

THE CHARTER SCHOOL NETWORK (ALMOST) NO ONE WANTS: MOBILIZING REGULATION AND LITIGATION TO SERVE THE PUBLIC INTEREST

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Publicly funded, independently operated charter schools entered the public sector three decades ago with the promise of innovating public education to better serve students in underperforming schools. Despite limited evidence of improved educational outcomes, charter schools are now an established part of the education system, with around 7,800 charter schools serving more than seven percent of public school students.

Although charter schools have long been associated with the controversial school choice movement, a recent entrant into the charter school arena has created new and urgent concerns. Hillsdale College, through its affiliate Barney Charter School Initiative, has been making escalating inroads into public education, capped most recently by an invitation by the Tennessee governor to establish fifty to one hundred new charter schools in the state (an increase of more than forty percent). Hillsdale is a conservative Christian college that declines federal and state funding, leaving it free from laws that prohibit discrimination by recipients of public funding. Its supporters and donors openly express that their mission is to destroy traditional public schools and replace them with publicly funded charter schools and vouchers to be used at private schools.

Federal and state laws and policies implemented in support of charter school expansion over the three decades of charter school history provide little protection against unchecked expansion of the Hillsdale agenda. This leaves our country in the position of publicly funding a political mission to overturn the public education system. Although charter schools are subject to the same laws governing all public schools, there is little oversight and substantial evidence of violations ranging from discrimination against students in protected classes to outright fraud. Existing

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recommendations to limit the number of charter schools or to hold charter schools accountable are inadequate or infeasible. Our proposal is to activate private incentives to litigate as a means of holding charter schools accountable to serving the public interest. We identify three areas in which litigation may provide an enforcement incentive for compliance with federal laws: employment discrimination liability under Title VII, liability of boards of directors of charter schools, and liability of third-party affiliates of charter schools.

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INTRODUCTION

Nearly 100 years after Tennessee made education history in the Scopes trial, the state is again poised to revolutionize public school education. In January 2022, Governor Bill Lee announced that he had invited Hillsdale College, widely known as a conservative Christian college, to establish fifty to one hundred new publicly funded, privately operated charter schools in the state, a move that would increase the number of charter schools in the state by at least forty percent.¹ Governor Lee praised Hillsdale’s curricular focus on “informed patriotism” in support of his charter school expansion plans.² If successful, Governor Lee’s ambitions would transform public education by introducing the largest number of Hillsdale charter schools in any state and more than tripling the existing number of Hillsdale charter schools nationwide.³ Governor Lee’s agenda would also establish a blueprint for further expansion nationwide by a charter school network that has been vocal about its ambitions to advance its deeply conservative political and social values through publicly funded charter schools.⁴ This unusual move by a governor to expand charter schools in partnership with Hillsdale College

¹ See Bill Lee, Governor of Tenn., 2022 State of the State Address (Jan. 31, 2022), <https://tn.gov/governor/sots/2022-state-of-the-state-address.html> [<https://perma.cc/6BWQ-SRPU>]; Marta W. Aldrich, *Why a Small Private Christian College in Michigan Is Having an Outsize Influence in Tennessee*, CHALKBEAT TENN. (Feb. 7, 2022, 8:05 PM), <https://tn.chalkbeat.org/2022/2/7/22922717/hillsdale-college-tennessee-governor-charter-schools> [<https://perma.cc/K5WN-PYHL>]. In the 2022–2023 academic year, Tennessee has 114 charter schools, so an additional fifty schools would be a 43.9% increase. See *Tennessee School Directory*, TENN. DEP’T OF EDUC., https://k-12.education.tn.gov/sde/CreateSchoolList.aspx?sql_id=513960 [<https://perma.cc/K2PP-Z9MH>].

² See Lee, *supra* note 1.

³ As of February 2023, there are twenty-two Hillsdale College member schools in eleven states. See *Schools: Hillsdale Classical Schools Across the Nation*, HILLSDALE COLL., <https://k12.hillsdale.edu/Schools/Affiliate-Classical-Schools> [<https://perma.cc/4EU7-L6EQ>].

⁴ See Stephanie Saul, *A College Fights ‘Leftist Academics’ by Expanding into Charter Schools*, N.Y. TIMES (Apr. 11, 2022), <https://www.nytimes.com/2022/04/10/us/hillsdale-college-charter-schools.html> (last visited Jan. 24, 2023) (“Hillsdale has ambitious plans to add to its network of classical public charter schools, which focus on ‘the centrality of the Western tradition.’”).

received extensive media coverage.⁵ Reactions ranged from stunned to appalled.⁶

Charter schools are public schools operated independently of the school district by a private organization.⁷ The term “charter” refers to the contract between the management of the school and the authorizer. Authorization to open a charter school within a state is based on the state’s legislative requirements and varies substantially among states.⁸ Charter schools are tuition-free and financed by public funds, where the funding is related to the per-student education cost that would have otherwise been provided to the charter student’s non-charter public school alternative.⁹ Charter schools must abide by the same federal and state laws that pertain to any public school. For instance, they cannot discriminate in admissions of students on the basis of race, religion, or disability status, and they cannot discriminate in hiring on the basis of race, religion, national origin, disability status, or sexual orientation.¹⁰ Most charter management organizations are nonprofits, although some

⁵ A partial list includes Saul, *supra* note 4; Andrea Cavallier, *Tennessee Governor Invites Private Conservative College to Open 50 Charter Schools Whose Anti-Woke Curriculum Will Teach Students That America Is ‘an Exceptionally Good Country,’* DAILY MAIL (Apr. 10, 2022, 2:14 PM), <https://www.dailymail.co.uk/news/article-10705123/Hillsdale-College-plans-open-charter-schools-fight-against-lessons-gender-race.html> [<https://perma.cc/P4BG-6JPL>]; Annie Abrams, *The Lesson in Republicans’ Alarming Embrace of ‘Classical Education,’* NEW REPUBLIC: SOAPBOX (Mar. 30, 2022), <https://newrepublic.com/article/165868/tennessee-classical-education-charter-schools> [<https://perma.cc/NU6Q-7BZ7>]; Kathryn Joyce, *How This Tiny Christian College Is Driving the Right’s Nationwide War Against Public Schools,* SALON (Mar. 15, 2022, 6:30 AM), <https://www.salon.com/2022/03/15/how-this-tiny-christian-college-is-driving-the-rights-nationwide-against-public-schools> [<https://perma.cc/S9RU-8UJQ>].

⁶ See, e.g., Saul, *supra* note 4. Bruce Fuller, a professor of education and public policy at the University of California, Berkeley, stated:

“I’ve been following charter schools over the last 25 years, and I’ve never seen a governor attempting to use charters in such an overtly political way . . . You’ve had governors who’ve encouraged the growth of charters to provide more high-quality options for parents, but it’s highly unusual to see a governor deploy the charter mechanism for admittedly political purposes.”

Id. In contrast, Florida Department of Education Commissioner Richard Corcoran expressed admiration for Governor Lee’s expansion plans and urged speed to complete the transformation so that it could not be undone by a future Democratic governor. See *infra* Section IV.B.1.

⁷ *What Is a Charter School?*, NAT’L CHARTER SCH. RES. CTR., <https://charterschoolcenter.ed.gov/what-charter-school> [<https://perma.cc/VWX9-GMGD>].

⁸ See *infra* Section II.A (describing state authorization laws).

⁹ YILAN SHEN & ALEXANDER BERGER, NAT’L CONF. OF STATE LEGISLATURES, CHARTER SCHOOL FINANCE 1–2 (2011), <https://web.archive.org/web/20221217212420/https://www.ncsl.org/documents/educ/charterschoolfinance.pdf>.

¹⁰ See *infra* Section III.A (citing federal antidiscrimination laws).

states permit for-profit education management organizations.¹¹ Federal law prohibits religious charter schools.¹²

Since the charter school movement took root in the early 1990s, charter schools have been promoted as a means to improve student performance in underserved and mainly urban communities.¹³ Charter schools initially enjoyed strong bipartisan support,¹⁴ and there has been rapid growth since the first charter school began operations in St. Paul, Minnesota, in 1992.¹⁵ Now, forty-five states and the District of Columbia have charter school laws,¹⁶ and about 7,800 charter schools operate, serving over seven percent of public school students.¹⁷ Although many charter schools enjoy a favorable reputation,¹⁸ charter schools have also received substantial criticism. Vast research shows that charter schools have largely failed to provide the anticipated educational benefits and have engaged in discriminatory treatment of students and exacerbated racial segregation.¹⁹ Still, others have engaged in financial crimes.²⁰

¹¹ See *infra* Section II.C.

¹² U.S. DEP'T OF EDUC., CHARTER SCHOOLS PROGRAM: TITLE V, PART B: NON-REGULATORY GUIDANCE 15 (2004), <https://www.ed.gov/policy/elsec/guid/cspguidance03.pdf> [<https://perma.cc/P4PQ-CDPP>].

¹³ See Sarah R. Cohodes & Katharine S. Parham, *Charter Schools' Effectiveness, Mechanisms, and Competitive Influence*, OXFORD RSCH. ENCYC. ECON. & FIN., June 28, 2021, at 2–3.

¹⁴ See, e.g., Jon Valant, *What Are Charter Schools and Do They Deliver?*, BROOKINGS INST.: POL'Y 2020 (Oct. 15, 2019), <https://www.brookings.edu/policy2020/votervital/what-are-charter-schools-and-do-they-deliver> [<https://perma.cc/A43M-8UL5>] (observing that former Presidents Bill Clinton, George W. Bush, Barack Obama, and Donald Trump supported charter schools).

¹⁵ See *Public Charter School Enrollment*, NAT'L CTR. FOR EDUC. STAT. (May 2022), <https://nces.ed.gov/programs/coe/indicator/cgb/public-charter-enrollment> [<https://perma.cc/P2A3-TCCE>] (“Between fall 2009 and fall 2019, overall public charter school enrollment increased from 1.6 million students to 3.4 million students and the number of public charter schools increased from approximately 5,000 to 7,500. During this period, the percentage of public school students who attended charter schools increased from 3 to 7 percent.”); Zachary Jason, *The Battle over Charter Schools*, HARV. ED. MAG. (2017), <https://www.gse.harvard.edu/news/ed/17/05/battle-over-charter-schools> [<https://perma.cc/3MJ8-VHCN>].

¹⁶ See *Public Charter School Enrollment*, *supra* note 15.

¹⁷ Jamison White, *How Many Charter Schools and Students Are There?*, NAT'L ALL. FOR PUB. CHARTER SCHS. (Dec. 6, 2022, 11:38 AM), <https://data.publiccharters.org/digest/charter-school-data-digest/how-many-charter-schools-and-students-are-there> [<https://perma.cc/5KDJ-QKNG>].

¹⁸ See, e.g., Melinda Tolliver, *Charter Schools Top Ranked Among 2021 Best High Schools*, NAT'L ALL. FOR PUB. CHARTER SCHS. (Apr. 27, 2021), <https://www.publiccharters.org/latest-news/2021/04/27/charter-schools-top-ranked-among-2021-best-high-schools> [<https://perma.cc/8TRA-G7PU>] (reporting charter schools appearing on U.S. News & World Report 2021 Best High Schools list).

¹⁹ See Ron Zimmer, Richard Buddin, Sarah Ausmus Smith & Danielle Duffy-Chipman, *Nearly Three Decades into the Charter School Movement, What Has Research Told Us About Charter Schools?*, in THE ROUTLEDGE HANDBOOK OF THE ECONOMICS OF EDUCATION 73 (Brian P. McCall ed., 2022) (surveying empirical research on charter school outcomes).

²⁰ See *infra* Section I.D.

Charter schools have long been associated with the controversial school choice movement. But the ideologically motivated incursion of Hillsdale into the charter school landscape has generated new controversies and opposition from corners that traditionally would support the school choice agenda. Hillsdale-affiliated charter schools are based on a “classical education” model that focuses on “the centrality of the Western tradition,”²¹ with a curriculum drawing on the report from the Trump-appointed Advisory 1776 Commission led by the president of Hillsdale College.²² Educators and historians have criticized Hillsdale’s “1776 Curriculum” for its ideological bias and distorted portrayal of U.S. history.²³

Furthermore, the ultimate goal of some supporters of Hillsdale’s agenda is not improvement of public schools but is instead a wholesale policy to privatize the public school system. Promoters of Hillsdale-sponsored schools in Florida have publicly announced that their agenda is to lure students away from traditional public schools until they collapse.²⁴ Charter school replacement of traditional public schools is not a hollow threat. As we show in Part II, more than half of the states—including Tennessee—have no limit on the number of charter schools that can be authorized.²⁵ At the extreme, school choice is not a “choice” in New Orleans, a city in which nearly every public school is a charter school.²⁶

Although the original promise of charter schools was to improve education through market competition that would be responsive to local needs, Governor Lee’s partnership with Hillsdale—backed by a \$32

²¹ *Founding a Hillsdale Classical School*, HILLSDALE COLL., <https://k12.hillsdale.edu/Schools/Start-a-School> [<https://perma.cc/VB6E-JLTJ>].

²² *See generally The Hillsdale 1776 Curriculum*, HILLSDALE COLL., <https://k12.hillsdale.edu/Curriculum/The-Hillsdale-1776-Curriculum> [<https://perma.cc/H26R-JHAP>]. *See also* PRESIDENT’S ADVISORY 1776 COMM’N, THE 1776 REPORT (2021), <https://trumpwhitehouse.archives.gov/wp-content/uploads/2021/01/The-Presidents-Advisory-1776-Commission-Final-Report.pdf> [<https://perma.cc/Q6ZP-MAQ5>]; *id.* at 41 (listing Hillsdale President Larry P. Arnn as Chair of the Commission).

²³ *See* Saul, *supra* note 4.

²⁴ *See* Kathryn Joyce, *The Far Right’s National Plan for Schools: Plant Charters, Defund Public Education*, SALON (Mar. 17, 2022, 6:30 AM), <https://www.salon.com/2022/03/17/the-far-rights-national-plan-for-schools-plant-charters-defund-public-education> [<https://perma.cc/G3N8-5ML2>] (“[Florida Department of Education Commissioner Richard] Corcoran suggested that once the state manages to lure 1.5 million students away from public schools—to get those kids ‘across that Rubicon,’ as he put it—the resultant loss of funding and forced consolidation would alter the educational landscape so radically that not even future Democratic governors could change it back.”); *see also infra* Section IV.B.1.

²⁵ *See infra* Part II.

²⁶ *See* J. Celeste Lay & Anna Bauman, *Private Governance of Public Schools: Representation, Priorities, and Compliance in New Orleans Charter School Boards*, 55 URB. AFFS. REV. 1006, 1007 (2019).

million budget to support charter facilities²⁷—is the antithesis of market competition and responsiveness to local communities. Market competition should mean that multiple charter schools would compete for students with each other and with other educational options as they seek authorization to form a charter school in a specific locale. Instead, by announcing a partnership with Hillsdale and with considerable influence over the authorization process,²⁸ Governor Lee has championed one specific provider with ambitions to create a highly conservative nationwide network of charter schools. Hillsdale charter schools have been controversial, and their efforts to introduce schools have been met with vehement, and sometimes successful, opposition from local communities. Responsiveness to the needs of the local community would mean a curriculum tailored to the community. In contrast, Hillsdale-affiliated charter schools use a standardized curriculum, and staff receive the same training.²⁹ Furthermore, a specific target of fifty to one hundred new charter schools would necessarily reallocate a substantial number of students away from district public schools and into newly formed Hillsdale charter schools, thereby guaranteeing a reduction in resources for district public schools.³⁰

Because Hillsdale College declines federal and state funding,³¹ it is not required to follow laws such as Title IX of the Education Amendments Act of 1972, which prohibits discrimination by recipients of public funding.³² Hillsdale College has created an organizational structure that preserves its control over the curriculum but allows it to bypass state regulations preventing a religious institution from operating a charter school. Hillsdale does not own or manage its affiliated charter schools.³³ Instead, independent, Hillsdale-created charter management organizations operate the schools, while the college provides curriculum

²⁷ *Gov. Bill Lee Delivers 2022 State of the State Address*, TENN. OFF. OF THE GOVERNOR (Jan. 31, 2022, 3:22 PM), <https://www.tn.gov/governor/news/2022/1/31/gov-bill-lee-delivers-2022-state-of-the-state-address.html> [<https://perma.cc/534M-7DEL>].

²⁸ See *infra* Section IV.B.4.

²⁹ See, e.g., *Barney Charter School Initiative*, HILLSDALE COLL., <https://k12.hillsdale.edu/Programs/BCSI> [<https://perma.cc/SKT6-A2NM>] (“BCSI employs Hillsdale College’s . . . liberal arts curriculum . . . Hillsdale also provides significant assistance to school leaders and boards in the form of counsel, training, and best practices.”).

³⁰ See Paul T. Hill, *Charter Schools: Good or Bad for Students in District Schools?*, BROOKINGS (June 7, 2019), <https://www.brookings.edu/blog/brown-center-chalkboard/2019/06/07/charter-schools-good-or-bad-for-students-in-district-schools> [<https://perma.cc/67HB-8ALF>].

³¹ *Support Hillsdale College*, HILLSDALE COLL., <https://secured.hillsdale.edu/hillsdale/support-hillsdale-college> [<https://perma.cc/H6UH-QQV8>] (“Hillsdale does not accept even one penny of state or federal taxpayer funding—even indirectly in the form of student grants or loans . . .”).

³² 20 U.S.C. § 1681(a).

³³ *Frequently Asked Questions*, HILLSDALE COLL., <https://k12.hillsdale.edu/About/FAQ> [<https://perma.cc/2C96-BLX3>].

and staff training without charge and leads principal and teacher recruitment.³⁴ The New York Times characterizes Hillsdale's charter school model as "trying to thread a needle—creating a vast K-12 network that embraces its pedagogy and conservative philosophy, in many cases taught by its graduates, while tapping into government money to run the schools."³⁵

Concerns over discriminatory treatment and practices have been publicly aired. For example, Hillsdale charter schools have been called out for their racial imbalance,³⁶ allegations of discriminatory treatment of Black students,³⁷ and one principal's racist social media posts.³⁸ In terms of following state public school education requirements, Hillsdale schools in Colorado have received waivers allowing them to bypass state laws with respect to teaching topics related to health and sexuality, as well as allowing bans on materials otherwise used in district schools.³⁹

But under the current charter school structure, there are limited mechanisms to prevent or sanction discrimination, leaving little incentive for Hillsdale charter schools to comply with federal and state laws. Problems with charter schools are manifest, and a number of proposals have been made to prevent abuses, including transparency in financial reporting,⁴⁰ greater accountability,⁴¹ caps on the number of charter

³⁴ See Phil Williams, *Revealed: Charter Schools Claim They Are 'Separate' From Hillsdale, but Evidence Tells Different Story*, NEWSCHANNEL 5 NASHVILLE (Sept. 23, 2022, 12:04 PM), <https://www.newschannel5.com/news/newschannel-5-investigates/revealed/revealed-charter-schools-claim-they-are-separate-from-hillsdale-but-evidence-tells-different-story> [<https://perma.cc/36NT-CBHH>].

³⁵ Saul, *supra* note 4.

³⁶ *Id.* ("In a city where 73 percent of public school students are Black and 17 percent white, Atlanta Classical Academy is the mirror image: 17 percent Black and 71 percent white, according to a 2020 state report. Overall, Hillsdale's charter school racial demographics are close to that of the Atlanta Classical students. That is a departure from charter schools nationally, which are about 30 percent white.").

³⁷ *Id.* ("One of the teachers . . . described how a dozen students, almost all Black, were dismissed last spring, just before state assessment tests were administered.").

³⁸ Joyce, *supra* note 24 ("In Florida, the principal of Naples Classical Academy, a BCSI charter, similarly came under scrutiny for his social media history, including posts about Muslim 'gang rape marathons' . . .").

³⁹ See *infra* Section IV.B.5.

⁴⁰ Preston C. Green III, Bruce D. Baker & Joseph O. Oluwole, *Are Charter Schools the Second Coming of Enron?: An Examination of the Gatekeepers That Protect Against Dangerous Related-Party Transactions in the Charter School Sector*, 93 IND. L.J. 1121, 1160 (2018) (advocating for more oversight of charter school transactions and potential conflicts of interest).

⁴¹ See Susan L. DeJarnatt, *Oversight, Charter Schools, and a Thorough and Efficient System of Public Education*, 70 S.C. L. REV. 435, 436–40 (2018) (noting that the current system relies on the market in terms of student enrollment as evidence of a charter school's performance).

schools,⁴² and use of the False Claims Act to reduce fraud.⁴³ However, existing proposals suffer from limitations, and no proposals address the possibility of discrimination against students or charter school employees.

The most frequently recommended proposals for holding public schools accountable are to improve oversight and set caps on the number of charters. But states set their charter school laws, and there are many incentives to expand charter schools without limit.⁴⁴ Furthermore, limits can be breached, and Hillsdale has been especially creative in circumventing opposition to expansion. In Wisconsin, Hillsdale exploited the ability of tribal colleges to authorize charter schools after its proposed charter school to be located in suburban Milwaukee was declined by every other authorizer in the state.⁴⁵ In Colorado, a political action committee (PAC) called the 1776 Project PAC intervened in local school board elections, helping fill the board with charter school supporters in two counties where Hillsdale-affiliated charter schools operate and are applying to operate.⁴⁶ Tennessee created an easier path for the entry of Hillsdale charters. With the support of the state legislature, Governor Lee created a state educational board that could overrule any local denial of charter school applications.⁴⁷

Our proposal is to activate private incentives to litigate as a means of holding charter schools accountable to serving the public interest. We identify three areas in which litigation may provide an enforcement incentive for compliance with federal laws: employment discrimination liability under Title VII, liability of boards of directors of charter schools, and liability of third-party affiliates of charter schools.

This Article provides the first legal analysis of the new risks from mission-driven charter schools exemplified by Hillsdale College's

⁴² See, e.g., Helen F. Ladd, *How Charter Schools Threaten the Public Interest*, 38 J. POL'Y ANALYSIS & MGMT. 1053, 1069 (2019) (“[T]he best strategy to promote the public interest in education would be to limit the number of charter schools and to refocus attention and resources on the traditional public schools.”).

⁴³ Erin R. Chapman, Note, *Education Fraud at the Margins: Using the Federal False Claims Act to Curb Enrollment Abuses in Online, For-Profit K–12 Schools*, 116 MICH. L. REV. 645, 658–66 (2018) (arguing for use of the False Claims Act to fight online charter school enrollment fraud).

⁴⁴ See *infra* Section II.B.

⁴⁵ Ruth Conniff, *How a Wisconsin Tribe Helped Launch a Trump-Approved ‘Make America Great Again’ Charter School*, WIS. EXAM’R (Dec. 22, 2021, 7:00 AM), <https://wisconsinexaminer.com/2021/12/22/how-a-wisconsin-tribe-helped-launch-a-trump-approved-make-america-great-again-charter-school> [https://perma.cc/K3BE-3WCJ] (quoting Margaret Daigneau, interim principal of Lake Country Classical Academy, explaining that the school applied to a tribal college for authorization because “[t]he other authorizers all declined”); see also *infra* Section IV.B.3.

⁴⁶ See *infra* Section IV.B.5.

⁴⁷ See *infra* Section IV.B.4.

politicized agenda. Part I recounts the history of the school choice movement and summarizes research on charter school performance. To understand the paths used by Hillsdale in its attempt to expand its reach and influence, we describe in Part II the complicated landscape of charter school authorization and management. There is substantial variation by state—and even within states—regarding the authorizing entity, requirements for a school to be granted a charter, whether for-profit organizations can manage schools, and limits on charter school expansion, including caps on the number of charter schools that can exist within a state or locale. In this Part, we also address how variation in legal requirements and in oversight and monitoring at the state level has allowed corruption and fraud to proliferate. Part III provides an overview of the federal role in advancing charter schools, including the timeline and role of federal education funding and accompanying oversight. We also discuss recent regulations intended to curb the abuse of public funds. Within the context of state and federal laws regulating charter schools, Part IV examines the mechanisms Hillsdale College uses to overcome restrictions to establish charter schools in order to expand its political reach. Hillsdale College's standardized curriculum and political agenda is directly contradictory to the original mission of charter schools to provide educational opportunities that meet the needs of students in underperforming schools. However, the presence of legal loopholes and political support within some states indicates that legal grounds for preventing Hillsdale expansion may be weak. In Part V, we provide our recommendations to mobilize regulation and litigation to enforce compliance with federal and state laws.

I. BACKGROUND ON THE SCHOOL CHOICE MOVEMENT

A. *The Market for Charter Schools*

Students face an extensive set of educational options beyond the simple public versus private school dichotomy. Public schools, all of which are supported by public funds, include traditional public schools, magnet schools, charter schools, and open enrollment schools. Private schools are not primarily supported by public funds and include schools with a religious affiliation as well as nonsectarian schools. Homeschooling is also an available private schooling option.

Alternative public schooling options emerged from the public school choice movement in the 1960s and took on additional salience

following desegregation orders in the 1970s.⁴⁸ In addition to traditional public schools, public schools of choice include open enrollment schools, magnet schools, and charter schools. It is important to focus on the “choice” dimension. For traditional public schools, the choice is largely made by choice of residence, and public schools are required to enroll and provide appropriate educational services to all eligible students. By contrast, schools of choice require active engagement on the part of parents to seek out and apply to schools.⁴⁹

Charter schools emerged from a proposal by University of Massachusetts Amherst education professor Ray Budde, who suggested that states grant charters to introduce experimental programs in public schools.⁵⁰ In the late 1980s, this proposal was championed by Albert Shanker, president of the American Federation of Teachers, as a means to improve education for the plethora of students who were not well-served by their public schools.⁵¹ The original mission of charter schools was innovation. Ember Reichgott Junge, the Minnesota legislator who wrote the nation’s first charter school law, described charter schools as “the ‘research and development’ sector of public education.”⁵² Progressive educators in Minnesota embraced the concept of school innovation, and in 1991, the state passed the nation’s first charter law.⁵³ St. Paul’s City Academy opened in 1992 as the first charter school in the United States and is still in existence today.⁵⁴ Early charter school proponents “envisioned small-scale, autonomous schools run by independent mom-and-pop operators who would be best positioned to respond to local community needs.”⁵⁵

The agreement that drove their emergence and growth was that charter schools would be free to innovate in exchange for greater

⁴⁸ Stephanie R. Logan, *A Historical and Political Look at the Modern School Choice Movement*, 27 INT’L J. EDUC. REFORM 2, 5–7 (2018).

⁴⁹ See *School Choice in the United States: 2019*, NAT’L CTR. FOR EDUC. STAT., <https://nces.ed.gov/programs/schoolchoice/intro.asp> [https://perma.cc/8QS2-SCKS] (summarizing school choice options and the role parents play in selecting schools).

⁵⁰ See Jason, *supra* note 15.

⁵¹ See EMBER REICHGOTT JUNGE, ZERO CHANCE OF PASSAGE: THE PIONEERING CHARTER SCHOOL STORY 33–36 (2012).

⁵² *Id.* at 5.

⁵³ See Jason, *supra* note 15.

⁵⁴ *Id.*

⁵⁵ 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, 5 (Christopher A. Lubienski & Peter C. Weitzel eds., 2010).

accountability.⁵⁶ But operating charter schools can be highly profitable, and accountability and monitoring have been lax.⁵⁷ The perils of profit-driven charter schools are well-documented in the legal literature.⁵⁸

Tennessee provides an example of how charter schools can be embraced by their community. The first charter school in Nashville was created by two sisters, Sandra Smithson and Mary Smithson-Craighead.⁵⁹ In 2003, concerned by the condition of schools in their native North Nashville neighborhood, the seventy-seven and eighty-seven-year-old sisters opened Smithson Craighead Academy, which still operates today.⁶⁰ The sisters were lifelong teachers and advocates with a genuine desire to bring educational opportunities to disadvantaged students, and Craighead recognized that community involvement was crucial to the school's success.⁶¹ Twenty years later, efforts to create Hillsdale charter schools, by contrast, are accompanied by overwhelming community resistance in Tennessee.⁶²

⁵⁶ JUNGE, *supra* note 51, at 5–6 (“The purpose of the chartering legislation was to give freedom to parents and teachers to create new schools outside the existing system. . . . These schools would be held accountable through performance-based outcomes in a contract overseen by an authorizer The authorizer would require chartering leaders to deliver quality education results. If they did not do so—or their innovation did not work—they would be closed. (How many district public schools close for accountability reasons? They don’t.)”).

⁵⁷ See CAROL BURRIS & DARCIE CIMARUSTI, NETWORK FOR PUB. EDUC., CHARTERED FOR PROFIT: THE HIDDEN WORLD OF CHARTER SCHOOLS OPERATED FOR FINANCIAL GAIN 8–11 (2021); Walker Richmond, *Charter School Accountability: Rhetoric, Results, and Ramifications*, 12 VA. J. SOC. POL’Y & LAW 330, 341–47 (2004); Dylan P. Grady, *Charter School Revocation: A Method for Efficiency, Accountability, and Success*, 41 J.L. & EDUC. 513, 539–42 (2012).

⁵⁸ See, e.g., John Morley, *For-Profit and Nonprofit Charter Schools: An Agency Costs Approach*, 115 YALE L.J. 1782 (2006); Green, Baker & Oluwole, *supra* note 40; Preston C. Green III & Chelsea E. Connery, *Charter Schools, Academy Schools, and Related-Party Transactions: Same Scams, Different Countries*, 72 ARK. L. REV. 407 (2019); see also *infra* Section III.C.

⁵⁹ *Sister Sandra Smithson Dedicated Her Life to Serving Christ, the Poor*, TENNESSEAN (May 19, 2022, 3:07 PM), <https://tennesseeregister.com/sister-sandra-smithson-dies-at-age-96> [<https://perma.cc/V47G-25UU>].

⁶⁰ See *id.*; *Mary Smithson-Craighead Obituary*, TENNESSEAN (July 15, 2008), <https://www.legacy.com/us/obituaries/tennessean/name/mary-smithson-craighead-obituary?pid=113415924> (last visited Feb. 17, 2023) (stating that Smithson-Craighead was born in 1915).

⁶¹ See Frank Daniels III, *Nashville’s First Charter Founder Still Pushing Reforms at 90*, TENNESSEAN (June 23, 2016, 10:00 PM), <https://www.tennessean.com/story/opinion/columnists/frank-daniels/2016/06/23/nashvilles-first-charter-founder-still-pushing-reforms-90/86286864> [<https://perma.cc/67E5-RCVD>] (“[S]he visited every home in the district to convince them to stick with the school. The outreach . . . worked By the second half of the year, so many students were coming to the school that portable classrooms had to be added.”).

⁶² This resistance escalated following a leaked video of a speech in Tennessee by Hillsdale President Larry Arnn in which he said that teachers are “trained in the dumbest parts of the dumbest colleges in the country.” Molly Olmstead, *Where the Right-Wing Attacks Against Education Finally Went Too Far—for Republicans*, SLATE (July 27, 2022, 5:35 AM),

B. *Educational Performance of Charter Schools*

The forces of the competitive market have been key to the argument in favor of charter schools since their creation.⁶³ Because charter schools would compete on a per-student basis for public funds otherwise allocated to students in traditional public schools, the expectation was that charter schools would be incentivized to innovate in response to the needs of the local community in order to attract students, and traditional public schools would be incentivized to improve their performance in order to retain students.⁶⁴

There is extensive literature examining the educational performance of charter schools.⁶⁵ Although initially promoted as a means to improve outcomes for students in underperforming schools, evidence of efficacy is decidedly mixed and varies substantially by state and school district. It is worthwhile to flag the challenges in making appropriate comparisons between charter schools and traditional public schools. Because charter schools are schools of choice, a simple comparison of performance, such as test scores and graduation rates, would be inappropriate, as charter schools could be attracting and retaining the most motivated and high-performing students and those with the most motivated parents. In addition, some charter schools, such as KIPP, that have favorable reputations have strict disciplinary requirements that are not permitted at traditional public schools.⁶⁶ Indeed, one of the criticisms of charter schools is that they have the incentive to push out low-performing students and recruit high-performing students (known as “cream skimming”) because renewal of their charter will be based on student performance.⁶⁷

The most promising approach to comparing the performance of charter schools relative to traditional public schools draws on students

<https://slate.com/news-and-politics/2022/07/tennessee-governor-bill-lee-hillsdale-education-charter-schools.html> [https://perma.cc/X6PH-CJRZ].

⁶³ Cohodes & Parham, *supra* note 13.

⁶⁴ See Martha Minow, *Reforming School Reform*, 68 *FORDHAM L. REV.* 257, 263–64 (1999); Leslie S. Kaplan & William A. Owings, *Funding School Choice: Implications for American Education*, 44 *J. EDUC. FIN.* 199, 199 (2018).

⁶⁵ See Zimmer, Buddin, Smith & Duffy-Chipman, *supra* note 19.

⁶⁶ See, e.g., Rick Hess, *Straight up Conversation: KIPP Chief of Policy and Public Affairs Richard Buery*, KIPP: PUB. SCHS. (June 14, 2018), <https://www.kipp.org/news/straight-conversation-kipp-chief-policy-public-affairs-richard-buery> [https://perma.cc/AUD7-75A8] (“KIPP is probably the most famed of the ‘No Excuses’ charter schools—known for a culture of high expectations and strict discipline.”).

⁶⁷ Adam Kho, Ron Zimmer & Andrew McEachin, *A Descriptive Analysis of Cream Skimming and Pushout in Choice Versus Traditional Public Schools*, 17 *EDUC. FIN. & POL’Y* 160, 161–64 (2022).

assigned into a school type by lottery.⁶⁸ Most charter schools are not oversubscribed, but those that are oversubscribed are required to select students by lottery. The lottery assignment allows for a comparison of outcomes of students, all of whom applied to a charter school but are by chance either admitted and enrolled in the charter school or not. In this way, those who are not selected by the lottery provide a reasonable comparison group to those who are admitted to the charter school. There are a number of influential articles in the economics literature that compare student outcomes using data from lottery assignments.⁶⁹

Although random assignment provides a rigorous experimental design, this approach also has numerous limitations. Because only the most successful charter schools are likely to be oversubscribed, evidence on performance from the most successful schools may not generalize to charter schools overall.⁷⁰ Furthermore, placement into charter schools is not entirely random because of preferential admission of siblings and children of staff.⁷¹ Finally, students not admitted via the lottery, as well as students admitted but who leave the original school, may attend another charter school, a private school, or drop out of school entirely, resulting in an absence of follow-up data necessary for comparing performance.⁷²

The main takeaway from the lottery assignment papers is that despite the rigor of the experimental design and bias toward retention of the most motivated students in the most desirable charter schools, there is little evidence that charter schools produce superior academic outcomes relative to traditional public schools.⁷³ But it bears emphasizing that at the individual school level, there is wide variation in charter school quality and performance, and some charter schools are highly ranked by U.S. News.⁷⁴

To date, charter schools have been concentrated in urban and metropolitan areas and have enrolled a high percentage of minority students and students from low-income households.⁷⁵ Evidence indicates that charter schools do not improve racial or socioeconomic diversity.

⁶⁸ See Zimmer, Buddin, Smith & Duffy-Chipman, *supra* note 19, at 81.

⁶⁹ See *id.* at 86 tbl.3.5.

⁷⁰ See *id.* at 81.

⁷¹ See *id.*

⁷² See *id.* at 82.

⁷³ See *id.* at 84.

⁷⁴ Of the 100 top-ranked public high schools by U.S. News, twenty-four are charter schools. See Tolliver, *supra* note 18.

⁷⁵ Yueting “Cynthia” Xu, *Who Attends Charter Schools?*, NAT’L ALL. FOR PUB. CHARTER SCHS. (Dec. 6, 2022, 11:38 AM), <https://data.publiccharters.org/digest/charter-school-data-digest/who-attends-charter-schools> [<https://perma.cc/6PR6-URXH>].

Studies show an increase in racial and socioeconomic segregation.⁷⁶ As we show in Part IV, existing Hillsdale schools have a lower minority population than their traditional public school counterparts, a demographic that is likely related to their mission and student recruiting practices.

C. *The Influence of Philanthropy and Politics*

In the late 1980s and early 1990s, it became widely recognized that students in many urban schools were struggling.⁷⁷ Charter schools seemingly offered an innovative opportunity to experiment with alternative education models. Wealthy philanthropists and their foundations, including Bill Gates, Eli Broad, and the Walton family, made transforming public education a priority and provided much of the funding and political impetus for introducing and expanding charter schools.⁷⁸ These philanthropists have been joined by other wealthy individuals, such as Michael Bloomberg, with funding going to charter school networks and political campaigns to expand charter schools. For example, along with other unidentified donors, the Walton family and Michael Bloomberg provided substantial contributions to the failed 2016 Massachusetts ballot initiative to raise the cap on the number of charter schools in the state.⁷⁹ The influence of wealthy philanthropists extends to high-level positions in government; Betsy DeVos, a prominent advocate

⁷⁶ See Zimmer, Buddin, Smith & Duffy-Chipman, *supra* note 19, at 76 (“Regardless of the approach, the bulk of this research . . . has concluded that charter schools lead to greater racial segregation for African Americans, while the conclusions are less consistent for whites and Hispanics.”).

⁷⁷ Jason, *supra* note 15, at 26 (“[T]hink tanks and the federal government released a series of damning reports on public schools, most notably the Reagan Administration’s *A Nation at Risk: The Imperative for Education Reform*, the 1983 report that warned of a ‘rising tide of mediocrity.’”).

⁷⁸ See Robin Rogers, *Making Public Policy: The New Philanthropists and American Education*, 74 AM. J. ECON. & SOCIO. 743, 751–52, 756 (2015) (describing the Bill & Melinda Gates Foundation and Walton Family Foundation’s support of charter schools); Dan Walters, *Eli Broad Was a Passionate School Reformer*, CALMATTERS (May 4, 2021), <https://calmatters.org/commentary/2021/05/california-eli-broad-charter-schools-died> [<https://perma.cc/UZK6-AA6J>] (describing Eli Broad’s support of charter schools).

⁷⁹ The ballot initiative proposed adding up to twelve new charter schools per year in the state. Supporters of charter school expansion raised \$23.6 million and opponents raised \$14.1 million. See Shira Schoenberg, *Who Is Funding Massachusetts Question 2, on Charter School Expansion?*, MASSLIVE (Nov. 5, 2016, 12:00 PM), https://www.masslive.com/politics/2016/11/who_is_funding_massachusetts_question_2_charter_schools.html [<https://perma.cc/MJ3H-4YF8>]. A large number of funders joined in opposition or support of this initiative. For a list of donors, see Bich Thi Ngoc Tran, *Which Townships Support Charter Schools? A Study of the 2016 Massachusetts Charter Referendum*, 102 SOC. SCI. Q. 865, 867 (2021).

for privatization of public education and of charter schools, served as Secretary of Education in the Trump administration.⁸⁰

The Gates Foundation has made substantial financial investments in school reform since the 1990s. These investments produced rapid charter school growth in New York City.⁸¹ The Gates Foundation launched a “small schools initiative,” which statistical analysis later showed failed to improve student performance and often produced worse educational outcomes than large schools.⁸² This failure led to a redirection of the Gates Foundation funding together with other proponents of school choice.⁸³ The Walton Family Foundation has been a major benefactor of the school choice movement. In 2011, the foundation made a \$25 million investment in the KIPP Foundation with the goal of doubling the number of students in KIPP charter schools by 2015.⁸⁴ In 2015, Philadelphia School Partnership, a philanthropic group funded by the Gates Foundation, Michael Dell, the Walton Family Foundation, and other foundations, offered to make a \$35 million donation to the Philadelphia public school system, under the condition that \$25 million be allocated to open new charter schools to serve an additional 15,000 students.⁸⁵

Philanthropy and politics are not always easily separable. Michigan offers an instructive view on how political influence and funding from wealthy philanthropists helped advance the school choice movement. It also offers a cautionary tale, showing the extent to which the school choice movement has failed Michigan students.

Michigan has the largest proportion of for-profit charter management operators of any state.⁸⁶ Founded in 1987, the Mackinac Center for Public Policy advocates for reforming schools through school

⁸⁰ See Cory Turner, *How Education Secretary Betsy DeVos Will Be Remembered*, NPR (Nov. 19, 2020, 5:00 AM), <https://www.npr.org/2020/11/19/936225974/the-legacy-of-education-secretary-betsy-devos> [https://perma.cc/WS8M-8NWK] (“On no other issue has DeVos been more consistent, or more consistently outspoken, than on her desire to expand school choice via charter schools and private school vouchers.”).

⁸¹ Rogers, *supra* note 78, at 751–52 (“By 2007, Gates would go on to give \$135 million to fund his education initiatives in New York City. The charter school movement grew rapidly.”).

⁸² See *id.* at 751–53.

⁸³ See *id.* at 753–55.

⁸⁴ Press Release, Walton Fam. Found., \$25 Million Investment in KIPP to Help Double Number of Families That Choose KIPP Schools (Nov. 15, 2011), <https://www.waltonfamilyfoundation.org/about-us/newsroom/25-million-investment-in-kipp-to-help-double-number-of-families-that-choose-kipp-schools> [https://perma.cc/UC2M-A8V9].

⁸⁵ Rogers, *supra* note 78, at 767.

⁸⁶ GARY MIRON ET AL., PROFILES OF FOR-PROFIT AND NONPROFIT EDUCATION MANAGEMENT ORGANIZATIONS 20 (15th ed. 2021), https://nepc.colorado.edu/sites/default/files/publications/RB%20Miron%20EMO%20complete_4.pdf [https://perma.cc/8B68-CTG5].

choice.⁸⁷ Following Minnesota's charter school experiment initiated in 1992, Michigan began chartering schools in 1994.⁸⁸ There is little regulation of schools under Michigan's charter law. For example, the state does not cap the number of charters and allows eighty percent to be operated by for-profit management operators, substantially above the sixteen percent share of for-profit management operators nationwide.⁸⁹ There is no centralized oversight, and a bill sponsored by a Republican state senator and supported by the Republican governor to increase oversight was defeated, in large part because of lobbying efforts of the DeVos family.⁹⁰

Despite the claim that student performance will benefit from unfettered market competition, Michigan's education performance has not matched its success in expanding school choice. For example, as shown in a 2017 ranking of states, Michigan has been at the bottom in student progress since 2003.⁹¹ Michigan also does not limit virtual charter schools, and these schools show especially poor performance.⁹²

D. *Risks Arising from the Charter School Profit Motive*

Whether organized as a for-profit or nonprofit entity, charter school management is highly profitable. Many charter schools operate under a "sweeps" contract in which all per-student public funds allocated to the charter school are awarded to the charter school operator, who retains any funds not spent on education as profit.⁹³ The profitability of charter management organizations has attracted investments from hedge

⁸⁷ The Mackinac Center receives substantial funding from Betsy DeVos. See Mark Binelli, *Michigan Gambled on Charter Schools. Its Children Lost.*, N.Y. TIMES MAG. (Sept. 5, 2017), <https://www.nytimes.com/2017/09/05/magazine/michigan-gambled-on-charter-schools-its-children-lost.html> (last visited Dec. 6, 2022).

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*; see also Stephen Henderson, *DeVos Family Showers GOP with Contributions After DPS Vote*, DET. FREE PRESS (Nov. 23, 2016, 3:08 PM), <https://www.freep.com/story/opinion/columnists/stephen-henderson/2016/09/03/charter-devos-money-michigan/89774760> [<https://perma.cc/65MZ-NGCH>].

⁹¹ Shawn D. Lewis, *Michigan Test Score Gains Worst in Nation*, DET. NEWS (Feb. 20, 2017, 12:08 AM), <https://www.detroitnews.com/story/news/local/michigan/2017/02/20/michigan-test-score-gains-worst-nation/98144368> [<https://perma.cc/6HPD-FM5L>] ("Michigan 'makes the bottom 10 list on all four measures, and ranks dead last in terms of proficiency growth since 2003,' said [Brian A.] Jacob, who prepared the study for the Brookings Institution.")

⁹² See Binelli, *supra* note 87.

⁹³ See Marian Wang, *When Charter Schools Are Nonprofit in Name Only*, PROPUBLICA (Dec. 9, 2014, 11:49 AM), <https://www.propublica.org/article/when-charter-schools-are-nonprofit-in-name-only> [<https://perma.cc/69GP-LNVN>]; see also *infra* Section II.C.

funds.⁹⁴ In some states, charter authorizers receive a fee for authorizing a school, which increases their incentive to expand the number of charters to grant and decreases the incentive to decline renewals.⁹⁵ Real estate has been identified as a particularly profitable area for charter operators.⁹⁶ Property is often leased to charter schools at wildly inflated prices. Financial services firms benefit from real estate deals that include schools using debt financing to purchase buildings, also at wildly inflated prices.⁹⁷ With profit motives and lax oversight come opportunities for fraud, corruption, and related-party transactions that are highly lucrative for the related parties. Charter school operators have been accused of, among other crimes, appropriating public funds,⁹⁸ including funds allocated to meal subsidies for students from lower-income households.⁹⁹

To understand how for-profit incentives can undermine educational goals, it is instructive to consider the financing arrangements for charter school properties. In contrast to traditional public schools where the district owns and pays for building repairs, charter schools either own or lease their buildings. Building purchases or repairs will typically be financed by debt, which is expected to be repaid from the per-student fees generated from student enrollment. If student enrollment declines, revenues decline, and if the charter is not renewed, revenues go to zero. Instead of district oversight provided to traditional public schools, charter schools become accountable to their lender, who in turn is accountable to shareholders. Under this arrangement, there is little incentive for charter schools or authorizers to maintain academic standards.

⁹⁴ Alan Singer, *Why Hedge Funds Love Charter Schools*, HUFFPOST (July 20, 2014), https://www.huffpost.com/entry/why-hedge-funds-love-char_b_5357486 [https://perma.cc/NK96-6XAL].

⁹⁵ Michigan charter authorizers, for example, may charge a fee of up to “3% of the total state school aid received by the public school academy in the school year.” MICH. COMP. LAWS ANN. § 380.502(6) (West 2023).

⁹⁶ See Peter Grant, *Charter-School Movement Grows—for Real-Estate Investors*, WALL ST. J. (Oct. 13, 2015, 11:33 AM), <https://www.wsj.com/articles/charter-school-movement-grows-for-real-estate-investors-1444750383> [https://perma.cc/8HLE-8K6P].

⁹⁷ See Binelli, *supra* note 87 (“Michigan does not mandate that its charter schools buy or lease property at fair-market prices, resulting—predictably—in wildly inflated real estate spending.”).

⁹⁸ See, e.g., Valerie Strauss & Carol Burris, *The 5 Most Serious Charter School Scandals in 2019—and Why They Matter*, WASH. POST (Jan. 27, 2020, 4:12 PM), <https://www.washingtonpost.com/education/2020/01/27/5-most-serious-charter-school-scandals-2019-why-they-matter> [https://perma.cc/NHP9-ZVFN].

⁹⁹ Becky Z. Dernbach, *Burnsville Charter School Director Takes Leave of Absence Following Fraud Allegations in Feeding Our Future Investigation.*, SAHAN J. (Feb. 3, 2022), <https://sahanjournal.com/education/feeding-our-future-abdiaziz-farah-mahad-ibrahim> [https://perma.cc/AJF8-QVLJ] (describing an FBI investigation into allegedly misspent Federal Child Nutrition Program funds).

II. STATE LAWS GOVERNING CHARTER SCHOOLS

A. Authorization

Charter school authorizers are entities with the power to issue charters to eligible applicants. Authorizers evaluate charter applications and often provide some degree of oversight over the schools. Table 1 below presents charter school authorizers by state. Local school boards are the most common type of authorizer. Typically, local boards have the authority to approve charter schools that will be geographically located in the board's school district.¹⁰⁰

Statewide authorizers are also common. Some states require approval from both the state board of education and a local school board, but in many states, applicants may bypass their local school board and apply directly to the state board of education or to a separate charter school commission.¹⁰¹ These commissions are typically contained in a state's department of education and are created solely to authorize or oversee charter schools. The members of such commissions are usually chosen for their experience with charter schools, in contrast with the state board of education, whose members are based on more general education expertise. As a result, charter school commissions are sometimes viewed as "more charter friendly" than state boards of education.¹⁰²

Multiple states allow nongovernmental entities to authorize public charter schools. In fifteen states, colleges and universities may become authorizers.¹⁰³ State-run colleges are most frequently eligible, but some states also permit private or tribal universities to grant charters. Nonprofit organizations may apply to become authorizers in three states.¹⁰⁴ Minnesota even permits a nonprofit to be formed for the sole purpose of serving as an authorizer.¹⁰⁵ Finally, state or local government entities beyond boards of education may become authorizers in six

¹⁰⁰ Details about state laws are provided in the Appendix *infra*.

¹⁰¹ See *infra* Appendix, Table 1.

¹⁰² Damon Mitchell, *The Fallout over Hillsdale College, Charter Schools and Tennessee School Districts, Explained.*, 90.3 WPLN NEWS (July 24, 2022), <https://wpln.org/post/the-fallout-over-hillsdale-college-charter-schools-and-tennessee-school-districts-explained> [https://perma.cc/9TET-THTA].

¹⁰³ See *infra* Appendix, Table 1.

¹⁰⁴ See *infra* Appendix, Table 1.

¹⁰⁵ MINN. STAT. ANN. § 124E.05(1)(h) (West 2023).

states.¹⁰⁶ The Office of the Mayor of Indianapolis, for instance, serves as the authorizer for forty-eight charter schools.¹⁰⁷

Table 1: Charter Authorizers by State

Authorizer	States
Local Districts/Boards of Education	AL, AK, CA, CO, CT, DE, FL, GA, ID, IL, IN, KS, KY, LA, ME, MD, MI, MN, MO, NV, NH, NM, NY, OH, OK, OR, PA, SC, TN, UT, VA, WA, WV, WI, WY
State Commissioner/Board of Education (Direct Application)	AZ, DE, IA, LA, NH, NJ, NM, NY, NC, OH, OK, RI, TX
State Commissioner/Board of Education (Additional Approval Required)	AK, CT, GA, IL, KS, MA, MN, MO, NH, NY
State Charter School Body	AL, AZ, AR, CO, DC, HI, ID, IN, ME, MS, MO, NV, SC, UT, WA, WV
State-Run Colleges	AZ, FL, HI, ID, IN, MI, MN, MO, NV, NY, OH, OK, SC, UT, WI
Other Colleges (e.g., Private, Tribal)	HI, ID, IN, MI, MN, MO, OK, SC, WI
County/State Agencies	HI, IN, KY, OH, WI, WY
Nonprofits	HI, MN, OH
No Charter School Law	MT, NE, ND, SD, VT

Authorizers often have unilateral discretion to approve a charter application, but in most states, a denial by an authorizer is rarely the final word. Table 2 presents state laws governing charter appeals. In at least twenty-four states, an applicant may revise their application and resubmit it, sometimes an indefinite number of times.¹⁰⁸ In some states that have multiple authorizers, denied applicants may “authorizer shop,” meaning they may seek approval from a different authorizer.¹⁰⁹

The majority of states permit applicants to appeal a denial to a state official. The state board of education or commissioner of education are

¹⁰⁶ See *infra* Appendix, Table 1.

¹⁰⁷ See *Find a Mayor-Sponsored Charter School*, INDY.GOV, <https://www.indy.gov/activity/find-a-mayor-sponsored-charter-school-mscs> [https://perma.cc/AL9M-9ZD5]. Forty-six mayor-sponsored charter schools are currently in operation in Indianapolis, with two additional schools opening in the 2022–2023 school year. *Id.*

¹⁰⁸ See *infra* Appendix, Table 2.

¹⁰⁹ *Ending Authorizer Shopping*, NAT’L ASS’N OF CHARTER SCH. AUTHORIZERS, <https://www.qualitycharters.org/state-policy/authorizer-shopping/ending> [https://perma.cc/WDY8-3AY6].

the most common appellate authorities, but four states cede appellate authority to a charter school commission. Thirteen states explicitly permit judicial review of denied applications.¹¹⁰ In Florida, for instance, applicants who have been denied by both a local school board and the state board of education may appeal the decision in state district court.¹¹¹

Table 2: Charter Application Appeals Process by State

Appeals Procedure	States
State Commissioner/Board of Education	AK, AR, CA, CO, DC, FL, HI, ID, KY, LA, MD, MO, NH, NM, OK, OR, RI, WV, WI
State Charter School Body	AL, NV, PA, TN
Revise and Reapply	AL, AZ, CA, GA, ID, IN, IA, KS, ME, MA, MN, MS, NV, NY, NC, OK, OR, PA, TN, TX, UT, VA, WA, WY
Apply to Different Authorizer	IN, ME, UT, WA, WI, WY
Judicial Review	AK, AZ, DC, FL, ID, IL, KY, NV, NJ, NM, OR, PA, SC
No Appeals	CT, DE, IA, MA, MI, NY, OH, TX, VA
No Charter School Law	MT, NE, ND, SD, VT

B. Caps

Minnesota's original charter school law, the first charter school legislation in the United States, set a limit of eight charter schools statewide.¹¹² Caps became a common feature of charter school laws, and by 2007, over half of the states that permitted charter schools restricted the number of charters that could be granted.¹¹³ Fifteen years later, only twenty states have any form of cap.¹¹⁴

¹¹⁰ See *infra* Appendix, Table 2.

¹¹¹ FLA. STAT. ANN. § 1002.33(6)(d)(1) (West 2022).

¹¹² Act of June 4, 1991, ch. 265, art. 9, § 3(3)(b), 1991 Minn. Laws 943, 1124.

¹¹³ See TODD ZIEBARTH, NAT'L ALL. FOR PUB. CHARTER SCHS., PEELING THE LID OFF STATE-IMPOSED CHARTER SCHOOL CAPS 3–4 (2007), <https://www.publiccharters.org/publications/peeling-lid-state-imposed-charter-school-caps> [<https://perma.cc/DG2E-R4JN>] (indicating in the table that twenty-two states plus the District of Columbia limit the number of schools in the state, new schools per year, or schools per authorizer).

¹¹⁴ See *infra* Table 3.

Charter school advocates have long targeted charter school caps,¹¹⁵ but perhaps the greatest impact on cap laws was a result of Race to the Top, the Obama Administration's competitive grant program developed to incentivize education reform.¹¹⁶ One criterion of the Race to the Top grant competition was "[t]he extent to which . . . [t]he State has a charter school law that does not prohibit or effectively inhibit increasing the number of high-performing charter schools."¹¹⁷ This provision penalized states with charter school caps, especially states where the number of charter schools was approaching the cap.¹¹⁸ In response, fifteen states lifted or modified their caps between the program's inception in June 2009 and the announcement of grant recipients in August 2010.¹¹⁹

Today, the remaining charter school caps take various forms. Table 3 summarizes cap laws by state.¹²⁰ Most common are statewide limits on the number of charter schools that may operate at one time. This limit ranges from ten schools in Maine¹²¹ to 2,650 schools in California.¹²² Some states, including Illinois¹²³ and New York,¹²⁴ specify the number of charters that may be granted in major cities. Rhode Island sets a statewide cap at thirty-five, and at least half of the schools must be "designed to increase the educational opportunities for at-risk pupils."¹²⁵ Most state limits are fixed, but California's limit increases by 100 annually,¹²⁶ while West Virginia's increases by ten every three years.¹²⁷ Arkansas's cap

¹¹⁵ See, e.g., ZIEBARTH, *supra* note 113, at 1–2.

¹¹⁶ See generally *Race to the Top*, WHITE HOUSE: PRESIDENT BARACK OBAMA, <https://obamawhitehouse.archives.gov/issues/education/k-12/race-to-the-top> [<https://perma.cc/5R2Y-PRZN>].

¹¹⁷ Overview Information; Race to the Top Fund; Notice Inviting Applications for New Awards for Fiscal Year (FY) 2010, 74 Fed. Reg. 59836, 59845 (Nov. 18, 2009).

¹¹⁸ Press Release, U.S. Dep't of Educ., States Open to Charters Start Fast in 'Race to Top' (June 8, 2009), <https://www2.ed.gov/news/pressreleases/2009/06/06082009a.html> [<https://perma.cc/GU4E-NTDT>].

¹¹⁹ Press Release, Nat'l All. for Pub. Charter Schs., National Alliance for Public Charter Schools Issues a Statement on the Selection of Round Two Race to the Top Winners (Aug. 24, 2010), <https://www.publiccharters.org/press/national-alliance-public-charter-schools-issues-statement-selection-race-top-winners> [<https://perma.cc/G3YM-JJBH>].

¹²⁰ See *infra* Table 3.

¹²¹ ME. REV. STAT. ANN. tit. 20-A, § 2405(10) (2023).

¹²² See CAL. EDUC. CODE § 47602(a)(1) (West 2022) ("In the 1998–99 school year, the maximum total number of charter schools authorized to operate in this state shall be 250. In the 1999–2000 school year, and in each successive school year thereafter, an additional 100 charter schools are authorized to operate . . ."). In the 2022–2023 school year, twenty-four school years have passed since the 1999–2000 school year, so an additional 2,400 schools are permitted.

¹²³ 105 ILL. COMP. STAT. ANN. 5/27A-4(b) (West 2022).

¹²⁴ N.Y. EDUC. LAW § 2852(9)(a) (McKinney 2022).

¹²⁵ 16 R.I. GEN. LAWS 16-77-3.1(g) (2022).

¹²⁶ CAL. EDUC. CODE § 47602(a)(1).

¹²⁷ W. VA. CODE ANN. § 18-5G-1(g) (West 2023).

increases by five anytime the number of charter schools is within two of the statewide limit.¹²⁸ Mississippi and New Mexico place limits on the number of schools that are authorized in the state each year,¹²⁹ while the District of Columbia sets annual caps per authorizer rather than a statewide cap.¹³⁰ In 2021, Wyoming permitted the State Loan and Investment Board to authorize charters, and the board currently has a cap during the trial period.¹³¹ Tribal colleges are the only authorizers with caps in Wisconsin.¹³² Ohio’s cap law is unique; authorizers typically may approve no more than 100 charter schools each, but any authorizer who maintains an “exemplary” rating by the Ohio Department of Education is not subject to caps.¹³³

Table 3: Charter School Caps by State

Type of Cap	States
No Cap	AL, AK, AZ, CO, CT, DE, FL, GA, HI, ID, IN, IA, KS, KY, LA, MD, MI, MN, MO, NV, NH, NJ, NC, OK, OR, PA, SC, TN, UT, WA, WI
Total Cap (Statewide)	IL, ME, MA, NY, RI, TX
Annual Cap (Statewide)	MS, NM
Cap (Per Authorizer)	DC, OH, WI, WY
Increasing Cap	AR, CA, WV
No Charter School Law	MT, NE, ND, SD, VT

C. Sponsors and Operators

The majority of charter schools in the United States are freestanding, that is, operated by the local groups who started the charter school.¹³⁴ As shown in Table 4, seven states permit for-profit charter schools.¹³⁵ However, a growing number of charter schools are operated by external management organizations, many of which are for-profit.¹³⁶ While nearly

¹²⁸ ARK. CODE ANN. § 6-23-304(c)(1)(B) (2023).

¹²⁹ MISS. CODE ANN. § 37-28-7(2)(b) (2022); N.M. STAT. ANN. § 22-8B-11(B) (West 2022).

¹³⁰ D.C. CODE § 38-1802.03(i)(2)(A)(i) (2023).

¹³¹ See Act of Apr. 22, 2021, ch. 169, sec. 1, § 21-3-302(a)(vii), 2021 Wyo. Sess. Laws 522, 524; *id.* sec. 5, at 535.

¹³² WIS. STAT. ANN. § 118.40(2r)(cq) (West 2022).

¹³³ OHIO REV. CODE ANN. §§ 3314.015(B)(2)(b)–(c), 3314.016(B)(7)(a)(v) (West 2022).

¹³⁴ See SPENCER FOUND. & PUB. AGENDA, CHARTER SCHOOLS IN PERSPECTIVE: A GUIDE TO RESEARCH 100–01 (2018) [hereinafter CHARTER SCHOOLS IN PERSPECTIVE].

¹³⁵ See *infra* Table 4. Not all of these states have for-profit schools currently in operation.

¹³⁶ See CHARTER SCHOOLS IN PERSPECTIVE, *supra* note 134, at 100–01.

all states forbid granting charters directly to for-profit entities, it is permissible in most states for charter schools to contract with for-profit management organizations who either provide specific services to the school or, in many cases, run day-to-day operations.¹³⁷

Table 4: For-Profit Charter Schools Laws by State

Are For-Profit Charter Schools Permitted?	May For-Profits Manage a Charter School?	States
YES	YES	AK, AZ, KS, OK, UT, VA, WI
NO	YES	AR, CO, DE, DC, FL, GA, HI, ID, IL, IN, IA, KY, LA, ME, MD, MA, MI, MN, NH, NJ, ¹³⁸ NC, OH, OR, PA, SC, TX, WA, WV, WY
NO	NO	AL, CA, CT, MS, MO, NV, NM, NY, RI, TN
No Charter School Law		MT, NE, ND, SD, VT

The for-profit management sector is concentrated among a few large organizations. In the 2019–2020 school year, more than one in ten charter school students nationwide were in schools operated by for-profit management organizations, and the ten largest for-profit organizations alone managed schools containing 87.1% of these students.¹³⁹ The dominance of large firms in this market might be expected to yield economies of scale in the form of consistent training or curriculum or consolidated administrative costs that free up funds to be spent on students. Indeed, a nationwide study found slightly higher student performance at schools that are operated by a management organization compared to freestanding charter schools.¹⁴⁰ However, these

¹³⁷ See BURRIS & CIMARUSTI, *supra* note 57, at 9. For-profit operators are commonly referred to as education management organizations (EMOs), while nonprofit operators are called charter management organizations (CMOs). Jamison White & Yueting “Cynthia” Xu, *Who Manages Charter Schools?*, NAT’L ALL. FOR PUB. CHARTER SCHS. (Feb. 10, 2022, 10:38 AM), <https://data.publiccharters.org/digest/charter-school-data-digest/who-manages-charter-schools> [<https://perma.cc/49XM-4EQ5>].

¹³⁸ In New Jersey, for-profits may establish a charter school, but “the private entity shall not realize a net profit from its operation of a charter school.” N.J. STAT. ANN. § 18A:36A-4(a) (West 2023).

¹³⁹ White & Xu, *supra* note 137.

¹⁴⁰ JAMES L. WOODWORTH ET AL., CTR. FOR RSCH. ON EDUC. OUTCOMES, CHARTER MANAGEMENT ORGANIZATIONS 20–21 (2017), https://credo.stanford.edu/wp-content/uploads/2021/08/cmo_final.pdf [<https://perma.cc/D9ZW-JXSQ>].

improvements were driven by nonprofit operators; for-profit operators as a whole performed no better than traditional public schools in reading—and worse in math—despite their size and resources.¹⁴¹

Arrangements with management organizations often result in public funds being funneled to for-profit groups. Operators have incentive to spend as little as possible on educating students in order to generate greater profits for stakeholders. Operators may increase their profits by hiring less experienced teachers¹⁴² who earn lower salaries¹⁴³ or by enrolling fewer students with disabilities who may have costly educational needs.¹⁴⁴

Another means by which management organizations profit from charter schools is by engaging in related-party transactions.¹⁴⁵ Related-party transactions are deals between a firm and another party based on “special, preexisting relationships” between the other party and a leader

¹⁴¹ *Id.* at 35.

¹⁴² See *National Teacher and Principal Survey: Percentage Distribution of School Teachers Based on Years of Teaching Experience: 2017–18*, NAT'L CTR. FOR EDUC. STAT., https://nces.ed.gov/surveys/ntps/tables/ntps1718_ftable03_t12n.asp [<https://perma.cc/K6ZF-5EDE>] (indicating that based on the 2017–2018 National Teacher and Principal Survey, 24.9% of charter school teachers have worked less than four years, compared to only 12.9% of traditional public school teachers, and that only 23.7% of charter school teachers have worked at least fifteen years, compared to 44.1% of traditional public school teachers).

¹⁴³ See *National Teacher and Principal Survey: Average Base Salary and Earnings from All Sources Among Regular Full-Time Public and Private School Teachers: 2017–18*, NAT'L CTR. FOR EDUC. STAT., https://nces.ed.gov/surveys/ntps/tables/ntps1718_20112002_t12n.asp [<https://perma.cc/PC3L-9J57>] (indicating that based on the 2017–2018 National Teacher and Principal Survey, the average base teaching salary of regular full-time teachers at charter schools is \$50,400, compared to \$58,400 at traditional public schools).

¹⁴⁴ See Nancy J. Zollers & Arun K. Ramanathan, *For-Profit Charter Schools and Students with Disabilities: The Sordid Side of the Business of Schooling*, 80 PHI DELTA KAPPAN 297, 299–300 (1998). Charter schools have the same responsibilities to students with disabilities as traditional public schools do and may not discriminate in their admissions process. U.S. DEP'T OF EDUC., KNOW YOUR RIGHTS: STUDENTS WITH DISABILITIES IN CHARTER SCHOOLS (2017), <https://sites.ed.gov/idea/files/dcl-factsheet-201612-504-charter-school.pdf> [<https://perma.cc/6W8K-MDPK>]. However, charter schools have been accused of discouraging students with disabilities from enrolling or remaining at the school. Zollers & Ramanathan, *supra*, at 299–300. One experiment found that charter schools are less likely than traditional public schools to respond to enrollment inquiries that mention students with an individualized educational plan. Peter Bergman & Isaac McFarlin Jr., *Education for All? A Nationwide Audit Study of School Choice* 17 (Nat'l Bureau of Econ. Rsch., Working Paper No. 25396, 2020). However, another study notes that disparities in the number and type of students with disabilities may partially be a result of charter schools coordinating the services they offer with those offered at other public schools in the same district. See CTR. FOR LEARNER EQUITY, ENROLLMENT CHARACTERISTICS OF STUDENTS WITH DISABILITIES IN CHARTER AND TRADITIONAL PUBLIC SCHOOLS 3–4 (2021), https://www.centerforlearnerequity.org/wp-content/uploads/CLE-CRDC_FINAL-Brief-2a.pdf [<https://perma.cc/JS7M-N6FZ>].

¹⁴⁵ See generally Green, Baker & Oluwole, *supra* note 40 (explaining the dangers of such transactions and providing examples involving charter schools).

in the firm,¹⁴⁶ such as buying school uniforms from a company owned by an executive's spouse.¹⁴⁷ While not inherently illegal, related-party transactions often lead to costly conflicts of interest.¹⁴⁸ In particular, these transactions may result in higher expenses since schools do business with favored parties rather than the lowest bidder. One common type of related-party transaction occurs when a charter school rents its facilities from an entity related to the management organization or from the management organization itself.¹⁴⁹ Such arrangements are not limited to small, fly-by-night organizations. Academica is the United States' largest for-profit management organization and has the second-greatest number of schools of any management organization, including nonprofits.¹⁵⁰ In the 2012–2013 academic year, thirty-one of the ninety-two charter schools that Academica operated in Florida leased property from companies controlled by Academica CEO Fernando Zulueta and his brother.¹⁵¹ In 2010, these companies earned \$19 million in lease payments, and the Zuletas controlled over \$100 million dollars in real estate exempt from property tax because they were sites of public schools.¹⁵² Crucially, rent payments to these companies were more expensive on average than schools that leased from unaffiliated companies, so Academica's exploits came at the expense of other educational needs.¹⁵³

Questionable spending practices by charter school operators take many forms. IDEA Public Schools, a nonprofit that operates 143 charter

¹⁴⁶ *Id.* at 1122–23.

¹⁴⁷ See Jacob Carpenter, *After Backlash over \$2M Luxury Jet, IDEA Charter Schools to Stop Spending \$400K on Spurs Tickets*, HOUS. CHRON. (Jan. 31, 2020, 9:09 AM), <https://www.houstonchronicle.com/news/houston-texas/education/article/After-jet-backlash-IDEA-charter-schools-curbing-15017880.php> [<https://perma.cc/43ZJ-NCMF>].

¹⁴⁸ Green, Baker & Oluwole, *supra* note 40, at 1122–23.

¹⁴⁹ See OFF. OF INSPECTOR GEN., U.S. DEP'T OF EDUC., ED-OIG/A02M0012, NATIONWIDE ASSESSMENT OF CHARTER AND EDUCATION MANAGEMENT ORGANIZATIONS 15, 17–18 (2016), <https://www2.ed.gov/about/offices/list/oig/auditreports/fy2016/a02m0012.pdf> [<https://perma.cc/N5PS-HP48>] (reporting that nine out of thirty-three schools audited had entered into a lease agreement with their management organization or an affiliate of the organization); see also Green, Baker & Oluwole, *supra* note 40, at 1133–34.

¹⁵⁰ White & Xu, *supra* note 137.

¹⁵¹ *Academica's Florida Real Estate Operations*, IN THE PUB. INT., June 2016, at 1, https://www.inthepublicinterest.org/wp-content/uploads/ITPI_Academica_Florida_Research_Brief_June_2016.pdf [<https://perma.cc/ZB7Q-JDCW>].

¹⁵² Kathleen McGrory & Scott Hiaasen, *Academica: Florida's Richest Charter School Management Firm*, MIA. HERALD (July 10, 2012, 12:50 PM), <https://web.archive.org/web/20210226213231/https://www.miamiherald.com/news/special-reports/cashing-in-on-kids/article1939207.html>.

¹⁵³ *Academica's Florida Real Estate Operations*, *supra* note 151, at 1–2.

schools nationwide,¹⁵⁴ recently faced criticism for purchasing season tickets and a luxury box for a professional basketball team and for attempting to lease a private jet.¹⁵⁵ Then there are cases of outright fraud. In June 2022, the cofounders and former CFO of Epic Charter Schools, a virtual charter school system that serves about 37,000 students, were charged with racketeering, embezzlement, and related offenses that cost taxpayers \$22 million.¹⁵⁶ The men allegedly moved school funds into a private business account and used the money to pay off personal credit card expenses, including a political donation to the Oklahoma State Superintendent.¹⁵⁷ This case is not an anomaly; the Network for Public Education maintains a long list of misbehavior called “Another Day Another Charter Scandal.”¹⁵⁸

While traditional public schools also seek to reduce costs and are susceptible to abuse from bad actors, for-profit operators pose unique concerns for two reasons. First, traditional public schools have financial oversight and transparency, whereas privately held companies have far fewer disclosure requirements, making it difficult to discern how funds are spent.¹⁵⁹ Second, the primary goal of traditional public schools is to educate students, while for-profits, by definition, seek to generate profits for their stakeholders. Given that for-profit managers, on average, fail to generate performance improvements over traditional public schools, permitting these organizations to extract money from publicly funded schools with no academic returns constitutes rent-seeking behavior.

D. *Charter School Laws in Tennessee*

Since Tennessee has become the focus of Hillsdale’s agenda, we summarize the landscape of the state’s charter laws. The Tennessee General Assembly authorized the creation of charter schools with the

¹⁵⁴ *Campus Locations*, IDEA PUB. SCHS., <https://ideapublicschools.org/our-schools> [<https://perma.cc/63WD-SD5Y>].

¹⁵⁵ Carpenter, *supra* note 147. IDEA cancelled the lease and did not renew its season tickets, and officials emphasized that the jet and tickets were to be paid for using private donations, not public education funds. *Id.*

¹⁵⁶ Nuria Martinez-Keel, *Epic Charter Schools Co-Founders Arrested on Charges of Financial Crimes*, OKLAHOMAN (June 24, 2022, 8:28 AM), <https://www.oklahoman.com/story/news/education/2022/06/23/epic-charter-schools-co-founders-arrested-ben-harris-david-chaney/7714825001> [<https://perma.cc/7NLH-W5KN>].

¹⁵⁷ *Id.*

¹⁵⁸ *Another Day Another Charter Scandal*, NETWORK FOR PUB. EDUC., <https://networkforpubliceducation.org/charter-scandals> [<https://perma.cc/D8MA-S4MV>].

¹⁵⁹ See Wang, *supra* note 93 (describing challenges of obtaining and monitoring financial records from charter school operators).

passage of the Tennessee Public Charter Schools Act of 2002.¹⁶⁰ The act set caps on the number of charter schools that could be created¹⁶¹ and generally permitted schools to open only in areas where students were below set income levels or failed to meet academic benchmarks.¹⁶² Four charter schools were approved by the start of the 2003–2004 school year.¹⁶³ Later amendments removed the cap on the number of charter schools¹⁶⁴ and permitted charters open to all students to be granted in any school district, regardless of local school performance.¹⁶⁵ As of August 2022, there are 114 charter schools operating in four counties in Tennessee, which contain the four largest and most urban cities in Tennessee.¹⁶⁶

In order to create a new charter school, a sponsor must submit an application to the board of education of the district in which the school will be located.¹⁶⁷ Charter school sponsors must be nonprofit entities and may not “promote the agenda of any religious denomination or religiously affiliated entity.”¹⁶⁸ If the board denies the application, the sponsor may appeal the decision.¹⁶⁹ Originally, the Tennessee State Board of Education heard appeals, but in 2021, the Tennessee Public Charter School Commission became the appellate body.¹⁷⁰ The Commission,

¹⁶⁰ Tennessee Public Charter Schools Act of 2002, ch. 850, 2002 Tenn. Pub. Acts (codified as amended in scattered sections of TENN. CODE ANN. tits. 8, 12, 49).

¹⁶¹ See *id.* § 6(a)(2), (b)(1)(C).

¹⁶² See *id.* § 6(a)(1)–(2) (specifying that most charter schools can only be formed to provide “alternatives for students in schools failing to make adequate yearly progress,” although a limited number of schools can be opened to “[a]ddress the unique needs of students eligible for special education services” or to enable school systems to collaborate with education students at public colleges, in which case 75% of prospective students must be failing to make adequate yearly progress, be enrolled in a school failing to make adequate yearly progress, or be eligible for free or reduced school lunch).

¹⁶³ See *Charter School Workshop Set*, NASHVILLE POST (Aug. 11, 2003), https://www.nashvillepost.com/home/charter-school-workshop-set/article_4945522e-fa2e-54bd-93a2-d47724ee7d29.html [<https://perma.cc/97TT-3KA8>] (“[F]our charter schools in Tennessee . . . were approved to serve students attending low performing schools.”). The North Nashville-located Smithson-Craighead Academy was one of the four. *Id.*

¹⁶⁴ Act of June 10, 2011, ch. 466, sec. 4, § 49-13-106(b)(1)(c), 2011 Tenn. Pub. Acts (codified as amended at TENN. CODE ANN. § 49-13-106(b)(1)(C) (2022)).

¹⁶⁵ *Id.* at sec. 2, § 49-13-106(a) (codified as amended at TENN. CODE ANN. § 49-13-106(a)).

¹⁶⁶ *Tennessee School Directory*, *supra* note 1 (listing 114 active schools after setting the “School Type” filter to “Public Charter”). These counties contain Chattanooga, Knoxville, Memphis, and Nashville.

¹⁶⁷ TENN. CODE ANN. § 49-13-106(i).

¹⁶⁸ *Id.* § 49-13-104(13).

¹⁶⁹ *Id.* § 49-13-108(b)(5)(A).

¹⁷⁰ *About Us*, TENN. PUB. CHARTER SCH. COMM’N, <https://www.tn.gov/tn-public-charter-school-commission/about-us> [<https://perma.cc/CFP6-LB32>].

composed of nine members appointed by the governor,¹⁷¹ is tasked not only with hearing appeals but also serving as the local education agency for all charter schools it approves.¹⁷²

Once the application has been approved, the authorizer and the sponsor will sign a charter agreement specifying how the school will be operated and managed.¹⁷³ The charter is valid for ten years, after which it may be renewed every ten years with the authorizer's approval.¹⁷⁴ The authorizer may revoke a charter if a school violates the charter agreement, mismanages finances, or fails to meet academic standards.¹⁷⁵ The authorizer must revoke a charter if for two consecutive years, a school's performance is in the bottom five percent statewide or a high school fails to graduate more than one-third of its students.¹⁷⁶

Despite being autonomously governed, charter schools must still follow some state requirements, including providing services for students with disabilities, holding public meetings, complying with state and federal antidiscrimination laws, and meeting the same performance standards as regular public schools.¹⁷⁷ Moreover, charter school teachers must hold educator licenses.¹⁷⁸ Charter schools are publicly funded, and when a student moves from a traditional public school to a charter school, "the money follows the child."¹⁷⁹ For each student in a charter school, the district in which the charter is located must distribute to the school an amount equal to the district's total funding divided by the number of students in the district, even if the charter was authorized by the Charter School Commission rather than the local board of education.¹⁸⁰

¹⁷¹ § 49-13-105(b)(1)(A).

¹⁷² *Id.* § 49-13-105(a).

¹⁷³ *Id.* § 49-13-110(a).

¹⁷⁴ *Id.* § 49-13-110(b)-(c).

¹⁷⁵ *Id.* § 49-13-122(a)(1), (b).

¹⁷⁶ *Id.* §§ 49-13-122(a)(3), 49-1-602(b)(2).

¹⁷⁷ *Id.* § 49-13-111(a)(3), (a)(5), (b), (h).

¹⁷⁸ *Id.* § 49-13-111(j).

¹⁷⁹ *Charter Schools FAQ*, TENN. DEP'T OF EDUC., <https://www.tn.gov/education/school-options/charter-schools/charter-school-faq.html> [<https://perma.cc/Y7DQ-CYYW>].

¹⁸⁰ § 49-13-112(a)-(b).

III. THE FEDERAL GOVERNMENT AND CHARTER SCHOOLS

A. *Federal Laws*

Charter schools are typically eligible for the same forms of federal support as are traditional public schools,¹⁸¹ including free or reduced meals under the National School Lunch Program,¹⁸² funds allocated under the Individuals with Disabilities Education Act,¹⁸³ and Title I grants, which are designed to support low-income students.¹⁸⁴ Allocating funding to charter schools is often complicated since enrollment is determined by students' choices rather than their location. For instance, Title I funding for charter schools is more tenuously linked to the school's poverty level than it is for traditional public schools, since a charter school's students do not come from a defined geographic area and the Title I funding formula relies on census estimates for a school's coverage area.¹⁸⁵ Charter schools therefore receive funds based on averages for the local district or state.¹⁸⁶

As public schools that receive federal funds, charter schools are subject to a number of laws that protect employees and ensure that all students have access to public education. Under Title VI of the Civil Rights Act of 1964, schools may not discriminate on the basis of race, color, or national origin in admissions, enrollment, or other educational activities.¹⁸⁷ Title IX of the Education Amendments of 1972 prohibits discrimination on the basis of sex in education programs that receive federal funds.¹⁸⁸

¹⁸¹ See 34 C.F.R. § 76.789(b) (2018). The regulation mandates that state educational agencies distribute to charter schools funds from any "covered program," *id.*, defined as a program "under which the [U.S.] Secretary [of Education] allocates funds to States on a formula basis," *id.* § 76.787.

¹⁸² FOOD & NUTRITION SERV., U.S. DEP'T OF AGRIC., CHARTER SCHOOL QUESTIONS AND ANSWERS: FEDERAL CHILD NUTRITION PROGRAMS 1 (2018).

¹⁸³ See *Formula Grant Definition*, U.S. DEP'T OF EDUC., <https://www2.ed.gov/fund/grant/about/formgrant.html> [<https://perma.cc/KN3X-5ELZ>] (Oct. 22, 2003) (specifying that IDEA grants "are noncompetitive awards based on a predetermined formula" allocated by the Department of Education, which qualifies them as charter-eligible "covered program[s]," as defined in 34 C.F.R. § 76.787).

¹⁸⁴ Christy Wolfe, *Title I Funding and Charter Schools: How the Dollars Follow (or Don't Follow) Students*, NAT'L ALL. FOR PUB. CHARTER SCHS. (Apr. 23, 2015), <https://www.publiccharters.org/latest-news/2015/04/23/title-i-funding-and-charter-schools-how-dollars-follow-or-dont-follow> [<https://perma.cc/RKS6-TSUM>].

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Education and Title VI*, U.S. DEP'T OF EDUC. (Jan. 10, 2020), <https://www2.ed.gov/about/offices/list/ocr/docs/hq43e4.html> [<https://perma.cc/V6LP-VHQA>].

¹⁸⁸ *Title IX and Sex Discrimination*, U.S. DEP'T OF EDUC. (Aug. 20, 2021), https://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html [<https://perma.cc/6S85-E6FU>].

Charter schools are also subject to laws regarding students with disabilities. Section 504 of the Rehabilitation Act of 1973 ensures “that students with disabilities are provided an equal opportunity to participate in or benefit from the aid, benefits, services, and opportunities provided to others in federally-assisted programs” and establishes the right to a “free appropriate public education (FAPE).”¹⁸⁹ The Individuals with Disabilities Education Act directs how states, school districts, and schools implement special education programs to ensure all students receive FAPE and provides funding to this end.¹⁹⁰ Similarly, Title II of the Americans with Disabilities Act of 1990 prohibits discrimination on the basis of disability, but unlike Section 504, Title II applies to all public entities, even if they decline federal funding.¹⁹¹

Charter school employees and job applicants are protected under Title VII of the Civil Rights Act of 1964 from employment discrimination. Under Title VII, it is unlawful to discriminate in hiring, firing, or otherwise discriminating with respect to compensation, terms, conditions, or privileges of employment on the basis of race, color, national origin, sex (including pregnancy, sexual orientation, gender identity, and transgender status), or religion.¹⁹² It is also unlawful to discriminate in employment on the basis of age (for individuals forty years or older) under the Age Discrimination in Employment Act (ADEA), on the basis of disability under the Americans with Disabilities Act (ADA), or on the basis of genetic information under the Genetic Information Nondiscrimination Act (GINA).¹⁹³

B. *Federally Funded Charter School Grants*

Through the Expanding Opportunity Through Quality Charter Schools Program (CSP), the U.S. Department of Education provides grants to support the creation of new charter schools.¹⁹⁴ The grants were

¹⁸⁹ Letter from Catherine E. Lhamon, Assistant Sec’y for C.R., U.S. Dep’t of Educ. & Sue Swenson, Deputy Assistant Sec’y, U.S. Dep’t of Educ., to Colleague 1 (Dec. 28, 2016), <https://sites.ed.gov/idea/files/colleague-201612-504-charter-school.pdf> [<https://perma.cc/633T-3ACH>]; see Rehabilitation Act of 1973, 29 U.S.C. § 794.

¹⁹⁰ Letter from Catherine E. Lhamon & Sue Swenson to Colleague, *supra* note 189, at 2.

¹⁹¹ *Id.* at 1 n.1.

¹⁹² See *Laws Enforced by EEOC*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/statutes/laws-enforced-eeoc> [<https://perma.cc/6SSU-236H>]; Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e-17.

¹⁹³ *Laws Enforced by EEOC*, *supra* note 192.

¹⁹⁴ *Charter School Programs*, OFF. OF ELEMENTARY & SECONDARY EDUC., U.S. DEP’T OF EDUC., <https://oese.ed.gov/offices/office-of-discretionary-grants-support-services/charter-school-programs> [<https://perma.cc/QGS7-GDEQ>].

created by the Improving America's Schools Act of 1994¹⁹⁵ and were later extended by the No Child Left Behind Act of 2001¹⁹⁶ and the Every Student Succeeds Act in 2015.¹⁹⁷ The majority of grants are awarded to states, which then distribute the funds to eligible charter schools or applicants, but some grants are awarded directly to schools or to nonprofit management organizations who wish to replicate successful schools.¹⁹⁸ From 1995 to 2017, CSP awarded a total of \$3.9 billion in grants to support charter schools.¹⁹⁹ In 2022, CSP's budget allocation was \$440 million.²⁰⁰

Despite the magnitude of CSP's funding, oversight of program spending has been lacking.²⁰¹ One concern is how start-up grants, which are the largest portion of CSP grants,²⁰² are distributed and used. New charter schools, like many independent start-ups, face risks and growing pains, and these challenges may be borne by the public if CSP grants are not allocated discerningly. According to a report by the Network for Public Education, nearly a third of CSP start-up grant recipients had not

¹⁹⁵ Improving America's Schools Act of 1994, Pub L. No. 103-382, §§ 10301-10307, 108 Stat. 3518, 3824-30 (codified in scattered sections of 20 U.S.C.).

¹⁹⁶ No Child Left Behind Act of 2001, Pub. L. No. 107-110, §§ 5201-5248, 115 Stat. 1425, 1788-1806 (2002) (codified in scattered sections of 20 U.S.C.).

¹⁹⁷ Every Student Succeeds Act, Pub. L. No. 114-95, §§ 4301-4311, 129 Stat. 1802, 1993-2013 (2015) (codified in scattered sections of 20 U.S.C.).

¹⁹⁸ *Charter Schools Program*, NAT'L ALL. FOR PUB. CHARTER SCHS., <https://www.publiccharters.org/our-work/federal-policy/charter-schools-program> [https://perma.cc/VH2L-NXC6].

¹⁹⁹ U.S. DEP'T OF EDUC., THE U.S. DEPARTMENT OF EDUCATION'S CHARTER SCHOOLS PROGRAM OVERVIEW 4 (2019), <https://oese.ed.gov/files/2019/12/CSP-Data-Overview-WestEd-7.22.2019.pdf> [https://perma.cc/7Y2P-U4YE].

²⁰⁰ Press Release, Nina Rees, President & CEO, Nat'l All. for Pub. Charter Schs., House Passes 2022 Omnibus Bill with Charter Schools Program Funding (Mar. 10, 2022), <https://www.publiccharters.org/latest-news/2022/03/10/house-passes-2022-omnibus-bill-charter-schools-program-funding> [https://perma.cc/3XPG-HLZ3].

²⁰¹ See, e.g., CTR. FOR MEDIA & DEMOCRACY, CHARTER SCHOOL BLACK HOLE: CMD SPECIAL INVESTIGATION REVEALS HUGE INFO GAP ON CHARTER SPENDING 3-5 (2015), https://www.prwatch.org/files/new_charter_school_black_hole_report_oct_21_2015.pdf [https://perma.cc/V8GN-J4VG] (explaining that a list of charter schools that received CSP grants was unavailable until 2015).

²⁰² See U.S. DEP'T OF EDUC., *supra* note 199, at 4. The report states that \$3.3 billion out of \$3.9 billion was awarded to state entities. *Id.* For a description of the grants' goal as "to open and prepare for the operation of new charter schools and to replicate and expand high-quality charter schools," see *Expanding Opportunities Through Quality Charter Schools Program (CSP) Grants to State Entities*, OFF. OF ELEMENTARY & SECONDARY EDUC., U.S. DEP'T OF EDUC., <https://oese.ed.gov/offices/office-of-discretionary-grants-support-services/charter-school-programs/state-entities> [https://perma.cc/N8D3-NTUD].

opened or opened and later closed during the eight-year period studied.²⁰³ The report estimated that the grants given to the nonoperational charter schools totaled nearly \$200 million.²⁰⁴

Another concern is that federal education funds are being funneled to for-profit entities. While for-profit charter schools are ineligible to directly receive CSP grants, nonprofit schools that are operated by for-profit management organizations are eligible.²⁰⁵ An audit by the Department of Education Office of Inspector General concluded that “charter school relationships with CMOs posed a significant risk to Department program objectives,” including a “lack of accountability over Federal funds” and “the risk of waste, fraud, and abuse.”²⁰⁶ In July 2022, the Department of Education issued new requirements for CSP grant recipients in order to “promote greater fiscal and operational transparency and accountability.”²⁰⁷ Under the new rules, if a charter school contracts with a for-profit management organization, the school must publish the terms of the contract including the amount paid to the organization, provide assurances that the school’s board will not be controlled by the organization, and disclose any business relationships between the charter developer and the organization or any related entities.²⁰⁸ State-level grant recipients must also specify a plan to monitor subgrantee schools that contract with for-profit operators.²⁰⁹ Moreover, to eliminate sweeps contracts where a school’s funds and control are transferred entirely to the operator, charter schools must ensure that the school “maintains control over all CSP funds, makes all programmatic decisions, and directly administers or supervises the administration of the grant or subgrant.”²¹⁰

²⁰³ CAROL BURRIS & JEFF BRYANT, NETWORK FOR PUB. EDUC., ASLEEP AT THE WHEEL: HOW THE FEDERAL CHARTER SCHOOLS PROGRAM RECKLESSLY TAKES TAXPAYERS AND STUDENTS FOR A RIDE 5 (2019), <https://networkforpubliceducation.org/wp-content/uploads/2019/12/Asleep-at-the-Wheel-ONLINE-VERSION.pdf> [<https://perma.cc/5VAE-P7Y7>].

²⁰⁴ *Id.* at 6.

²⁰⁵ Final Priorities, Requirements, Definitions, and Selection Criteria—Expanding Opportunity Through Quality Charter Schools Program, 87 Fed. Reg. 40406, 40409 (July 6, 2022) (to be codified at 34 C.F.R. ch. II).

²⁰⁶ OFF. OF INSPECTOR GEN., U.S. DEP’T OF EDUC., *supra* note 149, at 2.

²⁰⁷ 87 Fed. Reg. at 40406.

²⁰⁸ *See id.* at 40421–22.

²⁰⁹ *See id.* at 40423–24.

²¹⁰ *Id.* at 40424–25.

C. CARES Act

During the coronavirus pandemic, charter schools, along with traditional public schools, received grants as part of the CARES Act.²¹¹ In addition, because they are privately operated, some charter schools also accepted forgivable loans through the Paycheck Protection Program (PPP), which was intended to prevent small businesses from laying off employees during the pandemic.²¹² Consequently, charter schools in Nashville that received PPP funds received significantly more per-student federal coronavirus support than traditional public schools did.²¹³

IV. HILLSDALE CHARTER SCHOOLS

A. Background and Political Connections

Hillsdale College is a nonsectarian Christian liberal arts college in Michigan with the mission to “maintain[] ‘by precept and example’ the immemorial teachings and practices of the Christian faith.”²¹⁴ The mission statement further states that it “considers itself a trustee of our Western philosophical and theological inheritance tracing to Athens and Jerusalem,” and that the college does not succumb “to the dehumanizing, discriminatory trend of so-called ‘social justice’ and ‘multicultural diversity.’”²¹⁵ Hillsdale is not subject to federal laws such as Title IX of the Education Amendments Act of 1972 because the college does not accept federal funding, including loans or scholarships.²¹⁶ This independence, along with the college’s focus on classical and Western thought, has

²¹¹ See Andrew Ujifusa, *Private and Charter Schools Got \$6 Billion in Paycheck Protection Program Aid, Study Says*, EDUC. WEEK (Sept. 1, 2020), <https://www.edweek.org/education/private-and-charter-schools-got-6-billion-in-paycheck-protection-program-aid-study-says/2020/09> [https://perma.cc/SMB6-VYTB].

²¹² See *id.*; Erica L. Green, *Charter Schools, Some with Billionaire Benefactors, Tap Coronavirus Relief*, N.Y. TIMES (June 15, 2020), <https://www.nytimes.com/2020/06/15/us/politics/charter-schools-relief-coronavirus.html> (last visited Dec. 23, 2022).

²¹³ Ben Hall & Kevin Wisniewski, *Charter Schools Receive More per Student in Federal COVID Aid*, NEWSCHANNEL 5 NASHVILLE (Feb. 23, 2021, 8:20 AM), <https://www.newschannel5.com/news/newschannel-5-investigates/charter-schools-receive-more-per-student-in-federal-covid-aid> [https://perma.cc/7T9L-76RX].

²¹⁴ *Mission*, HILLSDALE COLL., <https://www.hillsdale.edu/about/mission> [https://perma.cc/76MW-2PQD].

²¹⁵ *Id.*

²¹⁶ *Support Hillsdale College*, *supra* note 31; see 20 U.S.C. § 1681(a).

drawn praise from prominent conservative leaders,²¹⁷ including Justice Clarence Thomas, who referred to Hillsdale as a “shining city on a hill” in his commencement address at the college.²¹⁸

Hillsdale College was founded in 1844,²¹⁹ and although it has embraced ultraconservative Christian values and teachings throughout its history, as a college it largely flew under the radar until around 2015. The cataclysmic event was the surge of Donald Trump’s presidential candidacy. Despite the small size of this college, with only 1,573 undergraduate students,²²⁰ it quickly became affiliated with the Trump candidacy and subsequent administration.²²¹ In a challenge to The New York Times Magazine’s 1619 Project, the Trump administration established the 1776 Commission,²²² chaired by Hillsdale President Larry Arnn.²²³ The “1776 Curriculum” is the backbone of the curriculum used in Hillsdale-affiliated charter schools. The curriculum clearly shows a strong conservative bias that is at odds with academic norms of fact-based

²¹⁷ See Erik Eckholm, *In Hillsdale College, a ‘Shining City on a Hill’ for Conservatives*, N.Y. TIMES (Feb. 1, 2017), <https://www.nytimes.com/2017/02/01/education/edlife/hillsdale-college-great-books-constitution-conservatives.html> (last visited Dec. 23, 2022).

²¹⁸ Hillsdale Coll., *Clarence Thomas Speaks at Hillsdale College’s Commencement Ceremony*, YOUTUBE, at 29:15 (May 14, 2016), <https://www.youtube.com/watch?v=dVqZ-dsjJXY> [<https://perma.cc/EM98-P7KU>].

²¹⁹ *History*, HILLSDALE COLL., <https://www.hillsdale.edu/about/history> [<https://perma.cc/D7JJ-79QR>].

²²⁰ *College Profile*, HILLSDALE COLL., <https://www.hillsdale.edu/about/college-profile> [<https://perma.cc/A7JG-CSDZ>].

²²¹ Vanity Fair described the college as “a feeder school for the Trump administration.” Sam Tanenhaus, *‘I’m Tired of America Wasting Our Blood and Treasure’: The Strange Ascent of Betsy DeVos and Erik Prince*, VANITY FAIR (Sept. 6, 2018), <https://www.vanityfair.com/news/2018/09/the-strange-ascent-of-betsy-devos-and-erik-prince> [<https://perma.cc/4QG6-9CU3>].

²²² Alana Wise, *Trump Announces ‘Patriotic Education’ Commission, a Largely Political Move*, NPR (Sept. 17, 2020, 5:59 PM), <https://www.npr.org/2020/09/17/914127266/trump-announces-patriotic-education-commission-a-largely-political-move> [<https://perma.cc/9B7L-F8QK>] (quoting Trump, who stated that “[c]ritical race theory, the 1619 Project, and the crusade against American history is toxic propaganda,” and that the new committee would be called the “1776 Commission” in response to the New York Times’ project).

²²³ See PRESIDENT’S ADVISORY 1776 COMM’N, *supra* note 22, at 41 (listing Hillsdale President Larry P. Arnn as Chair of the Commission).

and politically neutral education.²²⁴ Critics claim that Hillsdale's curriculum rewrites American history.²²⁵

Arnn has been vocal about the role of education in advancing a conservative Christian agenda, referring to education as a "weapon" in the war to reclaim America.²²⁶ In the context of education policy, Betsy DeVos is among the most visible connections. An ardent supporter of charter schools, DeVos advocated for the expansion of charter school funding as Secretary of Education in the Trump administration.²²⁷ Betsy DeVos has close ties with Hillsdale College, which include family contributions to the college and an appearance as a campus speaker.²²⁸

In reviewing the materials in light of Hillsdale's proposed entry into Tennessee, historian David Ewing identified a distorted and inaccurate position on the civil rights movement and, in particular, the teachings of Dr. Martin Luther King Jr.²²⁹ Dr. King was assassinated in Memphis,

²²⁴ Scholars critical of the 1776 Curriculum have observed that it is critical of affirmative action, takes an "overly positive" view of issues such as slavery, and "appears to take on the modern liberal state." Saul, *supra* note 4. Excerpts from the high school curriculum emphasize "the major and meaningful efforts Republicans made to guarantee the rights of African Americans," HILLSDALE COLL., THE HILLSDALE 1776 CURRICULUM: HIGH SCHOOL AMERICAN GOVERNMENT AND POLITICS unit 4, at 23 (2021), <https://s3.documentcloud.org/documents/21276359/hillsdale-1776-curriculum-excerpts.pdf> [<https://perma.cc/9X7F-MY7T>], in contrast to Progressivism, which is characterized as "a rejection of the principles of the Declaration of Independence as well as the form of the Constitution," *id.* unit 5, at 1.

²²⁵ See, e.g., Valerie Strauss & Darcie Cimarusti, *How Hillsdale College-Affiliated Charter Schools Spread*, WASH. POST (July 30, 2022, 10:03 PM), <https://www.washingtonpost.com/education/2022/07/30/hillsdale-affiliated-charter-schools-spread> [<https://perma.cc/YF57-TFTY>] ("Hillsdale's curriculum not only narrows the course of study available to students, it rewrites American history, particularly when it comes to civil rights.").

²²⁶ A three-part series published in Salon describes the influential role Hillsdale is playing in advancing a highly conservative, Christian agenda through its charter school network, curriculum materials, and political connections. In the first part of the series, Hillsdale President Larry Arnn is quoted saying, "Teaching is our trade; also, I confess, it's our weapon." Joyce, *supra* note 5.

²²⁷ See Turner, *supra* note 80.

²²⁸ See Alice Lloyd, *The College That Wants to Take over Washington*, POLITICO MAG. (May 12, 2018), <https://www.politico.com/magazine/story/2018/05/12/hillsdale-college-trump-pence-218362> [<https://perma.cc/5RRH-M695>] ("The conservative donors Arnn has cultivated include Wheel of Fortune host Pat Sajak and the DeVos and Prince families."); Virginia Abram, *Secretary of Education Betsy DeVos Speaks at Hillsdale*, COLLEGIAN (Oct. 22, 2020), <https://hillsdalecollegian.com/2020/10/secretary-of-education-betsy-devos-speaks-at-hillsdale> [<https://perma.cc/9BH8-797R>].

²²⁹ See Phil Williams, *Revealed: Charter School Program Favored by Tennessee Governor Rewrites Civil Rights History*, NEWSCHANNEL 5 NASHVILLE (Mar. 1, 2022, 1:19 PM), <https://www.newschannel5.com/news/newschannel-5-investigates/revealed-charter-school-program-favored-by-tennessee-governor-rewrites-civil-rights-history> [<https://perma.cc/J6GP-8N8L>] ("The 1776 Curriculum kind of has their own view of Dr. King and what he would believe today . . ."). As one example, Hillsdale's curriculum erroneously claims that Dr. King "appealed to the individual conscience and not the force of law to bring about a color-blind society." *Id.* (quoting

Tennessee, in 1968; for Governor Lee to deliberately invite publicly funded charter schools to teach an ahistorical and biased view of Dr. King's teachings in the state in which he was assassinated seems especially troubling.

B. *Hillsdale's Entry into the Charter School Market*

As described in Part III, charter schools are typically operated either as small-scale autonomous schools or as part of a larger chain of charter schools under a management company. Under either structure, the revenue that follows the students flows to the charter school operator. Hillsdale has developed an alternative administrative structure that allows it to maintain control over the curriculum but avoid the oversight and chartering restrictions that apply to charter school operators.

Hillsdale College began its push into public education by establishing the Barney Charter School Initiative (BCSI) in 2010 with funding from the Barney Family Foundation.²³⁰ BCSI is billed as “an outreach program of Hillsdale College devoted to the revitalization of public education through the launch and support of classical K-12 charter schools.”²³¹ Hillsdale emphasizes that the college simply supports charter schools and “does not own, govern, manage, or profit from any affiliated school.”²³² The initiative guides, at no cost, groups who wish to start classical charter schools and provides successfully chartered schools with curriculum curated by Hillsdale,²³³ including material from the controversial 1776 Curriculum.²³⁴

Under the umbrella of “Hillsdale K-12 Education,” there are Member Schools, which “receive curriculum, consultation, and training from the Hillsdale K-12 Education Office,” and Curriculum Schools, which license the K-12 Program Guide developed by Hillsdale College; Curriculum Schools may apply for Member School status after two

HILLSDALE COLL., *supra* note 224, unit 8, at 9). In reality, Dr. King specifically fought for civil rights laws that outlawed discrimination in public places, housing, and voting rights. *Id.*

²³⁰ See *Barney Charter School Initiative*, HILLSDALE COLL., <https://k12.hillsdale.edu/Programs/BCSI> [<https://perma.cc/3L54-ANR9>].

²³¹ *Id.*

²³² *Founding a Hillsdale Classical School*, *supra* note 21.

²³³ *Id.*

²³⁴ See *The Hillsdale 1776 Curriculum*, *supra* note 22. For differing characterizations of the 1776 Curriculum, compare Daniel Payne, *Trump Ally Hillsdale College Pitches 1619 Project Counterweight*, POLITICO (July 21, 2021, 4:50 PM), <https://www.politico.com/news/2021/07/21/trump-ally-1619-project-500464> [<https://perma.cc/6CJ7-LMNM>], with Haley Strack, *Hillsdale College Releases 1776 Curriculum in Hopes of Pursuing Truth About American History*, FEDERALIST (July 21, 2021), <https://thefederalist.com/2021/07/21/hillsdale-college-releases-1776-curriculum-in-hopes-of-pursuing-truth-about-american-history> [<https://perma.cc/WK6F-MLBD>].

years.²³⁵ Certified Schools have been certified by the Hillsdale K-12 Education Office. With only twenty-three member schools as of 2022, Hillsdale-affiliated charter schools currently represent only a small share of the charter school market.²³⁶

Like other schools of choice, admission to Hillsdale charter schools requires that parents apply to the schools, with applicants to oversubscribed schools selected by lottery. As in their expansion plans in Tennessee, Hillsdale charter schools depart from the nationwide norm of locating in urban areas and instead locate in predominantly white and affluent areas. Such locations act as a deterrent to applicants from minority populations, due to barriers as simple as lack of transportation.²³⁷ The student demographic composition of Hillsdale schools is the opposite of that in charter schools nationwide.²³⁸

Another benefit Hillsdale attains by not owning or managing the affiliated charter schools is that it can deflect any responsibility for the actions of school employees or administrators. For example, social media posts by the principal of the Hillsdale charter school Naples Classical Academy in Naples, Florida, received scrutiny for anti-Muslim posts, such as language about Muslim “gang rape marathons.”²³⁹ Hillsdale’s response was that it “does not own, govern, or manage any of its affiliated schools.”²⁴⁰

In the remainder of this Part, we provide examples of Hillsdale’s entry into different states.

1. Florida

Like Governor Lee of Tennessee, Florida’s Governor Ron DeSantis has embraced a relationship with Hillsdale.²⁴¹ With considerable political

²³⁵ See *Schools: Hillsdale Classical Schools Across the Nation*, *supra* note 3.

²³⁶ See *id.*

²³⁷ See, e.g., Saul, *supra* note 4 (“The students are selected through a citywide lottery, but the school’s location in affluent Buckhead may deter some applicants.”).

²³⁸ See *id.* (“In a city where 73 percent of public school students are Black and 17 percent white, Atlanta Classical Academy is the mirror image: 17 percent Black and 71 percent white, according to a 2020 state report. Overall, Hillsdale’s charter school racial demographics are close to that of the Atlanta Classical students. That is a departure from charter schools nationally, which are about 30 percent white.”).

²³⁹ Joyce, *supra* note 24.

²⁴⁰ *Id.*

²⁴¹ See Ana Ceballos & Sommer Brugal, *Conservative Hillsdale College Is Helping DeSantis Reshape Florida Education*, TAMPA BAY TIMES (July 5, 2022), <https://www.tampabay.com/news/florida-politics/2022/07/01/conservative-hillsdale-college-is-helping-desantis-reshape-florida-education> [https://perma.cc/S8JL-KTBJ]. The relationship between Governor DeSantis and

support from numerous parties, in particular Governor DeSantis and Richard Corcoran, former commissioner of the Florida Board of Education, Florida is the home of seven Hillsdale charter schools.²⁴²

The ties between Governor DeSantis and Hillsdale College extend well beyond a handful of charter schools, with an impact on Florida public education among many dimensions. Hillsdale is one of four groups that partnered with the Florida Department of Education to develop a civics training program for public schools.²⁴³ The training includes explicitly religious content. For example, the training includes a slide reading, “Founders expected religion to be promoted because they believed it was essential to civic virtue.”²⁴⁴

As another example of Hillsdale’s influence on public education in Florida, Hillsdale-affiliated reviewers were instrumental in the Florida Department of Education’s rejection of dozens of math textbooks over perceived references to critical race theory.²⁴⁵ Notably, out of 125 reviewers of math textbooks, only three reviewers raised objections. One was a Hillsdale College sophomore and the second was a Hillsdale civics education specialist.²⁴⁶

Florida has an openly conservative education agenda to privatize public education.²⁴⁷ In expressing admiration for Tennessee’s mission of increasing Hillsdale charter schools in the state by at least fifty, Corcoran urged that the move happen quickly, noting that once students are lured to charter schools from traditional public schools—what he called getting them “across [the] Rubicon”—the resulting “loss of funding and forced consolidation” of public schools will cause them to collapse and prevent future Democratic governors from changing the educational landscape back.²⁴⁸

Hillsdale College includes a partnership to develop a new civics program and provide professional training to public K-12 teachers. *Id.*

²⁴² *See id.*

²⁴³ *Id.*; see Joe Gorchow, *South Florida Educators Concerned New State Civics Training Is Creating “A Culture War Situation,”* CBS MIA. (July 14, 2022, 11:17 PM), <https://www.cbsnews.com/miami/news/south-florida-educators-concerned-new-state-civics-training-culture-war-situation> [<https://perma.cc/X8QH-FPST>].

²⁴⁴ Gorchow, *supra* note 243.

²⁴⁵ *See* Ceballos & Brugal, *supra* note 241.

²⁴⁶ *See id.*

²⁴⁷ *See* Greg Allen, *Florida Gov. DeSantis Takes Aim at What He Sees as Indoctrination in Schools*, NPR (July 13, 2022, 10:27 AM), <https://www.npr.org/2022/07/13/1110842453/florida-gov-desantis-is-doing-battle-against-woke-public-schools> [<https://perma.cc/AB47-FKBF>].

²⁴⁸ Joyce, *supra* note 24.

2. California

In an effort to open the first Hillsdale-affiliated charter school in California, supporters deployed controversial tactics aimed at both the authorizing board and local families. In its initial application, proposed charter school Orange County Classical Academy (OCCA) touted a partnership with both Hillsdale and nearby Chapman University, and marketing materials stated that “academy students would be given ‘priority for admittance and scholarships to Chapman.’”²⁴⁹ Despite Chapman clarifying that no formal relationship with OCCA exists, OCCA supporters continued to assert the claim, leading members of the Orange Unified School District (OUSD) Board of Trustees to suspect that the alleged affiliation misled minority families who signed a petition in support of the charter school.²⁵⁰

In addition, a pro-charter school PAC mounted a well-funded and successful campaign to place two charter-friendly members on the local authorizing school board. In the 2016 election, ninety-six percent and ninety-seven percent, respectively, of OUSD Board of Trustees members John Ortega’s and Brenda Lebsack’s campaign contributions came from the California Charter Schools Association’s PAC.²⁵¹ The charter was narrowly approved by a four-to-three vote, with Ortega and Lebsack voting in favor of the application.²⁵²

3. Wisconsin

Lac Courte Oreilles Ojibwe University (Lac Courte) is a public tribal university in northwestern Wisconsin. As stated on its website, its mission is “to provide Anishinaabe communities with post-secondary and continuing education while advancing the language, culture, and history of the Ojibwe.”²⁵³ In 2021, while it was a community college, Lac Courte became the charter school authorizer of the Lake County Classical

²⁴⁹ Tina Richards, *Charter School Seeking Entry into OUSD*, Foothills SENTRY (Nov. 2019), <https://foothillssentry.com/charter-school-seeking-entry-into-ousd.html> [<https://web.archive.org/web/20210301124303/https://foothillssentry.com/charter-school-seeking-entry-into-ousd.html>].

²⁵⁰ *Id.*

²⁵¹ Lynne Riddle, *Riddle: Are OUSD Trustees Ortega and Lebsack Conflicted on Upcoming Charter School Vote?*, VOICE OF OC (Dec. 8, 2020), <https://voiceofoc.org/2019/12/riddle-are-ousd-trustees-ortega-and-lebsack-conflicted-on-upcoming-charter-school-vote> [<https://perma.cc/QY85-YXZX>].

²⁵² *Regular Board Meeting Minutes*, ORANGE UNIFIED SCH. DIST. BD. OF EDUC. 9 (Dec. 19, 2019), https://www.orangeusd.org/uploaded/District/BoardOfEducation/2020/Board_Minutes/Board_Minutes_12.19.19_approved.pdf [<https://perma.cc/4HKT-SH9X>].

²⁵³ LAC COURTE OREILLES OJIBWE UNIV., <https://www.lco.edu> [<https://perma.cc/CXH3-EF9T>].

Academy (LCCA), an independent charter school located in suburban Milwaukee and a Hillsdale College Member School.²⁵⁴

It may seem surprising that Lac Courte ever was the charter authorizer of LCCA for several reasons. Geographically and with respect to mission, there is no evident synergy. Lac Courte is located a nearly five-hour drive away from LCCA.²⁵⁵ The missions of Hillsdale-affiliated schools and Lac Courte seem diametrically opposed, with Lac Courte advancing the “language, culture, and history of the Ojibwe,”²⁵⁶ and the Hillsdale K-12 curriculum dedicated to teaching Western history, traditions, and values based on a curriculum designed by an ultraconservative Christian college.²⁵⁷ There is minimal overlap in the constituency served by Lac Courte and LCCA, as LCCA has few to no tribal members among its students, all of whom are drawn from the local community.²⁵⁸

So how did Lac Courte become the authorizer? Like many states, Wisconsin permits schools to be chartered by any of a number of potential authorizers, including the chancellor of the University of Wisconsin, school district authorizers, and technical college boards, as well as the state’s two tribal colleges.²⁵⁹ The interim principal of LCCA was refreshingly honest when explaining why Lac Courte was LCCA’s charter authorizer: “The other authorizers all declined.”²⁶⁰

Although the tribe’s agreement to charter the LCCA school had been rationalized by appealing to high-minded shared values of “educational sovereignty,”²⁶¹ financial motives may have provided even more of an inducement. The college received three percent of the school’s per-pupil

²⁵⁴ Ruth Conniff, *How a Wisconsin Tribe Helped Launch a Trump-Approved ‘Make America Great Again’ Charter School*, WIS. EXAM’R (Dec. 22, 2021, 7:00 AM), <https://wisconsinexaminer.com/2021/12/22/how-a-wisconsin-tribe-helped-launch-a-trump-approved-make-america-great-again-charter-school> [<https://perma.cc/6CGC-2PQJ>]; see *About, LAKE COUNTRY CLASSICAL ACAD.*, <https://www.lakecountryclassical.org/about-us> [<https://perma.cc/P8KL-A4Y2>]. In October 2022, Lac Courte announced it would not renew LCCA’s charter unless it severed ties with Hillsdale. *Official LCOOU Public Statement Regarding LCCA Charter*, LAC COURTE OREILLES OJIBWE UNIV. (Oct. 4, 2022), <https://www.lco.edu/news/official-lcoou-public-statement-regarding-lcca-charter> [<https://perma.cc/A28U-TWZC>].

²⁵⁵ Conniff, *supra* note 254.

²⁵⁶ LAC COURTE OREILLES OJIBWE UNIV., *supra* note 253.

²⁵⁷ See *supra* Section IV.A.

²⁵⁸ Frank Vaisvilas, *Tribe Caught in Middle of Political Debate over Charter Schools in Wisconsin*, GREEN BAY PRESS GAZETTE (May 4, 2022, 11:30 AM), <https://www.greenbaypressgazette.com/story/news/native-american-issues/2022/05/02/gov-evers-vetoes-tribal-charter-schools-bill/7441070001> [<https://perma.cc/DP2N-EFTP>] (“Of the school’s 416 students, 351 are identified as white and only seven are identified as American Indian, according to the Department of Public Instruction.”).

²⁵⁹ See WIS. STAT. ANN. § 118.40(2r)(b)(1).

²⁶⁰ Conniff, *supra* note 255 (quoting Margaret Daigneau, interim principal of LCCA).

²⁶¹ *Id.*

school aid for serving as the authorizer.²⁶² In addition to the ongoing revenue stream, Lac Courte received an implementation grant from the state of \$750,625.²⁶³

Although Wisconsin largely does not cap the number of charter schools that can be authorized,²⁶⁴ the two tribal colleges in the state face a combined cap of six charters they are permitted to authorize.²⁶⁵ A bill to remove the cap on the number of charters that tribal colleges can authorize was vetoed in April 2022 by Wisconsin governor Tony Evers.²⁶⁶ Removal of this cap, if implemented at some future date, would provide an attractive opportunity for expanding the reach of charter schools, especially among those that, like LCCA, are declined by every other authorizer. The potential for charter school expansion through tribal authorizers is evident in Michigan. Tribally controlled Bay Mills Community College in Michigan is the authorizer of forty-six charter schools in the state, making it one of the top three authorizers in the state.²⁶⁷

4. Tennessee

In his 2022 State of the State Address, Tennessee Governor Bill Lee announced that his administration is partnering with Hillsdale College “to expand their approach to civics education and K-12 education,” describing the college as “champions of American exceptionalism,” and stating that “[f]or decades, Hillsdale College has been the standard bearer in quality curriculum and the responsibility of preserving American liberty.”²⁶⁸ In a speech in Franklin, Tennessee, four months earlier, Hillsdale College President Larry Arnn elaborated that he and Governor Lee had agreed to open fifty to one hundred charter schools in Tennessee.²⁶⁹ To operate these schools, the charter management organization American Classical Education Inc. (ACE) was launched with Hillsdale’s support.²⁷⁰ Although formally a separate entity from

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ *See supra* Section II.B.

²⁶⁵ WIS. STAT. ANN. § 118.40(2r)(cq) (West 2022).

²⁶⁶ Vaisvilas, *supra* note 258.

²⁶⁷ *Our History*, BAY MILLS CMTY. COLL. CHARTER SCHS. OFF., <https://bmcso.org/about/our-history> [<https://perma.cc/FC7M-2GC5>].

²⁶⁸ Lee, *supra* note 1.

²⁶⁹ Aldrich, *supra* note 1.

²⁷⁰ Ben Wilson, *New Charter School Management Organization Hires First CEO*, COLLEGIAN (Feb. 24, 2022), <https://hillsdalecollegian.com/2022/02/new-charter-school-management-organization-hires-first-ceo> [<https://perma.cc/HY86-4N3G>].

Hillsdale, ACE's CEO is a former Hillsdale student, and the board for one of ACE's proposed schools included "the Hillsdale chief of staff, the Hillsdale vice president of finance, the Hillsdale vice president of admissions, a member of the Hillsdale board of directors, the former superintendent of the college's own private Hillsdale Academy and two Hillsdale graduates."²⁷¹

ACE submitted applications to local school boards in three counties in Tennessee, but in the summer of 2022, the boards rejected all three applications.²⁷² In July 2022, ACE appealed the denials to the Tennessee Public Charter School Commission.²⁷³ The commission was created by a 2019 law supported by Governor Lee that revoked appeals authority from the state board of education.²⁷⁴ Unlike the board of education, whose duty is to oversee numerous facets of public education in Tennessee,²⁷⁵ the charter school commission has the sole "purpose of serving as an appellate public charter school authorizer and the [local education agency] for any public charter school it authorizes."²⁷⁶ Governor Lee appointed all nine commission members,²⁷⁷ including the board chairman of KIPP Memphis²⁷⁸ and the CEO of a CMO who also develops real estate projects "anchored by high-performing schools."²⁷⁹ With such

²⁷¹ Williams, *supra* note 34.

²⁷² See Wilson, *supra* note 270; Phil Williams, *Hillsdale-Affiliated Charter School Operator Asks State to Overrule Rutherford, Montgomery Counties*, NEWSCHANNEL 5 NASHVILLE (July 29, 2022, 4:08 PM), <https://www.newschannel5.com/news/newschannel-5-investigates/revealed/hillsdale-affiliated-charter-school-operator-asks-state-to-overrule-rutherford-montgomery-counties> [https://perma.cc/DH6V-V8FC].

²⁷³ Williams, *supra* note 272.

²⁷⁴ See Marta W. Aldrich, *Tennessee Legislature Approves Governor's Call for a Statewide Charter School Commission*, CHALKBEAT TENN. (Apr. 18, 2019, 11:45 AM), <https://tn.chalkbeat.org/2019/4/17/21107933/tennessee-legislature-approves-governor-s-call-for-a-statewide-charter-school-commission> [https://perma.cc/665T-CCGV]; see also *Gov. Lee's School Choice Agenda Gains Momentum in Tennessee General Assembly*, TENN. OFF. OF THE GOVERNOR (Mar. 20, 2019, 6:29 PM), <https://www.tn.gov/governor/news/2019/3/20/gov-lee-s-school-choice-agenda-gains-momentum-in-tennessee-general-assembly.html> [https://perma.cc/XFA9-KK8U] (characterizing the legislation as "Lee's charter school bill").

²⁷⁵ See TENN. CODE ANN. § 49-1-302 (2022) (effective July 1, 2023).

²⁷⁶ TENN. CODE ANN. § 49-13-105(a) (2022).

²⁷⁷ See *Commission Members*, TENN. PUB. CHARTER SCH. COMM'N, <https://www.tn.gov/tn-public-charter-school-commission/about-us/commission-members.html> [https://perma.cc/UDT9-4NPP].

²⁷⁸ *Terence Patterson*, TENN. PUB. CHARTER SCH. COMM'N, <https://www.tn.gov/content/tn/tn-public-charter-school-commission/about-us/commission-members/terence-patterson.html> [https://perma.cc/7SM5-8EW3].

²⁷⁹ *Derwin Sisnett*, TENN. PUB. CHARTER SCH. COMM'N, <https://www.tn.gov/tn-public-charter-school-commission/about-us/commission-members/derwin-sisnett.html> [https://perma.cc/U64Y-XKUB].

a “charter friendly” appeals board, “[h]aving the school board there as a step is relatively meaningless.”²⁸⁰

In 2022, lawmakers introduced a new bill that would allow applicants to bypass a local school board and apply directly to the commission for five years if the commission overruled the local board’s rejections three times in three years.²⁸¹ The new rule would enable the commission to grant itself exclusive authorizing authority over a school district and would create a five-year window for charter school operators to enter a community without local input. The sponsor removed the bill from the calendar in March 2022 but left open the possibility of reintroducing it in later sessions.²⁸² Even if the bill does not pass, the lack of a cap on charter schools and the ability to appeal to a governor-appointed board provide a clear path to approval for an applicant with political support.

However, Hillsdale may be their own greatest threat in Tennessee. In a two-hour speech in June 2022 in Williamson County, Hillsdale President Arnn claimed that American teachers “are trained in the dumbest parts of the dumbest colleges in the country.”²⁸³ At Arnn’s side during the speech was Governor Lee, whose silence was aggressively condemned from all sides, including his Republican allies.²⁸⁴ No Lee-appointed members of the appeals commission indicated that Arnn’s remarks would impact their decision, but spectators characterized the commission’s decision whether to grant a charter to an applicant facing near-universal scorn from the state they represent as “the first major test” for the legitimacy and autonomy of the board.²⁸⁵

However, in September 2022, one week before the Commission was scheduled to vote on the appeals, ACE withdrew all three charter school applications, citing a need for more time to “address concerns and clarify

²⁸⁰ Mitchell, *supra* note 102 (quoting education advocate and former Nashville school board member Amy Frogge regarding ACE’s application appeal).

²⁸¹ Adam Friedman, *Tennessee Bill to Bypass Local Decisions on Charter Schools on Pause in the House*, TENNESSEAN (Mar. 15, 2022, 5:20 PM), <https://www.tennessean.com/story/news/politics/2022/03/15/tennessee-charter-schools-bill-bypass-local-decisions-on-pause-house/7054338001> [<https://perma.cc/CSB4-82PM>].

²⁸² *Id.*

²⁸³ Phil Williams, *Revealed: Teachers Come from ‘Dumbest Parts of Dumbest Colleges,’ Tenn. Governor’s Education Advisor Tells Him*, NEWSCHANNEL 5 NASHVILLE (July 12, 2022, 11:34 AM), <https://www.newschannel5.com/news/newschannel-5-investigates/revealed/revealed-teachers-come-from-dumbest-parts-of-dumbest-colleges-tenn-governors-education-advisor-tells-him> [<https://perma.cc/Q76B-DBV4>].

²⁸⁴ Olmstead, *supra* note 62.

²⁸⁵ Marta W. Aldrich, *Hillsdale Group’s Charter School Appeals Will Test Independence of New Tennessee Commission*, CHALKBEAT TENN. (Aug. 10, 2022, 6:00 AM), <https://tn.chalkbeat.org/2022/8/10/23298438/hillsdale-charter-schools-appeals-tennessee-commission-governor-lee> [<https://perma.cc/8UAH-G4ZA>].

confusion and misconceptions raised by Commission staff.”²⁸⁶ In December 2022, ACE renewed its efforts by filing letters of intent to open charter schools in five school districts across Tennessee, including the three districts to which ACE had previously applied.²⁸⁷ If ACE submits formal applications, each district’s board of education must approve or deny the application; if denied, ACE may again appeal to the statewide Commission.²⁸⁸

5. Colorado

Colorado has generally embraced charter schools. Nationwide, Colorado has the third highest proportion of students in charter schools, with over fifteen percent of students attending charters.²⁸⁹ The National Alliance for Public Charter Schools, a pro-charter advocacy group, ranks Colorado’s charter school laws as the second best in the nation.²⁹⁰ Supporters of Hillsdale-affiliated charter schools in Colorado have made use of the state’s existing charter support and generous laws. For instance, since Colorado permits for-profit corporations to manage charter schools, American Legacy Academy, a Hillsdale curriculum school that has been approved to open in Weld County, will be operated by the for-profit CMO Academica, melding the profit- and mission-driven goals of these out-of-state actors.²⁹¹

A hallmark of charter school governance is the ability to operate independently, free from some requirements placed on traditional public schools. In Colorado, laws that give school boards authority over employment, training, and curriculum are automatically waived for

²⁸⁶ Melissa Brown, *Hillsdale-Backed Charter Schools Withdraw Applications Before State Appeals Vote*, TENNESSEAN (Sept. 29, 2022, 6:00 PM), <https://www.tennessean.com/story/news/politics/2022/09/29/hillsdale-backed-charter-schools-withdraw-applications-before-state/69528447007> [https://perma.cc/G4P3-KZB5].

²⁸⁷ Marta W. Aldrich, *Hillsdale-Linked Charter School Group Will Try Again in Tennessee*, CHALKBEAT TENN. (Dec. 5, 2022, 8:16 PM), <https://tn.chalkbeat.org/2022/12/5/23495563/hilldale-charter-schools-american-classical-tennessee-applications> [https://perma.cc/92SM-AUWK].

²⁸⁸ See Aldrich, *supra* note 285.

²⁸⁹ KEYSTONE POL’Y CTR., COLORADO’S MISSING YEAR: CHARTER SCHOOL PERFORMANCE 3 (2022), http://www.keystone.org/wp-content/uploads/2022/02/Missing-Year_Charter-Schools_final.pdf [https://perma.cc/VYW8-3ZSB].

²⁹⁰ TODD ZIEBARTH, NAT’L ALL. FOR PUB. CHARTER SCHS., MEASURING UP TO THE MODEL: A RANKING OF STATE PUBLIC CHARTER SCHOOL LAWS 3 (13th ed. 2022), https://www.publiccharters.org/sites/default/files/documents/2022-01/2022-model-law_rd3.pdf [https://perma.cc/672B-97MX].

²⁹¹ Strauss & Cimarusti, *supra* note 225.

charter schools, and charters may request waivers for other laws.²⁹² All Hillsdale affiliates avail themselves of waivers for at least thirty-five state laws.²⁹³ Two Hillsdale-affiliated charter schools are exempt from a statute that prohibits human sexuality education from emphasizing abstinence as the primary pregnancy prevention method or excluding LGBT health needs.²⁹⁴ In addition, two schools have removed the local school board's ability to determine which "books, magazines, papers, or other publications . . . are of immoral or pernicious nature,"²⁹⁵ allowing the school to decide what materials are available to students.

Hillsdale allies have been active in local government campaigns in Colorado communities where Hillsdale-affiliated charters operate or plan to operate. In the November 2021 elections, eleven candidates in school board races across the state were endorsed by the 1776 Project PAC,²⁹⁶ a PAC that wants to abolish critical race theory because it is "incredibly hostile to white people, Western civilization, classical liberalism, the enlightenment, the founding of America, and capitalism."²⁹⁷ In Grand Junction, the three PAC-supported winning candidates formed a majority on the local board.²⁹⁸ The following year, the board approved Hillsdale-affiliated Ascent Classical Academy's request to apply to the

²⁹² *Waivers & Policy Guidance*, COLO. DEP'T OF EDUC., <https://www.cde.state.co.us/cdechart/waivers> [<https://perma.cc/WVS7-CCQM>].

²⁹³ See COLO. DEP'T OF EDUC., CHARTER SCHOOLS WAIVERS 2022–23, at 10, 39, 50 (2022), <https://www.cde.state.co.us/cdechart/report-waiversbycharterschool-0> [<https://perma.cc/KPT3-6E9Y>] (indicating that Ascent Classical Academy Douglas County, Golden View Classical Academy, and Liberty Tree Classical Academy have forty waivers, and Ascent Classical Academy Northern Colorado has thirty-seven).

²⁹⁴ See *id.* at 39, 50 (indicating that Golden View Classical Academy and Liberty Tree Classical Academy waived Colorado Revised Statutes § 22-1-128); see also COLO. REV. STAT. § 22-1-128(6)(i), (7)(b) (2022) (describing requirements of sexual education programs, if a school chooses to offer them).

²⁹⁵ § 22-32-110(1)(r) (giving the local board of education the discretion to remove inappropriate materials from the school or library); see COLO. DEP'T OF EDUC., *supra* note 293, at 10, 50 (indicating that Ascent Classical Academy Douglas County and Liberty Tree Classical Academy waived Colorado Revised Statutes § 22-32-110(1)(r)).

²⁹⁶ See *Our Endorsed Candidates*, 1776 PROJECT PAC, <https://1776projectpac.com/endorsed-candidates> [<https://perma.cc/D9ZT-Y2CP>].

²⁹⁷ *Critical Race Theory*, 1776 PROJECT PAC, <https://1776projectpac.com/about> [<https://perma.cc/379K-ZPN7>].

²⁹⁸ See Nathan Deal & Sam Klomhaus, *Update: Haitz, Jones, Lema Take Lead in Board Race*, GRAND JUNCTION DAILY SENTINEL (Nov. 3, 2021, 11:37 PM), https://www.gjsentinel.com/news/western_colorado/update-haitz-jones-lema-take-lead-in-board-race/article_2bac6670-3bff-11ec-881c-c3c9c9c61565.html [<https://perma.cc/5EYX-66XY>] (indicating that Andrea Haitz, Will Jones, and Angela Lema won their school board races); see also *Our Endorsed Candidates*, *supra* note 296 (indicating that Andrea Haitz, Will Jones, and Angela Lema were endorsed by the 1776 Project PAC); *Board of Education Members and Contact Information*, MESA CNTY. VALLEY SCH. DIST. 51, https://www.d51schools.org/about_us/board_of_education/members [<https://perma.cc/D6KB-3DRU>] (indicating that there are five members on the school board).

Colorado Charter School Institute in hopes of starting a charter school in Grand Junction.²⁹⁹

In 2019, the Douglas County school board clashed with Ascent Classical Academy of Douglas County over the school's decision to allow teachers to carry concealed handguns in the building.³⁰⁰ In 2021, conservative political groups poured money into the school board race, ostensibly citing "parent power" and distaste toward unions.³⁰¹ All four candidates endorsed by the 1776 Project PAC won their seats, ousting incumbents and forming a majority of the seven-member school board.³⁰²

6. Failed Hillsdale Charters

Despite political support and the promise of superior education, not all of Hillsdale's efforts have been successful. Hillsdale-affiliated Metropolitan Philadelphia Classical Charter School withdrew its application after critics "raised several serious concerns, including its founders' lack of any connection to Philadelphia and its quasi-religious approach to education."³⁰³

In Florida, Tallahassee Classical School was approved by the state despite local opposition, but has since ended its relationship with Hillsdale, with teachers voicing concerns that Black students were disproportionately dismissed shortly before state assessment tests were administered.³⁰⁴ Livingston Classical Academy in Michigan also faced

²⁹⁹ Nathan Deal, *Board Approves Charter School Resolution*, GRAND JUNCTION DAILY SENTINEL (May 6, 2022), https://www.gjsentinel.com/news/western_colorado/board-approves-charter-school-resolution/article_9b8baf68-cc9c-11ec-a290-73b3b4339fec.html [https://perma.cc/A6DU-B6FX].

³⁰⁰ Meg Wingerter, *Lone Tree Charter School That Allows Staff to Carry Concealed Guns Will Leave Douglas County School District*, DENV. POST (Aug. 24, 2019, 11:27 AM), <https://www.denverpost.com/2019/08/23/ascent-classical-academy-armed-teachers> [https://perma.cc/J84W-5LFU].

³⁰¹ See Scott Weiser, *Conservatives Sweep Douglas County School Board Election*, DENV. GAZETTE (Nov. 13, 2021), https://denvergazette.com/news/conservatives-sweep-douglas-county-school-board-election/article_9e121316-3c47-11ec-9f14-53e296b0e453.html [https://perma.cc/3A4K-ASMQ].

³⁰² See *id.*; *Our Endorsed Candidates*, *supra* note 296 (indicating that the PAC endorsed Douglas County school board candidates Becky Myers, Kaylee Winegar, Christy Williams, and Mike Peterson).

³⁰³ Susan L. DeJarnatt, *Oversight, Charter Schools, and a Thorough and Efficient System of Public Education*, 70 S.C. L. REV. 435, 464–65 (2018). DeJarnatt also compared the school's vision of "moral character and virtue" to "a private preparatory school circa 1850" and characterized the proposed school as "near to a religious school in classical clothing." *Id.* at 465–66.

³⁰⁴ Saul, *supra* note 4.

opposition before being granted a charter and has likewise severed its ties with Hillsdale.³⁰⁵

Other charter schools have failed to launch. In 2017, Chicago Classical Academy (CCA), part of Hillsdale's BCSI, applied to open in Chicago's South Loop neighborhood.³⁰⁶ However, CCA faced steep competition; that year, Chicago Public Schools received nineteen other charter school applications,³⁰⁷ and state law permits no more than seventy charter schools to operate in the city at one time.³⁰⁸ School leaders acknowledged that "[o]pening a charter school in Chicago is no easy task,"³⁰⁹ and decided not to appeal their denial.³¹⁰

Texas offers a striking example of how a charter school can be pushed through the authorization process by using political connections despite repeated denials and overwhelming opposition. The Hillsdale affiliate Heritage Classical Academy (HCA)'s application for a charter has been denied three years in a row.³¹¹ Texas law requires charter schools to receive approval from the state board of education.³¹² During the most recent vote, the board expressed frustration with school leadership over perennial shortcomings of their application and voted to veto the application in a bipartisan vote.³¹³ The board's disunity regarding HCA compared to the other proposed charter schools debated during the

³⁰⁵ See Joyce, *supra* note 24; Letter from Steven Reagan, President, Livingston Classical Acad., to Student, Staff, and Parent Cmty. of Livingston Classical Acad. (June 18, 2021), <https://livingstonclassicalacademy.org/wp-content/uploads/2021/06/Letter-from-the-Board-6.18.2021.pdf> [<https://perma.cc/B7YG-V792>].

³⁰⁶ Juan Perez Jr., *Conservative Michigan College Backs Pitch for Chicago Charter School*, CHI. TRIB. (Mar. 30, 2017, 6:13 PM), <https://www.chicagotribune.com/news/breaking/ct-hillsdale-chicago-charter-school-met-20170330-story.html> [<https://perma.cc/G8WV-DHMS>].

³⁰⁷ *Id.*

³⁰⁸ See 105 ILL. COMP. STAT. ANN. 5/27A-4(b) (West 2022).

³⁰⁹ Karen Kidd, *Chicago Classical Academy Charter School Mulling Options Pending CPS Application Decision*, CHI. CITY WIRE (Dec. 4, 2017), <https://chicagocitywire.com/stories/511278630-chicago-classical-academy-charter-school-mulling-options-pending-cps-application-decision> [<https://perma.cc/5FTG-M9BV>] (quoting CCA leader Alice Epstein).

³¹⁰ Karen Kidd, *Chicago Classical Academy Charter School Down but Not Out, Would-Be Co-Founder Says*, CHI. CITY WIRE (Mar. 27, 2018), <https://chicagocitywire.com/stories/511371298-chicago-classical-academy-charter-school-down-but-not-out-would-be-co-founder-says> [<https://perma.cc/8EXR-C543>].

³¹¹ Brian Lopez & Kate McGee, *Texas State Board of Education Rejects Conservative-Backed Heritage Classical Academy Charter School for Third Time*, TEX. TRIB. (June 17, 2022, 2:00 PM), <https://www.texastribune.org/2022/06/17/sboe-charter-school-vote> [<https://perma.cc/H4BQ-YD4F>].

³¹² See TEX. EDUC. CODE. ANN. § 12.101(b) (West 2021).

³¹³ See Isaiah Mitchell, *State Board of Education Rejects Four Out of Five Charter School Applicants, Including Houston Classical School*, TEXAN (June 21, 2022), <https://thetexan.news/state-board-of-education-rejects-four-out-of-five-charter-school-applicants-including-houston-classical-school> [<https://perma.cc/X9QG-JH5D>] ("The final vote . . . was eight to six, with two Republicans joining every Democrat on the board.").

meeting is typical of the reaction to Hillsdale-backed schools; while votes concerning the other schools at the same meeting saw “near-unanimous agreement among the members, Heritage nearly split the fifteen-member board down the middle.”³¹⁴

This experience in Texas demonstrates the advantage of having an elected state board of education as the authorizer rather than, for instance, a governor-appointed charter school commission. However, the board is not immune from manipulation by outside forces. Two Republican board members who previously voted against HCA lost reelections to opponents who were funded by a PAC that received donations from the family of HCA’s chairman of the board. Another Republican who voted to deny HCA lost his position after the Texas Senate drew new state board districts.³¹⁵ If HCA applies a fourth time when the new board members take office, “its future—and that of other charter schools like it in Texas—looks bright.”³¹⁶

V. RECOMMENDATIONS

In this Article, we identified a series of unique areas of concern that arise from Hillsdale’s charter school incursion into the public school arena that were not anticipated, and were thereby hard to constrain, under the current charter school regulatory and administrative structure. In this Part, we identify how prior proposals to improve charter school accountability are unlikely to constrain charter school growth and practices. We then propose recommendations to mitigate unintended consequences of charter school expansion by use of regulation and litigation to ensure that charter schools serve the public interest.

A fundamental problem in the charter school sector is that there are limited incentives to monitor or hold charter schools accountable for their performance. Indeed, the rationale for charter schools is that the market, as demonstrated by enrollment, is the arbiter of success: schools that are successful will attract students, and schools that are not successful will fail to attract students and will close. In addition to the market test, some charters are not renewed for failure to meet state standards or are not financially viable, but this is relatively rare.

³¹⁴ *Id.*

³¹⁵ Edward McKinley, *Texas Conservatives Flex Muscle to Help Anti-Woke Charter School, a Sign of Things to Come*, HOUS. CHRON. (July 5, 2022, 3:35 PM), <https://www.houstonchronicle.com/politics/texas/article/Texas-conservatives-flex-muscle-to-help-anti-woke-17277096.php> [<https://perma.cc/72KL-LKFB>].

³¹⁶ *Id.*

A. Authorizers and Caps

Improving oversight and setting caps on the number of charters are commonly offered as mechanisms for holding charter schools to performance standards. States vary greatly in their charter school policies.³¹⁷ Restrictions on the number of authorizers limit the ability of charter applicants to shop for an authorizer. For example, a Hillsdale charter school in Wisconsin was ultimately granted a charter by a tribal college after being declined by every other authorizer.³¹⁸ In some states, there are numerous potential authorizers; in Michigan, for instance, over forty entities currently authorize charters.³¹⁹ Authorizers often benefit financially. Michigan's authorizers collect up to three percent of school funds from the charters they authorize.³²⁰ Even where authorizers are not paid, there are still implicit costs in terms of the time to conduct reviews and evaluate existing charters. As long as student demand is high, so that the school meets the market test, there is little upside for the authorizer to revoke a charter. In these situations, the lack of incentives for authorizers to conduct serious oversight and impose sanctions is obvious.

Caps on the number of charters force authorizers to make decisions among competing applications and may create incentives to monitor performance. For instance, Chicago limits the number of charter schools, creating intense competition among applicants and likely contributing to the denial of a Hillsdale affiliate's application in the city.³²¹

While well-intentioned and reasonable, limiting authorizers and imposing caps on charter schools are policies under state control, and state preferences and processes vary. In Massachusetts, a ballot initiative to raise the cap on the number of charter schools failed to pass.³²² In Tennessee, the governor and legislature simply created a state board that can overrule local boards as the charter school authorizer.³²³ With no cap on the number of charters that can be authorized in Tennessee, state board approval becomes a rubber stamp for charter schools, such as those affiliated with Hillsdale, that the governor supports. Texas similarly cedes

³¹⁷ See *supra* Section II.B.

³¹⁸ See *supra* Section IV.B.3.

³¹⁹ *Public School Academies by Authorizer*, MICH. DEP'T OF EDUC. (Sept. 13, 2022), https://www.michigan.gov/mde/-/media/Project/Websites/mde/PSAU/Maps-and-Lists/PSAs_by_Authorizer_2022_9_13.xlsx?rev=7cc653ebdb2464189e5592e3c97a39a&hash=11FD9831E6C88D8C88FD3264EF1640AC (last visited Jan. 11, 2023).

³²⁰ MICH. COMP. LAWS ANN. § 380.502(6) (West 2023).

³²¹ See *supra* Section IV.B.6.

³²² See Tran, *supra* note 79, at 865.

³²³ See *supra* Section IV.B.4.

authorization duties to a state school board.³²⁴ We do not consider proposals to enhance oversight or impose caps as providing sufficiently effective or feasible mechanisms to prevent the incursion of Hillsdale affiliates' charter schools.

B. *Financial Fraud and Financial Incentives*

The guaranteed revenue from public funding that follows the students and minimal oversight almost invites grifters and con artists to open charter schools. There are numerous cases of charter school operators engaging in financial fraud.³²⁵ Financial crimes can be addressed through the existing criminal justice system, and efforts can possibly be bolstered through use of the False Claims Act.³²⁶

A subtler form of financial malfeasance is through real estate arrangements. Investors and hedge funds have found charter schools to be attractive real estate investments.³²⁷ Because buildings to house charter schools are in many cases renovated at public expense, including in Tennessee, real estate developers benefit from charter schools through rental arrangements or with the prospect of developing neighborhoods or selling off the school property later. The state board appointed by Tennessee Governor Lee includes a real estate developer whose official profile advertises that he develops neighborhoods near high-performing schools.³²⁸ Having authorizers with a financial interest in development creates a substantial conflict of interest. This includes an incentive to authorize charter schools in communities with the least need for educational improvement, such as in Buckhead, Georgia, an affluent and mostly white neighborhood of Atlanta that is home to a Hillsdale member school.³²⁹

We therefore propose that individuals with any financial conflicts of interest, no matter how seemingly minor, be prohibited from serving as either an authorizer or a board member of a charter school. Charter legislation in some states mandates disclosures of conflicts of interest. For example, Delaware requires charter school founders and boards of directors to disclose in their application “any ownership or financial

³²⁴ See *supra* Section IV.B.6.

³²⁵ See *supra* Section I.D.

³²⁶ See Chapman, *supra* note 43, at 658–66.

³²⁷ See *supra* Section I.D.

³²⁸ Derwin Sisnett, *supra* note 279.

³²⁹ See generally ATLANTA CLASSICAL ACAD., <https://atlantaclassical.org> [<https://perma.cc/F3DF-LMUB>]; John Ruch, *Buckhead by the Numbers: A Look at the Latest U.S. Census Data*, BUCKHEAD (June 22, 2022), <https://www.buckhead.com/buckhead-by-the-numbers-a-look-at-the-latest-u-s-census-data> [<https://perma.cc/K6R4-WJCR>].

interest in the charter” and to continuously disclose such interests for the duration of the charter.³³⁰ We recommend that states extend legislation to forbid such financial interests.

C. *Litigation Proposals*

Schools are comprised of students and infrastructure, but without teachers, administrators, and staff, the school would not exist. Our proposal is to activate private incentives to litigate as a means of holding charter schools accountable to serving the public interest. The legal environment regarding the public-private boundaries between public charter schools and their independent operators remains unsettled. Gaps that limit effective monitoring and enforcement of laws and regulations governing charter schools may become exposed through litigation and may prompt voters to demand change through legislative action or constitutional amendments.

1. Hiring Practices

Investigative reporting revealed that Hillsdale charter schools are overwhelmingly staffed by graduates of Hillsdale College.³³¹ Because of Hillsdale’s heavy reliance on its own graduates, its employment practices may fall short in compliance with employment discrimination law or equal-opportunity obligations.

The charter school itself will bear liability in employment discrimination charges.³³² Because charter school revenue is set by the number of students enrolled, litigation expenses and damages awards will reduce net revenue. The threat of litigation should therefore incentivize charter schools to maintain compliance with Title VII, even if that means hiring and retaining teachers who are unmarried, pregnant, transgender, or Muslim.

³³⁰ DEL. CODE ANN. tit. 14, § 511(q) (West 2023).

³³¹ See Williams, *supra* note 34 (“They said about 80 percent [of teachers] would come from Hillsdale College where they are graduates.” (quoting statement by deputy superintendent of Jackson-Madison County)).

³³² See, e.g., Press Release, U.S. Equal Emp. Opportunity Comm’n, EEOC Sues the Guidance Charter School for Pay Discrimination (Mar. 22, 2018), <https://www.eeoc.gov/newsroom/eeoc-sues-guidance-charter-school-pay-discrimination> [<https://perma.cc/AR6J-FM89>].

2. Board of Directors' Responsibility and Accountability

Like teachers, Hillsdale boards of directors are overwhelmingly drawn from the Hillsdale universe.³³³ Most charter schools are organized as nonprofits, and nonprofit boards of directors are provided with some protection against lawsuits deriving from their roles on nonprofit boards.³³⁴ Boards of directors of for-profit charter schools have the same limited liability protection available to board members of any other for-profit organization. The protection is not comprehensive for boards of either nonprofit or for-profit charter schools if they fail to monitor and prevent illegal activities.³³⁵ Holding individual board members liable for failing to monitor and prevent illegal discrimination against staff or students, or for failing to detect financial fraud, would incentivize greater compliance with the law. This liability regime would not discourage parents, teachers, or community members who wish to improve public education from serving on a board but would deter disengaged, nonlocal actors who are not motivated by that goal.

3. Oversight Incentives

Any party that receives a financial benefit from their role in approving or sustaining a charter school should be considered potentially liable over failure to comply with laws. The analogy here is to workers' compensation. Under the workers' compensation system, workers injured on the job cannot sue their employers for workplace accidents and instead receive compensation payments and coverage of medical expenses according to a schedule.³³⁶ However, workers' compensation does not protect third parties from liability. If, for example, a construction worker falls off a defective ladder, the employee may not sue their employer but may sue the manufacturer of the defective ladder.

In analogy to workers' compensation, any third party to a charter school should not be exempt from lawsuits. This includes authorizers who receive a recurring payment for their role as authorizers.

³³³ See *supra* discussion accompanying note 271.

³³⁴ See generally NONPROFITS INS. ALL., DIRECTORS AND OFFICERS (D&O): KEY FACTS ABOUT INSURANCE AND LEGAL LIABILITY 5 (2019), https://secure.insurancefor nonprofits.org/AMSCentral/ResourceDocuments.cfm?var_PageAction=View&var_ID=60 [<https://perma.cc/RUJ9-5LHF>].

³³⁵ See Cindy A. Schipani & George J. Siedel, *Legal Liability: The Board of Directors*, 1 FAM. BUS. REV. 279, 281–83 (1988).

³³⁶ See generally Suzanne E. Macpherson, *Workers' Compensation: The Exclusive Remedy Provision*, 30 HOW. L.J. 581, 583 (1987).

Authorizers, such as school boards, that do not receive compensation for authorizing will be exempt from lawsuits. Similarly, real estate developers, investors, or property owners who play any constructive role in a charter school's location or continuance will not be exempt from liability.

CONCLUSION

Publicly funded, privately operated charter schools are an entrenched part of the educational landscape. We are not proposing that they be eliminated. But standards and regulations established for first-wave charter schools are not robust enough to withstand entry or monitor compliance with federal and state laws of charter schools that have an agenda that is in opposition to public policy. We provide a review of the wide range of state practices with respect to caps, authorizing entities, oversight, and management and financial practices. We provide examples of how easily a mission-driven charter school network, such as those affiliated with Hillsdale, can exploit loopholes and exert its substantial political and financial strength despite facing considerable opposition. Existing laws are simply insufficient to stop a charter school network on its march to destroy public education and replace it with a publicly funded version of what would otherwise be a private conservative religious education. We propose that litigation be mobilized in the public interest to enforce antidiscrimination laws and remove self-dealing conflicts of interest. Imposing liability on decisionmakers and stakeholders of mission-driven charter schools would realign these schools' interests with the public's interest in providing equitable education opportunities.