

**In the  
Supreme Court of Pennsylvania**

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**No. 28 EAP 2013**

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**THE SCHOOL DISTRICT OF PHILADELPHIA,**

*Appellant,*

v.

**DEPARTMENT OF EDUCATION and**

**WALTER D. PALMER LEADERSHIP LEARNING PARTNERS  
CHARTER SCHOOL,**

*Appellees.*

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On Appeal from the April 3, 2012, Order  
of the Commonwealth Court of Pennsylvania,  
No. 360 C.D. 2011, Affirming the March 4, 2011 Order of  
The Secretary of Education, No. EDU-2010-SLAP-01373889

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**BRIEF OF AMICUS CURIAE  
EDUCATION LAW CENTER - PA**

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## INTEREST OF AMICI CURIAE

The Education Law Center is a 38 year-old non-profit legal advocacy organization dedicated to ensuring access to a quality public school for the Commonwealth's most vulnerable children who historically have been at a disadvantage in the public education system – English language learners (“ELLs”), students with disabilities, minority students, students in poverty, students experiencing homelessness, students in foster care or institutions, and others. Philadelphia has the largest number of these often challenging and costly-to-educate student populations in the Commonwealth. Some of the city's charter schools provide a quality education to their share of these students. But taken as a whole, the charter system does not. It is the School District of Philadelphia which shoulders a disproportionate burden of educating vulnerable students.

We join here as *amicus curiae* in support of the School District of Philadelphia (“District”), because we find the District's argument to be clearly correct on the legal merits and because an affirmation of the lower court's decision would inevitably result in unfettered charter expansion and damage the overall quality of public education in Pennsylvania, particularly for the vulnerable student populations we seek to protect. ELC is often in an adversarial position with school



districts, and with the School District of Philadelphia in particular.<sup>1</sup> Meanwhile, we have no history of litigation against the Walter D. Palmer Leadership Learning Partners Charter School (“Palmer”), and we have no particular “ax to grind.” The bottom line is that, from the perspective of vulnerable student populations, the balance of the equities in this case weighs heavily on the District’s side. If the Pennsylvania Department of Education and the courts of this Commonwealth are unable to enforce reasonable controls on the growth of charter schools through legally negotiated and agreed-upon enrollment caps, it spells doom for school districts and the additional services they provide to their communities. It will also erode access to a quality public education for vulnerable student populations.

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<sup>1</sup> See, e.g., *D.C. v. Sch. Dist. Philadelphia*, 879 A.2d 408 (Pa. 2005); *Tyson v. Sch. Dist. Philadelphia*, 900 A.2d 990 (Pa. Commw. Ct. 2005); *LeGare v. Sch. Dist. Philadelphia*, No. 94cv4243 (E.D. Pa. filed Jul. 12, 1994); *Y.S. v. Sch. Dist. Philadelphia*, No. 85cv6924 (E.D. Pa. filed Dec. 4, 1985); *Everett v. Marcuse*, 426 F.Supp. 397 (E.D. Pa. 1977).

## **STATEMENT OF CONCURRENCE IN PRELIMINARY MATTERS**

*Amicus*, Education Law Center, concurs in the statements made by Appellant, The School District of Philadelphia, regarding the Statement of Jurisdiction, the Order in Question, the Statement of the Scope and Standard of Review, the Question Presented for Review, and the Statement of the Case.

## **SUMMARY OF THE ARGUMENT**

This is a case about a charter school that essentially does not serve English language learners, serves few students with severe disabilities, serves fewer boys than statistically it should, has a long history of poor academic indicators, and has had extensive evidence of testing irregularities yet is asking the Court to approve its intentional violation of the charter that it signed and knowingly agreed to become legally bound to. If the Court affirms, it will strike a serious financial blow to a school district that serves higher proportions of those vulnerable student populations and it will tell other charter schools that are similarly under-serving vulnerable student populations that there is no accountability to fear from school districts, the Pennsylvania Department of Education, or any court of this Commonwealth. This Court should send a different message, that gaming the public school system will not be tolerated, that the students of the Commonwealth will be protected, that charter growth can be reasonably negotiated, and that school districts must be maintained and supported consistent with the mandate under the Pennsylvania Constitution and laws of this Commonwealth.

The rules and procedures for charter school enrollment are so different than for district schools that charter schools, as a whole, serve fewer of the most challenging and costly student populations, impoverished students, English language learners, students with severe disabilities, and even boys, but despite this

un-level playing field, charter schools have not performed any better than district schools at educating students. For this reason, negotiated enrollment caps are appropriate to protect vulnerable student populations.

Negotiated enrollment caps are also consistent with the intent of the Charter School Law and the only practical tool at a school district's disposal to hold charter schools accountable. Unfettered charter school expansion in the context of limited and inadequate state and local funding actually decreases quality school choice by placing school districts in financial jeopardy. This was not the intent of the Charter School Law. School districts, as the thorough and efficient public education available to all students, are too important and provide too many services to their communities to not be saved. Negotiating reasonable charter growth actually *increases* quality educational choices for all students.

Unfortunately, the Commonwealth Court has repeatedly misinterpreted the charter school law in a way that both weakens charter school accountability and decreases school choice by damaging school districts. This Court should reverse the lower court and clarify that school districts have the authority to hold charter schools accountable through the use of reasonably negotiated enrollment caps.

## ARGUMENT

### **I. Limiting Charter Growth Is Necessary to Protect Vulnerable Students**

There are fundamental differences between the enrollment rules of school districts and charter schools. These differences create a competitive advantage for charter schools and leave vulnerable student populations underserved by charter schools. Limiting charter growth protects vulnerable students and ensures that they will not be cordoned off in increasingly underserved district schools.

#### **A. School Districts Must Educate All Students**

School districts – and not charter schools – are charged with ensuring that public education is available for *all* students. *See generally* 24 P.S. § 5-501, *et seq.* (“The board of school directors in every school district shall establish, equip, furnish, and maintain a sufficient number of elementary public schools . . . to educate every person.”). The day-to-day operation and management of our public schools are ultimately vested in the governing boards of school districts. *See* 24 P.S. § 3-301 (“The public school system of the Commonwealth shall be administered by a board of school directors . . . .”). School districts must accommodate all resident students who seek enrollment, whenever they come, no matter what the district’s capacity is to serve them. *See* 24 P.S. § 1301; 22 Pa.

Code § 11.11 (establishing an entitlement for school age children to attend their school district of residence). This means that districts must enroll all students with disabilities, no matter the disability, all English language learners, any students experiencing homelessness, and any students in the foster care system. There is, quite simply, no such thing as a “full” school district.

To enroll a child into a school district of residence, parents need only provide four items (the Education Law Center calls this the “four in the door”): proof of residency, proof of age, proof of immunizations, and a signed "Act 26" statement.<sup>2</sup> See 22 Pa. Code § 11.11(b) (requiring proof of the child’s age, residence, and immunizations); 24 P.S. §13-1304-A (requiring an Act 26 statement). *See also* Pa. Dep’t Education, *Basic Education Circular, Enrollment of Students* (2009), *available at* [http://www.portal.state.pa.us/portal/server.pt/community/purdon's\\_statutes/7503/enrollment\\_of\\_students/507350](http://www.portal.state.pa.us/portal/server.pt/community/purdon's_statutes/7503/enrollment_of_students/507350). Students should normally be admitted the next school day, but in no case longer than five school days. 22 Pa. Code § 11.11(b). Students experiencing homelessness do not even need to provide any documentation, but rather must be automatically enrolled. *See McKinney-Vento*

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<sup>2</sup> An “Act 26” statement is required to inform a new school whether or not an incoming student has been previously, or is currently, under suspension or expulsion for an act involving weapons, drugs or alcohol, or an act of violence. *See* 24 P.S. §13-1304-A.

Homeless Assistance Act, 42 U.S.C. §11432(g)(3)(C) (requiring schools to enroll students experiencing homelessness immediately, even if students are unable to provide documents that are typically required for enrollment).

Furthermore, school districts must educate a resident student even if that student has been expelled for misconduct by another school district or charter school. *See Hoke v. Elizabethtown Area Sch. Dist.*, 833 A.2d 304, 310 (Pa. Commw. Ct. 2003) (ruling that a school district does not have authority to expel a student for behavior that occurred prior to enrollment). Even when a school district expels one of its own students for misconduct, that district must still “make provision” for that student’s education. *See* 22 Pa Code § 12.6(e)(2) (requiring that districts make provision the parent of an expelled student is unable to find another school). In addition, if a student with a disability is expelled from a school district, the district must continue to provide that student a free and appropriate public education (“FAPE”) for as long as the child is eligible for special education (age 21 or graduation, whichever occurs first). 20 U.S.C. § 1412(a)(1).

### **B. Un-level Playing Field In Favor of Charter Schools**

In contrast, charter schools remain schools of choice, with no statutory responsibility to educate all students. The mere requirement that parents must, on their own initiative, take the extra step to apply to a charter school means that the

pool of applicants begins with a self-selective cohort. Meanwhile, at least in practice, the law is less clear about what charter schools can require as a condition of enrollment. To begin, each charter school determines its own enrollment policies. *See* 24 P.S. § 17-1719-A(6). Because of this, a Philadelphia parent who wishes to enroll her child in a charter school might have to navigate the different enrollment deadlines, procedures, and requirements for a number of Philadelphia's over 80 charter schools. This requires a level of sophistication and time that some Philadelphia parents lack. The students of these parents are eliminated from the charter school population before enrollment has even begun.

The eligible enrollment cohort is even more self-selective when charters are located in communities that are difficult to access by public transportation. Most charter schools, such as Palmer, do not serve a particular neighborhood catchment.<sup>3</sup> Rather, they must give equal preference to students from within the entire boundaries of the school district that authorized their charter. 24 P.S. § 17-1723-

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<sup>3</sup> In 2010, the School District of Philadelphia created "Renaissance charter schools." Renaissance schools are a fusion of charter schools and traditional district schools, in which failing district schools are reorganized as charter schools and operated by independent charter management organizations. *See* School District of Philadelphia, "Renaissance Schools," <http://webgui.phila.k12.pa.us/offices/r/renaissance-schools> (2013). Unlike traditional charter schools, Renaissance charters maintain a catchment area for student enrollment, which in turn produces student demographics that are more like district schools than traditional charter schools.



A(b). Then, if still not filled to capacity, they may also admit students from anywhere else in the state. *Id.* The boundaries of Philadelphia cover a range of over 142 square miles, and traveling from one end of the city to the other on public transportation can take over an hour. The District pays the transportation costs for students to attend a charter school. 24 P.S. § 17-1726-A. Understandably, however, many parents who rely on public transportation do not want their children to travel across the city by themselves to attend school. In addition, those parents still bear the cost and inconvenience of their own trips to the child’s school for teacher conferences, field trips, and school events. Thus, many parents can find themselves effectively priced out of some charter schools. The children of these parents are generally served in district-operated schools in their neighborhood, where they can walk to school.

In addition, much of the law regarding enrollment for school districts described above does not apply, at least in practice, to charter schools. Charter schools can limit the “number of attendance slots available” in their schools, *see* 24 P.S. § 17-1723-A(b), and thus, do not have to serve all students who seek admission.<sup>4</sup> In addition, many charters have decided that, for their own

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<sup>4</sup> It is worth noting that when charter schools ignore enrollment caps, they are asking to have it both ways – the ability to increase enrollment as the school pleases, but still limit enrollment whenever it wishes. While we make no

convenience, they will stop enrolling new students after the beginning of school year, even when they are not “full” as determined by their enrollment cap. School districts, of course, do not have this luxury, and student matriculation in the middle of the school year can be extremely disruptive to the learning environment.

Other charter schools have policies of refusing to enroll new students into their upper grades, even when there is space and even when those students seek to enroll before the first day of school. *See e.g.*, Freire Charter School, *Enrollment Policy*, [http://freirecharterschool.org/?page\\_id=65](http://freirecharterschool.org/?page_id=65) (last visited Aug. 20, 2013) (limiting enrollment to the 9<sup>th</sup> grade in their high school, which serves grades 9-12); KIPP Charter School, *Enrollment Application* [http://www.kippphiladelphia.org/files/dmfile/FINAL\\_KWPP\\_Enrollment\\_Form\\_01-30-2013\\_WRITABLE.pdf](http://www.kippphiladelphia.org/files/dmfile/FINAL_KWPP_Enrollment_Form_01-30-2013_WRITABLE.pdf), (last visited Aug. 20, 2013) (only providing for admission in grades 5 and 6, even though the school serves grades 5-8); Green Woods Charter School, *Admission of Students*, <http://greenwoodscharter.org/pdf/AdmissionofStudents.pdf> (last visited Aug. 20, 2013) (“Green Woods does not accept applications for the lottery for students entering 7th or 8th grade. The Board and Administration do have the full discretion to establish the number of students admitted to each grade and the grades they are

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allegations about Palmer in particular, this kind of gaming of the system can and does result in a selective study body.

admitted to. However, the Board and the Administration may not exceed the school's cap of a maximum of 675 students during the term of the school's charter.”). While it is convenient for charter schools to control how and when students matriculate into their schools, this is not a luxury that district schools can legally enjoy, and it creates a significant competitive advantage for charter schools.<sup>5</sup>

When a charter school expels a student, the student is always eligible for enrollment in the school district of residence. *See Hoke v. Elizabethtown Area Sch. Dist.*, 833 A.2d 304 (Pa. Commw. Ct. 2003). Therefore, charter schools never need to “make provision” for the education of students they have expelled. *See* 22

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<sup>5</sup> ELC has attempted to challenge many of these charter school practices and been unsuccessful. Although the Pennsylvania Department of Education (PDE) has established an administrative complaint procedure for students experiencing barriers to enrollment, this procedure is not available to students in charter schools. Pa. Dep't Education, *Basic Education Circular, Enrollment of Students* (2009), *available at* [http://www.portal.state.pa.us/portal/server.pt/community/purdon's\\_statutes/7503/enrollment\\_of\\_students/507350](http://www.portal.state.pa.us/portal/server.pt/community/purdon's_statutes/7503/enrollment_of_students/507350). PDE has determined that students experiencing enrollment barriers in charter schools should seek assistance from the authorizing school district. *See* Letter from Elizabeth Anzalone, Executive Assistant of the Charter School Office of the Pennsylvania Department of Education, to David Lapp, Staff Attorney, Education Law Center (Apr. 22, 2013) (on file with the Education Law Center) (refusing to utilize the PDE complaint procedure for students in charter schools). Of course, nothing in the charter school law actually requires an authorizing school district to help students enroll in charter schools or requires a charter school to enroll students at the request of the authorizer. The practical result is that students experiencing enrollment barriers in charter schools have nowhere to turn.

Pa. Code § 12.6(e)(2) (requiring expelling schools to “make provision” only when parents “are unable to provide the required education”). For the same reason, if a student with a disability is expelled from a charter school, it is no longer the charter school’s duty to provide that student with a free and appropriate public education, since the student can enroll in the school district. 300 C.F.R § 301.101(a); 300 C.F.R. § 300.530(d)(i). In addition, according to PDE, while districts must enroll students expelled from charter schools, charters do not have to educate students expelled from their district of residence. Pa. Dep’t Education, *Basic Education Circular, Charter School* (2004), available at [http://www.portal.state.pa.us/portal/server.pt/community/purdon%27s\\_statutes/7503/charter\\_schools/507318](http://www.portal.state.pa.us/portal/server.pt/community/purdon%27s_statutes/7503/charter_schools/507318) (informing all local education agencies that school districts do not have to pay tuition to charters for students they have expelled and, therefore, charters have no obligation to enroll such students).

Even within the self-selected cohort of eligible charter applicants, some charters have erected burdensome enrollment requirements beyond requirements of enrollment in a traditional public school. Such practices include:

- 25 page application forms;
- Limiting access to applications (One charter made its application available on its website for only 12 hours. Many charters refused to

- provide copies of their application until after parents attended an orientation meeting, sometimes far distances from where the charter school was located.);
- Screening for academic aptitude – Setting grade point average requirements; administering “placement” tests; requiring children to submit written essays; requiring letters of recommendation from previous teachers, community members and church leaders as a condition of enrollment;
  - Requiring information about income level, employment status, citizenship, place of birth, social security numbers;
  - Requiring documentation of a child’s disability prior to enrollment;
  - Parental involvement contracts, making a student’s enrollment contingent on a certain level of parental involvement.<sup>6</sup>

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<sup>6</sup> These practices have been documented over the past two years. See Benjamin Herold, *Questionable application processes at Green Woods, other charter schools*, The Notebook, (Sept. 14, 2012), <http://thenotebook.org/blog/125141/district-details-questionable-application-processes-green-woods-other-charters> (noting significant barriers in the enrollment applications of 17 of the 25 charter schools that were up for renewal in 2012); See also Public Citizens for Children and Youth, *PCCY Audit*, <https://www.pccy.org/userfiles/file/Education/CharterRenewals/CharterRenewalDocsCombined.pdf> (last visited Aug. 20, 2013) (finding “significant barriers” to enrollment at 10 of the 16 charter schools up for renewal in 2013). Note pages 11-14 of the “PCCY Audit” was conducted jointly by PCCY and the Education Law Center.

The enrollment policies of Palmer exemplify some of these kinds of barriers. Palmer’s enrollment materials are only available in English. The pre-lottery application must be located and must be completed between the months of January and March. *See* Walter D. Palmer Learning Partners Charter School, *Admissions*, <http://www.wdp-llpcs.org/page.php?pid=3> (last visited Aug. 20, 2013). If a child wins the lottery, a parent must first attend one of the “mandatory orientation sessions” and submit a detailed list of documentation. *Id.*<sup>7</sup> Each parent must also commit to volunteering at the school for two hours each month. *See* Walter D. Palmer Learning Partners Charter School, *Parent Expectations*, <http://www.wdp-llpcs.org/page.php?pid=10> (last visited Aug. 21, 2013). In addition, Palmer requires parents, as a condition of enrollment, to make 17 “commitments” of how they will support the school and support their child in the school. *Id.*<sup>8</sup> Palmer makes clear to parents that “failure to adhere to these commitments can cause

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<sup>7</sup> The list includes a copy of the student’s Social Security Card, which is prohibited for school districts to require. Pa. Dep’t of Education, *Basic Education Circular, Enrollment* (2009), available at [http://www.portal.state.pa.us/portal/server.pt/community/purdon's\\_statutes/7503/enrollment\\_of\\_students/507350](http://www.portal.state.pa.us/portal/server.pt/community/purdon's_statutes/7503/enrollment_of_students/507350), the student’s most recent report card from previous school, and special education records. It is the responsibility of the new school to obtain educational records. *See* 22 Pa. Code §11.11(b).

<sup>8</sup> These “commitments” include attending mandatory “Leadership Nights,” attending parent conferences as scheduled, participating in classroom or school wide activities and programs when requested, accepting full responsibility for the child’s behavior, and ensuring that the child will complete homework and follow the school rules and procedures.

[their] child to lose their enrollment status at [Palmer] and can lead to [their] child returning to his/her neighborhood school or an alternative program.” *See Id.*

While many of these requirements may sound perfectly reasonable and not particularly burdensome to a strong stable family, they can be prohibitive to enrollment of students in more challenging living arrangements. They also hinge a child’s enrollment status on the conduct of the child’s parent or guardian rather than the conduct of the student herself, which is beyond a school district’s authority. *See* 24 P.S. § 5-510 (permitting schools to adopt “reasonable rules and regulations as it may deem proper....regarding the conduct and deportment of all pupils”); 24 P.S. § 13-1318 (granting schools authority to discipline a student on account of that pupil’s “disobedience or misconduct).

Some of these practices can be partially explained by confusion in the charter law itself. Under the Charter School Law, charter schools are prohibited from discriminating on the basis of intellectual ability or aptitude, athletic ability, disability, proficiency in English, “or any other basis that would be illegal if used by a school district.” 24 P.S. §17-1723-A(b)(1). However, the charter law also permits charters to limit admission to particular grade levels, to a targeted population group composed of at-risk students, or to areas of academic concentration, and to create “reasonable criteria to evaluate prospective students ...” 24 P.S. § 17-1723-A(b)(2). It is unclear how the prohibition against

discrimination can be logically reconciled with “reasonable criteria to evaluate prospective students.” *But see Central Dauphin Sch. Dist. v. Founding Coalition, Infinity Charter School*, 847 A.2d 195 (Pa. Commw. Ct. 2004) (holding that the admissions policy of a proposed charter school for “mentally gifted students” did not violate the Charter School Law, because there was no *de jure* discrimination and students would actually be enrolled without regard to intellectual ability).

We are not alleging any intentional discrimination by charter school operators. It is likely that many of these practices that result in enrollment barriers are designed to help charter schools prepare and understand the needs of the students who will be enrolled in their schools. Rather, the point is that these practices create competitive advantages for charter schools over school districts, which are not permitted to adopt similar practices. It is also true, however, that there is no public reporting of the number of available seats at a charter school. A charter school could very easily tell a parent of an undesirable student that the school is full only to later make space available for a more desirable student. No one would ever know.

Regardless of intent, the inevitable results of these practices and of the nature of charter enrollment are that highly-mobile students – students in foster care, students experiencing homelessness, migrant students, and students who



leave their schools due to academic or behavioral difficulties – are at a clear disadvantage when enrolling in a charter school.

### **C. Charter Schools Serve Fewer Vulnerable Students**

The cumulative result of this “un-level playing field” is that charter schools serve a noticeably different population of students than school districts. In Philadelphia, charter schools as a whole educate smaller percentages of the vulnerable student populations on whose behalf ELC advocates, including English language learners, students with severe disabilities, students eligible for free and reduced lunch – a common metric of poverty – and even boys. Not coincidentally, these are the same populations of students who, on average, are more challenging to educate, perform less well on state achievement tests, and are most costly to serve.

**Special Education.** On first glance, it appears as if charter schools are educating special education students in a number proportionate to their overall enrollment. In 2011-2012, charter schools educated 23.6% of all public school students in Philadelphia.<sup>9</sup> Pa. Dep’t Educ., Bureau Special Educ. *Special Education Statistical Summary 2011-2012*, 99-100, 137-38 (2012) available at

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<sup>9</sup> In the analysis below, we use the most recent data available for each category. For students with disabilities, the most recent data is 2011-2012. For all ELLs, FRL, and gender, the most recent data is 2012-2013.

[http://penndata.hbg.psu.edu/documents/PennDataBooks/Statistical\\_Summary\\_2011-2012\\_Final.pdf](http://penndata.hbg.psu.edu/documents/PennDataBooks/Statistical_Summary_2011-2012_Final.pdf) Of the total number of special education students in Philadelphia, 24.17%, slightly more than the charter proportion of the overall student population, were enrolled in charter schools. *Id.* However, when examining the data by the *type* of disabilities, it is apparent that charter schools serve primarily students with mild disabilities -- the disabilities that are less costly to serve. Given that charters are legally open to all students, they should serve similar percentages of each type of disability as they serve of the overall student population. Instead, charters serve a significantly larger percentage of students with specific learning disabilities (SLD) and speech and language impairment (SLI), the two most common special education categories and also the two that, on average, are the least costly to serve.<sup>10</sup> Meanwhile, the District serves far larger percentages of students with “severe,” or costly, disabilities, such as autism, multiple disabilities, mental retardation (MR), visual impairment, and emotional disturbance. *Id.*

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<sup>10</sup> See Jay G. Chambers, *Total Expenditures for Students with Disabilities: Variation by Disability*, Special Education Expenditures Project (2003), available at [http://csef.air.org/publications/seep/national/final\\_seep\\_report\\_5.pdf](http://csef.air.org/publications/seep/national/final_seep_report_5.pdf) (reporting that “the two most common disabilities, specific learning disability (SLD) and speech/language impairment (SLI), make up over 60 percent of the population. These are also the two disabilities with the lowest per pupil expenditures...”).

Of the 2,515 students who qualified for speech and language IEPs in Philadelphia, 33.88% of them are in charter schools. *Id.* Similarly, charter schools enrolled almost 28% of students with specific learning disabilities. *Id.* In contrast, charter schools educate only 12% of the students with mental retardation, 18% of the students with emotional disturbance, 13% of students with autism, 17% of students with multiple disabilities, and only 2% of students with visual impairments. *Id.* Conversely, of course, the School District of Philadelphia enrolls significantly *higher* proportions of these same costly-to-educate students with disabilities – 87% of the students with mental retardation, 97% of students with visual impairment, 81% of students with emotional disturbance, 83% of students with multiple disabilities, and 87% of the Philadelphia students with autism. *Id.* These percentages are far higher than the overall 76% of Philadelphia students that are served in the District. In short, although charter schools educate a proportionate number of students with disabilities overall, they serve a disproportionate share of the less-expensive, more easily served special education students, while the school district educates all of the populations that are more expensive and generally more difficult to serve.<sup>11</sup>

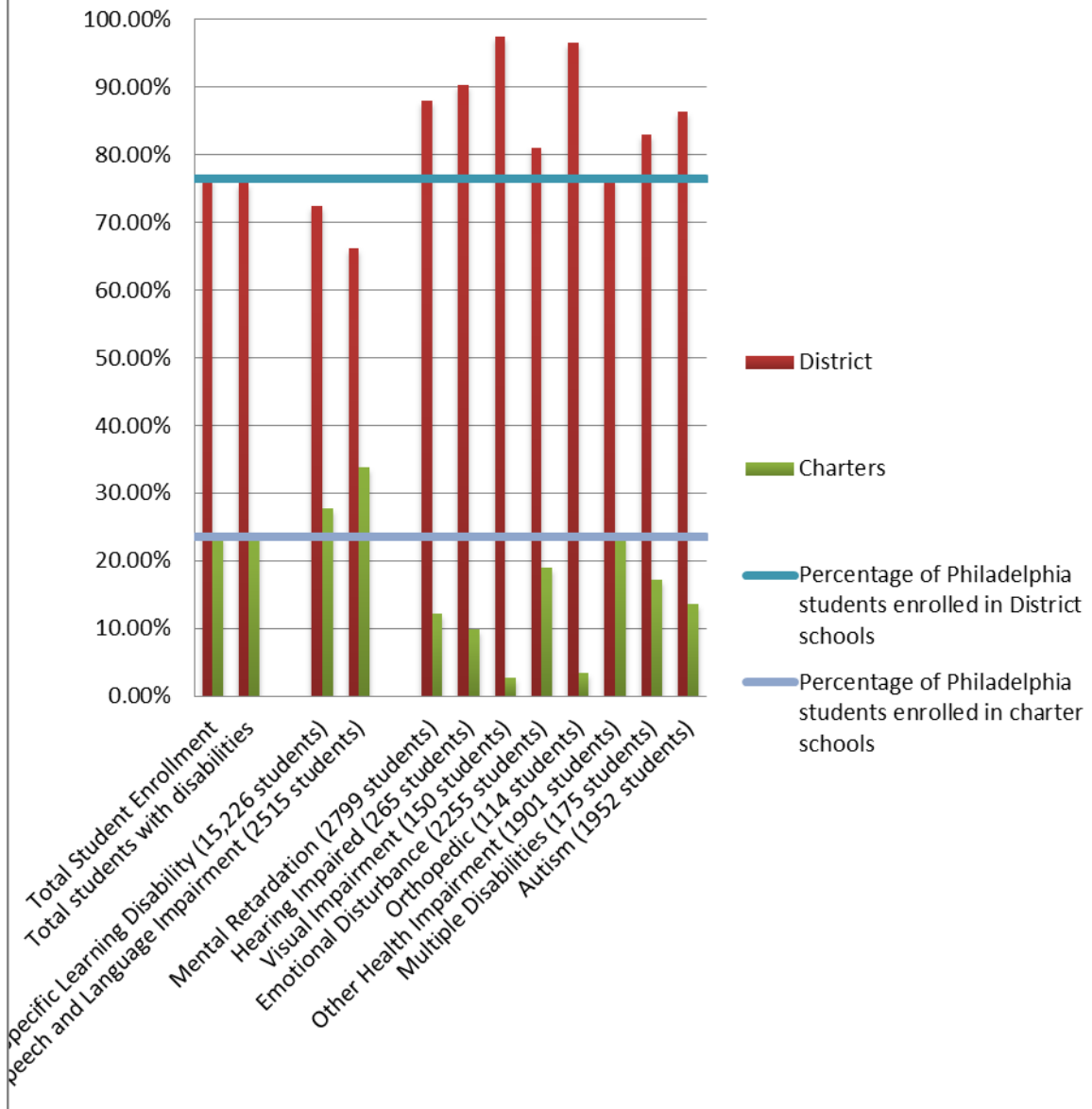
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<sup>11</sup> Commentators have pointed out that these disparities may be driven, at least in part, by perverse incentives built into the charter school law itself. *See, e.g.,* Bruce Baker, *The Commonwealth Triple-Screw: Special Education Funding & Charter*

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*School Payments in Pennsylvania*, School Finance 101 (June 5, 2012), <http://schoolfinance101.wordpress.com/2012/06/05/the-commonwealth-triple-screw-special-education-funding-charter-school-payments-in-pennsylvania>. The current charter school funding mechanism provides charter schools the same funding for each student with a disability, regardless of the severity of that student's disability. 24 P.S. 17-1725-A(a)(3). This creates a strong incentive to over-identify students with less costly disabilities and to under-identify (or under-enroll) students with severe (or more costly) disabilities. A student with a mild disability can be a financial boon to a charter school, given that the funding the charter receives will exceed the charter's cost to educate the child. In contrast, when a charter school enrolls a student with a severe disability, the funding may be inadequate.

## Percentage of students with disabilities enrolled in charter and District schools, by disability



Even within this already smaller portion of students with “severe disabilities” that charter schools do serve, it appears that charters serve an even smaller slice of the “severest of the severe.” Charter schools rarely apply to the

state's Special Education Contingency Fund.<sup>12</sup> While charter schools serve 6.2% of the overall public school population in Pennsylvania, Pa. Dep't Educ., *Enrollment Public Schools, 2012-2013*, [http://www.portal.state.pa.us/portal/server.pt/document/1338093/enrollment\\_public\\_schools\\_2012-13\\_xlsx](http://www.portal.state.pa.us/portal/server.pt/document/1338093/enrollment_public_schools_2012-13_xlsx) (last visited Aug. 20, 2013), only 1.27% of the applicants for special education contingency funds came from charter schools. See email from Ron Wells, Special Education Adviser, Pennsylvania Department of Education, to David Lapp, Staff Attorney, Education Law Center (Aug. 13, 2013) (on file with Education Law Center). Charter schools are eligible for contingency funds based on the same criteria as school districts. If charters and the School District of Philadelphia were educating identical populations of students, those percentages should mirror the percentages of overall students.

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<sup>12</sup> 24 P.S. § 25-2509.8 grants the Secretary of Education the authority to establish guidelines for the application, approval, distribution and expenditure of funds for “extraordinary” special education program expenses, also known as Special Education Contingency Funds. The fund’s purpose is to provide additional state funding for the implementation of the Individualized Education Program (IEP) for a student with significant disabilities. A contingency fund application may be submitted by a school district or charter school to partially meet the extraordinary educational needs of an individual child with significant disabilities who requires a highly specialized program or related services in order to receive an appropriate education in the least restrictive environment.

**English Language Learners.** Similarly, charter schools serve fewer English language learning students than they should, proportionate to their numbers. ELLs make up 8.8% of the school district of Philadelphia's student population, but only 3.8% of the overall charter school populations.<sup>13</sup> In other words, charter schools serve less than half of the ELL population than they should.

**Students in Poverty.** Charter schools serve fewer impoverished student than they should, proportionate to their numbers. While 81% of District students are eligible for free and reduced lunch, only 75% of charter school students are eligible.<sup>14</sup> Pa. Dep't Educ., *National School Lunch Program, 2013 Data*, [http://www.portal.state.pa.us/portal/http://www.portal.state.pa.us;80/portal/server.pt/gateway/PTARGS\\_0\\_190926\\_1343339\\_0\\_0\\_18/BD%2012-13%2006-21-13.xls](http://www.portal.state.pa.us/portal/http://www.portal.state.pa.us;80/portal/server.pt/gateway/PTARGS_0_190926_1343339_0_0_18/BD%2012-13%2006-21-13.xls) (last visited Aug. 20, 2013).

**Boys.** Finally, charter schools also educate a smaller percentage of boys than the District. In District schools, the gender breakdown is 48.8% girls and 51.2% boys. Pa. Dep't Educ., *Public School Enrollment Reports, 2012-2013*,

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<sup>13</sup> Data obtained through a data request to the School District of Philadelphia, available on file at the Education Law Center.

<sup>14</sup> We note that there are errors in the state's data, which over-reports by 20,000 the number of Philadelphia students enrolled in Mastery-Gratz and Mastery-Pickett charter schools. We corrected this error by using the enrollment numbers reported to the Pennsylvania Department of Education. See PA Dep't Educ., *Enrollment 2012-2013*, [http://www.portal.state.pa.us/portal/server.pt/document/1338093/enrollment\\_public\\_schools\\_2012-13.xlsx](http://www.portal.state.pa.us/portal/server.pt/document/1338093/enrollment_public_schools_2012-13.xlsx) (last visited Aug. 20, 2013).

[http://www.portal.state.pa.us/portal/server.pt/document/1338093/enrollment\\_public\\_schools\\_2012-13\\_xlsx](http://www.portal.state.pa.us/portal/server.pt/document/1338093/enrollment_public_schools_2012-13_xlsx) (last visited Aug. 20, 2013). In charter schools, the percentage is 50.5% girls and 49.5% boys. *Id.* While these disparities may not appear significant on first glance, there are approximately 1,000 less boys in Philadelphia charter schools than there would be if charters served equivalent proportions to District schools. In addition, the numbers are significantly skewed by the inclusion of Philadelphia's Renaissance Charter Schools, which are District schools under charter operation.<sup>15</sup> Without the inclusion of Renaissance schools, the traditional charter sector only educates 48.4% boys. *Id.* Seventeen Philadelphia charter schools, including Palmer, educate fewer than 45% boys, compared to only four charters that educate fewer than 45% girls. *Id.* On average, boys perform worse on state standardized tests. Pa. Dep't Educ., *State Report Card 2011-2012* (2012), *available at* <http://paayp.emetric.net/Content/reportcards/RC12M.PDF> (demonstrating that girls have higher proficiency rates in math and reading). They are more likely to

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<sup>15</sup> Of the 56,270 students in the charter sector, 12,791 were enrolled in Renaissance charter schools. Unlike traditional charter schools, Renaissance charters maintain a catchment area for student enrollment, which in turn produces student demographics that are more like district schools than traditional charter schools. The numbers above were all calculated with Renaissance charter schools included as "charter schools." The disparities are significantly more stark in each category if calculated using only traditional charter schools.



be behaviorally disruptive. *See Safe Schools, Statewide Report: 2011 – 2012* (2012) available at <https://www.safeschoolsreports.state.pa.us/historic/historic/2012/state.pdf> (reporting that boys are responsible for almost 70% of all “school safety” incidents and receive 70% of out-of-school suspension). Boys are also less likely to graduate in four years. *See Pa. Dep’t Educ., 4-Year Cohort Graduation Rates*, [http://www.education.state.pa.us/portal/server.pt/community/pennsylvania\\_department\\_of\\_education/7237/info/757639](http://www.education.state.pa.us/portal/server.pt/community/pennsylvania_department_of_education/7237/info/757639) (last visited Aug. 20, 2013) (showing that girls have an 84.57% graduation rate and boys only an 80.74% graduation rate). Therefore, serving more girls than boys will generally produce more successful schools.

It is possible that charter exclusivity, or the perception of exclusivity, is part of what makes charter schools attractive to parents to begin with. It is also clear that the circumstances that create a selective student body are also advantageous to charter schools, especially when state and federal policy can have punitive results for public schools with low test scores. But this exclusivity is also potentially harmful, from an educational perspective, to the vulnerable student populations left in the District, as they are more heavily concentrated than they should be. There is also a financial cost to this “creaming effect” of charter schools. In addition to the cost of the lost revenue that follows students who enroll in charter schools, school

districts also end up serving a greater proportion of student populations that are more expensive to educate. See Pa. Dep't Educ., *Costing Out the Resources Needed to Meet Pennsylvania's Public Education Goals* (2007), available at <http://www.portal.state.pa.us/portal/server.pt?open=18&objID=380438&mode=2> (legislatively commissioned study found that that in Pennsylvania it costs 1.3 times more to educate a student with disabilities, .43 times more to educate a student living in poverty, and somewhere between 1.48 and 2.43 times more to educate an English language learner).

#### **D. Poor Outcomes Have Not Prevented Charter Expansion**

One would suspect that, with all the advantages enjoyed by charter schools and by serving a selective student body, there would be a noticeable improvement in student academic outcomes. However, that is not the case. In 2011, Stanford University's Center for Research on Educational Outcomes (CREDO) reviewed the performance of Pennsylvania charter schools for the period 2007 – 2010, the most thorough examination ever performed of academic outcomes in Pennsylvania charter schools. Center for Research on Educational Outcomes, Stanford University, *Charter School Performance in Pennsylvania* (2011), available at [http://credo.stanford.edu/reports/PA%20State%20Report\\_20110404\\_FINAL.pdf](http://credo.stanford.edu/reports/PA%20State%20Report_20110404_FINAL.pdf). The CREDO study determined that, while some charter schools outperform school

districts, on the whole, the academic performance of charter schools in

Pennsylvania lags behind school districts. Ultimately, CREDO concluded that:

[S]tudents in Pennsylvania charter schools on average make smaller learning gains. More than one quarter of the charter schools have significantly more positive learning gains than their traditional public school counterparts in reading, but their performance is eclipsed by the nearly half of charter schools that have significantly lower learning gains. In math, again nearly half of the charter schools studied perform worse than their traditional public school peers and one quarter outperform them.

*Id.* at 3.

In 2012, CREDO performed a massive national study which covered charter school performance in 27 states, including Pennsylvania. The study concluded that although charter school performance was improving nationwide, Pennsylvania charter schools were still underperforming. Center for Research on Educational Outcomes, Stanford University, *National Charter School Study*, 53 (2013), *available* *at*

<http://credo.stanford.edu/documents/NCSS%202013%20Final%20Draft.pdf>

(finding that, on average, students in Pennsylvania charter schools lose the equivalent of 29 days of learning in reading and 50 days of learning in math as

compared to demographically similar students in Pennsylvania’s district operated schools).<sup>16</sup>

Despite the educational and financial costs, the School District of Philadelphia has not been unfriendly to charter expansion, even during the recent years of financial crisis. From 2008 – the year that the General Assembly amended the charter school law to affirm agreed-upon enrollment caps – to 2013, charter school enrollment in Philadelphia increased by almost 18,000 students, from 16% of the total public school population in 2008 to 28% of the total student population in 2013. Pa. Dep’t Educ., *Public School Enrollment Reports*, <http://www.education.state.pa.us/portal/server.pt/community/enrollment/7407> (last visited Aug. 20, 2013). In 2012-2013, the total charter population was over 56,000 students. *Id.*

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<sup>16</sup> Both of the CREDO studies cited here included students in Pennsylvania’s “Cyber-Charter” Schools, which have been found to have particularly poor educational outcomes. The CREDO study found that in both reading and math, all eight cyber schools operating in Pennsylvania at the time performed significantly worse than their traditional public school counterparts. This prompted the CREDO Research Manager, Devora Davis, to say, “What we can say right now is that whatever they’re doing in Pennsylvania is definitely not working and should not be replicated.” It is likely that the gap between Pennsylvania’s district and charter operated outcomes would shrink somewhat if comparing only students in brick and mortar charter schools. However, it is also clear that, even without cyber-charter schools in the mix, brick and mortar charter schools are not, as a whole, outperforming traditional school districts in the area of academic instruction.)

But not all charters should expand. For charters that underserve vulnerable student populations or provide no improvement to exist schools, it is not just legally permissible to negotiate enrollment caps, but it is also an ethical and educational responsibility for school districts to use all available tools to prevent their expansion.

### **E. Palmer Should Have Enrollment Caps**

Similar to the charter system as a whole, Palmer also does not serve proportionate numbers of English language learners, students with severe disabilities, or even boys. Palmer has two different school locations – a middle and high school (5<sup>th</sup>-12<sup>th</sup> grades) and an elementary school (pre-K-4<sup>th</sup> grades). Both of these schools serve similar numbers of students eligible for free and reduced lunch (FRL) as their surrounding District schools. The Palmer Middle and High School serves 86.5% FRL students, and the Palmer Elementary School serves 90.7% FRL. Pa. Dep't Educ., *National School Lunch Program, 2013 data*, [http://www.portal.state.pa.us/portal/http://www.portal.state.pa.us;80/portal/server.ppt/gateway/PTARGS\\_0\\_190926\\_1343339\\_0\\_0\\_18/BD%2012-13%2006-21-13.xls](http://www.portal.state.pa.us/portal/http://www.portal.state.pa.us;80/portal/server.ppt/gateway/PTARGS_0_190926_1343339_0_0_18/BD%2012-13%2006-21-13.xls) (last visited Aug. 20, 2013). These numbers are actually higher than the overall

district average and almost exactly the same as each school's five closest District-operated neighboring schools.<sup>17</sup>

At the same time, however, only 0.79% of students at the Palmer schools are English language learners. The District average is 10 times higher, at 8.8% ELL students. Most of the district schools that are in close geographic proximity to Palmer serve even higher ELL numbers than the District average.<sup>18</sup> In other words, Palmer's failure to serve ELL students cannot be attributed to a lack of ELL population in the communities surrounding Palmer's charter schools.

Palmer also serves a smaller overall percentage of students receiving special education than the District's average: 11.4% of students at Palmer are students

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<sup>17</sup> The FRL numbers at the five nearest schools to Palmer Elementary School are: 90.3% at James Ludlow (K-8) School; 89.6% at John Moffett Elementary; 94.2% at Penn Treaty Middle School; 89.4% at General Phillip Kerney (K-8); and 94.2% at Spring Garden School (K-8). The FRL numbers at the five nearest schools to the Palmer Middle and High School are: 88.7% at James Sullivan Elementary; 90% at Warren Harding Middle School; 90.5% at the William Ziegler School; 84% at Frankford High School; and 83% at Henry Lawton Elementary. Pa. Dep't Educ., *National School Lunch Program, 2013 data*, [http://www.portal.state.pa.us/portal/http://www.portal.state.pa.us;80/portal/server.ppt/gateway/PTARGS\\_0\\_190926\\_1343339\\_0\\_0\\_18/BD%2012-13%2006-21-13.xls](http://www.portal.state.pa.us/portal/http://www.portal.state.pa.us;80/portal/server.ppt/gateway/PTARGS_0_190926_1343339_0_0_18/BD%2012-13%2006-21-13.xls) (last visited Aug. 20, 2013).

<sup>18</sup> The ELL numbers at the five nearest schools to Palmer Elementary School are: 8.43% at James Ludlow (K-8) School; 9.89% at John Moffett Elementary; 9.15% at Penn Treaty Middle School; 0.44% at General Phillip Kerney (K-8); and 5.9% at Spring Garden School (K-8). The ELL numbers at the five nearest schools to the Palmer Middle and High School are: 6.37% at James Sullivan Elementary; 8.14% at Warren Harding Middle School; 15% at the William Ziegler School; 11.5% at Frankford High School; and 5.46% at Henry Lawton Elementary.

with disabilities, as compared to 13.56% at the District. Pa. Dep't Educ., Bureau Special Educ. *Special Education Statistical Summary 2011-2012*, 99-100, 137-38 (2012) *available at* [http://penndata.hbg.psu.edu/documents/PennDataBooks/Statistical\\_Summary\\_2012-2012\\_Final.pdf](http://penndata.hbg.psu.edu/documents/PennDataBooks/Statistical_Summary_2012-2012_Final.pdf). In addition, just as with the charter sector as a whole, the special education population served at Palmer is disproportionately comprised of students with mild disabilities, as compared to Philadelphia public school students as a whole. Of Palmer's students with disabilities, 79% are students diagnosed with either specific learning disabilities or a speech and language impairment, with only 21% in the more severe categories. *Id.* In the District, only 65% of the students with disabilities are diagnosed with specific learning disabilities or speech and language disabilities, while 35% are diagnosed with more severe disabilities. *Id.*

Finally, Palmer also serves significantly fewer boys than the School District. While only 44.7% of students at Palmer are boys, 51.2% of students in the District are boys. *See* Pa. Dep't Educ., *Public School Enrollment Reports*, <http://www.education.state.pa.us/portal/server.pt/community/enrollment/7407> (last visited Aug. 20, 2013). In 2012-2013, there were over 1,024 enrolled students in Palmer. For Palmer to serve its fair share of boys as District schools, it would have

to replace 66 girls with 66 boys. Such a change would have a dramatic impact on the climate of a school.

Meanwhile, despite fewer ELLs, fewer students with disabilities, and fewer boys, Palmer is still not performing academically any better than District schools. Since the enactment of the federal No Child Left Behind Act (“NCLB”), Palmer has never made Adequate Yearly Progress (“AYP”), as measured by the Pennsylvania State System of Assessment (“PSSA”).<sup>19</sup> For this reason, Palmer has been under Corrective Action II for five years.<sup>20</sup> PA Dep’t Educ., *Walter Palmer*

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<sup>19</sup> The No Child Left Behind Act of 2001 requires states to develop and implement a statewide accountability plan that measures the “adequate yearly progress” of all local educational agencies in the state (including charter schools). Each state is permitted some flexibility in defining what it means to make adequate progress but is guided and constrained by the definitions provided by federal law. No Child Left Behind Act of 2001, 20 U.S.C. § 6311(b)(2)(C). The Pennsylvania Department of Education submitted an accountability plan to the U.S. Department of Education (USDOE) outlining its plans to comply with NCLB, and in 2004 Pennsylvania began using “confidence intervals” to determine whether schools meet AYP targets. Pennsylvania’s accountability system, as outlined in the Pennsylvania Consolidated State Application Accountability Workbook, was approved by the USDOE. U.S. Dept. Educ., *Pennsylvania Consolidated State Application Accountability Workbook* (2012), available at <http://www2.ed.gov/admins/lead/account/stateplans03/pacsa.pdf>. Pennsylvania’s plan is based on Chapter 4 of Title 22 of the Pennsylvania Code, which contains the State Board of Education regulations. 22 Pa. Code § 4.51.

<sup>20</sup> Corrective Action II is the lowest status a school can have. AYP measures the minimum level of performance a school must achieve each year. In order from highest to lowest, the status levels falling below AYP are: Making Progress, Warning, School Improvement I, School Improvement II, Corrective Action I, and Corrective Action II. The first year a school falls short of the AYP goal it is placed



*School Report Card* (2012), available at <http://paayp.emetric.net/Content/reportcards/RC12S126513490000007674.PDF>; see also, PA Dep't Educ., *School AYP Status 2003 – 2012*, [http://www.education.state.pa.us/portal/server.pt/community/school\\_assessments/7442/2011-2012\\_pssa\\_and\\_ayp\\_results/1235182](http://www.education.state.pa.us/portal/server.pt/community/school_assessments/7442/2011-2012_pssa_and_ayp_results/1235182)) (last visited Aug. 20, 2013) (tracking the progress of Palmer through the AYP status levels from 2003 to 2012: 2012, Corrective Action II 5<sup>th</sup> year; 2011, Corrective Action II 4<sup>th</sup> year; 2010, Making Progress; 2009, Corrective Action II 3<sup>rd</sup> year; 2008, Corrective Action II 2<sup>nd</sup> year; 2007, Corrective Action II 1<sup>st</sup> year; 2006, Corrective Action I; 2005, Making Progress; 2004, School Improvement II; 2003, School Improvement I).

In addition, Palmer was recently under investigation by the state for suspicion of possible cheating on the 2010 and 2011 state standardized tests, which are used to measure schools' AYP. The suspicion was based on a "statistically

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on "warning" status. This means that the school must meet AYP measures the following year to be on track with the NCLB goal of student proficiency by 2014. A school that is identified as Making Progress is one that met AYP measures for one year but is currently in a probationary period until it completes a second year of AYP goals. PA Dep't Educ., *About Adequate Yearly Progress (AYP) in Pennsylvania*, <http://paayp.emetric.net/Home/About> (last visited Aug. 21, 2013). A school in Corrective Action II 5<sup>th</sup> year is a school that has been in the lowest status level for five years without achieving AYP status. When a school is in such a position it is required to implement a restructuring plan for the school in accordance with the PSEA Guide to School Improvement and Planning. Pa. State Educ. Ass'n, *PSEA Guide to School Improvement Planning* (2007), available at [http://www.psea.org/uploadedFiles/Publications/Professional\\_Publications/Informational\\_Publications/LocalSupportGuide.pdf](http://www.psea.org/uploadedFiles/Publications/Professional_Publications/Informational_Publications/LocalSupportGuide.pdf).

improbable number of wrong-to-right erasures” on students’ state standardized tests. See Bill Hangle & Dale Mezzacappa, *Confusion lingers over handling of cheating probes at charters*, The Notebook (Nov. 28, 2012), <http://thenotebook.org/blog/125389/two-charters-confusion-lingers-over-cheating-investigations>; Daniel Denvir, *How Pennsylvania Schools Made a Cheating Scandal Disappear*, Philadelphia City Paper (Jul. 18, 2013), available at [http://www.citypaper.net/cover\\_story/Erase\\_to\\_the\\_Top.html?viewAll=y](http://www.citypaper.net/cover_story/Erase_to_the_Top.html?viewAll=y).

Ultimately, the state closed its investigation, “notwithstanding extensive evidence of testing irregularities.” Letter from Carolyn C. Dumeresq, Deputy Secretary, Pennsylvania Department of Education, to D.F. Hinson, Chief Executive Officer, Walter D. Palmer Leadership Learning Partners Charter School (Oct. 3, 2012) available at <https://thenotebook.org/sites/default/files/palmer-letter.jpg>. However, after the state implemented new testing protocols for Palmer, the school’s proficiency rates for 11<sup>th</sup> graders dropped by 38 points in reading and 46 points in math. Bill Hangle & Dale Mezzacappa, *Confusion lingers over handling of cheating probes at charters*, The Notebook (Nov. 28, 2012), <http://thenotebook.org/blog/125389/two-charters-confusion-lingers-over-cheating-investigations>. Proficiency rates also dropped in both reading and math *for every cohort of students that can be tracked*.<sup>21</sup>

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<sup>21</sup> For example, from 2010-11 to 2011-12 the cohort of students who moved from

In 2005, Palmer agreed – as a matter of law – to be legally bound to an enrollment cap for the entire five years of its charter. Such a cap was perfectly legal under the Charter School Law at the time it was signed. Rather than change this, the General Assembly affirmed the validity of this agreement when it amended the Charter School Law in 2008. In addition to being perfectly legal, Palmer’s enrollment cap was also highly appropriate to protect vulnerable student populations.

## **II. Negotiated Agreements Are Consistent with the Charter School Law**

The Court has asked the parties to address “whether a charter school’s signing of a charter that contains a unilaterally imposed cap on enrollment can be considered ‘implied acquiescence’ to that cap, sufficient to satisfy the requirement for an express agreement under 24 P.S. § 1723-A(d)(1), or whether something more is required in order to constitute such an express agreement.” 2013 Pa. LEXIS 1183.<sup>22</sup> We submit to the Court that, in light of the serious issues described above

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3<sup>rd</sup> grade to 4<sup>th</sup> grade dropped from 88% proficient in Math and 80% proficient in Reading to 56% proficient in Math and 43% proficient in Reading. This same trend of declining scores followed each cohort tested. Scores can be found collected in one place at <http://www.greatschools.org/pennsylvania/philadelphia/5206-Walter-D-Palmer-Leadership-Learning-Partnership-CS/?tab=test-scores> or by piecing them together year by year at <http://paayp.emetric.net/>.

<sup>22</sup> Note that we fully agree with the Appellant that, for the immediate case, this is a moot question as Palmer expressly agreed to its enrollment cap. We would submit

with regard to the protection of vulnerable student populations and the preservation of school district schools, implied acquiescence is more than enough to establish a legally binding enrollment cap. The charter school law should be read to be consistent with school districts' constitutional duty to maintain a "through and efficient" education to all students. Pa. Const. Art. III, § 14.

By limiting charter growth to a rate that allows school districts to maintain and improve their own schools, enrollment caps actually increase the number of quality school choices in Pennsylvania communities and, thus, ensure that charter schools are held accountable, as is the intent of the charter school law. A "charter," whether technically a "contract" or not, is legally binding on the parties, and, thus, school districts should be fully empowered to use all leverage at their disposal, short of duress, to negotiate the terms of an enrollment cap.

#### **A. School Districts and Their Schools Are Important to Save**

It might be tempting to suggest that, since many parents want charter schools, we should abolish the traditional public schools and replace them all with charter schools. Certainly the General Assembly could choose to abolish school districts and replace them with some other entity that would provide the same services. But the General Assembly has not chosen to do this. Charter schools

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further, that short of duress, the reasons for a charter's express agreement are irrelevant to the validity of the enrollment cap.

have not replaced the services of school districts. There is a reason why school districts cannot legally adopt many of the practices of charter schools that result in a selective study body. The entire public education system in Pennsylvania, including the charter school system, is dependent on school districts. This is the system the General Assembly has created. So long as the General Assembly has not created some other “thorough and efficient system of public education to serve the needs of the Commonwealth,” then the law must be read in a way that ensures “the maintenance and support of” the system it has created. Pa. Const. Art. III, § 14.

School districts provide their communities with dozens of vital services that charter schools cannot provide. For example, school districts provide gifted education to eligible students. 22 Pa. Code Ch. 16 (Special Education for Gifted Students). Charter schools do not. *See* 24 P.S. § 17-1732-A (exempting charter schools from 22 Pa. Code Ch. 16). Schools districts provide access to career and technical education. 22 Pa. Code § 4.23(d)(1). Charter schools do not. Pa. Dep’t Educ., *Basic Education Circular, Charter Schools* (2004), available at [http://www.portal.state.pa.us/portal/server.pt/community/purdon's\\_statutes/7503/charter\\_schools/507318](http://www.portal.state.pa.us/portal/server.pt/community/purdon's_statutes/7503/charter_schools/507318) (stating that “a charter school is not required to provide [CTE] unless it becomes part of a student’s IEP). School districts enforce truancy laws, even for students in charter schools. 24 P.S. § 13-1333; Pa. Dep’t Educ.,

*Basic Education Circular, Compulsory Attendance and Truancy Elimination Plan*

(2006)

<http://www.patrancytoolkit.info/providers/291/BEC-CompulsoryAttendance.pdf> (explaining that charter schools must report truancy to the school district of residence, but only districts can file a truancy citation).

School districts pay tuition for students who choose cyber charter schools or out-of-county charter schools. 24 P.S. § 17-1725-A; 24 P.S. § 17-1749-A. These are just a few examples. There are many hundreds of provisions of the Pennsylvania Public School Code that apply to school districts. Only 66 apply to charter schools. 24 P.S. § 17-1732-A (counting 66 provisions applicable to charter schools).

Most fundamentally, school districts provide communities with *neighborhood* schools that serve every student. In the large urban communities where most charters are located, this often means a school that students can walk to. Neighborhood schools are sources of pride for many communities. Neighborhood schools host polling stations, community meetings, and even non-school-related athletic activities. They are often the hub of local activities and add to the social fabric of a community.<sup>23</sup> It is sadly true that some of Philadelphia's

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<sup>23</sup> As explained *supra*, the School District of Philadelphia has begun experimenting with some charter school models that focus on particular neighborhood catchments. This new experiment of a district/charter hybrid is promising, even if

communities have historically had poorly-operated district schools that have not provided them with a good school choice. In this way, charter schools have added important educational opportunities to families in many of those communities. But unmitigated charter school expansion promises to destroy the many strong neighborhood schools in the District and erode the social compact the District has woven with those communities.

Even charter schools depend heavily on the existence of a healthy school district, and the Charter School Law contemplates their survival. *See, e.g.*, 24 P.S. § 17-1726-A (requiring local school district to provide transportation for charter school students); 24 P.S. § 17-1719-A (contemplating the participation of charter school students in extracurricular activities with the local District-operated schools); 24 P.S. § 17-1717-A (granting the local board of school directors exclusive authority to receive and evaluate charter school applications; and 24 P.S. § 17-1729-A (granting the local board of directors authority over nonrenewal or revocation of a charter); 24 P.S. § 17-1717-A(b)(1) (allowing the conversion of a portion of an existing public school into a charter school). These repeated

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they are not what the Charter School Law contemplates as “charter schools.” However, even “neighborhood” charters have no obligation to serve *all* students in their boundaries, as they can still be “full.” And, unlike traditional charter schools, they are even more dependent on the District, which has exclusive authority to determine a neighborhood school catchment. Only district schools are truly schools for all children.

references indicate that charter schools are meant to educate children alongside district-operated schools.

### **B. Enrollment Caps Increase Accountability and School Choice**

The primary intent of the Charter School Law is to “expand choices” for “all pupils” and ensure “accountability.” 24 P.S. § 17-1702-A. It is not aimed at driving existing school districts into insolvency. To the extent that competition is part of the system, it is intended to be used raise the level of opportunities for students in all schools, not cause a fierce battle to the death. Such an outcome would serve only to reduce the number and quality of educational choices and opportunities for Philadelphia public school students – the opposite of the goal of the Charter School Law.

The District’s brief has provided a detailed explanation of the damaging financial impact of charter expansion. In the past 18 months, the School District of Philadelphia has been forced to close 30 of its own neighborhood schools. Kristen A. Graham, *'Catastrophic' budget laid out by Philly schools*, Philly.com (Apr. 20, 2013), [http://articles.philly.com/2013-04-20/news/38677018\\_1\\_budget-picture-summer-school-food-services](http://articles.philly.com/2013-04-20/news/38677018_1_budget-picture-summer-school-food-services). Those District schools served high numbers of vulnerable student populations. Charter expansion was largely responsible for the



loss of these neighborhood schools and, quite literally, has already reduced the number of choices available to students in those communities.

The consequences of this Court affirming the lower court could prove disastrous, and even fatal, to school districts throughout the state, and to the School District of Philadelphia in particular. If poor quality charter schools that do not equitably serve *all* students are permitted unfettered expansion, it harms the entire system. If agreed-upon enrollment caps can be unilaterally ignored by charter schools, the more than 80 charter schools in Philadelphia could all raise their enrollment at the same time. This unmitigated increase in tuition payments would force school districts into insolvency and would, for all intents and purposes, make it impossible for them to function. If insolvent, the District would be unable to perform its statutorily-prescribed duties for its own students or for charter school students. In this way, unregulated expansion of charters will weaken accountability, reduce parental choice, damage the quality of instruction, and further segregate vulnerable student populations into district schools.

Charter schools are public schools that operate “independently” from a school district. 24 P.S. § 17-1702-A. The CSL vests the chartering school district with responsibility for ensuring charter school accountability. *See* 24 P.S. § 17-1728-A(a). Unfortunately, this accountability, as construed by the courts, has been insufficient. The only explicit accountability tool in the charter law is the ability to

revoke or not renew a charter under 24 P.S. § 17-1729-A, which sets forth six exclusive grounds for revocation/nonrenewal. In the absence of compelling evidence of intentional discrimination, a charter school's failure to adequately serve certain student groups or the fact that it is contributing to the destruction of the school districts are not causes for revocation or nonrenewal. *Id.*

As this case demonstrates, even when a charter has clearly violated the law, the cost of charter school accountability can be also be exorbitant.<sup>24</sup> Some have speculated that the financial cost of revocation is one of the reasons why, as of April 2012, only eight charters had been revoked in Pennsylvania. Steve Esack & Devon Lash, *Closing a Charter School is a Long, Costly Process*, *The Morning Call* (Apr. 22, 2012), *available at* [http://articles.mcall.com/2012-04-22/news/mcallentown-charter-school-oversight-20120421\\_1\\_vitalistic-officials-charter-school-appeal-board-president-robert-e-smith](http://articles.mcall.com/2012-04-22/news/mcallentown-charter-school-oversight-20120421_1_vitalistic-officials-charter-school-appeal-board-president-robert-e-smith). When the accountability provisions of Section 17-1729-A are inadequate, the negotiation of enrollment caps can be used as an important tool to protect against unfettered growth of charters. This is especially true when a charter school is not providing a better education or serving all students.

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<sup>24</sup> Section 1729-A(a) provides a narrow list of categories for which a charter can be revoked. In a revocation action, the burden is on the district to produce “substantial evidence of a compelling (*i.e.* material) violation.” *In re: Renaissance Charter School*, Docket No. 2008-07 at page 3; *see also, e.g.*, 24 P.S. § 17-1729-A(c).

Nothing in the “unless agreed to by the charter school” language of Section 17-1723-A precludes a school district from utilizing leverage to convince a charter school to agree to an enrollment cap. In this case, there is no suggestion that the District did anything in particular to compel Palmer to agree to a cap. However, even if it had, short of duress, the agreement should still be valid. There are numerous carrots and sticks that the General Assembly has created for school districts to utilize in negotiations with charter schools. For example, districts can often be helpful to charters who are seeking school facilities. Districts can require detailed reports or access to the school under Section 17-1728-A. The School District of Philadelphia has exclusive discretion to permit charters to operate in more than one building. 24 P.S. § 17-172-A(d). In addition, the General Assembly has granted the School Reform Commission significant power to suspend various provisions of the School Code. *See* 24 P.S. 6-696 *et seq.* So long as a school district is using this leverage consistent with the intent of the charter school law and the rest of the school code to ensure that charters are serving all students and contributing to quality school choices, these negotiations are perfectly valid.

### **C. Commonwealth Court Precedent is Flawed**

The Commonwealth Court has failed to recognize that protecting vulnerable student populations, increasing school choice and accountability (which is the goal of the Charter School Law), and the constitutional mandate to maintain and support a “thorough and efficient system of public education” should all inform the reading of the Charter School Law so as to permit school districts to use the full leverage at their disposal to negotiate agreements on charter school enrollment caps when appropriate.

This Court, in a case that predated the enrollment cap amendment to the Charter School Law, ruled that school districts have limited authority to impose conditions in charters. *See West Chester Area Sch. Dist. v. Collegium Charter Sch.*, 571 Pa. 503, 812 A.2d 1172 (2002). However, *Collegium* did not foreclose *all* conditions, and the Court noted that Section 17-1729-A of the Charter School Law implicitly grants the authority to impose some conditions. As the Court explained, “This is not to say that a District Board may never impose conditions upon a charter. Any condition imposed, however, must be in accordance with the provisions of the CSL.” *Id.* at 521 n.17.

In *Collegium*, the school district tried to defend as valid conditions it imposed on a charter school, which were not explicitly authorized under the Charter School Law, because those conditions ensured the district’s ability to provide effective oversight, or accountability, of the charter school and protect

public funds. The Court ruled that, at that time, “the General Assembly simply did not provide” for such an approach. *Id.* at 520. Since *Collegium*, however, the General Assembly, in amending Section 17-1723-A, has explicitly provided for negotiated enrollment caps and thus gave school districts the authority to negotiate the inclusion of these conditions in a charter.

Also since *Collegium*, this Court has stated that a school district’s “funding obligation is inextricably linked to its duty to provide a public education.” *Slippery Rock Area Sch. Dist. v. Pa. Cyber Charter Sch.*, 612 Pa. 486, 501-504, 31 A.3d 657, 665-67 (2011) (holding that a school district has no obligation to pay for charter school programs that the district itself does not provide). This logic should also apply to the obligation to grant or not grant expanded enrollment to a charter school. When charter expansion impedes a district’s “duty to provide a public education” to its own students, it should have no “funding obligation” to expand charter schools.

Unfortunately, the Commonwealth Court’s precedent with regard to enrollment caps has refused to consider the impact of uncontrolled charter growth on a school district’s ability to fulfill its duty to educate all students. In a series of cases, including the case at bar, the Commonwealth Court has narrowed the authority of school districts to utilize enrollment caps. In *Foreman v. Chester-Upland School Dist.*, 941 A.2d 108, (Pa. Commw. Ct. 2008), the Commonwealth

Court held that charters are not “contracts,” but rather “more like the issuance of a regulatory permit,” and, therefore, an Empowerment School’s statutory authority to cancel contracts did not provide the authority to implement charter enrollment caps after the charter had already been signed. In dissent, Judge Smith-Ribner noted that this characterization of charters as “permits” gave inadequate weight to the charter law itself, which provides that the “written charter shall be legally binding on both the local board of school directors of a school district and the charter school's board of trustees.” 24 P.S. § 17-1720-A. Judge Smith-Ribner warned that rampant charter growth “sanctions the potential for charter school enrollment to reach a level that...might result in a forced shutdown of an entire public school system.” *See Foreman*, 941 A.2d 108, 117 (Smith-Ribner, J., dissenting). Judge Smith-Ribner concluded that, “The majority fails to comprehend this potential *threat to the constitutional mandate for the Commonwealth to maintain a system of public education to serve the needs of its school-aged children.*” *Id.* (*emphasis added*). Following *Foreman*, the General Assembly amended the charter law to specifically affirm the validity of enrollment caps when agreed-to as part of the legally binding charter.

Moreover, the Commonwealth Court recently held, in a case with fundamentally flawed reasoning, that even in the middle of the term of a charter to which it has already legally agreed to become bound, a charter school can appeal

an authorizing district's refusal to amend their charter to the Charter School Appeal Board (CAB) and, ultimately, to the courts. *See Northside Urban Pathways Charter School v. State Charter Sch. Appeal Bd.*, 56 A.3d 80 (Pa. Commw. Ct. 2012) (reversing the Charter Appeal Board's ruling that it did not, under the terms of the charter law, have jurisdiction to hear such appeals, holding that the CAB has "implied authority" to do so, and remanding back to the CAB with instructions to "review School District's decision in the same manner it would review a decision revoking or not renewing a charter). The *Northside* court confused the concepts of a school district's implied authority to *choose to agree* to amend a legally binding charter if it wished to do so, with a non-discretionary mandate to automatically grant a requested amendment absent compelling evidence of a material violation of the Section 17-1729-A criteria. As the dissent noted, the *Northside* court essentially ignored Section 17-1720-A, the provision of the charter school law that makes charters "legally binding" on charter schools. *See Northside*, 56 A.3d at 90 (Pellegrini, J., dissenting).

The Commonwealth Court also permitted the Freire Charter School to ignore an enrollment cap in its charter, merely because when it signed the charter it crossed out the specific enrollment cap provision.<sup>25</sup> *Sch. Dist. Philadelphia v. Pa.*

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<sup>25</sup> The Freire Charter School, another Philadelphia Charter School, has one of the most disproportionately under-served vulnerable student populations of any charter

*Dep't Educ.*, 45 A.3d 457, 461 (Pa. Commw. Ct. 2012). If the Freire Charter School altered the terms of the charter, then there should have been no mutual agreement and, thus, no charter. Freire's only recourse should have been to appeal a revocation or nonrenewal of its charter. In addition, by crossing off the enrollment limit, Freire essentially unilaterally imposed the terms of "no limit to capacity" on the District. *See* 24 P.S. § 17-1723-A(a).

Taking the holdings of *Foreman*, *Northside*, Freire, and this case together, the state of the Commonwealth Court case law is that school districts can never legally bind charter schools to enrollment caps, even by agreement, but that any charter school, good or bad (with a narrow exception for charters who are designed to be in "material violation") can unilaterally remove the caps at any time and for any reason, even during the term in which they have already agreed to become legally bound. If charters are to be held accountable for serving all students, if districts are to be preserved, and if communities are to "increase learning opportunities," this cannot be the state of the law.

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school compared to the School District of Philadelphia of any charter school in the city – 0.81% ELLs at Freire compared to 8% in the District, 83% of the special education students at Freire are diagnosed with a "specific learning disability" compared to only 53% at the District, 55.7% of students are eligible for Free/Reduced Lunch at Freire compared to 80.6% in the District; and only 41% boys at Freire compared to 51.2% boys in the District.



## **CONCLUSION**

For the foregoing reasons, the decision of the Commonwealth Court should be reversed.

Respectfully submitted,

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August 21, 2013

## CERTIFICATIONS

I, DAVID LAPP, certify that:

***Electronic filing.*** The foregoing Brief of *Amicus Curiae* that is being filed in an electronic format through the Court's web portal is an accurate and complete representation of the paper version of this document that is being filed by the Education Law Center.

***Word count limits.*** This brief contains 10,604 words, as counted by Microsoft Word 2010 software, and it complies with Rule 2135(a) of the Rules of Appellate Procedure.

***Proof of service.*** I caused true and correct copies of the brief and Reproduced Record to be served today by first-class mail, postage prepaid, addressed to:

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All other parties were served by way of electronic filing.

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