QUASI-STATE ACTOR: HOW THE APPLICATION OF STATE ACTION DOCTRINE CAN FILL A REGULATORY GAP IN NEW YORK CHARTER SCHOOL LEGISLATION

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INTRODUCTION

"It can hardly be argued that either students or teachers shed their constitutional rights . . . at the schoolhouse gate."[1] But how are their rights affected when they walk through the quasi-public schoolhouse gate of a charter school? State legislators have already codified the rights that should not be shed by providing detailed charter-enabling legislation requiring that certain rights be upheld in charter schools. However, these rights are currently under-enforced because statutory enforcement mechanisms focus only on academic standards. The theory behind the charter school movement never contemplated how to regulate academically successful charter schools that are problematic on other metrics. This theoretical oversight was baked into statutory enforcement mechanisms by state legislatures, and has left large portions of the state statutes under-enforced.[2] In fact, currently, the primary legislative enforcement mechanism is charter revocation, a solution that is both unlikely and undesirable for a school that is academically successful.[3] This paper argues that, as charter schools have become integral to the United States' educational landscape, the use of charter revocation as the sole legislative enforcement mechanism has left certain provisions of charter law unenforced.

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1. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

2. *See generally* Dylan P. Grady, *Charter School Revocation: A Method for Efficiency, Accountability, and Success*, 41 J.L. & EDUC. 513 (2012) (arguing that revocation statutes are vague and give authorizers high levels of discretion, and that states should adopt proposed amendments to ensure poor preforming schools are closed); Stephen D. Sugarman & Emlei M. Kuboyama, *Approving Charter Schools: The Gate-Keeper Function*, 53 ADMIN. L. REV. 869 (2001) (noting that although chartering bodies are the "gate-keepers" which determine which schools receive charters and which schools keep them, states have been insufficiently attentive to the financial and staff requirements needed to perform these functions properly). *See also* EMILY VAN DUNK & ANNELIESE M. DICKMAN, SCHOOL CHOICE AND THE QUESTION OF ACCOUNTABILITY (2003). Van Dunk and Dickman's five-year study of Milwaukee's voucher program concluded that school choice will not consistently improve education unless some structured accountability is included in choice policies. *Id.* The authors found that supply and demand is a poor accountability mechanism, public schools have not responded to competition, and empowered parents need information which is difficult to obtain. *Id.*

3. Grady, *supra* note 2, at 522, 538–42 (noting that when charter schools fail to demonstrate success, the theoretical response is to close the schools rather than creating more regulations because the state prefers revocation over regulation since the government lacks resources, and additionally "faces obstacles in using the limited regulatory mechanisms that charter authorizing and revocation statutes provide").

State action doctrine, coupled with § 1983 claims, presents one potential solution to this under-enforcement of statutory rights in charter schools. Since charter-enabling legislation purposefully left certain actions by charter schools unregulated, those actions, including most employment decisions, do not qualify as "state action," and therefore are not capable of being regulated by Constitutional provisions which only apply to state actors. However, the regulatory entanglement state action test addresses the quasi-public nature of charter schools by allowing constitutional claims to go forward when the right being affected is properly entangled with state regulation. Under this doctrine, courts can and should act as additional enforcers of legislation. However, there is currently no comprehensive and consistent understanding of how to effectively frame the state action doctrine. Thus far, courts have approached the question with too large a lens: either charter schools are always state actors or they are never state actors. This paper aims to provide a reasoned framework within which courts should analyze the state action doctrine as it applies to charter schools.

Given that charter schools are an experiment that is still percolating, it is important to allow states to adopt different approaches so that best practices can be evaluated. Determining when a charter school is considered a state actor requires a content-based inquiry of the enabling legislation. While the regulatory under-enforcement of non-academic standards is common across all states, the content of the non-academic standards of each state's charter-enabling statutes varies greatly.[4] This paper will explore in-depth the approaches and effects of enforcing non-academic regulations, such as student discipline, in academically successful charter schools in New York. By closely examining one specific jurisdiction, this paper will provide a lens into the ways in which the law is currently developing and the best course for the doctrine.

New York is a particularly good case study for a number of reasons. The New York City traditional public school system "[by] any reasonable measure of educational effectiveness . . . is not working well."[5] As of 2014, there were 233 charter schools educating over

4. Because any application of state action doctrine must be sensitive to operate within the bounds of a given state's charter enabling legislation this paper focuses on New York's charter enabling legislation and provides a model for the state to fill its regulatory gap. Exploring character statute standardization and statutory overhauls is a topic left to another paper.

5. DIANE RAVITCH & JOSEPH P. VITERITTI, *New York: The Obsolete Factory*, *in* NEW SCHOOLS FOR A NEW CENTURY: THE REDESIGN OF URBAN EDUCATION 17 (Diane Ravitch & Joseph P. Viteritti eds., 1997). Specifically, the authors note that New York City schools suffer from an unresponsive bureaucracy, decrepit and overcrowded

90,000 students in New York.[6] New York charter schools have been successful, and the system has been praised as one of the nation's most accountable.[7] Given the documented dysfunction of New York public schools,[8] the state has an interest in maintaining the academic successes achieved by its charter schools. These academic successes give this case study its focus. By studying a jurisdiction that is hailed for its academic regulation, the question of how to regulate non-academic standards comes to the fore. Additionally, there has been significant recent attention on disciplinary practices in academically successful charter schools in New York,[9] bringing the regulatory gap this paper examines into sharp focus. For students facing suspension, which is a key disciplinary tool in many charter schools,[10] a lack of enforcement may create rampant due process violations. Such violations are especially problematic because "'[e]ducation is perhaps the most important function of state and local governments' and the total exclusion from the educational process for more than a trivial period . . . is a serious event in the life of the suspended child."[11]

Moreover, charter schools are likely to only keep growing in the coming years. Charter schools are filling an educational void, and some have produced academic success.[12] As of November 13, 2016, President Donald Trump has vowed heavy support for school choice, including reprioritizing $20 billion of the current federal budget towards school choice. He has called for a "national goal of providing school choice to every one of the 11 million school aged children living in poverty," and has claimed that "school choice is the civil rights

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schools, poor management of budget, decentralization that allows "schools of the city to develop into arenas for adult ambition and greed rather than as institutions dedicated to the well-being of children," and large achievement gaps. *Id.* at 17–36.

6. Nat'l All. for Pub. Charter Schs., *New York: Total Number of Schools*, PUB. CHARTER SCH. DASHBOARD, http://www.publiccharters.org/dashboard/schools/page/overview/state/NY/year/2014 (last visited Aug. 13, 2017).

7. *See infra* Section II.B.

8. *See generally* DIANE RAVITCH, THE GREAT SCHOOL WARS: A HISTORY OF NEW YORK CITY PUBLIC SCHOOLS (2000).

9. *See infra* Section II.C.

10. *See infra* Section II.C.

11. Goss v. Lopez, 419 U.S. 565, 576 (1975) (internal citation omitted).

12. *See, e.g.*, Susan Dynarski, *Urban Charter Schools Often Succeed. Suburban Ones Often Don't*, N.Y. TIMES, Nov. 20, 2015, at BU6 ("In urban areas, where students are overwhelmingly low-achieving, poor and nonwhite, charter schools tend to do better than other public schools in improving student achievement."); Adam Ozimek, *The Unappreciated Success of Charter Schools*, FORBES (Jan. 11, 2015), http://www.forbes.com/sites/modeledbehavior/2015/01/11/charter-success/#734b356c70f4 (noting that charter schools do better at educating poor students and black students than traditional public schools, and are improving over time).

issue of our time."[13] However, as charter schools come to occupy more of the educational landscape, it is important to understand how rights are enforced, or not enforced, within these quasi-public schools.

This paper suggests that the regulatory void left by charter-enabling legislation should be filled by the courts, which should not shy away from finding charter schools to be state actors in certain situations. The quasi-public nature of charter schools begs the question: which parts are public, and which are private? This distinction has already been laid out in the charter-enabling legislation, but courts have been left without guidance as to how to apply these legislative determinations. Use of the regulatory entanglement state action test cabins the judicial inquiry in a state's statute, allowing the will of the people to prevail. Additionally, the relatively recent advent of charter schools, combined with the fact that a charter school's success cannot be adequately evaluated until after a student has graduated college, means that the efficacy of the charter school experiment will remain unverified for years.[14] As such, it is prudent to allow states to experiment and to enable the courts to serve as a forum to have the various voices be heard on this issue.[15] It is better, in this regard, to enforce

13. *Education*, TRUMP PENCE: MAKE AMERICA GREAT AGAIN! 2016 (Nov. 13, 2016, 8:13 AM), https://www.donaldjtrump.com/policies/education/ [https://web.archive.org/web/20161113081346/https://www.donaldjtrump.com/policies/education/].

14. *See, e.g.*, Andrew J. Rotherham, *KIPP Schools: A Reform Triumph, or Disappointment*, TIME (Apr. 27, 2011), http://content.time.com/time/nation/article/0,8599,2067941,00.html (noting that KIPP had an 89% college matriculation rate, but only 33% of those students completed college). To read KIPP's response to this data, which includes mentoring KIPP graduates in college on their study habits and course selection and meeting with their advisors, see Alexandra Starr, *Beyond College-Ready: Top Charter Schools Support Graduates in College*, NPR (June 7, 2015), http://www.npr.org/sections/codeswitch/2015/06/07/412304594/beyond-college-ready-top-charter-schools-support-graduates-in-college.

15. *See, e.g.*, *The Truth in the Transcript: In Speak Now, Kenji Yoshino Celebrates* Hollingsworth v. Perry, N.Y.U. L. NEWS (Apr. 21, 2015), http://www.law.nyu.edu/news/ideas/kenji-yoshino-speak-now-marriage-equality-on-trial (advocating that the "next great legal controversy" should be tried in the courtroom, not hashed out by politicians). Yoshino contrasts rigorous trial proceedings with misleading ad campaigns: "In media debates, or even academic debates, a smart person can always run out the clock or pivot away from the question and not really have to answer it . . . . Whereas if you're on the stand, under oath, under penalty of perjury, and you're being cross-examined for open-ended periods of time, you simply have to answer the question." *Id.* However, in order to have public debates on charter schools, cases would need to be tried, and currently less than two percent of cases make it to trial. *Id.* Overcoming the reluctance of courts in finding charter schools to be state actors is one important barrier to passing summary judgment, but there are many other forces preventing cases from reaching trial. *See* Patricia Lee Refo, *The Vanishing Trial*, 30 J. SEC. LITIG. A.B.A. 2, 2–4 (2004), https://www.americanbar.org/content/dam/aba/publishing/litigation_journal/04winter_openingstatement.authcheckdam.pdf (citing large

students' rights through the courts rather than through statutory overhaul. If courts hold charter schools to be state actors, students would be able to enforce their rights with constitutional claims, instead of being required to proceed through statutory claims, which are severely under-enforced.[16]

In Part I, this paper surveys a regulatory mismatch that is common nationwide to all charter school legislation. In Part II, the paper uses New York State charter-enabling legislation to illustrate the problems that arise from this mismatch. Part III argues that § 1983 claims are a good solution to the under-enforcement problem because state action doctrine will maintain autonomy for charter schools in specific areas. Additionally, this Part will show that state action doctrine nicely polices the line the legislature clearly drew between the public and private actions of charter schools. Part IV turns back to New York to illustrate an application of the regulatory entanglement test for state action analysis to one state's charter-enabling legislation.

I.
THEORETICAL GAP: ENFORCEMENT OF NON-ACADEMIC REGULATIONS IN CHARTER SCHOOLS

Charter schools continue a long tradition of local control over education.[17] Because state governments hold local authority over education,[18] each state must pass its own enabling legislation to establish charter schools. Each state decides how, and to what extent, to enable private parties to found charter schools.[19] Although this legislation

caseloads, expense, mindsets, alternative dispute resolution mechanisms, and the rise in summary judgment as reasons for the disappearing civil trial).

16. *See generally* Maren Hulden, Note, *Charting a Course for State Action: Charter Schools and § 1983*, 111 COLUM. L. REV. 1244 (2011) (arguing charter schools can be state actors for some purposes and not others under current Supreme Court doctrine); Jason Lance Wren, Note, *Charter Schools: Public or Private? An Application of the Fourteenth Amendment's State Action Doctrine to These Innovative Schools*, 19 REV. LITIG. 135 (2000) (presenting the arguments that charter schools are or are not state actors, but not assessing whether charter schools can be state actors for some purposes and not others). Although Hulden's argument is similar to mine, Hulden does not assess the regulatory enforcement gap, New York law, or how the statutory scheme and state action doctrine are natural bedfellows.

17. *See infra* Section II.A.

18. *The Federal Role in Education*, U.S. DEP'T OF EDUC. (May 25, 2017), https://www2.ed.gov/about/overview/fed/role.html

19. *See, e.g.*, *How and Why We Group States*, NAT'L ASS'N OF CHARTER SCH. AUTHORIZERS (Aug. 3, 2016), http://www.qualitycharters.org/research-policies/archive/how-and-why-we-group-states/ [https://web.archive.org/web/20160803052456/http://www.qualitycharters.org/research-policies/archive/how-and-why-we-group-states/] (grouping states into three categories—those with district authorizers, those with many authorizers, and those with few authorizers—and noting that the differ-

varies greatly, all charter-enabling legislation aims to hold charter schools responsible for reaching academic goals.[20] Therefore, charter-enabling legislation established enforcement procedures aimed solely at upholding academic standards.[21] However, all charter-enabling legislation also mandates that charter schools comply with certain non-academic rules.[22] It is these non-academic rules that currently remain under-enforced.

A. All Charter-Enabling Legislation Has One Main Goal: Academic Achievement

All chartering statutes are similar in that charter schools are created to accomplish a task: academic achievement. The idea is that, by regulating only outcomes, charters would allow private innovation in teaching methods to flourish.[23]

Charter schools are a response to an academic crisis in the United States. In 1983, at the behest of Secretary of Education Terrell Bell, the National Commission on Excellence in Education issued a report warning that the United States' education system was failing and in drastic need of innovative reforms.[24] The charter school movement answered this call for reform with the innovation of a new kind of school.[25]

Ray Budde unveiled his idea for charter schools at a conference for school reforms in Minnesota in 1988.[26] Budde defined a charter as "an instrument in writing from the sovereign power of a . . . country grant or guaranteeing rights, franchises, or privileges."[27] Looking to

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ences in authorizers oversight of charter schools are more nuanced than the amount of authorizers and are affected by the strength of policies and practices).

20. *See infra* note 31.

21. *See infra* Section I.A.

22. *See infra* Section I.B.

23. *See* RAVITCH & VITERITTI, *supra* note 5, at 6 ("In exchange for autonomy, a school is held to a degree of accountability that is generally unheard of in public education."); *see also* Joseph P. Viteritti, *Defining Equity: Politics, Markets, and Public Policy*, *in* SCHOOL CHOICE: THE MORAL DEBATE (Alan Wolfe ed., 2003) (describing the market-based idea behind the school choice movement).

24. Edward Graham, *"A Nation at Risk" Turns 30: Where Did it Take Us?*, NEA TODAY (Apr. 25, 2013), http://neatoday.org/2013/04/25/a-nation-at-risk-turns-30-where-did-it-take-us-2/.

25. *See* Robert C. Bulman & David L. Kirp, *The Shifting Politics of School Choice*, *in* SCHOOL CHOICE AND SOCIAL CONTROVERSY: POLITICS, POLICY, AND LAW 52 (Stephen D. Sugarman & Frank R. Kemerer eds., 1999); *see also* Ray Budde, EDUCATION BY CHARTER: RESTRUCTURING SCHOOL DISTRICTS: KEY TO LONG-TERM CONTINUING IMPROVEMENT IN AMERICAN EDUCATION 11 (1988).

26. *See* Budde, *supra* note 25.

27. *Id.* at 48 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1971)).

the Age of Exploration in the early seventeenth century as a model of success, Budde compared creating schools to chartering ships for a mission. Budde identified eight elements of chartering that could be applied to education: (1) a grantor; (2) a grantee with a plan; (3) a degree of risk to the grantee because charters can be revoked if the mission is unsuccessful; (4) competition is created because there is a risk of losing the charter to a better grantee; (5) supplies and resources to complete the enterprise of the charter are provided by the grantor; (6) a limited timeframe to complete the charter mission; (7) rewards for the explorer are identified; and (8) the means by which the explorer is accountable to the grantor are established.[28] Budde's vision was that the state would grant a charter to a visionary who wanted to explore an idea for a better school. If a school did not deliver on its promises, its charter would not be renewed, making charters accountable for their academic achievement.[29]

Accountability for academic achievement has transcended theory and become the cornerstone of charter legislation. Charter schools gained diverse political support, not because of curriculum or pedagogy, but by "changing the fundamental governance and management structure of schooling: unleashing the creative potential of educators and communities, nurturing diverse options for families, encouraging parents to choose what is best for their children, and making schools directly accountable to the people who use them."[30] Currently, "[a] school's charter is reviewed periodically (typically every 3 to 5 years) by the group or jurisdiction [called charter authorizers] that granted it and can be revoked if guidelines on curriculum

28. *Id.* at 48–52.

29. *Id.* at 47–52; *see* RAVITCH & VITERITTI, *supra* note 5, at 8–10 (providing an overview of the market model, public school model, and equal opportunity model of education); Viteritti, *supra* note 23, at 15–21 (describing the market-based idea behind the school choice movement).

30. THE CHARTER SCHOOL EXPERIMENT: EXPECTATIONS, EVIDENCE, AND IMPLICATIONS 2 (Christopher A. Lubienski & Peter C. Weitzel eds., 2010). This traditional support may be eroded by the advent of education management organizations (EMOs). According to the Center for Education Reform, only nineteen EMOs ran 350 schools in 2001–2002 (approximately 15% of the nation's charter schools) and are educating approximately 25–30% of all charter school students. Bryan Hassel, *The Future of Charter Schools*, *in* THE FUTURE OF SCHOOL CHOICE 193–98 (Paul E. Peterson ed., 2003). EMOs produce economies of scale within charter school educations. However, EMOs' drive to scale could limit the out-of-the-box approaches seen in mom-and-pop charter schools because "[t]he companies' own internal dynamics . . . push towards incrementalism." This analysis is further complicated by the fact that some EMOs are for-profit companies. *See id.* at 203.

and management are not followed or if the standards are not met."[31] Autonomy has come to be seen as the trade-off for accountability.[32] Every state's enabling legislation creates a right to revoke a charter if academic standards are not met.[33] This "performance-based oversight" is a common feature of all charter school legislation.[34]

B. Charter Schools Must Follow Some Non-Academic Regulations

Although the grand theory of charter schools is academic accountability, all states additionally require charter schools to meet certain non-academic regulations. For example, charter schools within New York City must abide by the same standards as public schools for health, sanitary, safety, local zoning, land use, and building code regu-

31. NAT'L CTR. FOR EDUC. STAT., U.S. DEP'T EDUC., THE CONDITION OF EDUCATION 2015, at 70, https://nces.ed.gov/pubs2015/2015144.pdf.

32. *See id.* ("The charter exempts the school from certain state or local rules and regulations. In return for flexibility and autonomy, the charter school must meet the accountability standards outlined in its charter."); PAUL T. HILL & ROBIN J. LAKE WITH MARY BETH CELIO, CHARTER SCHOOLS AND ACCOUNTABILITY IN PUBLIC EDUCATION 3–4 (2002); JOE NATHAN, CREATING HOPE AND OPPORTUNITY FOR AMERICAN EDUCATION 1 (1996) ("Unlike traditional public schools, however, [charter schools] are held accountable for achieving educational results. In return, they receive waivers that exempt them from many of the restrictions and bureaucratic rules that shape traditional public schools.").

33. *See, e.g.*, ARK. CODE ANN. § 6-23-105 (West 2017) ("The authorizer may place a public charter school on probation or may modify, revoke, or deny renewal of its charter if the authorizer determines that the persons operating the public charter school . . . Failed to meet academic or fiscal performance criteria deemed appropriate and relevant for the public charter school by the authorizer."); CAL. EDUC. CODE § 47604.5 (West 2017) ("The state board, whether or not it is the authority that granted the charter, may, based upon the recommendation of the Superintendent, take appropriate action, including, but not limited to, revocation of the school's charter, when the state board finds any of the following . . . Failure to improve pupil outcomes across multiple state and school priorities identified in the charter."); CONN. GEN. STAT. ANN. § 10-66bb (West 2017) ("The State Board of Education may revoke a charter if a charter school has failed to . . . demonstrate satisfactory student progress, as determined by the commissioner."); DEL. CODE ANN. tit. 14, § 516 (West 2017) ("Approved charters shall be subject to revocation or probation, after the exercise of due diligence and good faith, only for the following reasons . . . The school fails to comply with its charter or to satisfy, in its operation of the school, the criteria set forth in § 512 [setting forth minimum academic achievement standards] of this title."); FLA. STAT. ANN. § 1002.33(8)(a) (West 2017) ("The sponsor shall make student academic achievement for all students the most important factor when determining whether to renew or terminate the charter."). To read more examples, see, e.g., GA. CODE ANN. § 20-2-2068 (West 2017); IDAHO CODE ANN. § 33-5209(C) (West 2017); IND. CODE ANN. § 20-24-9-4 (West 2016); IOWA CODE ANN. § 256F.8 (West 2017); KAN. STAT. ANN. § 72-1907 (West 2017); LA. STAT. ANN. § 17:3972(A) (2017); MINN. STAT. ANN. § 124E.10 (West 2017); MO. ANN. STAT. § 160.405 (West 2016); NEV. REV. STAT. ANN. § 388A.300 (West 2016); N.H. REV. STAT. ANN. § 194-B:16 (2017).

34. HILL & LAKE WITH CELIO, *supra* note 32, at 2. The ability of the government to evaluate academic performance will be saved for another paper.

lations.[35] New York State charter schools are subject to freedom of information laws, personal privacy protection laws, and many provisions for managing conflicts of interest of municipal officers and employees.[36] Arizona provides that a charter school must be "nonsectarian in its programs, admission policies and employment practices and all other operations."[37] Colorado requires charter schools to implement a bully prevention policy and educational curriculum.[38] These non-academic regulations vary from state to state, but each state's charter-enabling legislation includes some non-academic standards or rules.

C. Enforcement Is Focused Almost Exclusively on Academic Achievement

Consistent with the origin of charter schools, every state's statutory enforcement mechanism is aimed at enforcing the performance of academic standards. In the vast majority of states, though, the only available enforcement mechanism is revocation, or threat of revocation, of the charter.[39]

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35. N.Y. EDUC. LAW § 2853(3)(a-1)–(a-2) (McKinney 2017).
36. *Id.* § 2854(1)(e)–(f).
37. ARIZ. REV. STAT. ANN. § 15-183(E)(2) (2017).
38. COLO. REV. STAT. ANN. § 22-30.5(116) (West 2017).
39. *See, e.g.*, CAL. EDUC. CODE § 47600 (West 2017); FLA. STAT. ANN. § 1002.33 (West 2017); LA. STAT. ANN. § 17:3981.2 (2017); MINN. STAT. ANN. § 124E.10 (West 2017); NEV. REV. STAT. ANN. § 386.5351 (West 2016). Some states have emergency takeover provisions. *See, e.g.*, COLO. REV. STAT. ANN. § 22-30.5-703 (West 2017); HAW. REV. STAT. ANN. § 302D-17 (West 2016) (charter authorizer can "take appropriate corrective actions or exercise sanctions short of revocation in response to apparent deficiencies in public charter school performance or legal compliance" such as reconstituting the governing board of the charter school and creating a voting majority or "direct the governing board and the charter school to take appropriate action to immediately address serious health and safety issues that may exist at a charter school in order to ensure the health and safety of students and employees and mitigate significant liability to the State"); MICH. COMP. LAWS ANN. § 380.507(7) (West 2016) ("[B]efore an authorizing body revokes a contract, the authorizing body may consider and take corrective measures to avoid revocation. An authorizing body may reconstitute the public school academy in a final attempt to improve student educational performance or to avoid interruption of the educational process. An authorizing body shall include a reconstituting provision in the contract that identifies these corrective measures, including, but not limited to, canceling a contract with an educational management organization, if any, withdrawing approval of a contract under section 506, or appointing a new board of directors or a trustee to take over operation of the public school academy."). Arizona law permits adjusting funding, including withholding up to ten percent of monthly state aid. ARIZ. REV. STAT. ANN. § 15-185(H) (2017). Mississippi authorizers can create a corrective plan or issue sanctions or, where warranted, require a "charter school to develop and execute a corrective plan." MISS. CODE ANN. § 37-28-31(4) (West 2017). Some states have nebulous provisions allowing a government agency to adopt rules to ensure compliance. *See, e.g.*, 105 ILL.

New York's statutory scheme is typical to that of many states.[40] Charter school entities and the Board of Regents, which is responsible for the general supervision of educational activities within the state, are empowered to oversee charter schools. The Board of Regents and the charter entities can visit, examine, and inspect any charter school that is under their oversight and inspect its records "to ensure that the charter school is in compliance with all applicable laws, regulations and charter provisions."[41] However, the Board of Regents' and charter entity's only real power to enforce compliance is to terminate, or threaten to terminate, the charter.[42] Although technically these entities can also revoke charters for violating non-academic standards, revocation is a harsh sanction for an academically-successful school. It would be imprudent to close down a school that is successfully educating its students, possibly forcing those students to attend a failing traditional public school where they will receive an inferior education. In practice, charter-enabling entities do not remove charters from academically successful schools.[43]

COMP. STAT. ANN. 5/27A-13 (West 2016); MASS. GEN. LAWS ch. 71, § 89(mm) (West 2017). These emergency takeover provisions could be a possible solution to the regulatory gap, but are not discussed in this paper because the existence and use of these provisions are entirely different questions. This topic should be further explored as part of the charter school experiment.

40. *Compare, e.g.*, N.Y. EDUC. LAW ch. 16 tit. 2 art. 56, *with* ALASKA STAT. ANN. ch. 03 art. 2, CAL. EDUC. CODE tit. 2, div. 4 Part 26.8 (West 2017), *and* MINN. STAT. ANN. ch. 124E (West 2017). See also *supra* note 39 for a detailed analysis of the similarities in revocation.

41. N.Y. EDUC. LAW § 2853(2).

42. *See id.* § 2855 (laying out the ability of the Board of Regents to revoke or threaten to revoke a school's charter). For an analysis of why this provision will not protect students' rights, see *infra* Section II.D.

43. *See Legislative Review of Charter Schools and SUNY's Designation as a Charter School Authorizer*, CHARTER SCHS. INST., STATE UNIV. N.Y. (2017), https://www.suny.edu/about/leadership/board-of-trustees/meetings/webcastdocs/LegislativeReviewHistoryofSUNYAuthorizing.pdf ("The Institute has recommended, and the Trustees have not renewed, i.e., closed, nine charter schools to date for failing to meet the requirements of their academic Accountability Plans and/or the Act."); *Policies for the Renewal of Not-for-Profit Charter School Education Corporations and Charter Schools Authorized by the Board of Trustees of the State University of New York,* STATE UNIV. N.Y. (2013), https://www.suny.edu/about/leadership/board-of-trustees/meetings/webcastdocs/Tab%202c-Policies%20for%20Renewal%20of%20Not%20for%20Profit%20Charter%20School.pdf.

II.
NEW YORK CASE STUDY: PROBLEM

A. *Studying One Jurisdiction Illustrates Important Principles*

Charter schools continue the tradition of local control over education, which creates significant variation in the regulation of education from state-to-state. The doctrine of local control posits that the state legislature has plenary powers over education.[44] These powers can be delegated.[45] In traditional public schools, the power to administratively regulate education has been delegated to local school districts, and the extent of delegation has varied in different states.[46] The U.S. Department of Education defines "a *public charter school*" as "a publicly funded school that is typically governed by a group or organization under a legislative contract (or charter) with the state or jurisdiction."[47] Although the powers are delegated differently than with traditional public schools, a "legislative contract" still assumes that the state has plenary powers over education.[48] And thus, charters continue to promulgate a theory of "local control."

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44. *See* MARTHA M. MCCARTY & NELDA SAMBRON-MCCADE, PUBLIC SCHOOL LAW: TEACHERS' AND STUDENTS' RIGHTS 5–11 (6th ed. 2009); *see also* Great Sch. P'ship, *Local Control*, GLOSSARY OF EDUC. REFORM (Feb. 18, 2016), http://edglossary.org/local-control/ ("[T]he Tenth Amendment . . . has been widely interpreted as delegating primary authority and control over the regulation, governance, and operation of public schools to states. . . . The role that state governments and agencies play in school governance and management varies from state to state, with some states exerting more direct control over public schools and other states allowing local governing bodies to adopt policies and perform governance functions for the schools in their district or municipality.").

45. *See* Great Sch. P'ship, *supra* note 44.

46. *See id.*

47. NAT'L CTR. FOR EDUC. STAT., U.S. DEP'T EDUC., *supra* note 31, at 70.

48. Gillian E. Metzger focuses on this point to attack charter school regulation using the non-delegation doctrine. She argues that "[a]t the same time, current [state action] doctrine applies such protections [of the Consitution] when they are often least needed—that is, when governments exercise close supervision and thus constitutional norms can be enforced by targeting government action directly. Worse still, focusing on government involvement creates perverse incentives for governments to forego close oversight of their private partners, even though such oversight is an important means for ensuring that private actors adhere to constitutional requirements." Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1371 (2003). Her solution is that if there is a private delegation of government power, the court must ask if it is adequately structured to preserve constitutional accountability. *Id.* at 1367. These structures allow flexibility for government: The government can either pass a statutory surrogate (such as Title VII), review decisions (which itself serves as the manner in which potential plaintiffs could enforce their rights), or sanction the administrative process. *Id.* at 1374. "Other means of satisfying constitutional accountability demands would be to structure the delegation so that no private delegate exercises monopolistic or quasi-monopolistic control over access to government benefits, or to

As creatures of state statutes, charter schools are created and operate differently from state to state.[49] Although the regulatory enforcement of granting and revoking charters is similar nationwide, the fact that each state passes different enabling legislation for charter schools means that the definition of "charter school" in one state will differ from that of another state.[50] Charter schools can be viewed as a way to educate "at-risk" students,[51] as laboratories for new ideas,[52] as ways to improve traditional public schools,[53] or as a way to demonstrate that the market can replace bureaucracy.[54] Another difference is the structure of authorizing agencies. Authorizers differ in their powers, how

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delegate only very limited powers. A court may also conclude that a private delegation meets constitutional requirements, even without limitations on private delegates equivalent to those that apply to government, because in a particular context the Constitution imposes lesser substantive constraints on private entities wielding government authority." *Id.* at 1486.

49. Julie F. Mead, *Devilish Details: Exploring Features of Charter School Statutes That Blur the Public/Private Distinction*, 40 HARV. J. ON LEGIS. 349, 350 (2003) ("[T]he precise contours defining a charter school depend on the particulars adopted by a state legislature. The resultant variations from state to state affect both how schools are created and how they operate.").

50. *See* Bulman & Kirp, *supra* note 25, at 53; *see also* Louann A Bierlein, *The Charter School Movement*, *in* NEW SCHOOLS FOR A NEW CENTURY, *supra* note 5, at 40–60 (noting that because of variation in state law, it is "an error to view all laws (and resulting charter schools) as equal").

51. *See, e.g.*, LA. STAT. ANN. § 17:3972(A) (West 2017) ("[I]t is the intention of the legislature that the best interests of at-risk pupils shall be the overriding consideration in implementing the provisions of this Chapter.").

52. *See, e.g.*, IDAHO CODE ANN. § 33-5202(4) (West 2017) (stating one of the intents of the Legislature in creating charter schools is to "[u]tilize virtual distance learning and on-line learning").

53. *See, e.g.*, CAL. EDUC. CODE § 47601(g) (West 2017) (stating one of the intents of the Legislature in creating charter schools is to "[p]rovide vigorous competition within the public school system to stimulate continual improvements in all public schools").

54. *See, e.g.*, IND. CODE ANN. § 20-24-2-1(4) (West 2016) (stating one of the intents of the Legislature in creating charter schools is to "[a]llow public schools freedom and flexibility in exchange for exceptional levels of accountability"). To read more about different state approaches to charter schools, see Bulman & Kirp, *supra* note 25, at 54–56 (comparing California, as an example of charter schools with a focus on reforming traditional public schools, to Arizona, where charter school law attempts to prove that market accountability trumps bureaucracy). The purpose of New York's charter law is to establish and maintain schools that "operate independently of existing schools and school districts" in order to: (1) "[i]mprove student learning and achievement;" (2) "[i]ncrease learning opportunities . . . with special emphasis on . . . students who are at-risk of academic failure;" (3) "[e]ncourage the use of different and innovative teaching methods;" (4) "[c]reate new professional opportunities for teachers, school administrators and other school personnel;" (5) "expand[ ] choices . . . within the public school system;" and (6) provide a "performance-based accountability systems by holding the schools. . .accountable for meeting measurable student achievement results." N.Y. EDUC. LAW § 2850 (McKinney 2017).

they monitor the schools, and their willingness to approve charter applications.[55] Authorizers come in many forms: state colleges and universities, local education agencies, and state agencies.[56] Additionally, different states apply different rights and regulations to their charter schools, and the detail of the drafting varies.[57] Further, each state's political landscape affects the legislative process. The extent to which legislative history is recorded or legally relevant adds another layer of difference. As of 2014, there were 6440 charter schools nationwide educating over 2.5 million students.[58] As of 2015, almost every state has passed enabling legislation for the establishment of charter schools.[59] Since 1999, there has been a large increase in the number of charter schools and the percent of public schools they represent.[60] While charter-enabling legislation has vast similarities in theory and enforcement mechanisms nation-wide, the specific issues which arise and solutions to those challenges will necessarily vary based on differences in state laws, funding, political climate, and other local factors.

In addition to state-to-state differentiation, the charter school movement also produces school-to-school variation. State law may mandate that a school's mission, populations served, discipline poli-

55. HILL & LAKE WITH CELIO, *supra* note 32, at 49 ("Authorizers differ on how willing they are to approve charter applications and how assiduously they monitor the performance of schools they have chartered. Though authorizers' duties and powers vary from state to state, neither state law nor an authorizer's status (as a school district, special-purpose state charter office, or other state entity) is a perfect predictor of how an authorizer will relate to schools.").

56. *Id.*

57. *Compare, e.g.*, MINN. STAT. ANN. § 124E.03 (West 2017) (specifically listing and citing to applicable rules and regulations including equal opportunity to athletic programs for different sexes, a requirement that the Pledge of Allegiance be said at least once a week, and submission of specific curriculum plans), *with* ALASKA STAT. ANN. § 14.03.255 (West 2016) (containing very little detail defining the contours of rights and responsibilities).

58. Amada Torres, *Charter School Parents and Their Perceptions of Independent Schools*, NATIONAL ASSOCIATION OF INDEPENDENT SCHOOLS (2014), https://www.nais.org/magazine/independent-school/fall-2014/charter-school-parents-and-their-perceptions-of-in.

59. There are only seven states without charter school legislations: Kentucky, Montana, Nebraska, North Dakota, South Dakota, Vermont, and West Virginia. *2015 National Overview*, CTR. FOR EDUC. REFORM, http://parentpowerindex.edreform.com (last visited Apr. 10, 2017). Alabama passed legislation in 2015, but no charter schools yet exist in the state. *Id.*

60. NAT'L CTR. FOR EDUC. STAT., U.S. DEP'T EDUC., *supra* note 31, at 70 ("From school year 1999–2000 to 2012–2013, the percentage of all public schools that were public charter schools increased from 1.7% to 6.2%, and the total number of public charter schools increased from 1,500 to 6,100. During the most recent period from 2011–2012 to 2012–2013, the percentage of all public schools that were charter schools increased from 5.8% to 6.2%, and the total number of public charter schools increased from 5,700 to 6,100.").

cies, curriculum, or other plans be specified in the charter. However, charter school legislation only creates standards. Therefore, private parties applying for charters can design schools to meet the statute's requirements and include additional features in varying ways. For example, one school may dedicate itself to educating bilingual students, another focuses on autistic students, a third takes a science-focused approach to educating only girls, and yet another charter school only educates specific grades.[61] Consequently, "public agencies [ ] oversee diverse portfolios of schools."[62]

B. New York Holds Charter Schools Accountable for Academic Success

New York has been identified as an example of a state with strong academic accountability for charter schools, and the state's charter revocation statute has been touted as "strong, clear, and direct."[63] Although revocation of charter schools is based mostly on academic performance, states vary in their clarity, standards, and processes for revocation.[64] The clarity of New York's charter creates more accountability: New York charter schools know what academic standards they are held to and what punishments will be imposed if

61. *See, e.g.*, Leslie Brody, *New York to Get Four New Niche Charter Schools*, WALL ST. J. (Apr. 12, 2016), https://www.wsj.com/articles/new-york-to-get-four-new-niche-charter-schools-1460508290. To read about New York City's 259 different schools, see *Find Charter Schools in New York City*, N.Y.C. CHARTER SCH. CTR., http://www.nyccharterschools.org/school-search (last visited Apr. 10, 2017), which include schools specializing in architecture, international cultures, the arts, and special education.

62. HILL & LAKE WITH CELIO, *supra* note 32, at 99.

63. Grady, *supra* note 2, at 544. New York requires that the charter school receive a statement detailing the proposed reasons for revocation with notice within a specified number of days. *Id.* Additionally, charter schools can request a hearing regarding the revocation decision. *Id.* Because "[m]ost of the litigation regarding charter school revocation statutes centers around the charter school's right to a hearing and appeal," "[b]y clearly defining not only the due process rights of schools, as well as the appeals process, charter schools are on notice and have guidelines which should result in less litigation over revocation decisions." *Id.* at 544–45; *see also Number of Authorizers in New York*, NAT'L ASS'N OF CHARTER SCH. AUTHORIZERS, http://www.qualitycharters.org/policy-research/state-map/new-york/new-york-authorizers/#NYTable (last visited April 10, 2017) (giving SUNY a twelve out of twelve in 2015 for satisfying all indexes of essential practices for charter authorizers).

64. *See* Grady, *supra* note 2, at 542–43 ("A general weakness of the charter school revocation statutes is that they fail to define the reasons for revocation. The statutes use varying terms of 'may,' 'shall,' and 'must' for when an overseer is to revoke a charter. This vests immense discretion in the hands of the overseer and charter schools may be unaware of when a revocation will actually occur. In addition, many revocation statutes have varying language, if any at all, for closure procedure and appeals.").

they do not meet those standards.[65] The State University of New York (SUNY) System, as the major New York charter authorizer, is responsible for enforcing most of the state's charters.[66]

A 2013 study by the Center for Research of Education Outcomes (CREDO) found that charter schools have shown an upward trend in academic achievement, noting especially positive trends in New York.[67] Although achievement varies across states, New York is one of eleven states in which student growth in both math and reading outpaced traditional public schools.[68] Closing charter schools that do not meet academic standards has been critical in creating a chartering scheme that produces quality education.[69] SUNY has been held as a model authorizer in holding schools accountable to academic standards.[70] A May 2010 report by the U.S. Department of Education entitled *Fostering Innovation and Excellence* highlighted SUNY's methods and willingness to close schools.[71]

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65. *See* HILL & LAKE WITH CELIO, *supra* note 32, at 99.

66. *About*, CHARTER SCH. INST., STATE UNIV. N.Y., http://www.newyorkcharters.org/about (last visited Apr. 10, 2017) (explaining that SUNY Charter Schools Institute currently oversees 152 charter schools and "is charged with evaluating initial applications for the opening of charter schools, ongoing monitoring of student academic performance and overall school operations, and for presenting findings and recommendations regarding the renewal of a school's charter to the SUNY Trustees").

67. CTR. FOR RESEARCH OF EDUC. OUTCOMES, NATIONAL CHARTER SCHOOL STUDY (2013), https://credo.stanford.edu/documents/NCSS%202013%20Final%20Draft.pdf.

68. *Id.* at 84.

69. *Id.* at 89.

70. *See* CTR. FOR EDUC. REFORM, CHARTER SCHOOL LAWS ACROSS THE STATES: 2015 RANKING AND SCORECARDS 62–63 (Alison Consoletti Zgainer & Kara Kerwin eds., 2015), https://www.edreform.com/wp-content/uploads/2015/07/CharterLaws2015.pdf (awarding New York an additional point for implementation because of "the state's responsible authorizing—opening strong charter schools while holding current charters accountable to their contracts and closing them as necessary"); *see also* Alex Medler, *A Hat Tip to the SUNY Charter Schools Institute*, NAT'L ASS'N OF CHARTER SCH. AUTHORIZERS, http://www.qualitycharters.org/2015/03/a-hat-tip-to-the-suny-charter-schools-institute/ (last visited Apr. 10, 2017) (congratulating SUNY for closing a failing charter school in a politically contentious climate.) To read more about SUNY's success as an authorizer, see *Legislative Review of Charter Schools and SUNY's Designation as a Charter School Authorizer*, CHARTER SCH. INST., STATE UNIV. N.Y. (2017), https://www.suny.edu/about/leadership/board-of-trustees/meetings/webcastdocs/LegislativeReviewHistoryofSUNYAuthorizing.pdf, which notes that SUNY only approves 31% of the charter applications and feels it has an "obligation to close the school down . . . [i]f a school is not meeting the promises made to its students."

71. *Fostering Innovation and Excellence*, U.S. DEP'T EDUC. 8 (2010), https://www2.ed.gov/policy/elsec/leg/blueprint/fostering-innovation-excellence.pdf (highlighting SUNY's revocation of charters for seven of the forty-seven schools applying for renewal).

C. New York Charter Schools Criticized for Violating Student Due Process

New York charter schools must meet due process standards for students being suspended. The New York City Department of Education follows Chancellor's Regulation A-443, which governs due process for suspensions and expulsions in traditional public schools.[72] While state law exempts charter schools from these provisions, New York still requires that charter schools meet certain due process requirements—including those for students being suspended—and allows charter schools to adopt their own standards for meeting due process.[73] For example, charter schools are required to ensure due process is being afforded to children being suspended. Charter schools must "meet the same health and safety, civil rights, and student assessment requirements applicable to other public schools," but are exempt from "all other state and local 'laws, rules, regulations, or policies governing other public or private schools.'"[74] Additionally, the statute states that "nothing in this subdivision shall affect the requirements of compulsory education of minors established by part one of article sixty-five of this chapter."[75] Article 65 contains various protections for students, including a prohibition on unlawful employment of minors, reports of reading tests, child abuse prevention, and anti-discrimination.[76] Included in Article 65, from which charter schools are not exempt, is section 3214 "Student Placement, Suspensions and Transfers," which codifies the federal constitutional right to due process for children being suspended.[77]

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72. N.Y. EDUC. LAW § 2851(2)(h) (McKinney 2017).
73. *Id.* §§ 2851(2)(h), 2854(1)(b).
74. *Id.* § 2854(1)(b).
75. *Id.*
76. *Id.* § 3214.
77. *Id.* The law permits suspending students who are "insubordinate or disorderly or violent or disruptive, or whose conduct otherwise endangers the safety, morals, health or welfare of others." *Id.* § 3214(1). If the suspension does not exceed five school days, the pupil must be given "notice of the charged misconduct," and if the pupil denies the charges, the pupil must be given an "explanation of the basis for the suspension." *Id.* § 3214(b)(1). If requested by the student or parent, there must be an "informal conference with the principal" where the pupil can present the pupil's version of the events and question complaining witnesses. *Id.* This must happen prior to suspension unless "the pupil's presence in the school poses a continuing danger to persons or property or an ongoing threat of disruption to the academic process," in which case the conference shall take place as "soon after the suspension as is reasonably practicable." *Id.* No student can be suspended for more than five days without an "opportunity for a fair hearing, upon reasonable notice, at which such pupil shall have the right of representation by counsel, with the right to question witnesses against such pupil and to present witnesses and other evidence on his or her behalf." *Id.* § 3214(c)(1). In addition, the statute requires that once a student is suspended there

New York's charter school statute also codifies the Supreme Court's decision in *Goss v. Lopez.*[78] In *Goss*, the Supreme Court held that public schools were required to provide a student with notice and an opportunity to present her side of the story when suspending a student for less than ten days.[79] Public high school students who had been suspended from school for misconduct without a hearing under an Ohio statute brought a class action seeking a declaration that the statute was unconstitutional.[80] Noting that Ohio had created a statutory right to a free public education and passed compulsory education laws, the Court said that education had become a property interest and due process must be met before students could be suspended.[81] In addition, the Court held that because of reputational harm, suspension also infringed on a liberty interest.[82] The Court refused to recognize a ten-day suspension as *de minimis* because even though "[a] short suspension is . . . a far milder deprivation than expulsion . . . . 'education is perhaps the most important function of state and local governments,' . . . and the total exclusion from the educational process for more than a trivial period, and certainly if the suspension is for 10 days, is a serious event in the life of the suspended child."[83] The Court recognized that "public education in our Nation is committed to the control of state and local authorities," and therefore left the due process requirements open ended.[84] At the "very minimum," students facing suspension must be "given some kind of notice and afforded some kind of hearing."[85] The Court noted that discipline in education is complex and frequent, and that requiring an "elaborate hearing . . . in every suspension" should be "viewed with great concern."[86]

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must be "immediate steps . . . for his or her attendance upon instruction elsewhere." *Id.* § 3214(e).

78. Goss v. Lopez, 412 U.S. 565 (1975).

79. *Id.* at 581.

80. The statute allowed a principal of a public school to suspend a student for up to ten days or expel them. In either case, the principal was required to notify the parents of the students within twenty-four hours. If expelled, the student was entitled to an appeal to the Board of Education, during which the student could be heard. No similar procedure was provided for suspended students. *Id.* at 576.

81. *Id.*

82. *Id.*

83. *Id.* (quoting Brown v. Board of Education, 347 U.S. 483, 493 (1954)).

84. *Id.* at 578 (quoting Epperson v. Arkansas, 393 U.S. 97, 104 (1968)).

85. *Id.* at 579.

86. *Id.* at 580. *Goss* requires "oral or written notice of the charges against [the student] and, if [she] denies them, an explanation of the evidence . . . and an opportunity to present [her] side of the story." *Id.* at 581. The Court noted that this can be as simple as the disciplinarian informally discussing the misconduct with the student. *Id.* at 582. The process should generally precede removal unless the student's presence "endangers persons or property or threatens disruption of the academic process." *Id.* at

"In 2011, a group of legal service organizations wrote to the [New York] State Education Department, which, in response, confirmed that the State expects charter schools at a minimum to meet the requirements of [s]ection 3214."[87] Even outside of section 3214, the charter statute provides that "the rules and procedures by which students may be disciplined . . . shall be consistent with the requirements of due process and with federal laws and regulations governing the placement of students with disabilities."[88]

Advocates for Children (AFC) studied disciplinary policies of 155 of New York City's 183 charters schools and reported on how many of the written charter agreements violated student due process rights.[89] All of these discipline policies were approved by one of three charter authorizers: the Board of Education, The Board of Trustees of SUNY, or the Board of Regents.[90] AFC found that 107 of the policies permitted suspension for any infraction of the policy no matter how minor, 82 of the policies permitted suspension for tardiness in violation of state law, 133 of the policies did not include a written notice requirement, 36 of the policies failed to include an opportunity to be heard prior to suspension, 25 of the policies failed to include a right to a hearing for long-term suspensions, 59 of the policies failed to include a right to appeal, 36 of the policies did not include additional procedures for suspending students with disabilities, and 52 of the policies failed to include a right to alternative instruction.[91]

The disciplinary practices of one of New York's highest performing charter schools, Success Academy Charter School, have been highlighted and criticized.[92] The network of Success Schools has five

580. The Court stopped short of requiring an opportunity to secure counsel or confront witnesses for a short suspension, but noted that a longer suspension may require greater protections. *Id.* at 583–84.

87. ADVOCATES FOR CHILDREN OF N.Y., CIVIL RIGHTS SUSPENDED: AN ANALYSIS OF NEW YORK CITY CHARTER SCHOOL DISCIPLINE POLICIES 10 n.27 (2015). Some charter schools claim they are exempt from the requirements of section 3214. *See, e.g.*, *Testimony Before the New York City Council Education Committee on Charter School Management*, N.Y. CIV. LIBERTIES UNION (2014), https://www.nyclu.org/en/publications/testimony-new-york-city-council-education-committee-charter-school-management ("[C]harter school students facing exclusionary discipline are not guaranteed access to basic due process protections provided under state law because many of the schools claim they are exempt from the requirements of [section 3214]."). However, this claim holds little merit based on a plain reading of the statute.

88. N.Y. EDUC. LAW § 2851(2)(h) (McKinney 2017).

89. ADVOCATES FOR CHILDREN OF N.Y., *supra* note 87, at 5–6.

90. N.Y. EDUC. LAW § 2851(2) (McKinney 2017).

91. ADVOCATES FOR CHILDREN OF N.Y., *supra* note 87, at 5–6.

92. *See* Complaint on Behalf of Fourteen Unnamed Students Against Success Academy Charter School (Jan. 20, 2016), http://rishawnbiddle.org/outsidereports/ocr_complaint_against_success_academy.pdf (alleging that Success Academy fails to

of the top ten schools in the state in math, two of the top five schools in English, and is ranked in the top five percent in science.[93] The network operates forty-one schools, has 14,000 students,[94] and plans to expand to seventy schools in five or six years.[95] During the 2012–13 school year, Success Academy Harlem 1 suspended twenty-three percent of its 896 elementary-aged students at least once (although a spokesperson for the network now claims the rate was not this high).[96] Although these suspensions may have been for shorter periods and thus are not necessarily entitled to the same processes as an over ten-day suspension as was at issue in *Goss*, they raise similar due process concerns as those at issue in *Goss* because they create the "exclusion from the educational process for more than a trivial period" and are "a serious event in the life of the suspended child."[97] The difference between high school students, as in *Goss*, and elementary school students, like those at Success, may affect the process that is due for a suspension of less than ten days.

Additionally, charter schools are not legally required to collect or report data on suspensions, which means that most of the information we have is anecdotal.[98] In October 2015, *The New York Times* reported on one Success Academy principal's "Got to Go" list of students that he intended to push out of the school.[99] Recently, a video was released by *The New York Times* portraying questionable teaching

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comply with the disciplinary due process rights of students); *see also* Leo Casey, *Student Discipline, Race and Eva Moskowitz's Success Academy Charter Schools*, ALBERT SHANKER INST. (Oct. 19, 2015), http://www.shankerinstitute.org/blog/student-discipline-race-and-eva-moskowitz%E2%80%99s-success-academy-charter-schools; Valerie Strauss, *The Startling Way NYC's Largest Charter Network Handles Student Discipline*, WASH. POST (Oct. 20, 2015), https://www.washingtonpost.com/news/answer-sheet/wp/2015/10/20/the-startling-way-nycs-largest-charter-network-handles-student-discipline. Additionally, Success Academy is a good case study because the charter network only functions in New York City.

93. *2016 Results*, SUCCESS ACAD. CHARTER SCHS., http://www.successacademies.org/results/ (last visited Apr. 14, 2017).

94. *About*, SUCCESS ACAD. CHARTER SCHS., http://www.successacademies.org/about/ (last visited Apr. 14, 2017).

95. Kate Taylor, *At a Success Academy Charter School, Singling out Pupils Who Have 'Got to Go',* N.Y. TIMES, Oct. 30, 2015, at A1.

96. Kate Taylor, *At Success Academy Charter Schools, High Scores and Polarizing Tactics*, N.Y. TIMES, Apr. 7, 2015, at A1.

97. Goss v. Lopez, 412 U.S. 565, 576 (1975); *see also supra* note 80.

98. This is another reason that bringing these claims in court could be advantageous. Through discovery, courts could require the data to be systematically collected and made public.

99. Taylor, *supra* note 95. Mr. Brown, the principal who created the "Got to Go" List in Success's Fort Greene school, currently teaches third grade at Success's Harlem 1 school. Heather Chin, *From Principal to Teacher, A Quiet Reassignment for Success Academy Fort Greene's Candido Brown*, BKLYNER (Jan. 22, 2016), http://

tactics, such as berating students for making mistakes while learning to count, at Success Academy, which raised questions of "abusive teaching," and the possibility of a network culture that encourages such practices.[100] In the video, a teacher yells at a first grader for counting incorrectly, tears up her work, and sends her to time-out.[101] Protecting due process rights in charter schools is important. Students of color increasingly attend charter schools,[102] and they are disproportionately affected by harsh disciplinary standards and are more vulnerable to the school-to-prison pipeline.[103] Additionally, students whose homes are zoned for traditional public schools that are failing academically tend to have less of a choice in attending charter schools than those zoned for academically successful schools.[104] If charter schools

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fortgreenefocus.com/blog/2016/01/22/success-academy-fort-greene-principal-candido-brown-reassigned/.

100. Kate Taylor, *At Success Academy School, a Stumble in Math and a Teacher's Anger on Video*, N.Y. TIMES, Feb. 13, 2016, at A16 ("[I]nterviews with 20 current and former Success teachers suggest that while [this teacher]'s behavior might be extreme, much of it is not uncommon within the network."). The teacher highlighted in the video was "considered so effective that the network promoted her last year to being a model teacher, who helps train her colleagues." *Id.*

101. *Id.*

102. "Charter schools are becoming increasingly popular to students of color, especially African-American students. According to a 2010 survey conducted by Harvard's Program on Educational Policy Governance and the journal, Education Next, 64% of African-Americans support charter schools while 14% of African-Americans were opposed." Preston C. Green III et al., *Charter Schools, Students of Color and the State Action Doctrine: Are the Rights of Students of Color Sufficiently Protected?*, 18 WASH. & LEE J. C.R. & SOC. JUST. 253, 254–55 (2012); *see also* Russell Skiba, *When Is Disproportionality Discrimination?: The Overrepresentation of Black Students in School Suspension*, *in* ZERO TOLERANCE: RESISTING THE DRIVE FOR PUNISHMENT IN OUR SCHOOLS 1072 (William Ayers, Bernardine Dohrn & Rick Ayers eds., 2001) [hereinafter ZERO TOLERANCE] (noting that rates of school punishment for black students have exceeded rates of school punishment for white students for over twenty-five years and do not appear to be decreasing).

103. *Education On Lockdown: The Schoolhouse To Jailhouse Track*, ADVANCEMENT PROJECT (Mar. 24, 2005), http://www.advancementproject.org/resources/entry/education-on-lockdown-the-schoolhouse-to-jailhouse-track (examining how students of color are disproportionately affected by zero-tolerance policies).

104. *See* JOSEPH VITERITTI, CHOOSING EQUALITY: SCHOOL CHOICE, THE CONSTITUTION, AND CIVIL SOCIETY 5–9 (2012) (noting that data show those stuck in failing school systems prefer choice, while "those who suffer the harshest pain are most inclined to try new medicine. Having the least to lose and the most to gain, they are prepared to accept [the] risk of experimenting with different treatment. Nevertheless . . . the risks inherent in change may be real, especially when improperly formulated; and they cannot be dismissed lightly"); *see also* Alan Wolfe, *The Irony of School Choice: Liberals, Conservatives, and the New Politics of Race*, *in* SCHOOL CHOICE: THE MORAL DEBATE, *supra* note 23, at 37 (arguing that minority support of school choice exists because "radical means become necessary" when inner-city public schools are failing and unlikely to change). However, charter schools do provide more choice to parents without the money to move by giving them an option to exit failing

are due process "black holes" for school suspensions, students of color will be disproportionately affected.[105]

D. Statutory Enforcement Mechanisms Are Insufficient to Remedy Due Process Violations

The current statutory scheme, which is intended to protect due process rights for charter school students, is insufficient. For example, New York law provides no private right of action and because students and parents are not parties to the contract between the state and the charter school, they cannot sue to enforce the contract.[106] Additionally, state law does not immediately provide for a direct remedy by the Board of Regents. Instead, individuals are required to bring complaints concerning charter violations to the board of trustees of the charter school first and, if the individual "determines that such board has not adequately addressed the complaint," then they may bring the complaint to the charter-enabling entity.[107] Only if the entity does not adequately address the complaint does the Board of Regents have power to "issue appropriate remedial orders to charter schools under their jurisdiction to effectuate the provisions of this section."[108] This system traps parents in a confusing bureaucratic system.[109] The only student rights claim ever adjudicated by the Board of Regents was

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public schools. *S*ee Howard Fuller, *The Continuing Struggle for School Choice*, *in* EDUCATIONAL FREEDOM IN URBAN AMERICA: *Brown v. Board* After Half a Century 4 (David Salisbury & Casey Lartique Jr. eds., 2004) (citing Albert O. Hirschman, EXIT, VOICE, AND LOYALTY (1970)) ("[I]f you lack the capacity to exit an organization, your voice is diminished; when you have the power to leave, your voice in enhanced.").

105. *See* Daniel J. Losen & Chistopher Edley, Jr., *The Role of Law in Policing Abusive Disciplinary Practices: Why School Discipline Is a Civil Rights Issue*, *in* ZERO TOLERANCE, *supra* note 102, at 230 ("For most children, school attendance is their first formal relationship with government. For minorities, the unyielding form of government intervention represented by zero tolerance teaches impressionable youth that the government can take away their right to an education without giving them or their parents a meaningful opportunity to be heard."); *see also* Deborah Archer, *Introduction: Challenging the School-to-Prison Pipeline*, 54 N.Y.L. SCH. L. REV. 867, 868 (2010) (analyzing the school-to-prison pipeline as having both a direct route, through discipline policies that end in arrest or referral to juvenile justice system, and an indirect route, through creating an environment that makes it more likely students will end up in the criminal justice system).

106. *See generally* N.Y. EDUC. LAW §§ 2850–2857 (McKinney 2017).

107. *Id.* § 2855(4).

108. *Id.*

109. The mother of the berated student in the recent New York Times video, *supra* notes 100–101, "seeking to hold someone accountable for what happened to her daughter . . . went into a Department of Education building in Brooklyn to ask about filing a complaint, but was told that Success was independent from the school district. She said that Ms. Nicholls, the principal, had given her information about how to reach Success's board of trustees, and that she had sent a letter, but she was not

dismissed because the parent did not first submit the claim to the Board of Trustees of the charter school.[110] In New York City alone there were 205 charter schools educating 95,000 students in 2016.[111] With only three charter entities,[112] it is impossible to closely monitor the conduct at all of these schools. Even if the bureaucratic hurdles are cleared, the Board of Regents' only available enforcement mechanism is to revoke a school's charter or place it on a remedial action plan threatening revocation.[113] Shutting down an academically successful school is an undesirable action, and threatening to do so is unlikely to be taken seriously. Academically successful charter schools therefore lack significant incentive to follow non-academic regulations.

III.
State Action Doctrine as a Solution

A right without a remedy is no right at all.[114] So the question becomes: how are rights unconnected to academic achievement supposed to be enforced and remedied?[115]

State action doctrine, though inconsistently applied, could serve as a useful mechanism in closing the enforcement gap. The heart of the state action doctrine is about drawing a line between the public and the private: public actions are subject to constitutional restraint, while private actions are usually exempt.[116] This private-public line is drawn in each state's charter-enabling legislation. Although § 1983 claims, which assert constitutional rights against state actors, ensure

optimistic that she would get a response." Kate Taylor, *Mother of Girl Berated in Video Assails Success Academy's Response*, N.Y. Times, Feb. 26, 2016, at A22.

110. Appeal of C.L., 51 Ed. Dept., Decision No. 16307, 2011 WL 6144299 (2011 N.Y. Comm'r Ed.).

111. *Growth and Demand Factsheet 2016–2017*, N.Y.C. Charter Sch. Ctr. (2017), http://www.nyccharterschools.org/sites/default/files/resources/NYC-CSC-growth-15-16.pdf.

112. N.Y. Educ. Law § 2851(3) (eligible school districts, the Board of Trustees of the State University of New York, and the Board of Regents).

113. *Id.* § 2855.

114. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803) ("The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. . . . The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.").

115. This paper does not focus on other charter mandates that are not rights-based. Although the enforcement mechanisms applies to both rights-based and non-rights-based requirements, rights-based mandates raise the question of Constitutional application to charter schools. Additionally, my proposed solution uses § 1983, which can only be used to enforce rights.

116. *See* The Civil Rights Cases, 109 U.S. 3 (1883).

enforcement of some of the same rights established in the charter, the charter is a contract governed by the charter-enabling legislation, to which students are not a party.[117] The advantage of using § 1983 to enforce these rights is that litigation would cut through the red tape provided for in the legislation, which requires students to try to enforce their constitutional rights through many bureaucratic hurdles.

A. Section 1983 Claims Avoid the Regulatory Failures of the Charter Statute

One way to try and enforce rights is to legislatively amend the procedures in the charter contract. Meaningful enforcement of non-academic standards under the charter contract would require a statutory overhaul, and probably an expansion of regulations. Given the academic success of charter schools,[118] it is not wise to completely overhaul the enabling legislation. Additionally, increasing regulation cuts against the underlying theory of the charter school experiment, which is providing the schools with the freedom to experiment.[119]

Rather than sue to protect students' statutory rights,[120] the best option for enforcing non-academic provisions of charter statutes is to file § 1983 claims to enforce students' constitutional rights.[121] Individuals can sue for deprivation of their federal civil rights under 42 U.S.C. § 1983.[122] Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .[123]

Suing charters directly through § 1983 claims would place the threat of liability with the institution best situated to take corrective

117. *See generally* N.Y. EDUC. LAW §§ 2850–2857.
118. *See supra* Introduction.
119. *See supra* Section I.A.
120. *See supra* Section II.D.
121. Exhaustion of administrative remedies may be required before filing a federal court action. In New York, the exhaustion doctrine does not apply if the action is challenged as unconstitutional or administrative remedies would be futile. Alexa Ashworth et al., *Proceeding Against a Body or Officer*, *in* 24 CYCLOPEDIA OF N.Y. PRACTICE WITH FORMS (Carmody-Wait ed., 2d ed. 2017). Further analysis of the issue of exhaustion will be saved for another paper.
122. 42 U.S.C. § 1983 (2012).
123. *Id.*

action: the individual charter schools. Charter schools can cure the violations more easily, and can be flexible in the approaches they use to do so, thus preserving the theory behind charter schools.[124] Courts can fashion remedies that fit the school, and ensure schools directly bear financial penalties, thereby aligning incentives.[125]

B. State Action by Regulatory Entanglement

In order to succeed on the merits in a § 1983 action, a plaintiff must show that a school was acting "under color of"[126] state law. Whether an individual or entity is acting "under color of" state law is analyzed under the state action doctrine.[127]

The Supreme Court's doctrine determines whether schools are state actors by applying a regulatory entanglement analysis. In

124. Currently in New York City's traditional public schools, Chancellor's Regulation A-443 sets up specific procedures to regulate suspension, including hearings in traditional public schools. *Education Resources: Disciplines/Suspensions*, N.Y.C.'s CHILDREN SERVS., http://www.nyc.gov/html/acs/education/discipline.html (last visited Apr. 14, 2017). However, charter schools are not subject to the Chancellor's Regulation. *See* N.Y. EDUC. LAW § 2854(1)(b) ("A charter school shall be exempt from all other state and local laws, rules, regulations or policies governing public or private schools, boards of education, school districts and political subdivisions, including those relating to school personnel and students, except as specifically provided in the school's charter or in this article."). Therefore, charter schools have the flexibility to set up their own suspension hearings, and they may be able to streamline the process or establish other creative solutions that function better than the Chancellor's Regulation.

125. Although individuals could alternatively sue charter authorizers under § 1983, it is unclear if the government can be held responsible. Municipalities can only be found liable under § 1983 where the municipality itself causes the constitutional violation at issue, which is a high threshold. Monell v. N.Y.C. Dep't of Soc. Servs., 436 U.S. 658, 694 (1978) ("[A] local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983."). Because New York law requires charter schools to "meet the same health and safety, civil rights, and student assessment requirements applicable to other public schools," it cannot be argued that the municipality causes the constitutional violation. N.Y. EDUC. LAW § 2854(1)(b). The Supreme Court has established a deliberate indifference exception to *Monell*. *See* City of Canton v. Harris, 489 U.S. 378 (1989). However, this is a demanding standard, which requires showing that a municipality's "failure to train [its employees] reflects a 'deliberate' or 'conscious' choice." *Id.* at 389.

126. 42 U.S.C. § 1983.

127. *See* Lugar v. Edmondson Oil Co., Inc., 457 U.S. 922, 929 (1982) ("[I]t is clear that in a § 1983 action brought against a state official, the statutory requirement of action 'under color of state law' and the 'state action' requirement of the Fourteenth Amendment are identical."); United States v. Price, 383 U.S. 787, 794 n.7 (1966) ("In cases under [§] 1983, 'under color' of law has consistently been treated as the same thing as the 'state action' required under the Fourteenth Amendment.").

Rendell-Baker v. Kohn, the Court excluded charter schools as state actors under a financial entanglement analysis, a public function analysis, or a symbiotic relationship analysis.[128] However, the Court left open the regulatory entanglement test as an avenue to finding that charter schools are state actors.

In *Rendell-Baker*, the Supreme Court held that a private school funded and regulated by the state was not considered a state actor when discharging an employee.[129] Rendell-Baker, a vocational counselor at a non-profit private school located on private property, was fired following a dispute with the director of the school, Sandra Kohn.[130] Her case was consolidated with those of five teachers who were dismissed after approaching the media against Kohn's policies.[131] The school served students who were experiencing difficulty completing high school, nearly all of whom were referred to the school by the state.[132] When students were referred to the school, the cities paid their tuition.[133] Additionally, the school was subjected to a variety of detailed regulations concerning students and some regulation of personnel policies, although few were specific.[134] At least ninety percent of the school's operating budget was provided by the state.[135] Rendell-Baker's position was funded by a grant from the State and the hiring was subject to approval by the State Committee on Criminal Justice.[136]

The Court assessed and rejected four different theories of state action on the facts of the case. First, the Court found the school's funding from the State insufficient to constitute state action because "school . . . is not fundamentally different from many private corporations whose business depends primarily on contracts . . . . Acts of such private contractors do not become acts of the government by reason of their significant or even total engagement in performing public con-

128. *See* Rendell-Baker v. Kohn, 457 U.S. 830, 841–42 (1982). Some courts have tried to distinguish the case based on charter schools' designation as "public schools." *See infra* note 159. Other courts have distinguished the case based on the fact that Charter Management Organizations act like school boards, which is a public function exclusively and historically reserved for the state. *See* ACLU v. Tarek Ibn Ziyad Acad., No. 09-138, 2009 WL 2215072, at 10 (D. Minn. July 21, 2009), *cert. denied*, No. 09–138, 2009 WL 3152045 (D. Minn. Sept. 24, 2009).

129. *Rendell-Baker*, 457 U.S. at 841–42.

130. *Id.* at 830.

131. *Id.* at 833.

132. *Id.* at 840–41.

133. *Id.*

134. *Id.*

135. *Id.* at 833.

136. *Id.* at 840–42

tracts."[137] In addition, the Court noted the relationship the school had with its teachers and counselors was fundamentally unchanged by the source of the funding.[138] Second, the Court rejected public function arguments because educating "mal-adjusted students" was not "traditionally the *exclusive* prerogative of the State."[139] The Massachusetts state statute showed only an intent to pay for the private education and it was not until recent history that the state undertook to provide education to those students not served by traditional public schools, therefore educating maladjusted high school students was not a traditional prerogative of the State.[140] Third, the Court denied a symbiotic relationship as a basis for finding state action because the State did not profit from the alleged constitutional violation.[141] Fourth, the Court looked to the extensive regulations of schools and held that "[t]he decisions to discharge petitioners were not compelled or even influenced by any state regulation. . . . [The] regulators showed relatively little interest in the school's personnel matters."[142]

Although the Court's analysis in three of these tests—the financial entanglement analysis, the public function analysis, and the symbiotic relationship analysis—appear to preclude finding charter schools as state actors, regulatory entanglement remains an open avenue for finding charter schools to be state actors.[143] Therefore, the extent to which the charter-enabling legislation regulates the rights that students aim to protect will be key to determining whether charter schools are state actors.

Justice White concurred in the Court's judgment, specifically noting that different civil rights claims and the entanglement of regu-

137. *Id.* at 840–41.

138. *Id.* at 849.

139. *Id.* at 842 (quoting Jackson v. Metro. Edison Co. 419 U.S. 345 (1974)).

140. *Id.* at 842–43 (explaining that educating maladjusted high school students was not an exclusive state prerogative given that Massachusetts did not even provide funding for educating these children until 1972, and that private actors have traditionally filed this role).

141. *Id.* at 842–43. Specifically, the Court rejected this argument by comparing the case to *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961). The Court noted that in *Burton*, "the restaurant was located on public property and that the rent from the restaurant contributed to the support of the garage. In response to the argument that the restaurant's profits, and hence the State's financial position, would suffer if it did not discriminate, the Court concluded that this showed that the State profited from the restaurant's discriminatory conduct." *Rendell-Baker*, 457 U.S. at 842–43.

142. *Rendell-Baker*, 457 U.S. at 841.

143. *Id.* at 840–42. In fact, *Rendell-Baker* might have been decided the other way if it had been a student suing to enforce her rights, rather than a teacher. *Id.* at 844 (White, J., concurring).

lation might justify a finding of state action: "[T]he critical factor is the absence of any allegation that the employment decision was itself based upon some rule of conduct or policy put forth by the State. As the majority states, 'in contrast to the extensive regulation of the school generally, the various regulators showed relatively little interest in the school's personnel matters.'"[144]

Although the Court did not find state action in *Rendell-Baker*, the Court has since used regulatory entanglement to find a private actor liable under Section 1983.[145] In *Brentwood Academy v. Tennessee Secondary School Athletic Association*, the Court found that a not-for-profit "membership corporation organized to regulate interscholastic sport among the public and private high schools . . . that belong to it" was performing a state action and was liable under § 1983 when it enforced a rule against a member school.[146] The Court based its holding on the entwinement of the Association with public schools: eighty-four percent of its members were public schools, and almost all public schools in the state were members.[147] Public school officials acting in their official capacity, often during school hours, performed "all but the Association's purely ministerial acts."[148] In addition, "the State of Tennessee has provided for entwinement from top down" by assigning State Board members to serve as members of the Board of Control and Legislative Council and treating the Association's employees as state employees by allowing them to be eligible for membership in the state retirement system.[149] The Court categorized the state in *Rendell-Baker* as a "mere public buyer[ ] of contract services," while distinguishing the funding of the Association by noting that "the schools . . . give up sources of their own income to their collective association. The Association thus exercises the authority of the predominantly public schools to charge for admission to their games; the Association does not receive this money from the schools, but enjoys the schools' moneymaking capacity as its own."[150] The Court also used the degree of entwinement to answer the Association's arguments that it was not performing a public function just like the school in *Rendell-Baker*.[151]

144. *Id.* at 844 (White, J., concurring).
145. Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 289 (2001).
146. *Id*.
147. *Id*.
148. *Id*. at 289–99.
149. *Id*. at 300.
150. *Id*. at 299.
151. *Id*. at 303 ("But this case does not turn on a public function test, any more than *Rendell-Baker* had anything to do with entwinement of public officials in the special school.").

Although the Supreme Court has never ruled on a case concerning the state action doctrine and charter schools, the Ninth Circuit applied the Court's claim-focused entanglement test to an employment claim against a charter school.[152] In *Caviness v. Horizon Community Learning Center*, the Ninth Circuit unanimously held that an Arizona charter school was not a state actor when it took "employment-related actions with respect to a former teacher."[153] Caviness was fired after questionable behavior with a female student and he later sued, alleging that Horizon failed "to instruct its employees to cease making statements about Caviness's performance," refused to allow a "name-clearing hearing," and forbade him from having contact with students during an administrative leave.[154] Because Caviness did not allege that Horizon was a state actor, the Ninth Circuit determined that his appeal must fail unless all charter schools under Arizona's statutory scheme are considered state actors.[155]

The Ninth Circuit rejected a common argument that charter schools are state actors because they are "public schools."[156] Caviness argued that charter schools are statutorily defined as "public schools" and therefore "engage in the provision of 'public educational services,' which he distinguishe[d] from the provision of the 'educational services' that the Supreme Court [in *Rendell-Baker*] held is not the exclusive and traditional province of the state."[157] The Ninth Circuit rejected this reasoning, saying it "merely restates [Caviness's] errone-

152. *See* Caviness v. Horizon Cmty. Learning Ctr., 590 F.3d 806 (9th Cir. 2010).

153. *Id.* at 808.

154. *Id.* at 813.

155. *Id.*

156. *Id.* at 812–13. *Contra* Matwijko v. Bd. of Trs. of Glob. Concepts Charter Sch., No. 04-CV-663A, 2006 WL 2466868, at *5 (W.D.N.Y. Aug. 24, 2006) (finding charter school in New York to be "public" and state actor because of statutory language, noting "New York law does not consider charter schools to be private schools"); Riester v. Riverside Cmty. Sch., 257 F. Supp. 2d 968, 972 (S.D. Ohio 2002) (finding "[d]efendants are state actors because the actions of community schools are, by Ohio statute, public"). Many states have taken a similar line. *See, e.g.*, ARIZ. REV. STAT. ANN. § 15-183 (2017) ("Charter schools are public schools that serve as alternatives to traditional public schools . . . ."); FLA. STAT. ANN. § 1002.33 (West 2017) ("All charter schools in Florida are public schools."); N.M. STAT. ANN. § 22-8B-4J (2011) ("A charter school shall be a nonsectarian, nonreligious and non-home-based public school."); UTAH CODE ANN. § 53A-1a-503.5(a) (2016) (stating that charter schools are "considered to be public schools within the state's public education system"). Additionally, Maryland and Washington, D.C., refer to charter schools as "public charter schools." MD. CODE ANN., EDUC. § 9-102; (West 2015); D.C. CODE § 38-1802.01 (2012). To read how different states' charter enabling legislations characterize charter schools, see Green III et al., *supra* note 102 (arguing charter schools may not be state actors under federal law with respect to student rights).

157. *Caviness*, 590 F.3d at 814–15.

ous argument that the state's statutory characterization is necessarily controlling."[158] Instead, the court held that whether "there is a close nexus between the State and the challenged action" of the private corporation determines if the school is a state actor.[159]

The Ninth Circuit looked to the extent of the regulations imposed on the charter school in Arizona. The court noted that "[i]t is important to identify the function at issue because an entity may be a State actor for some purposes but not for others."[160] Citing *Rendell-Baker*, the court reasoned that "government regulation of a private business is insufficient to make that business a state actor if the challenged conduct was 'not compelled or even influenced by any state regulation.'"[161] Even though the school was required to comply with some regulations, it was exempt from state teacher-certification requirements, as well as statutes governing dismissal of certified teachers.[162] Although the charter sponsor had approved and reviewed the school's "self-created personnel policies," this was not held to be a state action because "mere approval or acquiescence of the State is not state action."[163] The Ninth Circuit looked closely at the facts of the claim and held that the employment claim was not entangled with the charter school regulations. This is one example of how a regulatory entanglement analysis walks the exact line legislators drew: employment was supposed to be private. The other side of the quasi-public coin is reflected where charter school actions are properly entangled with the state regulations, such as student rights, and therefore involve state action.

Enforcing students' rights through § 1983 claims has many advantages over a complete statutory overhaul. First, charter schools are creatures of statutes.[164] Therefore, unlike the school in *Rendell-Baker*, courts can interpret a state's enabling statute, make a ruling, and then apply it wholesale to all similar actions involving charter schools in the state. This will provide more guidance to lower courts, charter schools, and parents than would a one-off regulatory entanglement decision concerning a private school. Additionally, the statute has already specified which rights apply to charters; court enforcement will buttress that political determination.

158. *Id.* at 815–16.
159. *Id.* at 812.
160. *Id.* at 812–13.
161. *Id.* at 816 (citing Rendell-Baker v. Kohn, 457 U.S. 830, 841–42 (1982)).
162. *Id.* at 810.
163. *Id.* at 817.
164. *See infra* Section I.A.

Second, although there are forty-four different statutes authorizing charter schools (forty-three states and the District of Columbia), the fact-intensive regulatory analysis that these claims will require and produce will preserve the experimental function of charter schools. Problems and advantages of different statutory schemes can be analyzed and adjusted accordingly. Third, courts can firmly stake their roles in this process through statutory analysis. Instead of acting as historians, theorists, or policymakers, judges can defer to legislatures and help implement and enforce decisions made by the political process. Fourth, statutory interpretation provides a clear way to challenge any court decision with which parties disagree. And finally, state action analysis maintains the quasi-public and quasi-private feature of charter schools. If charter schools are never considered to be acting under the color of state law, state actors, or political subdivisions of the state, they are essentially private actors. Alternatively, if they are always considered to be acting under the color of state law, state actors, or political subdivisions of the state, they are hammered by the same regulations as public schools. Regulatory analysis allows the legislature to determine—via regulations—which actions by charter schools are public, and courts uses the legislative decisions to apply state action analysis thereby giving this legislative decision Constitutional enforcement power.

IV.
New York Case Study: Solution

A. Doctrine Supports Claim-Based Regulatory Entanglement State Action Analysis

Claim-based regulatory entanglement requires courts to carefully assess a state's charter-enabling legislation. Federal courts often turn to state court rulings when conducting regulatory entanglement analyses.[165] As an example of how this analysis would play out in federal court, this paper evaluates how New York's decisions would affect a finding of state action for different claims.

165. *See, e.g.*, Greater Heights Acad. v. Zelman, 522 F.3d 678, 680 (6th Cir. 2008) (holding that "[a]fter considering Ohio's statutory and case law," Ohio charter schools are a political subdivision of Ohio for purposes of determining whether the schools could sue the state under the Fourteenth Amendment); Preston C. Green III et al., *The Legal Status of Charter Schools in State Statutory Law*, 10 U. Mass. L. Rev. 240, 243 (2015) ("From our review of the charter school, public-status case law, we find that courts primarily look to the language of pertinent statutory provisions.").

In *In re New York Charter School Association v. Smith*, the New York Court of Appeals summarized this quasi-public designation, which is dictated by the legislature and depends on the context:

> We recognize that charter schools possess some characteristics similar to a public entity. The Legislature created charter schools as "independent and autonomous *public* school[s]" and granted them powers that "constitute the performance of essential public purposes and governmental purposes of this [S]tate." At the same time, however, charter schools are not governed by appointees of the government, but by a self-selecting board of trustees that has "final authority for policy and operational decisions of the school." Further, the Legislature made clear that charter schools are exempt from all other state and local laws, rules, regulations or policies governing public schools. When the Legislature intended charter schools to be subject to particular laws governing public entities, it has said so. Thus, the status of charter schools has often been difficult to define because they may not be easily identified as either a purely private or public entity. . . . [C]harter schools are a hybrid of sorts and operate on different models.[166]

The status of charter schools depends heavily on the context. Charter schools are specifically categorized as non-public schools for designation of textbooks, purchases of supplies, aid for the purchase of school library materials, aid for software supplies, health and welfare services to all children, and transportation.[167] Drawing the line between situations in which charter schools are public and when they are private requires scrutiny of the charter legislation, and is highly fact-specific.

New York courts have not definitely ruled on whether charter schools may properly be considered state actors. Although the New York Court of Appeals' ruling in *New York Charter Schools Association v. DiNapoli* is often interpreted to support the proposition that charter schools are not political subdivisions of the state and therefore not state actors,[168] this reading is inaccurate. Whether or not charter schools are state actors remains an open question; it was not before the court, and the case was decided on different grounds.[169] Rather, in *DiNapoli*, the court found that the State Comptroller did not have au-

166. *In re* N.Y. Charter Schs. Ass'n v. Smith, 15 N.Y.3d 403, 409–10 (2010) (first citing N.Y. EDUC. LAW §§ 2853(1)(c), (d), (f) (McKinney 2017); then citing *id.* §§ 2854(1)(b) & (e); and then citing N.Y. Charter Schs. Ass'n v. DiNapoli, 13 N.Y.3d 120 (2009)).

167. N.Y. EDUC. LAW §§ 2850(4)(a)–(b).

168. *See, e.g.*, *In re* Martin H. Handler, P.C. v. DiNapoli, 23 N.Y.3d 239, 247 (2014).

169. *N.Y. Charter Schs. Ass'n,* 13 N.Y.3d. at 131–32.

thority to audit charter schools under his "incidental" powers.[170] The state legislature had passed a bill demanding the State Comptroller audit all charter schools. The State Comptroller issued a letter stating that this audit would "include assessment to the extent the schools met quantitative academic achievements goals and complied with student selection procedures and criteria, as set forth in their charters."[171] The court found that this power could not be construed as "incidental" to the audit of school districts, and was therefore unconstitutional under the New York Constitution.[172]

The court assumed that charter schools were not political subdivisions of the state, which would clearly give the Comptroller auditing power, because the respondents did not press the argument.[173] However, the court below argued in dicta that charter schools were political subdivisions because they serve a public function and receive significant public funding (an analysis that would make charter schools wholly public).[174] A lively dissent countered that charter schools were "independent and autonomous public school[s]," received public funding "only indirectly through tuition paid by local school districts," are deemed non-public for certain purposes, and are "not included in the statutory definition of a 'political subdivision.'"[175] The court in *DiNapoli* skirted the issue of whether charter schools are political subdivisions. The question was never answered by the Court of Appeals, and the struggle at the intermediate appellate court was over the all-or-nothing determination of political subdivision.[176] However, this all-or-nothing determination is unnecessary when state action doctrine is properly focused on regulatory entanglement. Therefore, federal courts can find New York charter schools to be state actors for certain purposes without contradicting the Court of Appeals' decision.

B. New York Charter Schools Are Usually Not State Actors for Employment

New York State's Constitution provides that laborers, workers, and mechanics "engaged in the performance of any public work" shall

170. *Id.*
171. *Id.* at 128.
172. *Id.* at 132.
173. *Id.* at 131.
174. N.Y. Charter Schs. Ass'n v. DiNapoli, 60 A.D.3d 119, 124 (N.Y. App. Div. 2009)
175. *Id.* at 125.
176. *Id.* at 124.

not be paid less than the "prevailing wage."[177] Labor Law section 220 implemented this requirement, providing that "contracts to which the state . . . is a party . . . and any contract for public work entered into by a third party acting . . . on the benefit of such public entity" shall contain a stipulation enforcing article, I section 17.[178] The New York State Department of Labor declared Labor Law section 220 applied to all charter schools. Labor Law section 220(2) statutorily defined four public entities: "the State, a public benefit corporation, a municipal corporation or a commission appointed pursuant to law."[179]

In a dispute over New York's prevailing wage law, the Court of Appeals conducted a thorough statutory analysis of New York's charter statute, constitution, and labor law statutes to determine that charter schools are not "public entities" when contracting to complete facility projects (although they may need to meet labor laws when doing work on a publicly owned building).[180] First, the court held that the charter agreement does not contemplate employment of workers on facility projects because it is a license to be an "education corporation and nothing more."[181] Second, the court held that "charter schools are not public entities within the meaning of the prevailing wage law." Third, the court held that the charter school was not acting on behalf of the chartering entity.[182]

The court made clear that charter schools, although not public in the context of facility projects, could be public in a different context. The court recognized that "the status of charter schools has often been difficult to define because they may not easily be identified as either purely private or public entity [sic] . . . [they] are a hybrid of sorts," but noted that "they are significantly less 'public' than the entities in those four categories" and thus do not fall within the prevailing wage law.[183] The court specifically pointed to section 2853(1)(f) of New York's Education Law, which provides that the board of trustees have "final authority for policy and operational decisions of the school," and to section 2854(1) of New York's Education Law, which provides that charter schools are exempt from all other state and local laws, rules, and regulations or policies governing public schools.[184] The court noted that section 2853(1)(g) of the Education Law, which de-

177. N.Y. CONST. art. I § 17.
178. *Id.* at 412 (Lippman, C.J., dissenting).
179. *Id.* at 409.
180. N.Y. Charter Schs. Ass'n v. Smith, 15 N.Y.3d 403, 411 (2010).
181. *Id.*
182. *Id.* at 410.
183. *Id.*
184. *Id.*

clares that the state is not liable for the charter school's debts, means that the charter school does renovations "on its own behalf, in its own name, and at its own risk."[185] The court noted there may be times when "a charter school is acting in place of, on behalf of and for the benefit of a public entity, there the prevailing wage law may apply," but in this case the school owned the building, and all construction was its responsibility.[186] Therefore, charters located in public buildings, although not public entities under the prevailing wage law, could be ordered to comply with wage laws based on the benefit to the public school building in which they are located.

C. New York Charter Schools Are Usually Not State Actors for Teacher Rights

Charter schools are usually private actors for claims based on teacher and employee civil rights. New York charter law regulates retirement, fingerprinting, and imposes some requirements on certifications (although there is a lot of flexibility built into the statute).[187] However, when it comes to the employer-employee relationship, there are no regulations in the statute; the statute makes this relationship a matter of private law.[188] Therefore, charter schools should not usually be considered akin to the government in employee relations, and in this light, *Matwijko v. Board of Trustees of Global Concepts Charter Schools* was wrongly decided.[189]

In *Matwijko,* the court held charter schools to be state actors when terminating a teacher because she distributed letters to parents about a disagreement with a Board decision.[190] The court grounded its reasoning in the designation of charter schools as "public schools," the amount of state funding the school received, and the mandatory state standards even though they were unrelated to employment.[191] This case distinguished *Rendell-Baker* solely on charter schools' designation as "public schools."[192] By holding charter schools to be public actors regardless of the claims asserted, the *Matwijko* court makes charter schools wholly public. However, it is clear from New York's charter-enabling statute that legislators did not want the State entan-

185. *Id.* at 411.
186. *Id.*
187. N.Y. EDUC. LAW § 2854. (McKinney 2017).
188. *Id.* at § 2854(3).
189. Matwijko v. Bd. of Trs. of Glob. Concepts Charter Sch., No. 04-CV-663A, 2006 WL 2466868 (W.D.N.Y. Aug. 24, 2006).
190. *Id.* at *5.
191. *Id.*
192. *Id.*

gled in employment decisions, and instead intended charter schools to be considered private actors for these decisions.[193] This holding therefore does not respect the quasi-private nature of charter schools.

D. New York Charter Schools Are Usually State Actors for Student Rights

When it comes to student rights, charter schools should be considered state actors.[194] Student discipline, the rights of disabled students, assessments, and enrollment are heavily regulated areas.[195] Charter schools must "meet the same health and safety, civil rights, and student assessment requirements applicable to other public schools," but are currently exempt from all other "laws, rules, regulations, or policies governing public or private schools."[196] Additionally, the statute goes on to explicitly state that Article 65 requirements are not exempted, ensuring that no reading of the above provisions would exclude charters from Article 65.[197] Article 65 contains forty-six sections mandating requirements schools must meet when educating children.[198] Charter schools are also required to meet individualized education programs for special education students.[199] Therefore, charter schools should be state actors for these purposes.

One federal court has already applied claim-focused regulatory entanglement analysis in this area, and other courts can build upon this reasoning to further protect student rights in other realms.[200] In *Scagg v. New York Department of Education*, the Eastern District of New York ruled "that claims addressing the nature and quality of education received at charter schools may be properly brought against such schools and their management companies under Section 1983."[201] The charter school allegedly failed to identify students with learning disabilities and provide those students with educational programs, monitor their educational performance, provide a safe environment, and provide proper refrigeration, lunches, rodent extermination, certified

193. N.Y. EDUC. LAW § 2854 (McKinney 2017).
194. Although the charter-enabling legislation goes into great detail regarding students, the legislation barely touches on employment regulations. *See* N.Y. EDUC. LAW § 2854.
195. *See, e.g.*, U.S. DEP'T OF EDUC., PROTECTING STUDENTS WITH DISABILITIES (2015).
196. *Id.* at § 2854(1)(b).
197. *Id.*
198. *Id*. at § 3214.
199. *Id.*
200. Scaggs v. N.Y. Dep't of Educ., No. 06-CV-0799, 2007 WL 1456221 (E.D.N.Y. May 16, 2007).
201. *Id.* at *13.

teachers, books, paper, pens and pencils.[202] The court held that while *Rendell-Baker* was an action regarding a single teacher "in which it may fairly be said that the state could be only minimally or tangentially involved," this case concerned the "total inadequacy of a school to provide free public education to its students while receiving state funding, being bound to state education standards and purporting to offer the same education services and facilities as any other public school."[203] Although this case noted non-academic standards that were being violated, the court's analysis focused on the total failure to provide education.[204]

Although *Scaggs* dealt with the "total inadequacy" of education, the reasoning of the decision applies to classifying charter schools as state actors for other non-academic rights, such as due process violations in disciplinary proceeding against students, even when a school is academically successful.[205] Due process rights are heavily regulated in New York's statute, and charter schools are required to provide for due process when applying for their charter and while operating.[206] The *Scaggs* court properly noted that state action analysis in charter schools might lead to different answers based on what a given claim alleges.[207] By refusing to interpret state action as an all-or-nothing

202. *Id.* at *1.

203. *Id.* at *14.

204. *Id.* at *1 ("According to plaintiffs, Riverhead classrooms were overcrowded, and students were not provided with adequate educational services and programs. Specifically, defendants allegedly failed to identify students with learning disabilities and special educational needs, failed to provide such students with educational programs designed to address these issues, and failed to monitor the students' educational performance. Plaintiffs also assert that Riverhead neither provided safe and adequate transportation, nor prevented violent and disruptive behavior among students. In addition, Riverhead allegedly lacked proper refrigeration, lunches, rodent extermination, certified teachers, books, paper, pens and pencils."). The recounting of the facts shows the court was perturbed by the lack of education and the non-academic violations were not instrumental to its decision.

205. Due process rights in suspensions were defined by the Supreme Court as an opportunity to present the other side of the story. Goss v. Lopez, 419 U.S. 565 (1975). The Court noted that this could be as simple as the disciplinarian informally discussing the misconduct with the student. *Id.* at 583. The process should generally precede removal unless the student's presence "endangers persons or property or threatens disruption of the academic process." *Id.* at 582–83. The Court stopped short of requiring an opportunity to secure counsel or confront witnesses for a short suspension, but noted that a longer suspension may require more. *Id.* at 583. New York has codified the decision in section 3214 of the New York Education Law.

206. *See supra* Section II.D.

207. *See Scaggs*, 2007 WL 1456221, at *14 ("By contrast to *Rendell-Baker,* in this instance, the alleged claims concern not an employment action with regard to a single teacher, in which it may fairly be said that the state could be only minimally or tangentially involved; rather, the claims relate to the alleged total inadequacy of a school

decision, the court properly analyzed the issue. If other federal courts follow this reasoning, the regulatory gap in enforcing nonacademic standards could be closed through litigation.

Conclusion

This paper focused on New York's charter school legislation to examine a common hole in all states' charter school enabling legislation. Each state's legislation focuses on achieving academic success. The statutes' major enforcement mechanism (revocation of a school's charter) was similarly designed with the sole goal of academic achievement in mind. Despite the fact that every state also maintains non-academic regulations that must be followed, enforcement of these provisions in an academically-successful school was not originally contemplated. Because states have an interest in maintaining the charters for academically successful schools, revoking charters for failure to meet non-academic regulations is not a viable solution for enforcement.

The statutes do not currently provide an avenue for enforcement of non-academic violations and a statutory overhaul could jeopardize the success of charter schools. However, asserting § 1983 claims can serve as a solution to remedy this under-enforcement. Because § 1983 claims require courts to undertake a state action analysis, judges will analyze charter statutes and preserve the quasi-public nature of charter schools, as envisioned by state legislators. Charter schools are creatures of state law, and therefore solutions to under-enforcement of non-academic standards must be thought of on a state level. New York has academically successful charter schools and a successful process for holding those schools accountable to academic standards. However, non-academic regulations, especially those providing for due process in suspensions, have recently been criticized as under-enforced. By analyzing charter-enabling legislation and court rulings, this paper discussed how § 1983 claims would proceed for student due process rights and employee due process rights under a state action doctrine analysis. State action doctrine, by focusing on regulatory entanglement, would allow student rights to be enforced in the courts while usually leaving employee rights to the private markets. This solution buttresses legislative decisions while solving the problem of under-enforcement of non-academic rights violations.

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to provide free public education to its students while receiving state funding, being bound to state educational standards and purporting to offer the same educational services and facilities as any other public school.").