

Challenging the Expansion of KIPP on Excessive and Disparate Suspensions, Existing K–12 Seats, and Procedural Grounds

The Washington Lawyers' Committee for Civil Rights and Urban Affairs (the "Committee") and the 21st Century Schools Fund¹ (21CSF) oppose the petition of KIPP to increase its enrollment ceiling or add new schools until such time as the Public Charter School Board ("PCSB") has established that: (1) KIPP has implemented practices to ensure that African American students and students with disabilities are not subjected to excessive and disparate discipline; (2) there is a need for expansion in light of the existing supply of K–12 seats; and (3) KIPP has met all the criteria under PCSB policy.

First, KIPP has a record of extremely high rates of discipline, especially among students of color or with disabilities. KIPP operates schools that suspend 24 percent or more of their students each year, a rate that is triple that of the national average for charter schools according to a recent Government Accountability Office ("GAO") Report on DC Charter School Discipline.² Before considering this petition, PCSB should conduct a thorough investigation of these alarmingly high suspension rates at these KIPP schools to ensure that federal and D.C. civil rights laws are respected.³

Second, there exist nearly 18,000 open public K–12 school seats citywide in existing D.C. charter schools and traditional DCPS schools combined. More specifically, that includes at least 9,500 open seats in Wards 7 and 8 alone. Given that available supply, opening any new schools cannot be justified absent a finding of specific need resulting from a comprehensive citywide analysis of K–12 supply and demand that has been conducted by an authority responsible for both DCPS and the charter sector, which currently is the responsibility of the Deputy Mayor for Education.

¹ Since 1968, the Committee has been providing legal assistance to individuals and communities who experience violations of their civil rights in Washington, D.C. and in the region. Working with law firms, the current docket includes cases to address discrimination in housing, employment, access to public accommodations and government services, as well as matters related to prison conditions, police misconduct and immigrants' rights. The Committee also maintains an education project that has represented DC community interests in current school funding litigation, and it partners more than fifty law firms and businesses with K-12 Title I D.C. public schools to provide academic enrichment activities, mentoring and tutoring. Since 1994, 21CSF has worked to build the public will and capacity to modernize public school facilities so that they support high-quality education and community revitalization.

² DISTRICT OF COLUMBIA CHARTER SCHOOLS Multi-Agency Plan Needed to Continue Progress Addressing High and Disproportionate Discipline Rates, GAO – 17 – 165, February 2017. (The GAO 2/2017 Report)

³ In addition, to the extent any Public Charter School Board Members have ties to KIPP or DC Prep, they should recuse themselves from voting on that school's petition.

Third, KIPP has not identified sites for two of its three proposed new schools although PCSB's enrollment-increase policy requires that the applicant demonstrate access to an appropriate facility.⁴

Given the serious civil rights concerns, the number of D.C. public school open seats that exist already, and our procedural concerns, the petition of KIPP should be denied in its entirety. Each of the bases for denying these petitions is addressed in more detail, below.

High Suspension Rates at KIPP Schools

PCSB should deny the enrollment increase petition of KIPP unless and until it determines that federal and D.C. civil rights laws have not been violated at several KIPP school facilities that have very high rates of suspensions, particularly of minorities and special education students. In addition, PCSB should not proceed with KIPP's petition until PCSB has verified that KIPP has policies and practices in place to prevent discrimination in the future.

Students in the District of Columbia are entitled, as a matter of law, to an education free from discrimination based on race and disability. This right is protected by both federal and District law. The District of Columbia School Reform Act of 1995 makes clear that charter schools are bound by these laws and must respect the civil rights of students. DC Code § 38–1802.04 (5). PCSB has an obligation, when considering an application from a proposed school, to ensure that it contains: "A description of the procedures the proposed school plans to . . . to comply with . . . all applicable civil rights statutes and regulations of the Federal Government and the District of Columbia." D.C. Code 38-1802.02 (11).

We believe that this obligation requires more than a pro forma review by PCSB, especially in light of recent revelations regarding disparate treatment. PCSB's own guidelines acknowledges this obligation, as they state that it is "unlikely to approve applications for schools with discipline policies that rely on school exclusion to manage student behavior and/or that are likely to result in high rates of suspensions and expulsions." *See* PCSB 2016 Charter Application Guidelines at 39.

PCSB guidelines also state that it "expects that schools will only expel students for federally recognized reasons," and that successful applicants will have "non-academic data" that show "a low percentage of exclusionary incidents, i.e. expulsions, out-of-school suspensions; high re-enrollment rates; and demographic/enrollment statistics similar to those of comparable schools." *See* PCSB 2016 Charter Application Guidelines at 38-39.⁵

⁴ PCSB Enrollment Ceiling Increase Policy (as of SY 2015-2016), <http://www.dcpccb.org/sites/default/files/report/Enrollment%20Ceiling%20Increase%20Policy%20%28updated%204.1.15%29%5B2%5D.pdf>

⁵ According to the PCSB, federally-recognized reasons include drug and alcohol incidents, weapons possession, and violent acts. While official expulsions from charter schools have gone down, the GAO Report did not address the degree to which charter school students and parents withdraw from certain charter schools out of frustration with multiple suspensions, or they are counseled by charter schools to "voluntarily withdraw" from school to either avoid being expelled, or because the charter states it cannot provide proper services for certain special education students. The GAO Report states that PCSB does not comprehensively track why students withdraw from charter schools. Report at 22-23. When fully explored, these "push outs" may well reflect a significant increase in disparate treatment of children of color and children with disabilities.

The obligation of PCSB to ensure that the laws prohibiting race and disability discrimination be enforced is particularly acute today. Recent studies of charter schools in D.C. have raised serious questions of race and disability discrimination.

In its February 2017 Report, the GAO found that D.C. charter schools on average suspend and expel students at a rate higher than D.C. Public Schools, and at twice the national average. <http://www.gao.gov/assets/690/682673.pdf>. African American students were disproportionately impacted: "D.C. Black students and students with disabilities were disproportionately suspended and expelled. For example, Black students represented 80 percent of students in D.C. charter schools, but 93 percent of those suspended and 92 percent of those expelled." *Id.* Students with disabilities also fared poorly in charter schools. Making up 12 percent of the charter school population, they were 20 percent of the charter students suspended and 28 percent of charter students expelled. *Id.* at 18.

The GAO analysis also found that the rates of suspension for Black students in D.C. charter schools were about six times higher than the rates for White students and the rates for students with disabilities were almost double the rates for students without disabilities.⁶

In addition, a recent report of the University of California at Los Angeles found that D.C. schools are highly segregated and that charters are significantly more segregated than public schools. <https://civilrightsproject.ucla.edu/news/press-releases/2017-press-releases/new-report-shows-schools-in-the-nation2019s-capital-remain-intensely-segregated-charter-schools-are-most-segregated-in-the-city> at page 55.⁷

With respect to KIPP, the GAO Report revealed that several KIPP schools have alarmingly high suspension rates that are at or well above 26% of their student populations, and those rates are more than triple the national average for charter schools around the country:

1. KIPP DC Aim Academy: 32.6%
2. KIPP DC College Prep: 26.1%
3. KIPP DC Key Academy: 27.3%
4. KIPP DC Valor Academy: 28.3%

See Appendix VII, GAO Report.⁸

These disparities may well violate federal and District civil and human rights laws. PCSB has an affirmative obligation, prior to approving KIPP's petition, to ensure that proper measures are put in place to address these disparities and to ensure that civil rights laws are complied with. To fail

⁶ GAO Report: Summary, and at pgs. 13, 18-19 and Figure 6.

⁷ Seventy-one percent of African American public school students in D.C. attend what the report calls "Apartheid" schools, meaning that they are nearly 100% African American. *Id.*

⁸ These figures do not include partial day or full day suspensions. PCSB admitted to the GAO that partial day and full day suspensions are not reported, so PCSB does not know how often this happens at the schools, further causing concern about disparate treatment. GAO Report at 17-18.

to do so would be to abdicate its lawful duty as an oversight agency and fail the students of the District that rely on the Board to protect their interests.

Existing Supply of Public School Seats

In its January 27, 2017 petition, KIPP proposes to open two new schools and 1,935 new seats in Ward 7 as well as an additional 1,035 seats in “Ward TBD.” The SRA requires that each charter petition include “[a] statement of the need for the proposed school in the geographic area of the school site.”⁹ While “need” is not defined in the statute, determining whether there is a need for additional schools and additional seats in the geographic area of the proposed school site(s) must begin with an analysis of the existing and projected demand for K-12 seats against the supply of available K-12 seats in the geographic area(s) in question.

This analysis must be conducted using up-to-date projections of the school-age population within the affected neighborhood cluster(s), which KIPP has not done. In addition, decisions about establishing new K-12 capacity within a given neighborhood must be made within a city-wide context and process. The Office of the Deputy Mayor for Education is presently conducting a process to revise D.C.’s Public Education Master Facilities Plan (EFMP). Any decision to establish new K-12 seats should be made only after the completion of the EFMP.

According to the most recent available official D.C. K-12 capacity and enrollment figures, there currently exist nearly 18,000 open (unused) K-12 seats citywide in D.C. Public Schools and charter schools combined, with more than 9,500 of those seats located in Wards 7 and 8.¹⁰ Even taking into account annual K-12 enrollment increases, which have averaged approximately 2,500 new K-12 students citywide over the last five years, the 9,500 currently open seats in Wards 7 and 8 are beyond sufficient in the short term to accommodate any likely enrollment growth. There accordingly is no justification for the approval of KIPP’s petition outside of a larger citywide supply-demand analysis made within the framework of a revised EFMP. Any premature approval of additional K-12 seats that later prove to be unneeded or unwise will result in added costs to the District. If these applications are approved, District of Columbia residents will be forced to pay millions of additional tax dollars each year through facility allowances and other costs and existing public and charter schools will be harmed.

Procedural Concerns Regarding KIPP’s Application

KIPP’s application seeking to increase its enrollment ceiling by 45% by adding 2,970 students – an increase from 6,584 to 9,554 - should be denied for failure to meet PCSB’s “minimum criteria” for being considered for an enrollment ceiling increase. An enrollment increase constitutes an amendment to a school’s charter and therefore must be evaluated in accordance with the full substantive and procedural requirements of D.C. Code §§ 38-1802.02. *See* D.C. Code § 38-1802.04(c)(10). To assist charter schools in complying with these requirements, PCSB has established and published an “Enrollment Ceiling Increase Policy” (the “Policy”).

According to the Policy “[a] school must meet the following minimum criteria in order to be considered for an enrollment ceiling increase request.” The very first “minimum criteri[on]” is

⁹ D.C. Code 38-1802.02(2).

¹⁰ See OSSE 2016-17 audited enrollments; 2015-2016 update of DCPS and charter school capacities in 2013 D.C. Master Facilities Plan as compiled by 21CSF. Excludes seats in charter schools authorized since 2015.

that the school demonstrate “[a]ccess to a facility to accommodate the projected enrollment (as demonstrated through a lease).” KIPP’s application fails to meet this criterion. KIPP’s ability to accommodate the enrollment increase requested in its application is dependent upon it establishing three new campuses. KIPP cannot demonstrate access to any of these three new campuses and none have been approved by PCSB.

With respect to the first new campus KIPP proposes to open for the 2018-19 school year, the application acknowledges that KIPP is “exploring” two potential sites, but does not demonstrate access to either. The second new campus is a proposed new high school to open in the 2019-2020 school year. KIPP’s application states that this new campus will be on land it currently owns, but admits that there is not yet any building, much less a suitable one, on the land. The third campus that KIPP asserts justifies PCSB acting now to increase its enrollment ceiling is an unspecified turnaround of /merger with / acquisition of an unidentified existing charter school in some location to be determined – as far from demonstrated access to a location as one can imagine.

KIPP implicitly acknowledges the failure in its application by proposing a process by which the PCSB would act now on the basis of insufficient information to approve the enrollment-ceiling increase and then review that action later through a KIPP-proposed process and on the basis of limited, KIPP-proposed criteria. This proposal flips the approval process on its head. Under KIPP’s proposal, PCSB would not apply the full criteria for evaluating a charter change as required by D.C. Code §§ 38-1802.02, and any such approval outside the statutory process would be subject to legal challenge.

Should PCSB adopt KIPP’s proposal, it would be abandoning its obligation to protect the educational opportunities of District of Columbia children and acting inconsistent with its authorizing legislation and policies. The proper course would be to consider changes to KIPP’s charter after KIPP has developed appropriate plans that demonstrate access to facilities that can accommodate the additional enrollments. PCSB could then determine, applying the full criteria of D.C. Code §§ 38-1802.02, whether each proposed enrollment ceiling increase was warranted.

Under the guise of a simple enrollment increase, KIPP is essentially asking PCSB to approve an ambitious multi-campus expansion. KIPP has not provided the information or justification for such an expansion. PCSB should not take this important step outside of a larger citywide supply-demand analysis made within the framework of a revised EFMP and until PCSB has the information necessary to fulfill its statutory obligation to the District’s children.

Jonathan M. Smith, Executive Director
Kent Withycombe, Public Education Project Director
Washington Lawyers’ Committee for Civil Rights and Urban Affairs

Mary Filardo, Executive Director
Alex Donahue, Deputy Director for Policy & Research
21st Century School Fund