], charter students in Philadelphia performed better in math and reading in 2009 than their district counterparts. Fifty-six percent of charter students scored ‘advanced’ or ‘proficient’ in reading, compared to 48 percent of the district students and 71 percent statewide. When it came to math, 57 percent of the charter students scored ‘advanced’ or ‘proficient,’ compared to 52 percent of the district students and 73 percent statewide.<sup>165</sup>

This outcome, however, should be weighted in light of the charter schools mix of students. Charter schools “serve fewer impoverished students, fewer English language learners, fewer students with severe disabilities, and fewer boys.”<sup>166</sup> Despite this, the PEW study also found that

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<sup>160</sup> Garda, *supra* note 21, at 666.

<sup>161</sup> See CHARTER SCHOOL PERFORMANCE IN PENNSYLVANIA, CENTER FOR RESEARCH ON EDUCATION OUTCOMES, STANFORD UNIVERSITY (April 2011) *available at* [http://credo.stanford.edu/reports/PA%20State%20Report\\_20110404\\_FINAL.pdf](http://credo.stanford.edu/reports/PA%20State%20Report_20110404_FINAL.pdf).

<sup>162</sup> *Id.* at 8.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at 20.

<sup>165</sup> THE PEW CHARITABLE TRUSTS’ PHILADELPHIA RESEARCH INITIATIVE, PHILADELPHIA’S CHANGING SCHOOLS AND WHAT PARENTS WANT FROM THEM (2010) *available at* [http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Philadelphia\\_Research\\_Initiative/PRI\\_education\\_report.pdf](http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Philadelphia_Research_Initiative/PRI_education_report.pdf).

<sup>166</sup> See Lapp, *supra* note 107.

On the 2009 SAT . . . students in charter high schools performed worse than their counterparts in district-run schools. They scored an average of 779 out of 1,600 in the math and verbal portions of the test, taken by students applying to college, compared to an average of 814 in district-run high schools. Both are well below the national average of 1,016.<sup>167</sup>

With regard to recent academic benchmarks, the Corbett Administration originally altered the Pennsylvania System of School Assessment (“PSSA”) testing rules for charter schools without federal approval in order to make it easier for charter schools to satisfy federal benchmarks.<sup>168</sup> Prior to a federally mandated recalculation, 54 percent of charter schools made “AYP,”<sup>169</sup> or adequate yearly progress.<sup>170</sup> After the federally mandated recalculation, only 28 percent of Pennsylvania charter schools made AYP in the 2011–2012 school year, none of which were cyber charter schools.<sup>171</sup> Comparatively, 50 percent of district-run schools made AYP for the 2011–2012 school year.<sup>172</sup> Charter schools also have a 2.3 percent dropout rate as compared to the district-run school dropout rate of 1.2 percent.<sup>173</sup> Lastly, concerns have also risen regarding the innovativeness of charter schools, especially cyber charter

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<sup>167</sup> THE PEW CHARITABLE TRUSTS’ PHILADELPHIA RESEARCH INITIATIVE, *supra* note 165, at 20.

<sup>168</sup> Steve Esack & Eugene Tauber, *State Changed PSSA Testing Rules for Charter Schools without Federal Approval: Rules Change Appears to Have Inflated Success Rate of Some Charter Schools*, THE MORNING CALL, Oct. 5, 2012, [http://articles.mcall.com/2012-10-05/news/mc-pa-charter-tomalis-ayp-20121005\\_1\\_public-charter-schools-bob-fayfich-test-participation-rates](http://articles.mcall.com/2012-10-05/news/mc-pa-charter-tomalis-ayp-20121005_1_public-charter-schools-bob-fayfich-test-participation-rates) (“Gov. Tom Corbett’s education chief changed the PSSA testing rules in a way that makes it easier for charter schools to meet federal benchmarks than traditional public schools. Education Secretary Ron Tomalis’ change, made without federal approval, might have skewed the results of the 2011–12 PSSA scores to make it appear charter schools were outperforming traditional public schools, according to a Morning Call review of publicly available test score data.”).

<sup>169</sup> AYP, or adequate yearly progress, is a part of the federal No Child Left Behind Act and measures the annual progress of schools towards reaching the goal of 100% proficiency in math and reading. Pennsylvania Department of Education, *Academic Achievement Report* <http://paayp.emetric.net/Home/About> (last visited Jan. 30, 2014).

<sup>170</sup> Martha Woodall, *With New Rules, Pa. Charter School Performance Plumets*, PHILADELPHIA INQUIRER, Jan. 25, 2013, <http://www.philly.com/philly/education/188308291.html>.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> Esack, *supra* note 159.

schools.<sup>174</sup>

## VI. THE NEED TO REFORM THE BUSINESS OF CHARTER SCHOOLS

Charter schools are “a good idea, a timely experiment—but one that unfortunately has run amok in Pennsylvania.”<sup>175</sup> Despite exemplary charter school examples, “[t]he data are [sic] clear. It’s all about the profits.”<sup>176</sup> Profiteers have hijacked the charter school movement, siphoning public funds, pocketing efficiency costs, and squeezing profits in what has evolved into a metaphorical “educational gold rush.”<sup>177</sup> The Charter School Law has also fostered a climate where charter schools are competing against local school districts for resources and students.<sup>178</sup> The funding scheme and outcome determinative focus of the Charter School Law also encourages charter schools to cherry pick the best and cheapest students to educate, while weeding out those students that are more costly to educate and arguably the most vulnerable.<sup>179</sup> In addition, some politicians are ostensibly utilizing the charter school movement and the rhetoric of “school choice” to further their political agendas of privatization and the dismantling of unions.<sup>180</sup> Some of the most troubling aspects of the charter school movement are the numerous instances and anecdotes of fraud, nepotism, and chicanery as described *supra*.<sup>181</sup>

Pennsylvania students are the losers in all of this. The

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<sup>174</sup> See *e.g.*, Saul, *supra* note 47 (questioning the “cutting-edge” nature of cyber school, noting that critics have characterized cyber education as subsidized home schooling).

<sup>175</sup> Satullo, *supra* note 1 **Error! Bookmark not defined.**

<sup>176</sup> Ratvich, *supra* note 68.

<sup>177</sup> Heller, *supra* note 5.

<sup>178</sup> Kristen A. Graham, *Philadelphia Hopes to Launch Cyber School in Fall*, PHILADELPHIA INQUIRER, Apr. 18, 2013, [http://articles.philly.com/2013-04-19/news/38650042\\_1\\_cyber-charters-cyber-students-virtual-school](http://articles.philly.com/2013-04-19/news/38650042_1_cyber-charters-cyber-students-virtual-school) (Philadelphia school district is partnering with the Chester County Intermediate Unit to provide a virtual academy for its students).

<sup>179</sup> Garda, *supra* note 21, at 718; see also Lapp, *supra* note 107 (“[S]chool choice’ means parents and students choosing schools, not schools choosing students.”).

<sup>180</sup> See Denvir, *supra* note 72 (“Against this faint resistance to charters, Corbett—with his ties to the pro-charter advocates and execs angling for a slice of the billion-dollar education pie—reinforced the view that he is stacking the deck against traditional public schools in June when a new law, requiring that test scores be included in teacher evaluations, excluded charters.”).

<sup>181</sup> See generally, DeJarnatt, *supra* note 25; see also Otterbein, *supra* note 11.

Charter School Law is flawed and in desperate need of reform. It should be amended to provide more oversight, transparency, accountability, and compliance with Pennsylvania's Sunshine Act<sup>182</sup> and Right to Know Law,<sup>183</sup> whether through a funded charter school oversight office or a more efficient charter school revocation statute to ensure that charter schools that are actually improving education are funded, while by the same token promoting accountability.<sup>184</sup> The inequitable funding scheme for charter schools urgently needs to be changed to reflect actual charter school costs,<sup>185</sup> while removing the retirement funding double dipping and blind lease reimbursement arrangement.<sup>186</sup> Operating fund balances should also be capped.<sup>187</sup> Legislators should further consider curtailing or regulating for-profit educational management companies.<sup>188</sup> Additionally, the original reimbursement to school districts for charter school costs should be reinstated. The Charter School Law further needs to implement mechanisms to protect our most vulnerable students. For instance, the Charter School Law should be amended to require universal enrollment procedures,<sup>189</sup> while penalizing charter schools that improperly exclude students.<sup>190</sup> Moreover, greater weight should be accorded to academic progress, growth, and input, rather than output.<sup>191</sup> The Charter School Law further needs to be revised to allow local schools districts to "share in the charter school experiment."<sup>192</sup>

The Pennsylvania General Assembly has recognized this need for reform and "the need to promote more sensible funding, quality in planning and governance, better fiscal and educational accountability, and more transparency in

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<sup>182</sup> 65 Pa.C.S.A. § 701.

<sup>183</sup> 65 P.S. § 67.101.

<sup>184</sup> See Grady, *supra* note 2, at 539.

<sup>185</sup> Wagner, *supra* note 87, at 2.

<sup>186</sup> *Id.*

<sup>187</sup> Pa Sch. Bds. Ass'n, *supra* note 72, at 16.

<sup>188</sup> See Kathleen Conn, *When School Management Companies Fail, Righting Educational Wrongs*, 31 J.L. & EDUC. 245 (2002); see also Wagner, *supra* note 87, at 2.

<sup>189</sup> Garda, *supra* note 21, at 710.

<sup>190</sup> David Lapp, *Charter School Reform Must Protect Vulnerable Students*, THE LEGAL INTELLIGENCER, Nov. 26, 2012.

<sup>191</sup> See Joel Naroff, *Are Charter Schools Working, It's Anybody's Guess*, Philadelphia Inquirer, Apr. 8, 2013, [http://articles.philly.com/2013-04-08/business/38348740\\_1\\_traditional-public-school-cyber-schools-charter-school](http://articles.philly.com/2013-04-08/business/38348740_1_traditional-public-school-cyber-schools-charter-school).

<sup>192</sup> Knade, *supra* note 28.

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operations.”<sup>193</sup> The 2013–2014 legislative session has produced numerous pieces of legislation proffered to address the inequities and apparent flaws of the Charter School Law.<sup>194</sup> There is also legislation, however, which seeks to promote more charter schools without first instituting reform. Specifically, some legislators, with the support of the Corbett administration, appear to be “stacking the deck” against public schools in what is seemingly an attempt to cater to charter school executives to further political ideologies.<sup>195</sup> Such legislation would authorize “the governor to declare a school district ‘financially distressed’ and appoint a chief recovery officer empowered to close schools, cancel union contracts and hand over school management to private entities.”<sup>196</sup> Handing over the reins to the school districts to an experiment, however, seems highly illogical.

## VII. CONCLUSION

The charter school system has not proven to be the expected pinnacle to reform. Charter schools have the potential to fix certain aspects of Pennsylvania’s educational system, but only if the Charter School Law is reformed to close loopholes and curtail its vulnerability to harmful profiteering.

In conclusion, education is not a business and should not be operated as such. Many business principles run contrary to educational principles in which we want all children to maximize their achievement. The charter school movement is merely an experiment, and legislators need to ensure the Charter School Law provides the necessary laboratory conditions for charter schools to accurately be assessed, free from profiteering, fraud, corruption, and political ideologies, which have undoubtedly plagued the charter school initiative

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<sup>193</sup> See Knade, *supra* note 28.

<sup>194</sup> See [http://www.pdba.org/issues-advocacy/issues-research/cyber-charter-schools/2013bills/Charter\\_Reform\\_Bills-041113.pdf](http://www.pdba.org/issues-advocacy/issues-research/cyber-charter-schools/2013bills/Charter_Reform_Bills-041113.pdf) (noting the following Pennsylvania charter school reform bills: HB 979, HB 984, HB 759, HB 617, HB 618, HB 980, HB 934, HB 970, HB 971, HB 371, HB 372, HB 1074, HB 1082, and SB 812).

<sup>195</sup> See Denvir, *supra* note 72 (“But public-education activists say a larger agenda to undermine public schools in favor of charter operators—at a large cost to fiscally distraught districts—is evident.”).

<sup>196</sup> *Id.*; see also Associated Press, Pennsylvania advances bill that paves way for state takeovers of struggling school districts, THE PATRIOT NEWS, May 22, 2012, [http://www.pennlive.com/midstate/index.ssf/2012/05/pennsylvania\\_advances\\_bill\\_tha.html](http://www.pennlive.com/midstate/index.ssf/2012/05/pennsylvania_advances_bill_tha.html).

from the beginning. Students should not be viewed in dollars and cents.