

**Luck of the Draw?  
On the Fairness of Charter School Admissions Policies\***

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Jonathan R. Dolle  
Stanford University  
jdolle@stanford.edu

Anne Newman  
Washington University  
arnewman@wustl.edu

**ABSTRACT:** This paper examines the fairness of charter school admissions lotteries from a philosophical perspective, with a focus on California charter schools. Lotteries are an intuitively fair mechanism for distributing some valued social goods in short supply. In theory, using lotteries to determine admission is fair because it gives equally deserving students the same chance to enroll. Yet charter admissions lotteries are more complicated than simply drawing lots, raising questions about their fairness in practice. For example, charters often incorporate tiered preferences into their lotteries, increasing the chances that certain types of students get admitted. Also, because the outcomes of lotteries are supposed to be random, their fairness is hard to determine, *ex post*. And the integrity of some research findings comparing charter schools and regular public schools depends, in part, on the integrity of charter admissions processes. In light of these concerns, we investigate the fairness of admissions lotteries in two parts. First, we survey how oversubscribed charters in California structure their admissions process, and we raise concerns about the fairness of some existing preferences and lottery procedures. Second, we develop a philosophical argument about the nature of fair lotteries, arguing that in addition to using fair procedures, charter admissions lotteries require greater transparency and accountability. Finally, we conclude with several policy recommendations for improving the fairness of admissions lotteries in light of our concerns about current practices.

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*Would scholar Bobby Bowman come on up," the head of the school, Eva Moskowitz, boomed into a microphone after Bobby's name was the first to be plucked from the box. A few parents did a little dance as they were handed a yellow piece of paper with instructions about how to officially enroll their child. "It's like 'American Idol.' I got my gold ticket to Hollywood," Nigel White beamed after his daughter's name was pulled from the box.<sup>1</sup>*

## **1. Introduction**

In the last two decades a new type of public school has emerged: the charter school. Charters are public elementary or secondary schools licensed to operate independent of some constraints that govern regular public schools, on the assumption that increased autonomy will enable them to be more innovative, efficient, and responsive to students' needs. Charter school legislation is also driven by concerns about educational equity, as demonstrated by provisions for charters in No Child Left Behind (NCLB) that view charters as compensatory alternatives for students in persistently failing schools.<sup>2</sup> In exchange for their increased autonomy, charter schools must produce certain predetermined results. If a charter school fails to achieve these results, its charter can be revoked and the school closed. As of 2005, 41 states and the District of Columbia had passed laws allowing for the creation of charter schools.<sup>3</sup> Although requirements vary from state to state, most legislation requires admissions preferences to be written into a

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<sup>1</sup> Deborah Kolben, "Joy, Dashed Hopes at Harlem Lottery for Charter School," *New York Sun*, March 23, 2006. Online at: [http://www.nysun.com/article/29650?page\\_no=2](http://www.nysun.com/article/29650?page_no=2)

<sup>2</sup> See NCLB's Charters School Program (CSP), No Child Left Behind Act of 2001, Section 5201 (Statement of Purpose); also see supporting federal policy statements, e.g. "Facts about Supporting Charter Schools," available at <http://www.ed.gov/nclb/choice/charter/charter.html>.

<sup>3</sup> The DOE cites the following website for analysis of individual state laws: <http://www.edreform.com/index.cfm?fuseAction=claw>.

school's charter, and most require charter schools to use admissions lotteries when more students wish to enroll than space allows.<sup>4</sup>

As the popularity of charter schools grows, parents in communities across the country increasingly find their children's educational future decided by moments like the one described above: a public drawing that allocates slots in over-subscribed charter schools.<sup>5</sup> To receive state and federal financial support, charter schools must employ an admissions lottery when the number of applicants exceeds available spaces.<sup>6</sup> At first pass, a lottery admissions process seems intuitively fair, especially compared to the alternatives. Market-based distributive mechanisms yield familiar and troublesome inequalities, given families' vastly unequal purchasing power in educational and housing markets. Such inequalities are precisely what many charter schools aim to mitigate by targeting families and communities with limited financial resources. Merit-based mechanisms for distributing K-12 education are also troubling; as political philosophers have recently argued, definitions of merit vary widely and merit is, ideally, what good K-12 schools are supposed to nurture in students (Anderson, 2004; Satz, 2007). Using lotteries to determine admission seems to escape the potentially viscous cycles of market- and merit-based admissions by giving all students an equal chance, independent of means or merit (Sher, 1980; Kornhauser & Sager, 1988; Stone, 2007).

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<sup>4</sup> The Center for Education Reform, a policy and advocacy organization that supports school choice programs, maintains a website with information about each state's charter law. See: <http://www.edreform.com/index.cfm?fuseAction=claw>.

<sup>5</sup> Regular public schools and private schools also sometimes use lottery admission procedures. Although we focus on charter schools, our arguments may be relevant to other schools, as well as to other uses of social lotteries.

<sup>6</sup> For federal regulations, see "Charter School Program, Title V, Part B, Non-Regulatory Guidance" of the No Child Left Behind Act, available at: <http://www.ed.gov/programs/charter/index.html>. For profiles of state charter laws, amendments, and related news, see: [http://www.uscharterschools.org/pub/uscs\\_docs/sp/index.htm](http://www.uscharterschools.org/pub/uscs_docs/sp/index.htm)

Yet a closer examination of charter admissions lotteries is warranted for three important reasons. First, charter schools often incorporate preferences into their lottery procedures, increasing the chances that certain types of students get admitted. The fairness of these preferences deserves closer examination. Second, because the outcomes of lotteries are random, the fairness of results cannot be checked in the same way market- or merit-based distributions can be checked. In the case of market distribution, fairness can be defended after the fact by gathering evidence that demonstrates an absence of coercion, truth in advertising, or other common legal requirements.<sup>7</sup> In the case of merit-based admission, fairness can be defended after the fact on substantive grounds: does the distribution respect the relative strength of individuals' claims? But lotteries have no *ex post* check on the fairness of outcomes. The only way to know a lottery was fair is to know a fair procedure was used—that is, one resulting in genuinely random outcomes. We argue that confirming the fairness of a lottery procedure *ex post* is more difficult in the case of charter admissions than is typically understood.

A third reason admissions lotteries warrant more attention is because the integrity of findings about charter schools' outcomes is contingent upon the integrity of their admissions processes. This is especially true as a growing number of educational researchers use school admissions lotteries as proxies for random assignment: those admitted are the treatment group and those denied admission (presumably because they lost the admissions lottery) are the control group. If, as we argue, there are reasons to question the transparency and accountability of charter admissions lotteries, this may have implications for the trust we put in comparisons of charter schools and regular

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<sup>7</sup> In some cases fair market distribution may also require evidence of market access and impersonality of exchange, but evidence of these conditions can also be mustered after the fact.

public schools. That said, our analysis of charter admissions lotteries does not depend on a positive assessment of charter school student achievement. Even if charters do, on average, underperform regular public schools, there are still instances where a local charter outperformed the local district school, or where a particular child fares better in a charter than he or she would fare in a regular public school.<sup>8</sup> In addition, parents clearly value the option of sending their children to charter schools, a relatively uncontested finding in the research literature (e.g., Teske & Schneider, 2001).

Given these concerns about the preferences schools may incorporate into their lotteries, the transparency of lottery procedures, and the integrity of charter research, we take up the following basic question: Are lotteries a fair way to allocate limited admission slots at charter schools? We approach this question in several steps. In the first section, we offer a brief overview of how oversubscribed charters structure their admissions process, and how existing federal and state laws regulate this process. We focus on California, which has one of the oldest charter laws in the country and the largest number of charter schools in operation.<sup>9</sup> And we conclude that California faces some serious challenges ensuring fair charter admissions lotteries given the diversity of policies and practices employed and the limited accountability of charter schools for their admissions practices.

In the second section we make a more philosophical claim about the nature of fair lotteries. In addition to fair procedures, we argue that charter admissions lotteries should

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<sup>8</sup> An important problem for thinking about school choice is what parents do (and should be able to) know about the quality of school before enrolling their child. This interesting problem is beyond the scope of this paper.

<sup>9</sup> Zimmer, Ron W., and Rand Education Institute. *Charter School Operations and Performance: Evidence from California*. Santa Monica, CA: Rand, 2003.

be “epistemically fair,” that is, parents, teachers, and community members should be justified in believing that the charter school in their community is using a genuinely random admissions procedure. Given the diversity of lottery procedures and the limited accountability of charters detailed in section one, we argue that many (perhaps most) admissions lotteries are not fair in the epistemic sense, even if they use fair procedures. Procedural fairness is necessary, but not sufficient, for a lottery to be epistemically fair.

Building on these arguments, we suggest that school admissions lotteries are actually quite difficult to conduct in fair and transparent ways. Specifically, we argue that four conditions make lotteries particularly susceptible to tampering: (1) high stakes; (2) decentralization; (3) complex procedures; and (4) an allocating agent with a vested interest in the outcome. To be clear: we do not have evidence that manipulation is occurring. Our argument is that California charter admissions practices currently lack the transparency and accountability to know whether fair admissions procedures are being used. This failure of transparency and accountability is, we argue, a failure of fairness in the epistemic sense.

In conclusion, we offer several suggestions for improving the fairness of admissions lotteries. Ideally the stakes attached to school admissions lotteries would be much lower than they presently are, where winning may be the difference between receiving a good education and receiving a poor one. Since the stakes are high, it is all the more important that admissions lotteries are as fair as possible. To this end, we conclude by briefly highlighting several policy recommendations for improving the fairness of charter admissions procedures.

We now turn to a brief survey of the charter school landscape in the US, within which we situate our analysis.

## **2. The landscape of charter admissions**

Like regular public schools, charters are limited in the preferences they can consider when deciding which students to admit because they are funded by tax dollars. This distinguishes them from private schools, which typically have much greater latitude when choosing to admit (or expel) a student. Whereas private schools can admit students based on academic merit, athletic prowess, religious affiliation, or ability to pay, charter schools are barred from these approaches.

The requirement that students be admitted by lot when schools are oversubscribed can be found in both state and federal legislation. At the federal level, NCLB provides guidelines for charter school admissions, which apply to charters that receive federal start-up grants or Title I funds. Federal guidelines do allow schools to admit some students automatically without entering a lottery, including the siblings of current students and the children of school staff and the charter's founders, so long as this is a small percentage of school enrollment. Preferences may also be given to children seeking to transfer from a failing public school, as allowed under NCLB's choice provisions. These federal guidelines condone minimum qualifications for participation in admission lotteries, so long as the stipulated qualifications are:

- (a) consistent with the statutory purposes of the federal Charter School Program;
- (b) reasonably necessary to achieve the educational mission of the charter school; and

(c) consistent with civil rights laws and Part B of the Individuals with Disabilities Education Act.<sup>10</sup>

Federal law prohibits charters from using separate lotteries for boys and girls to achieve gender balance. If such balance is desired, the guidelines suggest that schools might achieve it through targeted marketing—a suggestion that explicitly acknowledges the significant role background activities can play in who ends up entering an admissions lottery.

The California Education Code also sets state-wide conditions for charter school admission practices:

[I]f the number of pupils who wish to attend the charter school exceeds the school's capacity, attendance, except for existing pupils of the charter school, shall be determined by a public random drawing. Preference shall be extended to pupils currently attending the charter school and pupils who reside in the district except as provided for in Section 47614.5. Other preferences may be permitted by the chartering authority on an individual school basis and only if consistent with the law.”<sup>11</sup>

Section 47614.5 sets out additional conditions for receiving funding from the Charter School Facility Grant Program, specifically allowing for admissions preferences based on school lunch eligibility. Because state funding is contingent upon at least 70% enrollment of students eligible for free or reduced lunch, charter schools may give preference to these students to help ensure state funding is maintained.<sup>12</sup> The code also explicitly excludes admissions preferences based on race, gender, and religion.

Federal and state legislation give charters substantial leeway for determining both admissions preferences and lottery procedures. Secondary schools in CA are accredited

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<sup>10</sup> For federal (non-regulatory) guidance on charter schools admissions lotteries, see "Charter Schools Program: Title V, Part B, Non-Regulatory Guidance," US Department of Education, July 2004: <http://www.ed.gov/policy/elsec/guid/cspguidance03.doc>.

<sup>11</sup> *Ref. California Education Code §47605(b)(5)(H), §47605(d)*

<sup>12</sup> Students eligible for free lunches come from families with income no greater than 130% of the federal poverty line. Students eligible for reduced-price lunches come from families with income no greater than 185% of the poverty line.

by the Western Association of Schools and Colleges (WASC), but this accreditation does not look carefully at admission preferences or lottery procedures; rather, it focuses primarily on continuous improvement, assessment of student learning, student development, and fiscal governance.<sup>13</sup> And California elementary and middle schools are not required to pursue WASC accreditation. Given this accountability gap, the newly formed California Charter Schools Association (CCSA) has introduced a charter-specific certification program in partnership with WASC. Certification requires a third-party review every three to six years focusing on compliance with five quality criteria: (1) student academic achievement; (2) ethical leadership; (3) continuous focus on increasing quality; (4) responsible governance; and (5) fiscal accountability.<sup>14</sup>

While CCSA's certification program improves transparency and accountability, it faces several important limitations. First, certification is voluntary and only pursued by a fraction of California charter schools. Second, certification does not look carefully at schools' lottery admissions processes, nor does it require annual audits of such processes (annual financial audits are all that is required.) Third, accountability is often defined as consistency with the school charter. If the preferences articulated in the charter document are legal but unfair, CCSA does not have a way to hold schools undergoing review accountable to the spirit of the law, above and beyond the letter.

### **3. What makes charter admissions lotteries fair?**

Because of their pervasive use, school admissions lotteries raise important political and philosophical questions about the fairness of randomly allocating limited social goods. Education is a uniquely important social good because it is so closely

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<sup>13</sup> See [http://www.acswasc.org/about\\_criteria.htm#cdcriteria](http://www.acswasc.org/about_criteria.htm#cdcriteria) .

<sup>14</sup> See <http://www.myschool.org/association/qualitystandards/> .

connected to the concept of equality of opportunity. The idea that a democratic state owes its citizens equal opportunity has broad intuitive appeal; both liberals and conservatives would likely agree that public education can and should play a significant role in leveling the playing field to enable opportunities in a variety of arenas (e.g. finding a good job, securing financial independence, or exercising political liberties). On first pass, then, the importance of education to realizing other opportunities makes distributing education by lot seem fair when slots at desired schools are limited. We next turn to three different ways admission lotteries can be (un)fair: substantive fairness, procedural fairness, and epistemic fairness.

### **3.1 Substantive fairness: Are charter admission lotteries substantively fair?**

Call any lottery *substantively fair* if and only if employing a lottery is what justice requires. Clearly lotteries are not defensible in all cases. For example, if Jon returns to his parked car and finds a stranger blocking the door and claiming the car is his, a nearby police officer could use a procedurally fair lottery (e.g., flipping a fair coin) to decide ownership. But such a procedure would be demonstrably unfair in the substantive sense: a fair lottery was used when no lottery was called for.

To better understand why we might want to distribute school admission—or anything else—by lot, consider what makes the allocation of a social good fair. The fairness of an allocation procedure depends on the good being allocated, the context of allocation, and the strength of the claimants' claims.<sup>15</sup> Although the first two criteria are relatively straightforward, evaluating the strength of competing claims can be particularly

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<sup>15</sup> In our definition of fair distribution we follow Stone's account of a fair allocation. Peter Stone, "Why Lotteries Are Just," *Journal of Political Philosophy*. Vol. 15, No. 3, 2007: 276-295

challenging. Economist and philosopher Amartya Sen provides a clear illustration of these difficulties via an example of three children vying for ownership of one flute:

Imagine three children who have between them only a single flute, and they are trying to decide who should get to keep it. Child A has no toys, whereas the other two children (B and C) have many. Child B is the only one with musical talent enough to play the flute. And child C, as it happens, is the one who made the flute in the first place. Who has the strongest claim?<sup>16</sup>

The claims of these children correspond to three different conceptions of fairness as grounds for moral claims: equity, utility, and entitlement. If the strength of their respective claims is contested, some adjudication process may be necessary to decide how to allocate the good. When adjudication is practically or morally impossible, a lottery offers an intuitively fair way to resolve the impasse.

Prima facie, admissions lotteries appear to be an easy way to avoid adjudicating between students' competing claims for admission. Charter proponents argue for the substantive fairness of charter policy on grounds that it expands school choice for parents, increases schools' accountability through parents' greater mobility and promotes innovation by reducing red tape. Because middle and higher income families already have substantial school choice due to their greater income and mobility, many proponents also agree that charters should serve the poorest communities and should not use admissions tests. Extending this reasoning, admissions lotteries avoid unfair preferences and maximize parental choice.

However, all California charter schools do invoke some preferences. As noted, the California Educational Code requires that preference is "extended to pupils currently attending the charter school and pupils who reside in the district except as provided for in Section 47614.5." And, even more importantly, "other preferences may be permitted by

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<sup>16</sup> Recounted during a lecture at Stanford University by Amartya Sen, April 7 2006.

the chartering authority on an individual school basis and only if consistent with the law.”<sup>17</sup> Albert Einstein Academy Charter School (AEACS) in San Diego, California is an interesting example of the problems inherent to admissions preferences.<sup>18</sup>

**Example 1: Albert Einstein Academy Charter School.** AEACS offers a language immersion program in which students are taught in both German and English. As part of its pedagogical approach, AEACS gives preference to students who already speak German fluently. According to Executive Principal Luci Fowers, the ideal mix would be to have 50 percent of students fluently speaking German. As of February 2007, only 15 percent of the schools’ students were German-speaking. Einstein received 242 applications for 100 spots for the 2007-2008 school year, and, of those who have applied, only 31 speak German. Nevertheless, the San Diego School District asked AEACS to stop offering preferences, arguing that the practice may violate state and federal equal protection clauses.<sup>19</sup> Currently the school continues to grant admissions preference to German speaking students, up to 25 percent of the total positions available in each grade. They also employ an outside agency to participate in and verify the fair execution of the lottery.<sup>20</sup> Yet, according to AEACS’s website, winning the admission’s lottery may not be enough: “If a child has been accepted for attendance at Albert Einstein through the lottery system, families will be contacted to schedule an interview with the school to determine that the school is a good match for the child academically and personally and for the family. . . if the school, child and parents decide to continue with the enrollment process, the child will be formally registered as attending Albert Einstein. . .”<sup>21</sup> Notably, this post-lottery collective decision-making process is not discussed in the school’s charter.

The case of AEACS illustrates the “tiered” preference system often involved in charter admissions lotteries. Preferences for the children of current employees, district employees, and siblings of currently enrolled students are commonplace and allowed by law, as long as these preferences are made explicit in the school’s charter. But AEACS

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<sup>17</sup> *Ref. California Education Code §47605(b)(5)(H), §47605(d)*

<sup>18</sup> The information provided in this sketch of Albert Einstein Academy Charter School (and all subsequent examples from California charter schools) was obtained exclusively from publicly available information on the school’s website. We did not independently verify whether actual admission policy or procedures matched this description.

<sup>19</sup> [http://sports.uniontrib.com/uniontrib/20070227/news\\_1m27einstein.html](http://sports.uniontrib.com/uniontrib/20070227/news_1m27einstein.html)

<sup>20</sup> [www.aeacs.org/charter.pdf](http://www.aeacs.org/charter.pdf) (pp. 27-29)

<sup>21</sup> <http://www.aeacs.org/ouenrollmentprocess>

also illustrates the ease with which school admission can be influenced by other factors, even if the lottery was procedurally fair.

The central virtue of lotteries over other distribution mechanisms is their impartiality under conditions of indeterminacy.<sup>22</sup> As an admissions procedure, lotteries offer a way to distribute limited slots without unfairly preferring some students over others. That some charter schools readily combine preferences with lottery admissions overlooks the tension that can exist between innovation and choice in the logic of charter schools. On one view, allowing preference systems (and therefore limiting choice) is defensible in light of the greater good served by innovative schools like AEACS. Conversely, some argue charter admissions preferences should be kept to an absolute minimum, lest the arguments for greater choice and accountability are undermined. Of course, choice and innovation need not be in conflict, but current California law allows for charter admissions preferences that clearly limit choice.

Put differently, the debate over charter preferences can be understood as a tension between two different understandings of choice: i) choice as the *number* of school options or ii) choice as the *variety* of school options. When choice in the second sense (variety) is achieved in part through admissions preferences, choice in the first sense (number of options) is diminished.

Although we do not recommend a particular set of guidelines for what sorts of preferences should or should not be allowed, we believe chartering authorities—as well as WASC and CCSA—should exercise extreme caution when approving charters, accrediting, or certifying a school that does not expand the number of choices for some

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<sup>22</sup> Stone, "Why Lotteries Are Just," 4.

nearby families but expands the variety (and, therefore, number) for a *more limited* set of families.

### **3.2 Procedural fairness: Are charter admission lotteries procedurally fair?**

Consider the key elements of a lottery. First, there must be an indivisible *prize* that needs to be distributed, in this case charter school admission. Second, there must be a recognizable group of competing claimants to the prize, the *pool* of beneficiaries. For charters, this pool is a self-selecting group of parents living in or near the district wishing to enroll one or more children. Third, there must be a person or group of persons in a position to authorize and carry out the lottery, the “*allocating agency*.” For charters, this is almost always the charter school, though cases like AEACS blur this line by distinguishing between the lottery process conducted by an outside agency and the collective decision reached by the school, parents, and child. And fourth, there must be one or more random procedures for choosing which beneficiaries receive a pay-off, the *pay-off condition*.<sup>23</sup> For charters, this procedure varies dramatically from school to school. Together, a lottery comprises these four elements.

Of these four elements, charters can most easily (and legally) influence the pool of beneficiaries. In fact, federal law encourages charters to engage in targeted marketing as a means of diversifying their student body, as noted above in federal (non-regulatory) guidelines that suggest that schools might seek gender balance through marketing. Other papers in this symposium discuss the efficacy and fairness of such marketing, so we set aside this issue.

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<sup>23</sup> For convenience, I follow Kornhauser and Sager’s use the terms “prize,” “pool,” “pay-off condition,” and “allocating agency” Kornhauser and Sager, “Just Lotteries,” 485.

So when it comes to the procedural fairness of charter school lotteries, we focus on the third and fourth components: the allocating agency and the procedure that determines which students are admitted. On the face of it, setting up a fair lottery procedure may seem straightforward. Consider, for example, the lottery procedure used at Steele Canyon High School, as described on the school's webpage.<sup>24</sup>

**Example 2: Steele Canyon High School.** Located in Spring Valley, California, Steele Canyon uses a detailed lottery procedure. Each applicant was entered into a computer and assigned a number from 1 to the final applicant in their respective category and placed on a list. Next, "the applicants' names were then cut into individual strips of paper remaining in the categories from the Admissions Requirements within the Charter documentations. Each category of applicants' names (strips of paper) were then placed in sealed, labeled envelopes and locked in a cabinet until the Public Lottery was held. The date of the Public Lottery was posted on the Steele Canyon Charter website and commenced on Monday, March 26, 2007, at 3:00 p.m. as posted. Two Board members, the School Registrar, staff members, and an adult community member in good standing (who is not employed by Steele Canyon High School and has no students in the school) were present to conduct the Lottery. All names from each category were pulled out of the hat according to the guidelines listed on the Admissions Requirement page that was given at the time of application to each applicant. Additional copies of the Admission Requirements handout were also in the room. Names were pulled one at a time until each name was taped on the waiting list in the order they were randomly pulled from the hat. The hat was then turned over and checked by hand to ensure that no names were left remaining. The public members present were notified that the waiting list would be posted on the school website by the end of the week and letters of regret or acceptance would be mailed by weeks' end as well. The community member verified each envelope and certified the Lottery at the end of the process. This person initialed each page of the waiting list to verify that all names were placed on the list and signed a letter of certification. SCHS Registrar locked up the list in the School Registrar Office. This individual began the process of notification and updating the waiting list during the last week of March."<sup>25</sup>

Steele Canyon's lottery seems like a careful, secure, and fair procedure. Names are numbered and sealed in envelopes and locked in a cabinet. The lottery is observed by multiple people, including a disinterested community member. Names are pulled from a

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<sup>24</sup> The information presented in this example was drawn from the school's website:

<http://www.steelecanyoncharter.net/Admissions.html>

<sup>25</sup> <http://www.steelecanyoncharter.net/Admissions.html>

hat and carefully taped, one by one, onto the waiting list. The lists are certified and then posted publicly.

Yet this procedure is not enough to guarantee that the lottery process is secure. First, the lottery process technically begins with the placing of applicant names on a master computer list. This list is as important as any subsequent step in the process: omitting a name at this point ensures that he or she will not attend Steele Canyon. But no safeguards on the composition of this list are provided for (e.g. applicants get no confirmation (like an application receipt) that they will be entered in the lottery) —at least as far as the school’s charter provides. Second, all but one member of the lottery committee have a vested interest in the outcome of the lottery by virtue of their school responsibilities. And the only community member who may not have such an interest (no information is provided about how the community member is selected) is merely responsible for certifying that all names were drawn, not for actually drawing the names. Third, there is little assurance that the random element—the hat drawing—is truly random. If, for instance, personally identifiable information is visible on the paper strips (e.g., the student’s name), it would be easy for the person(s) drawing names to avoid particular strips. To ensure equiprobability, paper strips would need to be indistinguishable to the person drawing names and well-mixed. Fourth, it is unclear whether members of the public who attend the lottery are notified of the names as they are drawn. Announcing names makes the lottery more public, but it also undermines the anonymity of those applying to enroll their students in the charter school. Such anonymity may be particularly desirable if parents are worried about what other parents,

teachers, and community members think of enrolling their child in a local charter, particularly if the student is not ultimately selected for admission.

Ensuring an admissions lottery is conducted in accordance with procedural fairness—that is, in a way the public is justified in trusting—requires a third, distinct sense of fairness, which we will discuss next.

**3.3 Epistemic fairness: Are charter admission lotteries epistemically fair?** In most instances, charter schools like Steele Canyon may, in fact, be conducting admission lotteries that are both substantively and procedurally fair. But, we argue, justice requires more than fairness in these two senses. Call a lottery *epistemically fair* if the potential beneficiaries are warranted in believing a lottery was procedurally fair. In this case, warrant involves producing evidence to justify belief in the procedural fairness of an admissions lottery, start to finish.

The use of random allocation procedures for distributing social goods creates unique political and epistemic problems. Unlike other ways of distributing goods, lotteries reflect “an intentional choice to make a decision by a non-intentional mechanism”<sup>26</sup> Because the outcomes of lotteries are unintentional, the results cannot be justified in the same way market- or merit-based distributions can be justified. Evidence supporting the procedural fairness of a lottery may be direct, like the requirement that a lottery be public, or indirect, like the statistical analysis of lottery outcomes.<sup>27</sup> Both types of evidence have difficulties, and neither shed light on the motivations or intentions of the lottery’s allocating agent. Because many different conditions might be classified as “public,” and because only certain types of tampering lend themselves to statistical

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<sup>26</sup> Elster, *Solomonic Judgements : Studies in the Limitations of Rationality*, 37.

<sup>27</sup> See for example Elster’s fascinating discussion of the history of the American military draft in Elster, *Solomonic Judgements : Studies in the Limitations of Rationality*.

analysis, more is required to warrant belief in the procedural fairness of a lottery. Perhaps good intentions are sufficient for charter administrators, but this is not enough to warrant parents' belief that an admission lottery was fair. Consider the case of High Tech High Schools computerized lottery system, as described by the school's webpage.<sup>28</sup>

**Example 3: High Tech High Schools (HTHS).** HTHS is a “school development organization” in San Diego that presently runs 7 charter schools. Its central mission is to prepare students for college, work, and citizenship, and it strives to have a student body at each school that reflects the diversity of the local community. Their schools have a technology and science focus, with the goal of increasing the number of disadvantaged students who succeed in math and engineering.<sup>29</sup> To be eligible for admissions at a High Tech High school, parents must complete an online application and attend a mandatory informational session with their children. When the number of applicants exceeds available spaces, HTHS employs a computerized lottery program that randomly chooses students for admission. Preferences are given to siblings, and students who qualify for the Federal Free and Reduced Lunch program “may” receive a statistical advantage in the lottery (parents are asked to report their income). In response to the frequently asked question, “What are my chances of getting admitted?” HTHS reports that because a computerized lottery is used, “it is nearly impossible to estimate the likelihood of a particular student being admitted.”<sup>30</sup>

Like Steele Canyon, HTHS does not describe the lottery process with sufficient precision to verify its procedural fairness. Yet conducting the lottery by computer also presents a unique epistemic challenge, as a computer lottery is not (and cannot be) transparently random or public. Recently electronic voting has been criticized on exactly the same grounds: without a paper trail, there can be no audit of the electronic procedure. In the case of electronic ballots, this has meant incorporating a voter-verified paper ballot. Yet no such option is available to verify the procedural fairness of a random process conducted electronically. Verifying randomization in any instance is notoriously difficult since there is no clear-cut way to check the results against the desired outcomes—a

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<sup>28</sup> All information about the HTHS lottery process was drawn from the school's webpage: <http://www.hightechhigh.org/admissions/HTH-AdmissionsFAQ.php>.

<sup>29</sup> See <http://www.hightechhigh.org/about/index.php> for an overview of HTHS schools.

<sup>30</sup> See <http://www.hightechhigh.org/admissions/HTH-AdmissionsFAQ.php> for admissions FAQs.

problem that is compounded when the process is done electronically (above and beyond the dramatic effect, state lotto drawings are televised and involve brightly colored bouncing balls blown inside a clear box to ensure “publicly verifiable randomization”).

For all of these reasons, it is difficult to imagine a computerized admissions lottery satisfying the requirement of epistemic fairness—especially when the lottery is under the control of school administrators. That HTHS states that “it is nearly impossible to estimate the likelihood of a particular student being admitted” is very concerning, as fairness requires being able to calculate the exact probability of acceptance given a list of applicants, their background characteristics, and a clear set of admissions preferences.<sup>31</sup>

In the HTHS example, as well as AEACS and Steele Canyon, the overriding concern is that actual charter admissions practices are treating people fairly. When it comes to the substantive and procedural fairness of admissions lotteries, we are wary of current practices but are not arguing that current preferences or procedures are inherently unfair. However, when it comes to epistemic fairness, there is substantial evidence that many charter admission practices are not adequately transparent or accountable and are therefore demonstrably unfair. One way of understanding the moral weight behind epistemic fairness is by considering what citizens can reasonably expect from public institutions. Citizens have a right to more than the assurances of public officials and school leaders that fair admissions procedures are being followed; they have a right to independent verification of such procedures—verification they can trust. When parents or

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<sup>31</sup> HTHS’s statement that “it is nearly impossible to estimate the likelihood of a particular student being admitted” most likely means the school does not know how many students will apply and cannot predict who will be admitted. But *predicting outcomes* is very different from *estimating likelihood*. By definition, a fair lottery should not be predictable, but the likelihood or probability of a particular student’s admission should be precisely calculable once the number of applicants is known.

citizens are denied such verification (in school admissions procedures or elsewhere), they have grounds for feeling humiliated.

We use *humiliation* as a term of art, following the important philosophical work of Avishai Margalit.<sup>32</sup> It is worth closer examination as an ethical underpinning of epistemic fairness. Margalit defines humiliation as “any sort of behavior or condition that constitutes a sound reason for a person to consider his or her self-respect injured.”<sup>33</sup> On this account both individuals and institutions can be humiliating, though neither requires a humiliator (that is, someone intentionally trying to humiliate). In this sense humiliation is a normative concept, rather than a psychological one; the focus is on the reasons given rather than on emotional states. In the normative sense, someone who has reason to feel humiliated but does not actually feel that way is still the subject of humiliation.

Conversely, in the psychological sense, somebody who feels humiliated but lacks sound reasons for feeling this way is not subject to humiliation on this view. The claimant who loses a lottery that was epistemically unfair may or may not feel humiliated—what is important (for this discussion) is that she would have been justified in feeling so.

Some might object that all forms of government are humiliating, in that they all—by definition—serve to direct and constrain human behavior. On this view, governing institutions should be abolished. Margalit calls this the “Anarchist view,” and we follow him in rejecting it. For what seems clear, upon reflection, is that such a society would be highly unstable, for the only authority to respect is one’s own. But if the anarchist recommends the inclusion of non-governmental institutions to help add stability—say, a free market—then that institution, by default, becomes a governing institution. In the case

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<sup>32</sup> It should not be assumed that Margalit would agree with our special application of the concept of humiliation to charter admission lotteries.

<sup>33</sup> Margalit, *The Decent Society*, 9.

of a market unencumbered by governmental regulation, monopolies and cartels would end up filling this role.<sup>34</sup> So the question is not whether government should exist (or not), but what responsibilities and constraints governing institutions should be subject to.

One additional clarification: self-respect is different from self-esteem because “respect constitutes a ground for treating people equally, while esteem forms a basis for ranking people.”<sup>35</sup> The grounds for self-respect are something held equally in common—that is, membership in humanity. The grounds for self-esteem, on the other hand, are achievements relative to other members of the group. But just because self-respect and self-esteem are different does not mean they are incommensurable. There may be situations in which the gain of one results in the loss of another. At the core of self-respect is the value of belonging to a group.<sup>36</sup> Humiliation, then, is the process of alienating individuals from a legitimate encompassing group. According to Margalit, encompassing groups have six characteristics: (1) members share a common character and culture; (2) people *growing up* in the group acquire its culture and traits; (3) group membership is a matter of mutual recognition; (4) people self-identify as members of the group; (5) membership is a matter of belonging, rather than achievement; and (6) anonymity of membership—not everyone in the group knows each other.<sup>37</sup> Thus, everyone is a member of an encompassing group, and most people are members of several encompassing groups.

Given this understanding of humiliation, the problem with epistemically unfair lotteries is that a lottery loser (or winner) does not know whether she lost (or won)

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<sup>34</sup> Margalit, *The Decent Society*, 12-22.

<sup>35</sup> Margalit, *The Decent Society*, 44.

<sup>36</sup> *Ibid.*, 47.

<sup>37</sup> *Ibid.*, 138-140.

because of encompassing group membership. The point of epistemic fairness is to provide knowledge sufficient to ensure admissions lottery participants that encompassing group discrimination did not occur. This is, of course, the reason for excluding gender, race, and religion as reasons for preferring some students over others. As charter schools expand the range of preference schemes, or incorporate additional “admissions counseling” after the results of the admissions lottery have been determined, students and parents may have strong grounds for feeling humiliated in the above sense. Similarly, if charter admissions lottery procedures remain opaque and unaccountable, parents and children applying for admission may well have reason to feel humiliated. Because the outcomes of lotteries are necessarily unequal, they are also most susceptible to suspicion of unjust distribution. Counteracting reasonable suspicion with transparency and evidence is the central concern of epistemic fairness.

Understanding what makes admissions lotteries susceptible to tampering can also indicate how to improve their transparency and accountability. Four features of charter schools make their admissions lotteries particularly vulnerable:

- (1) Decentralization
- (2) Conducted/coordinated by a party with vested interests in the results
- (3) The outcomes are high stakes for children, families, teachers, and the school
- (4) Complex procedures are used that are not always transparent
  - a. Schools are legally allowed to make preferential admissions decisions as long as these preferences are stated within the school’s charter (except where such preferences conflict with state law)
  - b. Schools have access to significant data on students (and sometimes student families) prior to the lottery

What these conditions have in common is that all put pressure on the epistemic fairness of lotteries by creating incentives or opportunities for tampering.

Charter schools are under increasing pressure to demonstrate educational progress. As accountability for achievement increases, the incentives for finding mechanisms for boosting student achievement also increase. Marketing to students with stronger academic potential is one obvious strategy; however, if demand is already strong, an even easier method is to find proxies for student success and incorporate these into the school's charter as admission preferences. But another expedient method would be to tamper with the admissions lottery itself to ensure that a disproportionate number of academically strong students are admitted and/or academically struggling students are rejected.

In many cases, charter school admissions lotteries meet all four conditions because: (1) the quality of one's education significantly determines one's life chances; (2) most admissions lotteries are conducted by individual schools, rather than independent agencies or the state; (3) most charter schools incorporate preferences for students meeting various conditions; and (4) pressure is mounting for schools to demonstrate performance to keep their charter, creating incentives for schools to admit students who will boost their test score results. Given these pressures, it is unsurprising that charter schools are now beginning to seek certification of best practices. The partnership between CCSA and WASC is undoubtedly a step in the right direction. Yet thus far admissions practices and the conduct of public lotteries have not been given serious attention by these organizations. Ensuring the fairness of charter admissions lotteries requires greater transparency, accountability, and oversight. In conclusion, we make several recommendations for improving the fairness of charter admission lotteries and policy.

#### 4. Recommendations

Up to this point, we have examined the fairness of admission lotteries in practice and theory, and considered where and why existing lotteries fall short of the three fairness criteria. Ideally, the stakes attached to school admissions lotteries would be much lower than they presently are; right now winning can be the difference between receiving a good education and receiving a poor one. That the educational stakes are sometimes very high lends further support to our argument that admissions lotteries should be as fair as possible. To this end, we offer several policy recommendations for improving the fairness of charter admissions lotteries:

- *Establish clearer laws on allowable preferences.* The preferences that charter schools use in their admission lotteries vary greatly, ranging from the priority given to siblings (which federal law condones), to more dubious preferences, like those extended to German-speakers at Albert Einstein Academy. Without more explicit state guidelines about what preferences are allowed, it is impossible to verify the fairness of admission lotteries. We recommend that states revisit their charter laws and establish clear guidelines about acceptable preferences—guidelines that should meet *both* the spirit and letter of anti-discrimination laws (e.g., the 14<sup>th</sup> amendment, Civil Rights Act, and the Individuals with Disabilities Education Act).
- *Establish clearer legislation on what constitutes a “public” lottery.* Given that the procedural and epistemic fairness of a lottery are contingent upon a transparent process, it is critical admissions lotteries are conducted in a forum that is genuinely public and accessible to participants. To this end, we recommend that states specify what constitutes a public lottery in their charter legislation—presently one of the most under-specified (and hence largely ignored) aspects of admission requirements, despite its central importance to ensuring an (epistemically) fair lottery.
- *Require that lotteries be conducted by independent, third-parties.* Although we have no evidence that school officials take unfair advantage of weak lottery procedures to select high-achieving (or otherwise more desirable) students or to exclude low-achieving (or otherwise less desirable) students, there is an undeniable conflict of interest when the agents who run a lottery are also among its beneficiaries. This conflicting interest is heightened by increased pressure placed on charters to

demonstrate academic achievement on standardized tests. We recommend this conflict of interest be eliminated by requiring that lotteries be conducted by third-party agents, significantly improving the procedural and epistemic fairness of admission lotteries.

- *Require annual admission audits.* Charter schools are currently held accountable to chartering authorities for their students' academic achievement, and schools risk having their charter revoked when they fail to meet performance expectations. To institutionalize and underscore the importance of the above recommendations, we believe that charters should be held accountable for their admission practices. To this end, we recommend annual admission audits, similar to the annual financial audits required of all California charters schools. These audits would be conducted by an independent agency to verify that existing admissions practices fulfill the letter and spirit of the law (preferably in accordance with the fairness criteria outlined above).

Putting these recommendations into practice would be an important step towards improving the fairness (in all three senses) of charter admission lotteries.

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