American Civil Liberties Union Foundation of Delaware, American Civil Liberties Union Foundation Racial Justice Program, and Community Legal Aid Society, Inc., Complainants

v.

State of Delaware and Red Clay Consolidated School District, Respondents

Complaint to the Office of Civil Rights, Region III Regarding Charter Schools and the Segregation of Delaware's Public Schools in Violation of Title VI and § 504 of the Rehabilitation Act

12/3/2014

I. INTRODUCTION

For over sixty years, the segregation of Delaware's public schools has been the subject of litigation. While the state made considerable progress after its segregated schools were challenged in 1952, recent trends resulting from the state's charter school policies have caused substantial and troubling resegregation. Specifically, the state's Charter School Act of 1995 ("Charter School Act") has led to the proliferation of high-performing charter schools[1] with practices and policies that result in the disproportionate exclusion of African-American and Hispanic students, low income students,[2] and students with disabilities. These disparities result from the state-sanctioned preferential admissions treatment of students in a 5-mile radius from a school, essay requirements regarding student "interest" in a school's teaching methods or why a

[1] This complaint refers to a charter school as "high-performing" when in the 2013-2014 academic year, at least 90% of students met the state reading and math standards (measured by the highest grade level for which data is available). *See* Exhibit A. In the 2013-2014 school year, these schools were: the Charter School of Wilmington, Newark Charter School, Sussex Academy, MOT Charter School, and Odyssey Charter School. *Id*.

[2] In this complaint, we use the definition of "low income" utilized by the State of Delaware in their publically available charter school data. Prior to the 2010-11school year, Delaware considered students who received free or reduced lunch ("FRL") to be low income. *See* "Other Student Characteristics," State of Delaware: The Official Website of the First State, *available at* http://profiles.doe.k12.de.us/SchoolProfiles/CommonControls/popUp.aspx?distCode=0&schoolCode=0&dataBlock=Demographics&catBlock=OtherCharacteristics (last viewed Dec. 1, 2014). Between 2011 and 2013 Delaware counted students as low income who received FRL, TANF or SNAP Benefits. *Id.* Starting with the 2013-2014 school year, Delaware counts only students who receive Temporary Assistance for Needy Families ("TANF") or Supplemental Nutrition Assistance Program ("SNAP") as low income. *Id*. By eliminating students who receive free and reduced lunch (based on federal income guidelines) from the state's count of low income students, Delaware lowered the household income limit for classification as low income from 185% of the Federal Poverty Level to approximately 137% of the Federal Poverty Level. Delaware's FRL program allows households earning up to 185% of the Federal Poverty Level to qualify. *See* Income Eligibility Guidelines, State of Delaware: The Official Website of the First State, *available at* http://www.doe.k12.de.us/Page/1237; Federal Child Nutrition Programs-Income Eligibility Guidelines, Fed. Reg. Vol. 79, No. 43 (Mar. 5, 2014), *available at* http://www.fns.usda.gov/sites/default/files/2014-04788.pdf (last viewed Dec. 1, 2014). Comparing Delaware's TANF income eligibility limits to the Federal Poverty guidelines shows that the state's TANF income limits are approximately 137% of the Federal Poverty Level. *See* Temporary Assistance for Needy Families (TANF), State of Delaware: The Official Website of the First State, http://www.dhss.delaware.gov/dss/tanf.html (last viewed Dec. 1, 2014); Income Eligibility Guidelines: Federal Poverty Guidelines-100%, Fed. Reg. Vol. 79, No. 43 (Mar. 5, 2014), *available at* http://www.fns.usda.gov/sites/default/files/2014-04788.pdf. Residents of Delaware receiving SNAP benefits must earn at or below 130% of the Federal Poverty Level. Food Supplement Program, State of Delaware: The Official Website of the First State, http://www.dhss.delaware.gov/dss/foodstamps.html (last viewed Dec. 1, 2014).

While this complaint alleges that the State of Delaware's policies have the effect of allowing schools to discriminate against low income students, complainants recognize that there is no income-based disparate impact claim available. However, we refer to the effect of Delaware's charter school policies on low income students to emphasize that, in a state where income is so closely correlated with race and the race-based achievement gap is so stark, such policies will have a detrimental effect on both low income families and families of color.

school is a "good choice" for one's child, and the state's failure to adequately regulate school-level barriers to admission (i.e. expensive uniform requirements, parental involvement requirements, and activity fees). The State of Delaware through the Delaware Department of Education ("DDE") and Red Clay Consolidated School District ("RCSD") authorize all of the charter schools in the state and are responsible for the disproportionate exclusion of students of color, low income students, and students with disabilities from the high-performing schools.

These circumstances are informed by a long history. In 1952, eight African-American parents sued for their children's right to attend the all-white public school in their community of Claymont, challenging the constitutionality of the "separate but equal" doctrine.[3] The judge who heard the case, Chancellor Collins Seitz, ordered the all-white high school to admit the African-American students, bravely reversing centuries of state-sanctioned segregation in education.[4] Chancellor Seitz weighed the merits of the "separate but equal" principle, ultimately concluding that the African-American school's inferior facilities, limited curriculum, and heavy teaching load violated this principle.[5] The court echoed plaintiffs' assertion that "legally enforced segregation in education, in and of itself, prevents [African-American students] from receiving education opportunities which are 'equal' to those offered white [students]"[6] and held that both the "facilities and educational opportunities" at the all-black school were "substantially inferior in a Constitutional sense, to those at [the all-white school]."[7] In a rebuke to *Plessy v. Ferguson*,[8] Chancellor Seitz ruled that he did "not believe the relief should merely be an order to make [the two schools] equal."[9]

Through appeals, *Belton* became one of the five cases the Supreme Court consolidated into *Brown v. Board of Education*.[10] The decision appealed from Delaware was the only decision that the Supreme Court affirmed when ruling in *Brown*. Over the course of the next forty years, Delaware integrated its public schools through the extensive use of busing and race-conscious

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[3] *See Belton v. Gebhart*, 87 A. 2d 862 (1952) *aff'd sub nom. Brown v. Bd. of Educ. of Topeka, Kan.*, 349 U.S. 294 (1955).

[4] *An Interview with the Honorable Collins Jacques Seitz Conducted by the Honorable A. Leon Higginbotham Jr. and by David V. Stivison, in* CHOOSING EQUALITY: ESSAYS AND NARRATIVES ON THE DESEGREGATION EXPERIENCE 75 (Robert L. Hayman Jr. & Leland Ware, eds., Pennsylvania State Univ. Press 2009).

[5] *Belton*, 87 A. 2d at 868-69.

[6] *Id*. at 864.

[7] *Id*. at 871.

[8] *Plessy v. Ferguson*, 163 U.S. 537 (1896).

[9] *Belton*, 87 A. 2d at 871.

[10] *Brown v. Bd. of Ed. of Topeka, Shawnee Cnty., Kan.*, 347 U.S. 483, 490 (1954) *supplemented sub nom. Brown v. Bd. of Educ. of Topeka, Kan.*, 349 U.S. 294 (1955) (hereinafter "*Brown*").

public school assignments. Unfortunately, the integration Delaware public schools achieved has been significantly diminished over the last two decades, in step with the proliferation of charter schools across the state.

As detailed in Part IV of this complaint, Delaware's expansion of charter schools has led to segregated charter schools for students of color, students from low income families, and students with disabilities. Specifically, more than three-quarters of the state's charter schools are racially identifiable.[11] High-performing charter schools are almost entirely racially identifiable as White. In addition, low income students and students with disabilities (to the extent that students with disabilities are served by charter schools) are disproportionately relegated to failing charter schools[12] and charter schools that are racially identifiable as African-American or Hispanic. Relatedly, the proliferation of charter schools has been accompanied by increased segregation in public schools located in districts where charter schools operate. Despite the opening of many charter schools in racially and economically diverse areas, these trends will only worsen as long as Delaware's charter schools are permitted to employ their current exclusionary admission requirements. Exclusionary requirements include "interest" requirements in the form of examination scores,[13] "good choice"[14] essays written by parents, access to gifted and talented (or

[11] In this complaint, racially identifiable schools are identified using the Department of Education's Office for Civil Rights ("OCR") "rule of thumb" for identifying such schools. A school is racially identifiable if there exists at least a 20% disparity between a given school and its surrounding district's enrollment for a given racial group. *See* Letter from Beth Gellman-Beer, Supervising Attorney Philadelphia Office, U.S. Dep't of Educ. To Mark Murphy, Secretary of Educ., Del. State Dep't of Educ. 3 (May 22, 2013) (on file with author) ("In determining whether a school is racially identifiable, OCR compares the percentage of minority students in the school to the percentage of minority students in the District as a whole. In comparing enrollment disparities, OCR looks for differences that are statistically significant and may also consider 'a rule of thumb' that flags disparities of 20 percent between school enrollments and district-wide enrollments as possible indicators of racial identifiability."). To determine whether charter schools in Delaware are racially identifiable, this complaint used the state's school-specific and district-specific enrollment data. *See generally* School and District Profiles, State of Delaware: The Official Website of the First State, http://profiles.doe.k12.de.us/SchoolProfiles/State/Default.aspx (last viewed Dec. 1, 2014). Because several charter schools are authorized by the RCSD and the district enrollment data for RCSD included charter school data, this complaint adjusted the RCSD enrollment data to include only public, non-charter schools in determining the racial identifiability of charter schools authorized by RCSD.

[12] The terms "failing" and "nonfailing" in this complaint are derived from Delaware's Adequate Yearly Progress ("AYP") standards. AYP is the name given to accountability standards that states developed under the federal No Child Left Behind Act. In Delaware, schools are put into three categories: "Above Target," "Meets Target," or "Below Target," based on students' scores on the Delaware Comprehensive Assessment System ("DCAS"), Delaware's statewide standardized test. 14 Del. Admin. Code 103, *available at* http://regulations.delaware.gov/AdminCode/title14/100/103.pdf. For this complaint, "low-performing charter schools" or "failing schools" are schools that are "below target," or fail to meet AYP.

[13] Applicants to the Charter School of Wilmington ("CSW") who wish to be considered for admission under the school's first priority preference, "specific interest in CSW's methods, philosophy or educational focus," must score well on a "CSW-administered placement test" which "assesses exposure and foundation in Math and Reading." The Charter School of Wilmington, Student Admissions Policy (approved Oct. 28, 2014) at 1-2, *available at* http://www.charterschool.org/aboutus/boardofdirectors/downloads/policies/csw-admissions-policy-rev102814.pdf (last viewed Nov. 30, 2014). To assess "specific interest," the school evaluates performance on the placement test along with the following factors: report card grades for math and science in 7th and 8th grades, teacher recommendations, enrollment in honors classes for Math or Science, extracurricular activities in Math or Science,

"honors") elementary and middle school programs,[15] annual activity fees,[16] mandatory parent involvement,[17] and mandatory uniform purchases.[18] The Complainants allege that charter schools' exclusionary admissions requirements, which DDE and RCSD have allowed them to employ, have dissuaded parents of African-American, Hispanic, and low income students and students with disabilities from applying to charter schools and/or prevented them from successfully placing their children in high-performing charter schools.

Additionally, the Charter School Act, coupled with the Neighborhood Schools Act of 2000, has interfered with the integration of Delaware's traditional urban public schools.[19] Delaware's school system now presents most inner-city students of color with a Hobson's choice: attend a hyper-segregated traditional public school or attend a hyper-segregated charter school.[20] Though Delaware's charter school system operates under the auspices of choice, the most desirable and/or high-performing schools cannot and will not admit every student who wishes to attend. Rather, such schools, especially the Charter School of Wilmington ("CSW"), Sussex Academy, and Newark Charter School ("NCS"), discussed in detail in Part IV, admit a

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and an applicant essay. *Id*. at 2. The school evaluates all factors based on a system where each factor is weighted differently, but the placement test accounts for more than 50% of available points. Thus, CSW's admissions process screens out children who have not had access to accelerated curriculums prior to seeking admission.

[14] Sussex Academy requires parents to write an essay about why the school is a "good choice" for their child. Sussex Academy, Addendum Application to Delaware Standard Application (2015-2016), *available at* http://www.sussexacademy.org/Admissions/. This will screen out talented children whose parents are illiterate or function with low-literacy, whose parents do not speak English, and whose parents will consider an essay a significant barrier for other reasons.

[15] *See* discussion of CSW admissions process *supra* note 13.

[16] *See, e.g.*, Sussex Academy, Student Handbook 2014-15 at 6, *available at* https://imageserv11.team-logic.com/mediaLibrary/1/Web2015_10_16_14.pdf (assessing a $200 annual activity fee for middle school students and a $225 activity fee for high school students and requiring parents seeking a waiver to contact the school's office).

[17] *See, e.g.*, Sussex Academy, School Success Agreement, *available at* https://imageserv.team-logic.com/mediaLibrary/1/School_Success_Plan_1.pdf (requiring parents to "[v]olunteer to chaperone field work, review portfolio presentations, help with special assignments from [] child's team and work to support the PTO and Sports Boosters as needed").

[18] *See, e.g.*, Shirt Orders, The Charter School of Wilmington, http://charterschool.org/shirt-orders/ (last viewed Nov. 12, 2014); Sussex Academy, Student Handbook 2014-2015 at 12, *available at* https://imageserv11.team-logic.com/mediaLibrary/1/Web2015_10_16_14.pdf; Uniform Purchases, Newark Charter School, http://ncs.charter.k12.de.us/pages/Newark_Charter_School/Parents/Uniform_Purchases (last viewed Nov. 12, 2014).

[19] The Neighborhood Schools Act of 2000 required a number of Delaware school districts to develop neighborhood school plans, which were to address the way students were assigned to schools in a given district in order for students to attend the grade-appropriate school geographically closest to the student's home. 72 Del. Laws c. 287 (2000).

[20] Leland Ware & Cara Robinson, *Charters, Choice, and Resegregation*, 11 DEL. L. REV. 1, 2-3 (2009) (citing Justice Souter's dissent in *Zelman v. Simmons-Harris*, 536 U.S. 639, 707 (2002)).

disproportionate number of higher-income White students who have no disabilities. As a result, Delaware's nonfailing charter schools, especially its high-performing charter schools which form a subset of that category,[21] by and large do not serve students of color, poor students, or students with disabilities.[22] This situation leaves to the traditional public schools the more costly and difficult task of educating the students most challenged by poverty or special education needs. In sum, Delaware charter schools now deprive students of the fully integrated education their communities have fought so hard to achieve through *Belton*, *Brown*, and decades of litigation and advocacy, and they are leading to more segregated non-charter public schools. As demonstrated *infra*, the segregating effect of charter schools has increased with the growth in charter schools, but the state has long known of the problem. A 2006 report commissioned by DDE and the State Board of Education noted that many of the charter schools might be "accelerating the resegregation of public schools based on race, class and ability."[23]

This Complaint, filed by the American Civil Liberties Union Foundation of Delaware, the American Civil Liberties Union Foundation's Racial Justice Program, and the Disabilities Law Program of Community Legal Aid Society, Inc., ("CLASI")[24] alleges that the policies of the State of Delaware and RCSD with respect to the expansion, approval and reapproval of charter schools violate the Department of Education's regulations interpreting Title VI of the Civil Rights Act of 1964 and Section 504 of the Rehabilitation Act of 1973. Applying a "disparate impact" theory, the Complainants seek to vindicate the rights of African-American students, Hispanic students and students with disabilities in Delaware public schools, as they are disproportionately harmed by charter school admission policies that deny them admission or deter them from seeking admission to the high-performing charter schools, and interfere with the integration of Delaware's traditional public schools. The Complainants ask the Department of Education's Office for Civil Rights ("OCR") to investigate Delaware's charter school system and encourage and direct the state and RCSD to adopt new policies and practices to ensure that charter schools reverse the segregation of public school students by race, class, and disability.

[21] *See supra* notes 1, 12 for a definition of "nonfailing" and "high-performing."

[22] For a detailed breakdown of how admissions policies are correlated to racial identifiability and performance of Delaware's charter schools, please see Exhibits A and B.

[23] *See* Gary Miron, et al., *Evaluation of the Delaware Charter School Reform, Year 2 Report* ii (2006), *available at* http://homepages.wmich.edu/~miron/publics/de_cs-eval_year2_report.pdf. The finding was conditional because the report also recognized the resegregative effect of interdistrict choice and the Neighborhood Schools Act. *Id.*

[24] CLASI is the oldest and largest civil legal services program in Delaware, providing representation to people who are poor since 1946. CLASI, through its Disabilities Law Program, is also the Protection and Advocacy program for the State of Delaware, designated by the Governor to protect and advocate the rights of people with disabilities in Delaware.

II. LEGAL FRAMEWORK

Title VI of the Civil Rights Act of 1964 provides that the State of Delaware, DDE, and RCSD, as recipients of federal financial assistance, may not exclude students from participation in their programs or activities on the basis of race, color, or national origin.[25] Even a facially neutral law may have an unlawful discriminatory impact on students of a particular race or color. OCR has explained that in "determining whether a facially neutral policy has an unlawful disparate impact on the basis of race," OCR will engage in a three-part inquiry.[26] First, OCR will determine whether a policy has "resulted in an adverse impact on students of a particular race as compared with students of other races."[27] Next, in the case of an adverse impact, OCR will determine whether the policy in question is "necessary to meet an important educational goal."[28] In making this determination, OCR will "consider both the importance of the goal that the school articulates and the tightness of the fit between the stated goal and the means employed to achieve it."[29] Finally, if the policy is necessary to meet an important educational goal, OCR will assess whether there are (a) "comparably effective alternative policies or practices that would meet the school's stated educational goal with less of a burden or adverse impact on the disproportionately affected racial group," or whether (b) "the school's proffered justification [is] a pretext for discrimination."[30] An affirmative answer to either (a) or (b) results in a finding of unlawful discrimination.[31]

Regulations promulgated by the U.S. Department of Education prohibit a recipient of federal funds from "utiliz[ing] criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin."[32] Section 504 of the Rehabilitation Act prohibits discrimination against students with disabilities.

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[25] 42 U.S.C. § 2000d.

[26] U.S. Dep't. of Educ. OCR, Guidance Letter at 11 (Jan. 8, 2014), *available at* http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.html.

[27] *Id*.

[28] *Id*.

[29] *Id*.

[30] *Id*.

[31] *Id*. at 11-12.

[32] 34 C.F.R. § 100.3(b)(2); U.S. Dep't of Justice, Title VI Legal Manual 47-49 (2001), *available at* http://www.justice.gov/crt/about/cor/coord/vimanual.pdf.

Facially neutral policies that have the effect of discriminating against students with disabilities are similarly prohibited by Section 504.[33]

As detailed below, the DDE authorizes all but four of the state's charter schools; the remaining four are approved, i.e., authorized, by the RCSD. Under Delaware law, DDE, the State Board of Education and (as to the charter schools authorized by RCSD) RCSD are responsible for oversight of the charter schools.[34] All charter schools are required to submit annual reports addressing, *inter alia*, school operations and management to DDE, the State Board, and the approving authority. Those entities may conduct compliance reviews, and the approving authority is required to do so at least every three years.[35] In considering charter school renewal applications, which must be filed periodically by every continuing charter school, the approving authority is required to determine the school's compliance with the criteria set forth in the Charter Schools law, 14 Del. C. §§ 501-17.[36] The criteria include not discriminating in the admissions process against any student because of race, color, national origin or disability.[37]

The charter schools discussed in Part IV, CSW, Sussex Academy, and NCS, are three of the high-performing charter schools in Delaware.[38] Each has created structural barriers to the admission of students of color and students with disabilities, and, despite evidence of underrepresentation of these groups, they have inadequately taken diversity into account in their admissions and outreach practices. Comparing the African-American and Hispanic student enrollment at these three schools with the African-American and Hispanic student enrollment in their corresponding school districts leaves no doubt that the demographic makeup of the three charter schools in no way reflects their surrounding districts. In fact, as noted in Figure 5, *infra*, all three of these schools are considered racially identifiable as White.[39] The following charts illustrate the segregated nature of Delaware's charter schools and their lack of diversity relative to their surrounding districts.

Figure 1. Demographics of Three Delaware High-Performing[40] Charter Schools and Their Surrounding Districts (2013-14)[41]

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[33] 29 U.S.C. § 701 *et seq*.

[34] Charter School of Wilmington Preferences, Del. Op. Att'y Gen. 06-IB07, at *1 (April 10, 2006).

[35] 14 Del. C. § 513.

[36] *Id*. at §514A(a).

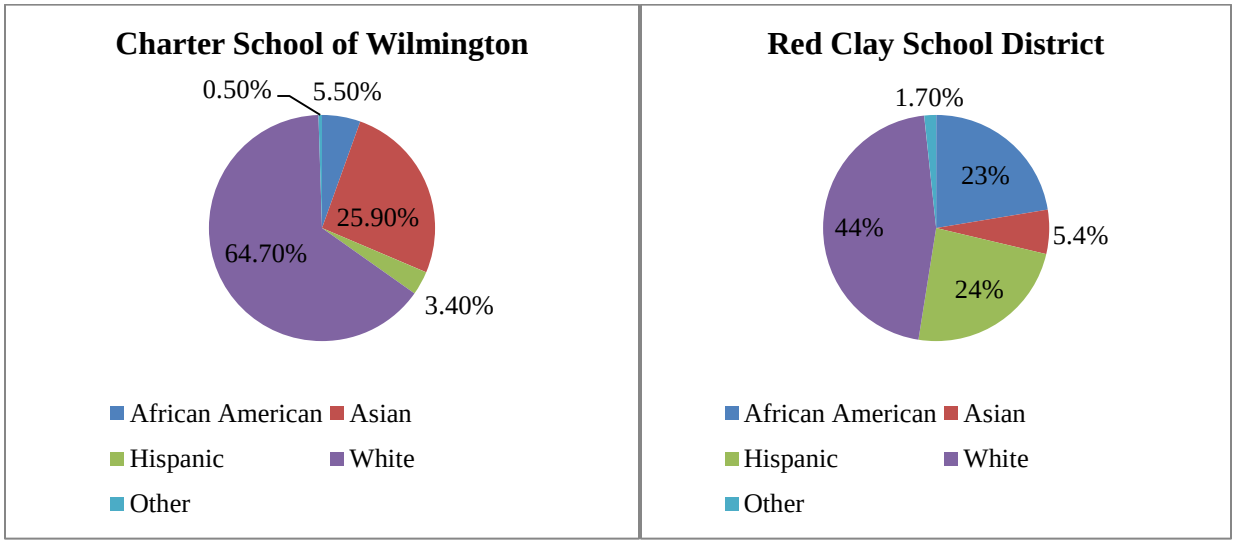
[37] *Id*. at §506(a)(4).

[38] *See supra* note 1.

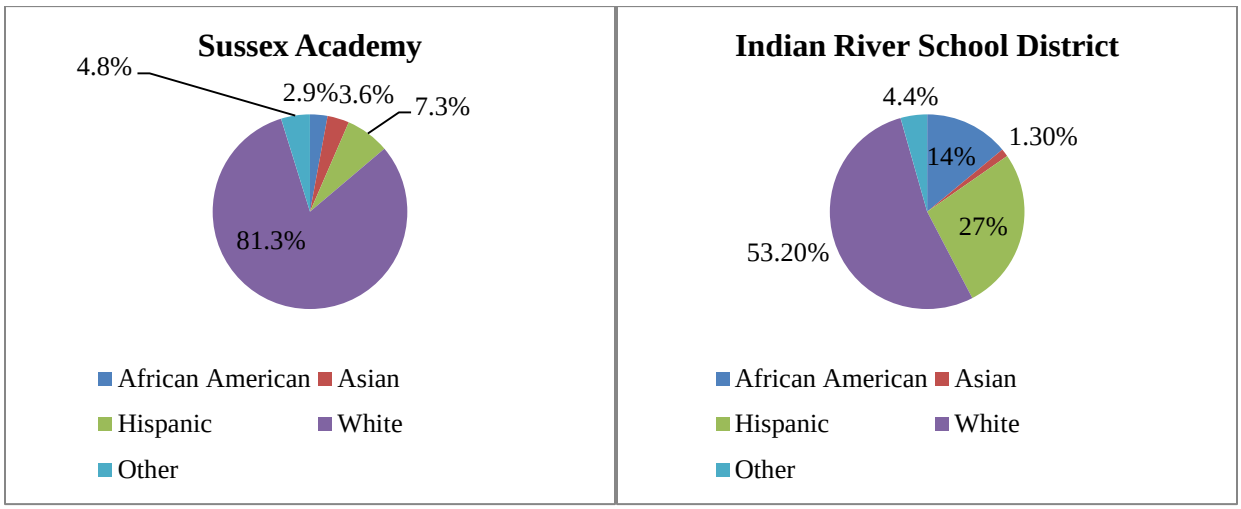
[39] *See also* Exhibit A.

[40] *See supra* note 1.

Charter School of Wilmington v. Red Clay School District (2013-14)[42]



Sussex Academy v. Indian River School District (2013-14)



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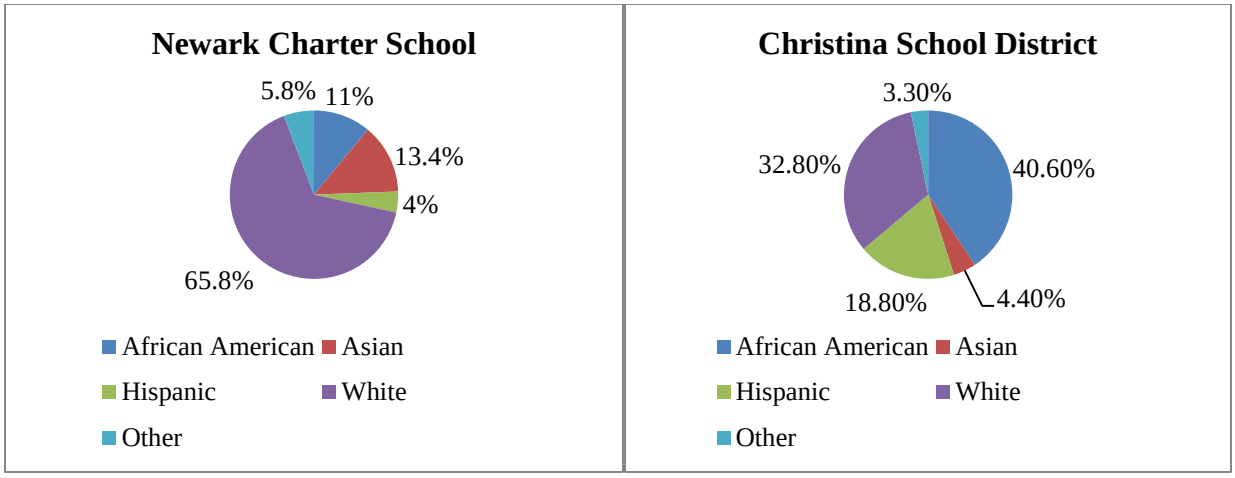
[41] *See generally* Delaware School and District Profiles, State of Delaware: The Official Website of the First State, *available at* http://profiles.doe.k12.de.us/SchoolProfiles/State/Default.aspx.

[42] Because several charter schools are authorized by the RCSD and the district enrollment data for RCSD on the State of Delaware website included charter school data, this complaint adjusted the RCSD enrollment data from that website to include only public, non-charter schools.

Newark Academy v. Christina School District (2013-14)



These schools are but the most extreme examples of the segregation that Delaware's charter policy has engendered, in which students must choose between schools that are failing, segregated, or both.

III. DESEGREGATION HISTORY

Perhaps because of its location in the mid-Atlantic region, historically sandwiched between slave and free states, Delaware's history with respect to race is unique. In 1992, the *New York Times* described Sussex County, Delaware's southernmost county, as the "northernmost county in Mississippi."[43] Delaware's northernmost county is, in contrast, part of metropolitan Philadelphia, Pennsylvania. As a result, Delaware is inconsistent in its relationship to race; it was both a national leader in school integration and has been a microcosm of many communities' struggles throughout the country to integrate public schools. An arduous school integration process, documented in the state's rich desegregation litigation, preceded Delaware's current public school system and the relatively recent emergence of charter schools.

Wilmington, Delaware is located in New Castle County. In 1950, Wilmington's population was about 110,000, 15% of whom were African-American.[44] Suburban New Castle County's population at the time was about 62,000, 6.4% of whom were African-American.[45] During the next two decades, the suburban New Castle County population ballooned to five

[43] WILLIAM H. WILLIAMS, SLAVERY AND FREEDOM IN DELAWARE, 1639-1865 xii (1996).

[44] *Evans v. Buchanan*, 393 F. Supp. 428, 432 (D. Del. 1975) *supplemented*, 416 F. Supp. 328 (D. Del. 1976) *aff'd as modified*, 555 F.2d 373 (3d Cir. 1977).

[45] *Id*.

times its previous size, while the suburban African-American population "declined slightly."[46] As a result, by the mid-1970s, the African-American population of the County had become heavily concentrated within the City of Wilmington."[47] The disparity led to racially identifiable schools whose resources hugely varied.

Prior to the Supreme Court's decision in *Brown*, the Delaware Chancery Court, in *Belton*, held that the state's segregated schools were not *per se* unconstitutional, but that the facilities and educational opportunities were substantially inferior at the all-black schools at issue in the case.[48] The court considered differences in facilities, transportation, teacher training, pupil-teacher ratios, and overall educational opportunities.[49] *Belton* became one of five cases before the Supreme Court in *Brown* regarding the constitutionality of the "separate but equal" doctrine outlined by *Plessy* [50] and its application to public schools. The case was the only case affirmed by the Supreme Court.[51]

However, despite this initial leadership, Delaware delayed and resisted implementation of *Brown*'s desegregation mandate. The initial regulations drawn by the State Board of Education after *Brown* created a loophole to prevent immediate desegregation by requiring local school districts to file a request before desegregation could begin.[52] For more than three years after the *Brown* decision in 1954, local school districts did not file the requests, and the state did not force the schools to desegregate.[53] In *Evans v. Buchanan*, the Third Circuit Court of Appeals was not swayed by this blame-shifting; it compelled admission of the named parties to schools in their respective districts without regard to race and ordered the state to formulate a desegregation plan.[54] In 1959, the district court approved almost the entire grade-by-grade State Board plan for desegregation that would span over twelve years.[55] However, the Third Circuit Court of Appeals

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[46] *Id*.

[47] *Id*. at 432-33.

[48] *Belton*, 87 A.2d at 869, 871.

[49] *Id*. at 869-70.

[50] *Plessy*, 163 U.S. 537 (1896).

[51] *Brown*, 349 U.S. at 301.

[52] *Evans v. Buchanan*, 152 F. Supp. 886, 887-88 (D. Del. 1957) *aff'd in part, vacated in part*, 256 F.2d 688 (3d Cir. 1958).

[53] *Id*.

[54] *Id*. at 888–89.

[55] *Evans v. Buchanan*, 172 F. Supp. 508, 516 (D. Del. 1959) *supplemented*, 173 F. Supp. 891 (D. Del. 1959) and *vacated sub nom. Evans v. Ennis*, 281 F.2d 385 (3d Cir. 1960).

held, in part, that the twelve-year plan failed to follow the "intent and substance" of *Brown*.[56] It ordered the lower court to compel the State Board to submit for its approval a "modified plan which [would] provide for full integration of all grades of the public schools of Delaware commencing with the Fall term 1961."[57] It also ordered the lower court to direct the individual defendants, members of the Board of Trustees or of the Boards of Education in the named School Districts, "to integrate commencing with the Fall term 1960, the respective . . . plaintiffs who . . . actively [sought] integration," in addition to ordering the continued grade-by-grade integration then in effect until the modified plan providing for full integration was put in place.[58]

In 1968, eight years after the Third Circuit's desegregation order in *Evans*, the state legislature passed the Education Advancement Act to change district boundaries and consolidate schools.[59] The Act excluded Wilmington from the reorganization planned by the State Board and from any consolidation plan.[60] Thus, the Act effectively ensured that segregation persisted in Wilmington, given that Wilmington's core black schools remained segregated.[61] Indeed, in 1974, "[t]he Wilmington Public Schools . . . ha[d] an enrollment of 14,688 pupils, of whom 83% [we]re black and 14% [we]re white."[62] Of the 22 schools in the city, "11 ha[d] virtually all-black (94-100%) enrollments and one ha[d] a virtually all-white (89%) enrollment."[63] African-American families from Wilmington sued to desegregate their schools by including suburban schools in their district, and the district court ordered the presentation of alternate desegregation plans, both within the current boundaries of the Wilmington School District and incorporating other parts of New Castle County.[64] The court passed on the question of whether the Educational Advancement Act violated the constitution in its confinement of Wilmington students to Wilmington schools.[65] The district court referred to schools that had previously been *de jure* black schools and that between 1956-1973 had black student enrollment of no less than 91% as "racially identifiable,"[66] viewing such enrollment numbers as "a clear indication that segregated

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[56] *Evans*, 281 F.2d at 388.

[57] *Id*. at 390.

[58] *Id*.

[59] *Evans*, 393 F. Supp. at 438

[60] *Id*. at 438-39.

[61] *Id*. at 439.

[62] *Evans v. Buchanan*, 379 F. Supp. 1218, 1222 (D. Del. 1974).

[63] *Id*.

[64] *Id*. at 1224.

[65] *Id*.

schooling in Wilmington [had] never been eliminated and that there still exist[ed] a dual school system."[67]

The portion of the Education Advancement Act excluding Wilmington was declared unconstitutional in 1975, in subsequent phases of *Evans*. [68] The district court found in 1975 "(a) a historic arrangement for inter-district segregation within New Castle County, (b) significant governmental involvement in inter-district discrimination, and (c) unconstitutional exclusion of Wilmington from consideration for consolidation by the State Board."[69] By leaving Wilmington out of any broader desegregation plan, the state had excluded nearly 75% of the African-American student population of New Castle County and 44% of the African-American student population in Delaware, effectively preserving the racial identifiability of Wilmington and the suburban New Castle County Districts and thus contributing to a "separation of the races."[70]

In 1976, the district court reviewed proposals to desegregate Wilmington and northern New Castle County schools.[71] The court rejected an intra-district plan that would have left in place racially identifiable schools in Wilmington and suburban New Castle districts.[72] Notably, the court considered Wilmington schools that were, "for the most part, 85% to 95% black" to be racially identifiable.[73] The court also rejected inter-district proposals including voluntary plans involving magnets, forced busing, and part-time desegregation.[74] The court ordered inter-district reorganization and desegregation within two years.[75] The court's proposed plan (which could be substituted by an approved state plan), among other things, included all of northern New Castle County, set up an interim board of education, and set a range of 10–35% African-American enrollment as *prima facie* evidence of having desegregated.[76] The Third Circuit upheld the

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[66] *Id*. at 1223.

[67] *Id*. (citation omitted).

[68] *Evans*, 393 F. Supp. at 447.

[69] *Id.*

[70] *Id*. at 439, 446 (internal quotations omitted) (citation omitted).

[71] *Evans v. Buchanan*, 416 F. Supp. 328, 343-352 (D. Del. 1976), *aff'd as modified*, 555 F.2d 373 (3d Cir. 1977).

[72] *Id*. at 343–44.

[73] *Id*. at 343.

[74] *Id*. at 344-47.

[75] *Id*. at 353-61.

[76] *Id*. at 354 –58.

decision but disapproved of the *prima facie* desegregation percentages, holding "that no particular racial balance will be required in any school, grade, or classroom."[77]

In 1978, the district court adopted a "9-3 plan" where children would attend schools in the predominantly suburban districts for nine years and schools in the City of Wilmington for three consecutive years.[78] In 1981, after the state legislature empowered the State Board to "ensure compliance with the parameters set forth in the 1978 order," the Delaware district court approved the State Board's division of the single consolidated district into four separate school districts.[79] These school districts closely resembled the previous attendance areas.[80] Under these conditions, Delaware reached the height of its integration efforts in the 1980s.

In 1989, the State Board requested RCSD "to bring the racial composition of its student populations at each District school to within +/- 10% of the minority percentages for each grade level in the District by Fall 1991."[81] The Red Clay Consolidated School Board submitted a plan in March 1990 (the "Plan") in response that contained a "mixed feeder plan" and a "choice component" to be developed and submitted at a subsequent date.[82] This Plan was to be implemented in September 1991.[83] A "mixed feeder plan" is one which incorporates race-conscious alternatives to a geographic feeder plan in order to achieve desegregated schools.

In 1991, RCSD moved to have the 1978 order amended to allow a deviation from the 9-3 plan in order to implement a "CHOICE" or magnet school plan in conjunction with a part of the District's mixed feeder plan proposed in March 1990.[84] The court granted the motion with certain conditions that addressed, in part, concerns raised throughout the proceedings.[85] Notably, the court paid special attention to the RCSD's history of "delay, obfuscation, and recalcitrance" in remedying racial disparities from 1984-91.[86] Additionally, the court explained that RCSD had

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[77] *Evans v. Buchanan*, 555 F.2d 373, 380 (3d Cir. 1977), *cert. denied*, 434 U.S. 880 (1977).

[78] *Evans v. Buchanan*, 447 F. Supp. 982, 989, 1008 (D. Del. 1978) *aff'd*, 582 F.2d 750 (3d Cir. 1978).

[79] *Coal. To Save Our Children v. Buchanan*, 744 F. Supp. 582, 584 (D. Del. 1990).

[80] *Evans v. Buchanan*, 512 F. Supp. 839, 846 (D. Del. 1981).

[81] *Coal. To Save Our Children*, 744 F.Supp. at 584-85.

[82] *Id*. at 585.

[83] *Id*. at 584-85.

[84] *Coal. to Save Our Children v. State Bd. of Educ. of State of Del.*, 757 F. Supp. 328, 331, 333 (D. Del. 1991).

[85] *Id*. at 354-64.

[86] *Id*. 341–46.

not reached unitary status.[87] While the CHOICE plan was never implemented due to incomplete funding, RCSD nevertheless developed several magnet programs with approval of the court.[88] The district eventually implemented the Mixed Feeder II plan (a version of the mixed feeder plan proposed by Red Clay in 1990).[89]

In 1995, the State Board and all four Northern New Castle County school districts successfully moved for a declaration of unitary status.[90] Despite evidence of segregated classrooms,[91] vastly different educational outcomes for students of color,[92] and evidence of disparate treatment in special education identification and discipline,[93] the court found that the defendants had achieved unitary status.[94] Ultimately, the court concluded that the defendants had "complied in good faith with the desegregation decrees" at issue, that they were "unlikely to return to the segregative practices of their predecessors," and that "the vestiges of past discrimination ha[d] been eliminated to the extent practicable."[95] In reaching that conclusion the court relied on its finding, based on the data presented to it, that only one school in the four

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[87] *Id* at 350 ("[T]he court cannot and will not make a finding that the Red Clay District is currently operating in compliance with the Equal Protection Clause, nor can the court find that the currently constituted majority of the Red Clay Board, in the absence of supervision by the State Board, will operate the District in compliance with the United States Constitution in the near future.").

[88] *Coal. to Save Our Children v. State Bd. of Educ. of State of Delaware*, No. CIV. A. 1816-1822-SLR, 1994 WL 829065, at, *2 (D. Del. Aug. 29, 1994).

[89] *Id*.

[90] *Coal. to Save Our Children v. State Bd. of Educ. of State of Del.*, 901 F. Supp. 784, 785 (D. Del. 1995), *aff'd*, 90 F.3d 752 (3d Cir. 1996).

[91] The court acknowledged, for example, that the "'classroom imbalance' issue of concern to plaintiff [was] that ostensibly created by 'tracking' or 'ability grouping,'" that "[i]n each school district, . . . more white than minority students had been kept at the same 'honors' level throughout high school," and that there was "evidence among high school students who achieve identical testing scores, [that] black students were more likely to be placed in the lower level class than were white students." *Id*. at 799-801.

[92] The court noted that "[v]arious demographic data demonstrate[d] that there [was] a 'black/white gap' in the desegregation area and New Castle generally" as to socioeconomic measures such as attainment of a high school degree, poverty, unemployment, and fertility rates. *Id*. at 818.

[93] The court noted that the "percentage of minority students in special education programs in the 4 districts [was] higher than the percentage of minority students in the general population" and that "[t]he disproportionate placement of minority students in special education programs [was] a national concern and a matter of national debate." *Id*. at 820.

[94] *Id*. at 823–24.

[95] *Id*.

Northern New Castle County school districts was racially identifiable and that the schools were "among the most racially balanced in the United States."[96]

That laudable racial balance is no longer the case. As shown *infra* in Figure 12, RCSD alone, where CSW is located, has ten racially identifiable schools, as does Christina School District, where NCS is located. The same year that schools in Delaware were declared "unitary," Delaware adopted the Charter School Act of 1995. Delaware's first charter school, CSW, was authorized by RCSD and opened in 1996. As the state legislature debated the bill that would become the Charter School Act, state senators worried that the Act would interfere with Delaware's ability to abide by ongoing desegregation orders.[97] In addition, lawmakers, representatives of the Parent Teacher Association ("PTA"), and school leaders voiced concerns that the Act would negatively impact low income families and result in resource disparities across schools and communities.[98] Senator Harris McDowell pointed out that charter schools could potentially benefit more privileged, higher-income families, leaving "the remainder of [sic] a worse situation."[99] Wayne Bastian, Superintendent of the Delmar School District, feared that corporations would disproportionately fund schools in certain areas, noting, for example, that students in Delmar would not have the same opportunity as students in Wilmington due to the "additional finances" that corporations around Wilmington would contribute.[100] His concerns were justified, as all of the companies still in existence that formed a consortium in partnership with parents and other community members to establish CSW are located within 5 miles of the school.[101] Jeanette Krause, representing the PTA, wondered what would happen to funds that follow students to charter schools in the cases where students return to their home districts during the academic year.[102]

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[96] *Id.* at 799.

[97] *See* SB. 200, Del. S. Deb. Audio Recording, 138th Gen. Assembly, 1995 (audio of debate on file with author).

[98] *Id*.

[99] *Id*.

[100] *Id*.

[101] *See* The Charter School of Wilmington, School Profile, *available at* http://charterschool.org/downloads/aboutus/csw-school-profile-2015.pdf (noting that "a consortium of six local companies, together with teachers, parents, and community leaders, organized [CSW]"); The Charter School of Wilmington, Quick Fact Sheet, *available at* http://www.charterschool.org/downloads/aboutus/quick-fact-sheet-2015.pdf (stating that the "1996 Consortium Member Companies include Bell Atlantic, Delmarva Power, DuPont Company, Hercules, Inc., Medical Center of Delaware, and Zeneca, Inc"). Delmarva Power, DuPont Company, Medical Center of Delaware (now Christiana Care Health System), and Zeneca, Inc. (now AstraZeneca, Inc.) are all located within 5 miles of CSW. *See generally* Googlemaps, googlemaps.com (last viewed Dec. 1, 2014).

[102] *See supra* note 97.

In 2000, despite continued concerns about charter schools' impact on segregation, Delaware adopted the Neighborhood Schools Act of 2000. The Act requires the Brandywine, Colonial, Christina, and Red Clay Consolidated School Districts "to develop and implement Neighborhood School Plans . . . that allows [sic] every student to attend the grade-appropriate school geographically closest to the student's home."[103] The Act's legislative record includes a letter from Wilmington's Mayor, James H. Sills, Jr. to Senator David P. Sokola, the Act's sponsor in the Senate, expressing concern "that [the] bill, if passed by the Senate, could reincarnate a segregated school system."[104] The legislative record also shows that the City of Wilmington went on to pass a City Council Resolution by unanimous vote opposing the bill "absent studies to determine the impact on the City of Wilmington."[105]

These individuals' comments and concerns have proved prescient over the years. In the years since charter schools first took root, researchers nationwide have found that "charter schools often lead to increased school segregation" and, "[i]n many cases, [charter schools] exacerbate current school segregation," a phenomenon that Delaware's system exemplifies.[106]

IV. FACTS

A. Charter School Law

Delaware passed legislation permitting independent charter schools in 1995 to "create an alternative to traditional public schools operated by school districts and improve public education."[107] Charter schools may not "discriminate against any student in the admissions process because of race, creed, color, sex (except in the case of a same-gender school), handicap, or national origin, or because the student's school district of residence has a per student local expenditure lower than another student seeking admission; or . . . be formed to circumvent a court-ordered desegregation plan."[108] Per the statute, charter schools may not restrict admissions

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[103] 72 Del. Laws c. 287 (2000) (on file with author).

[104] H. 140, 16th day of 2nd Legislative Session, at page 246 (Del. 2000) (Letter from James H. Sills, Jr., Mayor of City of Wilmington, Del., to Sen. David P. Sokola, Del. S. (June 30, 1999)) (on file with author).

[105] H. 140, 16th day of 2nd Legislative Session, at page 246 (Del. 2000) (Letter from Theopalis K. Gregory, Sr., Council Member At-Large and President Pro Tempore, City Council of City of Wilmington, Del., to Sen. Margaret Rose Henry, Del. S. (Mar. 31, 2000)) (on file with author).

[106] Iris C. Rotberg, Charter Schools and the Risk of Increased Segregation (2014), *available at* http://www.edweek.org/ew/articles/2014/02/01/kappan_rotberg.html.

[107] Del. Code Ann. tit.14 § 501.

[108] Del. Code Ann. tit. 14 § 506(a)(4)-(5).

except through age and gender, or through a lottery in the case of over-enrollment.[109] Yet the law allows for charter schools to give *preference* in admission to siblings, as well as to (a) students residing within a 5-mile radius of the school; (b) students residing within the regular school district in which the school is located; and (c) students who have a specific interest in the school's teaching methods, philosophy or educational focus, among other preferences.[110]

In practice, the high-performing charter schools' preferences for students who have a specific interest in the school's teaching methods, philosophy or educational focus or a sibling already enrolled in the school so dramatically determine which students are granted admission at those charter schools that the other preferences have become nearly irrelevant for low income students and students of color.[111] CSW and Sussex Academy use the "interest" exception to justify enrolling a high number of White, middle-class children from areas that are far more diverse than their corresponding charter school populations, rendering both these charters and the more heavily-minority public schools racially identifiable.[112]

Even though the statutes governing charter schools in Delaware are race-neutral on their face, they fail to address a number of barriers for students of color, students from low income families, and students with disabilities seeking to enroll in Delaware's charter schools. The admissions processes and attendance requirements for charter schools vary throughout the state, and practices at the high-performing schools, such as the CSW, NCS, and Sussex Academy, stand out as creating particularly challenging barriers for these groups. CSW, for example, screens out underserved students by prioritizing admission for applicants who perform well on an entrance test assessing math and reading skills. As discussed above, CSW gives the highest preference in admission to students who can demonstrate a "specific-interest" in CSW's methods.[113] The school has created a point system to measure a student's interest whereby a student can accrue a maximum of 383 points.[114] The entrance test offers applicants an opportunity to accrue over 50% of the total 383 points.[115] The remainder is made up of seventh and eighth grade report cards (up to 120 points) and a combination of teacher recommendations, previous enrollment in math and science honors classes, extracurricular activities in math or

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[109] Del. Code Ann. tit. 14 § 506(a)(3).

[110] Del. Code Ann. tit. 14 § 506(b)(1)-(4).

[111] *See* discussion *infra* Part IV, C-E.

[112] *See* Exhibit A (showing that CSW and Sussex Academy require parent and/or student essays regarding specific interest in the schools).

[113] *See* discussion *supra* note 13.

[114] *Id*.

[115] *Id*.

science, and an applicant essay (up to 65 points).[116] A student must accrue 325 points or more to establish a "specific-interest preference."[117]

Many other Delaware charter schools enroll few low income students because they do not provide the same transportation that is required of traditional public schools. Delaware's Charter School laws dictate that students residing outside of the district where a charter school is located shall not have busing or subsidized transportation available.[118] The effect of this policy is that low income students residing outside of a charter school's district can often not afford to enroll because poor parents, including many parents of students of color, either have no car or only one car and work obligations interfere with their ability to drive their children to school or a pick-up site.

While charter schools may not charge tuition, many carry out substantial fundraising campaigns each year that pressure parents to raise significant sums of money for or donate to the schools.[119] The high-performing charter schools in the state also require that students purchase and wear expensive uniforms.[120] Students with disabilities are frequently deterred from applying

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[116] *Id*.

[117] *Id*.

[118] The language of the Charter School statute with respect to transportation is:

> The charter school *may* request to have the school district where the charter school is located transport students residing in that district to and from the charter school on the same basis offered to other students attending schools operated by the district, or to receive from the State a payment equal to 70% of the average cost per student of transportation within the vocational district in which the charter school is located and become responsible for the transportation of those students to and from the charter school. *In the case of students not residing in the district where the charter school is located, the parents of such students shall be responsible for transporting the child without reimbursement to and from a point on a regular bus route of the charter school*. In lieu of the payment from the State specified above, if a charter school utilizes a contractor for student transportation the charter school shall publicly bid the routes, and the State shall reimburse the charter school for the actual bid costs only if lower than the payment specified above. Notwithstanding the foregoing, a student at a charter school shall receive such transportation assistance as is made available to students pursuant to a public school choice program established by this Code provided that such student otherwise meets the eligibility requirements for such assistance. In the event a charter school chooses to transport students itself, it shall do so in accordance with all public school transportation safety regulations. Local school districts and charter schools shall cooperate to ensure that the implementation of this chapter does not result in inefficient use of state appropriations for public school transportation and the State Board shall exercise its authority to approve bus routes so as to avoid such waste.

Del. Code Ann. tit. 14, § 508 (emphasis added).

[119] Declaration of Prof. Eve Buckley attached as Exhibit C ("Buckley Decl."), ¶ 2.

[120] *See* Shirt Orders, The Charter School of Wilmington, http://charterschool.org/shirt-orders/ (last viewed Nov. 12, 2014); Sussex Academy, Student Handbook 2014-2015 at 12, *available at* https://imageserv11.team-logic.com/mediaLibrary/1/Web2015_10_16_14.pdf; Uniform Purchases, Newark Charter School, http://ncs.charter.k12.de.us/pages/Newark_Charter_School/Parents/Uniform_Purchases (last viewed Nov. 12, 2014); MOT Charter School, Family Handbook (2013-2014) at 17-19, *available at* http://www.motcharter.com/Family-

to certain charter schools or are discouraged from receiving services through an Individual Education Program once they are enrolled in a charter school.[121]

B. Charter Schools in Delaware 2014-2015

There are currently 24 active charter schools in Delaware,[122] and more are scheduled to open in the next two school years.[123] Of the 24 active charter schools, 20 were granted charters from the state of Delaware, and the remaining four, including CSW, were authorized by RCSD.[124] According to data for the 2013-14 school year, charter schools represent approximately 10% of the schools in the state,[125] and serve approximately 8% of the state's public school population.[126]

Figure 2. Delaware Public Schools by Type and County (2013-14)[127]

County	High	Vocational Technical	Middle	Elementary	Early Edu. & Kindergarten	Special, ILC*& Other	Total
Kent	5	1	7	28	2	10	53
New Castle	15	4	17	62	5	20	123
Sussex	7	1	8	18		7	41

Handbook/; Uniforms/Dress Code, Odyssey Charter, http://odysseycharterschooldel.com/uniforms.html (last viewed Nov. 12, 2014).

[121] Exhibit C, Buckley Decl., ¶ 4.

[122] Charter Schools, Delaware Department of Education, http://www.doe.k12.de.us/Page/1735 (last viewed Nov. 12, 2014).

[123] *Id*.

[124] *Id*. The Charter School of Wilmington, Delaware College Preparatory Academy, Delaware Military Academy, and Odyssey Charter School (initial charter only) were authorized by the Red Clay School Board. *Id*.

[125] *See* Figure 2 (showing that in the 2013-2014 school year, there were 217 charter schools in Delaware); *supra* note 122 (according to the list of active charter schools, 21 charter schools operated in the 2013-2014 school year).

[126] *See* Information (Charter School by County (2013-2014)), State of Delaware: The Official Website of the First State, http://profiles.doe.k12.de.us/SchoolProfiles/State/Account.aspx (last viewed Dec. 1, 2014) (stating that in the 2013-14 school year, there were 11,078 students enrolled in Delaware charter schools); About (State Enrollment History for Public Schools), State of Delaware: The Official Website of the First State, http://profiles.doe.k12.de.us/SchoolProfiles/State/Default.aspx (last visited Dec. 1, 2014) (in the 2013-14 school year, there were 131, 514 students enrolled in Delaware public schools).

[127] About (Delaware Public Schools by Type and County (2013-14)), State of Delaware: The Official Website of the First State, http://profiles.doe.k12.de.us/schoolprofiles/State/Default.aspx (last viewed Dec. 1, 2014).

Total	27	6	32	108	7	37	217

*ILCs are "Intensive Learning Centers" for students who need additional academic and behavioral supports. These are referred to as alternative schools in most places.

Figure 3. Charter Schools by County (2013-14)[128]

County	Number of Schools	Combined Enrollment	Percent of Statewide Charter Enrollment
Kent	4	1,536	14%
New Castle	16	9,130	82%
Sussex	1	412	4%
Total	21[129]	11,078	100%

As described more fully below, charter school demographics and corresponding trends in public school enrollment indicate that Delaware's charter schools' admissions policies and the state's authorization of charter schools have had a significant disproportionate impact on students of color, low income students, and students with special needs. The state's charter schools are becoming increasingly racially identifiable. High-performing charter schools are almost entirely racially identifiable as White. Low income students and students with disabilities are disproportionately relegated to failing charter schools and those charter schools that are racially identifiable as African-American or Hispanic. In addition, students in traditional public schools have become more segregated. The state and RCSD have failed to ensure that charters attempt to represent their local school district's demographic makeup and serve all eligible students, regardless of race. For the 2013-14 school year, 16 of the 21 charter schools operating (76%) were racially identifiable as White, African-American, or Hispanic.[130] Within Delaware's nonfailing charter schools in the 2013-14 academic year, the high-performing schools were racially identifiable as White with the exception of MOT Charter School, where White students nevertheless made up 71.1% of the student body.[131] The state and RCSD are not ensuring that

[128] Information (Charter School by County (2013-2014)), State of Delaware: The Official Website of the First State, http://profiles.doe.k12.de.us/SchoolProfiles/State/Account.aspx (last viewed Dec. 1, 2014).

[129] There are currently 24 charter schools in Delaware; this figure reflects the number of charter schools open in Delaware during the 2013-2014 school year. *See supra* note 122.

[130] *See* Figures 4, 5, 6.

[131] *See* Figure 5; Exhibit A.

African-American and Hispanic students are given equal access to these high-performing schools.

Figure 4. Delaware Charter Schools, Racial Identifiability (2013-14)[132]

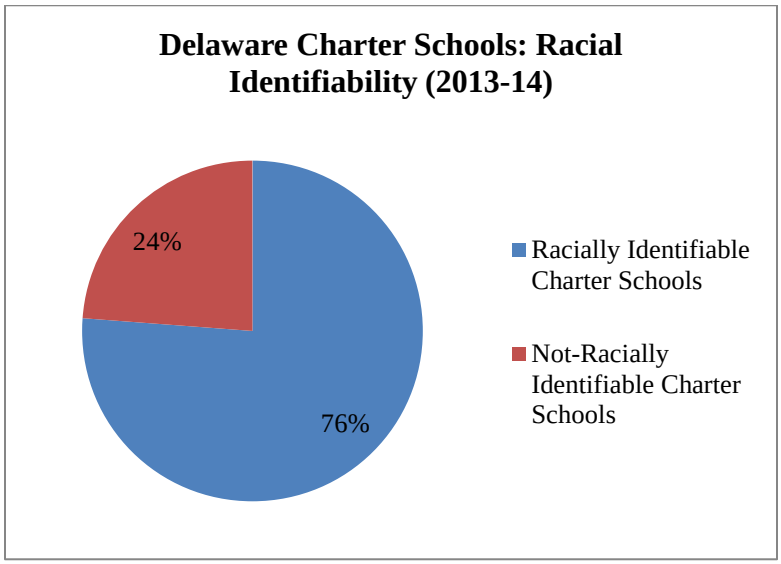
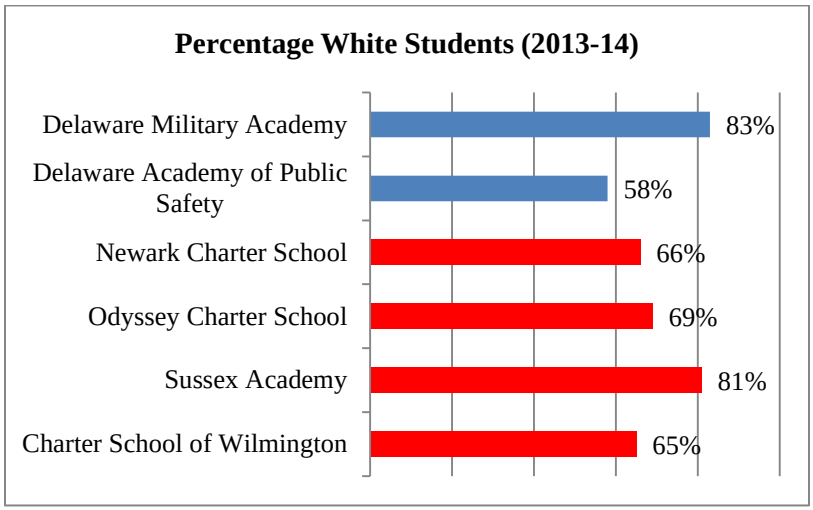


Figure 5. Delaware Charter Schools, Racially Identifiable as White (2013-14)*[133]



* Red Bars indicate Schools that are "high-performing."[134]

[132] *See* Exhibits A and B.

[133] *See* Exhibits A and B.

[134] See *supra* note 1 for explanation of term "high-performing."

Figure 6. Delaware Charter Schools, Racially Identifiable as African-American or Hispanic (2013-14)[135]

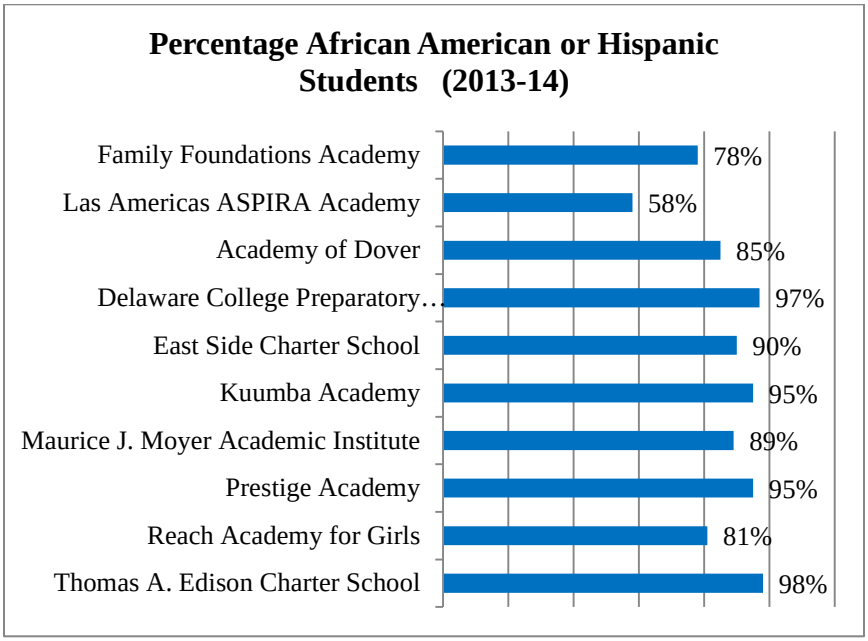
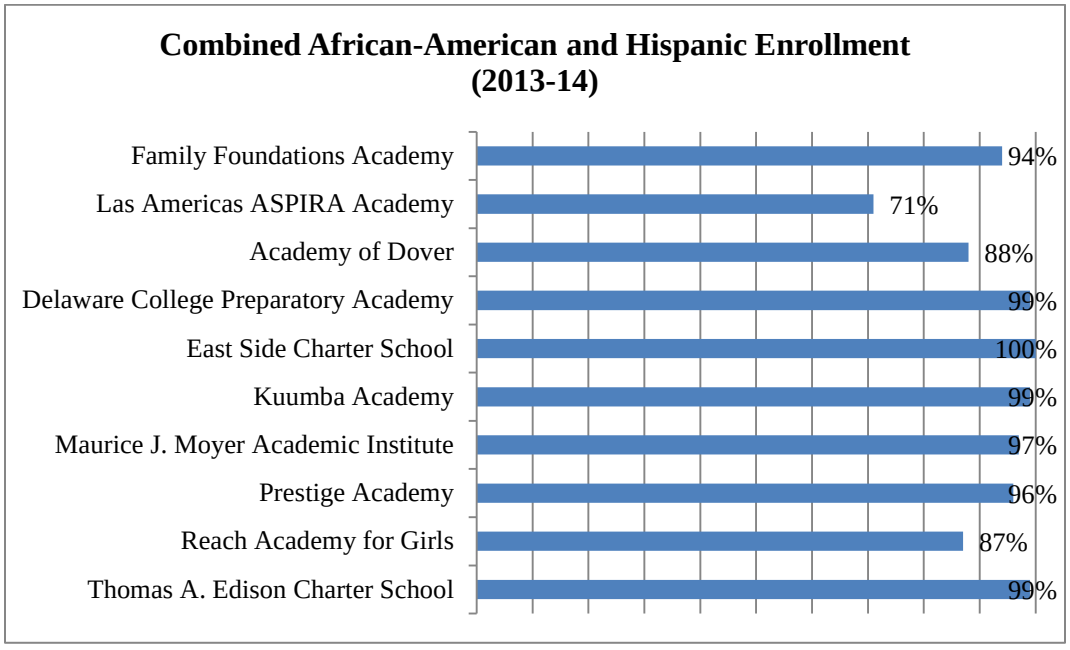


Figure 7. Delaware Charter Schools, Racially Identifiable as African-American or Hispanic - combined African-American and Hispanic Enrollment (2013-14)[136]



[135] *See* Exhibits A and B.

[136] *See supra* note 41.

With regards to low income students, failing charter schools serve a disproportionate number of low income students. In the 2013-14 school year, the average percentage of low income students at failing charter schools was 55%, compared with 33% at nonfailing charter schools. See Figure 8. Moreover, for the same school year, the average percentage of low income students at charter schools that were racially identifiable as African-American or Hispanic was 65%, compared with 13% at charter schools that were racially identifiable as White. See Figure 9.

Figure 8. Average Percentage of Low Income Students at Failing vs. Nonfailing Delaware Charter Schools (2013-14)[137]

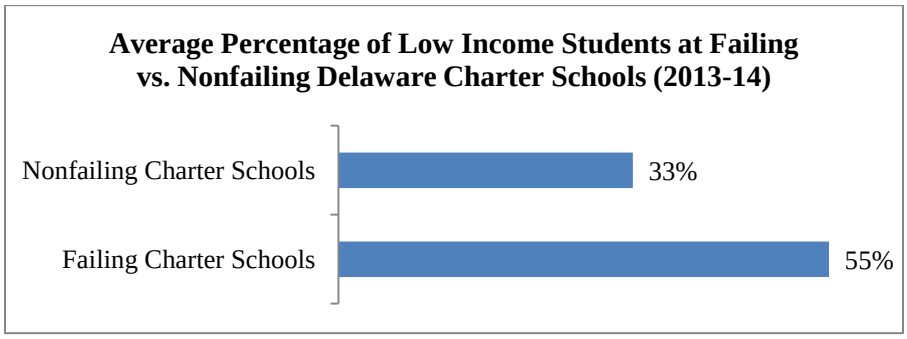
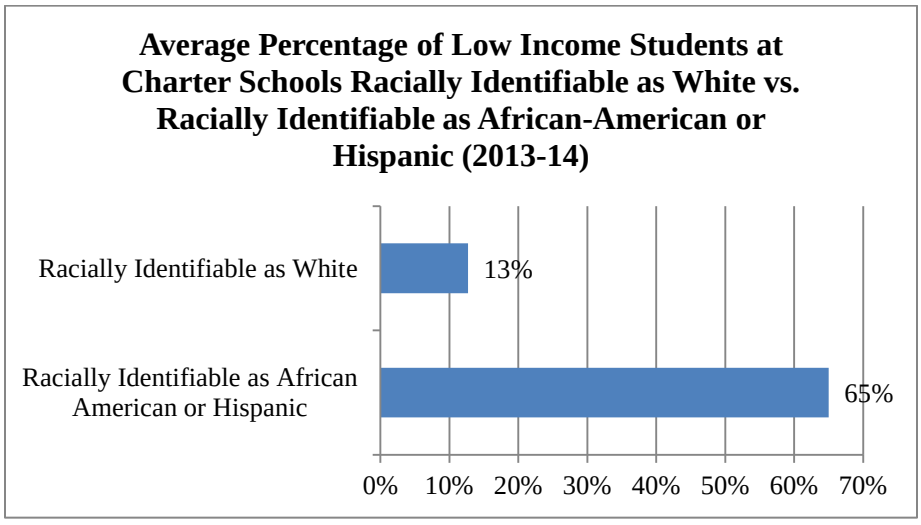


Figure 9. Average Percentage of Low Income Students at Charter Schools Racially Identifiable as White vs. Racially Identifiable as African American or Hispanic (2013-14)[138]



[137] *Id.*

[138] *Id.*

To the extent that charter schools serve special needs students, failing charter schools also serve a similarly disproportionate number of this group. The average percentage of special needs students at failing charter schools is 26%, compared with 6% at nonfailing charter schools. See Figure 10. As is the case with low income students, special needs students are disproportionately served by schools that are racially identifiable as African-American or Hispanic. The average percentage of special needs students at African-American or Hispanic–identifiable schools is slightly more than twice the average of special needs students at charter schools that are racially identifiable as White. See Figure 11.

Figure 10. Average Percentage of Special Needs Students at Failing vs. Nonfailing Delaware Charter Schools (2013-14)[139]

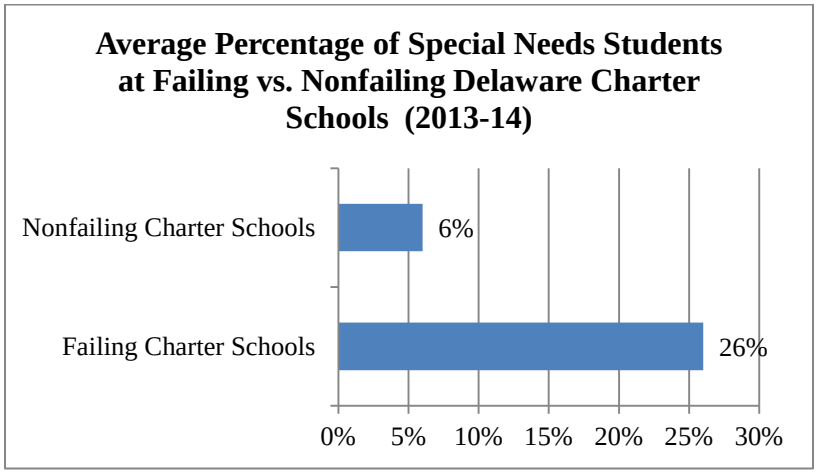
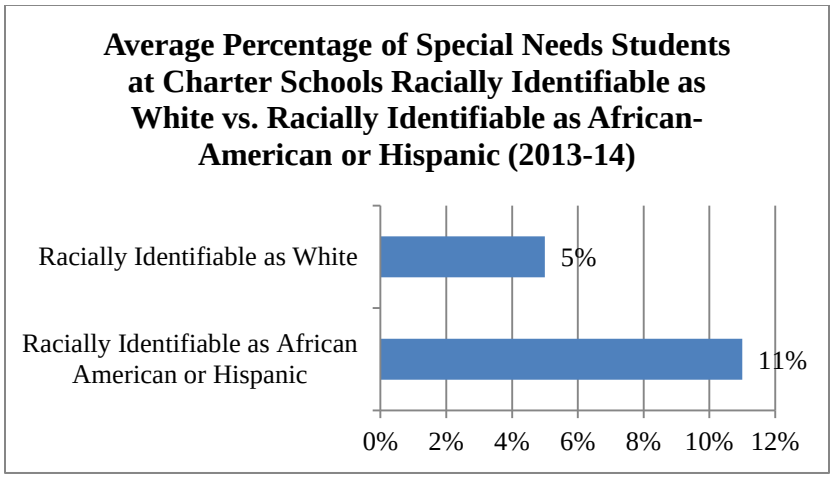


Figure 11. Average Percentage of Special Needs Students at Charter Schools Racially Identifiable as White vs. Racially Identifiable as African American or Hispanic (2013-14)[140]



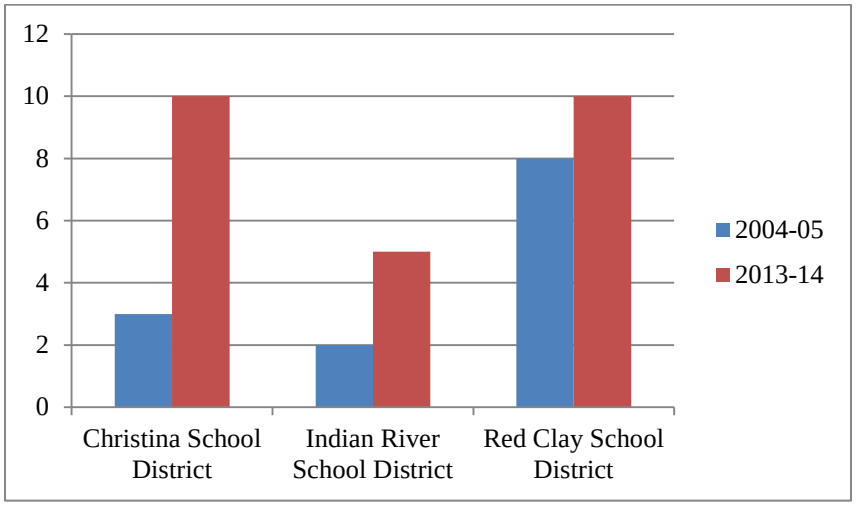
[139] *Id.*

[140] *Id.*

The growth of charter schools has led to the increased segregation of students within traditional public school districts as well. The charts and discussion in the subparts below illustrate this phenomenon in the three school districts surrounding the three charter schools we examine in depth: RCSD (surrounding CSW), Indian River School District (surrounding Sussex Academy), and Christina School District (surrounding NCS). Overall, in each location, for the last ten school years (2005-2014), the percent of White students enrolled in traditional public schools has decreased while Hispanic and low income student enrollment in those same schools has generally increased.

In addition to these visible demographic changes across the districts, students of the same racial groups have become even more clustered by schools. This is evident while tracking changes in the number of racially identifiable schools in the three districts examined closely in this Part IV, C-E. Between the 2004-05 school year, the oldest year for which data is available on the DDE website, and the 2013-14 school year, the most recent, the number of racially identifiable traditional public schools in each district has increased. In the Christina School District during this time period, the number of racially identifiable schools more than tripled from three to ten. Indian River School District's racially identifiable schools increased from two to five, and RCSD saw an increase from eight to ten. These changes show that school-level resegregation is occurring at a disproportionately high rate compared to districtwide demographic[141] trends, underscoring the significance of Delaware's charter school proliferation.

Figure 12. Racially Identifiable Public, Non-Charter Schools by District[142]



[141] Districtwide demographics cited *infra* include students enrolled in non-charter public schools.

[142] *See supra* note 41.

In RCSD, the percentage of White students dropped from 49.7% in 2005 to 44% in 2014.[143] In the Indian River School District, the percentage of White students dropped from 64.7% to 53.2% during the same time period. In the Christina School District, White student enrollment dropped from 44.8% to 32.8% during the same window.[144] On the other hand, in RCSD, during the same period, the percentage of Hispanic student enrollment increased from 17.7% to 24%.[145] In the Indian River School District, during the same period, the percentage of Hispanic student enrollment increased from 13.6% to 27%,[146] and in the Christina School District for that period, it increased from 10.8% to 18.8%.[147]

In sum, charter school demographics and corresponding demographic trends in public school enrollment indicate that the proliferation of Delaware's charter schools has had a significant disproportionate impact on students of color, low income students, and students with special needs. This has left the state's high-performing charter schools almost entirely racially identifiable as White while low income students and students with disabilities are disproportionately relegated to failing charter schools and those charter schools that are racially identifiable as African-American or Hispanic. The unfortunate result is that students in traditional public schools have become more segregated.

The worsening segregation in terms of race and ethnicity, income, and special needs in Delaware's public and charter schools undermines the *quality* of education that Delaware's schools might otherwise be able to offer to African-American students, Hispanic students, and students with disabilities. In particular, extensive research regarding the impact of racial diversity in schools and classrooms points to important and unique benefits of racial diversity. The National Academy of Education concluded, for example, that the "overall academic and social effects of increased racial diversity are likely to be positive."[148] Specifically, regarding academic achievement, the Academy has found a "relatively common finding" among studies that "African American student achievement is enhanced by less segregated schooling" and that "these positive effects for African American students tend to be larger in earlier grades than in later grades."[149] Regarding "inter-group relations," the Academy has found that while "racially

[143] *Id*.

[144] *Id*.

[145] *Id*.

[146] *Id*.

[147] *Id*.

[148] National Academy of Education, Race-conscious Policies for Assigning Students to Schools: Social Science Research and the Supreme Court Cases 3 (2007), *available at* http://www.naeducation.org/cs/groups/naedsite/documents/webpage/naed_080863.pdf.

[149] *Id* at 2.

diverse schools and classrooms will not guarantee improved inter-group relations," the research "supports the conclusion that, generally speaking, such diverse environments are likely to be constructive in this regard."[150] In the long-term, "experience in desegregated schools" at the elementary and secondary levels "increases the likelihood of greater tolerance and better intergroup relations among adults of different racial groups."[151] Moreover, the Academy has found that while diversity cannot be "understood as a guarantee of positive relations," striving for diversity "should be understood as an attempt to avoid the harms of racial isolation and to create an environment that allows for positive intergroup relations."[152]

C. Charter School of Wilmington

CSW is Delaware's oldest charter school, and one of the highest-performing schools in the state. CSW was recently ranked the 10th-best high school in the nation by *Newsweek* magazine.[153] While it is located within the boundaries of RCSD, which enrolls over 50% nonwhite students, its own demographics are predominantly White. As discussed above, CSW's admissions policies are heavily weighted in favor of students that "have a specific interest in [the school's] methods, philosophy, or educational focus," as permitted by Del. Code Ann. 14 §§ 506(b)(1)-(3).[154]

CSW's specific-interest priority is determined by a point system, based in large part on an academic examination. As discussed in Part I, applicants can earn up to 383 points by combining the values of (1) their score on a CSW-administered entrance test covering math and reading (up to 198 points); (2) their middle school grades in math and science (up to 120 points); and (3) teacher recommendations, enrollment in honors math or science classes, extracurricular math or science programs, and an essay written by the applicant (up to 65 points).[155] Any student who scores 325 points or more is deemed to have met the standards for the specific-interest priority. Students who do not meet that threshold can request an interview with the school to determine whether the point system screened out an otherwise-qualified student.[156] Students deemed to "have met the requisite foundation for the specific-interest preference"[157] are

[150] *Id*. at 27.

[151] *Id*. at 32.

[152] *Id*. at 35.

[153] America's Top High Schools: 2014, Newsweek, http://www.newsweek.com/high-schools/top-10-schools-2014 (last viewed Nov. 12, 2014).

[154] *See supra* note 13.

[155] *Id*.

[156] *Id*.

prioritized by the following categories (in order or priority): 1) Students residing within RCSD; 2) Siblings of students enrolled in CSW; and 3) Children of CSW permanent employees.[158] Because CSW admits students who meet the requisite specific-interest score *and* have a sibling at the school before applicants who meet the score but have no siblings in the school, their system inevitably works to perpetuate the school's existing racial imbalance. Each year, the waiting list for admission contains at least one hundred students.[159]

Highly selective yet racially neutral admissions policies, like the one at CSW, are devoid of diversity considerations and have devastating effects on diversity. CSW enrolled 970 high school students in the 2013-14 school year, of which 64.7% were White, 25.9% were Asian/ Pacific Islander, 5.5% were African-American, and 3.4% were Hispanic.[160] In the 2013-14 school year, non-charter public schools within RCSD, on the other hand, were 44% White, 5.4% Asian/Pacific Islander, 23% African-American and 24% Hispanic/Latino.[161] See Figure 13 for a full demographic breakdown.

Figure 13. Enrollment Demographics for CSW and Surrounding District (2013-14)[162]

	Red Clay Consolidated School District		Charter School of Wilmington	
Race/Ethnicity	**2012-13**	**2013-14**	**2012-13**	**2013-14**
African-American	22.9%	23%	6.2%	5.5%
Other	1.4%	1.7%	0.3%	0.4%
Asian	5.1%	5.4%	26.6%	25.9%
Hispanic/Latino	25.3%	24.4%	3.1%	3.4%
White	44%	44%	63.6%	64.7%
Low Income	56.9 %	37.9 %	5.5%	2.4%

[157] *Id*.

[158] *Id*.

[159] Complainants requested data from charter schools regarding admissions and wait lists via the Delaware Freedom of Information Act ("FOIA"). Charter School of Wilmington's response showed that 881 applicants applied for 231 seats for the class of 2018 (on file with author). The exact number of students on the waiting list was unclear. The NCS FOIA response shows that for the 2014-15 school year 3,285 students applied and 3,095 were placed on the waiting list.

[160] *See supra* note 41.

[161] *Id*.; *see also supra* note 42.

[162] *Id*.; *see also supra* note 42.

Special Education	12.9 %	13%	0.2%	0.6%

In the 2013-14 school year, only 2.4% of CSW's student population was low income.[163] Additionally, only 0.6% of the student population was identified as special education.[164] According to the National Center for Education Statistics ("NCES"), in the 2012-13 school year only 14 CSW students were eligible for the free lunch program, and 11 were eligible for the reduced-price lunch program, out of a total enrollment of 970.[165]

D. Sussex Academy

Sussex Academy is the only charter school in Delaware's southernmost county, Sussex County. Authorized by the state, Sussex Academy's student population is over 80% White despite facially race-neutral admissions policies. In the 2013-14 school year, only 4.4% of the school's students were considered special education students, compared to a statewide average of 13.6%.[166] Sussex Academy served grades 6-8 until the 2013-14 school year, when, with state approval, it added a 9th grade. The school now plans to expand to offer grades 10-12 over the next three years, pursuant to approval received from DDE in 2012. Sussex Academy draws students from public schools throughout Sussex County's Indian River School District, and the difference in diversity between Sussex Academy and the Indian River schools is stark.

For the 2013-14 school year, Sussex Academy enrolled a student population that was 81.3% White, 7.3% Hispanic, and 2.9% African-American, with 4.4% of students receiving special education services and 11.2% designated as low income students.[167] In contrast, in the 2013-14 school year, traditional public schools in the surrounding school district, the Indian River School District, were 53.2% White, 27% Hispanic, and 14% African-American, with 15.7% designated as special education students and 46.6% designated as low income students.[168] See Figure 14 below for a full demographic breakdown.

[163] *Id*.

[164] *Id*.

[165] Charter School of Wilmington, National Center for Education Statistics, http://nces.ed.gov/ccd/schoolsearch/school_detail.asp?Search=1&SchoolID=100000400012&ID=100000400012 (last viewed Dec. 1, 2014).

[166] *See supra* note 41.

[167] *Id.*

[168] *Id*.

Figure 14. Comparative Demographics of Sussex Academy & Indian River School District (2013-14)[169]

	White	African-American	Hispanic	Special Education	Low income
Sussex Academy (charter school)	81.3%	2.9%	7.3%	4.4%	11.2%
Indian River School District	53.2%	14.0%	27.0%	15.7%	46.6%
Difference	+28.1%	-11.1%	-19.7%	-11.3%	-35.4%

In part, the racial imbalance at Sussex Academy results from a daunting application process. In the school's 2012 application to expand and offer high school grades, Sussex Academy requested and was permitted by the state to grant a preference to children who expressed an interest in the school's teaching methods, philosophy or educational focus, as determined through an additional essay and interview beyond the standard state-approved application.[170] The current Sussex Academy Charter Renewal defines "Children with Specific Interest in Teaching Methods, Philosophy, or Educational Focus" as "[c]hildren who express an interest to be considered for such preference and are identified through an essay and interview submitted during the open application period and evaluated by a committee of the Executive Board." [171] All applicants must complete both the state-approved standard application and a supplemental application for Sussex Academy, which requires a parent's written explanation of why Sussex Academy is a good fit for their child and a student essay explaining why the child wants to attend Sussex Academy. Student essays must "[i]nclude specific information about what Sussex Academy can offer [them] in terms of the methods, philosophy or educational focus and explain how [the] school would be the best fit for [their] learning preferences."[172] The student essay requirement applies even to grade school applicants.[173] As a practical matter, particularly given the age of the applicants, children of more educated parents will be better able to take advantage of that preference.

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[169] *Id*.

[170] Sussex Academy of Arts & Sciences, Charter Renewal 2013-2018 65 (2012), *available at* http://www.doe.k12.de.us/cms/lib09/DE01922744/Centricity/Domain/151/SAAS_Ren2013_Appl.pdf.

[171] *Id*. (internal quotations omitted).

[172] Sussex Academy, Addendum Application to Delaware Standard Application (2015-2016), *available at* http://www.sussexacademy.org/Admissions/.

[173] *Id*.

Over the years, the percentage of African-American students at Sussex Academy has fallen to new lows. In 2006, 5% of the school's students were African-American.[174] In 2007 African-Americans made up 4% of the student body.[175] The percentage of African-American students declined to between 2.5% and 3.1% in 2008, 2009 and 2010.[176] While the percentage of African-American students rose to 3.6% in 2011, it fell again to 2.1% in 2012, and to 1.8% in 2013.[177]

In addition to the burdensome application, low income students must overcome several financial barriers to attend Sussex Academy. The Sussex Academy student handbook advises that each student will be assessed a $200-$225 activity fee annually, and families must affirmatively apply for a waiver or reduction if the fee poses difficulty.[178] The handbook also advises that students are required to wear uniforms sold by a school-approved vendor.[179] Those requirements dissuade low income children and their parents from applying and keep them from attending. Furthermore, there are fundraising "goals" for parents.[180] Because parents may not know that these fundraising goals are optional, less affluent parents may be opting out of sending their children because they know they cannot raise money for the school.

Despite years of meager enrollment of African-American, Hispanic, and low income students, the school has offered nothing beyond assurances that it will conduct outreach to potential minority or low income students at Sussex Academy.[181] In addition, the state of

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[174] *See supra* note 41.

[175] *Id*.

[176] *Id*.

[177] *Id*.

[178] *See supra* note 16.

[179] Sussex Academy, Student Handbook 2014-2015 at 12, *available at* https://imageserv11.team-logic.com/mediaLibrary/1/Web2015_10_16_14.pdf.

[180] Sussex Academy, Student Handbook 2014-15 at 6, *available at* https://imageserv11.team-logic.com/mediaLibrary/1/Web2015_10_16_14.pdf. The handbook states that "[i]n keeping with the student-centered nature of Sussex Academy, it is [the school's] desire to offer a plethora of enrichment/extracurricular activities for students to develop their interests and talents." *Id*. In addition, the handbook states that to support such initiatives requires monies," and "[i]t shall be the practice of Sussex Academy to limit *fundraising* activities somewhat to avoid overlapping of initiatives and the nuisance of such." *Id*. (emphasis added). In this section discussing "fundraising activities," the handbook also discusses the school's activity fees, creating confusion as to the type of fundraising and other expenses parents will incur.

[181] To the extent that the School addressed diversity issues in its Charter Renewal Application for the 2013-18 period, it stated that "[t]he Executive Board is desirous of maintaining a [board] membership that is knowledgeable in" several areas, including "diversity issues, including but not limited to, outreach, student recruitment, and instruction; [and] at risk-populations and children with disabilities, including, but not limited to, students eligible for special education and related services." *See supra* note 170 at 10. In describing how the background of the school's founding members "makes him or her qualified to operate a charter school" and able to "maintain collective

Delaware did not require any changes in the school's marketing plan when Sussex Academy applied for expansion in 2012.

E. Newark Charter School

NCS is a successful charter school located in the suburban section of the Christina School District. The Christina School District covers the western portion of Delaware's northernmost county, New Castle, as well as a noncontiguous portion of the City of Wilmington, located twenty miles away. Newark is home to the University of Delaware. Founded largely by professionals residing in Newark, Delaware, NCS serves a large number of families affiliated with the University of Delaware.[182] Its charter was authorized by the State of Delaware.

NCS uses the standard state application for admissions, but it embraces many practices and traditions that align it more closely with private schools than traditional public schools and pose admissions barriers for students of color and students with disabilities. If a child is not admitted in Kindergarten, it is very difficult for him/her to gain admission at a later time, even though the school currently offers K-10 instruction levels, because there is a sibling preference and, with the exception of the 2013-14 school year, very few seats have become available each year.[183] Uniforms are expensive and can only be ordered through a private vendor, such as Land's End.[184] Parents are pressured by the school community to volunteer and contribute financially to the school's success, which does not account for the financial and time constraints faced by lower-income families.[185] The school decided not to include a cafeteria in its original design – making it impossible to serve students who needed federally funded free- or reduced-priced lunch – claiming that the space was needed for a library.[186] This policy decision has had a

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experience, of contractual access to such experience" in the area of "[d]iversity issues," the Renewal Application states that 1) Marc Cooke, one founding member has had "many opportunities to work with diverse student populations;" 2) Nancy Gideon, another founding member, "works with diverse populations" as a physician, "hired a Spanish-speaking physician who is starting to care for many members of the Hispanic community," and "is involved with outreach in [the Spanish-speaking] community as well;" 3) Delbert Kwan, a third founding member, has demonstrated his commitment to diversity by employing a medical practice that is 25% minority; and 4) Jill Menendez, the fourth founding member, "brings a range of knowledge relative to diversity" because "[h]er family is ethnically diverse" and "brings a metropolitan sensibility to outreach in Sussex County." *Id*. at 10, 13. Apart from noting that the Board has formed an "Outreach" committee "responsible for public relations and reaching underserved populations for application to the school," the renewal application does not provide details as to the schools' specific outreach or diversity efforts. *Id*. at 18.

[182] Declaration of Eve Buckley, attached as Exhibit C ("Buckley Decl.") at ¶ 3.

[183] Exhibit C, Buckley Decl., at ¶ 5. As discussed *infra*, NCS did not use those additional seats to increase diversity.

[184] Uniform Purchases, Newark Charter School, http://ncs.charter.k12.de.us/pages/Newark_Charter_School/Parents/Uniform_Purchases (last viewed Nov. 12, 2014).

[185] Exhibit C, Buckley Decl., at ¶ 2.

[186] *Id*., at ¶ 7.

lingering effect on the demographic make-up of NCS because once students are admitted their siblings are given priority admissions, and by the time NCS began offering free and reduced lunch in 2012-13, eleven years after the school opened, the school had very few low income students or students of color relative to Christina School District. *See* Figure 15.

For the 2013-14 school year, demographic data shows that the proportion of African-American, Hispanic, low income and special education students living in the Christina School District far outpaces the diversity of the NCS student body, as evidenced by Figure 15, below.

Figure 15. Racial/Ethnic Makeup of Newark Charter School Compared to Area Residents and Public Schools (2013-14)[187]

	African-American	Hispanic	White	Special Education	Low Income
Newark Charter School	11%	4%	65.8%	5.7%	8.4%
Christina School District	40.6%	18.8%	32.8%	14.2%	46.5%
Difference	-29.6%	-14.8%	33.0%	-8.5%	-38.1%

In late 2011, NCS requested state approval for a major expansion of their K-8 program to include grades 9-12. In 2012, the Delaware Board of Education approved the request despite the dramatic differences between the student body demographics of NCS and the student body of Christina School District (see Figure 15). This led to an increased minority population at Newark High School ("NHS") (see Figure 18), the Christina high school most commonly attended by students who completed the K-8 program at NCS. NHS's minority population grew from 53.7% in the 2012-13 school year to 57.7% in the 2013-14 school year.[188] NCS's high school students continue to reflect the demographic makeup of the K-8 program, so the state's approval of NCS's expansion effectively increased the likelihood that middle-class White students will attend the high-performing charter school and that minority and disadvantaged students will continue to attend the district's lower-performing high schools.[189] The state further enabled NCS

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[187] *See supra* note 41.

[188] *Id*.

[189] In considering and granting the NCS application to expand from grades K-8 to K-12, Delaware's Secretary of Education recognized that the demographics of the Christina School District are more diverse than those within the preferred five mile radius area. She recognized that she had the discretion to condition approval of the application on elimination of that preference, yet declined to eliminate even that anti-diversity preference. She rejected that opportunity because lifting the preference could have a negative impact on parent and community engagement with the school and "since NCS is significantly less diverse than the public school population *within the 5 mile radius*, it

to create a high school that is much less diverse than the school district population when it permitted NCS to give priority in high school admissions to students who were enrolled in NCS's eighth grade class. Prior to the expansion, NCS's eighth grade class had 163 students, of whom 73% were White and 11% were African American.[190] Of those 163 students, 126 accepted seats in the new ninth grade, leaving only 35 spots to be filled.[191] The addition of thirty-five new students to the NCS ninth grade had, at most, a trivial effect on diversity. In the 2013-14 school year, the first year of the NCS's expansion, African-American and Hispanic students together accounted for just 15% of students.[192] The ninth grade classes at Christina's three traditional public high schools, on the other hand, were 69.1% African-American or Hispanic.[193] The NCS eighth grade during the 2012-13 school year was 11% African-American, 2.5% Hispanic, 73% White, and 4.9% special education; the NCS ninth grade during the 2013-14 school year was 12.4% African-American, 3.1% Hispanic, 3.7% special education, and 68.9% White. See Figure 16.

Figure 16. Demographics of Newark Charter School Expansion to Ninth Grade*[194]

School	Grade	White	African American	Hispanic	Special Education	Low income
NCS (2012-13)	8th	73.0%	11.0%	2.5%	4.9%	9.2%
NCS (2013-14)	9th	68.9%	12.4%	3.1%	3.7%	3.8%
Christina School District (2013-14)	9th	25.9%	50.4%	18.7%	20.3%	47.4%

* This data was initially calculated in September 2014. The data publically available on the State webpage has since changed to exclude any figures under 5 percentage points, but the underlying data for these calculations is on file with Complainants.

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does not appear the geographic radius restriction is the principal cause of the current disparity." 4/12/12 Memorandum from Lillian M. Lowery to the Delaware State Board of Education, at 3, *available at* http://archive.delawareonline.com/assets/pdf/BL187896412.PDF (emphasis in original).

[190] *See supra* note 41.

[191] *Id*.

[192] *See supra* note 41.

[193] *Id*.

[194] *Id*.

Approval of NCS's expansion application was conditioned on "(1) the development, approval and implementation of an outreach plan to significantly increase, consistent with the public school population it serves, the diversity of NCS going forward; and (2) NCS providing a free and reduced lunch program for all grades starting in the fall of 2012."[195] The requirement to implement an outreach program has not been meaningful for the reasons outlined below.

First, although NCS sought to expand the entire school, the Secretary of Education instructed NCS to focus its diversity outreach efforts at the kindergarten level despite the fact that NCS is "located within one of [Delaware's] most diverse and lowest performing districts" and serves "strikingly few of the most at-risk students within its five mile radius."[196] Even if NCS increased diversity in its kindergarten class through outreach, the increased diversity would do little to address the lack of diversity in the school's other grades. A decade would have to pass before the incoming kindergarteners reach the high school and the impact of outreach efforts could encompass the elementary and middle school.

Second, even though the state issued a directive (albeit a conservative one) to increase diversity in the NCS kindergarten class through outreach, the state failed to meaningfully monitor NCS's outreach efforts to ensure the school materially increased diversity at that level. The data shows no increase in diversity.

Rather than instruct NCS to focus its diversity outreach efforts at the kindergarten level, the state could have seized on NCS's expansion plans and required it to conduct diversity outreach to fill *any* new slots created through the expansion. In fact, in accordance with its expansion plans, in the 2013-14 school year, NCS enrolled a total of 760 students in grades 1-4.[197] In the 2012-13 school year, NCS enrolled 532 students in grades K-3.[198] Thus, assuming all of its students were promoted to the next grade, NCS should have had 228 new spots for students in the 2013-2014 school year, in addition to the 190 open spots in its kindergarten class.[199] Had the state and/or NCS prioritized increasing diversity at the school, NCS could have significantly increased the school's diversity with respect to non-white students and students with disabilities through those 228 new spots. Instead, the percentage of African-American and special education

[195] Memorandum from Lillian M. Lowery, *supra* note 189 at 1.

[196] *Id*. at 7.

[197] *See supra* note 41.

[198] *Id*.

[199] *Id*.

students decreased in the 2013-14 school year, and these groups continue to be disproportionately excluded from this excellent school.[200]

Figure 17. NCS Demographics After Mandated Outreach*[201]

	White	African-American	Hispanic	Special Education	Low income
NCS Grades K-4 (2012-13)	64.4%	11.7%	4.1%	6.3%	8.5%
NCS Grades K-4 (2013-14)	66.2%	10.5%	4.9%	5.9%	10.3%

* This data was initially calculated in September 2014. The data publically available on the State webpage has since changed to exclude any figures under 5 percentage points, but the underlying data for these calculations is on file with Complainants.

While NCS was adding 161 students to its debut 9th grade class, NHS became even more heavily concentrated with students of color. From the 2012-13 to the 2013-14 school year, the number of NHS 9th grade African-American students increased from 38.1% to 44.6% of the class; its Hispanic students increased from 13.4% to 19.2%; its special education students increased from 9.9% to 14.1%.[202]

Figure 18. Newark High School Ninth Grade Demographics Before/After NCS Expansion*[203]

	White	African-American	Hispanic	Special Education	Low income
NHS Grade 9 (2012-13)	43%	38.1%	13.4%	9.9%	63.1%
NHS Grade 9 (2013-14)	30.5%	44.6%	19.2%	14.1%	47.9%*

*As described in footnote 2, the State of Delaware changed their definition of low income in advance of the 2013-14 school year.

F. Other Charter Schools Authorized by the State of Delaware

Overall, the Charter School Act has created a system of segregated public schools and segregated charter schools. Rather than creating laboratories of success, as the charter school

[200] The number of African-American students decreased from 11.2% to 11.0%, and the number of special education students decreased from 6.8% to 5.7%. *Id.*

[201] *Id*.

[202] *See supra* note 41.

[203] *Id.*

movement initially envisioned, Delaware's charter schools have renewed the segregation and achievement disparities that Delaware suffered sixty years ago. Today, most of Delaware's public charter schools are racially identifiable. By and large, the charter schools identifiable as mostly-White are successful academically, while the charter schools identifiable as mostly-African American and Hispanic are, on the whole, unsuccessful. There are exceptions to this rule, but the results are consistent. Charter schools are extremely segregated, and charter schools that are academically successful are more likely to be predominately White.

V. COMPLAINANTS AND TIMELINESS

This Complaint is brought by the ACLU of Delaware, the ACLU Racial Justice Program, and CLASI. This Complaint is timely because the policies and practices complained of are ongoing and evidence presented in this Complaint of the racial and disability-related disparities is based on the most recent publicly-available data. The complaining organizations, through membership and representation, file this Complaint on behalf of impacted students with disabilities and African-American and Hispanic students in Delaware.

VI. ARGUMENT

A. The Complainants Have Established a Violation of Title VI and Section 504

Title VI prohibits recipients of federal financial assistance from discriminating based on race, color, or national origin.[204] Section 504 likewise prohibits recipients of federal financial assistance from discriminating based on disability.[205] The Department of Education regulations implementing these statutes prohibit state or school conduct that has "the effect of subjecting individuals to discrimination because of their race, color, or national origin," as well as conduct that has "the effect of subjecting qualified handicapped persons to discrimination on the basis of handicap."[206] The regulations prohibit practices and policies that have a *disparate impact* by race or disability, even if there is no *discriminatory intent* behind those practices.[207] As a result, in order to establish that State of Delaware laws and policies, and Respondent's actions with respect to charter schools, have violated Title VI and Section 504, complainants need to show

[204] 42 U.S.C §§ 2000d-2000d-7 (2012).

[205] 29 U.S.C. § 794 (2012).

[206] 34 C.F.R. § 100.3(b)(2); 28 C.F.R. § 41.51(b)(3)(i).

[207] *See* discussion *supra* Part II.

that those laws and actions have a disparate impact on students of color and students with disabilities.[208] Discriminatory intent need not be established.

In the education context, a disparate-impact analysis proceeds in three steps. The first step is to ascertain whether a state or school district's facially neutral practice has a disproportionate and adverse impact on children of a particular race or children with disabilities. If so, then there is a *prima facie* case of disparate-impact discrimination. Next, if there is a *prima facie* case of disparate impact, the practice is unlawful unless the district demonstrates that it serves an educational necessity or an important educational goal.[209] In other words, the state would be required to show that the challenged course of action bears a manifest relationship to an objective that is "legitimate, important, and integral to [its] educational mission."[210] Finally, even if the practice does serve an educational necessity, it is unlawful if equally effective and less discriminatory alternative practices are available.[211]

In this case, each step of this analysis demonstrates that the state's charter school laws and authorization policies, coupled with the practices of the schools themselves, have the unlawful effect of discriminating by race and disability. The state and RCSD have disadvantaged African-American and Hispanic students and students with disabilities by permitting charter schools to employ exclusionary practices, which have the effect of denying students of color and students with disabilities access to its high-performing schools while increasing segregation in non-charter public schools.

The facts demonstrate that the challenged policies and practices permitted by Respondents do not constitute an "educational necessity" and are not part of an important educational goal. Generally, charter schools are considered a solution for failing public schools. But educational outcomes at the failing public schools have not significantly improved with the introduction of charter schools in Delaware. Many of the charter schools that serve students of color are themselves failing. Moreover, even if Respondents' practices with regard to charter

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[208] *See, e.g.*, *Larry P. ex rel. Lucille P. v. Riles*, 793 F.2d 969, 982 (9th Cir. 1984) (Title VI); 29 U.S.C. § 794 (2012); 28 C.F.R. § 41.51 (§ 504 enacting regulations' general prohibition against discrimination that "[n]o qualified handicapped person, shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity that receives or benefits from federal financial assistance"); *see also GI Forum v. Texas Educ. Agency*, 87 F. Supp. 2d 667, 678-79 (W.D. Tex. 2000) (analyzing student pass rates to determine whether high school exit exam had a disparate impact on students of color in an action under Title VI); U.S. Dep't of Justice, Title VI Legal Manual at 49-50 (2001).

[209] *Riles*, 793 F.2d 969 at 982.

[210] *Elston v. Talladega County Bd. of Educ.*, 997 F.2d 1394 at 1413 (11th Cir. 1993) (compiling Title VI cases holding that defendants bear the burden of demonstrating that their challenged practice is supported by a "substantial legitimate justification"); U.S. Dep't of Justice, Title VI Legal Manual 50-53 (2001).

[211] *See Elston*, 997 F.2d at 1407; *Young ex rel. Young v. Montgomery County Bd. of Educ.*, 922 F. Supp 544, 550-51 (M.D. Ala. 1996); U.S. Dep't of Justice, Title VI Legal Manual 53 (2001).

schools had led to significant educational improvement for Delaware children generally, there would be no basis for a finding that Respondents had to disadvantage disabled children and children of color in order to achieve that gain. In this case, the facts, coupled with disparate impact analysis, demonstrate that Respondents' actions under Delaware's Charter School Law, result in segregated charter schools and increasingly segregated regular public schools, to the detriment of its students of color and students with disabilities and in violation of Title VI and § 504.

VII. PROPOSED LEGAL REMEDIES

In order to resolve this complaint OCR should:

1. Compel the State of Delaware and RCSD to place a moratorium on the authorization and opening of new charter schools until an effective desegregation plan for African-American students, Hispanic students, and students with disabilities has been developed and implemented;
2. Compel the State of Delaware and RCSD to require charter school admissions to be based upon a random opt-out lottery only and open and available to all students in the school district in which they are located.
3. Compel the State of Delaware and RCSD to ensure that the cost of attending a public charter school is free and that parents are not required or pressured to purchase uniforms or raise money for the school.
4. Compel the State of Delaware and RCSD to ensure that total funding for non-charter public schools is equal to that of charter schools serving comparable demographics and that class sizes are capped at the same levels in charter schools as in public schools.
5. Compel the State of Delaware to ensure that schools with higher than average percentages of low income and students of color receive additional funding to offset the money and talent siphoned by charter schools.
6. Compel the State of Delaware to ensure that students with disabilities are recruited and reasonably accommodated in all charter schools in Delaware. OCR should compel the State of Delaware to train charter school personnel regarding disability discrimination and reasonable accommodations, and to monitor each charter school for its enrollment and retention of students with disabilities until it reaches the state average (i.e. ten percent).

VIII. CONCLUSION

While charter schools generally and in Delaware could serve the educational goal of providing laboratories of innovation, Delaware's charter schools are not worth the discrimination they engrain. Delaware proved that it can operate integrated public schools. Its schools have been inclusive of students with disabilities, low income students, and students of color. There is no indication that Delaware's high-performing charter schools are even attempting to serve students with disabilities or African-American and Hispanic students. Because diverse public schools are possible, and the exclusion of students from high-performing public schools due to their race or disability is a violation of Title VI and § 504, the Complainants request that OCR open an investigation and work with the parties to resolve the Complaint and ensure that Delaware's public schools, including charter schools, are accessible to all of its eligible students.

Dated this 3rd day of December, 2014.

/s/ Courtney A. Bowie
Dennis D. Parker
Courtney A. Bowie
Laura Huizar
Robert Hunter*
American Civil Liberties Union Foundation
Racial Justice Program
125 Broad St., 18th Floor
New York, NY 10004
Tel: 212-549-2682
Fax: 212-549-2654
Email: cbowie@aclu.org
*Non-attorney paralegal writer

/s/ Richard H. Morse
Kathleen MacRae*
Richard H. Morse
American Civil Liberties Union Foundation of Delaware
100 West 10th Street, Suite 603
Tel: 302-654-5326, ext. 103
Fax: 302-654-3689
Email: rmorse@aclu-de.org
*Non-attorney ACLU of Delaware Executive Director

/s/ Daniel Atkins
Brian Hartman, Project Director
Daniel Atkins, Legal Advocacy Director
Marissa Band, Staff Attorney
Disabilities Law Program
Community Legal Aid Society, Inc.
100 W. 10th Street, Suite 801
Wilmington, Delaware 19801
Tel: 302-575-0660, ext. 229
Email: datkins@declasi.org

EXHIBIT A

EXHIBIT A. ADMISSIONS AND ENROLLMENT REQUIREMENTS AT DELAWARE NONFAILING[i] CHARTER SCHOOLS[ii]

Delaware Nonfailing Charter Schools (2013-2014)	Racially Identifiable (2013-2014)[iii]	Percent of Racially Identifiable Group (2013-2014)[iv]	Percent Low-Income Enrollment (2013-2014)[v]	Percent Special Education (2013-2014)[vi]	High-Performing (2013-2014)[vii]	Placement Test	Parent Essay for Admission	Student Essay for Admission Regarding Specific Interest	Past Grades Evaluated for Admission	Uniform Purchase Required from Specific Vendors	Annual Activity Fee	Parental Involvement Requirement
1. Charter School of Wilmington	YES	64.7% White	2.4%	0.6%	✓	✓ [viii]		✓ [ix]	✓ [x]	✓ [xi]		
2. Newark Charter School	YES	65.8% White	8.4%	5.7%	✓					✓ [xii]		
3. Sussex Academy	YES	81.3% White	11.2%	4.4%	✓		✓ [xiii]	✓ [xiv]		✓ [xv]	✓ [xvi]	✓ [xvii]
4. Odyssey Charter School	YES	69.4% White	17.8%	4.0%	✓					✓ [xviii]		
5. Delaware Military Academy	YES	83.3% White	6.7%	2.8%						✓ [xix]		
6. Reach Academy for Girls	YES	80.8% African American ("Af.Am.")	59%	5.3%						✓ [xx]		
7. Academy of Dover Charter School	YES	85.4% Af.Am.	68.8%	8.4%								

8. East Side Charter School	YES	89.8% Af.Am.	84.1%	15.1%								
9. Family Foundations Academy	YES	77.5% Af.Am.	49.9%	5.9%						✓ [xxi]		✓ [xxii]
10. Kuumba Academy Charter School	YES	95.3% Af.Am.	63.1%	5.7%					✓ [xxiii]	✓ [xxiv]		
11. Las Americas ASPIRA Academy	YES	57.9% Hispanic	27.8%	4.6%						✓ [xxv]		✓ [xxvi]
12. MOT Charter School	NO	(MOT is not a racially identifiable school, but the majority of the student body is White, 71.1%)	4.9%	5.9%	✓	✓ [xxvii]		✓ [xxvii]	✓ [xxix]	✓ [xxx]		✓ [xxxi]
13. Providence Creek Academy	NO	(Providence Creek is not a racially identifiable school, but the majority of the student body is White, 63.1%)	24.5%	4.4%								✓ [xxxii]

= Racially Identifiable (White)

= Racially Identifiable (African American ("Af.Am.") or Hispanic)

= Not Racially Identifiable

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[i] The terms "failing" and "nonfailing" in this complaint are derived from Delaware's Adequate Yearly Progress ("AYP") standards. AYP is the name given to accountability standards that states developed under the federal No Child Left Behind Act. In Delaware, schools are put into three categories: "Above Target," "Meets Target," or "Below Target," based on students' scores on the Delaware Comprehensive Assessment System ("DCAS"), Delaware's statewide standardized test. 14 Del. Admin. Code 103, *available at* http://regulations.delaware.gov/AdminCode/title14/100/103.pdf. For this complaint, "low-performing charter schools" or "failing schools" are schools that are "below target," or fail to meet AYP.

[ii] All information in this table regarding schools' use of a placement test, parent essay for admission, student essay for admission, past grades, uniform purchase requirements, annual activity fees, and parental involvement requirements is based from the information made publicly available on each school's website.

[iii] In this complaint, racially identifiable schools are identified using the Department of Education's Office for Civil Rights ("OCR") "rule of thumb" for identifying such schools. A school is racially identifiable if there exists at least a 20% disparity between a given school and its surrounding district's enrollment for a given racial group. *See* Letter from Beth Gellman-Beer, Supervising Attorney Philadelphia Office, U.S. Dep't of Educ. To Mark Murphy, Secretary of Educ., Del. State Dep't of Educ. 3 (May 22, 2013) (on file with author) ("In determining whether a school is racially identifiable, OCR compares the percentage of minority students in the school to the percentage of minority students in the District as a whole. In comparing enrollment disparities, OCR looks for differences that are statistically significant and may also consider 'a rule of thumb' that flags disparities of 20 percent between school enrollments and district-wide enrollments as possible indicators of racial identifiability."). To determine whether charter schools in Delaware are racially identifiable, this complaint used the state's school-specific and district-specific enrollment data. *See generally* School and District Profiles, State of Delaware: The Official Website of the First State, http://profiles.doe.k12.de.us/SchoolProfiles/State/Default.aspx (last viewed Dec. 1, 2014). Because several charter schools are authorized by the RCSD and the district enrollment data for RCSD included charter school data, this complaint adjusted the RCSD enrollment data to include only public, non-charter schools in determining the racial identifiability of charter schools authorized by RCSD.

[iv] *See* School Profiles, State of Delaware: The Official Website of the First State, http://profiles.doe.k12.de.us/SchoolProfiles/State/Default.aspx (last viewed Nov. 14, 2014).

[v] *Id*.

[vi] *Id*.

[vii] This complaint refers to a charter school as "high-performing" when in the 2013-2014 academic year, at least 90% of students met the state reading and math standards (measured by the highest grade level for which data is available). *See* School Profiles, State of Delaware: The Official Website of the First State, http://profiles.doe.k12.de.us/SchoolProfiles/State/Default.aspx (last viewed Nov. 17, 2014). In the 2013-2014 school year, these schools were: the Charter School of Wilmington, Newark Charter School, Sussex Academy, MOT Charter School, and Odyssey Charter School. *Id*.

[viii] The Charter School of Wilmington, Student Admissions Policy (approved Oct. 28, 2014) at 1-2, *available at* http://www.charterschool.org/aboutus/boardofdirectors/downloads/policies/csw-admissions-policy-rev102814.pdf (last viewed Nov. 30, 2014).

[ix] *Id*.

[x] *Id*.

[xi] Shirt Orders, The Charter School of Wilmington, http://charterschool.org/shirt-orders/ (last viewed Nov. 12, 2014).

[xii] Newark Charter School, http://ncs.charter.k12.de.us/pages/Newark_Charter_School/Parents/Uniform_Purchases (last viewed Nov. 12, 2014)

[xiii] Sussex Academy, Addendum Application to Delaware Standard Application (2015-2016), *available at* http://www.sussexacademy.org/Admissions/ (last viewed Dec. 1, 2014).

[xiv] *Id*.

[xv] Sussex Academy, Student Handbook 2014-2015 at 12, *available at* https://imageserv11.team-logic.com/mediaLibrary/1/Web2015_10_16_14.pdf.

[xvi] *Id*. at 6.

[xvii] Sussex Academy, School Success Agreement at 2, *available at* https://imageserv.team-logic.com/mediaLibrary/1/School_Success_Plan_1.pdf (requiring parents to "[v]olunteer to chaperone field work, review portfolio presentations, help with special assignments from [] child's team and work to support the PTO and Sports Boosters as needed).

[xviii] Uniforms/Dress Code, Odyssey Charter School, http://odysseycharterschooldel.com/uniforms.html (last viewed Nov. 17, 2014).

[xix] Delaware Military Academy, DMA Cadet Handbook 2012-2013 at 17, *available at* http://www.demilacad.org/index_htm_files/Handbook%202012-2013%20Final.pdf.

[xx] Reach Academy for Girls, Uniform Policy, *available at* http://www.reachacademyforgirls.org/UserFiles/Servers/Server_4072197/File/School%20Policies/Uniform%20Policy%202013.pdf.

[xxi] Family Foundations Academy, 2014-2015 Student Code of Conduct at 23-25, *available at* http://www.familyfoundationsacademy.org/ourpages/auto/2014/1/3/46286396/Family%20Foundations%20Academy%20Student%20Code%20of%20Conduct%202014-2015.pdf.

[xxii] Family Responsibility, Family Foundations Academy, http://www.familyfoundationsacademy.org/apps/pages/index.jsp?uREC_ID=225969&type=d&pREC_ID=552193 (last viewed Nov. 17, 2014) (parents must check their child's progress each week on Home Access Center).

[xxiii] Kuumba Academy Charter School, Required Documents for All Applications, *available at* http://kuumbaacademy.org/modules/cms/pages.phtml?pageid=146264&sessionid=799576ebe6eeb5119ed0bcfe6788d24b&sessionid=799576ebe6eeb5119ed0bcfe6788d24b (requiring state test scores for students applying to grades 2-8).

[xxiv] Kuumba Academy Charter School, Kuumba Academy Charter School Student Code of Conduct (Revised Aug. 2014) at 16, *available at* http://kuumbaacademy.org/modules/groups/homepagefiles/cms/953202/File/Kuumba%20Code%20of%20Conduct%202014-2105.pdf?sessionid=799576ebe6eeb5119ed0bcfe6788d24b.

[xxv] Las Americas ASPIRA Academy, School Uniform Policy, *available at* http://www.aspiraacademy.org/pdf/Code_Of_Conduct/School_Uniform_policy_2012.pdf.

[xxvi] Las Americas ASPIRA Academy, School Code of Conduct (2014-2015 School Year, Grades K-8th) at 10, *available at* http://www.aspiraacademy.org/pdf/Code_Of_Conduct/LAAA_Code_of_Conduct_2014-2015.pdf (requiring parents to "[c]omplete a minimum of five (5) hours of volunteer time during each school year (July 1-June 30).

[xxvii] MOT Charter School, Admissions Policies & Procedures at 2, *available at* https://imageserv11.team-logic.com/mediaLibrary/15/MOT__Admissions_Policy_K-12_4.pdf.

[xxviii] *Id*.

[xxix] *Id*.

[xxx] MOT Charter, High School Family Handbook 2014-2015 at 13, *available at* https://imageserv11.team-logic.com/mediaLibrary/15/HS_Handbook_Website.pdf.

[xxxi] *Id*. at 21 ("Because parent involvement is integral to the success of MOT Charter School, we request that each family serve at least 10 volunteer hours each academic year.")

[xxxii] Providence Creek Academy Charter School, School-Parent-Student Compact School Year 2014-2015, *available at* http://www.pcasaints.org/wp-content/uploads/2014/03/Student-handbook-14-15.pdf (requiring parents to "[v]olunteer[] in or for [their] child's classroom.").

EXHIBIT B

EXHIBIT B. ADMISSIONS AND ENROLLMENT REQUIREMENTS AT DELAWARE FAILING[i] CHARTER SCHOOLS[ii]

Delaware Failing Charter Schools (2013-2014)	Racially Identifiable (2013-2014)[iii]	Percent of Racially Identifiable Group (2013-2014)[iv]	Percent Low-Income Enrollment (2013-2014)[v]	Percent Special Education (2013-2014)[vi]	High-Performing (2013-2014)[vii]	Placement Test	Parent Essay for Admission	Student Essay for Admission	Past Grades Evaluated for Admission	Uniform Purchase Required from Specific Vendors	Annual Activity Fee	Parental Involvement Requirement
1. Delaware Academy of Public Safety and Security	YES	57.9% White	29.4%	13.3%				✓ [viii]	✓ [ix]	✓ [x]		
2. Prestige Academy	YES	94.8% African American ("Af.Am.")	60.6%	19.5%						✓ [xi]		✓ [xii]
3. The Maurice J. Moyer Academic Institute	YES	88.5% Af.Am.	78.4%	31.3%								
4. Thomas A. Edison Charter School	YES	98.3% Af.Am.	80.9%	6.8%			✓ [xiii]		✓ [xiv]			✓ [xv]
5. Delaware College Preparatory Academy	YES	96.8% Af.Am.	82.1%	4.1%						✓ [xvi]		✓ [xvii]
6. Gateway Lab School	NO	(Gateway Lab School is not a racially	27.9%	58.7%						✓ [xviii]		

		identifiable school, but the majority of the student body is White, 64.4%)										
7. Campus Community Charter School	NO	(Campus Community is not a racially identifiable school, but African American students comprise the largest group, 41.1%)	39.2%	9.0%			✓ [xix]	✓ [xx]	✓ [xxi]			✓ [xxii]
8. Positive Outcomes Charter School	NO	(Positive Outcomes is not a racially identifiable school, but the majority of the student body is White, 65.8%)	38.3%	63.3%			✓ [xxiii]	✓ [xxiv]	✓ [xxv]	✓ [xxvi]		

= Racially Identifiable (White)

= Racially Identifiable (African American ("Af.Am.") or Hispanic)

= Not Racially Identifiable

[i] The terms "failing" and "nonfailing" in this complaint are derived from Delaware's Adequate Yearly Progress ("AYP") standards. AYP is the name given to accountability standards that states developed under the federal No Child Left Behind Act. In Delaware, schools are put into three categories: "Above Target," "Meets Target," or "Below Target," based on students' scores on the Delaware Comprehensive Assessment System ("DCAS"), Delaware's statewide standardized test. 14 Del. Admin. Code 103, *available at* http://regulations.delaware.gov/AdminCode/title14/100/103.pdf. For this complaint, "low-performing charter schools" or "failing schools" are schools that are "below target," or fail to meet AYP.

[ii] All information in this table regarding schools' use of a placement test, parent essay for admission, student essay for admission, past grades, uniform purchase requirements, annual activity fees, and parental involvement requirements is based from the information made publicly available on each school's website.

[iii] In this complaint, racially identifiable schools are identified using the Department of Education's Office for Civil Rights ("OCR") "rule of thumb" for identifying such schools. A school is racially identifiable if there exists at least a 20% disparity between a given school and its surrounding district's enrollment for a given racial group. *See* Letter from Beth Gellman-Beer, Supervising Attorney Philadelphia Office, U.S. Dep't of Educ. To Mark Murphy, Secretary of Educ., Del. State Dep't of Educ. 3 (May 22, 2013) (on file with author) ("In determining whether a school is racially identifiable, OCR compares the percentage of minority students in the school to the percentage of minority students in the District as a whole. In comparing enrollment disparities, OCR looks for differences that are statistically significant and may also consider 'a rule of thumb' that flags disparities of 20 percent between school enrollments and district-wide enrollments as possible indicators of racial identifiability."). To determine whether charter schools in Delaware are racially identifiable, this complaint used the state's school-specific and district-specific enrollment data. *See generally* School and District Profiles, State of Delaware: The Official Website of the First State, http://profiles.doe.k12.de.us/SchoolProfiles/State/Default.aspx (last viewed Dec. 1, 2014). Because several charter schools are authorized by the RCSD and the district enrollment data for RCSD included charter school data, this complaint adjusted the RCSD enrollment data to include only public, non-charter schools in determining the racial identifiability of charter schools authorized by RCSD.

[iv] *See* School Profiles, State of Delaware: The Official Website of the First State, http://profiles.doe.k12.de.us/SchoolProfiles/State/Default.aspx (last viewed Nov. 14, 2014).

[v] *Id*.

[vi] *Id*.

[vii] This complaint refers to a charter school as "high-performing" when in the 2013-2014 academic year, at least 90% of students met the state reading and math standards (measured by the highest grade level for which data is available). *See* School Profiles, State of Delaware: The Official Website of the First State, http://profiles.doe.k12.de.us/SchoolProfiles/State/Default.aspx (last viewed Nov. 17, 2014). In the 2013-2014 school year, these schools were: the Charter School of Wilmington, Newark Charter School, Sussex Academy, MOT Charter School, and Odyssey Charter School. *Id*.

[viii] Delaware Academy of Public Safety and Security, Cadet Service Information, *available at* http://www.dapsscharterschool.org/apps/download/2/eUOcd8mBQ4bAc6nMvd1mxUzatBvphOP5SmrCrAAYDNjajpdJ.pdf/Cadet%20Service%20Information.pdf.

[ix] Delaware Academy of Public Safety and Security, Application Cover Letter, *available at* http://www.dapsscharterschool.org/apps/download/2/gLSR9TKmHVP1vKrvuZ0ZgbyDXCb0fw5EOniVw9caSOjtdWBo.pdf/Cover%20Letter.pdf.

[x] Delaware Academy of Public Safety and Security, DAPSS Uniform Policy 2014-2015, *available at* http://www.dapsscharterschool.org/apps/download/2/QWn58CY33HwaygIvc7YNfOaru9mUmmGCIgRSWOzdMfeBbHsC.pdf/2014-15_Uniform.pdf.

[xi] Uniform Orders, Prestige Academy, http://www.prestigeacademycs.org/uniform-orders.html (last viewed Nov. 17, 2014).

[xii] Prestige Academy, Prestige Academy Family Covenant at 2, *available at* http://www.prestigeacademycs.org/uploads/7/2/2/9/7229998/famcovsample_000.pdf (requiring parents to "volunteer at least once each trimester").

[xiii] Thomas A. Edison Charter School, 2015-2016 K-8 Student Supplemental Application, *available at* http://thomasedison.charter.k12.de.us/education/page/download.php?fileinfo=U3R1ZGVudF9BcHBsaWNhdGlvbl9Db21iaW5lZF8yMDE1LTIwMTYucGRmOjo6L3d3dzUvc2Nob29scy9kZS90aG9tYXNlZGlzb25jaGFydGVyL2ltYWdlcy9kb2NtZ3IvN2ZpbGU0NDEucGRm&sectiondetailid=1 (requiring parents to state why they are choosing TECS for their child and providing two lines for parents' response).

[xiv] *Id.*

[xv] Thomas A. Edison Charter School, Student Handbook/Code of Conduct for Students, Parents, Teachers, and Administrators 2013-2014 at 10, *available at* http://thomasedisoncharter.de.schoolwebpages.com/education/page/download.php?fileinfo=U3R1ZGVudENvZGVPZkNvbmR1Y3QucGRmOjo6L3d3dzUvc2Nob29scy9kZS90aG9tYXNlZGlzb25jaGFydGVyL2ltYWdlcy9kb2NtZ3IvMTBmaWxlMzAwLnBkZg==&sectiondetailid=581 ("Thomas Edison Charter School Parents are required to volunteer a minimum of 3 hours per year.").

[xvi] School Uniforms, Delaware Preparatory Academy, http://delaware.gabbartllc.com//index.php?pageID=9042 (last viewed Nov. 17, 2014).

[xvii] Delaware College Preparatory Academy, Scholar Code of Conduct: Scholar Rights and Responsibilities, Grades Kindergarten through Five, School Year 2013-2014 at 5, *available at* http://delaware.gabbartllc.com/page/56233_2 ("Parents are required to complete fifteen hours of service to the school.").

[xviii] FAQs, Gateway Lab School, http://www.gatewaylabschool.org/faqs/ (last viewed Nov. 17, 2014).

[xix] Campus Community School, Supplemental Application, *available at* http://campuscommunityschoo.fatcow.com/CCS%20Supp%20App%202014-2015.pdf (requiring parents to state "[i]n what ways [they] feel that Campus Community School will serve [their] child" and providing two lines for response).

[xx] *Id.*

[xxi] Campus Community School, Application for Enrollment 2015-2016, *available at* http://www.positiveoutcomescs.org/ourpages/auto/2011/6/15/51625980/2%20-%20Application%20Directions%202015-16.pdf.

[xxii] Campus Community School, Handbook 2012-2013 at 5, *available at* http://campuscommunityschoo.fatcow.com/pdfs/student-handbook-12-13-final-1.original.pdf ("All parents are expected to volunteer in some way during the year.").

[xxiii] Positive Outcomes Charter School, Supplemental Application for Enrollment 2015-2016, *available at* http://www.positiveoutcomescs.org/ourpages/auto/2011/6/15/51625980/5%20-%20POCS%20Supplemental%20Application%202015-16.pdf.

[xxiv] *Id.*

[xxv] Positive Outcomes Charter School, Application for Enrollment 2015-2016, *available at* http://www.positiveoutcomescs.org/ourpages/auto/2011/6/15/51625980/2%20-%20Application%20Directions%202015-16.pdf.

[xxvi] Positive Outcomes Charter School, Student Handbook 2014-2015 at 15-16, *available at* http://www.positiveoutcomescs.org/ourpages/auto/2012/4/24/58076073/POCS%20Student%20Handbook%202015%20Final.pdf.

EXHIBIT C

DECLARATION OF EVE BUCKLEY

I, Eve Buckley, hereby declare:

1. I am a resident of Newark Delaware and the Christina School District. I am a professor of history at the University of Delaware in Newark. I have a child in elementary school in the Christina School District.
2. Many charter schools carry out substantial fundraising campaigns each year that pressure parents to raise significant sums of money for or donate to the schools. In addition, there are mandatory supply and activity fees at various charter schools, including Newark Charter School and Charter School of Wilmington.
3. Newark Charter School was founded largely by professionals residing in the Newark area, and serves a large number of families affiliated with the University of Delaware.
4. Newark Charter School uses the standard state application for admissions, but it embraces many practices and traditions that align it more closely with private schools than traditional public schools. These pose admissions barriers for students of color and students with disabilities.
5. If a child is not admitted to Newark Charter School in Kindergarten, it is very difficult for the child to gain admission at a later time, though the school currently offers K-10 instruction levels, because there is a sibling preference and, with the exception of an

increase during the 2013- 2014 expansion, very few seats have become available each year.

6. Parents of Newark Charter School students are pressured by the school community to volunteer and contribute financially to the school's success, although that is difficult for lower-income families because of the financial and time constraints faced by lower-income families.

7. Newark Charter School decided not to include a cafeteria in its original design, claiming that the space was needed for a library. As a result it could not serve students who needed federally funded free- or reduced-priced lunch .

I declare under penalty of perjury under the laws of the United States and the State of Delaware that the foregoing is true and correct.

EXECUTED this 1 day of December, 2014 in Newark, Delaware.

Eve Buckley