

# School Choice and the Pressure to Perform

## *Déjà Vu for Children with Disabilities?*

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### ABSTRACT

Major principles underlying school choice—such as market competition and parental autonomy—are in serious tension with the principles underlying inclusion from both philosophical and legal perspectives. In this article, the authors explicate this tension and then examine the empirical evidence indicating that exclusion of students with special needs, particularly by schools that market themselves on the basis of test scores, has been a result of the implementation of school choice. The authors suggest that school choice has turned back the clock by once again encouraging public schools to exclude students with special needs on the ground that educating such students is beyond the scope of their mission.

SCHOOL-CHOICE POLICIES ARE BECOMING increasingly accepted and implemented throughout the U.S. educational system. These policies come in a number of different forms, starting with *eased catchment areas* and building to *magnets*, *charters*, and *vouchers*. The underlying rationales for each policy may include parental autonomy, market competition, or forging strong school communities (Howe, 1997). Because these rationales differ along with the specific approach, drawing conclusions about the merits of school choice per se is difficult. Still, one general criticism cuts across the forms of, and justifications for, school choice: These choice schemes seriously exacerbate the stratification of school populations. This general criticism is the focus of

this article, particularly as it applies to students with special needs.

Our analysis is divided into two general sections. In the first, we examine the tension between the principles underlying the inclusion of students with special needs and the principles underlying school choice, particularly market competition and parental autonomy. We consider both the legal and philosophical dimensions of this tension. In the second section, we examine empirical findings from five states and a case study of the Boulder, Colorado, school-choice system. Taken together, these findings indicate that school choice is indeed resulting in the increased stratification and exclusion of students with special needs and that the pressure to perform on achievement tests is a significant factor. We conclude with a few observations about how the current situation resembles the period before the enactment of the Education for All Handicapped Children Act of 1975.

### CONFLICTING PRINCIPLES

The primary principle underlying the Individuals with Disabilities Education Act (IDEA; 1990) is inclusion. Congress' passage of the Education for All Handicapped Children Act, the precursor legislation to IDEA, was prompted by a coordinated campaign of court cases—most prominently *Pennsylvania Association of Retarded Citizens (PARC) v. Commonwealth* (1972) and *Mills v. Board of Education* (1972; see Welner, 2001). The requirements of the *principle*

of inclusion may be illustrated by distinguishing it from the weaker principle of nonexclusion. Inclusion places the responsibility on public schools to adjust their curricula and instructional methods accommodate students with special needs, whereas nonexclusion merely requires permitting these students to enroll in and attend public schools. More specifically, inclusion requires public schools to take steps that affirmatively provide a "free, appropriate public education" in the "least restrictive environment" (LRE). It also adds a presumption in favor of *mainstreaming*, which places the burden on schools to justify why they are not including students with special needs in the general education classroom within the schools that they would otherwise attend in the absence of any disability.

School choice threatens the principle of inclusion because two principles that often underlie school-choice policies—market competition and parental autonomy—are in serious tension with it. Indeed, choice policies driven by these principles can sometimes result in an abandonment of the principle of nonexclusion.

The market rationale for school choice is based on the following three general claims:

1. Public schools are performing dismally.
2. Precluding choice results in a system that provides no reasons for schools to improve.
3. Providing parents with choice will improve public education by forcing schools to compete for students.

Schools that are unwilling or unable to maintain their enrollments will be forced to "go out of business," and the remaining schools will be better individually and overall (Chubb & Moe, 1990).

The market rationale is rarely *pure* in the sense of relying exclusively on consumer preference that is broadly construed. Test scores are the typical measure of school success (e.g., Chubb & Moe, 1990), and the criterion of test scores creates a powerful incentive system of its own that is quite at odds with the principle of inclusion. Schools that include students who do not score well on tests will be judged as inferior and, in the extreme, will be forced by the marketplace to close. The typical market-driven choice system thus provides a strong incentive for schools to exclude low-scoring students, including many students with special needs.

The parental autonomy rationale for school choice is based on the claim that parents should be at liberty to determine the manner in which their children will be educated and, furthermore, that they have the best knowledge regarding the educational needs of their children. Like the market rationale, the parental autonomy rationale is rarely pure in the sense of relying solely on parents to determine how to educate their children, regardless of the overall consequences. Presently, the parental autonomy rationale is typically teamed with the

market rationale under an overarching utilitarian framework that has as its aim maximizing academic (read: test) performance. In other words, providing parents with the autonomy to choose schools they judge to be the best for their children (and to leave the ones they don't) is an important part of the mechanism by which market competition in public education will lead to improved academic performance.

A menu of types of schools from which parents may choose is also a part of the mechanism. The exercise of parental autonomy creates the "demand" to which the educational market responds with a "supply." Not all parents will perceive the needs and interests of their children to be the same; therefore, similar parents (and students) will come together to form different school communities. A diversity of schools will (and should) characterize school-choice systems. This school-level conception of diversity harkens back to the doctrine of "separate but equal" and the noninclusion of students considered to be "special education." This can be highly problematic, particularly when the menu of choice schools includes those that adopt high academic performance as their overriding mission.

### **Philosophical Analysis**

When choice schools define themselves in terms of an academically rigorous curriculum, they are sometimes able to exclude students with special needs by citing a "bad fit" between the school and these students' needs (Heubert, 1997; Welner & Howe, in press). In this way, these schools employ a rationale for excluding students that ironically is based on meeting the diversity of public school students' needs.

This rationale is at complete odds with the principle of inclusion and the associated practice of mainstreaming, in which schools are required to adjust their curricula and instruction to meet the special needs of individual students. It plays on substituting the broad psychological sense of a need—any want or desire—for the more narrow moral sense of a need—a *pressing* want or desire. For example, there is a rather clear difference between the desire for a luxury automobile and the desire for adequate medical care. Likewise, there is a difference, admittedly not as clear, between the desire for elite academic schools and the desire for inclusion. That the distinction between desires per se and pressing desires—*genuine needs*—has a foothold in the real world of educational policy is shown by the fact that private schools, not public ones, have historically been the place to obtain such an elite education.

The idea that genuine needs may be identified and separated from mere desires, preferences, wants, and the like is a crucial step in defining the responsibilities of public institutions. For example, a free public education for all is something that a just society should provide; luxury automobiles do not rise to this level. This is true, at least, for egalitarian conceptions of justice. Libertarian conceptions would limit public institutions and responsibilities to an absolute mini-

mum, embracing a “minimalist” or “nightwatchman” state (Nozick, 1974) and leaving education to the private sector. In this libertarian vision, the distinction between needs and preferences has no place, for everything becomes a matter of free choice, period. Nobody, including the state, has the right or authority to tell people what is best, what compromises they must make, what agreements they must enter into, or whose needs must take precedence.

Philosophical theories of justice rarely, if ever, find application in the real world of education policy. Even the concept of vouchers, the most radical kind of school-choice proposal, embraces the idea of a public responsibility to fund, or at least subsidize, education for all. Nonetheless, conceding that the public has some role to play in providing an education to all leaves considerable room on the continuum between the pure forms of the egalitarian and libertarian conceptions of justice (see Note 1). Toward the libertarian end, the idea of *public education* becomes little more than the idea of *publicly funded education*.

Enter market-driven school choice. The market offers the mechanism that best fits with the libertarian conception of the role of the public in public education: Resources are pooled to support a (minimalist) institution of education open to all. It is then up to individuals to participate in a competitive system requiring them to engage in marketplace activities such as choosing from among existing schools and forming agreements with like-minded individuals to start new schools. In theory, these individual choices will respond to “specialized segments of consumer demand” (Chubb & Moe, 1990, p. 32), combining to form the invisible “hand” that will lead to overall improvement (see Note 2).

These market-driven school-choice schemes are in serious tension with the principle of inclusion, which is fundamentally grounded in an egalitarian conception of justice in which needs, rights, and the drive for equality of opportunity prevail over individual and local preferences and agreements. This conception underlies IDEA, but the passage of Pub. Law 94-142 in 1975 apparently did not extinguish the argument that local districts and schools should be free to define their missions so as to exclude students with special needs. The school-choice movement has given this argument a vibrant new life.

### **Legal Analysis**

Given this tension between inclusion and the market-based philosophy of education, one might expect to find some resolution within the set of laws governing choice and special education (see Welner & Howe, 2001). This legal framework offers comfort to both camps, however. Although disability law expressly and strenuously favors inclusion, charter school laws favor deregulation and competition with equal clarity and strength, and choice supporters could use certain loopholes in disability law designed to protect schools from onerous mandates.

Special education is framed primarily by the federal IDEA plus state statutes that are largely dictated by IDEA. Two antidiscrimination laws also provide important protections for students with special needs: Section 504 of the Rehabilitation Act of 1973 (see Note 3) and Title II of the Americans with Disabilities Act (ADA; see Note 4) prohibit discrimination based on disability in the administration of public services, including education. Section 504 and Title II contain similar language, offer similar protections, and have been interpreted in a similar manner by the courts. The following discussion thus considers the two together (see Note 5).

### **Section 504 and Title II**

In a nutshell, the nondiscrimination provisions in Section 504 and Title II require that choice schools must make reasonable accommodations as necessary to serve students with disabilities. Accommodations are considered reasonable unless they would create “undue hardship” to the local education agency (LEA) or would “fundamentally alter the nature” of the school’s services or program (see Note 6). According to Heubert (1997), this means that a school with an accepted test-score admission process (such as Lowell High School in San Francisco and Boston Latin School in Massachusetts) could exclude students who score low on the test, even if this disproportionately burdens students with disabilities. By contrast, a “back to basics” school could not set restrictive academic criteria, such as reading at grade level, because such criteria are not necessary to fulfilling the school’s mission (see Note 7).

As a general rule, school districts are free, pursuant to the IDEA, to create cost-saving mechanisms to concentrate special education resources at particular sites (see Note 8). This is allowed, however, only when the mechanisms do not deny unique educational opportunities to the child with special needs. Denial of these opportunities constitutes discrimination and violates Title II and Section 504.

### **IDEA**

IDEA provides a uniform set of rules designed to ensure that students with disabilities are educated with their general education peers to the maximum extent appropriate given each student’s special education needs (20 U.S.C. § 1412). It includes provisions granting funds for special education implementation and requiring all recipient states to provide qualifying students with procedural rights and entitlements. These students should be exposed to the same curriculum, the same high academic standards, and the same opportunities for socialization (see, e.g., 20 U.S.C. §§ 1401(8); 1414 (b–d)). The shorthand version of this concept is taken from IDEA’s language: a free, appropriate public education (20 U.S.C. § 1412 (a)(1)) in the LRE (20 U.S.C. § 1412(a)(5)).

This requirement broadly encompasses other important rights, such as the right to an individual eligibility determination and a corresponding Individualized Education Program (IEP), along with the right to be educated with general education peers to the maximum extent appropriate. IDEA accordingly endorses a concept of "meaningful" access that is grounded upon schools providing (a) necessary aids and services in the classroom and (b) general education teachers who can deliver instruction that meets the needs of individual students (see, e.g., *Board of Education v. Rowley*, pp. 200–202, for an interpretation of the IDEA requirement of a free, appropriate public education). Student placement in a non-mainstreamed educational setting cannot be justified by administrative convenience to the school; restrictive educational settings can only be justified in terms of individual benefits to the student (20 U.S.C. § 1412(a)(5)).

Until 1997, federal legislation did not address the relationship between charter schools and students with disabilities. The IDEA regulations did, however, broadly mandate state responsibility for guaranteeing nondiscriminatory and complete schooling of children with disabilities. According to the regulations, "Each SEA [state education agency] shall ensure that each public agency establishes and implements a goal of providing full educational opportunity to all children with disabilities in the area served by the public agency" (34 C.F.R. § 300.304), and "Each public agency shall take steps to ensure that its children with disabilities have available to them the variety of educational programs and services available to nondisabled children" (34 C.F.R. § 300.305). These provisions, in addition to Section 504 and Title II, provided important assurances to students with disabilities that they should not be excluded from admission into charter schools.

Thus, although charter schools are exempt from compliance with most state bureaucratic rules, they remain subject to a comprehensive body of federal rules as regards students with disabilities. The two IDEA provisions that are most nettlesome to these schools are as follows:

1. Students with disabilities must be placed in the LRE, meaning that they must be included in general education classrooms and other settings with nondisabled students to the maximum extent appropriate (20 U.S.C. § 1412(a)(5) and 34 C.F.R. § 300.550(b)(1)).
2. Students with disabilities must be taught by personnel who are "appropriately and adequately prepared and trained" and who meet the "highest standard in the state" for the provisions of special education (34 C.F.R. § 300.136; see Note 9).

Because most founders, teachers, and parents involved with charter schools relish their independence and freedom,

these rules are a particularly bitter pill for them to swallow. Vanourek, Manno, Finn, and Bierlein (1997) warned that, "Charter-school directors should be wary of those who would try to force their schools to mimic conventional schools in their approach to special education." They wrote of a "vexing dilemma" whereby charter schools "are required by law to follow special-ed laws as regular schools do, but what often makes them appealing is that they approach these matters differently." As discussed later in this article, this different "approach" for some charter schools has amounted to underserving students with disabilities or steering them away (see also Welner & Howe, in press).

### **Charter School Legislation**

As part of an educational reform movement that began in the 1980s, states and school districts throughout the United States now offer school-choice options among public schools. The simplest of these reforms merely allows students to attend schools in their school district but outside their usual catchment area. More complex reforms allowed students to choose schools outside the district of their residence. States have also adopted reform legislation allowing people and sometimes corporations to create contractually based charter schools that could draw students from all parts of a district without regard for their place of residence.

Although this article considers laws governing other choice schools in general—such as magnet schools and intra-district choice schools—because of the recent appearance on the scene and rapid growth of charter schools, we have singled them out for further elaboration.

Charter schools were virtually unheard of prior to the early 1990s. As of August 2000, however, 37 states, Puerto Rico, and the District of Columbia had passed charter legislation, and approximately 500,000 students were enrolled in about 2,000 charter schools (Garn, 2000). Indiana passed a charter school law in 2001, becoming the 38th state with such legislation. Although less than 1% of U.S. public school students attended charter schools in 1998–1999, the percentage was considerably higher in several states where charter schools have taken hold. As of 1999, Arizona had the highest percentage at 4.0% of its enrollment, followed by Colorado at 2.0% (U.S. Department of Education, 2000).

The legislation allowing for charter schools ("enabling legislation") differs from state to state, but the general framework is consistent. Charter schools are exempt from many restrictions and bureaucratic rules that govern traditional schools. Charters must nonetheless abide by all federal (and most state) laws regarding safety, health, and civil rights, including federal disability laws. As a result, the majority of their increased autonomy concerns relief from state statutes and regulations governing the areas of budgeting, curriculum and instruction, materials, schedules, facilities, and personnel. Fewer teachers in charter schools may need to be certified (depending on the state), although certification of special

education teachers may be required (depending on the state and on the interpretation of federal disability law; see Note 10).

Eighteen states include provisions that expressly prohibit discrimination in admissions on the basis of disability. Four additional states have a provision that prohibits discrimination against protected individuals in any context, presumably including admissions (see Note 11). Several states allow charter schools to establish enrollment criteria consistent with the school's mission or scope, or to limit enrollment to a specialized area or focus (see Note 12). Some of these states specifically permit admissions based on academic achievement criteria (see Note 13). Nine states forbid the use of such criteria, while two others warn against unreasonable or sole reliance on such criteria (see Note 14). Eight states expressly provide that a primary purpose of the charter school legislation is to offer increased learning opportunities for special populations. The legislation in some of these states uses general terminology, whereas two states specifically name students with disabilities as a target population (see Note 15). Finally, the charter school statutes of four states include a provision designed to ensure that the schools enroll a cross-section of the community's students; however, only two of these states specifically include special education students in their provisions (see Note 16).

The most worrisome feature concerning regulation of choice schools *vis-à-vis* inclusion is admissions criteria that permit schools to determine whether students with special needs "fit" with their missions. Although some jurisdictions explicitly forbid exclusionary admissions criteria, many others either explicitly permit them or are hopelessly vague in the guidance they provide. Heubert's (1997) analysis, briefly discussed earlier, is worth a second look in regards to this problematic area.

Heubert opined that academic schools like Lowell and Boston Latin could exclude students with inadequate test scores (see Note 17). Modifying this test-score requirement would place an undue hardship on these schools or fundamentally alter the nature of their services. The test-based admission can be thought of as lying at the core of these schools' programs. Heubert distinguished this kind of case from a "back-to-basics" choice school that according to him, could not make the same claim about test-based admissions.

Assuming that courts and regulatory authorities reach conclusions consistent with Professor Heubert's prediction, thus creating this exemption from the requirement of nonexclusion, we foresee a dangerous slippery slope. We can think of no justifiable basis whereby schools in which admissions are based on tests have a special claim to the criterion of "undue hardship." Accordingly, many choice schools may claim undue hardship on other grounds. Montessori schools, for instance, are constructed around student-directed activities that arguably require a certain level of maturity and behavioral control. Might these Montessori schools therefore be entitled to screen out immature or ill-behaved children? If

a test is the *sine qua non* of the "undue hardship" standard, these schools could certainly develop their own admissions tests. Likewise, Core Knowledge schools would have no problem developing such tests. For other choice schools, sweat-equity contracts (i.e., requiring parents to donate a certain amount of time) may constitute a key facet of the overall instructional program. For example, sweat-equity contracts are a feature of one of Boulder's charter schools, a member of William Glasser's Quality School Consortium. All these types of schools would likely place disproportionate limitations on students with disabilities, but they would seem to fall under the same type of exemption for undue hardship as do the test-based admission criteria of other schools.

The above philosophical and legal discussions should prompt considerable concern among people committed to inclusion in public schools of students with special needs. The philosophical analysis reveals a fundamental tension between the libertarian/market conception of justice that underlies school choice and the egalitarian conception that underlies inclusion. Accordingly, market-driven school-choice policies can continue to expand only at the expense of inclusion. The legal analysis in turn reveals the insufficient safeguards protecting against the exclusion from choice schools of students with special needs. Choice schools can potentially base their exclusion of such students on their specialized missions, claiming that the students threaten to place undue hardship on the school or to fundamentally alter the nature of their services. The grim implication for inclusion is the same. Whether these analyses signal genuine problems depends on how school choice is in fact playing out for students with special needs. We now examine that question.

## THE EMPIRICAL EVIDENCE

Empirical evidence concerning the effects of school choice on students with special needs is relatively sparse. The most comprehensive study we could find was conducted by the U.S. Department of Education (2000), in which data were collected on the percentage of students with disabilities enrolled in charter schools in 22 states and the District of Columbia. This study found that, in general, charter schools across the nation enrolled a lower percentage of special education students than did public schools. In 15 states and the District of Columbia, the percentage of special education students enrolled in charter schools was less than the percentage enrolled in the public schools. This group included all of the jurisdictions with the largest charter school movements relative to the number of public education students served. Against this general trend, in 7 states charter schools enrolled a larger percentage of special education students than did the public schools. With the exception of New Mexico, each of the 7 states had a relatively small charter-school movement.

In addition to this large-scale survey study, more focused research concerning the effects of various state choice

systems on students with special needs is beginning to accumulate—typically from states that have significant charter-school programs under way. The findings have consistently confirmed the claim suggested in the U.S. Department of Education (2000) survey that school choice is resulting in the stratification and exclusion of these students. In this section, we examine findings concerning charter schools in five states from which there is sufficiently detailed research evidence to begin to understand how and why the exclusion of students with special needs occurs as the result of school choice. We then investigate the comprehensive school-choice system in Boulder, Colorado. In each case, we describe exclusionary patterns of enrollment and we consider how they might be explained by incentives and admissions practices.

### **Charter Schools**

Several states have examined the early effects of charter schools, including their special education enrollments. In California, little difference was found in the proportion of special education students enrolled in charter schools versus public schools overall. When newly formed “start-up” charter schools were distinguished from public schools that had converted to charters (“conversion” charter schools), however, the difference was pronounced. Whereas 26% of start-up charter schools had no special education students, only 6% of conversion charters had none of these students (SRI, 1997, reported in the UCLA Charter School Study, 1998). These findings suggest that start-up schools market themselves so as to create a niche that excludes students with special needs.

Arsen, Plank, and Sykes (2000) found that approximately 75% of Michigan’s charter schools (officially called *public school academies*) offered no special education services whatsoever in 1997–1998. On average, those charter schools that did enroll special education students spent approximately 1% on special education services, far less than did the typical public school. In general, charter schools in Michigan enrolled far fewer students with special needs and provided fewer and less costly special education services for those students they did enroll. Arsen et al. emphasized choice schools’ financial incentive for excluding these students, which was not inconsistent with the incentives for excluding students that were associated with producing high test scores (also a factor in Michigan) and creating niche schools. Indeed, the effect of these incentives was cumulative (see Welner & Howe, in press).

Arsen et al. (1999) found “strong circumstantial evidence” (p. 75) of choice schools “skimming” students who cost less to educate. Special education students with severe disabilities are extraordinarily expensive to educate. Said Arsen et al., “For many charter schools, it would be prohibitively expensive to offer a full special education program. Consequently, they have an interest in excluding students who need these services” (p. 76).

Operating along with these financial and accountability forces is a choice school’s desire to reflect a “theme” or a community vision. Charter-school personnel often speak of these matters in terms of the “fit” between the student and the school. According to McLaughlin, Henderson, and Ullah (1996), “Charter schools are, in part, based on the premise that not all the curriculum or instructional approaches used in a given charter school work for all students; there is an assumption that students should ‘fit’ an approach” (p. 5). Arsen et al. (1999) described how the very process of determining fit can function to exclude students with special needs:

Many charter schools, for example, have adopted elaborate application procedures for prospective students. They require parents to fill out application forms or participate in interviews before enrolling their children. This makes it at least possible for administrators to discourage applications from students who might disrupt the school community. (p. 75)

Garn (2000) documented how the charter school funding formula in Arizona provided incentives to exclude special education students. The state offers a flat rate supplementary payment of \$174 per special education student and no allocation for transportation. The former provides a disincentive for charter schools to enroll students with special needs and the latter effectively eliminates the opportunities to participate in choice for parents of these students who have no means of providing transportation. McKinney (1996) observed that because of budgetary pressures, “the marketplace concept that drives charter school legislation is stood on its head and proves to be a disincentive when it comes to serving children with disabilities.” He quoted an Arizona charter school principal: “One severely disabled special ed kid would put me out of business” (p. 25).

Not surprisingly, charter schools spent considerably less on special education than did public schools in Arizona: 1.4% versus 10%. Furthermore, only a few charter schools spent a substantial amount on students with special needs, whereas nearly half spent nothing at all. These figures on allocations for such students provide strong, albeit indirect, evidence that Arizona charter schools are excluding them on a massive scale.

N. Zollers (2000; see also J. Zollers & Ramanathan, 1998) found that charter schools (specifically, for-profit charter schools) in Massachusetts exclude students with special needs in three ways: overtly barring them upon discovering their disabilities, returning them to their former schools on the grounds that no suitable program exists for them, and “counseling out” by appealing to their alleged best interests.

Charter schools also work within the set of incentives and disincentives created by states’ high-stakes accountability systems. Schools are rewarded, often financially, for students who score high on tests, and they are punished for their

students who score low on these tests. Yet, these mean test scores rise and fall primarily with the entering test scores of students and only secondarily with the schooling these students subsequently receive. A choice school that recruits high-scoring students thus often gains the benefit of a state-run apparatus that financially rewards such recruitment and publicizes the test scores as demonstrating instructional excellence. The opposite holds true for choice schools that enroll students with low test scores. J. Zollers and Ramanathan (1998) pointed out that the test-score incentives are even stronger for the for-profit management companies because if they cannot show substantial test-score gains, they lose their charters.

In Colorado, charter schools enroll 6.7% special education students on average, whereas the public school districts in which they are located enroll 10.2% on average. By far, the most prevalent kind of charter school in Colorado is Core Knowledge. Core Knowledge schools define their mission almost exclusively in terms of well-defined academic curricula. The vast majority of these schools enroll a smaller percentage of special education students than the districts in which they are located. In the few cases in which Core Knowledge schools exceed the district average (2 of 21), it is by a small margin, and these districts have percentages that are lower than the state average. These Core Knowledge charter schools enroll an average of 4.6% special education students; the average for the districts in which they are located is 8.9%. Colorado's charter schools as a whole enroll roughly two thirds (65%) of the percentage of special education students as the districts in which they are located, but the Core Knowledge charter schools in the state enroll roughly one half (52%), thus contributing disproportionately to the stratification caused by charter schools. (The statistics reported in this paragraph are included in or derived from Colorado Department of Education, 2000.)

Taken together, the findings from these five states—California, Michigan, Arizona, Massachusetts, and Colorado—confirm a general trend of exclusion and increased stratification of special education students. That such a trend would emerge is not surprising in light of (a) the financial and accountability pressures under which charter schools operate and (b) the pressure they are under to formulate specialized missions in order to obtain a market niche. The enrollment patterns associated with Colorado's Core Knowledge charter schools indicate that the emphasis on a specific kind of academic mission contributes to the exclusion of students with special needs from choice schools. A study of the school choice system in the Boulder Valley (Colorado) School District (BVSD; Howe & Eisenhart, 2000; see Note 18) further confirmed this finding.

### **The Boulder Choice System**

The school choice ("open enrollment") system in Boulder, Colorado, is unusually comprehensive among choice systems

in the United States. All students in the BVSD are free to choose enrollment in a school other than the "neighborhood school" to which they are assigned, and approximately 20% successfully exercise choice. This level of participation is sufficient to force all schools in BVSD to compete for enrollment. Schools that fare poorly in the competition face reduced resources and, in the extreme, closure.

BVSD enrolls approximately 27,000 students and operates 63 schools. Open enrollment has existed in this district since 1961, but it did not become a significant practice and source of controversy until the mid-1990s. Spurred by a concerned and vocal group of parents who were discontented with the district's implementation of the "middle school philosophy," coupled with a perceived lack of emphasis on academics in BVSD more generally, various choice options began to proliferate. This happened at a time when the school-choice movement also began accelerating at the state and national levels.

Several types of choice options were differentiated, and *open enrollment* became an umbrella term that in addition to the option to enroll in any district neighborhood school on a space-available basis, now covers four other kinds of options:

1. *focus schools*—schools with a particular curricular focus that have no attendance area;
2. *neighborhood focus schools*—focus schools that give priority for enrollment to students from within the neighborhood attendance area;
3. *strand schools*—neighborhood schools employing two curricular strands, one of which would be the normal BVSD curriculum while the other would be an alternative curriculum (typically Core Knowledge); and
4. *charter schools*—relatively autonomous district schools with no attendance area whose accountability to BVSD is specified in a contract. Variations also exist within these types.

Prior to the 1994–1995 school year, five articulated choice options were available in BVSD. All emphasized diversity, experiential learning, integrated learning, or bilingual education, sometimes in combination. By 1999–2000, 16 additional articulated choice options were available. Half of these had adopted a new kind of mission consistent with the mood of the mid-1990s, namely, an explicit emphasis on academic rigor.

Stratification by race and by income increased substantially in BVSD between the 1994–1995 and 1999–2000 school years. The simultaneous advent of choice schools with an explicit emphasis on academics and college preparation best explains this increased stratification. The demand for these elite new choice schools can in turn be partially explained by Colorado's policy shift toward high-stakes standardized

exams (the Colorado Student Assessment Program, or CSAP). The elite choice schools have benefited greatly under this state accountability framework by skimming the district's highest scoring students (Howe & Eisenhart, 2000). Under these conditions, one can speculate with some justification that BVSD schools would also become more stratified with respect to special education (see Note 19).

Our investigation of broad BVSD trends discovered no discernible longitudinal increase in stratification by special education associated with the expansion of open enrollment. (Similar analyses did demonstrate increased stratification by race and income.) Hidden within these broad statistics, however, was compelling evidence of increased stratification among the newly created choice schools. Indeed, three choice schools—a middle school emphasizing social responsibility, a high school emphasizing vocational education, and a high school serving adjudicated youth—had the highest percentages of special education students in the district (save one school dedicated exclusively to students with severe disabilities). In 2000–2001, these three schools' percentages were 23.3%, 25.9%, and 27.3% respectively, compared to 12.1% for the district overall (Boulder Valley School District, 2001).

At the other extreme, the two choice schools most notorious for "elitism" in the district, and whose formation was at the center of the expansion of open enrollment in the mid-90's—Pinnacle, a Core Knowledge-focus elementary school (see Note 20), and Firmament, an academically oriented charter middle school—had the second and third lowest special education percentages in the district in 2000–2001. At 4.3% and 5.4% respectively, they were well below the district average of 12.1%.

In terms of having exceedingly low special education percentages, these start-up choice schools, along with several others in BVSD, mirrored the findings discussed earlier with respect to start-up charter schools in California. The latest addition to this genre of schools in BVSD, the High Ridge charter school (now K–5 but eventually to be K–12), was opened in the 2000–2001 school year. High Ridge continues the exclusionary pattern. It had the lowest percentage of special education students in the district, 3.6%.

There is another way in which a pattern of increased stratification by special education may be masked by crude statistics. BVSD's strand schools—and many of its focus schools—report special education statistics at the school level even though they follow the school-within-a-school model. As a result, the distribution of students between the programs within these schools is not reflected in the statistics. Three (of 34) elementary schools and 3 (of 13) middle schools fall within this category. Masked stratification is quite likely in each case, especially for the 4 schools that employ the Core Knowledge curriculum, given the data reported previously concerning the low special education enrollment in Colorado's Core Knowledge charter schools. Furthermore, parents and teachers from these BVSD schools reported that special education students are routinely counseled out of Core

Knowledge because they cannot keep up with the pace of the curriculum and therefore are not a good fit. The claim by a teacher that "Core [knowledge] is notorious for not having as many staffed [special education] students" went unchallenged in a focus group that included parents and teachers participating in a school's Core Knowledge curriculum strand.

Participants in the Boulder choice study also reported exclusionary practices in several schools other than those employing Core Knowledge. According to one individual intimately familiar with the school, BVSD's Montessori focus school (which, incidentally, tied with Firmament for the third lowest percentage in the district in terms of students with special needs at 5.4%) counsels out special education students (e.g., students with ADHD) who lack the capacities for self-control and self-direction believed to be required by the Montessori method. In BVSD's arts focus middle school, scheduling constraints were identified as having an exclusionary effect. That is, enrolling in certain courses in the focus curriculum forces students to take most or all of their courses together, creating tracks that exclude and concentrate special education students. Finally, one parent of a student with special needs remarked regarding her dealings with an unidentified school: "I . . . talked to the parents and they laid it out. 'We're an aggressive school. We want the best test scores. The families are very driven; we want all the higher achieving kids.'"

BVSD also requires that after receiving "conditional acceptance" for enrollment at a school, a student with special needs must "have a staffing which finds that the open enrollment placement is appropriate before a change in attendance can occur" (see Note 21). This provides a formal means of steering such students away, in addition to the more informal means of counseling out (see Welner & Howe, in press). It also provides an incentive for the parents of these students to attempt to remove their children from special education. As reported by both a middle school principal and the parent of a special education student, these parents' perception is that their children will likely not be admitted to academically oriented choice schools because being labeled as "special education" allows them to be flagged and then denied via the staffing procedure.

Additional allegations that surfaced during the BVSD study applied to even deeper layers of stratification. Critics maintained that the opportunity of choice schools to use the staffing procedure to deny enrollment to conditionally admitted students with special needs permits these schools to take the least demanding and least expensive of these students. This, the critics argued, benefits the schools in two ways. First, they report a flat percentage of special education students that makes no mention of the kinds of special needs served. Second, these schools can take advantage of the state's special education funding formula, which allocates the average cost of students with special needs into various categories. Within the "mild needs" category, some students have greater needs, and schools gain a financial advantage by ad-

mitting only those students with the mildest of mild needs. (For similar allegations concerning Massachusetts' schools, see Zollers & Ramanathan, 1998.)

One district-wide BVSD special education administrator summed up the situation in Boulder as follows: "Open enrollment makes some options less available for special education parents." This claim has two interpretations: one relative and the other absolute. Because special education services have always been concentrated to a degree in certain schools, parents of special education students may have experienced diminished choice relative to the expanded options available to other parents but not relative to the options they had before the expansion of open enrollment. The options of parents of special education students have been diminished in the absolute sense, however, in that they have actually decreased relative to their options before the expansion of open enrollment. As more BVSD schools have specialized their curricula and instruction, fewer are able or willing to accommodate special education students than were prior to the expansion of open enrollment.

## CONCLUSIONS

The principle of inclusion is grounded in an egalitarian conception of justice—a conception that supercedes and sometimes requires setting aside the accepted practices and perceived interests of local communities. Reliance on the latter in the distribution of public education was once the rule, but it proved woefully inadequate from the point of view of students with special needs. These students were pervasively denied access to an adequate, or even any, public education. For them, local control meant segregation and discrimination. In the face of sometimes strong local objections, parents of these students turned to the federal courts and the U.S. Congress for help.

Now Congress and state governments are looking to a new form of local control—choice schools—to help address a variety of ills that they perceive as existing in public schools. This effort may indeed find some success. Choice schools can advance some of the most worthy goals of local control. At its best, this policy results in innovative, responsive schools that embrace the uniqueness of their community. At its worst, however, this policy becomes a tool for the short-sighted to create exclusive, private academies at the public expense. Accordingly, we contend that the policy's successes will come at the expense of many vulnerable students, including those with special needs.

The nation seems to have come full circle. The federal mandate requiring that students with special needs be included in public education was passed in recognition of the unfortunate existence of powerful incentives to exclude these students from public schools. The new law required that special education students were to be included not only formally but also in a meaningful way. After a quarter-century of progress, a different cohort of reformers is designing laws that no

longer embrace inclusion. Instead, these laws wholeheartedly welcome market incentives—forces that demonstrably promote exclusion. This market-driven school choice now provides public schools with the power to exclude students with special needs on the grounds that educating such students is beyond the scope of their mission. They are in fact excluding these students. *Déjà vu.* ■

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## AUTHORS' NOTES

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## NOTES

1. Some libertarians do advocate for no government role whatsoever in education (see Dewey, 1996; Richman, 1995).
2. Strictly speaking, a libertarian conception should ignore the consequences of education policies. Because liberty is the overriding value, whether overall improvement occurs is beside the point and also requires imposing some general yardstick beyond individual preferences. To our knowledge, such purists exist only in philosophy books.
3. 29 U.S.C. § 794. This provision states that "[n]o otherwise qualified individual with a disability . . . shall, solely by reason of his disability, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity receiving federal financial assistance."
4. 42 U.S.C. §§ 12101 *et seq.* (1994). Title II of the ADA prohibits discrimination because of a person's disability in all services, programs, and activities provided or made available by any public entity, not just those receiving federal funding. *Id.* at § 12132; see also 28 C.F.R. § 35.130.
5. Important differences do exist, but they are not relevant to this discussion.
6. The undue hardship language is from 34 C.F.R. § 104.12(a), enforcing Section 504. The fundamentally alter language is from the U.S. Department of Justice's *Technical Assistance Manual* for Title II of the ADA (1992), p. 13. The same manual states that a "public entity may not impose eligibility criteria for participation in its programs, services, or activities that either screen out or tend to screen out persons with disabilities, *unless it can show that such requirements are necessary* for the provision of the service, programs, or activity" (p. 12; emphasis added). Note that these exceptions to the requirement for accommodation apply to nondiscrimination claims, not to the requirement that schools provide a free, appropriate public education (see Heubert, 1997, pp. 329–330).
7. We will return to the undue hardship issue in our later discussion of IDEA's requirement that each student with disabilities must receive an education that is appropriate to his or her individual needs. As we shall see, enforcement of these provisions must balance between protecting legitimate interests and creating a loophole that can be abused by unscrupulous operators of choice schools.

8. LEAs cannot do this, however, if it violates either the child's IEP or IDEA's inclusion mandate.
9. Instead of setting federal minimum standards for charter school teachers, this provision leaves the task to individual states. As a result, the federal government mandates only that special education students in charter schools have teachers who meet the same minimum standards that a state sets for other public school special education teachers.
10. As noted earlier, IDEA regulations provide that students with disabilities must be taught by personnel who are "appropriately and adequately prepared and trained" and who meet the "highest standard in the state" for the provisions of special education (34 C.F.R. § 300.136(b) and (c)).
11. Eight states that have an admissions nondiscrimination clause also have a general nondiscrimination clause (Fiori & Cashman, 1998). Unless otherwise stated, the figures set forth in this paragraph are from Fiori and Cashman's work.
12. For instance, Ahearn mentions a state document from Alaska that includes "a statement that charter schools can serve 'students who will benefit from a particular teaching method or curriculum,' but care is advised in disallowing admissions of students with disabilities because of the potential for violating civil rights laws on discrimination" (Ahearn, 1999, no page available).
13. New Hampshire and Texas are two such states. For instance, the New Hampshire statute states, "Charter schools may select pupils on the basis of aptitude, academic achievement, or need, provided that such selection is directly related to the academic goals of the school" (N.H. REV. STAT. ANN. § 194-B:9(c)(1)).
14. The charter school statutes in Louisiana, Massachusetts, Michigan, Minnesota, New Jersey, North Carolina, Ohio, and Pennsylvania forbid these schools from basing enrollment on intellectual or academic ability or measures of aptitude or achievement. The statutes in Rhode Island and Wyoming appear to allow the use of these criteria but only in a limited way.
15. Illinois and Louisiana explicitly name students with disabilities as a target population. The laws in California, Colorado, Florida, New Hampshire, North Carolina, and Rhode Island use general terms such as *academically low-achieving* or *at-risk* that may or may not include students with disabilities. Colorado law also provides that the chartering authority shall give preference to applications for charter schools that are designed to increase the educational opportunities of students with disabilities (among other at-risk groups). The Florida and Nevada statutes give charter schools the right to limit enrollment exclusively to (among other at-risk groups) students with disabilities.
16. Louisiana and Rhode Island have provisions that include special education students. The laws in New Jersey and North Carolina focus instead on racial and/or academic factors. Other provisions that demonstrate an increased focus on target populations (but not specifically special education populations) include Colorado's requirement that a certain number of charter schools focus on target populations and Texas' relaxation of restrictions on the total number of open-enrollment charter schools for schools focusing on target populations. In addition, statutes in three states (California, Connecticut, and Massachusetts) require reports with respect to special populations within their charter schools.
17. Recall also that several states' charter school laws specifically allow for academic enrollment criteria.
18. The data for the analyses reported here were collected in connection with the Boulder choice study (Howe & Eisenhart, 2000). Most of the analyses reported in this article, however, are new.
19. The former president of the BVSD school board was an ardent supporter of the formation of new choice schools with high academic performance as their primary mission. Her objection to having her daughter included in the same classroom with a child with Down syndrome—which she asserted in a front-page interview with the local newspaper—was taken by skeptics as indicative of choice supporters' pervasive attitude toward students with special needs.
20. School names are all pseudonyms.

21. This requirement is set forth on the district's Web site, retrieved February 4, 2001, from [http://www.bvsk12.co.us/eduprograms/bv\\_openenroll.html#special](http://www.bvsk12.co.us/eduprograms/bv_openenroll.html#special)

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