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## Widening the Achievement Gap: The 2010 D.C. Teacher Contract Deprives D.C. Charter School Students of an Adequate Education

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# WIDENING THE ACHIEVEMENT GAP: THE 2010 D.C. TEACHER CONTRACT DEPRIVES D.C. CHARTER SCHOOL STUDENTS OF AN ADEQUATE EDUCATION

THOMAS G. BRUNET\*

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\* Note & Comment Editor, Vol. 20, *American University Journal of Gender, Social Policy & the Law*; J.D. Candidate, May 2012, American University, Washington College of Law; B.A. 2005, Georgetown University. Thank you to my editor, Sarah Comeau, for her guidance throughout the writing process. Special thanks to my brothers, Justin and Franco, for always providing me with honest feedback. Thank you to Daria for her constant encouragement and unwavering support in all that I do. Most importantly, I would like to thank my parents, Georges and Sandra, not only for their love and seemingly endless patience, but also for teaching me the importance of advocating for the educational rights of others.

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## I. INTRODUCTION

Roughly one-third of adult residents in the District of Columbia are functionally illiterate.<sup>1</sup> This problem results from the failure of the D.C. public education system to provide students with a quality education.<sup>2</sup> The

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1. See STATE EDUC. AGENCY, THE STATE OF ADULT LITERACY REPORT: INVESTING IN HUMAN CAPITAL 3, 18 (2007), available at [http://www.seo.dc.gov/seo/lib/seo/pdf/sea\\_state\\_of\\_adult\\_literacy\\_final\\_032807.pdf](http://www.seo.dc.gov/seo/lib/seo/pdf/sea_state_of_adult_literacy_final_032807.pdf) (describing how people who are functionally illiterate have some ability to read and write but have difficulty with ordinary reading tasks, such as filling out a job application or understanding a pay stub).

2. Cf. EDITORIAL PROJECTS IN EDUC. RESEARCH CTR., CITIES IN CRISIS 2009: CLOSING THE EDUCATION GAP 14 (2009), available at <http://www.americaspromise.org/Our-Work/Dropout->

social effects are clear: each year, more students graduate high school without learning the basic skills needed for competitive employment.<sup>3</sup> Adequate funding is paramount to the success of students, but mismanagement of funds plagues the District of Columbia Public School<sup>4</sup> System (DCPS).<sup>5</sup> DCPS spends more money per pupil than most large school systems;<sup>6</sup> yet, D.C. public schools lack adequate facilities.<sup>7</sup> Moreover, DCPS schools are among the worst performing,<sup>8</sup> despite being located in one of the highest spending public school districts in the nation.

Conversely, charter schools positively impact D.C. students. Charter schools largely outperform traditional public schools, while also maintaining a graduation rate that is twenty-two percent higher than that of their public school counterparts.<sup>9</sup> Specifically, charter schools raised student proficiency in math and reading to a higher level than their traditional public school counterparts in the same period of time.<sup>10</sup> The

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Prevention/~media/Files/Our%20Work/Dropout%20Prevention/Cities%20in%20Crisis/Cities\_In\_Crisis\_Report\_2009.ashx (reporting that D.C. schools have a drop-out rate higher than the national average).

3. Cf. ACT, INC., ACT PROFILE REPORT – NATIONAL: GRADUATING CLASS 2009 7 tbl.1.1 (2009), available at <http://www.act.org/news/data/09/pdf/National2009.pdf> (noting that only one-quarter of high school students who attend college preparatory classes are prepared for college or an entry-level job).

4. “DCPS Schools” refers to the system of traditional public schools in the District. Cf. D.C. CODE § 38-1800.02(B) (not including public charter schools within the definition of “District of Columbia Public School[s]”).

5. See David S. Fallis et al., *Not Maintained, Costly Heating Systems Fail in Doves*, WASH. POST, Dec. 31, 2007, at A01 (explaining that the failure of DCPS to spend \$100,000 a year to maintain boilers led to a \$10-million-dollar emergency expenditure to repair citywide poorly maintained boilers).

6. Moira Herbst, *Public-School Spending Hits 16-Year High as New York Leads U.S.*, BLOOMBERG.COM (June 30, 2010), <http://www.businessweek.com/news/2010-06-30/public-school-spending-hits-16-year-high-as-new-york-leads-u-s-.html> (placing the District at fourth place in per-pupil education spending for 2008).

7. See *id.* (observing that neglect and failure to maintain facilities continually cause failing boilers, broken bathrooms, leaking roofs, lead-tainted drinking water, asbestos contamination, and rodent infestations); see also Dan Keating & V. Dion Haynes, *Can D.C. Schools be Fixed?*, WASH. POST, June 10, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/06/09/AR2007060901415.html> (highlighting that the District ranks third-highest in spending among the 100 largest school districts in the nation).

8. See Nick Anderson, *D.C. Leads Urban Schools in Reading Gains; Despite Improvement, the City Still Trails Others in Achievement*, WASH. POST, May 21, 2010, at B01 (stating that DCPS students score at the bottom in reading and math among students in major city school systems).

9. See Deborah Simmons, *D.C. Charter Schools Used to Tout Student-Aid Program; Friendship One School Involved*, WASH. TIMES, Sept. 29, 2010, at A6 (stating that students at a D.C. Charter School, Friendship Collegiate, enjoyed a ninety-four percent graduation rate).

10. See Robert Cane, *Equal Funding for Charter Schools Is Next Reform Frontier in D.C.*, WASH. EXAMINER, Oct. 23, 2010, <http://www.washingtonexaminer.com/opinion/columns/OpEd-Contributor/Robert-Cane-Equal-funding-for-charter-schools-is-next-reform-frontier-in-DC->

continued success of D.C. charter schools is at risk due to funding inequities, as they, in the wake of ratification of a new teacher contract, receive significantly less funding than their traditional public school counterparts.<sup>11</sup> Even though aware of these funding inequities, DCPS and the Washington Teachers Union ratified a teacher contract that allows the highest performing teachers to earn raises in DCPS schools and increases the amount of money spent by DCPS.<sup>12</sup>

This Comment argues that the 2010 D.C. Teacher Contract deprives D.C. charter school students of an adequate education.<sup>13</sup> Part II establishes the District's standard of educational quality.<sup>14</sup> Part II also explains how school finance litigation helped define and enforce educational requirements in many states.<sup>15</sup> Part III argues that charter school students should receive the same standard of educational quality as DCPS school students, because charter schools too are public schools.<sup>16</sup> In addition, Part III contends that the 2010 D.C. Teacher Contract contributes to a lack of high-performing D.C. Charter School teachers and ultimately denies charter school students their right, granted by the Home Rule Charter, to an adequate education.<sup>17</sup> Part IV recommends that the additional funds raised by DCPS should be included in the Uniform Per Student Funding Formula (UPSFF) calculation, so that charter schools can access them.<sup>18</sup> Part V concludes that the 2010 D.C. Teacher Contract can only substantially impact all D.C. public school students when education funds are allocated

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105594143.html (highlighting that, from 2007 to 2010, charter schools improved student performance in secondary schools from forty-three to fifty-seven percent in math and forty-three to fifty-two percent in reading, compared to DCPS, which only raised secondary school proficiency from twenty-six to forty-three percent in math and twenty-nine to forty-two percent in reading during the same time period).

11. See MEAGAN BATDORF ET AL., BALL STATE UNIV., CHARTER SCHOOL FUNDING: INEQUITY PERSISTS 3-4 & tbl.1 (2010) (estimating that charter schools received \$17,525 per pupil versus \$29,808 per pupil for DCPS, a difference of \$12,283 per pupil).

12. See Bill Turque, *Foundations Reserve Right To Pull Funding If D.C. Schools Chief Rhee Leaves*, WASH. POST, Apr. 28, 2010, at A01 (illustrating that much of the sources for funding, however, will come from outside sources).

13. See *infra* Part I (introducing the dilemma that the new teacher contract creates).

14. See *infra* Part II.A-D (explaining the difference between charter schools and traditional public schools and highlighting the importance of equal funding in achieving the goals set forth by Congress).

15. See *infra* Part II.E-F (introducing the history of school finance litigation and the evolution of the concept of educational adequacy).

16. See *infra* Part III.A (focusing on the meaning of the word "public" and its impact on school funding in D.C.).

17. See *infra* Part III.B-C (comparing the Home Rule Charter to the constitutions of States in order to determine the level of educational adequacy required in the District).

18. See *infra* Part IV (explaining how charter school students will be disadvantaged if the funds are not made available to all public school students).

## II. BACKGROUND

### A. Charter Schools

#### 1. Establishment: The D.C. School Reform Act

To address D.C.'s devastating illiteracy rate, Congress enacted the School Reform Act of 1995 (School Reform Act).<sup>20</sup> This Act established the D.C. Public Charter School Board (PCSB) as an authorizer of charter schools and requires the PCSB, and other eligible chartering authorities,<sup>21</sup> to regularly evaluate D.C. charter schools for academic results, compliance with applicable local and federal laws, and efficient fiscal management.<sup>22</sup> Charter schools are public schools that operate free from many of the traditional public school regulations,<sup>23</sup> enjoying increased autonomy in exchange for achieving agreed upon academic and financial performance goals.<sup>24</sup>

Charter schools force traditional public schools to compete for students because charter schools provide parents the option to send their children to schools that best fit their children's unique needs.<sup>25</sup> For example, this allows children with strong aptitude for a particular subject to attend schools that specialize in those skills,<sup>26</sup> ultimately improving student performance.<sup>27</sup> As a result, thirty-six percent of D.C. public school

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19. See *infra* Part V (arguing that although charter school students and DCPS students do not exist in different school districts, the same arguments apply).

20. District of Columbia School Reform Act of 1995, D.C. CODE § 38-1800.02-1809.01 (2010).

21. See *id.* § 38-1800.02(17) (defining "eligible chartering authority").

22. *Id.* § 38-1802.11.

23. See BRYAN C. HASSEL, *THE CHARTER SCHOOL CHALLENGE: AVOIDING THE PITFALLS, FULFILLING THE PROMISE* 4-8 (1999) (explaining that even though traditional public schools and charter schools both exist under the arm of the public school system for funding purposes, there are some key differences between public schools and charter schools).

24. See *id.* at 6 (explaining that charter schools have the ability to establish their own curriculum).

25. See *id.* (describing how the success of charter schools depends on their responsiveness to parents' needs and demands). *But see id.* at 123 (describing how financial difficulties during such schools' difficult startup phases sometimes led to schools having no dedicated "special-education" administrator").

26. See Deborah Simmons, *Charter Schools Finding Niches; Specialization Seen as the Next Wave of Reform*, WASH. TIMES, Aug. 30, 2010, at A1 (discussing how "second-generation" charter schools are experimenting with preparing students for specialized careers).

27. See *supra* notes 11-12 and accompanying text.

students attend one of the city's fifty-two charter schools.<sup>28</sup>

## 2. *Funding: The Uniform Per Student Funding Formula*

The UPSFF is a vital component of D.C. charter school law.<sup>29</sup> Under the UPSFF's mathematical process, each student enrolled in a D.C. public school receives a "foundation level" of funding that covers a variety of costs, from books to teacher salaries.<sup>30</sup> Thus, the UPSFF attempts to ensure that all students receive the same dollar amount, or equal funding, regardless of whether the students attend a traditional public school or a public charter school.<sup>31</sup>

### *B. High Quality Education: The Appropriate Education Standard in the District*

In lieu of a constitutional provision about education, as many States have, the District has a patchwork of laws that helps define the level of education the D.C. government guarantees to public school students.<sup>32</sup> The District of Columbia Home Rule Act (Home Rule Act) is the District's functional equivalent to a state constitution.<sup>33</sup> The D.C. Human Rights Law (Human Rights Law), a provision of the Home Rule Act, establishes a minimum level of education that the District must provide public school

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28. See Bill Turque, *Charter School Enrollment Up Nearly 6 Percent*, WASH. POST (Oct. 6, 2010), [http://voices.washingtonpost.com/dcschools/2010/10/charter\\_enrollment\\_up\\_nearly\\_s.html](http://voices.washingtonpost.com/dcschools/2010/10/charter_enrollment_up_nearly_s.html) (noting that charter school enrollment continues to grow in the District); see also D.C. PUBLIC CHARTER SCH. BD., *SY2010-2011 Charter School Profile*, DCPUBLICCHARTER.COM, <http://www.dcpubliccharter.com/Enrollment-and-Demographics/SY2010-002D-2011-Charter-School-Profile.aspx> (last visited Jan. 29, 2010) (estimating that D.C. charter schools are educating 28,000 students in the 2010-2011 school year).

29. See D.C. CODE § 38-2901(8) (2001) (explaining that a per pupil formula details funding for DCPS and charter school students).

30. See *id.* § 38-2901(5) (exempting many education costs from those included in foundation level calculations, such as special education and funding from federal or other, non-appropriated revenue sources); PARENTS UNITED FOR THE D.C. PUB. SCHS., THE D.C. PUBLIC SCHOOLS OPERATING BUDGET (2002), [hereinafter 2002 D.C. SCHOOLS OPERATING BUDGET], available at [http://www.21csf.org/csf-home/Documents/Emails/DCPS\\_Local\\_Operating\\_Budget.pdf](http://www.21csf.org/csf-home/Documents/Emails/DCPS_Local_Operating_Budget.pdf) (defining DCPS expenses funded by D.C. as including teacher pay, books, custodians, utilities, special education, and early childhood through high school programs).

31. See D.C. CODE § 38-2902 (2001) (using imperative language that the Formula "shall apply to operation budget appropriations" for both DCPS and Public Charter Schools) (emphasis added).

32. See *id.* § 38-916 (stressing the importance of a "high quality" of education that also prepares students for employment); see also *id.* § 2-1402.01 (2001) (providing for every individual to have an opportunity to participate fully in educational institutions).

33. See *id.* § 1-201.02 (stating Congress' intention to delegate limited legislative powers to the D.C. government).

students.<sup>34</sup> Specifically, the Human Rights Law guarantees all D.C. public school students the right to an equal opportunity to participate in “all aspects” of D.C. life.<sup>35</sup> Thus, the Human Rights Law contributes to the definition of the level of education required in D.C. by stating that the city must ensure students have access to full participation in D.C.’s “economic, cultural, and intellectual life.”<sup>36</sup>

The D.C. Council (Council) added to the definition of the minimum standard of education by codifying a standard in the policy declaration of funding for public schools.<sup>37</sup> Thus, applicable D.C. law requires the D.C. government to guarantee and provide D.C. public school students a “high quality” education that prepares them to participate in D.C.’s “economic, cultural, and intellectual life.”<sup>38</sup>

### *C. 2010 D.C. Teacher Contract*

The funding disparity between DCPS schools and charter schools became more apparent after the ratification of the 2010 D.C. Teacher Contract (Contract); this disparity concerns charter school advocates because it reduces the amount of money available for each charter school student.<sup>39</sup> The Contract creates a performance-based pay system under which teachers will receive three to five percent base salary increases over the next few years.<sup>40</sup> Contrary to the School Reform Act, these raises will not be funded through the UPSFF; instead, DCPS schools will use outside funds to pay their teachers.<sup>41</sup>

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34. *See id.* § 2-1402.01 (guaranteeing the right to an “equal opportunity to participate in the economic, cultural, and intellectual life of the District,” including the right to participate in educational institutions for every student in the District).

35. *Id.*

36. *Id.*

37. *See* § 38-916 (stating that a “high quality” public education is of critical importance for all children in the District).

38. *Id.* (suggesting that a high quality education includes the retention of high quality teachers).

39. *Cf.* COLLECTIVE BARGAINING AGREEMENT BETWEEN THE WASHINGTON TEACHERS UNION LOCAL #6 OF THE AMERICAN FEDERATION OF TEACHERS AND THE DISTRICT OF COLUMBIA PUBLIC SCHOOLS, OCTOBER 1, 2007 – SEPTEMBER 30, 2010, at 94 (2010) [hereinafter D.C. TEACHER CONTRACT] (funding DCPS teacher raises outside of the UPSFF); *see also* Deborah Simmons, *Charter Schools Threaten to Sue D.C. for Funding*, WASH. TIMES, May 3, 2010, at A6 [hereinafter Simmons, *Charter Schools Threaten to Sue*] (describing how unnamed advocates of charter schools may sue if the District does not increase funding for charter schools to compensate for the Contract).

40. *See* D.C. TEACHER CONTRACT, *supra* note 39, at 94 (requiring retroactive payment of the raises for appropriate periods from 2007-2010).

41. *See generally* Simmons, *Charter Schools Threaten to Sue*, *supra* note 39 (stating that the new teacher contract will exclude charter schools from the additional funding).

### *D. Charter School Funding Inequities*

#### *1. Misinterpretation of the Status of Charter Schools*

The misconception that charter schools are not public schools, and thus, do not qualify for public funding, is a major obstacle to equal funding.<sup>42</sup> In *Council of Organizations & Others for Education About Parochial, Inc. v. Governor*, a company and two members of the Michigan State Board of Education, in their private capacity, challenged the constitutionality of the Michigan Charter Schools Act.<sup>43</sup> The Supreme Court of Michigan deemed the act constitutional and held that “public school academies”—created by the act—are public because they are under the control of the State, even though they are not under the “immediate and exclusive” control of the State.<sup>44</sup>

#### *2. Inappropriate Allocation of State Funds*

In *Moreau v. Avoyelles Parish School Board*, the Board sought to charge the Avoyelles Public Charter School for transportation services.<sup>45</sup> Avoyelles Public Charter School, along with some parents of students, sought an order compelling the Board to provide free transportation, and a Louisiana Circuit Court of Appeals ultimately concluded that the State of Louisiana must similarly provide all free public services to charter schools.<sup>46</sup>

In *Francine Delany New School for Children, Inc. v. Asheville City Board Of Education*, the North Carolina Board of Education raised additional funds through fines, forfeitures, and a supplemental school tax but did not include those additional funds in the per pupil funding formula.<sup>47</sup> North Carolina requires the Board of Education to adhere to a uniform budget formula that allocates funds equally between schools.<sup>48</sup>

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42. See *Council of Orgs. & Others for Educ. About Parochial, Inc. v. Governor*, 566 N.W.2d 208, 211, 216 (Mich. 1997) (explaining that appellees argued that the court should enjoin distribution of public funds to the public academies).

43. See *id.* at 212 (reciting how the plaintiffs initially lost on standing, then managed to obtain a preliminary injunction on refiling).

44. See *id.* at 216 (arguing that charter schools are under the control of the State because they are under the control of the state charter granting authorities).

45. See *Moreau v. Avoyelles Parish Sch. Bd.*, 897 So. 2d 875, 880 (La. Ct. App. 2005) (noting that the School Board argued that “the legislature never intended for local school boards to absorb the cost of providing the expected free transportation for charter school students.”).

46. See *id.* at 878, 887 (holding that the Board must offer free transportation both to charter schools and traditional public schools).

47. See *Francine Delany New Sch. for Children, Inc. v. Asheville City Bd. of Educ.*, 563 S.E.2d 92, 93 (N.C. Ct. App. 2002) (explaining that, by statute, all North Carolina public schools must adhere to a uniform budget formula).

48. See *id.* (indicating that funding for public schools comes from three sources:

The charter school argued that it was necessary to include the funds received from the supplemental school tax in the per pupil funding formula to avoid unequal funding for charter school students.<sup>49</sup> The decision to not include the supplemental tax revenues resulted in charter school students receiving \$1,100 less per pupil for the school year.<sup>50</sup> A North Carolina Court of Appeals held that the school board had to include the funds from the supplemental school tax in the per pupil formula.<sup>51</sup>

### *E. School Finance Litigation: The Concept of Adequacy*

In the early 1970s, state courts became the leading mechanism for rectifying inequities in education funding.<sup>52</sup> The notion of a state constitution-based fundamental right to an adequate education has gradually emerged.<sup>53</sup> Initially, courts rejected challenges to unequal school funding.<sup>54</sup> Courts proved more amenable when litigation strategies began focusing on whether state education provisions conformed to state constitutional definitions of adequacy.<sup>55</sup> These inquiries examine the adequacy of the level of funding rather than equal allocation of such funding between districts.<sup>56</sup> The goal of adequate funding is to ensure that

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the State Public School Fund, the local current expense fund, and the capital outlay fund).

49. *See id.* (explaining that the school alleged that the funds received from the supplemental school tax needed to be included into the per pupil funding formula).

50. *See id.* (noting that the Board included the additional revenue in the per pupil funding calculations for non-charter schools).

51. *See id.* at 97 (finding that the legislature had clearly expressed an intent that such additional fines and forfeitures were part of the local school administrative unit's "operating expense fund," which, by legislative fiat, had to be apportioned among all schools).

52. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 58 (1973) (holding that arguments against finance of education based upon local property taxes was a matter for state legislatures and not barred by the U.S. Constitution); *see also* ELAINE M. WALKER, EDUCATIONAL ADEQUACY, DEMOCRACY, AND THE COURTS 23-30 (2005) (highlighting the wave of litigation that gave rise to a recognition of a fundamental right to education).

53. *See, e.g.,* Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 206 (Ky. 1989) (recognizing a fundamental right to education in Kentucky).

54. *See* WALKER, *supra* note 52, at 23-26 (explaining the three phase evolution of school finance litigation: phase one litigants sued under the 14th Amendment's Equal Protection Clause; phase two litigants combined the Equal Protection Clause and applicable state constitution provisions; and most recently, phase three litigants have focused exclusively on the state education clauses and the concept of adequacy).

55. *See* William E. Thro, *A New Approach to State Constitutional Analysis in School Finance Litigation*, 14 J.L. & POL. 525, 534-37 (1998) (discussing "equity suits," in which plaintiffs generally "believe more money means a better education, and have little or no tolerance for any differences in money and/or opportunities," and "quality suits," in which plaintiffs argue constitutional guarantees protect a minimum educational quality and that inadequate funding leads to an inadequate education).

56. *See* Alfred A. Lindseth, *Educational Adequacy Lawsuits: The Rest of the Story*

every district has sufficient funding to provide adequate education, not necessarily equal funding among districts.<sup>57</sup>

Perhaps the best articulated definition of adequacy came from *Rose v. Council for Better Education*, where the Kentucky Supreme Court focused on the state constitution's requirement of an "efficient" education.<sup>58</sup> *Rose* made clear that funding is paramount to an adequate education.<sup>59</sup> Thus, in determining whether an educational system is adequate in Kentucky, the judiciary's role is to ensure that school districts follow both applicable statutory and constitutional guidelines to ensure that students receive sufficient resources to prepare them for civic engagement and competition in the labor market.<sup>60</sup>

Following *Rose*, the New York Court of Appeals, in *Campaign for Fiscal Equity v. State*, determined that the New York Constitution's Education Article requires that each student receive a "sound basic" education.<sup>61</sup> The court defined a "sound basic" education as "a meaningful high school education, one that prepares [students] to function productively as civic participants."<sup>62</sup> An appellate division court held that the contested education financing system was unconstitutional and violated New York's constitutional mandate to make available a "sound basic" education to all the state's children because it did not provide a "meaningful high school education" that enabled students to compete for jobs.<sup>63</sup>

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6 (Apr. 24, 2004) (unpublished manuscript), available at [http://www.hks.harvard.edu/pepg/PDF/events/BrownConf/PEPG\\_04-07Lindseth.pdf](http://www.hks.harvard.edu/pepg/PDF/events/BrownConf/PEPG_04-07Lindseth.pdf) (explaining that adequate funding is more important than equal funding, because some school districts have higher needs due to difficulties in educating enrolled students).

57. *See id.* (explaining that equity cases sometimes disappointed advocacy groups by resulting in *equal* spending but not *increased* spending, such as in California, which has capped property taxes and has become "one of the lowest spending states in the country").

58. *See Rose*, 790 S.W.2d at 205-06, 211-213 (holding the constitutional requirement of an efficient education to be one that enables students to develop the basic skills necessary to participate effectively as citizens in a democratic society).

59. *See id.* at 211-12 (holding, however, that the "General Assembly . . . may also empower [local school entities] to enact local revenue initiatives to supplement the uniform, equal educational effort that the General Assembly must provide").

60. *See id.* at 212 (eschewing mandating any particular funding scheme and leaving it to the General Assembly to determine "how best to achieve efficiency").

61. *See Campaign for Fiscal Equity, Inc. v. State (CFE I)*, 655 N.E.2d 661, 665 (N.Y. 1995) (holding that the education financing system fails to afford New York City's public school children the opportunity for a meaningful high school education despite a requirement of a sound basic education).

62. *See Campaign for Fiscal Equity, Inc. v. State (CFE III)*, 801 N.E.2d 326, 330, 332 (N.Y. 2003) (construing a sound basic education as "purposeful").

63. *See Campaign for Fiscal Equity, Inc. v. State (CFE II)*, 719 N.Y.S.2d 475, 515 (Sup. Ct. 2001) (finding that New York City public schools failed to provide a "sound basic" education); *see also CFE III*, 801 N.E.2d at 332 (rejecting, upon review, the Appellate Division's grade-specific analysis).

### III. ANALYSIS

#### *A. Like Their DCPS Counterparts, D.C. Charter School Students Deserve an Adequate Education, Because D.C. Charter Schools Are Public Schools.*

The fallacy that charter schools are not public schools ultimately deprives charter school students of an adequate education.<sup>64</sup> To be a public school, a school must be under the control of the school system.<sup>65</sup> D.C. charter schools are public schools because they are under the control of the District.<sup>66</sup> Specifically, charter school and DCPS school students deserve an equal opportunity to an adequate education because the schools they attend are part of the D.C. school system that delivers public education.<sup>67</sup>

The Michigan Supreme Court, in *Council*, held that Michigan’s charter schools met the requirements of a public school because they were under the control of the state school system.<sup>68</sup> The *Council* court reasoned that Michigan charter schools are under the control of the State because their charter authorizing bodies are under the “ultimate and immediate control of the state and its agents.”<sup>69</sup> Just as in *Council*, D.C. charter schools are under the control of D.C. government because their chartering authority—the PCSB—is under the ultimate and immediate control of the D.C. Mayor’s office.<sup>70</sup>

Applying *Council*’s rationale, D.C. charter schools cannot escape the “public” label because the D.C. government similarly controls D.C.

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64. See District of Columbia School Reform Act of 1995, D.C. CODE § 38-1800.02(29) (2001) (defining a “public charter school” as a “publicly funded school in the District of Columbia”); Council of Orgs. & Others for Educ. About Parochiaid, Inc. v. Governor, 566 N.W.2d 208, 213-14 (Mich. 1997) (explaining that, by statute, public school academies are public schools in Michigan). *But see* § 38-1800.02(12)(B) (defining the term “District of Columbia public school” so as to not include public charter schools).

65. Compare *Council*, 556 N.W.2d at 216 (explaining that Michigan public academies are “public institutions,” because the state charter-granting board controls them during the application-approval process), with § 38-1802.03 (noting that District-funded chartering authorities have approval power over would-be charter schools), and § 38-1800.02(17) (defining D.C. charter-granting authorities).

66. See also § 38-1808.11 (granting D.C. chartering authorities oversight authority over charter schools).

67. Cf. *Council*, 566 N.W.2d at 216 (stating that the Michigan Constitution requires the legislature to “maintain and support a system of public schools”).

68. See *id.* at 216-17 (reasoning that Michigan’s public school academies are under such control because they are subject to the State’s power to approve and revoke their charters; because they are subject to State’s control over their funding; and because, like other schools, they are fully subject to the School Code).

69. See *id.* at 216 (explaining that charter schools are under the control of the State, because the State authorizing body is a state organization).

70. See § 38-1802.11(a)(1)(A) (proclaiming that state chartering authorities “shall monitor the operations of each public charter school to which the eligible chartering authority has granted a charter”).

charter-granting authorities.<sup>71</sup> The *Council* test for qualification as a public school is persuasive, as D.C. charter schools are under the immediate control of the District.<sup>72</sup> As long as the District has immediate control over the charter-authorizing board, that will qualify as exerting immediate control over the charter schools.<sup>73</sup> Therefore, were *Council* the law in the District, D.C. charter schools would be public schools because the D.C. Mayor's Office controls the PCSB.

Because Michigan Charter Schools are part of the state-controlled education system, the *Council* court found the state control requirement met and, thus, classified the schools as "public."<sup>74</sup> Similar to Michigan charter school laws, D.C. charter school laws treat both DCPS and charter schools as public.<sup>75</sup> Since the authorizing bodies in Michigan are public institutions, the State indirectly exercises control over charter schools through the application-approval process.<sup>76</sup> Similarly, the PCSB is the sole chartering authority in the District. The PCSB has the ability to revoke charters pursuant to the School Reform Act through the very same application-approval process as Michigan's chartering authority.<sup>77</sup>

An equal funding requirement follows from the fact that both D.C. charter schools and DCPS schools wear the public label. The D.C. Code outlines the requirement that all public schools must fund their operating expenses through the UPSFF.<sup>78</sup> Therefore, similar to the requirement in *Council* that public monies apply to both public schools and charter schools, *Council* is persuasive that operating expenses for DCPS schools and charter schools be funded equally through the UPSFF.<sup>79</sup>

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71. *See id.* § 38-1802.11(d) (explaining that each eligible chartering authority that issues a charter must submit a report to the Mayor, the District of Columbia Council, the Board of Education, the Secretary of Education, and some federal officials each year by, at the latest, July 30).

72. *See id.* § 38-1802.14(a) (establishing the Public Charter School Board as a subdivision within the D.C. Government).

73. *Cf. Council*, 566 N.W.2d at 216-17 (explaining that the state constitution grants authority to the legislature to establish charter-authorizing organizations).

74. *See id.* (noting that if an organization is controlled by the State, it is part of the State).

75. *See* § 38-2901(8)-(9) (explaining that a charter school is to be publicly funded).

76. *See Council*, 566 N.W.2d at 216 (explaining that the authorizing bodies have the ability to reject any application with which they are not completely satisfied).

77. *See* D.C. CODE § 38-1800.02 (2001) (establishing the PCSB, operating under the Board of Education as an "eligible chartering authority"); *see also* § 34.1802-14 (defining the PCSB and how its members are selected).

78. *See id.* § 38-2902 (2001) (applying the formula to operating budget appropriations for District of Columbia resident students in DCPS and District of Columbia public charter schools). *But see* § 38-2902(4)(c) (carving out significant exempted sources of funding from the Uniform Per Student Funding Formula).

79. *See Council*, 566 N.W.2d at 219 (requiring the State Board of Education to maintain and support a system of free public elementary and secondary schools as defined by the law).

Because D.C. charter schools and DCPS schools are public, both should receive equal funding for their students.<sup>80</sup> Just as in *Council*, the unfounded belief that charter schools are not public must be rejected because D.C. charter schools are part of the D.C. school system that delivers public education.<sup>81</sup>

*B. In Order to Ensure That D.C. Charter School Students Receive an Adequate Education, the 2010 Teacher Contract Must Adhere to the Equal Funding Guidelines Mandated by the UPSFF.*

Not computing the 2010 Teacher Contract as part of the UPSFF disadvantages D.C. charter school students.<sup>82</sup> The Contract's teacher funding structure will result in unequal educational opportunities for charter school students because less experienced and less qualified teachers will teach charter students, as charter schools can no longer competitively afford higher caliber teachers.<sup>83</sup>

Using the Human Rights Law's standard that education must enable students to achieve full participation in the District's "economic, cultural, and intellectual life," the threshold for what constitutes an adequate education in the District appears not to require much.<sup>84</sup> However, analyzed in tandem with the District's abhorrent track record and student results, the systems currently in place are barely beginning to meet the "adequacy" requirements.<sup>85</sup> Allowing DCPS to exclude the additional funding for teacher raises deprives charter schools of vital funding and results in an inadequate education for charter school students.<sup>86</sup> The inequities in funding would allow DCPS students to move closer to the goals of academic achievement while putting charter school students on the

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80. See § 38-2901(9) (defining a public charter school as a school that is publicly funded).

81. See, e.g., *Council*, 566 N.W.2d at 216-17 (explaining that schools under the control of the state are public).

82. Cf. *Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 56-57 (1973) (illustrating that the school funding formula based on property taxes disadvantaged children living in poor school districts).

83. See generally D.C. TEACHER CONTRACT, *supra* note 39, at 94 (concluding that the raises contemplated by the Contract will result in DCPS teachers "being among the highest compensated educators in the nation").

84. See § 38-2901(5) (stating that the foundation level of funding means that "amount of funding per weighted student needed to provide adequate regular education services to students").

85. See *Rose v. Council for Better Educ.*, 790 S.W.2d 186, 197 (Ky. 1987) (lamenting then-poor student achievement in Kentucky public schools, as compared to national rankings); see also ACT, INC., ACT PROFILE REPORT-DISTRICT OF COLUMBIA: GRADUATING CLASS 2009 9 (2009) (illustrating that DC students have continuously scored below average in national achievement tests).

86. See D.C. TEACHER CONTRACT, *supra* note 39, at 94 (highlighting that DCPS teacher pay will increase as much as 20%).

opposite path.<sup>87</sup>

*1. The Funding Structure of the 2010 Teacher Contract Violates Established Notions of Adequacy Because It Provides Educational Resources to DCPS Students While Denying Charter School Students Access.*

In analyzing educational adequacy, the *Moreau* court focused on strict statutory interpretation.<sup>88</sup> Using the *Moreau* decision as a guide, the 2010 D.C. Teacher Contract denies charter students an adequate education because a school funding practice that provides educational resources to one group of students and not another is inconsistent with established notions of adequacy.<sup>89</sup>

While *Moreau* applied to students in different school districts receiving unequal access to transportation services, the same standards apply to unequal public funding between D.C. charter school and DCPS students.<sup>90</sup> The 2010 D.C. Teacher Contract deprives D.C. charter school students of the educational resources necessary to achieve an adequate education.<sup>91</sup> This will usher the most qualified and most experienced teachers to DCPS, as charter schools may be unable to compete with the higher salaries.<sup>92</sup>

Additionally, if charter schools choose to compete with the higher salaries DCPS offers, the per pupil amount will inevitably decrease in accordance with the increased spending.<sup>93</sup> Similar to Louisiana's failure to sponsor charter school transportation services in *Moreau*, by not factoring the funds into the UPSFF, the District-sponsored funding mechanism provides charter school students with inadequate educational resources as compared to their DCPS counterparts.<sup>94</sup>

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87. *See generally id.* (implying that, according to the Contract, performance pay will result in better teachers getting paid more money, so DCPS will be able to afford those teachers that command more money).

88. *See Moreau v. Avoyelles Parish School Bd.*, 897 So. 2d 875, 882-84 (La. Ct. App. 2005) (noting how the School Board argued that the requirement to provide transportation applied only to "public schools" within the jurisdictional boundaries of local school boards).

89. *See id.* at 880, 887 (stating that the requirements of the statute apply to charter schools as well because they fall into the statutory definition of public schools).

90. *See* D.C. CODE § 38-2901(8) (2001) (stating that the per student funding formula applies to both DCPS students and charter school students).

91. *Cf. Moreau*, 897 So. 2d at 880-81, 887 (concluding that denying charter students access to free busing violated the education statute because the legislature "intended for local school boards to absorb the cost of providing the expected free transportation for charter schools").

92. *Cf. D.C. TEACHER CONTRACT*, *supra* note 39, at 4 (stating that the contract will be carried out with the help of "partners").

93. *See* § 38-2901(8) (stating that the per pupil formula is to be used to account for annual operating funding).

94. *Cf. id.* § 38-2902(b) (stating that the UPSFF shall apply to operating budget

*2. The District Must Factor the Additional Funding into the UPSFF or Else D.C. Charter School Students Will Receive an Inadequate Education Because Their DCPS Counterparts Will Receive More Funds Per Student.*

In *Francine Delany*, the North Carolina Court of Appeals held that any additional funds raised by the board of education had to be factored into the per pupil funding formula so that the charter schools could access them.<sup>95</sup> In establishing the ultimate funding duty that the board of education had to the charter schools, the *Francine Delany* court looked to North Carolina's per pupil funding statute.<sup>96</sup> The *Francine Delany* charter school students received an equal share of the local expense fund but did not receive revenue from supplemental taxes and penal fines and forfeitures.<sup>97</sup> The problem, however, is that, like the charter school students in *Francine Delany*, D.C. charter school students received an equal per pupil share of the D.C. General Fund but received no share of the revenues collected for the teacher raises created by the 2010 D.C. Teacher Contract.<sup>98</sup>

The *Francine Delany* court focused on legislative intent to find that the Board of Education's interpretation of the funding requirement deprived charter school students of their right to adequate funding.<sup>99</sup> Following *Francine Delany's* persuasive discussion of how statutes on the same matter must be construed together, it is plausible that the additional funding that DCPS acquires for teacher raises is inconsistent with the D.C. Code provisions requiring equal funding for all public school students.<sup>100</sup>

Consistent with the *Francine Delany* court's reading of the North

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appropriations for DCPS and charter schools).

95. See *Francine Delany*, 563 S.E.2d 92, 97 (N.C. Ct. App. 2002) (articulating that courts must construe statutes in a way not to defeat legislative intent and finding that the North Carolina Legislature clearly intended operating expenses raised by fines, forfeitures, and supplemental taxes to be shared in a single local expense fund).

96. See *id.* at 93 (analyzing N.C. GEN. STAT. § 115C-426(a) to determine that all North Carolina public schools must follow the uniform funding requirements).

97. See *id.* (noting that, had *Francine Delany* School received full access, it would have had an additional \$1100 per year).

98. *But see id.* at 96-98 (reading "local current expense appropriation" in the Charter School Funding Statute as synonymous with the phrase "local current expense fund" in the School Budget and Fiscal Control Act, which required that funds be apportioned according to the membership of each local school administrative unit, which included charter schools (internal citations and quotations omitted)).

99. See *id.* at 97-98 (finding that the board of education deprived charter school students of adequate funding because the board ignored legislative intent by not sharing additional funds with charter schools).

100. See *supra* Part II.A-C (highlighting the D.C. CODE provisions that refer to education).

Carolina funding statute, the UPSFF statute shows that the Council “clearly intended” General Funds for charter schools to be subject to the UPSFF.<sup>101</sup> Therefore, construing the UPSFF, which creates uniform student funding criteria, with the requirement of a “high quality” education for all students in the District, as laid out in the Declaration of Funding, the Council intended that any additional funds raised by DCPS for an operating expense be included in the UPSFF calculation.<sup>102</sup>

*C. The 2010 D.C. Teacher Contract Deprives D.C. Charter School Students of Their Right to an Adequate Education Because the Contract Denies Them a High Quality Education.*

*Rose* refers to an “efficient” education that enables students to develop the basic skills necessary to participate effectively as citizens in a democratic society and to be prepared to compete in the contemporary economy.<sup>103</sup> This definition of an adequate education draws from basic notions of a citizen’s role in society and the obligations of the state education system to prepare students for competitive employment.<sup>104</sup> The Kentucky Supreme Court’s statement has served as the inspiration for substantive definitions of adequacy by other states.<sup>105</sup>

For example, the New York Supreme Court in *CFE II* held that a “sound basic” education requires New York to provide students with the “foundational skills that students need to become productive citizens capable of civic engagement and sustaining competitive employment.”<sup>106</sup> Similar to the rationale in *Rose*, the court focused the definition of sound basic education on the obligation of the State to prepare students to be productive citizens who are able to compete in the labor market.<sup>107</sup>

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101. See D.C. CODE § 38-2902(b) (2001) (stating that the formula shall apply to operating budget appropriations from the General Fund for DCPS and for Public Charter Schools).

102. Cf. *Francine Delany*, 563 S.E.2d at 97-98 (concluding that the various education statutes in North Carolina show that the legislature clearly intended that the supplemental taxes be included in the operating budget of the local expense fund so that charter schools could access them).

103. See *Rose v. Council for Better Educ.*, 790 S.W.2d 186, 211-13 (Ky. 1989) (stating that efficient means substantial in its uniformity and in its equality of financial resources and educational opportunity for all students).

104. See *id.* at 212 (noting that the system of education must have as its goal to provide children with oral and written communication skills, knowledge of economic and political systems, understanding of governmental systems, knowledge of mental and physical wellness, grounding in the arts and academic and vocational skills that allow them to compete in the job market).

105. See, e.g., *CFE II*, 719 N.Y.S.2d 475, 482 (Sup. Ct. 2001) (listing courts in New Hampshire, Massachusetts, and Alaska as having used *Rose* to define their own Educational Clauses).

106. *Id.* at 487.

107. See *id.* at 486 (suggesting that education standards need to ensure that high

In the District, the Funding of Public Schools Declaration of Policy requirement of a “high quality” education means an education that enables all students in the District “to participate fully in the economic, cultural, and intellectual life of the District,” the requirement laid out in the Human Rights Law.<sup>108</sup> This requirement is similar to court decisions on adequacy because, insofar as it mandates preparing students for full participation in D.C.’s economic life, it focuses on the District’s obligation to prepare students to be productive citizens who are able to compete in the labor market.

*1. D.C. Charter School Students Deserve an Adequate Education Which Encompasses Rose’s “Efficient” Standard as well as CFE’s “Sound Basic” Standard.*

According to the court in *Rose*, an adequate education is one that provides all students in a school system with an equal opportunity to participate effectively as citizens and to compete in the job market.<sup>109</sup> States adopting *Rose* have defined this minimum requirement using a multitude of phrases that encompass the same standard as the adequacy requirement.<sup>110</sup> Accordingly, the “high quality” requirement in the District is an example of a phrase that can reasonably encompass the same adequacy requirements as the “efficient” terminology used in *Rose*. Therefore, D.C. charter school students and DCPS students deserve the same quality of teachers to ensure that all students in D.C. receive an adequate education.<sup>111</sup>

Since *Rose* left the legislative and executive branches to describe the skills each student needs as well as the methods for developing those skills,<sup>112</sup> the District’s “skills” and “methods” must be taken from similar sources, including the education-related provisions of D.C. law: the Human Rights Law, the School Reform Act, the UPSFF, and the Funding of Public Schools provision in the D.C. Code. Read together, the language of these provisions suggest that the Council intended to meet the recognized

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school graduates are capable of working at better than low-level service jobs).

108. D.C. CODE § 2-1402.01 (2001); *see id.* § 38-916(1) (recognizing the “critical importance” of a “high quality” education).

109. *See Rose*, 790 S.W.2d at 211-12 (stating that schools must receive adequate funding in order to achieve the goal of ensuring that every child in the state has an equal opportunity to have an adequate education).

110. *See, e.g., CFE II*, 719 N.Y.S.2d at 484-87 (describing “sound basic education” as the adequate education necessary to allow students to become productive citizens).

111. *See CFE III*, 801 N.E.2d 326, 333 (N.Y. 2003) (noting that in order to meet the requirement of a sound basic education there cannot be a discrepancy in the level of educational inputs, including teacher quality).

112. *See Rose*, 790 S.W.2d at 211-12 (explaining that the legislature must monitor the state education system to ensure that there is no waste or mismanagement).

standard of adequacy for all public school students in D.C.<sup>113</sup> The level of education required in D.C. is one of “high quality” that will ensure D.C. students’ full participation in D.C.’s economic, cultural, and intellectual life.

*2. D.C. Charter School Students Will Not Receive an Adequate Education Because the 2010 Teacher Contract Only Guarantees “High Quality” for DCPS Students.*

The D.C. Code requires a “high quality” public education that will ensure all D.C. students’ full participation in the District’s economic, cultural, and intellectual life.<sup>114</sup> The District’s “high quality” public education requirement mandates the same “sound basic” education defined in *CFE III*.<sup>115</sup> If a “high quality” education is coextensive with a “sound basic” education, then the 2010 D.C. Teacher Contract frustrates the requirement in the Human Rights Law that all students receive an “equal opportunity to participate in the economic, cultural, and intellectual life of the city.”<sup>116</sup> The Contract contravenes the District’s “high quality” education standard because charter school students will be unable to receive a high quality education because they will not learn from high quality teachers.<sup>117</sup>

Like the concepts of “efficient” and “sound basic” education, the “high quality” standard in the District is one that applies equally to all students.<sup>118</sup> If DCPS students receive instruction from the teachers who perform well on the evaluations that determine pay, as set forth in the Contract, D.C. charter school students will receive instruction from those teachers who are lower performing and thus command lower salaries because charter schools will lose out in funding for competitive hiring. This inequity results in an education that does not meet accepted notions of adequacy because, in direct contrast to the holdings of *Rose* and *CFE III*, D.C. charter students

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113. *Compare Rose*, 790 S.W.2d at 205-06 (concluding that the state education requirement is one of an “efficient” education), *with* § 38-916(1) (declaring that the D.C. requirement is one of a “high quality” education).

114. *See* § 2-1402.01 (aspiring that all individuals to have equal opportunities for participation in all aspects of life); *see also* § 38-916(1) (stating that a “high quality public education for all students in the District of Columbia” is of “critical importance”).

115. *See CFE III*, 801 N.E.2d at 332 (deciding that a sound basic education within the meaning of the Education Article of the State is a meaningful high school education that prepares students to compete for jobs that enable them to support themselves and to function productively as civic participants).

116. *See also* D.C. TEACHER CONTRACT, *supra* note 39, at 94-95 (providing incentives for teachers to teach in DCPS schools but not in charter schools).

117. *See* § 38-916(1), (3) (stating that in addition to a “high quality” education, there is a need to attract and retain “highly qualified” teachers and principals).

118. *See id.* § 38-916(1) (using the term “all” in the statute).

will not have access to an equal opportunity to an adequate education when compared to their DCPS counterparts.<sup>119</sup> Comparatively, DCPS students will have teachers that better prepare them for participation in the District's "economic, cultural, and intellectual life," while D.C. charter school students have teachers who are unable to provide the same education.<sup>120</sup> Charter school students will not be able to "participate fully in the economic, cultural and intellectual life of D.C." due to the discrepancies in teacher pay, a result in tension with the Human Rights Law.<sup>121</sup>

Under *CFE III*, to afford students an adequate education allowing them the opportunity to participate productively in their communities, students must receive a "sound basic" education.<sup>122</sup> According to *CFE III*, without such a sound basic education, children will not be able to participate meaningfully in contemporary society.<sup>123</sup> Likewise, D.C. charter school students will be at a disadvantage in participating in the District's "economic, cultural, and intellectual life" in the absence of a "high quality" education because their DCPS counterparts will be better equipped for civic engagement and participation in the labor market.<sup>124</sup> Whether calling it a "sound basic" or "high quality" education, an adequate education requires the District to ensure that all public schools receive adequate funding that guarantees the existence of textbooks, good teachers, and adequate school facilities.<sup>125</sup>

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119. See *Rose v. Council for Better Educ.*, 790 S.W.2d 186, 211 (Ky. 1989) (stating that each child must receive an equal opportunity to have an adequate education); *CFE III*, 801 N.E.2d at 340 (finding a causal link between funding and provision for a sound basic education).

120. See generally D.C. TEACHER CONTRACT, *supra* note 39, at 94 (incentivizing high performing teachers to work in DCPS schools because they can earn more money).

121. See D.C. CODE § 2.1402.01 (2001) (stating that denying someone the opportunity to fully participate in the economic, cultural and intellectual life qualifies as a prohibited act of discrimination).

122. See *CFE III*, 801 N.E.2d at 331 (holding that the minimal level of education that schools are required to provide is a sound basic education that consists of the foundational skills that students need to become productive citizens capable of civic engagement and sustaining competitive employment).

123. See *id.* at 330-31 (agreeing with the trial court that the goal of the state education clause is to prepare the "rising generation" to function productively as civic participants and recognizing that this requirement may vary with contemporary society and job markets).

124. See D.C. CODE § 38-916(4) (2001) (noting the need for graduates to possess educational skills that make them competitive in future endeavors); *CFE III*, 801 N.E.2d at 331 (observing that a "sound basic" education at the high school level is indispensable).

125. See *CFE III*, 801 N.E.2d at 340 (stating that the establishment of a causal link between funding and performance is evidence that funding ensures a sound basic education).

*D. D.C. Charter School Students Will Not Be Able to Participate in the Economic, Cultural, and Intellectual Life of the District Because the 2010 D.C. Teacher Contract Impedes the Equal Development of D.C. Students.*

A “sound basic” education is difficult to measure.<sup>126</sup> The approach that civic engagement is adequate to qualify someone as a productive citizen fully able to participate in economic and cultural life sets the bar too low.<sup>127</sup> If civic engagement were the only requirement in the District, the D.C. Code would not declare a requirement of a “high quality” education because all that an individual would need to participate in civic life is valid identification stating that the person is at least eighteen years of age.<sup>128</sup> Instead, by analyzing *CFE II*, it is apparent that a “sound basic” education requires a level of education that enables students to go beyond the low threshold of civic engagement and approach the level of being able to engage in thoughtful discourse regarding the various aspects of civic engagement.<sup>129</sup> The additional wording of the Human Rights Law implies that the District must provide students with an education that teaches the skills necessary to gain employment in order to satisfy the requirement of full participation in economic life.<sup>130</sup>

In *CFE II*, a New York court found that engagement in economic life did not mean that students were only entitled to receive an education that prepared them minimally for low paying jobs, nor did it require that students receive an education that prepared them for lucrative careers.<sup>131</sup> Instead, a “sound basic” education required the attainment of a “middle

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126. *See id.* at 331 (concluding, in contrast to the Appellate Division, that requiring only a lower, grade-specific level of skills, such as only an eighth-grade education, was incorrect, for a sound basic education “should not be pegged . . . to any particular grade level” but instead to outcomes in fashioning productive citizens).

127. *Cf. id.* (quoting *CFE II*, 719 N.Y.S.2d 475, 485 (Sup. Ct. 2001)) (observing that the Appellate Division concluded that students between the eighth and ninth grades in New York receive the skills necessary for civic participation, such as voting and serving on a jury, but agreeing with the trial court that a sound basic education requires more than being merely “qualified to vote or serve as a juror” but requires also the ability to do so “capably and knowledgeably”).

128. For the example of voting, see D.C. CODE §§ 1-1001.07, 1-1001.02(2) (2001) (defining who may vote and who is a qualified elector).

129. *See CFE II*, 719 N.Y.S.2d at 485 (“An engaged, capable voter needs the intellectual tools to evaluate complex issues, such as campaign finance reform, tax policy, and global warming. . .”).

130. *See* D.C. CODE § 2-1402.01 (2001) (requiring that every individual be given the opportunity participate in the District’s economic life); *CFE III*, 801 N.E.2d at 331 (asserting that a “sound basic” education carries with it a requirement that public school students be instructed in such a way that they are able to compete in the workforce).

131. *See CFE II*, 719 N.Y.S.2d at 486 (noting, however, that the Court of Appeals’ use of the phrase “minimally adequate” suggested that a sound basic education did not require that all high school students be prepared to attend an elite four year college or university).

ground.”<sup>132</sup> Therefore, D.C. charter school students need to learn from high performing teachers or else they will be unable to compete for jobs.

The D.C. Human Rights Law requires that individuals in the District have “an equal opportunity to participate fully in the economic, cultural and intellectual life of the District and to have an equal opportunity to participate in all aspects of life, including, but not limited to in employment.”<sup>133</sup> Like the standard in *CFE II*, the provision of public education in the District requires the attainment of a middle ground; if not, D.C. students will be unable to compete in the economic world, as required by the Human Rights Law.<sup>134</sup> Thus, under *CFE II*'s standard, D.C. law could analyze productive citizenship with attention to the symbiotic relationship that exists between the education that students receive and the economic needs of society.<sup>135</sup> Accordingly, students must be prepared to fill jobs demanded by the D.C. labor market, and this preparation is a right of all public school students, DCPS and D.C. charter school students alike.

The 2010 D.C. Teacher Contract does not help the District achieve these goals universally. By contradicting the standards in *CFE II*, the 2010 D.C. Teacher Contract only achieves these goals for DCPS students.<sup>136</sup> By implementing a performance-based pay system, DCPS will ensure that its students are receiving a sound basic education.<sup>137</sup> As the court in *CFE II* outlined, high salaries attract better teachers.<sup>138</sup> The performance-based pay will help DCPS recruit and retain those teachers that prepare students to participate fully in the economic, cultural, and intellectual life of the District because the 2010 D.C. Teacher Contract requires District officials to finance the Contract's higher salaries.<sup>139</sup>

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132. See generally *CFE III*, 801 N.E.2d at 331 (stating that children in the twenty-first century need a sound basic education in order to obtain competitive employment).

133. D.C. CODE § 2-1402.01 (2001).

134. See *id.* § 38-916(4) (showing a need for District of Columbia public school graduates to possess educational skills that render them competitive with graduates of suburban schools).

135. See *CFE II*, 719 N.Y.S.2d at 486 (explaining that providing students with an education that will benefit them in the job market means understanding what the job market will require of its labor force).

136. Compare *CFE III*, 801 N.E.2d at 360-61 (Smith, J., concurring) (agreeing with the majority that the state Education Article requires a sound basic education for public school students of all school districts), with D.C. TEACHER CONTRACT, *supra* note 39, at 4 (stating that high standards are the force behind the contract between the Washington Teachers' Union and the DCPS).

137. Cf. *CFE II*, 719 N.Y.S.2d at 550 (explaining that qualified teachers are necessary element to achieving a sound basic education).

138. See *id.* at 526 (explaining that if the New York City public schools are to compete successfully with surrounding suburban schools for qualified teachers and administrators, more resources will have to be made available to increase salaries and improve working conditions).

139. See Bill Turque, *D.C. Teachers Paid for Through Budget Cuts, Reallocation of*

Unfortunately, D.C. charter school students do not have their own 2010 D.C. Teacher Contract to motivate District officials to offer them additional funding.<sup>140</sup> The requirement for New York schools, as laid out in *CFE II*, is that all public school students receive a sound basic education.<sup>141</sup> As evidenced in *CFE II*, it is also the constitutional responsibility of a State to remove things that impede the State's ability to provide a sound basic education.<sup>142</sup> Just like the inadequate professional development of teachers in *CFE II*, the impediment that the 2010 D.C. Teacher Contract creates must be removed in order to afford all public school students in D.C. the opportunity to receive a sound basic education that prepares them to participate fully in the economic, cultural, and intellectual life of the city.<sup>143</sup>

*E. Being Taught by Lower Performing Teachers Provides D.C. Charter School Students with Lower Quality Educational Inputs Than Their DCPS Counterparts, Further Depriving Charter School Students of an Adequate Education.*

The 2010 D.C. Teacher Contract deprives charter school students of an adequate education because it tends to rob them of access to quality educational inputs.<sup>144</sup> Implicit in the argument that the District must prepare students to participate fully in the economic, cultural, and intellectual life of the city is the importance of high quality educational inputs.<sup>145</sup> Analyzing the performance-based pay system that the 2010 D.C. Teacher Contract creates under *CFE II*, teachers with performance so low

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*Funding*, WASH. POST, May 11, 2010, at B01 [hereinafter Turque, *D.C. Teachers Paid*] (describing how the District finally figured out how to finance the teachers contract through budget cuts and reallocations, federal funds, private foundation money, and bridge-lending from other District programs until the foundation money becomes available).

140. See generally D.C. TEACHER CONTRACT, *supra* note 39 (applying only to the DCPS).

141. See *CFE II*, 719 N.Y.S.2d at 485 (holding that students must be prepared to become productive citizens and that it is public schools' duty to give students the foundational skills they need to obtain productive employment and/or pursue higher education).

142. See *id.* at 528 (recognizing that New York's Education Article imposes a duty upon the State to ensure the availability of a sound basic education to all the children and that the State's power over education is plenary).

143. Cf. *id.* at 496 (explaining that professional development is essential in training and maintaining qualified teachers because it serves to ameliorate the shortcomings of new teachers, keep teachers current in their subject areas, and disseminate techniques for teaching at-risk students, among other things).

144. See D.C. TEACHER CONTRACT, *supra* note 39, at 94-95 (providing incentives for qualified teachers to teach in DCPS schools); see also *CFE II*, 719 N.Y.S.2d at 491 (studying educational inputs, "the resources available in public schools," as a means of measuring educational adequacy).

145. See *CFE II*, 719 N.Y.S.2d at 492 (explaining that relevant educational inputs and outputs must be examined over multiple years).

that they are unable to provide “minimally adequate” instruction deprive public school students in the District of a high quality education.<sup>146</sup> Consequently, these teachers cannot equip students with the foundational skills needed to become productive citizens capable of civic engagement and sustaining competitive employment.<sup>147</sup>

Similar to New York, the District cannot provide “minimally adequate” instruction to charter school students because the charter schools do not have sufficient funding to be able to pay high quality teachers.<sup>148</sup> Under the current DCPS performance-based pay system, poorly performing teachers are essentially those deemed unable to provide adequate instruction to their students.<sup>149</sup>

The 2010 D.C. Teacher Contract deprives D.C. charter school students of adequate educational inputs, and ultimately a “high quality” education, by making employment in DCPS schools more attractive to high performing teachers.<sup>150</sup> To the detriment of charter school students, these teachers could earn a higher salary in DCPS schools, and thus, are more likely to leave charter schools, an act that would deprive charter students of the same level of education that DCPS students will receive.<sup>151</sup> Similarly, the fact that the New York City education system made it difficult for New York City’s schools to compete with surrounding suburbs for higher-quality teachers helped lead the *CFE II* court to find the state educational structure unconstitutional.<sup>152</sup>

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146. *See id.* at 491 (describing the three categories of inputs as (1) “minimally adequate” teaching by adequately trained sufficient personnel; (2) “minimally adequate” physical facilities and classrooms; and (3) “minimally adequate” instrumentalities of learning”).

147. *See id.* at 492 (stating that there are many measures of teacher quality, and that by each of these measures, the quality of New York City’s public school teachers-in the aggregate-is inadequate).

148. *See id.* at 496 (recognizing a causal link between poor teacher quality and the State’s failure to assure that the city’s public schools received adequate funding to afford their students the “sound basic education” guaranteed by the Education Article of the New York Constitution).

149. *See also CFE III*, 801 N.E.2d 326, 332 (N.Y. 2003) (noting that to determine whether New York City schools in fact deliver minimally adequate instruction to students, the trial court took evidence on the “input” of teaching and compared the resulting “output,” such as test scores, to determine the performance level of teachers).

150. *See generally* D.C. TEACHER CONTRACT, *supra* note 39, at 93-103 (providing raises and other financial incentives for DCPS teachers).

151. *See generally id.* (providing incentives to high performing teachers).

152. *See CFE II*, 719 N.Y.S.2d at 526, 530, 541, 549-50 (holding that (1) the State failed to assure that the city’s public schools received adequate funding to afford their students the “sound basic education” guaranteed by the Education Article of the New York State Constitution; (2) the state’s funding mechanisms had an adverse and disparate impact upon the city’s minority public school students in violation of specific implementing regulations of Title VI of the Civil Rights Act; and (3) the legislature, rather than the court, would be given the first opportunity to reform public school financing system).

As with the poor schools in *CFE II*, “teacher flight” aggravates preexisting difficulties, such as the poverty of student households, that charter schools face in offering an adequate education for charter school students.<sup>153</sup> If D.C. charter schools raise teacher pay, charter school students will not receive the same education that DCPS students receive to prepare for participation in employment because a lack of funds for *other* operating expenses will result.<sup>154</sup> Consequently, a lack of funds for other operating expenses, such as books and maintenance, will likely still contribute to “teacher flight.” Teacher flight ultimately deprives charter school students of an adequate education and directly violates the Human Rights Law.

The D.C. Code requires a quality public education and is consistent with the requirements enforced in other jurisdictions.<sup>155</sup> Congress correctly identified this fact when enacting the School Reform Act and the accompanying requirement of equal funding, later outlined in the UPSFF.<sup>156</sup> However, the 2010 D.C. Teacher Contract denies D.C. students their fundamental right to a high quality education because charter school students cannot participate in D.C.’s “economic, cultural, and intellectual life.”<sup>157</sup>

Since the court in *CFE II* was able to identify a causal link between teacher quality and student performance, this causal link provides evidence that by not employing higher performing teachers, D.C. charter school students will likely not achieve the goals of the Human Rights Law.<sup>158</sup> If the D.C. Human Rights Law seeks to put all students in a position to effectively compete in the job market, D.C. charter school students must receive “an equal opportunity to participate in all aspects of life,

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153. *Cf. id.* at 490 (identifying a high correlation between high poverty and low academic performance in New York City).

154. *Cf.* 2002 D.C. SCHOOLS OPERATING BUDGET, *supra* note 30, at 1 (noting that the UPSFF provides fixed funding for operating expenses).

155. *See* *Rose v. Council for Better Educ.*, 790 S.W.2d 186, 211 (Ky. 1989) (holding that the system of schools should be “substantially uniform,” such that each child is provided with an equal opportunity for adequate education).

156. *See* D.C. CODE § 38-916 (2001) (articulating the policy rationales behind funding, including providing “high quality public education,” attracting “highly qualified teachers and principals,” and training students to be “competitive” in “employment and higher education”).

157. *See* D.C. TEACHER CONTRACT, *supra* note 39 (creating raises for DCPS teachers that may create an atmosphere of competition for teachers with charter schools).

158. *See CFE I*, 655 N.E.2d 661, 667 (N.Y. 1995) (stating that in order to succeed in the specific context of the case, the plaintiffs had to establish a causal link between the present funding system and any proven failure to provide a sound basic education to New York City school children); *see also CFE III*, 801 N.E.2d 326, 340 (N.Y. 2003) (affirming the trial court’s finding of such causation).

including . . . in educational institutions.”<sup>159</sup> Therefore, to meet this requirement, the educational inputs must be the same across D.C. public schools because the Human Rights Law entitles all D.C. students to equal educational opportunities.<sup>160</sup>

#### IV. POLICY RECOMMENDATIONS

The School Reform Act establishes that all public schools—charter and traditional—should receive the same amount of the Council’s General Funds per student for school operating costs, the largest of which is teacher salaries.<sup>161</sup> The new teacher contract violates this act because the raises it creates are funded outside of the UPSFF for DCPS.<sup>162</sup> The School Reform Act mandates that operating expenses receive funding through the UPSFF.<sup>163</sup> Teacher pay is one of the main operating expenses of a school, yet DCPS plans to fund the raises that the new teacher contract creates with funds from sources other than its allotted dollars from the UPSFF, thereby creating inequities in operating cost funding.<sup>164</sup>

The UPSFF should ensure that DCPS and charter schools receive uniform public funding for teacher salaries and other operating expenses from the General Fund of the District; funding raises outside of the formula, however, exacerbates funding inequities because doing so provides DCPS with additional funds to finance operating expenses to which charter schools do not have access.<sup>165</sup> Charter schools will have to cover the operating expense of teacher salaries with the funds they received

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159. See D.C. CODE § 2-1402.01 (2001) (explaining that in order to achieve the goals of the Act, all students must have an equal opportunity to seek education).

160. See *CFE II*, 719 N.Y.S.2d 475, 491 (Sup. Ct. 2001) (quoting *CFE I*, 655 N.E.2d 661, 666 (N.Y. 1995)) (describing the three categories of inputs as (1) “minimally adequate teaching of reasonably up-to-date basic curricula such as reading, writing, mathematics, science, and social studies, by sufficient personnel adequately trained to teach those subject areas”; (2) “minimally adequate physical facilities and classrooms which provide enough light, space, heat, and air to permit children to learn”; and (3) “minimally adequate instrumentalities of learning such as desks, chairs, pencils, and reasonably current textbooks”).

161. See D.C. CODE § 38-1804.01 (2001) (setting forth the requirements for the UPSFF calculation).

162. See *Turque, D.C. Teachers Paid*, *supra* note 139 (explaining that the additional monies will not be determined by the UPSFF, but instead, that funding will come from stimulus dollars, private foundations, and federal and other funds).

163. See D.C. CODE § 38-1804.01(b) (requiring the use of a formula—later implemented as the UPSFF); see also § 38-2902(b) (explaining that the UPSFF does not govern funds from federal and certain other revenue sources).

164. See § 38-1804.01 (stating that a formula—later implemented as the UPSFF—determines the annual payments from the General Fund to the Board of Education to finance annual operating funding for DCPS and public charter schools on a uniform per student basis).

165. See also *Simmons, Charter Schools Threaten to Sue*, *supra* note 39, at A6 (discussing how charter advocates argue that they are receiving unfair treatment).

for their operating expenses through the UPSFF.<sup>166</sup> This will further widen the funding gap between charter schools and DCPS.<sup>167</sup> While DCPS may use the full amount set aside for each student through the UPSFF appropriately, the charter schools must use a portion of the amount calculated by the UPSFF for each student in order to compete with DCPS and pay for the highest performing teachers.<sup>168</sup> Ultimately, this will result in an even lower amount of funding for each of their students.<sup>169</sup>

If DCPS funds teacher raises through outside funds, it will be able to allocate a larger UPSFF amount to its students than the charter schools can to theirs.<sup>170</sup> This will create an even greater funding disparity, in clear tension with the UPSFF policy purpose that school operating expenses receive equal funding.<sup>171</sup> Consequently, the only way to operate a school system that conforms to established notions of educational adequacy is to require DCPS to include the additional funds in the UPSFF calculation.

## V. CONCLUSION

The 2010 D.C. Teacher Contract widens the achievement gap. The 2010 D.C. Teacher Contract moves D.C. students away from the goals of both the Human Rights Law and constitutional notions of adequacy.<sup>172</sup> The same arguments that plaintiffs have advanced in support of poor and minority children can be advanced on behalf of charter school children.<sup>173</sup> Although traditional public schools and charter schools are technically under the same arm of government and subject to the UPSFF, the actions of DCPS in essence create two different school districts: one that adheres to the guidelines of the School Reform Act and funds operating expenses through the UPSFF, and one that receives outside funds for operating

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166. See § 38-1804.01 (listing the expenses that must be calculated in the UPSFF).

167. Cf. Simmons, *Charter Schools Threaten to Sue*, *supra* note 39, at A6 (reporting rumors that charter advocates may sue to seek equal funding).

168. Cf. D.C. CODE § 38-2906(a)-(b) (2001) (stating that the annual appropriations shall equal the total estimated cost for the number of resident students projected to be enrolled in schools).

169. Cf. *id.* § 38-2901 (stating that the foundation level of funding means the “amount of funding per weighted student needed to provide adequate regular education services to students”).

170. See *id.* (not discussing allocation of non-UPSFF funds).

171. But see *id.* § 38-2902(b) (explicitly carving out exceptions for funding sources other than the D.C. General Fund).

172. See, e.g., D.C. CODE § 2-1402.01 (2001) (stating that “[e]very individual shall have an equal opportunity to participate fully in the economic, cultural and intellectual life of the District and to have an equal opportunity to participate in all aspects of life, including . . . in educational institutions.”).

173. See generally *CFE II*, 719 N.Y.S.2d 475 (Sup. Ct. 2001) (arguing that children in poor school districts are entitled to an adequate level of funding in order to help them reach the goals outlined by New York’s Education Article).

expenses.<sup>174</sup> DCPS and charter schools have the same goals for the students of the District. The implementation of various educational policies, however, makes achieving those goals for all students difficult. The most effective way to achieve educational adequacy for all public school students in the District is to make sure that both charter schools and DCPS schools adhere to the guidelines that Congress enacted with the School Reform Act.

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174. *See* § 38-2902 (stating that the District of Columbia resident students in DCPS and Public charter schools of the District of Columbia are subject to the same operating budget appropriations).