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NEPC POLICY MEMO

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CHARTER SCHOOLS, FAIR HOUSING AND LEGAL STANDARDS A CALL FOR EQUAL TREATMENT

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In this NEPC Policy Memo, Lisa Mieritz contends that the sorts of discrimination and risks of discriminatory practices that exist in the context of housing also exist in the context of charter schools. Yet while fair housing laws offer protection in the former context, no comparable protections exist regarding charter schools. The author therefore calls for charter laws to adopt legal protections similar to those found in fair housing laws.

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Fair housing laws have helped insure the equal opportunity rights of families and children for decades by guaranteeing that families have equal access to information about available housing and schools.¹ Since discrimination in housing is implicated in unequal schools, providing equal educational opportunity is among the key purposes of fair housing laws. These laws alone cannot, however, address all of the practices that undermine equal educational opportunity. To achieve their public purpose, fair housing laws must be buttressed by parallel policies that address non-housing-related practices. Moreover, given the common legal foundation for equal housing policy and the provision of equal educational opportunity, fair housing laws provide us with a template for addressing discrimination in the charter school marketplace.

Civil Rights and Fair Housing Practices

Non-discrimination policy that governs charter school practices is urgently needed because charter schools are now an important source of educational inequality. Moreover, charter school practices that undermine equality of educational opportunity bear an uncanny similarity to the type of practices now banned in the real estate context. Although by themselves these charter school practices do not violate the fair-housing laws, they are in considerable tension with those laws. This tension is noteworthy because education law is based on many of the same civil rights acts that serve as the basis for fair housing laws (Jennings, 2012). Legal requirements that govern the housing marketplace could be applied with good effect to the charter school marketplace.

Equality of Information: A Prerequisite of a Free Marketplace

Providing free access to the same information in a timely fashion is required by housing law because markets require transparency to function fairly. This means that all consumers in the housing market must be provided equal and unfettered access to the same information (Tresch, 2002). Federal Housing Authority (FHA) laws have required this for decades because vulnerable populations are denied equal opportunity in the absence of such provisions (see *Shelley v. Kramer*, 1948; *Jones v. Mayer Co.*, 1968). As a result of these laws, all families are empowered to make residential and educational decisions based on common and equal information that consequently contributes to creating and maintaining diverse neighborhoods and schools. This is an especially important protection for poor families because they typically send their children to schools within 10 miles of their ‘home school’ (Bifulco & Ladd, 2006).²

By contrast, consumers in the charter school marketplace receive information differently depending on their ethnic, religious and socio-economic backgrounds (see Wells, 1994; see also Lacierno-Paquet & Brantley, 2008). This denies education consumers equal information and

¹ See the Appendix for a partial list, plus brief descriptions.

² Information, of course, does not address all limitations on an accessible marketplace. Transportation limitations, for instance, would continue to place effective limits on school choice.

undermines the creation of a fair market which in turn contributes to housing segregation along ethnic and socioeconomic lines as a function of these segregated schools.

Since the 1960s, the FHA and most state regulatory agencies have identified key processes in the selling and renting of real estate that are susceptible to discriminatory abuse by real estate agents, lessors, builders, and lenders. The FHA and federal and state courts and regulators have accordingly developed clear measures regarding possible discrimination in those real estate processes. In addition, decades of court cases have fleshed out the legal requirements designed to ensure equal treatment and equal information to buyers and renters of real estate, irrespective of race, ethnicity, religion, familial status, disability, and, in many states, sexual orientation.

Protection of Equal Educational Opportunity is Embedded in FHA Laws

Among the benefits of establishing a residence in a given location are those associated with education – the opportunity to send one’s children to high-quality schools. These educational benefits are therefore a key part of fair housing benefits afforded by FHA laws, along with benefits related to factors such as lower crime, more parks and libraries, property-value preservation, and the benefits of interracial association, the last of which also has an identified educational component: interracial schools have greater achievement levels for minorities than do schools that are relatively more segregated (Linn & Welner, 2007).

The importance of providing equal access to the advantages of specific housing locations is so great that the law forbids any deceptive practice that might mislead or deceive a person of any group or class about the potential benefits of one location compared to another. For instance, as explained by the U.S. Department of Housing and Urban Development (HUD), the law forbids providing different information to different people based on their group affiliation, and it provides that advertising may not be used to suggest a preference or an advantage to any group in their ability to acquire or have access to housing benefits. People may not be differently informed about: 1) the availability of housing; 2) the, “terms, conditions or privileges for sale or rental of a dwelling”; 3) substituting different housing, services or amenities for one customer compared to those supplied to another; 4) promoting property differently to different individuals based on their group membership; 5) persuading homeowners to list and sell their homes in order to avoid living near minorities or experiencing a loss of property values due to an influx of minorities (a practice called blockbusting); or 6) denying any person, “access to or membership in a facility or service (such as a multiple listing service) related to the sale or rental of housing” (U.S. HUD, n.d., b).

Because home financing is also essential in acquiring housing, discrimination in financing practices is forbidden as well. Any differences in these practices based on race or group affiliation are prohibited, including: 1) making a loan; 2) providing information regarding a loan; 3) imposing terms or conditions on loans, “such as different interest rates, points, or fees”; 4)

assigning a value through an appraisal to a property, as differences in appraisal values could jeopardize loan-approvals, or 5) setting terms or conditions for assuming or ‘purchasing’ a loan (U.S. HUD, n.d., b).

Differential Provision of Information has Discriminatory Effects

The law further prohibits ‘steering’: the practice of providing different information to different potential consumers in the same marketplace in order for the salesperson to secure an undisclosed ulterior motive such as financial gain, a segregated housing development, or political gain or influence. Steering is prohibited because it exploits people based on their incomplete or different levels of information relative to the person conducting the steering. This is a prime example of restricting information in a marketplace, causing free competition to fail (Tresch, 2002); no free marketplace can exist without ‘perfect’ information, or at least the equal availability of information to all participants in that marketplace.

The potential harms to families of being denied the benefits of equal access to good schools and desired neighborhoods are so great and the history of abuses of minorities in providing them equal access to these benefits is so strong that the law explicitly forbids misleading, deceptive or targeted advertising as well as advertising that might overtly or subconsciously lead vulnerable populations to feel unwelcomed in certain areas or obliged to live in other areas. The HUD website warns, for example, “It is illegal for anyone to: [1] threaten, coerce, intimidate or interfere with anyone exercising a fair housing right or assisting others who exercise that right; or [2] to advertise or make any statement that indicates a limitation or preference based on race, color, national origin, religion, sex, familial status or handicap” (HUD, n.d., b).³

Fair housing laws, then, protect against any overt, subtle or deceptive practice that creates a difference in housing opportunities between individuals of different groups, central among which is equal access to good schools and integrated student populations, both of which are proven to benefit children.

Civil Rights and Charter School Policy and Practice

These central educational benefits—the benefits of equal access to high-quality schools and integrated schools—which have been the object of extraordinary efforts to reduce discrimination

³ Fair housing laws also protect the right of disabled individuals to have access to equal housing opportunities. Disabled individuals may not be denied the opportunity of living in a certain area or dwelling, for instance, simply because a structure requires “reasonable modifications” to be included that are suitable to the needs of that disabled person. HUD’s website states, “A landlord may not: [1] Refuse to let [a disabled person] make reasonable modifications to [a] dwelling at [the disabled person’s] expense, if necessary for the disabled person to use the housing; [2] Refuse to make reasonable accommodations in rules, policies, practices or services if necessary for the disabled person to use the housing” (U.S. HUD, b). Such provisions have the effect of helping to also protect – in a catchment area system – the educational benefits available in any locality afforded to those with special needs.

and to improve fairness to all ethnicities and classes, have recently, through the charter school movement, been theoretically de-coupled from both the residence of the family and the location of the school as well as school-peer-populations. Theoretically, given *de facto* residential segregation, this decoupling has potential benefits. In practice, however, charter school choice has not served to mitigate housing segregation. Instead, it has added a layer of educational segregation on top of housing segregation (see Mickelson, Bottia, & Southworth, 2008).

Charters Can Subvert Civil Rights Goals

School choice resulting from the growth of the charter sector has also, without any public discussion or official acknowledgement, effectively subverted the intent of fair housing laws (and other anti-discrimination policies) to bring about equal and common opportunities for educational experiences for children of all groups and ethnicities. Simply put, since current charter school policies and practices ignore FHA anti-discrimination policy they undermine the legal rights of minorities protected through fair housing laws.

As things currently stand, the right to equal access to educational opportunities and the right to equal access to the benefits of ‘interracial associations’ are subject to housing and education rules and practices that are in considerable tension. While fair housing laws increase equal access to information and educational opportunity for all families while minimizing coercive treatment of minorities, charter school practices place educational opportunities at risk within a legal and actual environment where access to information is substantially unequal. The charter school environment also has fewer protections against the coercive treatment of minorities.

Becker and Stambach (2006), for instance, describe how charter schools in a district they studied recruit families in “private, upscale homes from which low-income families had been excluded” (p. 169). Conversely, in School District 2 in Colorado Springs, those starting new charter schools canvass poor neighborhoods for their recruitment strategy (McGraw, 2009). The families of these children receive very different types of information and options for their children – one designed to provide charter children a privileged experience excluding the poor, the other designed to provide schooling in an environment of concentrated poverty. Charter schools also consistently under-enroll students with disabilities (see Miron, Urschel, Mathis, & Tornquist, 2010). For instance, while Denver Public Schools in 2009 enrolled seven thousand children with severe cognitive or physical disabilities, the district’s charter schools enrolled just two such students (Myers, 2010). Whatever the other justifications for such practices, the educational benefits of fair housing and anti-discrimination laws are effectively being denied, and this denial is linked to the lack of legal protections and the lack of equal information.

Charters Can Often Choose their School Demographics

Some charter operators selectively solicit parents to enroll their children in the operators' charter schools. This practice, in the context of housing, is illegal under fair housing law because it constitutes 'steering': the selective delivery of information to vulnerable parties to achieve an ulterior motive such as financial gain or to achieve a certain racial profile. This issue has taken on added importance as for-profit companies have taken on a larger role in running charter schools, online as well as brick-and-mortar. Rupert Murdoch, who's News Corp. recently entered the for-profit K-12 education industry, called education "a \$500 billion sector in the US alone that is waiting desperately to be transformed" (quoted in Fang, 2011). Again, consider the definition of steering: a willingness to manipulate people for profit and to provide different sets of information and incentives to people in the market for the same good (housing or education) with an ulterior motive of generating financial or political gain for one's self.

Charter operators now also commonly canvas neighborhoods as well as organize direct mail campaigns and marketing in church and ethnic-oriented settings to recruit children to charter programs. The parallel to this practice would be considered discriminatory in the housing market, since charter promoters can, and undoubtedly do, select their target areas based on criteria (e.g., familial status, religion, and ethnicity) which are forbidden under FHA law. Urrieta (2006) quoted The Heritage Academy's charter school director: "You have to know who the clientele is" (p. 465). While a marketplace that includes such approaches may be technically open to the public, the use of selective targeting undermines this goal as a matter of practice. It is discriminatory not only due to the selection of specific families but also due to the exclusion of specific families through the absence of canvassing and advertising: all families not being canvassed have been discriminated against under FHA standards precisely because they have received different information and different recruitment or persuasion than the targeted families. Delivering different information to families that are in the market for the same benefits—educational or otherwise—is illegal under FHA rules and principles. Moreover, such imbalanced soliciting creates a type of 'blockbusting', the practice of subtly or overtly encouraging some families to move out of a neighborhood, forbidden under fair housing standards. Imagine that someone canvassing a neighborhood tells families that 'most' of the children from that neighborhood attend a particular charter school, thus encouraging parents from that neighborhood to move out of the catchment-area school so that their child does not feel out of place.

With regard to targeting, it should be noted that the church-based solicitation of families who live in the same educational marketplace would be illegal under FHA rules that prohibit coercing potential consumers; providing information unevenly among potential consumers; targeting potential consumers based on wealth, religion and familial status; and the steering of potential customers by those likely to have financial and political/power-related ulterior motives in their recruitment activities. Similarly, advertising schemes depicting a preferred populace (of,

e.g., homeowners), such as one that is predominantly Hispanic, Black or Anglo, are forbidden under FHA rules, but such advertising is typical in charter school promotions and delivers a coercive message to families that one type of student is more welcome than others. As noted above, under FHA law it is explicitly prohibited to “advertise or (to) make any statement that indicates a limitation or preference based on race, color, national origin, religion, sex, familial status or handicap” (HUD, n.d., b).

Because parents in different racial and economic groups are provided dramatically different sets of data – sets of information that often do not overlap – students do not have equal access to all charter school programs. It is impossible to say, for instance, that a minority parent chose for his or her child not to attend a largely white suburban charter school when (as opposed to parents in a different neighborhood) the parent had never been given information about the school’s program. Fair housing laws have recognized for many decades that differences in information streams being supplied to Anglo versus minority families have led those families to divergent decisions. Fair housing laws, in response, require that information streams given to all types of families be the same.

Although a child’s right to equal access to educational opportunities is at stake in both the housing and educational marketplaces, current policy in these two key areas works at cross purposes. Since the state has a compelling interest in each instance, the policies should be aligned.

Charter Advocates Should Not Dismiss Integration Strategies

Charter school advocates have argued that segregation in charters is irrelevant and that the ‘right to interracial association’ is not denied, due to so-called parental choice: the notion that no discrimination exists if minority parents choose segregated schools.⁴ Urrieta (2006) looked at this contention, noting that The Heritage Academy, a charter school, used the notion of the ‘free market’ and ‘parental choice’ *in lieu* of concerns about integration and therefore as somehow compensating for the increased segregation brought about through charter schools. Yet the use of parental choice as a substitute for racial integration is problematic in part because no free marketplace of information exists in the charter school sector (see Tresch, 2002). If no free marketplace of information exists, no free marketplace of choice for consumers in education exists, defying the charter claim that the so-called ‘charter-marketplace’ could serve as a surrogate for school integration in charter schools.

Also, as Bifulco and Ladd (2006) have pointed out, many poor parents really have little choice among schools because of transportation and location issues, meaning that they are tied to schools (whether charter or otherwise) in their neighborhoods. Charter placement is not random;

⁴ See this online commentary from the pro-charter Progressive Policy Institute, responding to a study showing racial segregation in charter schools: <http://progressivepolicy.org/charters-and-civil-rights>

operators select a location based on a variety of factors, often including desired populations. This fact undermines a basic premise of charter schools: that children are not tied to their neighborhood schools but may choose from among many successful schools. It also suggests that, in reality, no actual ‘de-coupling’ of a child’s living-site and school opportunities for poor children may exist, even though charter school policies may formally say any child can attend any school. That is because, particularly for poor children, traveling more than ten miles from their ‘assigned’ conventional district school or from a charter school in their neighborhood is “unrealistic”, say Bifulco and Ladd: “Most charter school families chose a charter school within 10 miles of the traditional public school that they previously attended... Hence, we define as the relevant choice set for each student transferring to a charter school, all of the charter schools offering the relevant grade within a 10-mile radius of that student’s traditional public school” (Bifulco and Ladd, 2006, p. 48).

Bifulco and Ladd note, as well, that in North Carolina “only 19% of Black students had access to integrated charters nearby” (p. 52). While the Black families in their study stated a preference for integrated schools (specifically, those with a .4 to .6 Black population), “the substantial majority of Black students who made racially segregating moves did not have access to charter schools with racially balanced student profiles” (p. 52). Because poor and minority families lack the same charter school choices as wealthy Anglo families, and particularly because they don’t have the choices they might prefer, the idea that the so-called charter marketplace functions as a surrogate for integration is without merit.

Conclusion

The same set of rights that is at issue in fair housing laws is at issue in charter school policies: the right to equal information to decide which school is best for your child; the right to equal educational opportunity; the right not to be ‘steered’; the right not to be victimized by targeted advertising or indoctrination or biased or self-interested coercion; the right to the facts—just the facts—in the same manner as they are made available to any parent. Currently, it is often the charter schools that are targeting and choosing the students and their families—not the other way around. To ensure fairness in educational opportunity, providing uniform information in a uniform manner to all children and their families within an educational marketplace seems imperative.

The deliberate efforts of some within the charter school movement to avoid the same kind of equality-of-opportunity policy framework that guides the Federal Housing Authority are not subtle. The FHA laws are well-known; they control every action, every advertisement, and every solicitation by every real estate developer and agent in the country and have done so for decades. Yet some within the charter school movement appear to have taken advantage of a void in policy to, in effect, implement virtually every practice the FHA forbids by both law and policy.

A child's access to equal educational opportunity is at stake in both sets of laws and practices, and because the access to schools for the poor is effectively limited to schools near their residence, fair housing laws provide a clear template for the protections now needed in the charter school context. Through such legislation, the intent and legal provisions of FHA laws should effectively govern all charter school laws, policies and practices to ensure protection of the rights of families and children.

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APPENDIX
FAIR HOUSING LAW PROHIBITIONS⁵

- 1) Discrimination “in the sale, rental, and financing of dwellings, and in other housing-related transactions, based on race, color, national origin, religion, sex, familial status (including children under the age of 18 living with parents or legal custodians, pregnant women, and people securing custody of children under the age of 18), and handicap (disability)” (Title VIII of the Civil Rights Act of 1968 [Fair Housing Act], as amended);
- 2) Discrimination “on the basis of race, color or national origin in programs and activities receiving federal financial assistance” (Title VI of the Civil Rights act of 1964);
- 3) Discrimination “based on disability in any program or activity receiving federal financial assistance” (Section 504 of the Rehabilitation Act of 1973);
- 4) Discrimination, “on the basis of race, color, national origin, sex or religion in programs and activities receiving financial assistance from HUD’s Community Development and Block Grant Program” (Section 109 of Title I of the Housing and Community Development act of 1974);
- 5) Discrimination, “based on disability in programs, services and activities provided or made available by public entities. HUD enforces Title II when it relates to state and local public housing, housing assistance and housing referrals” (Title II of the Americans with Disabilities Act of 1990);
- 6) Discrimination, “on the basis of sex in education programs or activities that receive federal financial assistance” (Title IX of the Educational Amendments Act of 1972);
- 7) Discrimination, “in the sale, leasing, rental or other disposition of properties and facilities owned or operated by the federal government or provided with federal funds” (Executive Order 11063); and
- 8) The law also provides that, “federal agencies ... affirmatively further fair housing in their programs and activities and ... that the Secretary of HUD will be responsible for coordinating the effort” (Executive Order 12892).

⁵ As set forth on the website of the U.S. Department of Housing and Urban Development (n.d., a).