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## Cyber Charter Schools - An Analysis of Their Legality

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# CYBER CHARTER SCHOOLS—AN ANALYSIS OF THEIR LEGALITY

*Kathryn Kraft\**

## I. INTRODUCTION

**A**MERICANS highly value education. Because of this, they have proposed various reform methods in an effort to either improve public education or to provide an alternative to it. One such reform has gained widespread acceptance in the past ten years—charter schools.

Charter schools are publicly-funded schools; however, they operate with more autonomy than traditional public schools. Charter schools gain this autonomy by entering into a contract with a public school district or state education board and promising strong student success rates in exchange for less administrative oversight and more local control. Ten years ago, only one state authorized charter schools. Now, close to forty states authorize charter schools with express charter school laws.

A second generation of charter schools recently appeared. “Cyber” or “virtual” charter schools now operate in more than ten states. These schools function exclusively over the Internet to provide education to their students. Students log into the system from home using computers purchased with state funds. Students then receive assignments and feedback over the Internet from the cyber charter school.

Cyber charter schools faced immediate criticism. Opponents question their ability to provide quality instruction without human interaction, their reliance on parents to verify attendance and provide educational assistance, the amount of money they receive relative to the amount of money they expend, and the state’s ability to monitor these schools and their students. The critics’ strongest argument, however, addresses the legality of cyber charter schools.

Cyber charter school opponents challenge their legality under current legislative frameworks. Most states enacted charter school laws before technology could support schools operating exclusively over the Internet; it is likely the laws’ drafters did not even contemplate cyber schools. Therefore, it is possible that cyber charter schools fall outside the scope of charter school laws. This comment analyzes cyber charter schools’ le-

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gality under existing charter school laws. It then proposes a plausible way for states to give these schools the opportunity to succeed, while providing sufficient oversight to curtail problems: a new statute aimed specifically at cyber charter schools.

This comment begins with an overview of charter schools, focusing on their history and analyzing both their perceived advantages and disadvantages. Next, it addresses charter school legislation in general. Following this general analysis, it compares and contrasts the different approaches to charter schools taken by two representative states and then briefly evaluates the potential for charter school success under each legislative framework. This section concludes with a brief look at the federal legislation that impacts charter schools.

Following this overview, this comment specifically addresses cyber charter schools. It presents their history and analyzes their perceived advantages and disadvantages. Then, it addresses the relevant case law and state legislation that gives insight into the legality of these schools.

Finally, this comment analyzes the need for specific cyber charter school legislation. A strong, well-drafted cyber charter school law would serve two purposes. First, it would enable cyber charter schools to provide education to students who work best in the cyber environment. Second, it would address critics' concerns and relieve state courts from judicial law making.

## II. THE CHARTER SCHOOL MOVEMENT

Charter schools are legislatively authorized, publicly-funded schools created by contracts between an individual or group and a granting body, usually a public school district.<sup>1</sup> Charter schools operate independent of many state and local regulations and thus can offer students a diverse and innovative education without the hindrance of regulation.<sup>2</sup>

Charter schools represent a hybrid of traditional public schools and private schools, sharing attributes of both.<sup>3</sup> For example, charter schools are akin to private schools in that they are independent and self-governing.<sup>4</sup> Charter schools exert control over their curriculum, staff, budget, organization, school calendar, and daily schedule.<sup>5</sup> Also like private schools, charter schools are schools of choice, chosen by the families of their students and by the teachers and administrators who staff the schools.<sup>6</sup>

Charter schools also share similarities with traditional public schools. First, they are public entities. Because charter schools receive public funds, they must admit students without regard to race, religion, or aca-

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1. Karla A. Turekian, Note and Comment, *Traversing the Minefields of Education Reform: The Legality of Charter Schools*, 29 CONN. L. REV. 1365, 1373-76 (1997).

2. *Id.*

3. CHESTER E. FINN, JR. ET AL., *CHARTER SCHOOLS IN ACTION: RENEWING PUBLIC EDUCATION* 14-15 (2000).

4. *Id.* at 15.

5. *Id.*

6. *Id.*

demic ability.<sup>7</sup> Second, like traditional public schools, charter schools are accountable to a public body (usually a state or local school board).<sup>8</sup> However, charter schools do differ significantly from traditional public schools. First, charter schools can be formed by non-traditional entities, such as teachers, parents, and both non-profit and for-profit organizations.<sup>9</sup> Second, they are exempt from many state and local regulations that govern traditional public schools.<sup>10</sup> Finally, charter schools are held liable to their granting bodies for producing satisfactory educational gains, and, unlike traditional public schools, may be permanently closed for failing to do so.<sup>11</sup>

#### A. THE CHARTER SCHOOL MOVEMENT'S HISTORY

The charter school movement began in response to a perceived need for diversity and innovation in public schools.<sup>12</sup> Today's traditional public schools are heavily influenced by the "factory model" of education.<sup>13</sup> This education model is based upon the principles that proved successful in early twentieth century factories.<sup>14</sup> In a factory model education system, experts design the overall system and make decisions in a centralized method.<sup>15</sup> While this educational model has enabled America's public schools to dramatically raise the percentage of high school graduates, evidence shows that America's achievements in producing such a high quantity of high school graduates has been undermined by its reliance on a lower quality of education.<sup>16</sup> Still, the factory model remains today, manifesting itself in several ways. For example, schools reward teachers for producing higher than expected gains in student achievement on standardized tests and schools track students according to their academic ability and age.<sup>17</sup> The factory model system often frustrates students, parents, teachers, and administrators.<sup>18</sup>

Against this factory model backdrop, the school choice movement began. Parents and students wanted more educational choices and the opportunity to individualize public school education. Teachers and administrators wanted more control over their professional work. School choice initiatives took various forms including open-enrollment plans, inter-district transfer programs, private school tuition vouchers, magnet

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7. *Id.*

8. *Id.*

9. *Id.* at 15.

10. *Id.*

11. *Id.* at 16.

12. Molly O'Brien, *Symposium: Education and the Constitution: Shaping Each Other and the Next Century: Free at Last? Charter Schools and the "Deregulated" Curriculum*, 34 AKRON L. REV. 137, 139 (2000).

13. *Id.* at 146.

14. *Id.*

15. *Id.*

16. FINN ET AL., *supra* note 3, at 56-57.

17. O'Brien, *supra* note 12, at 147.

18. FINN ET AL., *supra* note 3, at 57.

schools, and charter schools.<sup>19</sup> Of these various methods, charter schools have achieved the greatest success in state legislatures, as evidenced by the number of state legislatures that have passed specific charter school legislation.<sup>20</sup> Minnesota enacted the nation's first charter school law in 1991. Since then, thirty-seven other states and the District of Columbia have authorized charter schools with express charter school laws.<sup>21</sup> By 2000, more than 1,600 charter schools operated in America, serving almost 400,000 students.<sup>22</sup>

#### B. LEGISLATIVE SUPPORT FOR THE CHARTER SCHOOL MOVEMENT

Charter schools owe their success in state legislatures to their bipartisan appeal. Both Republicans and Democrats embrace these schools.<sup>23</sup> Republicans support charter schools because these schools provide competition to traditional public schools, operate without the burdens of state or local regulations, and must produce strong results in order to continue operating.<sup>24</sup> Democrats support charter schools because they present a new approach to education while adhering to the core values of traditional public schools.<sup>25</sup> Democrats admire charter schools' innovative approaches to education and appreciate their open admissions process, free cost, and nonsectarian purpose.<sup>26</sup> Most legislators believe these schools will provide flexibility and innovation for school curricula and increase parental involvement.<sup>27</sup> Legislators also believe charter schools will increase learning opportunities for students, create valid public school choices for parents and students, create new professional opportunities for public school teachers, and provide more accountability.<sup>28</sup>

#### C. THE CHARTER SCHOOL MOVEMENT'S GOAL

The charter school movement claims to improve America's public education system. Charter school proponents believe that charter schools foster dynamics that will improve all public schools.<sup>29</sup> Proponents believe charter schools can accomplish this for two reasons. First, proponents believe the new concepts and methods attempted by charter schools will later be applied in traditional public schools.<sup>30</sup> This allows charter schools' innovative concepts and methods to reach students who attend

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19. *Id.* at 153.

20. *Id.*

21. West Ed and U.S. Dept. of Educ., *Frequently Asked Questions*, at [http://www.uscharterschools.org/pub/uscs\\_docs/gi/faq.htm](http://www.uscharterschools.org/pub/uscs_docs/gi/faq.htm) (2002).

22. INSIDE CHARTER SCHOOLS: THE PARADOX OF RADICAL DECENTRALIZATION 7 (Bruce Fuller ed., 2000).

23. BRYAN C. HASSEL, *THE CHARTER SCHOOL CHALLENGE: AVOIDING THE PITFALLS, FULFILLING THE PROMISE 2* (1999).

24. *Id.*

25. *Id.*

26. *Id.*

27. O'Brien, *supra* note 12, at 155.

28. West Ed, *supra* note 21.

29. HASSEL, *supra* note 23, at 2.

30. *Id.*

traditional public schools. Second, proponents believe charter schools will compete with traditional public schools, forcing them to reform in response to the competitive pressure.<sup>31</sup>

#### D. CREATING AND OPERATING A CHARTER SCHOOL

The mechanics of creating a charter school can be simple: an entity that desires to create a charter school contracts with the designated granting body of the state.<sup>32</sup> Although states vary in classifying the entities that can seek charters, most states allow teachers, parents, public schools, private schools, non-profit agencies, and for-profit firms to apply for charters.<sup>33</sup> The granting body is a public entity—usually the state board of education<sup>34</sup>—although some states allow local or county school boards, city councils, and public universities to issue charters.<sup>35</sup>

The applicant must apply to the designated granting body.<sup>36</sup> The application usually explains the purpose and structure of the proposed charter school.<sup>37</sup> If approved, the granting body and the applicant enter a charter (or contract) and the applicant promises to follow the charter's terms and goals and the granting body promises to exempt the applicant from certain public educational regulations.<sup>38</sup> The charter usually lasts between three to fifteen years,<sup>39</sup> and the granting body usually retains the right to revoke the charter during this term if the applicant fails to fulfill its promises.<sup>40</sup> The granting body also reserves the right to evaluate the charter school's success at the end of the term.<sup>41</sup> If the granting body is pleased with the school's performance, it can renew the charter; if the granting body is displeased, it can refuse to renew the charter and close the school.<sup>42</sup>

After a granting body approves a charter school application, the charter school can begin receiving funds. Funding for charter schools comes either from the state or from the school district where each charter school student resides<sup>43</sup> and is based on a calculation of per pupil expenditures.<sup>44</sup> Usually, charter schools receive funds for each student in an amount equal to the amount the student's traditional public school would

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31. *Id.*

32. Turekian, *supra* note 1, at 1373.

33. *Id.*

34. Jessica P. Driscoll, Student Research, *Hot Topics in Education: Charter Schools*, 8 GEO. J. ON POVERTY L. & POL'Y 505, 505-06 (2001).

35. FINN ET AL., *supra* note 3, at 17.

36. Driscoll, *supra* note 34, at 505-06.

37. Turekian, *supra* note 1, at 1373.

38. Driscoll, *supra* note 34, at 506.

39. Justin M. Goldstein, Note, *Exploring "Unchartered" Territory: An Analysis of Charter Schools and the Applicability of the U.S. Constitution*, 7 S. CAL. INTERDIS. L.J. 133, 139 (1998).

40. Driscoll, *supra* note 34, at 506.

41. See FINN ET AL., *supra* note 3, at 16.

42. *Id.*

43. Turekian, *supra* note 1, at 1374.

44. *Id.*

have received from the state.<sup>45</sup>

Once a charter school is created and initially funded, it opens. Charter schools operate differently from traditional public schools. In part, this is because these schools have powerful incentives to succeed. If these schools fail to keep students and their families happy, they face losing their students<sup>46</sup> since parents can withdraw students at any time.<sup>47</sup> If these schools fail to comply with their charters, they face permanent closure<sup>48</sup> since charter schools must prove successful in order to gain renewal of their limited charters.<sup>49</sup> With this impetus, charter schools attempt to provide innovative solutions to common educational dilemmas.

## E. ADVANTAGES AND DISADVANTAGES OF CHARTER SCHOOLS

### 1. *Advantages of Charter Schools as Espoused by Their Proponents*

Many people support charter schools and believe that these schools have many advantages. Two advantages are cited most often by charter school proponents. First, charter school proponents believe that these schools provide innovative solutions to the educational problems faced by public schools. Second, charter school proponents believe charter schools will improve all public education.

#### a. Charter Schools Will Provide Innovative Solutions to Educational Problems

Charter school proponents believe that these schools create innovative educational environments, allowing teachers and administrators to meet the needs of students who have been under-served by traditional public schools.<sup>50</sup> Proponents believe charter schools can offer these innovative approaches for two reasons. First, the people (staff and students) at charter schools choose to be there.<sup>51</sup> Therefore, when an idea is proposed, only those at the charter school must be convinced of its merits; no superintendent, school board, or large teaching staff must be persuaded.<sup>52</sup> This eliminates much of the "red tape" that plagues traditional public schools. Second, these schools govern themselves.<sup>53</sup> Their administrators have greater autonomy in hiring the school's staff and in establishing the curriculum, discipline policies, calendars, budgets, and daily schedules.<sup>54</sup> By shifting control to the local level, charter school personnel can make decisions that best fit the needs of their particular student group.

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45. Inside Charter Schools, *supra* note 22, at 6.

46. FINN ET AL., *supra* note 3, at 265.

47. HASSEL, *supra* note 23, at 6.

48. *Id.*

49. *Id.*

50. Driscoll, *supra* note 34, at 506.

51. HASSEL, *supra* note 23, at 3.

52. *Id.*

53. FINN ET AL., *supra* note 3, at 15.

54. O'Brien, *supra* note 12, at 173.

Charter school proponents also believe that these schools can positively influence the student learning process by subtly effecting changes in the learning atmosphere.<sup>55</sup> Proponents believe that charter schools can change the “hidden curriculum” of public schools by creating a school culture with stronger values, beliefs, and relationships than that of a traditional public school.<sup>56</sup> For example, proponents believe that charter schools’ hidden curriculum encourages democratic thinking and acceptance of diverse ideas.<sup>57</sup>

In addition, proponents believe that the innovative nature of charter schools benefits teachers and parents. These schools encourage teacher professionalism because charter school teachers work in an entrepreneurial setting with great autonomy<sup>58</sup> and can experiment with innovative teaching approaches. Proponents also believe that these schools increase parental involvement, and cite reports that charter schools’ parents are highly involved in their school’s daily operations.<sup>59</sup> This makes sense. Because parents chose to send their students to these schools, they want to support the schools with their resources and service. This high-level of involvement leads to a family-like, supportive school atmosphere.<sup>60</sup>

#### b. Charter Schools Will Improve All Public Schools

Proponents also believe that charter schools will improve traditional public schools. In fact, this remains the stated goal of the charter school movement. Proponents believe this improvement will occur for two reasons. First, they believe competition between charter schools and traditional public schools will foster change in traditional public schools.<sup>61</sup> Second, they believe traditional public schools will utilize charter schools as laboratories for ideas that will later be transitioned into traditional public schools.<sup>62</sup>

First, proponents believe charter schools will create competition between public schools—ultimately leading to increased quality of all schools—because the basic model of market competition dictates such a response.<sup>63</sup> If many students chose charter schools, traditional public schools will lose students and, with them, significant funding. This funding loss will force traditional public schools to either adapt or close.<sup>64</sup> In an effort to retain students and funding, traditional public schools will

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55. *Id.* at 174.

56. *Id.* at 157.

57. FINN ET AL., *supra* note 3, at 265-66.

58. *Id.* at 266.

59. *Id.* at 265.

60. *Id.*

61. Driscoll, *supra* note 34, at 506.

62. O’Brien, *supra* note 12, at 156-57.

63. William Haft, *Charter Schools and the Nineteenth Century Corporation: A Match Made in the Public Interest*, 30 ARIZ. ST. L.J. 1023, 1039 (1998).

64. *Id.* at 1040.



seek out new methods and better teachers. Thus, education for all students would improve.

Second, proponents suggest that traditional public schools will utilize charter schools as laboratories for change and then apply successful programs to traditional public schools.<sup>65</sup> According to this theory, traditional public schools would learn from charter schools. Upon seeing successful strategies implemented by charter schools, traditional public schools would implement the same ideas in their own schools. In this way, all schools would benefit from the innovative charter school solutions. In fact, in some states, charter schools cannot receive charters without demonstrating that their educational models could be transferred to traditional public schools.<sup>66</sup> In these states, charter schools are required to provide information on their educational findings or offer implementation services to traditional public schools.<sup>67</sup>

Although current research does not reveal that charter schools have significantly impacted public education as of yet, proponents hope that, as more charter schools open, positive results will become more apparent. They believe that as charter school innovations are applied more broadly to traditional public schools, positive effects will be realized and that through increased funding, communication, and collaboration between charter schools and traditional public schools, all public education will improve.<sup>68</sup>

## 2. *Disadvantages of Charter Schools as Espoused by Their Critics*

Despite widespread support for charter schools, they do have critics. Critics complain that charter schools weaken traditional public schools, are risky, do not offer programs that substantially differ from the programs offered by traditional public schools, and fail to adequately serve their students.

### a. Charter Schools Weaken Traditional Public Schools

Charter school critics' chief fear is that, instead of improving all public schools, charter schools actually weaken other public schools.<sup>69</sup> Critics believe that charter schools divert resources, excellent teachers, talented students, and supportive parents from traditional public schools.<sup>70</sup> In part, this fear is supported by evidence that charter schools do take funds from traditional public schools<sup>71</sup> and attract more fortunate and able stu-

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65. Judith Johnson & Alex Medler, *The Conceptual and Practical Development of Charter Schools: By Expanding Public School Choice, Charter Schools are Providing Options that Families Want for Their Children and are Helping People Throughout Our Public School Systems Ask What Each of Us Can do to Improve Education for all Children*, 11 STAN. L. & POL'Y REV. 291, 303 (2000).

66. Haft, *supra* note 63, at 1039.

67. *Id.*

68. *Id.* at 1039-40.

69. Driscoll, *supra* note 34, at 506.

70. *Id.*

71. FINN ET AL., *supra* note 3, at 153.

dents to their schools.<sup>72</sup> Critics worry that this trend will lead to competition among charter schools for the best students while disadvantaged students will remain in ailing traditional public schools.<sup>73</sup>

Charter school proponents refute this argument. First, charter school proponents point out that public education dollars are meant to be spent for the education of a particular student and are not designated for particular schools or school systems.<sup>74</sup> They feel that funds for charter school students should not be viewed as money a school district “lost,” but rather as money that follows a particular student.<sup>75</sup> Second, charter school proponents argue that statistics show that, although charter schools do draw high-achieving students, many charter schools also attract troubled and at-risk students.<sup>76</sup> Charter school proponents point to studies that show charter schools serve proportionate numbers of low income students, disabled students, students with limited English proficiency, and minority students.<sup>77</sup> The research on this point, however, remains mixed.<sup>78</sup>

#### b. Charter Schools Are an Educational Risk

Critics also view charter schools as risky and believe that taxpayers’ dollars and students’ educations should not be gambled on these schools.<sup>79</sup> These critics feel that charter schools are not backed by sound research. Though charter school proponents concede that charter schools are in an experimental stage and remain untested by time,<sup>80</sup> they argue that some experimentation is necessary to develop new teaching methods. Charter school proponents also assert that states can minimize the risk that charter schools will rely solely on untested methods by monitoring charter schools and requiring their students to take standardized tests.<sup>81</sup> While this requires a delicate balance between charter schools and their governing bodies (since freedom from administrative oversight is crucial to a charter school’s success and their proponents believe standardized testing negatively impacts students<sup>82</sup>), monitoring and testing would prevent charter schools from hindering students’ educations. By taking these precautions, states could easily monitor the gains of charter school students and ensure that charter schools provide adequate education to their students.

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72. *Id.* at 157.

73. Driscoll, *supra* note 34, at 506.

74. FINN ET AL., *supra* note 3, at 152.

75. *Id.*

76. *Id.* at 157.

77. *Id.*

78. *Id.*

79. *Id.* at 153.

80. *Id.*

81. O’Brien, *supra* note 12, at 164.

82. *Id.* at 155.

c. Charter Schools Will Not Significantly Contribute to Public Education

Some critics believe that charter schools do not offer educational practices that significantly differ from those utilized by traditional public schools. They argue that charter schools' curricula mirrors the curricula practiced in traditional public schools<sup>83</sup> and that the schools do not provide sufficient innovation to justify their existence. This argument is difficult for charter school proponents to address for two reasons. First, no set charter school curriculum exists.<sup>84</sup> Second, many charter schools offer programs that actually are variations on traditional public school curricula or that represent a return to previously discarded public school teaching strategies.<sup>85</sup>

d. Charter Schools Fail to Adequately Serve Their Students

Critics also believe that charter schools lack the ability to adequately serve some charter school students, particularly disabled students.<sup>86</sup> These critics feel that some charter schools lack the physical capacity to serve disabled students and thus do not attract them to their schools. While charter school proponents point out that, in most states, the percentage of disabled students enrolled in charter schools is similar to the percentage of disabled students enrolled in traditional public schools, they also acknowledge that some charter schools fail to meet the needs of their disabled students.<sup>87</sup> Charter school proponents attribute this failure to a lack of experience and resources.<sup>88</sup> They also believe that states can guard against this problem by requiring charter-granting bodies to condition charters on the applicant's establishment of both adequate facilities and programs for disabled students.<sup>89</sup>

F. OVERVIEW OF LEGISLATIVE APPROACHES TO CHARTER SCHOOLS  
TAKEN BY DIFFERENT STATES

Each state approaches charter schools differently. Some states have no charter school laws.<sup>90</sup> But the majority of states do. Of this majority, the charter school laws vary considerably and range from permissive laws that grant wide freedoms to charter schools to strict, restrictive laws. Charter schools proponents classify these laws based on their openness to charter schools. Laws are either "weak" (not hospitable to charter

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83. FINN ET AL., *supra* note 3, at 156.

84. *Id.*

85. *Id.*

86. *Id.* at 157.

87. *Id.* at 158-59.

88. *Id.*

89. *Id.*

90. The Center for Education Reform, CER Press Release, *Latest Charter School Laws Scorecard Released: ANALYSIS PAVES THE WAY FOR NEW REGULATIVE ACTION*, at <http://edreform.com/press/2003/charterlaws.htm> (2003).

schools) or “strong” (hospitable to charter schools).<sup>91</sup>

### 1. *Factors Affecting the Strength of a Charter School Law*

A charter school law’s strength depends on the many factors that influence a state legislature. These factors include partisan control, the strength of the state’s teacher unions, the quality of the state’s public schools, and the state’s overall political climate. First, partisan control can influence charter school legislation.<sup>92</sup> Although both Republicans and Democrats support the charter school movement, each party supports charter schools for different reasons. Thus, each party supports variations on charter school laws that highlight different elements.<sup>93</sup> Usually, Republicans support stronger charter school laws because they closely resemble the school choice movement the party also supports.<sup>94</sup> Democrats typically support weaker charter school laws that allow for more state supervision. Second, teacher unions can influence the strength of a charter school law.<sup>95</sup> Teacher unions often fight against charter schools laws, and, if powerful, teacher unions can influence the legislatures to pass weaker charter school laws or altogether block charter school legislation.<sup>96</sup> Third, both the condition of traditional public education and a state’s political culture influence charter school legislation.<sup>97</sup> For example, a state with a weak public school system and a political culture that accepts reform would be receptive to a strong charter school law.<sup>98</sup> Typically, higher-income urban states are more inclined to adopt stronger charter school legislation.<sup>99</sup> Together, these factors uniquely combine in each state to produce variations on charter school laws.

### 2. *Features of Strong and Weak Charter School Laws*

Although many factors affect the strength of charter school laws, charter school laws of a similar strength share common features. Common features of weak charter schools laws include the following:

- The kinds of entities that may create charter schools are narrowly defined.
- Limits are placed on the number of charter schools that may be created and on the number of students who may enroll in charter schools.
- Charter schools must gain approval from local school boards which have absolute power to deny charters. Charter schools cannot appeal adverse decisions.

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91. See FINN ET AL., *supra* note 3, at 101.

92. HASSEL, *supra* note 23, at 21.

93. *Id.* at 22.

94. *Id.*

95. *Id.* at 22-23.

96. *Id.* at 23.

97. *Id.*

98. *Id.* at 24.

99. *Id.*

- Charter schools must follow the same regulations regarding teacher certification requirements and teacher salaries that apply to traditional public schools.
- Charter schools receive less per-student funding than traditional public schools and have no additional allowances for facilities or other capital expenses.<sup>100</sup>

In contrast, strong charter school laws also share similarities. These similarities include the following:

- Many kinds of entities may be granted a charter.
- No limits are placed on the number of charter schools that may open or on the number of students who may enroll in charter schools.
- Several granting bodies exist and an appeals process allows applicants to challenge adverse decisions.
- Waivers are granted automatically from most state and local regulations.
- Charter schools exert control over budgets, personnel, and curriculum.
- Per-student funding is equal to the pre-student funding provided to traditional public schools. Charter schools receive start-up and capital money.
- The state maintains a charter accountability system.<sup>101</sup>

#### G. THE IMPACT OF A STATE'S CHARTER SCHOOL LAW ON THE CHARTER SCHOOL MOVEMENT WITHIN THE STATE

The strength of a state's charter school law dramatically impacts the success of the charter school movement in that state. Typically, the charter school movement is most successful in states with strong laws and struggles in states with weaker laws. Scholars have identified several factors that are crucial to the success of the charter school movement in a state. These factors include the operation of the charter-granting process, the number of students permitted to attend charter schools, the degree of autonomy the charter schools receive, and the funding for charter schools.<sup>102</sup>

First, the operation of a state's charter-granting process can significantly impact the charter school movement's success within the state. For example, limits on the number of charter schools allowed, on the number of granting bodies allowed, and on the types of entities that can seek charters can be critical. Obviously, a state that severely limits the number of charter schools that can be created will create less opportunities for educational innovation than could be achieved in a state with a law that

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100. FINN ET AL., *supra* note 3, at 102.

101. *Id.*

102. HASSEL, *supra* note 23, at 18.

allows an unlimited number of charter schools to open.<sup>103</sup> Likewise, limits on the number of granting bodies affect the success of the charter school movement. If only one entity can grant charters, few charters will be approved.<sup>104</sup> The converse is true in states with multiple granting bodies. In these states, a previously rejected applicant can pursue a charter from another granting body.<sup>105</sup> Finally, limits on the types of entities allowed to apply for a charter affects the success of the charter school movement. If a state only allows traditional public schools to convert to charter schools, few charter schools will be created.<sup>106</sup> However, if a state allows a broad range of individuals or groups to apply for charters, many more charter schools with diverse characteristics can be created.<sup>107</sup>

Funding can also limit the success of the charter school movement within a state. In some states, charter schools are required to be a fiscal part of an existing school district.<sup>108</sup> This arrangement does not allow charter schools much autonomy, a needed factor for innovation.<sup>109</sup> In states where funds are provided directly to charter schools, the schools can exert more control over their budget and, consequently, more control over the programs they offer.<sup>110</sup>

Finally, exemption from state and local regulations improves the charter school movement's chances for success. Foremost among these exceptions is exemption from a state-mandated curriculum. This exemption from a state-mandated curriculum is important because mandated curricular requirements hinder charter schools' abilities to create innovative programs.<sup>111</sup> First, charter schools that are required to teach state-mandated curricula will be unable to implement major curriculum innovations.<sup>112</sup> These schools will be constrained to teaching the same material offered by traditional public schools. Second, strict state mandates regarding curriculum can cause charter schools to lose their individual identities. As these schools modify their curriculum to fit the state-mandated requirements, they will begin to more closely resemble traditional public schools.<sup>113</sup>

#### H. COMPARISON OF TWO CHARTER SCHOOL LAWS AND THEIR IMPACT ON THE CHARTER SCHOOL MOVEMENT

Because each state drafts its own charter school laws, these laws vary greatly. Still, similarities exist between laws of similar strength. Therefore, a comparison of two representative laws will show the impact a

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103. *Id.* at 18-19.

104. *Id.* at 18.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. O'Brien, *supra* note 12, at 157.

112. *Id.* at 161.

113. *Id.* at 164.

charter school law's strength has on the success of the charter school movement in that state. To this end, information compiled by The Center for Education Reform (CER) proves helpful. CER is a national, non-profit advocacy organization that supports educational reforms.<sup>114</sup> It strongly supports charter schools and ranks the nation's charter school laws according to establish criteria. In CER's most recent rankings, CER found Arizona's charter school law to be the strongest in the nation<sup>115</sup> and found Mississippi's charter school law to be the weakest.<sup>116</sup> By looking at the specifics of these two charter school laws and the status of the charter school movements in these states, it is easy to extrapolate the impact these laws have on the charter school movement.

First, clear differences exist in the way Arizona and Mississippi handle the charter granting process. Arizona allows an unlimited number of charter schools to be created<sup>117</sup> while Mississippi allows only six charter schools to exist at one time.<sup>118</sup> Arizona allows multiple entities to grant charter school applications and allows public bodies, private persons, and private organizations to apply for a charter.<sup>119</sup> In contrast, Mississippi allows only the state board of education to grant charters following approval by a local school board and limits the applicant pool to existing public schools.<sup>120</sup> Arizona enables all students to attend charter schools,<sup>121</sup> while Mississippi restricts attendance to students in the local school district and to the charter school employees' children.<sup>122</sup>

Arizona and Mississippi provide differently for the management of charter schools. Arizona provides charter schools with an automatic waiver from regulatory laws.<sup>123</sup> Mississippi requires a charter school to negotiate each exemption with the school district where the school is located.<sup>124</sup> Arizona makes charter schools legally and fiscally autonomous;<sup>125</sup> Mississippi does not.<sup>126</sup>

The effects of these representative charter school laws on the charter school movement within each state is obvious when comparing the states' charter school statistics. As of fall 2001, 419 charter schools operated in

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114. Jeanne Allen, The Center for Education Reform, at <http://edreform.com/index.html> (2002).

115. The Center for Education Reform, *Charter School Legislation: Profile of Arizona's Charter School Law*, at [http://edreform.com/charter\\_schools/laws/Arizona.htm](http://edreform.com/charter_schools/laws/Arizona.htm) (2000).

116. The Center for Education Reform, *Charter School Legislation: Profile of Mississippi's Charter School Law*, at [http://edreform.com/charter\\_schools/laws/Mississippi.htm](http://edreform.com/charter_schools/laws/Mississippi.htm) (2002).

117. Center for Education Reform, *supra* note 115.

118. Center for Education Reform, *supra* note 116.

119. Center for Education Reform, *supra* note 115.

120. Center for Education Reform, *supra* note 116.

121. Center for Education Reform, *supra* note 115.

122. Center for Education Reform, *supra* note 116.

123. Center for Education Reform, *supra* note 115.

124. Center for Education Reform, *supra* note 116.

125. Center for Education Reform, *supra* note 115.

126. Center for Education Reform, *supra* note 116.

Arizona,<sup>127</sup> while only one charter school operated in Mississippi.<sup>128</sup> This shows that many students in Arizona have been exposed to charter school reform, while only a few students in Mississippi have been exposed to this education reform.

## I. OVERVIEW OF FEDERAL LEGISLATION IMPACTING CHARTER SCHOOLS

The federal government responded favorably to the charter school movement and enacted legislation in support of these schools. Bipartisan support enabled Congress to pass legislation<sup>129</sup> in support of charter schools and to make federal funds available to them.<sup>130</sup>

## II. THE CYBER CHARTER SCHOOL MOVEMENT

Cyber charter schools are the most recent evolution of the charter school movement. These schools represent a merger between the charter school movement and the Internet.<sup>131</sup> A cyber charter school is a charter school that operates 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.<sup>132</sup> Like other charter schools, a cyber charter school usually operates free of bureaucratic or regulatory controls and is held accountable to the granting entity and the parents of its students.<sup>133</sup> Therefore, a cyber charter school's success depends on its ability to fulfill the goals outlined in its charter.<sup>134</sup> Currently, at least 30 cyber charter schools operate in twelve states.<sup>135</sup> Pennsylvania has the most cyber charter schools of any state. Currently eight cyber charter schools operate in Pennsylvania, serving approximately 5,100 students.<sup>136</sup>

### A. ADVANTAGES AND DISADVANTAGES OF CYBER CHARTER SCHOOLS

Like all charter schools, cyber charter schools have both proponents and critics. Proponents believe these schools represent an important

127. Center for Education Reform, *supra* note 115.

128. Center for Education Reform, *supra* note 116.

129. SCHOOL CHOICE IN THE REAL WORLD: LESSONS FROM ARIZONA CHARTER SCHOOLS 59 (Robert Maranto et al. eds., 2001).

130. 20 U.S.C. § 7221e (2002).

131. Neal McCluskey, *Beyond Brick and Mortar: Cyber Charters Revolutionizing Education*, Center for Education Reform, at <http://edreform.com/pubs/cyber.htm> (2002).

132. American Federation of Teachers, *Do Charter Schools Measure Up? The Charter School Experiment After 10 Years* 98 (2002).

133. McCluskey, *supra* note 131.

134. *Id.*

135. *Id.* Cyber charter schools operate in: Alaska, Arizona, California, Colorado, Florida, Kansas, Minnesota, New Mexico, Ohio, Pennsylvania, Texas, and Wisconsin. *Id.*

136. Christian F. Rhodes, *Razing the Schoolhouse: Whether Cyber Charter Schools Can Overcome Statutory Restrictions*, 167 WEST EDUC. L. REP. 561, 561 (2002).



evolution of the charter school movement. Critics believe these schools pose more problems than solutions.

*1. Advantages of Cyber Charter Schools as Espoused by Their Proponents*

Proponents believe cyber charter schools fill an important niche and close an existing gap in traditional public education. They believe these schools' key advantage is their ability to reach students who are underserved by traditional public schools<sup>137</sup> and who are unable to function in a traditional school. Examples of such students include students with severe medical conditions, students who seek to accelerate their course work, and students who are professional entertainers or athletes.<sup>138</sup> Proponents believe that these students, who normally would encounter difficulties in receiving a traditional public school or "brick and mortar" charter school education, can access a public education through cyber charter schools.<sup>139</sup> Whereas before, these students would be forced to attend a private school or obtain an alternative to a high school diploma, by attending a cyber charter school they are now able to obtain a free education.

Proponents of cyber charter schools believe these schools offer flexibility which enables them to better meet the needs of key student groups. This flexibility exists because cyber charter schools reach students in wide geographical areas, allow parents to tailor their child's education, and provide a flexible schedule. First, unlike charter schools and traditional public schools that are restrained to enrolling students in a limited geographical area, cyber charter schools can reach students in any location.<sup>140</sup> This feature particularly benefits homebound students or students who must travel for their careers. Second, proponents believe that these schools allow parents to tailor their child's education to meet specific needs. For example, while other schools offer a single curriculum to all students, cyber charter schools can offer multiple curricula and programs, allowing their families to select the most appropriate curriculum for a student's particular needs.<sup>141</sup> Finally, while other schools must offer classes on a Monday through Friday daytime schedule, cyber charter schools can provide an education at any time. Parents of cyber charter school students can adjust the delivery of their child's education to best fit the student's schedule.<sup>142</sup> Again, this feature would especially benefit students who are unable to follow a regular attendance schedule because of medical problems or careers. Because of increased flexibility and parental control, parents of cyber charter schools often praise the flexibility

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137. McCluskey, *supra* note 131.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

these schools offer.<sup>143</sup>

## 2. *Disadvantages of Cyber Charter Schools as Espoused by their Critics*

Despite advantages espoused by their proponents, cyber charter schools faced immediate criticism. Critics question the ability of states to adequately monitor these schools, the schools' ability to provide adequate educations, and their legality under current charter school laws. Much of their sharpest criticism comes from school districts and public school educators.

First, critics question the states' ability to monitor these schools and their students.<sup>144</sup> Because most cyber charter school students are educated in their own home, critics fear the task of overseeing these schools is too much for states to bear. Many critics also fear that the lack of state control over these schools allow anyone who can create a website to create a cyber charter school, even people who lack credible programs.<sup>145</sup> Critics fear that private entities may enter the cyber charter school movement by offering programs that are not educationally sound. After obtaining a charter, these entities would be free from most state regulation and oversight. Critics fear that these schools would then provide an inferior education to cyber charter school students.

Opponents also question cyber charter schools' ability to provide quality instruction. Critics question their ability to provide adequate instruction with such limited teacher interaction and with such strong reliance on parents to verify attendance and provide educational assistance.<sup>146</sup> Most cyber charter school students interact with their teachers only through the Internet. Critics question whether students can receive sufficient educational support in this environment. Also, because cyber charter school students' interactions with teachers is so limited, students' immediate questions must be addressed by their parents. Critics believe that parents are unable to provide a level of assistance and instruction comparable to that provided by teachers. Also, critics fear that parents will not be consistent in reporting school attendance and work products.

Cyber charter school critics also complain about the lack of daily interaction with teachers and other students. These critics believe this deficiency harms cyber charter school students' social development.<sup>147</sup> In response, cyber charter school proponents point out that, although the Internet is the chief means of education, cyber charter schools can contract with other entities to arrange for alternative methods of teaching. For example, a cyber charter school could hold physical education classes

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143. *Id.*

144. See KPMG Consulting, Pennsylvania Department of Education, Cyber Charter Schools Review, *Executive Summary*, at [http://www.pde.state.pa.us/charter\\_schools/lib/charter\\_schools/execsummprojappr.pdf](http://www.pde.state.pa.us/charter_schools/lib/charter_schools/execsummprojappr.pdf) (2001).

145. See McCluskey, *supra* note 131.

146. See KPMG Consulting, *supra* note 144.

147. *Id.*

at the YMCA or coordinate field trips for their students.<sup>148</sup> This would allow cyber charter school students to interact with other students and teachers in a “real world” setting.

The opposition raised by public school districts centers on conflicts over funding, specifically over how much money cyber charter schools should receive.<sup>149</sup> School districts balk at sending a students’ full funds to these schools and argue that the cost of a cyber charter school education is much cheaper than the cost of a traditional public school education.<sup>150</sup> For example, critics point out that cyber charter schools have no overhead expenses for building maintenance, janitorial staff, busing, and cafeterias. Critics believe that cyber charter schools should receive funds equal to their actual expenses and should not receive funds equal to those received by a traditional public school.

School districts also voice concerns that cyber charter schools are committing fraud. Critics are concerned that non-legitimate entities are creating cyber charter schools and absconding with the funds without providing a valid education for their students. This appears to be a legitimate concern. Some cyber charter schools have been accused of receiving excess funds by claiming students who have not actually enrolled in their schools.<sup>151</sup>

Critics’ most important argument is that these schools may not be legal under existing charter school laws. Critics claim that these schools fall outside the scope of charter school laws and that, even if they fit within the law’s scope, these schools cannot meet the requirements of these laws. Because most states do not directly address cyber charter schools with specific legislation, the legality of cyber charter schools must be resolved by examining each state’s charter school law and other legislation concerning cyber education. Since most legislatures drafted charter school laws before the concept of schools operating exclusively over the Internet seemed viable, critics claim that the legislatures did not intend for charter school laws to authorize cyber charter schools. Critics also claim that cyber charter schools cannot meet the requirements under existing charter school laws, such as provisions that address school attendance or school facilities.

#### B. OVERVIEW OF APPROACHES TO CYBER CHARTER SCHOOLS TAKEN BY STATE LEGISLATURES

Because cyber charter schools are so novel, states have not reached a consensus on how to treat them. Currently, three approaches exist. First, a state might have no legislation regarding cyber education. Second, a state might have laws regarding cyber education in general, but lack spe-

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148. *Id.*

149. McCluskey, *supra* note 131.

150. *See id.*

151. *Id.*

cific legislation addressing cyber charter schools. Finally, a state might specifically address cyber charter schools with legislation.

First, some states have no laws regarding cyber charter schools or cyber education in general.<sup>152</sup> Almost all states do not statutorily provide for cyber charter schools and several states also lack any laws regarding cyber education.

Second, some states legislatively address cyber schools or cyber education in general, but do not specifically address cyber charter schools.<sup>153</sup> Examining these laws show how states focus on cyber education. For example, Michigan has created a virtual high school.<sup>154</sup> Its goals include expanding the curricular offerings for other state high schools, creating an instructional model using multimedia tools, providing students and teachers with the opportunity to develop skills through on-line learning, and granting high school diplomas through a dual enrollment method with traditional public schools.<sup>155</sup> Course offerings include at-risk programs, college-level equivalency courses, and professional development programs for teachers.<sup>156</sup> Michigan also provides for the possible expansion of this program.<sup>157</sup> Likewise, West Virginia has also enacted virtual school legislation, citing findings that other states offer Internet-based instruction, virtual schools offer more courses to students in remote geographic areas, and virtual learning allows students to learn at a different time and pace.<sup>158</sup> West Virginia also authorizes its virtual school director to recommend whether to make these courses available to students receiving home instruction.<sup>159</sup> The West Virginia virtual school law also specifically exempts virtual schools from certain mandatory laws that apply to materials used by traditional public schools.<sup>160</sup> Again, like Michigan, because West Virginia specifically requests recommendations regarding the success of this legislation, the state seems open to future ventures into cyber education.

Two other states' laws on virtual schools may be compared. These laws are more limited in their scope. The Florida virtual school can serve any student in the state but gives priority to students who need expanded access to courses in order to meet their educational goals (such as home-school students or students who do not have access to higher-level courses) and to students who seek accelerated access to courses in order to graduate early.<sup>161</sup> Oklahoma also has a limited cyber education law. The Virtual Internet School in Oklahoma Network Act establishes a pilot program for developing a virtual Internet school. The school's purpose is

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152. See Rhodes, *supra* note 136, at 562-63.

153. *Id.* at 563.

154. MICH. COMP. LAWS § 380.1481 (2002).

155. *Id.* § 380.1481(2)(a)-(d), (f).

156. *Id.* § 380.1481(3)(b), (d), (g).

157. *Id.* § 380.1481(4).

158. W. VA. CODE § 18-2E-9(a)(3)-(5) (2002).

159. *Id.* § 18-2E-9(d)(3)(A)-(E).

160. *Id.* § 18-2E-9(e).

161. FLA. STAT. ch. 1002.37(1)(b)(1)-(2) (2002).

to provide information about the advantages of Internet-based instruction and its focus is on developing Internet-based instruction in a single content area.<sup>162</sup> Oklahoma only offers this program to nine public school districts that represent different areas of the state and meet the state's conditions for installing technological instruments.<sup>163</sup>

Finally, a state might have specific cyber charter school legislation. As of yet, only Pennsylvania has passed specific cyber charter school legislation.<sup>164</sup> Because Pennsylvania has chartered more cyber charter schools and has a higher cyber charter school enrollment than any other state, it follows that the state legislature responded with the nation's first cyber charter school law.<sup>165</sup>

Pennsylvania's cyber charter school law places more restrictions on cyber charter schools than the state's charter school law places on brick and mortar charter schools. For example, unlike with brick and mortar charter schools, Pennsylvania vests the power to grant a cyber charter only in the Department of Education.<sup>166</sup> The Department of Education also must assess each cyber charter school annually to determine its compliance with its charter and relevant legislation.<sup>167</sup> Pennsylvania also requires cyber charter schools to make information regarding their school and its charter available to each student's school district of residence.<sup>168</sup>

### C. USING STATE LAW TO DETERMINE THE LEGALITY OF CYBER CHARTER SCHOOLS

As mentioned, cyber charter schools' critics' most salient argument is that these schools are not legal. Without a clear cyber charter school law, courts must resolve the question of these schools' legality based on the public policy contained in the state's charter school law and any other legislation that supports educational technology or cyber schools. Obviously, this analysis impacts the cyber charter school movement's success within the state. The three basic legislative approaches to cyber charter schools mentioned above figure prominently in this analysis.

First, when determining the legality of cyber charter schools in states with no laws regarding cyber charter schools or other cyber schools, courts utilize the state's charter school law and any other legislation relevant to cyber education. Courts must determine if the goals of the state's general charter school law support cyber charter schools when examined in conjunction with laws regarding educational technology. For example, if a state's charter school law states that the law's goal is to create new learning opportunities and the state has other legislation which encour-

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162. OKLA. STAT. tit. 70, § 1210.722 (2002).

163. OKLA. STAT. tit. 70 § 1210.724(A)-(B) (2002).

164. 2002 Pa. Legis. Serv. 2002-88 (West) (codified at PA. STAT. ANN. tit. 24, § 1742-A (West 2003)).

165. Rhodes, *supra* note 136, at 561.

166. PA. STAT. ANN. tit. 24, § 17-1741-A(a)(1).

167. *Id.* § 17-1742-A(1).

168. *Id.* § 17-1743-A(c).

ages educational technology, a court might find that these laws taken together demonstrate legislative support for cyber charter schools. In contrast, if a state lacks legislation endorsing educational technology, a court might find that the state's public policy does not support cyber charter schools.

The problem with this analysis is that it is malleable depending on personal views towards cyber charter schools. In general, cyber charter school supporters are likely to broadly read provisions related to educational technology as support for cyber charter schools.<sup>169</sup> Conversely, opponents are likely to narrowly construe these provisions. Opponents are also likely to liken cyber charter schools with home schools and cite provisions that forbid public funds from giving home schoolers.<sup>170</sup>

In states with legislation that generally addresses cyber schools but does not specifically address cyber charter schools, the analysis is slightly different. In these states, a court could look to both the cyber school legislation and the state's charter school law to determine if the state's public policy supports cyber charter schools. Because of this, it is more likely that courts would find legislative support for charter schools.

In these states, legislative support for cyber charter schools could be inferred from the general cyber school laws.<sup>171</sup> For example, in Michigan, the provision regarding expansion of the state's Internet course offerings could be used to show that the state legislature supports the development and growth of cyber education and thus would support cyber charter schools. Because West Virginia, like Michigan, specifically requests recommendations regarding the success of cyber schools, the state seems open to other future ventures in cyber education, such as cyber charter schools. Supporters in Florida or Oklahoma would encounter more difficulties in utilizing their state's cyber-related education laws to show legislative support for cyber charter schools. For example, because Oklahoma narrows its program only to one content area, it would be difficult to show that the state legislature broadly supports cyber schools. Instead, opponents would likely point to the statute's strict regulation of cyber schools. Opponents would argue that, while the state legislature supports cyber education, it does so only under limited circumstances with strong state oversight.

Truly, the legality of cyber charter schools can only be completely resolved if a state has an express cyber charter school law. At this time, Pennsylvania is the only state with such a law. This law relieves the Pennsylvania courts from ruling on the legality of these schools. Unfortunately, because Pennsylvania is the only state with an express cyber charter school law, the legality of cyber charter schools remains unclear in the other states where these schools operate.

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169. *Id.*

170. *Id.* at 562.

171. *Id.*

## D. OVERVIEW OF CYBER CHARTER SCHOOL CASE LAW

Cyber charter schools are such a recent innovation that few disputes concerning them have reached appellate courts. The few challenges that have arisen are limited to disputes in Pennsylvania. Because Pennsylvania authorized more cyber charter schools at an earlier date than other states, it is reasonable that this state's court system has seen the most litigation on the subject.<sup>172</sup> Even then, only four cases have reached state appellate courts or federal district courts in Pennsylvania. It is useful to examine this case law because all of these cases, in some way, challenge the legitimacy and legality of cyber charter schools. The courts' resolutions demonstrate how courts in other states might address these issues if their own legislatures fail to do so.

The first cyber charter school case, *Angstadt v. Midd.-West School District*, arose in the U.S. District Court for the Middle District of Pennsylvania.<sup>173</sup> There, the court declined to grant a cyber charter school student's preliminary injunction which would have allowed her to participate in traditional public school athletics.<sup>174</sup> The plaintiff argued that she had a property interest in playing high school athletics because Pennsylvania's charter school law allows charter school students to participate in traditional public school extracurricular activities if the charter school does not provide the same activities.<sup>175</sup> The court noted that it was unclear if the cyber charter school the plaintiff attended could lawfully be considered a "charter school" within the meaning of the term as used in the charter school law.<sup>176</sup> The court did not base its decision on this position and ultimately concluded that the plaintiff failed to satisfy the required criteria for a preliminary injunction.<sup>177</sup>

The second judicial challenge involving cyber charter schools arose in the U.S. District Court for the Eastern District of Pennsylvania. In *Learning by Grace, Inc. v. Pennsylvania Department of Education*,<sup>178</sup> a non-profit corporation sought to operate a cyber school that would provide a Christian-based education via the Internet.<sup>179</sup> It sued on a First Amendment rights violation.<sup>180</sup> The court abstained from rendering judgment, citing the importance of allowing the state's administrative and judicial tribunals the opportunity to resolve these issues.<sup>181</sup> The court dismissed the action without prejudice so that the plaintiff could first exhaust administrative remedies.<sup>182</sup>

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172. McCluskey, *supra* note 131.

173. *Angstadt v. Midd.-W. Sch. Dist.*, 182 F. Supp. 2d 435 (M.D. Pa. 2002).

174. *Id.* at 443.

175. *Id.* at 439.

176. *Id.* at 441.

177. *Id.* at 443.

178. No. 02-6769, 2002 U.S. Dist. LEXIS 17316, at \*6 (E.D. Pa. Sept. 10, 2002).

179. *Id.* at \*1.

180. *Id.* at \*5.

181. *Id.* at \*6.

182. *Id.* at \*7.

Two other cases involving cyber charter schools and the Department of Education have been resolved by Pennsylvania state courts. Both cases involved funding for cyber charter schools. Under Pennsylvania's charter school law, a charter school receives funds for each of its students from the school district of the student's residence.<sup>183</sup> If a school district fails to make a payment, the charter school submits documentation to the Department of Education through the Secretary of Education.<sup>184</sup> The Secretary of Education then deducts the debt from state payments slated for the delinquent school district and directs this money to the charter school.<sup>185</sup>

In the first case challenging this law as applied to cyber charter schools, *Boyetown Area School District v. Department of Education*, the court ruled that the Department of Education could not withhold subsidy money from school districts that refused to pay the tuition bills submitted by cyber charter schools without first allowing the school districts to challenge the deductions.<sup>186</sup> The court determined that the withholding of subsidy payments constituted an adjudication and thus the school districts should be given notice of a hearing and an opportunity to be heard.<sup>187</sup> The court remanded the decision to the Department of Education and ordered the Department of Education to provide an expedited opportunity for the school districts to be heard.<sup>188</sup>

The Commonwealth Court again ruled on a cyber charter school case in June 2002. In *Pennsylvania School Boards Association v. Zogby*, Pennsylvania school districts asked the court to review the Department of Education's decision to withhold subsidy money from school districts that refused to pay the tuition bills submitted by cyber charter schools.<sup>189</sup> The school districts also challenged the legality of cyber charter schools under the state's charter school law.<sup>190</sup> The court remanded the case to the Department of Education with instructions for the Department of Education to provide an opportunity for the school districts to challenge the subsidy deductions.<sup>191</sup> However, the court held that, on remand to the Department of Education, the school districts could not challenge the legality of cyber charter schools because they lacked standing to do so.<sup>192</sup> The court concluded that the school districts lacked standing since Pennsylvania's charter school law only allows the school district that granted the charter and the State Charter School Appeal Board to participate in the decision to grant or deny a charter school application.<sup>193</sup> The court found that

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183. PA. STAT. ANN. tit. 24, § 17-1725-A(2)-(3) (West 2002).

184. *Id.* § 17-1725-A(5).

185. *Id.*

186. 797 A.2d 421, 427-28 (Pa. Commw. Ct. 2002).

187. *Id.* at 427.

188. *Id.* at 427-28.

189. 802 A.2d 6, 8 (Pa. Commw. Ct. 2002).

190. *Id.*

191. *Id.* at 9.

192. *Id.* at 9-11.

193. *Id.*



non-chartering school districts have an obligation to pay for their students who attend charter schools, but have no right to participate in the charter-granting process.<sup>194</sup> Similarly, the court found that, should a school district refuse to pay a charter school's invoice, the Department of Education has no discretion to consider the legality of the charter school and must direct subsidy money to the charter school if the Department of Education finds that each claimed student actually attends the school.<sup>195</sup> The court continued its analysis of the Charter School Law in dicta, finding cyber charter schools legal under the Charter School Law.<sup>196</sup>

### III. POSSIBLE SOLUTION

#### A. REASONS AND PURPOSE FOR SPECIFIC CHARTER SCHOOL LEGISLATION

As the previous discussion reveals, express cyber charter school legislation is necessary to avoid judicial lawmaking. This legislation could take three main forms. First, a state legislature could outright ban cyber charter schools. This would give conclusive guidance to state charter-granting bodies and the state's department of education. Second, a state could specifically authorize the creation of cyber charter schools and provide that cyber charter schools must follow the same procedures and guidelines that brick and mortar charter schools must follow. Under this framework, courts would analyze any disputes over cyber charter schools in the same way that they would resolve a dispute over a brick and mortar charter school. Third, a state could pass specific cyber charter school legislation with provisions aimed at the likely problems cyber charter schools might encounter. Under this legislative framework, courts would look to this specific law for guidance in resolving disputes over cyber charter schools.

#### B. ISSUES A STATE LEGISLATURE SHOULD ADDRESS WHEN DRAFTING SPECIFIC CYBER CHARTER SCHOOL LEGISLATION

If a state legislature chooses to draft a specific cyber charter school law, it must address several key concerns. First, the state must address how the creation of cyber charter schools will differ from that of brick and mortar charter schools. Second, a state must address how and when a cyber charter school would be exempt from the educational provisions that apply to brick and mortar charter schools and traditional public schools. Finally, the state should address the evaluation process for cyber charter schools.

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194. *Id.* at 10.

195. *Id.* at 9.

196. *Id.* at 11.

### *1. Creation of Cyber Charter Schools*

When drafting cyber charter school legislation, a state should address how the creation of cyber charter schools differs from the creation of brick and mortar charter schools. Unlike brick and mortar charter schools, cyber charter schools are not restricted to a particular geographical area. Thus, they could conceivably draw students from across the state. A state should decide whether cyber charter schools should be limited in their geographic scope and whether they must be approved by each student's school district of residence or only by the granting body. Limiting the geographic range of a cyber charter school's potential student base eliminates one aspect of its appeal. Many cyber charter school students select cyber charter schools because of their flexibility; proximity is not a prime consideration. Also, requiring the school district of each student's residence to approve the cyber charter school might result in long delays and prevent potential cyber charter school students from enrolling in cyber charter schools. Therefore, a state should allow any student within the state to attend a cyber charter school without requiring the student's school district of residence to approve the cyber charter school.

### *2. Cyber Charter Schools' Compliance with State Laws*

When drafting cyber charter school legislation, a legislature must also consider whether cyber charter schools should be required to comply with state education laws. Typically, traditional public schools must comply with all state education laws and brick and mortar charter schools must comply with a state's charter school law. This law usually incorporates selected public school education laws by reference. When drafting a cyber charter school law, a state should decide whether cyber charter schools should be exempt from state education laws.

As examples, an examination of three typical education law provisions and their likely effect on cyber charter schools may prove beneficial. These three areas include compulsory student attendance, facility maintenance, and teacher certification. Logistically, it would be difficult, if not impossible, for a cyber charter school to comply with these provisions as they apply to traditional public schools. Therefore, a state must determine whether it should exempt a cyber charter school from these laws or modify these laws to allow cyber charter schools the opportunity to comply.

#### *a. Compulsory Attendance*

Compulsory attendance rules are a staple of education laws. Most states require students to attend school for a set number of hours each day and a set number of days each year. However, cyber charter school students do not physically attend school, so these rules would be meaningless as applied to them. Still, giving cyber charter schools a blanket exemption to general compulsory attendance rules could cause students

to receive an inadequate education. Potentially, students could work on school assignments for only a few hours a week and receive the same credit that traditional public school students receive only if they attended school all day, five days a week. Instead, the state should compromise. In creating this compromise, the state should require the state's department of education to ensure that cyber charter school students actually receive an appropriate amount of educational time and refrain from requiring cyber charter schools to keep their students on-line for the traditional schedule followed by traditional public schools. A state's department of education could ensure that cyber charter school students receive an appropriate education by requiring their teachers to monitor the time students spend on school-related activities.

b. Facility Maintenance

Many education provisions relate to school maintenance. These laws regulate issues from flagpole etiquette to school security measures. Obviously, since cyber charter schools lack physical facilities, these rules would be meaningless as applied to them. When deciding whether cyber charter schools should be required to comply with these provisions, legislatures should consider the purpose of these provisions. Because these laws typically are aimed at protecting students, it does not seem logical to hold cyber charter schools accountable for these laws. With this in mind, states should fully exempt cyber charter schools from provisions related to school maintenance.

c. Teacher Certification

A third area legislators should address when drafting cyber charter school legislation is teacher certification. To teach in a traditional public school, states usually require a person to be certified or to obtain emergency certification. Many state charter school laws require that a set percentage of the charter school staff—often as high as 80 percent—be certified by the state. Cyber charter school critics believe cyber charter schools cannot meet this high percentage. Critics take this position because they believe that parents of cyber charter school students should be counted as teachers since these schools rely heavily on parents to monitor and correct student work. Critics argue that, because cyber charter schools rely so heavily on parental support to oversee student work, parents should be considered “teachers,” and if so considered, it is unlikely that cyber charter schools could meet the required percentage of certified teachers. Cyber charter school proponents refute the notion that parents of cyber charter school students are teachers according to the state law. Because parents are not paid by cyber charter schools, proponents believe that parents are merely unpaid volunteers.

A compromise between these two viewpoints can be reached. First, cyber charter schools should be required to comply with the teacher certification percentage rules applicable to brick and mortar charter schools

regarding their paid staff members. For the purpose of the teacher certification laws, parents of cyber charter school students would not be considered “teachers,” but would be considered unpaid volunteers.

### *3. Evaluation of Cyber Charter Schools*

Finally, the states should address the evaluation process for cyber charter schools. Although these schools need the opportunity to develop and implement successful programs, while these schools undergo this development, students should not suffer. Therefore, states should draft specific provisions related to cyber charter schools’ evaluations. These provisions should have several key elements. First, only one body—likely the state department of education—should evaluate cyber charter schools. By allowing only one entity to evaluate all the cyber charter schools in a state, the state guarantees that each school will be evaluated fairly and will be compared to other cyber charter schools.

Next, the criteria for evaluating cyber charter schools should be set forth specifically in a cyber charter school law. Cyber charter schools should be evaluated on several grounds. First, their compliance with applicable laws should be evaluated. Second, cyber charter schools should be required to provide an accounting of their funding and expenses. Finally, cyber charter schools should be required to demonstrate their progress.

### *4. Time Limitations on Cyber Charter School Legislation*

A state might choose to draft a cyber charter school law with a time limit; the law could be drafted so that it expires after a set time. This would enable the state to experiment with the cyber charter school movement without demonstrating a long-term commitment to unproven programs and without directing substantial funds to these programs. If, after the provisional time limit, the state is satisfied with their performance, the state could re-authorize these schools on a more permanent basis.

By incorporating these considerations into a cyber charter school law, the state could exert more control over cyber charter schools and ward off future problems. At the same time, cyber charter schools could function without excessive regulation. A temporary cyber charter school law with provisions for both autonomy and state oversight would strike a fair compromise between the desires of cyber charter school proponents and critics.

## IV. CONCLUSION

Education has been the focus of many reform movements. Of these reforms, the charter school movement has recently captured the support of many Americans with its promise of innovation.

As the charter school movement expanded, it spawned a related movement—the cyber charter school movement. Cyber charter schools re-

present one way to publicly educate students who otherwise might not be served by traditional public schools. However, these schools face difficulties. Their most troubling obstacle is their legality under existing charter school laws. With this in mind, it is imperative that states draft legislation to resolve this issue. States must enact specific provisions to guard against the problems inherent to these schools while allowing these schools to operate with some autonomy. The resulting legislation would be a fair compromise, satisfying both worried lawmakers and innovative cyber charter school proponents. Following a trial period during which cyber charter schools would have the opportunity to succeed, the states could reevaluate these schools in light of their accomplishments. This would enable states to make informed decisions when voting whether to continue supporting these schools. Cyber charter schools represent a possible vision of education's future. Therefore, it is important that states give these schools the opportunity to succeed.