

COMMENT

BY VIRTUE OF BEING VIRTUAL: HOW PENNSYLVANIA'S CYBER CHARTER SCHOOLS VIOLATE THE LEAST RESTRICTIVE ENVIRONMENT PROVISION OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT*

I. INTRODUCTION

"You're in control of your child's learning environment from the safety of your own home!" Andre's mom repeats the Power 99 FM¹ advertisement for Commonwealth Charter Academy² to his grandmother as she maneuvers through lunch traffic, speeding to her son's school.³ She has left work in the middle of the day, once again, to pick Andre up—suspended for disrespecting his teacher.⁴ Andre has disabilities.⁵ He needs constant prompting from his teachers to stay on task and engaged.⁶ When he struggles with assignments, he often becomes angry and disruptive.⁷ After listening to that Commonwealth Charter Academy advertisement countless times on the many drives to stop her son from wreaking havoc on his teachers and peers, Andre's mom decides that this drive will be the last.⁸

Commonwealth Charter Academy representatives assured her that Andre would benefit from the cyber charter school's high-quality and individualized virtual instruction.⁹ No costs, no calls from the school, and a free computer?¹⁰ Deciding to enroll

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1. Philadelphia's #1 radio station for hip-hop and R&B is heavily sponsored by Commonwealth Charter Academy. See *The Rise & Grind Morning Show*, POWER 99FM (2022), <https://power99.iheart.com/featured/the-rise-grind-morning-show/> [<https://perma.cc/XL37-DHN9>] (last visited Nov. 1, 2022).

2. See COMMONWEALTH CHARTER ACAD. (2022), <https://www.ccaeducate.me/> [<https://perma.cc/W8ZG-TD9X>] (last visited Nov. 1, 2022).

3. The author created this hypothetical for illustrative purposes.

4. See *infra* Part II.C.2 for a discussion of how cyber charter school parents of students with disabilities struggle with behavior problems and poor staff interactions at brick-and-mortar schools.

5. See *infra* Part III.B.3 for a discussion of the least restrictive environment for Andre.

6. See *infra* Part III.B.3.

7. See *infra* Part III.B.3.

8. See *infra* Part III.B.3.

9. See COMMONWEALTH CHARTER ACAD. (2022), *supra* note 2.

10. See *id.*

her son immediately, Andre's mom has no idea that the consequences will soon outweigh the perceived convenience.¹¹

This Comment dispels the myth that Pennsylvania's cyber charter schools provide appropriate public education to most students with disabilities. The Individuals with Disabilities Education Act (IDEA)¹² requires that all students be educated in the least restrictive environment appropriate to their needs.¹³ To ensure that students with disabilities are included with their nondisabled peers to the greatest extent possible, IDEA provides that all children start in the regular classroom environment and move toward more restrictive environments as their needs require.¹⁴ This Comment argues that Pennsylvania's cyber charter schools are not regular classroom environments because of their virtual nature. As school choice options, these schools are illegal substitutes for in-person educational placements for most students with disabilities.¹⁵ Therefore, for students with disabilities to attend cyber charter schools, key stakeholders must first decide, on an individual basis, whether such schools are appropriate educational placement options.

This Comment proceeds in three sections. Section II examines the history of school choice and education reform related to students with disabilities, illuminates the current education practices at Pennsylvania's cyber charter schools, then describes the educational best practices for providing special education services. Section III reveals how the historical exclusion of students with disabilities has been allowed to persist with this high-tech option, argues that cyber charter schools are less restrictive than the regular classroom environment, and thus undercut a student's ability to benefit from special education services, and reviews current events that support in-person instruction.

II. OVERVIEW

The location where students with disabilities receive their education and related services may seem like a trivial issue. But where a child receives their special education services drastically impacts the quality of their educational experience. A careful review of the problem is helpful to understand the need for face-to-face instruction for most students with disabilities. This Section provides context essential to understanding how Pennsylvania's cyber charter schools violate IDEA for most students with disabilities by providing only virtual instruction.

Part II.A introduces charter schools by briefly summarizing the history of school reform in the United States and the birth of cyber charter schools. Part II.B outlines the public education experience for students with disabilities before federal regulations were enacted and their unintended consequences emerged. Part II.C details the relevant state

11. *See id.* (stating that there are no enrollment caps and no waiting list).

12. 20 U.S.C. §§ 1400–1482.

13. 20 U.S.C. § 1412(a)(5)(A) (defining “the least restrictive environment” as one where “children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily”).

14. *Id.*

15. *See infra* Section III for a discussion of how cyber charter schools violate federal education mandates.

requirements regarding students with disabilities for Pennsylvania cyber charter schools, current practices, and persistent educational outcomes. Part II.D reviews educational best practices for complying with federal and state special education regulations and the impact of COVID-19 school closures on implementing those practices.

A. *The Origins of Cyber Charter Schools*

In Pennsylvania, charter schools are public schools authorized to operate under charters granted by a local board of school directors or the Pennsylvania Department of Education.¹⁶ The chartering authority, or school district, is also known as the authorizing local education agency.¹⁷ Unlike district schools that receive total funding, charter schools receive state and local tax dollars to aid in operations but require resources from other sources.¹⁸ Most charter schools are brick-and-mortar schools, in which students receive face-to-face, teacher-led instruction at a school facility.¹⁹

The origins of charter schools can be traced back to the school reform movement of the 1980s. Reformers thought that improving education was the key to securing the United States' lead in the "world economic [marketplace]."²⁰ The acting Secretary of Education under the Reagan administration created and directed the National Commission on Excellence in Education to report on the quality of education in America.²¹ The report warned that the nation's future was threatened because "the

16. PA. DEP'T OF EDUC., WHAT IS A CHARTER SCHOOL? 1 (2021) <https://www.education.pa.gov/K-12/Charter%20Schools/Pages/What-is-A-Charter-School.aspx> [<https://perma.cc/W4C7-DHCR>]; see CHRISTOPHER A. LUBIENSKI & PETER C. WEITZEL, *Two Decades of Charter Schools: Shifting Expectations, Partners, and Policies*, in THE CHARTER SCHOOL EXPERIMENT: EXPECTATIONS, EVIDENCE, AND IMPLICATIONS 1, 14 (Christopher A. Lubienski & Peter Weitzel eds., 2010) [hereinafter *Two Decades*] ("[L]ittle research has been conducted on the entities that authorize charter schools or the shifts in political power arising from the introduction of charter schools.").

17. "Local educational agency or LEA means a public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public elementary or secondary schools in a city, county, township, school district, or other political subdivision of a State, or for a combination of school districts or counties as are recognized in a State as an administrative agency for its public elementary schools or secondary schools." 34 C.F.R. § 300.28(a) (2022).

18. Funding formulas are beyond the scope of this Comment. See Susan DeJarnatt, *Virtual Reality: Cyber Charter Schools and the Need for Reform*, PA BAR ASSOC. QUARTERLY (2021) for an in-depth discussion of funding formulas.; See *Just the FAQs—Charter Schools*, CTR. FOR EDUC. REFORM (2021), <https://edreform.com/2021/03/just-the-faqs-charter-schools/> [<https://perma.cc/8MDX-2NUJ>] ("Nationwide, on average, charter schools receive 20 percent less per-pupil funding than their district counterparts and in some cases as much as 60 percent."); Lubienski & Weitzel, *Two Decades*, *supra* note 16, at 12 ("[M]any charter schools . . . seek and secure substantial amounts of private funding to support their work, though this pursuit of private funds often entails trade-offs for school operators.").

19. PA. DEP'T OF EDUC., *supra* note 16.

20. RAY BUDDÉ, EDUCATION BY CHARTER: RESTRUCTURING SCHOOL DISTRICTS, THE REGIONAL LAB FOR EDUC. IMPROVEMENT OF THE NORTHEAST & ISLANDS 49 (1988); see Lubienski & Weitzel, *Two Decades*, *supra* note 16, at 7 ("Market-based perspectives that see competition as a rising tide that can lift all boats have collided with the realities of metropolitan segregation, parent preferences, and perverse incentives for schools to attract higher-achieving students rather than focusing solely on instructional improvements.").

21. The Commission was created as a result of the Secretary's concern about "the widespread public perception that something is seriously remiss in our educational system." THE NAT'L COMM'N ON EXCELLENCE IN EDUC., A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM 7 (1983) [hereinafter A NATION AT

educational foundations of our society [were] being eroded by a rising tide of mediocrity.”²² Research showed that poor educational outcomes were due to inadequacies in the overall educational process.²³

Ray Budde, a former assistant professor of Education at The University of Massachusetts, Amherst,²⁴ responded to the call for education reform with a proposal to restructure schools through chartering.²⁵ Budde’s vision was to challenge traditional local school districts by empowering teachers, the closest staff to the classroom, with more decisionmaking power over instructional methods and leadership roles.²⁶ As Budde’s idea gained traction, Albert Shanker, president of the American Federation of Teachers, took it a step further—suggesting that teachers start new schools within their school buildings.²⁷

Minnesota put Budde’s and Shanker’s philosophies into action, enacting the first charter school law in 1991.²⁸ Early charter school advocates “envisioned small-scale, autonomous schools run by independent mom-and-pop operators who would be positioned to respond to local community needs.”²⁹ The advent of charter schools gave parents the option to choose between poor performing traditional public schools and these new, exciting community-based schools.³⁰ In Pennsylvania, the school choice model of charter schools required a description of how parents, teachers, and other community members were involved in designing and implementing the proposed

RISK]; Valerie Strauss, *‘A Nation at Risk’ Demanded Education Reform 35 Years Ago. Here’s How It’s Been Bungled Ever Since*, WASH. POST (Apr. 26, 2018), <https://www.washingtonpost.com/news/answer-sheet/wp/2018/04/26/the-landmark-a-nation-at-risk-called-for-education-reform-35-years-ago-heres-how-it-was-bungled/> [<https://perma.cc/7BQG-UQRT>].

22. A NATION AT RISK, *supra* note 21, at 9. *A Nation at Risk* has been hotly contested from the time it came out. Holly G. McIntush, *Defining Education: The Rhetorical Enactment of Ideology in “A Nation at Risk”*, 3 RHETORIC & PUBLIC AFFS. 419, 420 (Fall 2000); see Lubienski & Weitzel, *Two Decades*, *supra* note 16, at 6–7 (“In the absence of data on charter school performance, the early discussions over charter schools necessarily focused on their theorized outcomes and impacts.”).

23. A NATION AT RISK, *supra* note 21, at 16–17.

24. Lubienski & Weitzel, *Two Decades*, *supra* note 16, at 4–5; Susan Saulny, *Ray Budde, 82, First to Propose Charter Schools, Dies*, N.Y. TIMES (June 2005), <https://www.nytimes.com/2005/06/21/us/ray-budde-82-first-to-propose-charter-schools-dies.html> [<https://perma.cc/7KHP-379B>].

25. Lubienski & Weitzel, *Two Decades*, *supra* note 16, at 4–5; see BUDDE, *supra* note 20, at 16.

26. BUDDE, *supra* note 20, at 30; Ted Kolderie, *Ray Budde and the Origins of the ‘Charter Concept’*, EDUC. EVOLVING 1–2 (June 2005), <https://www.educationevolving.org/pdf/Ray-Budde-Origins-Of-Chartering.pdf> [<https://perma.cc/R335-TKGW>].

27. Kolderie, *supra* note 26, at 1; *Closing the Achievement Gap: Charter School FAQ*, PBS (2004), <https://www.pbs.org/closingtheachievementgap/faq.html> [<https://perma.cc/U8PU-95V8>].

28. Kolderie, *supra* note 26, at 2 (explaining that Minnesota envisioned a framework of state policy and the possibility of schools being authorized by the state as well as by a local board); Lubienski & Weitzel, *Two Decades*, *supra* note 16, at 1.

29. Lubienski & Weitzel, *Two Decades*, *supra* note 16, at 3 (explaining that goals for charter schools as a reform movement include “introducing competition to the school sector, promoting more equitable access to quality school options through greater choice, encouraging innovation, and thereby creating more effective and efficient educational processes and outcomes”).

30. Lubienski & Weitzel, *Two Decades*, *supra* note 16, at 7 (“Concerned parents, particularly those with children trapped in decaying urban schools, must be empowered to seek high-quality schooling alternatives.”).

schools.³¹ Also, charter schools were to provide “demonstrated, sustainable support for the charter school plan by teachers, parents, and other community members and students.”³² Because education is the primary avenue for economic mobility in the United States, school choice can be framed as a civil rights and liberty issue.³³ The charter school option was particularly attractive in urban areas where most traditional public schools struggled.³⁴

During the first decade of their existence, over two thousand charter schools opened across thirty-eight states.³⁵ These schools were intended to increase overall student achievement through franchise and competition.³⁶ However, the bargain of school

31. Priscilla Wohlstetter & Joanna Smith, *Uncommon Players, Common Goals: Partnerships in Charter Schools*, in *THE CHARTER SCHOOL EXPERIMENT: EXPECTATIONS, EVIDENCE, AND IMPLICATIONS* 147, 152 (Christopher A. Lubienski & Peter Weitzel eds., 2010).

32. Establishment of Charter School, 24 P.S. § 17-1717-A(2)(i) (1997); Priscilla Wohlstetter & Joanna Smith, *Uncommon Players, Common Goals: Partnerships in Charter Schools*, in *THE CHARTER SCHOOL EXPERIMENT: EXPECTATIONS, EVIDENCE, AND IMPLICATIONS*, *supra* note 31, at 152.

33. PETER C. WEITZEL & CHRISTOPHER A. LUBIENSKI, *Grading Charter Schools: Access, Innovation, and Competition*, in *THE CHARTER SCHOOL EXPERIMENT: EXPECTATIONS, EVIDENCE, AND IMPLICATIONS* 15, 16 (Christopher A. Lubienski & Peter Weitzel eds., 2010) [hereinafter Weitzel & Lubienski, *Grading Charter Schools*].

34. See Lubienski & Weitzel, *Two Decades*, *supra* note 16, at 7 (“Concerned parents, particularly those with children trapped in decaying urban schools, must be empowered to seek high-quality schooling alternatives. Disadvantaged urban populations . . . [came to see school choice] as a potential solution to racial and socioeconomic achievement gaps.”).

35. EVALUATION OF THE PUBLIC CHARTER SCHOOLS PROGRAM: FINAL REPORT, SRI INT’L 71 (2004); see Lubienski & Weitzel, *Two Decades*, *supra* note 16, at 4 (explaining that this policy change “enticed a wide range of actors – from small, local nonprofits to large corporations and foundations”).

36. BUDDÉ, *supra* note 20, at 49; see Lubienski & Weitzel, *Two Decades*, *supra* note 16, at 1 (“[C]harter schools are part of a larger deregulation reform agenda in public policy that has seen broad political support – not just in education and not just in the United States, but also in many other sectors around the globe.”).

choice—autonomy for accountability³⁷—never occurred.³⁸ Many state statutes do not hold charter schools accountable³⁹ for their performance⁴⁰ yet allow them to expand.⁴¹

Besides disregarding accountability, early charter school laws left unclear what types of charter schools were permitted in each state.⁴² As of 2022, charter school laws exist in forty-five states and the District of Columbia.⁴³ Over time, Budde’s vision of small, community-based schools led by teachers⁴⁴ evolved into large management organizations that exist as business entities separate from the schools they manage, and serve multiple schools and hundreds of students.⁴⁵ The two types of management organizations are charter management organizations (CMOs), or schools with nonprofit tax status, and education management organizations (EMOs), or schools with for-profit

37. See Lubienski & Weitzel, *Two Decades*, *supra* note 16, at 14 (“Charter schools operate under a two-part model of accountability in which they are expected to answer to both consumers (parents) and public regulators.”).

38. See CTR. FOR EDUC. REFORM, NATIONAL CHARTER SCHOOL LAW RANKINGS & SCORECARD—2021 (2021), <https://edreform.com/wp-content/uploads/2021/06/ce-rcer-charterlaws-scorecard-2021.pdf> [<https://perma.cc/64MA-EQMJ>] (providing no category for educational outcomes); see Lubienski & Weitzel, *Two Decades*, *supra* note 16, at 9 (“[As of 2010], charter schools on average, are performing no better than traditional public schools on student achievement, and cities with high levels of competition for students are not experiencing greater improvements in student achievement.”).

39. See Lubienski & Weitzel, *Two Decades*, *supra* note 16, at 10 (“[C]harter school policy is . . . a state issue, with substantial variation in these regulations between states. Not only do the regulations themselves vary, but states also demonstrate substantially different capacities and willingness to enforce the rules they have on the books.”).

40. Charter school accountability is compromised to the extent that statutes fail to define clear standards of school performance in educational outcomes, although the lack of such standards clearly expands the scope of a charter school’s freedom from outside interference (i.e., its autonomy). See MARC DEAN MILLOT, UW/RAND CTR. ON REINVENTING PUB. EDUC., AUTONOMY, ACCOUNTABILITY, AND THE VALUES OF PUBLIC EDUCATION: A COMPARATIVE ASSESSMENT OF CHARTER SCHOOL STATUTES LEADING TO MODEL LEGISLATION xi (Sept. 1996); see Lubienski & Weitzel, *Two Decades*, *supra* note 16, at 11 (“[C]harter schools perform about the same as traditional public schools, but there are large differences in performance within and between states.”).

41. See *Just the FAQs—Charter Schools*, CTR. FOR EDUC. REFORM (2021), <https://edreform.com/issues/choice-chartr-schools/facts/> [<https://perma.cc/B3SN-KHWP>] (“As of 2020, there were more than 7,300 charter schools across the country with more than 3.3 million students, with demand higher everywhere they are located.”); see also Gary Miron, *Performance of Charter Schools and Implications for Policy Makers*, in THE CHARTER SCHOOL EXPERIMENT: EXPECTATIONS, EVIDENCE, AND IMPLICATIONS 73, 88 (Christopher A. Lubienski & Peter Weitzel eds., 2010) (“Overall, closure rates for charter schools remain relatively low, and most charter schools that are closed do so because of financial mismanagement, rather than poor performance.”).

42. See DeJarnatt, *supra* note 18, at 3 (“Cyber charters started in Pennsylvania even though the 1997 Charter School Law did not mention them.”).

43. *Just the FAQs—Charter Schools*, *supra* note 41.

44. See Lubienski & Weitzel, *Two Decades*, *supra* note 16, at 4–5; Kolderie, *supra* note 26, at 1; *Closing the Achievement Gap*, *supra* note 27.

45. Rebecca David, NATIONAL CHARTER SCHOOL MANAGEMENT OVERVIEW, 2016-2017, NAT’L ALL. FOR PUB. CHARTER SCHS. 3 (Aug. 27, 2018) https://www.publiccharters.org/sites/default/files/documents/2019-10/napcs_management_report%20%283%29.pdf [<https://perma.cc/3CNY-Q6LD>] (describing large management organizations as separate business entities that manage at least three schools and serve a minimum of 300 students).

tax status.⁴⁶ In 1998, Pennsylvania was the first state to open a cyber charter school, shortly after the first charter school law was enacted.⁴⁷

Cyber charter schools offer students curriculum and instruction online through the internet or other electronic means.⁴⁸ Cyber charter schools have expanded with no research to support or justify their growth.⁴⁹ Data do, however, show that the structure of cyber charter schools is associated with adverse outcomes for most students.⁵⁰ As of 2021, about half of all virtual schools in the United States are cyber charters.⁵¹ Because cyber charter schools have larger average enrollments, their students make up about three-quarters of all virtual school enrollments.⁵² Cyber charter schools are more likely to be operated by EMOs than other virtual schools.⁵³ For-profit EMOs have rapidly expanded over the past two decades and enroll 3.5 times more students than nonprofits.⁵⁴ The two most prominent for-profit EMOs, Stride Inc. and Connections, see very high profit margins because they do not bear the burden of supporting the in-person needs of their students like brick-and-mortar schools do.⁵⁵ These cyber charter schools receive more state funding support per special education student than general education student because service delivery and disability increase individual special education student costs.⁵⁶

46. *Id.* at 2–3 (reporting KIPP Foundation as the top enrolling CMO and K12 Inc. as the top enrolling EMO for the 2016–2017 school year); EMOs include both nonprofit and for-profit companies. *See* Lubienski & Weitzel, *Two Decades*, *supra* note 16, at 13 (“Although EMOs control a relatively low percentage of charter schools overall, they dominate several urban areas through high market share.”).

47. James Jack, John Sludden & Adam Schott, *Issue Brief: An Analysis of Pennsylvania’s Cyber Charter Schools*, RSCH. FOR ACTION 1. (Nov. 2013), https://www.researchforaction.org/wp-content/uploads/2021/07/RFA_PACER_Analysis_Cyber_Charters_November_2013.pdf [<https://perma.cc/G85E-QHH7>] (“Pennsylvania’s first cyber charter school opened in 1998, enrolling 44 full-time students.”).

48. *What is a Charter School?*, *supra* note 16. NAT’L EDUC. POL’Y CTR, VIRTUAL SCHOOLS IN THE U.S. 2021, 1, 10 (May 2021), <https://nepc.colorado.edu/sites/default/files/publications/RB%20Virtual%20Schools%202021.pdf>. [<https://perma.cc/SL3Z-3XG8>]

49. NAT’L EDUC. POL’Y CTR, *supra* note 48, at 1, 5.

50. *Id.* at 1, 12. (reporting that virtual schools had 1.7 times as many students per teacher and that higher numbers of students per teacher at virtual schools was associated with lower graduation rates and school performance ratings).

51. The other 50.1% of schools account for blended learning schools, independent virtual schools, and district schools. *See id.* at 11 (reporting that 49.9% of all virtual schools are charters).

52. *See id.* at 1, 11 (reporting that 75.8% of students enrolled in virtual schools were enrolled in cyber charters).

53. *Id.* at 1, 20; *see* Weitzel & Lubienski, *Grading Charter Schools*, *supra* note 33, at 24 (“Many of these EMOs have combined financial backing, packaged and branded curricula, and economies of scale with considerable political access . . .”).

54. NAT’L EDUC. POL’Y CTR, *supra* note 48, at 11.

55. *See id.* at 4–5. As of December 16, 2020, K12 Inc. changed its brand name to Stride Inc. Sydney Lake, *Online Education Provider K12 Inc. Rolls Out New Brand Name*, Va. Bus. (Nov. 18, 2020), <https://www.virginiabusiness.com/article/online-education-provider-k12-inc-rolls-out-new-brand-name/> [<https://perma.cc/32NG-7YQT>].

56. *See* AUGENBLICK, PALAICH, & ASSOC., COSTING OUT THE RESOURCES NEEDED TO MEET PENNSYLVANIA’S PUBLIC EDUCATION GOALS, PA. STATE BD. OF EDUC. 30–33 (Dec. 2007) (“The special education cost weight identified . . . represents an average across all disability and service delivery groups.”).

B. *Federal Regulations for Students with Disabilities*

This Part discusses federal regulations that protect the educational rights of students with disabilities. Part II.B.1 details the challenges students with disabilities faced before federal protections for equal education were enacted. Part II.B.2 reviews those federal regulations and their impact.

1. Before Federal Protections for Students with Disabilities

A decade before school reform by chartering, there were no federal protections for students with disabilities.⁵⁷ Disabled students were denied equal education opportunities.⁵⁸ There was a feeling of “invisibility of the handicapped in America.”⁵⁹ Before special education became available, children with disabilities were either institutionalized without education or separated from their nondisabled peers.⁶⁰ Only one in five students with disabilities were educated by public schools in the United States, leaving over one million disabled students excluded.⁶¹ Another 3.5 million did not receive supplementary aids and services that met their individual needs.⁶² Students with disabilities were considered “uneducable, disruptive, and their presence disturbing to children and adults in the school community.”⁶³ States had laws that excluded students with more severe disabilities.⁶⁴ Minority and low-income students with disabilities were more likely to be excluded.⁶⁵

In 1971, *Pennsylvania Association of Retarded Children (P.A.R.C.) v. Pennsylvania*⁶⁶ first addressed excluding children with disabilities.⁶⁷ P.A.R.C. argued that Pennsylvania statutes and practices, denying students with disabilities the right to attend Pennsylvania public schools, were unconstitutional under the Equal Protection Clause of the Fourteenth Amendment.⁶⁸ P.A.R.C. and the Commonwealth ultimately settled via a consent agreement enjoining the State from “deny[ing] to any mentally retarded child access to a free public program of education and training.”⁶⁹ Also, all students with disabilities from preschool to age twenty-one were to be provided access to a free public program of education and training appropriate to their capacities by the start of the 1972–1973 school year.⁷⁰ P.A.R.C. prompted students with disabilities in

57. See JANE WEST, NAT’L COUNCIL ON DISABILITY, BACK TO SCHOOL ON CIVIL RIGHTS: ADVANCING THE FEDERAL COMMITMENT TO LEAVE NO CHILD BEHIND 6 (2000).

58. *Id.*

59. *Id.* at 26.

60. *Id.*

61. *Id.* at 6.

62. *Id.*

63. *Id.* at 26.

64. See *id.* at 6 (explaining that many state laws excluded students who were “blind, deaf, or labeled ‘emotionally disturbed’ or ‘mentally retarded.’”).

65. *Id.*

66. 334 F. Supp. 1257 (E.D. Pa. 1971).

67. *Id.* at 1257.

68. *Id.* at 1258, 1266.

69. *Id.* at 1258.

70. *Id.* at 1266.

other states to bring claims.⁷¹ In 1972, *Mills v. Board of Education*⁷² prohibited D.C. public schools from excluding seven Black students with disabilities.⁷³ The court, relying on the Fourteenth Amendment, held that the District of Columbia's interest in educating excluded children must outweigh its interest in preserving financial resources, and any inadequacies could "[not] bear more heavily on the . . . handicapped child than on the normal child"—meaning that schools must serve their entire population's needs equitably.⁷⁴

2. The Enactment of Federal Protections for Students with Disabilities

Shortly after *P.A.R.C.* and *Mills* prohibited excluding students with disabilities in their respective jurisdictions, the Education for All Handicapped Children Act⁷⁵ was passed in 1975.⁷⁶ The Education for All Handicapped Children Act tasked school districts with “establish[ing] a goal of providing full educational opportunities to all handicapped children” and ensuring a “free appropriate public education” for all children with disabilities that “emphasizes special education and related services designed to meet their unique needs.”⁷⁷ The least restrictive environment provision of the Education for All Handicapped Children Act mandated inclusion of students with disabilities:

To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.⁷⁸

The Education for All Handicapped Children Act is now known as the Individuals with Disabilities Education Act (IDEA).⁷⁹ IDEA makes federal funding contingent upon states complying with its goals and procedures for educating students with disabilities.⁸⁰

IDEA aims “to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for future education.”⁸¹ Also,

71. See *Mills v. Bd. of Educ.*, 348 F. Supp. 866 (D.D.C. 1972).

72. 348 F. Supp. 866 (D.D.C. 1972).

73. *Id.* at 869–70, 878.

74. *Id.* at 876.

75. Pub. L. No. 94-142, 89 Stat. 773 (1975).

76. *Id.*

77. *Id.* at 785.

78. The Education for All Handicapped Children Act's least restrictive environment provision, 20 U.S.C. § 1412(a)(5)(A) (1975), was unchanged when reauthorized as Individuals with Disabilities Education Act in 1990, Pub. L. No 101-476, 104 Stat. 1103 (1990), and was later amended in 1997. 20 U.S.C. § 1412 (a)(5)(A) (1997).

79. 20 U.S.C. §§ 1400–1482.

80. *Id.* § 1412(a).

81. *Id.* § 1400(d)(1)(A).

IDEA seeks “to assess, and ensure the effectiveness of, efforts to educate children with disabilities.”⁸²

A child requires special education and related services for any of the following categories of disabilities: intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments, emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments (commonly including Attention Deficit Hyperactivity Disorder), or specific learning disabilities (deficits in the areas of reading, writing, and math).⁸³ Each child with a disability must have an individualized education plan (IEP), a written statement that includes programming designed to meet the student’s educational needs resulting from their disability and allows the child to make progress in the general education curriculum.⁸⁴

To comply with free appropriate public education (FAPE) requirements, school districts must provide services for students with disabilities according to their IEPs.⁸⁵ FAPE requires states to offer personalized instruction with sufficient support services to permit students with disabilities to benefit educationally from that instruction.⁸⁶ Also, states must provide students with disabilities opportunities equal to those of their nondisabled peers.⁸⁷ IEPs must be “reasonably calculated to enable child[ren] to make progress appropriate in light of [their] circumstances.”⁸⁸ Although IDEA does not promise particular educational outcomes,⁸⁹ school districts must ensure that appropriate special education services are being rendered to address student needs by reviewing and revising IEPs at least annually.⁹⁰

According to IDEA, children with disabilities must be educated alongside their nondisabled peers to the greatest extent possible, in the least restrictive environment capable of meeting their needs.⁹¹ Educational placement options such as special classes and separate schools are advisable only when the regular classroom setting is insufficient to provide a satisfactory education.⁹² A student eligible for special education services is not automatically placed in a special class.⁹³ Rather, the IEP team must determine the

82. *Id.* § 1400(d)(4).

83. *See id.* § 1401(3)(a).

84. 20 U.S.C. § 1414(d)(1)(A) (stating that IEPs include present levels of academic achievement and functional performance, measurable annual goals, a description of how progress will be measured toward meeting annual goals, special education services, related services, supplementary aids, accommodations, modifications, and the extent to which the child will not participate with nondisabled children in the regular class and other school activities).

85. *Id.* § 1401(9).

86. *See Bd. of Educ. v. Rowley*, 458 U.S. 176, 177 (1982).

87. *See id.* at 186.

88. *Endrew F. v. Douglas Cnty. Sch. Dist.*, 580 U.S. 386, 403 (2017).

89. *Id.* at 998.

90. 20 U.S.C. § 1414(d)(4)(A)(i); 34 C.F.R. § 300.320(a)(2)(i) (2022) (stating that measurable annual goals designed to meet student needs must be included in the IEP).

91. 20 U.S.C. § 1412(a)(5).

92. *Id.* (explaining that removal of children with disabilities from the regular educational environment should only occur when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily).

93. *Id.*

least restrictive environment for the student, which refers to physical placement, education services, and instruction.⁹⁴ IDEA further states that educational placements should not violate the least restrictive environment requirements.⁹⁵

Students with disabilities continued to struggle to receive appropriate services long after the enactment of IDEA because the federal government ineffectively enforced the law.⁹⁶ Parents served as IDEA's primary enforcers.⁹⁷ But they neither had sufficient knowledge of the law's requirements, nor could they meaningfully participate in their children's monitoring processes.⁹⁸

As students with disabilities continued to struggle under the initial special education regulations, the George W. Bush administration prioritized increasing academic performance and progress by enacting the No Child Left Behind Act of 2001 (NCLB).⁹⁹ NCLB aimed to "provide all children significant opportunity to receive a fair, equitable, and high-quality education, and to close educational achievement gaps."¹⁰⁰ IDEA sought to align with NCLB in its 2004 amendments, emphasizing mainstreaming and inclusion—advocating for students to be with their nondisabled peers to the greatest extent possible.¹⁰¹ "Achievement-based accountability systems" under NCLB thwarted instructional innovation and created perverse incentives to "teach to the test."¹⁰² NCLB required states to test and report results for students grades three through twelve in reading and math.¹⁰³ It mandated that all students be proficient by their state's standards by the 2013–2014 school year and, generously, allowed states to create their proficiency measures.¹⁰⁴ Unfortunately, no state met its self-imposed standards.¹⁰⁵ Schools that continually failed to reach annual achievement targets faced increasingly serious sanctions under NCLB, including states shutting down underperforming schools and

94. *Id.*

95. *Id.* § 1412 (a)(5)(B).

96. WEST, *supra* note 57, at 70.

97. *Id.*

98. *Id.* at 69–71.

99. Pub. L. No. 107-110, § 1001. 115 Stat. 1425 (2002) (codified as amended in scattered sections of 20 U.S.C.); see Weitzel & Lubienski, *Grading Charter Schools*, *supra* note 33, at 19 (referring to the No Child Left Behind era as the "cornerstone of many arguments for expanded school choice"); see generally James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U. L. REV. 932 (2004) (providing an in-depth overview of the historical context, benefits, and limitations of No Child Left Behind).

100. 20 U.S.C. § 6301 (stating that NCLB's purposes can be reached by "closing the achievement gap between high—and low-performing children" and "holding schools . . . accountable for improving the academic achievement of all students.>").

101. See Pub. L. 108-446, 118 Stat. 2647, 2699 (2004).

102. See Weitzel & Lubienski, *Grading Charter Schools*, *supra* note 33, at 25; Ryan, *The Perverse Incentives of the No Child Left Behind Act*, *supra* note 99, at 973.

103. Like the concerns stated in the National Commission on Excellence in Education's report almost twenty years earlier, NCLB grew out of concern that the U.S. education system was no longer "internationally competitive." Alyson Klein, *No Child Left Behind: An Overview*, ED. WEEK (Apr. 10, 2015), <https://www.edweek.org/policy-politics/no-child-left-behind-an-overview/2015/04> [<https://perma.cc/V7R7-DQX6>].

104. Under NCLB, schools are kept on track toward their goals through a mechanism known as "adequate yearly progress" or AYP. *Id.*

105. See *id.*

turning them into charter schools.¹⁰⁶ However, charter schools, especially cyber charter schools, continued to fail by this metric.¹⁰⁷

Under this regime, alternate assessments aligned to alternate achievement standards (via a portfolio or collection of student work rather than the traditional standardized test) were introduced for students with severe cognitive disabilities.¹⁰⁸ NCLB prescribed no limit for how many students could qualify for an alternate assessment.¹⁰⁹ However, no more than one percent of tested students could be counted as proficient using an alternate assessment.¹¹⁰

In December 2015, President Barack Obama signed into law the Every Student Succeeds Act¹¹¹ (ESSA) to remedy NCLB's shortcomings.¹¹² ESSA purports to modify practices and policies to provide "operational flexibility" in implementing school improvement plans.¹¹³ While NCLB afforded states autonomy regarding test measures only,¹¹⁴ ESSA allows states to control the consequences when schools fail to achieve their markers of success.¹¹⁵ Under ESSA, states and school districts are no longer subject to federal consequences for failing to meet yearly academic progress goals.¹¹⁶ From the 2017–2018 school year to the 2020–2021 school year, the only categories of schools identified for comprehensive support and improvement are, for each state, the lowest-performing five percent of all public schools and public high schools failing to graduate one-third or more of their students.¹¹⁷

106. *Id.* It is difficult to isolate the impact of charter schools on students' academic performance because many charter school students transfer from private schools. *See* Weitzel & Lubienski, *Grading Charter Schools*, *supra* note 33, at 19–20. The demographic profiles of student populations in public and charter schools vary on factors that are known to influence school success. *See id.*

107. NAT'L EDUC. POL'Y CTR, *supra* note 48, at 37 (stating that Pennsylvania found all of its rated cyber schools to be performing unacceptably); *see* Weitzel & Lubienski, *Grading Charter Schools*, *supra* note 33, at 20 ("During a time when No Child Left Behind and achievement results dominated educational news, demonstrating superior achievement in charter schools may have been seen as a make-or-break issue for charter advocates.").

108. Christina A. Samuels, *Ed. Dept. Policing ESSA Rule Involving Testing, Special Education*, EDUC. WEEK (Apr. 24, 2018), <https://www.edweek.org/policy-politics/ed-dept-policing-essa-rule-involving-testing-special-education/2018/04> [<https://perma.cc/E6XM-7FKX>].

109. *Id.*

110. *Id.*

111. Pub. L. No. 114-95, 129 Stat. 1802 (2015); *see* Weitzel & Lubienski, *Grading Charter Schools*, *supra* note 33, at 15 ("[T]he Obama administration has largely emphasized equity and innovation, while many conservatives and neoclassical economists tend to emphasize competitive effects.").

112. *See* Pub. L. No. 114-95, 129 Stat. 1802.

113. Pub. L. No. 114-95, 129 Stat. 1802, 1817 (2015).

114. *See* Klein, *supra* note 103 (noting that NCLB allowed states to set their own proficiency goals but mandated sanctions for schools that failed to achieve those state-specific goals).

115. *See* Pub. L. No. 114-95, 129 Stat. 1802, 1837–38 (requiring states to factor the "annual measurement of achievement" established by ESSA into a statewide accountability system and making charter school accountability subject to state law).

116. "Section 112(a)(1)(F) (42 U.S.C. 12523(a)(1)(F)) is amended by striking 'not making adequate yearly progress for two or more consecutive years under section 1111 of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 6301 et seq.)' and inserting 'implementing comprehensive support and improvement activities or targeted support and improvement activities under section 1111(d) of the Elementary and Secondary Education Act of 1965.'" Pub. L. No. 114-95, 129 Stat. 1802, 2185 (2015).

117. *Id.* at 1837.

Under ESSA, the portfolio model was all but abandoned, and no more than one percent of a state's students can be given an alternate assessment.¹¹⁸ A 2018 analysis of state plans revealed gaps in special education under ESSA.¹¹⁹ Thirty-three states did not separate the performance of students with disabilities in their school rating systems, leading to concerns that schools could conceal poor special education outcomes while receiving a good rating.¹²⁰ Only eighteen states had the same long-term academic goals for students with disabilities as general education students.¹²¹ Ten states had detailed descriptions of interventions for students with disabilities, and most states did not address English Language Learners with disabilities.¹²²

3. Federal Protections of Students with Disabilities in Charter Schools

In the early years of school reform, similar percentages of special education students were served in the charter sector as in the district sector.¹²³ Students with more significant disabilities were rarely enrolled in charter schools except when the charter school was designed explicitly for that purpose.¹²⁴ Thus, students with mild to moderate disabilities accounted for most charter school enrollments.¹²⁵ Excluding students with disabilities from charter schools violates both federal and state laws.¹²⁶ However, charter schools with more rigorous academics that aim to serve high-achieving students counsel students with disabilities out altogether, especially those with increased needs.

Some states authorize charter schools solely for students with disabilities.¹²⁷ These schools may be open to legal challenges under IDEA because students must be placed in

118. Samuels, *Ed. Dept. Policing ESSA Rule Involving Testing, Special Education*, *supra* note 108.

119. Christina A. Samuels, *State ESSA Plans Fall Short on Spec. Ed., Advocates Say*, EDUC. WEEK (Oct. 9, 2018), <https://www.edweek.org/ew/articles/2018/10/10/state-essa-plans-fall-short-on-spec.html> [<https://perma.cc/XTB6-4DNY>] (“The National Center for Learning Disabilities analyzed each state’s plan under three key areas: holding districts and schools accountable, helping struggling schools, and collaborating to support all students.”).

120. *Id.*

121. *Id.*

122. *Id.*

123. A 2003 national report found that, compared to traditional public schools, the charter school sector enrolled thirteen percent fewer white students, fourteen percent more black students, and nearly identical percentages of English Language Learners. David R. Garcia, *Charter Schools Challenging Traditional Notions of Segregation*, in THE CHARTER SCHOOL EXPERIMENT: EXPECTATIONS, EVIDENCE, AND IMPLICATIONS 33, 37 (Christopher A. Lubienski & Peter Weitzel eds., 2010).

124. Suzanne E. Eckes, *Charter Schools Legislation and the Potential to Influence Student Body Diversity*, in THE CHARTER SCHOOL EXPERIMENT: EXPECTATIONS, EVIDENCE, AND IMPLICATIONS 51, 67 (Christopher A. Lubienski & Peter Weitzel eds., 2010) [hereinafter *Charter Schools Legislation*].

125. *See id.* (discussing research finding that students with more significant disabilities are rarely enrolled in charter schools not specifically designed for them and that “charter schools tend to enroll students with mild to moderate disabilities”).

126. 20 U.S.C. § 1400(d)(C)(4); Eckes, *Charter Schools Legislation*, *supra* note 124.

127. Thirteen states authorize charter schools specifically for special education students. Eckes, *Charter Schools Legislation*, *supra* note 124, at 67–68. Ohio and Florida authorize the most schools and their state statutes explicitly include information in their charters that discuss the design for students with disabilities. *Id.*

their least restrictive environment.¹²⁸ These schools may also violate the Fourteenth Amendment of the U.S. Constitution,¹²⁹ which requires states to demonstrate a rational basis for treating students differently based on disability status.¹³⁰ This rational basis analysis constitutes the midlevel scrutiny applied to admissions and student assignment plans.¹³¹ There has been little research on the legality of this analysis.¹³² Consequently, there will likely be legal challenges at both ends of the spectrum—against charter schools excluding students with disabilities and against charter schools that serve only special education students.¹³³

C. Pennsylvania Cyber Charter Schools

The Pennsylvania General Assembly is supposed to serve the needs of the Commonwealth by providing a “thorough and efficient system of public education.”¹³⁴ Pennsylvania was the twenty-seventh state to approve charter school reform by passing the Charter School Law (Act 22) in 1997.¹³⁵ Consistent with other states’ charter school laws, Act 22 did not specify what kinds of charter schools the legislation governed.¹³⁶

Less than one year after statewide charter approval, Pennsylvania approved its first cyber charter school.¹³⁷ SusQ-Cyber Charter School targeted “highly motivated, independent learners” in Northumberland County.¹³⁸ Like the charter school movement

128. *Id.* at 68–69 (“[C]harter schools that serve students with special needs and that restrict admissions ‘do not ensure that each child needs the level of restrictiveness that characterizes the school, [and] they risk violating the dictates of IDEA.’ In other words, a segregated school may not be the least restrictive environment for students attending a charter school that enrolls mostly students with disabilities.” (second alteration in original)).

129. The Fourteenth Amendment says, “All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1; *see* Eckes, *Charter Schools Legislation*, *supra* note 126, at 69.

130. Comparably, a state must demonstrate a compelling reason for treating students differently based on race. *See* Eckes, *Charter Schools Legislation*, *supra* note 124, at 69.

131. *Id.*

132. *See id.*

133. *Id.*

134. PA. CONST. art. III, § 14.

135. P.L. 225, No. 1997-22 § 1, 1997 Pa. Laws 225 (1997) (codified as amended at 24 P.S. §§ 17-1701-A–17-1751-A (West 2022)); Luis A. Huerta, Chad d’Entremont & María-Fernanda González, *Cyber Charter Schools: Can Accountability Keep Pace with Innovation?*, 88 PHI DELTA KAPPAN 23, 25 (2006).

136. *See* Pa. Sch. Bds. Ass’n v. Zogby, 802 A.2d 6, 8 n. 3 (Pa. Commw. Ct. 2002) (holding that cyber charters were not precluded under charter school law even though not explicitly mentioned in the statute).

137. JAMES JACK, JOHN SLUDDEN & ADAM SCHOTT, RSCH. FOR ACTION, ISSUE BRIEF: AN ANALYSIS OF PENNSYLVANIA’S CYBER CHARTER SCHOOLS 1, 1 (2013) (“Pennsylvania’s first cyber charter school opened in 1998, enrolling 44 full-time students.”).

138. Huerta, d’Entremont & González, *supra* note 135.

generally, cyber charter school messaging emphasized the potential for improved student experiences, specifically through technology.¹³⁹

In the early 2000s, sixty percent of cyber charter school students nationally were formerly homeschooled.¹⁴⁰ Local school districts evaluated student performance in the homeschool setting but required family cooperation.¹⁴¹ Homeschool parents, who were previously responsible for providing instruction, welcomed teachers who acted as education consultants and deferred to their decisions in managing teaching and learning processes.¹⁴²

Although one of the later states to adopt charter reform, Pennsylvania has led the expansion of cyber charter schools.¹⁴³ Over a dozen cyber charter schools surfaced in Pennsylvania during the first decade after statewide approval.¹⁴⁴ Pennsylvania codified its school choice policy in 2002 to keep up with rapid growth in the cyber charter school sector.¹⁴⁵ As of 2021, the Pennsylvania Department of Education has authorized fourteen cyber charter schools.¹⁴⁶ These full-time, virtual schools enroll students from all five hundred school districts across Pennsylvania.¹⁴⁷ Between the 2006–2007 and 2010–2011 school years, Pennsylvania saw a seventy-five percent increase in cyber charter school enrollments.¹⁴⁸ In the wake of the COVID-19 pandemic, Pennsylvania cyber charter school enrollment increased from thirty-eight thousand students in October 2019¹⁴⁹ to over sixty thousand students in October 2020.¹⁵⁰

139. Bryan Mann & David P. Baker, *Cyber Charter Schools and Growing Resource Inequality Among Public Districts: Geospatial Patterns and Consequences of a Statewide Choice Policy in Pennsylvania, 2002–2014*, 125 AM. J. OF EDUC. 147, 155 (2019), <https://www.journals.uchicago.edu/doi/full/10.1086/701249> [<https://perma.cc/AFM2-KX76>].

140. Huerta, d’Entremont & González, *supra* note 135, at 24.

141. *Id.*

142. Huerta, d’Entremont & González, *supra* note 135, at 24; *see* Weitzel & Lubienski, *Grading Charter Schools*, *supra* note 33, at 23 (“Expectations, if not requirements, for parental involvement . . . are often enshrined in charter school law.”).

143. Huerta, d’Entremont, & González, *supra* note 135, at 24 (“Approximately 11% of all charter schools in Pennsylvania are cyber schools, the largest proportion in the nation.”); *Virtual Charter Schools in the U.S. 2021*, *supra* note 49, at 1, 11; Mann & Baker, *supra* note 139, at 156 (“Pennsylvania [is] among the largest contributors to the nation’s total enrollments in cyber charters . . .”).

144. Mann & Baker, *supra* note 139.

145. *Id.* at 152.

146. *See* 24 PA. STAT. AND CONS. STAT. ANN. § 17-1741-A (West 2022); PA. DEP’T OF EDUC., CHARTER SCHOOL ANNUAL REPORTS (2021).

147. Mann & Baker, *supra* note 139, at 148.

148. CTR. FOR RSCH. ON EDUC. OUTCOMES, CHARTER SCHOOL PERFORMANCE IN PENNSYLVANIA 1 (2019).

149. *See* PA. DEP’T OF EDUC., PENNSYLVANIA CHARTER SCHOOL ENROLLMENT 2019-2020 (2020); Andrew Goldstein, *Pandemic Boosts Enrollment in Cyber Charter Schools, but Costs Also Are Rising*, PITTSBURGH POST-GAZETTE (May 3, 2021, 10:45 AM), <https://www.post-gazette.com/business/bop/2021/05/03/Pennsylvania-cyber-charter-schools-brick-and-mortar-traditional-education-pandemic-online-virtual-learning-costs/stories/202105020002> [<https://perma.cc/738A-H4KQ>].

150. *See* PA. DEP’T OF EDUC., PENNSYLVANIA CHARTER SCHOOL ENROLLMENT 2020-2021 (2020); Goldstein, *supra* note 149; NAT’L EDUC. POL’Y CTR, *supra* note 48, at 18 (“As initial evidence suggests, the pandemic that struck in spring, 2020 has resulted in very large growth in this sector.”).

1. Pennsylvania Cyber Charter School Regulations for Students with Disabilities

As described above, Pennsylvania cyber charter schools must ensure that a FAPE is available to students with disabilities in compliance with IDEA.¹⁵¹ Pennsylvania charter school law states that charters may be revoked, or schools may not be allowed to seek renewal if they violate federal laws regarding students with disabilities.¹⁵² Schools applying to become cyber charters must include stated provisions of education and related services for students with disabilities to be considered.¹⁵³ Once approved, both brick-and-mortar and cyber charter schools must comply with the provisions regarding students with disabilities.¹⁵⁴ To meet the aim of allowing innovation and school choice, neither are subject to the more expansive requirements for students with disabilities that Pennsylvania school districts must meet.¹⁵⁵ For example, if a cyber charter school cannot meet a student with disabilities' needs, it can request that the school of residence (or the local district school that the student would have otherwise attended) aid in delivering services.¹⁵⁶

Pennsylvania cyber charter schools determine their own enrollment policies, but state law prohibits them from discriminating based on intellectual ability or disability status.¹⁵⁷ These schools may, however, limit admission to a targeted population group composed of at-risk students and create "reasonable criteria to evaluate prospective students."¹⁵⁸

2. Cyber Charter Schools Are Attractive to Students with Disabilities

A 2019 study found that Pennsylvania cyber charter schools reduce special education student learning gains in reading and math.¹⁵⁹ Despite these poor outcomes, cyber charter schools are becoming more attractive for students with disabilities than

151. 22 PA. CODE § 711.3(a) (2009).

152. 24 PA. STAT. AND CONS. STAT. ANN. § 17-1729-A(a)(5) (West 2022).

153. 24 PA. STAT. AND CONS. STAT. ANN. § 17-1747-A(13).

154. 24 PA. STAT. AND CONS. STAT. ANN. § 17-1732-A(b) (stating that cyber charter schools must comply with Chapter 711, which regulates charter school services and programs for children with disabilities).

155. 22 PA. CODE § 711.2(e) (2008) (explaining that brick-and-mortar and cyber charters are exempt from Chapter 14, which regulates special education services and programs for school districts); see 24 PA. STAT. AND CONS. STATE. ANN. § 17-1732-A; see also *Charter-Public School Comparison: An Uneven Playing Field*, PA. SCH. BDS. ASSN., https://www.psba.org/wp-content/uploads/2014/09/A_Closer_Look-Uneven_Playing_Field-053014.pdf [<https://perma.cc/9VCH-ZSLK>].

156. 24 PA. STAT. AND CONS. STAT. ANN. § 17-1744-A(3).

157. 24 PA. STAT. AND CONS. STAT. ANN. § 17-1723-A(b)(1). The Pennsylvania Fair Educational Opportunities Act (PFEOPA) entitles all Pennsylvania students to equal opportunities for education regardless of their handicap or disability. 24 PA. STAT. AND CONS. STAT. ANN. § 5002(a); see Eckes, *Charter Schools Legislation*, *supra* note 124, at 52.

158. 24 PA. STAT. AND CONS. STAT. ANN. § 17-1723-A(b)(2); see Garcia, *supra* note 123, at 34 (explaining that many state laws provide incentives for charter schools to serve at-risk students).

159. CTR. FOR RSCH. ON EDUC. OUTCOMES, *supra* note 148, at 43 (comparing student learning gains for students in cyber charter schools and brick-and-mortar schools benchmarked against estimated learning gains at traditional public schools from the 2013–2014 school year to the 2016–2017 school year).

brick-and-mortar charter schools.¹⁶⁰ Cyber charter school enrollments for special education students exceed general education student enrollments, typically because parents view these institutions as a last resort option.¹⁶¹ Compared to parents of general education students, parents of students with disabilities are more likely to struggle with reports of behavior problems and bullying, and poor interactions with staff at brick-and-mortar schools.¹⁶² These factors can lead parents of students with disabilities to choose cyber charter schools.¹⁶³ When parents lack sufficient knowledge about the academic performance of cyber charter schools, it is unlikely that they will make a rational choice.¹⁶⁴ They will instead select schools based on preferences or information other than academic performance.¹⁶⁵

The increased enrollment of students with disabilities is also likely impacted by Pennsylvania cyber charter schools' focus on the potential of technology to improve student experiences when trying to sell this school choice option to families.¹⁶⁶ Parents flock toward the dream of a high-tech opportunity with all course materials, instruction, and testing available in the comfort and safety of their own homes.¹⁶⁷ Individualized curriculum, a safe environment, self-paced instruction, and no longer having to contend with calls about behavioral issues create an appealing alternative to brick-and-mortar schools for parents.¹⁶⁸

Commonwealth Charter Academy (CCA), the Pennsylvania cyber charter school with the highest special education enrollment,¹⁶⁹ advertises that it “understand[s] that each child has unique educational needs and brings differing abilities and skills for

160. NAT'L EDUC. POL'Y CTR., *supra* note 48, at 26; see Weitzel & Lubienski, *Grading Charter Schools*, *supra* note 33, at 31 (explaining that from their inception to 2010, there was evidence that special needs students were underrepresented in charter schools).

161. Michelle Ann Efthimiadou, *Perceptions of Cyber Students with High Incidence Disabilities on the Impact of Self-Determination on Post-Secondary Transition: A Descriptive Case Study 14* (2020) (Ed.D. dissertation, Drexel University) (ProQuest No. 28148126) <https://www-proquest-com.libproxy.temple.edu/docview/2459648061?pq-origsite=gscholar&fromopenview=true> [<https://perma.cc/6DFG-8WJU>]; CTR. FOR RSCH. ON EDUC. OUTCOMES, *supra* note 50, at 9.

162. Dennis Beck, Anna Egalite & Robert Maranto, *Why They Choose and How It Goes: Comparing Special Education and General Education Cyber Student Perceptions*, 76 *COMPUTS. & EDUC.* 70, 76 (2014).

163. *Id.*; see Weitzel & Lubienski, *Grading Charter Schools*, *supra* note 33, at 27 (“Two of the highly anticipated outcomes for charter schools, improved equity of access and improved achievement, depend on the actions of parents as consumers of education.”).

164. The rational-choice model predicts that parents will collect and use information on the academic quality of various school options to best advance their child's future economic earnings. See Weitzel & Lubienski, *Grading Charter Schools*, *supra* note 33, at 27.

165. Weitzel & Lubienski, *Grading Charter Schools*, *supra* note 33, at 27; see Courtney A. Bell, *All Choices Created Equal? The Role of Choice Sets in the Selection of Schools*, 84 *PEABODY J. EDUC.* 191, 194 (2009) (discussing how parents tend to rely more on their networks and friends when choosing schools, rather than objective sources of information).

166. Mann & Baker, *supra* note 139, at 155.

167. *See id.*

168. Efthimiadou, *supra* note 161, at 41.

169. Commonwealth Charter Academy Charter School enrolled 2,453 special education students in the 2019–2020 school year. PA. DEPT. OF EDUC., *SPECIAL EDUCATION STATISTICAL SUMMARY 2019-2020* 85 (2020), https://penndata.hbg.psu.edu/Portals/66/documents/PennDataBooks/Statistical_Summary_2019-2020.pdf [<https://perma.cc/W5BS-HPHF>].

learning to the classroom. But America's one-size-fits-all educational system makes it nearly impossible for children to receive anything more than a cookie-cutter education, even if that's not the best fit for them."¹⁷⁰ It further states that "online school . . . broadens access to a quality education, particularly for students in remote locations, unsafe neighborhoods or other situations where challenges like low enrollments make the traditional school model impractical."¹⁷¹ CCA makes these claims without providing any supporting data.¹⁷²

Nationally, for-profit EMOs market to parents of students with disabilities—likely because of the additional federal and state funding that follow their enrollment.¹⁷³ However, for-profit EMOs are not spending this money on teaching special education students.¹⁷⁴ Data indicate that for-profit EMOs spend less than brick-and-mortar charter schools on special education teachers.¹⁷⁵ Cyber charter schools average 26.4 students per teacher, while public schools average only sixteen students per teacher.¹⁷⁶ Research does not show how cyber charter schools administer special education services to students with disabilities, either.¹⁷⁷ In Pennsylvania, it costs 1.3 times more to educate a student with a disability than a general education student.¹⁷⁸

3. Inside Pennsylvania Cyber Charter Schools

Cyber charter school practices conflict with the needs of students with disabilities in three ways. First, cyber charter schools count on their students to possess strong self-determination skills, but most special education students have executive functioning deficits. Second, cyber charter schools employ teachers that may not have the experience or training to teach special education students. Third, cyber charter schools convince

170. *Why Students Choose Online Classes at CCA*, COMMONWEALTH CHARTER ACAD., <https://ccaeducate.me/why-cca/> [<https://perma.cc/64NA-PGMQ>] (last visited Nov. 1, 2022).

171. *Id.*

172. *See id.* ("At CCA, we try to alleviate any concerns families might have about the quality of our online education program.")

173. NAT'L EDUC. POL'Y CTR., *supra* note 48, at 27 (2021); *see* Weitzel & Lubienski, *Grading Charter Schools*, *supra* note 33, at 25 ("[T]he explosive growth of EMOs serve as a valuable reminder that schools are big business, with considerable administrative burdens.")

174. A 2012 study on K12 Inc. (now Stride, Inc.) showed that the cyber charter network enrolled a "higher proportion of children with disabilities relative to brick-and-mortar charter schools at that time" while "spending a fraction of what other charter schools were spending for special education teachers' salaries and benefits." NAT'L EDUC. POL'Y CTR., *supra* note 48, at 27; *see* Lubienski & Weitzel, *Two Decades*, *supra* note 16, at 12–13 ("Many charter schools end up spending greater proportions of their budgets on administrative costs than do traditional public schools, in part because charters have to recruit students and cannot rely on large district offices to handle many administrative functions.")

175. NAT'L EDUC. POL'Y CTR., *supra* note 50, at 27.

176. *Id.* at 30.

177. *See id.* at 27.

178. AUGENBLICK, PALAICH, & ASSOC., *supra* note 56, at 30; In school year 2019–2020, the Philadelphia School District reported the following percentages for disabilities: autism, 15.8%; emotional disturbance, 9.5%; intellectual disability, 12.2%; speech or language impairment, 7.6%. PA. DEP'T. OF EDUC., SPECIAL EDUCATION DATA REPORT SCHOOL YEAR 2019-2020 (2020), https://penndata.hbg.psu.edu/penndata/documents/BSEReports/Data%20Preview/2019-2020/PDF_Documents/Spced_Quick_Report_SD463_Final.pdf [<https://perma.cc/8D5C-TCEC>].

parents to enroll students with disabilities into cyber charter schools based on frustrations with brick-and-mortar schools and other nonobjective considerations.

Nationally, 7.2 million students across all public schools receive special education services.¹⁷⁹ Sixty-seven percent of these students are found eligible under the disability categories of specific learning disability, speech or language impairment, and other health impairment.¹⁸⁰ Consistent with national norms, most students with disabilities at Pennsylvania cyber charter schools fall into one of these three disability categories.¹⁸¹

Though not one of the most served disabilities nationally, emotional disturbance is also highly prevalent among students in cyber charter schools.¹⁸² These four disability categories fall under the “high incidence disability” classification.¹⁸³ High incidence disabilities are often combined with academic, behavioral, and social issues.¹⁸⁴ Students under all disability categories generally have lower self-determination skills than their nondisabled peers.¹⁸⁵ These skills include problem-solving, planning, setting goals, and advocating for oneself.¹⁸⁶ Students with self-determination skills feel in control of their choices and are motivated to make decisions in difficult situations, as they are empowered to affect the outcomes.¹⁸⁷

Pennsylvania cyber charter schools assume that students in the virtual environment are naturally self-determined.¹⁸⁸ As a result, this setting demands good organization and communication skills.¹⁸⁹ The most successful virtual students are “independent, self-directed learners with strong home support.”¹⁹⁰ Because students with disabilities have, on average, lower self-determination skills than their general education counterparts, they are less likely to succeed in the cyber charter school environment.¹⁹¹

Special education teachers at cyber charter schools struggle to teach students with disabilities.¹⁹² While conducting research on Pennsylvania cyber charter school students

179. From school year 2009–2010 through 2019–2020, the number of students ages three to twenty-one who received special education services under IDEA increased from 6.5 million, or thirteen percent of total public school enrollment, to 7.2 million, or fifteen percent of total public school enrollment. *Students with Disabilities*, NAT'L CTR. FOR EDUC. STATS. (May 2022), <https://nces.ed.gov/programs/coe/indicator/cgg>.

180. Thirty-three percent of all students who received special education services had specific learning disabilities, nineteen percent had speech or language impairments, and fifteen percent had other health impairments (including having limited strength, vitality, or alertness due to chronic or acute health problems like a heart condition, tuberculosis, rheumatic fever, nephritis, asthma, sickle cell anemia, hemophilia, epilepsy, lead poisoning, leukemia, or diabetes). *Id.*

181. *See* Efthimiadou, *supra* note 161, at 4.

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.* at 23.

186. *Id.* at 9.

187. *See id.* at 24–25.

188. *Id.*

189. *Id.*

190. *Id.*

191. *See id.* (“Research proves the necessity for intervention to promote self-determination in all disability categories. Students in every one of the IDEA specified disability categories have demonstrated lower self-determination skills than non-disabled peers.” (citation omitted)).

192. *See id.* at 12.

with high incidence disabilities, a thirty-year veteran special education teacher reported that the lack of student engagement was a limitation to the study.¹⁹³ She found that the lack of engagement is a consequence of students not having daily interactions with staff.¹⁹⁴ Students are not receiving direct instruction in executive functioning skills despite federal and state mandates that students receive such instruction.¹⁹⁵ Cyber charter school students have fewer opportunities to practice these skills because “they often have no direct contact with teachers and do not have daily peer interactions.”¹⁹⁶

Many teachers in cyber charter schools lack experience serving students with disabilities virtually.¹⁹⁷ Despite the availability of research-based curriculum and virtual learning best practices, teachers do not know how to implement IEPs for students with disabilities in the cyber setting.¹⁹⁸ There is little consistency in implementing IEPs' postsecondary transition goals (goals for disabled high school students entering their next stage of life) for high incidence students with disabilities.¹⁹⁹ For example, because a Pennsylvania cyber charter school spans the entire state, a teacher may not know which community agencies are in the student's area to support a student with disabilities' postsecondary transition goals.²⁰⁰

Parents underestimate the commitment and responsibility of facilitating their child's education at home.²⁰¹ Lack of parental involvement, of course, can be particularly detrimental to student growth in the cyber charter school setting where all assignments are completed at home.²⁰²

Pennsylvania's cyber charter schools are consistent with cyber charter schools nationally in that they impact all students negatively, not just students with disabilities.²⁰³ Students in Pennsylvania cyber charter schools have significantly weaker growth than both those attending a traditional public school and the average student attending a brick-and-mortar charter school.²⁰⁴ Generally, brick-and-mortar charter schools have the most growth, followed by students in traditional public schools, with cyber charter schools trailing last. Brick-and-mortar charter school students showed a gain of 24 instructional days in reading and similar growth in math compared to traditional public school students.²⁰⁵ Compared to traditional public school students, a cyber charter school student loses the equivalent of 106 instructional days of reading and 118 instructional

193. *Id.*

194. *Id.*

195. *See id.*

196. *Id.* at 14.

197. *Id.* at 34.

198. *See id.*

199. *Id.* at 13.

200. *Id.* at 35. When a student with disabilities turns fourteen, the IEP must contain “appropriate, measurable post-secondary goals based on age-appropriate transition assessments related to training, education, employment, and where appropriate, independent living skills as well as the transition services, including courses of study needed to assist the child in reaching those goals.” 20 U.S.C. 1414(d)(1)(A)(i)(VIII).

201. Efthimiadou, *supra* note 161, at 40.

202. *Id.*

203. *Id.* at 3.

204. CTR. FOR RSCH. ON EDUC. OUTCOMES, *supra* note 150, at 45.

205. *Id.*

days of math.²⁰⁶ Studies of Pennsylvania cyber charter schools show a lack of accountability and inadequate school performance.²⁰⁷ More than half of the cyber charter schools in the state received failing adequate yearly progress grades²⁰⁸ by Pennsylvania's metric.²⁰⁹

D. Educational Best Practices for Students with Disabilities

This Part discusses educational best practices for enforcing IDEA and providing special education services. Part II.D.1 describes best practices that promote the inclusion and improvement of educational outcomes for students with disabilities. Part II.D.2 highlights school reopening guidance in the wake of the 2020 COVID-19 pandemic and the detrimental impact virtual instruction has on special education students.

1. Special Education Best Practices

Students with disabilities must receive evidence-based instruction responsive to their needs through collaboration, assessment, and social/emotional/behavioral high-leverage practices.²¹⁰ For special education students to be included successfully in the regular classroom, their service providers must collaborate.²¹¹ Collaboration between general education teachers, special education teachers, paraprofessionals, and other related service providers helps students attain learning outcomes by adjusting instructional and behavior plans based on data.²¹² In inclusive environments, special education teachers use their specialized knowledge not only to assist students with special needs but to provide beneficial support toward all students in the classroom.²¹³ General education teachers need appropriate training to provide for the successful

206. *Id.*

207. See Mann & Baker, *supra* note 139 at 151 (stating that test scores and dropout rates were the basis for determining adequacy of school performance).

208. *Id.* at 159.

209. Every Pennsylvania student in grades 3–8 and 11 is assessed in reading and math. *Summary of Pennsylvania Performance Standards*, PA. SCH. BD. OF EDUC. 1, <https://www.stateboard.education.pa.gov/Documents/Research%20Reports%20and%20Studies/SummaryofPAPerformanceStandards1.pdf> [<https://perma.cc/GYM4-Q46A>]. Students in grades 5, 8, and 11 are assessed in writing. *Id.* Additionally, Pennsylvania administers the Pennsylvania System of School Assessment (PSSA), an annual test to assess mastery of academic standards, to all students. *Id.* The PSSAs test student performance, and student achievement is classified as advanced, proficient, basic, or below basic. *Id.* Aligned with NCLB, Pennsylvania schools are evaluated on a minimum target level of improvement called Adequate Yearly Progress (AYP). *Id.* For Pennsylvania schools to meet their AYP requirements, students must perform at or above the proficient level. *Id.*; see also Klein, *supra* note 105 (“Under the law, schools are kept on track toward their goals through a mechanism known as ‘adequate yearly progress’ or AYP.”).

210. MARY DEAN-BARRINGER, RONNIE BILLINGLEY, MARY BROWNELL, DIA JACKSON, MICHAEL KENNEDY, TIM LEWIS, LARRY MAHEADY, JAMES MCLESKEY, JACKIE RODRIGUEZ, MARY CATHERINE SCHEELER, JUDY WINN & DEBORAH ZIEGLER, COUNCIL FOR EXCEPTIONAL CHILDREN, HIGH-LEVERAGE PRACTICES IN SPECIAL EDUCATION, 1–2 (2017).

211. JENNIFER S. HEMANN, INCLUSION OF SPECIAL NEEDS STUDENTS INTO THE REGULAR EDUCATION CLASSROOM 18 (2007), <https://scholarworks.uni.edu/grp/827/>.

212. BARRINGER ET AL., *supra* note 210, at 17.

213. Hemann, *supra* note 211, at 16.

inclusion of all students.²¹⁴ Effective collaboration helps “facilitate students’ social and emotional well-being across all school environments and instructional settings.”²¹⁵

Various assessment materials are essential to developing a deep understanding of a student’s individual needs.²¹⁶ A comprehensive learner profile is necessary to analyze school-based learning environments to determine potential supports and barriers to a student’s academic progress.²¹⁷ Teachers must interpret assessment results to design and implement a plan aligned with the student’s needs.²¹⁸ After developing a coherent plan, teachers must continue to collect data on assessments, observe the student’s academic performance and behavior, complete a self-assessment of their classroom instruction, and communicate with key stakeholders to ensure that the plan improves student learning.²¹⁹

To foster strong social, emotional, and behavioral skills, teachers must establish age-appropriate and culturally responsive expectations, routines, and procedures in their classrooms and ensure that they are implemented with fidelity throughout the school year.²²⁰ Building mutually respectful relationships with students, engaging students in establishing the classroom’s rules and routines, and valuing diversity fosters student engagement across learning environments.²²¹ Mainstreaming students with disabilities into classrooms with general education students provides both groups of students the opportunity to learn acceptance and appreciate each other’s differences.²²² Students benefit from positive and constructive feedback that is timely, meaningful, age-appropriate, and communicated at rates commensurate with the task and phase of learning.²²³ Teachers must provide positive reinforcement and encouragement to help students learn.²²⁴

Because students with disabilities often struggle to make friends, socialize, and problem solve in social interactions,²²⁵ direct social skills instruction should be provided to students who struggle to perform targeted social skills.²²⁶ Students tend to make and keep friends when introduced to classmates in a small group environment.²²⁷ Teachers should align lessons with classroom and school-wide expectations to teach interpersonal

214. *Id.* at 24.

215. BARRINGER ET AL., *supra* note 210, at 17 (citing the co-taught environment as an example of an instructional setting).

216. *Id.* at 19 (listing informal and formal observations, work samples, curriculum-based measures, functional behavior assessment (FBA), school files, analysis of curriculum, information from families, and other data sources as examples of appropriate assessment materials).

217. *Id.*

218. *Id.*

219. *Id.* at 20.

220. *Id.*

221. *Id.*

222. Hemann, *supra* note 211, at 26.

223. BARRINGER ET AL., *supra* note 210, at 21 (stating that feedback may be verbal, nonverbal, or written).

224. Hemann, *supra* note 211, at 24.

225. *Id.* at 29.

226. BARRINGER ET AL., *supra* note 210, at 21.

227. Hemann, *supra* note 211, at 29.

skills explicitly.²²⁸ If a child continues to struggle behaviorally, special educators must develop a plan to address behaviors that are “chronic, intense, or impede[] learning.”²²⁹

Teachers must develop adaptable short-term and long-term instructional goals and sequence their lessons to help students meet their specific learning targets.²³⁰ They must also teach students with disabilities metacognitive processes to solve problems, regulate attention, organize thoughts and materials, and monitor their thinking.²³¹ Modeling and integrating self-regulation and metacognitive strategy into instruction supports student learning and independence.²³² Additionally, scaffolded supports, such as visual, verbal, and written supports, can provide temporary assistance to students in need and help them complete tasks they struggle with independently.²³³ When teachers model and scaffold steps, students can better grasp concepts, apply skills, and complete tasks successfully and independently.²³⁴

Teachers must assign students to groups based on explicit learning goals, monitor peer interactions, and provide positive and corrective feedback to support learning.²³⁵ Teachers should use purposeful grouping to accommodate learning differences, promote in-depth academic-related interactions, and teach students to work collaboratively.²³⁶ By choosing tasks that require collaboration and issuing directives that foster interactions, teachers can maximize learning opportunities and increase participation.²³⁷

2. COVID-19 School Closures Illuminate the Harms of Virtual Learning

As the 2020–2021 school year pushed students into virtual learning due to the COVID-19 pandemic, the United States realized that remote learning is not an effective learning model for some K–12 students.²³⁸ Even adult students attending professional schools, such as law school or medical school, struggled to learn remotely.²³⁹ Public

228. BARRINGER ET AL., *supra* note 210 at 21.

229. *Id.* (“A comprehensive FBA [functional behavior assessment] results in a hypothesis about the function of the student’s problem behavior. Once the function is determined, a behavior intervention plan is developed that (a) teaches the student a pro-social replacement behavior that will serve the same or similar function, (b) alters the environment to make the replacement behavior more efficient and effective than the problem behavior, (c) alters the environment to no longer allow the problem behavior to access the previous outcome, and (d) includes ongoing data collection to monitor progress.”).

230. *Id.* at 22.

231. *Id.* at 23.

232. *Id.*

233. “Scaffolded supports provide temporary assistance to students so they can successfully complete tasks that they cannot yet do independently and with a high rate of success.” *Id.*

234. *See id.*

235. *Id.* at 24.

236. *Id.*

237. *Id.*

238. *See* CAITLIN RIVERS, ELENA MARTIN, CRYSTAL WATSON, MONICA SCHOCH-SPANNA, LUCIA MULLEN, TARA KIRK SELL, SCOTT GOTTLIEB, KELSEY LANE WARMBROD, DIVYA HOSANGADI, AMANDA KOBOKOVICH, CHRISTINA POTTER, ANITA CICERO & TOM INGLESBY, PUBLIC HEALTH PRINCIPLES FOR A PHASED REOPENING DURING COVID-19: GUIDANCE FOR GOVERNORS 13 (2020).

239. *See* Aomeng Cui & Amir Hassan, *Virtual Medical School: Burnout and A Path Forward*, STAT NEWS, <https://www.statnews.com/2021/09/21/virtual-medical-school-burnout-and-a-path-forward/>

health experts soon recognized that virtual instruction is not a “substitute for in-person learning and socialization” and predicted that long-term school closures would lead to education gaps, among other consequences, for many students.²⁴⁰

For students with disabilities, disparities in educational outcomes caused by COVID-19 school closures will likely be even more severe.²⁴¹ School closures “can lead to severe learning loss, and the need for in-person instruction is particularly important for students with heightened behavioral needs.”²⁴² Students with disabilities fall into the group of marginalized students who are “at greater risk of ‘disappearing’ from the education system during gaps in school” due to nonengagement with remote learning.²⁴³ Virtual learning can cause nearly irreparable damage to educational outcomes for consistently low-performing students with persistent learning challenges.²⁴⁴

Because in-person social interaction at school is important for developing language, communication, social, emotional, and interpersonal skills, school closures impede students’ ability to develop social and emotional skills.²⁴⁵ In-person instruction and routine in-person contact are critical to children’s social-emotional development.²⁴⁶ In-person, school counselors can recognize signs of trauma that primary caregivers may miss—because they themselves are experiencing the same familial stress—and can coordinate with teachers to implement interventions.²⁴⁷

Cyber charter school enrollments in Pennsylvania have increased exponentially due to the COVID-19 pandemic.²⁴⁸ Parents worried their children would fall further behind as brick-and-mortar schools struggled to adapt to virtual learning and consequently

[<https://perma.cc/GLF6-Q78T>] (Sept. 21, 2021) (“Our class started school eager to connect with others answering the call to medicine but, like many professionals who were forced to pivot to remote work during the pandemic, we were confronted with new, lonelier routines. Instead of learning how to use stethoscopes by listening to each others’ hearts in Columbia’s high-tech simulation rooms, we’ve struggled to learn medicine by watching YouTube videos alone. Day after day, interactions via black Zoom boxes have displaced forming real connections with classmates and teachers and distanced us from our budding profession and passion.”); *see also* Richard Vedder, *Is A Law School Meltdown Coming?*, FORBES, <https://www.forbes.com/sites/richardvedder/2020/06/08/is-a-law-school-meltdown-coming/?sh=e06a7383b364> [<https://perma.cc/243V-KE7Y>] (June 8, 2020) (surveying Harvard Law students revealed that 56% of students polled said “their education [during the spring 2020] semester was ‘less effective’ because of remote learning.”).

240. RIVERS ET AL., *supra* note 238.

241. *See* Ctrs. for Disease Control and Prevention, *The Importance of Reopening America’s Schools this Fall*, COVID-19 (July 23, 2020), http://ww11.doh.state.fl.us/comm/_partners/covid19_school_resources_links/the_importance_of_reopening_americas_schools_this_fall_cdc.pdf [<https://perma.cc/S8DB-NJJY>].

242. *Id.*

243. Nason Maani & Sandro Galea, *Science and Society are Failing Children in the COVID Era*, SCI. AM. (Mar. 3, 2021), <https://www.scientificamerican.com/article/science-and-society-are-failing-children-in-the-covid-era/#> [<https://perma.cc/9RJS-KMVH>].

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.*

248. *See, e.g.*, PA. DEP’T OF EDUC., PENNSYLVANIA CHARTER SCHOOL ENROLLMENT 2020-2021 (2021); PA. DEP’T OF EDUC., PENNSYLVANIA CHARTER SCHOOL ENROLLMENT 2019-2020 (2021); Avi Wolfman-Arent, *New Pa. Data Shows How The Pandemic Gave A Big Boost to Cyber Charter Schools*, WHY? (Dec. 8, 2020), <https://why.org/articles/new-pa-data-shows-how-the-pandemic-gave-a-big-boost-to-cyber-charter-schools/> [<https://perma.cc/3WYQ-S2S4>]; Andrew Goldstein, *supra* note 149.

enrolled their children into cyber charter schools in droves.²⁴⁹ But, although cyber charter schools have more experience providing virtual instruction,²⁵⁰ the educational outcomes are still abysmal.²⁵¹

III. DISCUSSION

Pennsylvania's cyber charter schools cannot provide adequate public education to most students with disabilities through virtual instruction exclusively. For this reason, cyber charter schools should be made an educational placement option to satisfy IDEA's least restrictive environment requirement. This Section proceeds in three parts. Part III.A compares the exclusion of students with disabilities from public education before federal regulations with their present-day exclusion from brick-and-mortar schools through cyber charter schools and concludes that the new high-tech school choice option creates the same result. Part III.B argues that Pennsylvania's cyber charter schools directly violate the federal mandate of education in the least restrictive environment for students with disabilities. Part III.C analyzes the call for in-person instruction in recent COVID-19 school reopening guidance. Part III.D argues that the best solution for this problem is making cyber charter schools an educational placement option instead of a school choice option.

A. *Cyber Charter Schools Mirror Pre-IDEA Exclusion for Students with Disabilities*

Cyber charter schools fail students with disabilities in ways that closely resemble the harms students with disabilities experienced before federal protections were enacted.²⁵² It is no secret that all cyber charter schools perform significantly worse than brick-and-mortar schools.²⁵³ However, for special education students, the implications of these failing schools are far worse.²⁵⁴ Before IDEA, only one in five students with disabilities were educated by public schools in the United States.²⁵⁵ No cyber charter schools existed in 1975, so over one million students were excluded from brick-and-mortar classrooms.²⁵⁶ IDEA was enacted to remedy this exclusion and integrate students with disabilities as much as possible by placing them into brick-and-mortar classrooms with their nondisabled peers.²⁵⁷

As of 2020, the percentage of Pennsylvania students with disabilities enrolled in cyber charter schools exceeds that of both district and charter brick-and-mortar

249. See Goldstein, *supra* note 149.

250. *Id.* (“Those who were in cyber charter schools talked up the cyber charter school experience — because after all we’ve been working at this for 20 years all day long every day — and you would expect our program to be better than what the school districts could put together in three weeks . . .”).

251. Mann & Baker, *supra* note 139, at 151.

252. See *supra* Part II.B.1 for a discussion of pre-IDEA treatment of students with disabilities.

253. See *supra* Part II.C.3 for a discussion of cyber charter school performance data.

254. See *supra* Part II.C.3.

255. WEST, *supra* note 57, at 6.

256. See *id.*

257. See *supra* Part II.B.1 for a discussion of IDEA's history and case law prohibiting excluding students with disabilities.

schools.²⁵⁸ All students who attend cyber charter schools are physically separated from each other.²⁵⁹ Although students with disabilities who attend cyber charter schools have the same opportunities as their nondisabled peers, the physical separation from those peers is more harmful for disabled students. Relegating students with disabilities to the confines of their homes without the support of an educator in close proximity effectively recreates the “invisibility of the handicapped in America.”²⁶⁰

Cyber charter schools are the newest innovation in exclusionary tools that stifle IDEA’s goal of including students with disabilities.²⁶¹ IDEA envisioned a regular classroom in which students with disabilities have in-person interactions with their teachers and peers, not a siloed experience where they struggle alone.²⁶² Students with disabilities enrolled in cyber charter schools have no peers to model social interactions, no teachers to read their nonverbal cues for help, and no practice for future integration into society.²⁶³ Education is the primary avenue for economic mobility in the United States.²⁶⁴ Because cyber charter schools exist in a segregated social landscape within the United States, they contribute to broader segregation patterns.²⁶⁵ Cyber charter schools continue to fail students with disabilities—contributing to the disabled community’s rank toward the implicit bottom of the social hierarchy.²⁶⁶ Students with disabilities’ executive functioning needs are underdeveloped in the virtual environment,²⁶⁷ delaying their working memory, flexible thinking, and self-control necessary to learn, work, and manage daily life.²⁶⁸ Postsecondary transition goals are seldom implemented.²⁶⁹ Most students with disabilities graduate from their bedroom desks and matriculate into society with mastery of elementary material at best, little to no job training, and few social skills.²⁷⁰

Cyber charter schools mask this reality by framing themselves as an *option* for parents.²⁷¹ Despite having the right to choose inclusion by sending their students with disabilities to brick-and-mortar schools, parents’ increasing preference for cyber charter

258. See FIXING THE FLAWS IN PA’S SPECIAL EDUCATION FUNDING SYSTEM FOR CHARTER SCHOOLS: HOW AN OUTDATED LAW WASTES PUBLIC MONEY, ENCOURAGES GAMING THE SYSTEM, AND LIMITS SCHOOL CHOICE, EDUC. VOTERS OF PA. 5–6 (June 2020), <http://educationvoterspa.org/wp-content/uploads/2020/06/Ed-Voters-short-report-electronic-version-1.pdf> [<https://perma.cc/23GZ-ZQSN>].

259. See *supra* Part II.C for a discussion of relevant state requirements and current practices of cyber charter schools.

260. See *supra* Part II.B.1 for a discussion on the challenges students with disabilities faced before federal regulations were enacted.

261. See *supra* Part II.B.1.

262. See *supra* Part II.B.1.

263. See *supra* Part II.C.3 for a discussion of how cyber charter schools fall short in meeting the needs of students with disabilities.

264. Weitzel & Lubienski, *Grading Charter Schools*, *supra* note 33, at 16.

265. See *id.* at 18.

266. See *supra* Part II.C.3.

267. See *supra* Part II.C.3.

268. Efthimiadou, *supra* note 161, at 12.

269. *Id.* at 13.

270. See *supra* Part II.C.3.

271. See *supra* Part II.C.2 for a discussion of how cyber charter schools tailor marketing to parents of students with disabilities.

schools has essentially revived the pre-IDEA era.²⁷² School choice is commonly thought to be a form of values expression.²⁷³ However, most parents of students with disabilities do not have the time, money, or education to assess the academic quality of various school options.²⁷⁴ If parents knew of the future they were choosing for their children by sending them to a cyber charter school, they would likely keep them enrolled at a brick-and-mortar.²⁷⁵ Parents of students with disabilities who struggle academically and behaviorally at brick-and-mortar schools choose the cyber charter option for convenience or as a last resort, quickly removing their children from brick-and-mortar schools with little time to review the cyber charter school's performance.²⁷⁶ This seeming exercise of choice often results in self-segregation.²⁷⁷

Word-of-mouth recommendations and misinformation fuel enrollments of students with disabilities into cyber charter schools.²⁷⁸ Cyber charter schools are promising parents of students with disabilities safety, autonomy, flexibility, and peace of mind, but, in reality, most students are simply not learning.²⁷⁹ Reflect upon the pre-IDEA era when students with disabilities were considered “uneducable, disruptive, and their presence disturbing to children and adults in the school community.”²⁸⁰ Today, parents of students with disabilities deemed disruptive are lured out of the brick-and-mortar environment by cyber charter school advertisements that purport to relieve them of their struggles with their child's behavior problems at school.²⁸¹ Parents of students with disabilities considered uneducable are relieved to escape poor interactions with staff at brick-and-mortar schools.²⁸² Parents who are told that their children's presence is disturbing to the school community may believe that removing them from brick-and-mortar schools is the only way to prevent bullying—but in doing so, they unwittingly stamp out their children's social growth.²⁸³ Where laws excluding students with disabilities once elicited public outrage,²⁸⁴ we now have a school choice option that excludes these students in plain sight, yet remains largely unopposed.²⁸⁵ Minority and low-income students with disabilities are more likely to attend cyber charter schools, just

272. See *supra* Part II.B.2 for a discussion of how IDEA attempted to facilitate a better education for students with disabilities.

273. Weitzel & Lubienski, *Grading Charter Schools*, *supra* note 33, at 16.

274. The rational-choice model predicts that parents will collect and use information on the academic quality of various school options to best advance their child's future economic earnings. See *id.* at 27.

275. See *supra* Part II.C.2.

276. See *supra* Part II.C.2.

277. See Weitzel & Lubienski, *Grading Charter Schools*, *supra* note 33, at 18.

278. See *supra* Part II.C.2 for a discussion of how cyber charter schools tailor marketing to parents of students with disabilities.

279. See *supra* Part II.C.3 for a discussion of how cyber charter schools fall short in meeting the needs of students with disabilities.

280. WEST, *supra* note 57, at 26.

281. See *supra* Parts II.B.1 and II.C.2, respectively, for discussions of the challenges students with disabilities faced before federal regulations were enacted and how cyber charter schools tailor marketing to parents of students with disabilities.

282. See *supra* Parts II.B.1 and II.C.2.

283. See *supra* Parts II.B.1 and II.C.2.

284. See *supra* Part II.B.1.

285. See *supra* Part II.C.3.

as they have been more likely to be excluded throughout the United States' vast history of school reform.²⁸⁶ For these reasons, parents should not be able to unilaterally place their children with disabilities in cyber charter schools.

Contrary to *Mills*, which stated that the interest in educating excluded children must outweigh the interest in preserving financial resources,²⁸⁷ the sole interest of Pennsylvania cyber charter schools in educating students with disabilities is profit.²⁸⁸ Consistent with pre-IDEA times, millions of students with disabilities attending cyber charter schools are not receiving supplementary aids and services that meet their individual needs.²⁸⁹ Cyber charter schools are not providing students with disabilities appropriate education and training.²⁹⁰ Cyber charter schools benefit financially from enrolling students with disabilities because they receive more money per disabled student than general education student, and are not required to use the money to support the disabled student's needs.²⁹¹ The burden of exclusion bears more heavily on the disabled student without appropriate support in the home environment than the nondisabled student.²⁹²

The United States has fallen short in its effort to promote inclusion and achievement among students with disabilities through federal regulations.²⁹³ Minimal improvements in inclusion efforts have been made from the chartering movement to the age of No Child Left Behind to the reforms of the Every Student Success Act.²⁹⁴ Unfortunately, students with disabilities have significantly regressed due to the cyber charter movement.²⁹⁵

B. The Least Restrictive Environment Provision Requires In-Person Instruction for Students with Disabilities

This Part argues that Pennsylvania's cyber charter schools directly violate the federal mandate of education in the least restrictive environment for students with disabilities. Part III.B.1 explores the underlying policy interest in keeping students with disabilities physically near their same aged, nondisabled peers. Part III.B.2 highlights the absence of virtual educational placement options under IDEA, emphasizing that the least

286. See *supra* Part II.B.1; Lubienski & Weitzel, *Two Decades*, *supra* note 16, at 7 ("Concerned parents, particularly those with children trapped in decaying urban schools, must be empowered to seek high-quality schooling alternatives. Disadvantaged urban populations . . . [came to see school choice] as a potential solution to racial and socioeconomic achievement gaps.").

287. See *Mills v. Bd. of Educ.*, 348 F. Supp. 866, 876 (D.D.C. 1972).

288. See EDUC. VOTERS OF PA., *supra* note 258 ("Enrollment patterns in special education tiers are consistent with the likelihood that many charter schools are exploiting the funding system by cherry picking students with low-cost special education needs and discriminating against students with high-cost needs.").

289. WEST, *supra* note 57, at 6.

290. See *supra* Part II.C.3 for a discussion of how cyber charter schools fall short in meeting the needs of students with disabilities.

291. See *supra* Part II.C.2 for a discussion of why cyber charter schools tailor marketing to parents of students with disabilities.

292. See *Mills v. Bd. of Educ.*, 348 F. Supp. 866, 876 (D.D.C. 1972) (holding that public school inadequacies cannot bear more heavily on disabled students than nondisabled students).

293. See *supra* Part II.B.2 for a discussion of the enactment of federal protection for students with disabilities.

294. See *supra* Part II.B.2.

295. See *supra* Part II.B.2.

restrictive environment provision was always intended for in-person placements. Part III.B.3 contextualizes the need for in-person instruction by illustrating how a brick-and-mortar school would address the needs of a student with disabilities compared to a cyber charter school.

1. The Policy Interest of Integration

IDEA guarantees an appropriate education for students with disabilities.²⁹⁶ IDEA's underlying policy interest of integrating students with disabilities to achieve appropriate education implies that the least restrictive environment provision applies to in-person instruction.²⁹⁷ Virtual instruction was not conceived of when IDEA was passed in 1975.²⁹⁸ Although technological advancement in education can be beneficial, it does not ensure adequate and effective support for the United States' most vulnerable student population.²⁹⁹ The inclusion mandate refers to the terms "regular educational environment" and "regular classes" as starting points for all students.³⁰⁰ "Regular" has not been defined by legislators or case law in this context.³⁰¹ However, these terms could not have been interpreted as referring to electronic means, which did not yet exist. There is no stated public policy reason to provide all students with equal access to a deficient educational opportunity.³⁰²

The least restrictive environment provision has remained untouched amid reauthorizations of IDEA, further evidencing that it was never intended to recognize virtual instruction.³⁰³ The least restrictive environment provision aims to prevent the segregation of students with disabilities by mainstreaming and including disabled and nondisabled peers alike.³⁰⁴ Because the legislation arose out of exclusion concerns,³⁰⁵ when the drafters wrote that children with disabilities were to be educated "with children who are not disabled,"³⁰⁶ they must have meant in the *actual* company of such children—not through a computer screen.³⁰⁷ The inclusion mandate was enacted to facilitate a sense of *normalcy* for special education students: to ensure that students with disabilities would not feel like outcasts.³⁰⁸ What is more segregating and isolating than being at home, alone, in front of your computer?

296. 20 U.S.C. § 1412(a)(5)(A).

297. *Id.*

298. *Id.* § 1412(5)(B).

299. *See supra* Part II.C.2.

300. 20 U.S.C. § 1412(a)(5).

301. *See id.*

302. *See supra* Part II.C.2.

303. *See* U.S. Dep't Educ., *A History of the Individuals with Disabilities Act*, IDEA, <https://sites.ed.gov/idea/IDEA-History#2000s-10s> [<https://perma.cc/U35B-WD6H>] (Mar. 18, 2022) (reporting no change to the least restrictive environment provision with several reauthorizations).

304. *See supra* Part II.B.2 for a discussion of the enactment of federal protections for students with disabilities.

305. *See supra* Part II.B.2.

306. 20 U.S.C. § 1412(a)(5)(A).

307. IDEA never once mentioned virtual instruction as a regular class option. *See id.*

308. *See supra* Part II.B.2.

2. There Are No Virtual Educational Placement Options Under IDEA

IDEA's governing regulations specify that "a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services."³⁰⁹ But educational placement options requiring a continuum of support do not include any virtual means.³¹⁰ From least to most restrictive, the environments are: (1) full or 100% inclusion in the regular classroom with appropriate supports; (2) special classes outside of the regular classroom, or 1%–99% inclusion with appropriate supports; (3) separate schools, or 0% inclusion with intensive supports; or (4) hospitalization, homebound, home-based, or 0% inclusion with intensive supports.³¹¹ Accordingly, the virtual environment is less restrictive than the regular classroom, equating to total freedom or 0% inclusion with inappropriate support.³¹² For a student with disabilities, total freedom undercuts any benefit from special education services.

Students with disabilities are not restricted enough in the cyber environment and do not receive direct services.³¹³ Most accommodations and modifications cannot be provided in the virtual setting.³¹⁴ The high-leverage practices that improve educational outcomes and align with the least restrictive environment provision cannot be provided through a little square on Zoom or asynchronous instruction.³¹⁵ Students at cyber charter schools neither interact with peers daily, nor have direct contact with teachers.³¹⁶ Teachers cannot foster meaningful relationships with, or expect any engagement, from students who are not present physically in the learning environment.³¹⁷ Manipulatives, modeling, and scaffolding steps utilized to help students grasp concepts must be administered in-person to be effective.³¹⁸ Students with social skills deficits need direct instruction and opportunities to practice social skills in real-world settings with peers.³¹⁹ Strong relationships with adults and in-person peer interactions are necessary to support emotional and behavioral regulation for students with behavioral needs.³²⁰ Students who lack self-determination need motivation in close proximity.³²¹

309. 34 C.F.R. § 300.115.

310. *See id.*

311. *See id.* § 300.115(b)(1).

312. *See supra* Part II.C.3 for a discussion of how cyber charter schools do not meet the needs of students with disabilities.

313. *See supra* Part II.C.3.

314. *See infra* Part III.B.3.

315. *See supra* Part II.D.1 for a discussion of special education best practices. *See also* Commonwealth Charter Academy Charter School Coronavirus (Covid-19) Continuity Of Education Plan <https://ccawebsite.azureedge.net/production/Storage/media/pdfs/covid-19%20-%20act%2013%20coe%20plan.pdf> [<https://perma.cc/SU83-TB7B>] (detailing how CCA provides instruction: "CCA's courses are designed to fully allow asynchronous learning through posted lessons. Teachers grade assignments following submission and provide support . . . via webmail, chat, or video, as needed. For students who prefer a synchronous learning experience, teachers use Zoom[, a videoconferencing platform.] to guide instruction for each day's posted lesson and additionally reinforce concepts in live class sessions.").

316. *See supra* Part II.C.3.

317. *See supra* Part II.D.1.

318. *See supra* Part II.D.1.

319. *See supra* Part II.D.1.

320. *See supra* Part II.D.

321. *See supra* Part II.C.3.

3. A Real-World Example

Let us return now to Andre.³²² Andre is a seventh grader eligible for special education services under the disability categories of specific learning disability and other health impairment.³²³ He has deficits in the areas of reading and math and is diagnosed with Attention Deficit Hyperactivity Disorder.³²⁴ Because Andre finds math and reading challenging, he needs positive reinforcement to remain engaged and must be in close proximity to his teacher to stay on task.³²⁵ Andre is motivated by competition, so seeing his peers receive positive praise can encourage him to keep going.³²⁶ But he will sometimes put his head down if an assignment is too difficult, or he will try to distract the class to avoid doing the assignment.³²⁷ His disruptions in reading and math frequently impede his learning and that of others.³²⁸ Andre gets frequent movement breaks as an incentive to keep him on task and engaged while working on assignments.³²⁹ His assignments are chunked into smaller parts than his nondisabled peers' assignments to ensure that he does not become overwhelmed with the material.³³⁰

His IEP includes a description of what the least restrictive environment looks like for him.³³¹ Andre attends both reading and math in special classes outside of the regular education classroom because his IEP team determined that he did not benefit from receiving instruction for those subject areas in regular education classroom.³³² He participates in science, history, electives, lunch, and extracurricular activities in the regular education classroom alongside his nondisabled peers, with appropriate modifications and accommodations.³³³

Andre's needs can be met in a brick-and-mortar school by physically placing him in these environments.³³⁴ His special classes have no more than twelve students, which minimizes distractions and allows his special education teacher to focus on improving his foundational skills.³³⁵ His teacher can pair him with a friend with whom he can work on complex activities to minimize his frustration.³³⁶ All of Andre's teachers can address his behavioral needs in the moment to ensure that he does not fall behind with his

322. See *supra* Section I for an introduction to Andre's learning challenges.

323. See *supra* Part II.C.3.

324. See *supra* Part II.C.3.

325. See *supra* Part II.D.1 for a discussion of special education best practices.

326. See *supra* Section I.

327. See *supra* Section I.

328. See *supra* Section I.

329. See *supra* Part II.D.1.

330. See *supra* Part II.D.1.

331. See *supra* Part II.B.2 for a discussion of IEPs.

332. See *supra* Part II.D.1.

333. See *supra* Part II.B.2.

334. See *supra* Part II.B.2.

335. See Lubienski & Weitzel, *Two Decades*, *supra* note 16, at 11 ("Miron suggests that policy makers should consider how charter schools can be made more accountable and if other uses of public funds (such as reducing class size) might have greater effects on student achievement.").

336. See *supra* Part II.D.1.

assignments.³³⁷ Further, they can leverage Andre's ability to participate in fun assignments with peers to increase his overall engagement.³³⁸

However, what will Andre's plan look like in a cyber charter school? Will the cyber charter school provide small group instruction?³³⁹ An option might be a virtual classroom with less than twelve students for reading and math, but what is stopping Andre from closing his computer when he gets frustrated due to the nature of his disability?³⁴⁰ How will the cyber charter school implement Andre's accommodation requiring close proximity to his teacher?³⁴¹ How will it ensure he gets to work in small groups?³⁴² With a virtual breakout room with no adult supervision?³⁴³ What happens when Andre completely disengages because the work is too complicated and both his mother and grandmother are at work?³⁴⁴ His mom will no longer receive those dreaded phone calls during her shift, but is Andre actually learning?³⁴⁵

C. COVID-19 School Reopening Guidance is Synonymous with the Rationale for In-Person Instruction Under the Least Restrictive Environment Provision

Unfortunately, a deadly virus had to sweep the nation for public health experts to recognize virtual instruction's long-term consequences on the most vulnerable students.³⁴⁶ When the COVID-19 pandemic forced parents to become at-home education facilitators, the United States swiftly gathered research to show that students need to be back in the classroom.³⁴⁷ Though policymakers and researchers were more concerned with the economic benefits of a return to work for parents of school-aged children than the negative impact on students with disabilities,³⁴⁸ the findings are clear—virtual instruction detrimentally impacts educational outcomes for all students.³⁴⁹ The Centers for Disease Control and Prevention declared that virtual instruction due to COVID-19 school closures is harmful to students with disabilities.³⁵⁰ And yet, the federal government has not taken a closer look at cyber charter schools that have operated with these same harmful effects for decades.³⁵¹

337. See *supra* Part II.D.1.

338. See *supra* Part II.D.1.

339. Compared to the average of 16 students per teacher in public schools, cyber charter schools have 26.4 students per teacher. NAT'L EDUC. POL'Y CTR, *supra* note 48, at 30.

340. See *supra* Part II.D.2 for a discussion of the harms of virtual school on students.

341. See *supra* Part II.D.2.

342. See *supra* Part II.D.2.

343. See *supra* Part II.D.2.

344. See *supra* Part II.D.2.

345. See *supra* Part II.D.2.

346. See *supra* Part II.D.2.

347. See *supra* Part II.D.2.

348. See *supra* Part II.D.2 for a discussion on the impact of COVID-19 on virtual schooling and the Centers for Disease Control and Prevention's response.

349. See *supra* Part II.D.2 for a discussion of the harms of virtual school on students.

350. See *supra* Part II.D.2.

351. See *supra* Part II.D.2.

School reopening guidance suggested that in-person instruction benefits students both educationally and social-emotionally.³⁵² Even higher education institutions have expressed their distaste for virtual instruction.³⁵³ If virtual instruction is not sufficient for adult students attending professional schools, how could it possibly be adequate for struggling children?³⁵⁴ IDEA cannot ensure that all children with disabilities have a free, appropriate public education that emphasizes special education and related services designed to meet their unique needs³⁵⁵ and prepare them for future education with cyber charter schools. The Centers for Disease Control and Prevention agree that students with disabilities struggle to learn in the virtual environment and that in-person instruction improves educational outcomes for students.³⁵⁶

The rationale for both COVID-19 school reopening and holding cyber charter schools accountable for providing an appropriate education in the least restrictive environment for students with disabilities is synonymous.³⁵⁷ Data show that years of distance learning at cyber charter schools disadvantaged those students, just as virtual learning disadvantaged brick-and-mortar school students during COVID-19 school closures.³⁵⁸ One could argue that COVID-19 school closures effectively enrolling students into virtual environments differs from parents electing to enroll them in cyber charter schools. But poor outcomes in the virtual environment persist in both scenarios.³⁵⁹

D. Recommendations

The cyber charter school environment should be an educational placement option for IEP teams to consider. Closing the door to cyber education under IDEA's "regular class" and allowing only those students with disabilities who can benefit from virtual instruction to attend an educational placement will improve educational outcomes. As of 2022, educational placement options include homebound, hospital, separate school, separate class, resource room, and residential facility.³⁶⁰ Suppose the cyber charter

352. See *supra* Part II.D.2.

353. See Vedder, *supra* note 239 ("The American Bar Association, which is the cartel that largely controls entry into the legal profession, seemingly hates online learning."); see also Cui & Hassan, *supra* note 239.

354. See Vedder, *supra* note 238; Cui & Hassan, *supra* note 239.

355. See 20 U.S.C. § 1400(d)(1)(A).

356. See Ctrs. for Disease Control and Prevention, *supra* note 241.

357. See *supra* Part II.D.2 for a discussion on COVID-19's impact on virtual schooling and the Centers for Disease Control and Prevention's response.

358. See *supra* Parts II.B.2, II.C.2, and II.C.3 for discussions on the harms of virtual school on all students.

359. See NAT'L EDUC. POL'Y CTR., *supra* note 48, at 4 (May 2021) ("The research evidence, however, tells a different story. Most importantly, it does not support claims that virtual education produces better student outcomes, as compared to conventional face-to-face approaches to teaching and learning in brick-and-mortar schools. In fact, full-time virtual schools, in particular, have yielded very poor outcomes. Moreover, the use of digital platforms and learning programs is tied to significant threats to the integrity of schools' curriculum and instruction programs, their student assessments, and their data collection and record-keeping practices.")

360. See *Least Restrictive Environment (LRE) and Educational Placement for Students with Individualized Education Programs*, PA. DEP'T EDUC. (last visited Nov. 1, 2022) <https://www.education.pa.gov/Policy-Funding/BECS/PACode/Pages/LeastRestrictiveEnvironment.aspx> [<https://perma.cc/N6JV-YPUM>].

school environment was relegated to an educational placement option rather than a school choice option. In that case, students with disabilities who thrive educationally with total freedom can consider the educational placement option, while students that need a more restrictive environment cannot.

Students with disabilities' enrollments in cyber charter schools as a school choice option does not comply with IDEA.³⁶¹ However, the cyber charter school environment could satisfy the inclusion mandate as an alternative placement if an IEP team determines that an individual student with disabilities can benefit from virtual instruction. A talented and gifted student with autism whose obsessive interests and repetitive behaviors are their only learning impediments may benefit from cyber charter schooling.³⁶² A hearing impaired student with strong self-determination skills should not be excluded from a cyber charter school environment if no other deficits are present.³⁶³ A hearing aid and closed captioning are appropriate supports for that student.³⁶⁴

The law cannot rely on parents to enforce IDEA and ensure students with disabilities will receive their education.³⁶⁵ IDEA was revolutionary in creating a role for parents and giving them a legal right to shape their children's educational service.³⁶⁶ However, leaving too much responsibility in parents' hands has allowed cyber charter schools to exploit their lack of expertise in education services and outcomes.³⁶⁷ Cyber charter schools rely on parents to hold their children accountable—the same parents who struggled to hold their children accountable with the support of brick-and-mortar schools.³⁶⁸ Parents are not teachers. They are not learning coaches. Family cooperation, similar to the involvement of homeschool parents when cyber charter schools were created, should be required for students with disabilities who can handle total freedom when considering a cyber charter school as an educational placement.³⁶⁹ Because most parents of students with disabilities lack the resources to ensure student success in the virtual environment, the IEP team should consider a parent's willingness to be involved before changing placement to a cyber charter school.³⁷⁰

The Pennsylvania legislature must refuse to allow cyber charter schools as a school choice option, then regulate the cyber charter school environment as an educational placement option to enforce IDEA. To comply with regulations, Pennsylvania cyber charter schools must focus on improving their programming to meet the needs of the students with disabilities who qualify for their educational placement option. Pennsylvania cyber charter schools should conduct IEP addendum meetings to determine

361. See *supra* Section III for discussion of IDEA's enactment and requirements.

362. See *supra* Part II.C.3 for a discussion of the disability categories most prevalent in Pennsylvania cyber charter schools.

363. See *supra* Part II.C.3.

364. See *supra* Part II.C.3.

365. See *supra* Parts II.A and II.B.1, respectively, for discussions of how IDEA attempted to facilitate a better education for students with disabilities and parents' involvement in their children's education.

366. See 20 U.S.C. § 1412(a)(5)(A).

367. See *supra* Part II.C.2 for a discussion of how cyber charter schools market themselves to parents.

368. See *supra* Part II.C.2 for a discussion of the struggles parents of students with disabilities faced when their children were enrolled at brick-and-mortar schools.

369. See *supra* Part II.C.

370. See *supra* Part II.C.2.

whether students are appropriately placed. Students who do not qualify for the cyber charter educational placement because they require in-person support must return to their desired brick-and-mortar charter school or local brick-and-mortar district school. Students who do not require in-person support and whose needs the IEP team agrees can be met in a cyber charter school should be allowed to remain enrolled at the cyber charter school. Educational outcomes will likely improve at both brick-and-mortar and cyber charter schools as a result. Brick-and-mortar schools will have more resources to support their students with in-person needs—the majority of Pennsylvania’s special education students. Pennsylvania cyber charter schools will be forced to improve their programming and, consequently, improve their educational outcomes, or will no longer be able to capitalize on the per-pupil funding for special education students that they cannot adequately serve.³⁷¹

Critics may argue that making cyber charter schools an educational placement option violates the Equal Protection Clause of the Fourteenth Amendment by not providing general education and special education students equal access to cyber charter schools. However, this option comports with both IDEA and the Equal Protection Clause because there is a rational basis for considering the cyber charter school environment a lesser restrictive environment than the regular class: the disparate educational outcomes that have persisted for decades for both general education students and students with disabilities.³⁷² This rational basis analysis is necessary to treat students differently based on disability,³⁷³ and would be applied to an IEP team’s calculus of a student’s appropriate educational placement.

IV. CONCLUSION

This Comment addressed the current educational practices of cyber charter schools that violate federal requirements for students with disabilities and proposed a new educational placement option that would satisfy the least restrictive environment provision. Relegating cyber charter schools to an educational placement option for students with disabilities holds cyber charter schools accountable for providing an appropriate education that will help each student maximize his or her potential and prepare learners to succeed in school and life.³⁷⁴ This statutory framework forces cyber charters to reevaluate their delivery of supplementary supports and services if they wish to continue to educate students with disabilities.

371. See *supra* Part II.C.2. for a discussion of why cyber charter schools tailor marketing to parents of students with disabilities.

372. See Eckes, *Charter Schools Legislation*, *supra* note 124, at 68–69 (“[C]harter schools that serve students with special needs and that restrict admissions ‘do not ensure that each child needs the level of restrictiveness that characterizes the school [and] they risk violating the dictates of IDEA.’ In other words, a segregated school may not be the least restrictive environment for students attending a charter school that enrolls mostly students with disabilities.”) (second alternation in original).

373. *Id.*

374. *Why Students Choose Online Classes at CCA*, *supra* note 170.