

GRADING THE GRADERS AND REFORMING THE REFORM: AN ANALYSIS OF THE STATE OF PUBLIC EDUCATION TEN YEARS AFTER *NO CHILD LEFT BEHIND*

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Because of the public perception that schools hold the major obligation for educating children, schools tend to get the lion's share of the blame for the achievement gap. It is not surprising then that when the nation looks to ways to reduce or close the gap, the major attention tends to be aimed at improving schools. Recent research has yielded a much clearer understanding of the extent to which and the ways in which school variables influence the achievement gap. The belief that good schools have a powerful impact on student achievement was the driving force behind the No Child Left Behind (NCLB) Act. In 2001, for the first time in our nation's history, closing the black-white achievement gap was determined to be of such importance to our national interest that it became a matter of federal policy. The purpose of the bill was clearly stated right up front on the title page: "To close the achievement gap with accountability, flexibility, and

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choice, so that no child is left behind.”⁺

I. INTRODUCTION

In 2001, as a bipartisan means of bringing about significant substantive change in public education, Congress, by an overwhelming majority, passed No Child Left Behind (NCLB).¹ The legislation was Republican President George W. Bush’s signature education reform item. President Bush’s successor, Democratic President Barack Obama, suggested significant changes for NCLB.² Considering President Obama’s public statements that high student achievement is possible through public education reform,³ one might expect that President Obama would be one of NCLB’s most outspoken advocates. Judging by his public comments, however, President Obama believes Congress must reform the reform in public education.⁴

⁺ ROD PAIGE & ELAINE WITTY, *THE BLACK-WHITE ACHIEVEMENT GAP: WHY CLOSING IT IS THE GREATEST CIVIL RIGHTS ISSUE OF OUR TIME* 15 (Amacom 2010) (internal citations omitted).

1. 20 U.S.C. §§ 6301-6304 (2002). On May 23, 2001, the House of Representatives passed the bill with 381 votes. See *Final Vote Results for Roll Call 497*, HOUSE OF REPRESENTATIVES (Dec. 13, 2001), <http://clerk.house.gov/evs/2001/roll497.xml>. Similarly, it passed the Senate with 87 votes. See *Role Call Vote on H.R. 1 (No Child Left Behind Act of 2001)*, U.S. SENATE (Dec. 18, 2001), http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=107&session=1&vote=00371. Indeed, NCLB was enacted as a bipartisan effort toward much needed education reform. Because NCLB was technically an amendment to Title I of the Education and Secondary Education Act of 1965, some education law scholars argue NCLB was a federal misapplication of Title I. See, e.g., Derek W. Black, *The Congressional Failure to Enforce Equal Protection Through The Elementary and Secondary Education Act*, 90 B.U. L. REV. 313, 314 (2010). Specifically, Black argues that “[i]n particular, recent revisions of Title I, such as the No Child Left Behind Act, have been used to spur general school reform and political agendas more than to further non-discrimination and equity for poor students.” *Id.* (internal citations omitted).

2. Helene Cooper, *Obama Urges Education Law Overhaul*, N.Y. TIMES, March 14, 2011, available at http://www.nytimes.com/2011/03/15/us/politics/15obama.html?_r=2&ref=nochildleftbehindact.

3. See, e.g., BARACK OBAMA, *THE AUDACITY OF HOPE: THOUGHTS ON RECLAIMING THE AMERICAN DREAM* 163 (Crown Publishers 2006).

4. See Cooper, *supra* note 2. Moreover, during President Obama’s 2011 State of the Union address, he opined as follows:

Our schools share this responsibility. When a child walks into a classroom, it should be a place of high expectations and high performance. But too many schools don’t meet this test. That’s why instead of just pouring money into a system that’s not working, we launched a competition called Race to the Top. To all 50 states, we said, “If you show us the most innovative plans to improve teacher quality and student achievement, we’ll show you the money.”

One of NCLB's most significant reform measures was to create "choice,"⁵ thus allowing children attending "failed" or "failing" public schools to transfer to other public schools that meet accountability benchmark standards. The purpose of implementing this choice was obviously to ensure that children would have the opportunity to receive a quality education.⁶ Arguably, many presumed NCLB would level the inherently unequal playing field that was the subject of *Brown v. Board of Education*⁷ and hundreds of other educational inequality cases that resulted from the ruling in *Brown*.⁸ As a matter of practical

Race to the Top is the most meaningful reform of our public schools in a generation. For less than 1 percent of what we spend on education each year, it has led over 40 states to raise their standards for teaching and learning. And these standards were developed, by the way, not by Washington, but by Republican and Democratic governors throughout the country. And Race to the Top should be the approach we follow this year as we replace No Child Left Behind with a law that's more flexible and focused on what's best for our kids.

Transcript: Obama's State of the Union Address, N.P.R., Jan. 25, 2011, <http://www.npr.org/2011/01/26/133224933/transcript-obamas-state-of-union-address> (last visited June 22, 2011).

5. Other scholarship has defined the concept of "school choice" for the purposes of education reform as follows:

Under public school choice, parents have options that are restricted to public schools. For example, thirty-three states have open enrollment laws of varying degrees that allow students to attend public schools outside their home district, and eighteen states make open enrollment mandatory.

John C. Goodman, *School Choice vs. School Choice*, 45 HOW. L.J. 375, 380 (2002) (citing EDUC. COMM'N OF THE STATES, BUILDING ON PROGRESS: HOW READY ARE STATES TO IMPLEMENT PRESIDENT BUSH'S EDUCATION PLAN? 14 (2001)).

6. HERBERT J. WALBERG, SCHOOL CHOICE: THE FINDINGS 8 (Cato Institute 2007) ("Thanks to the spread of 'school report cards' and the disclosure required by states and the federal No Child Left Behind Act, more parents than ever before are aware that their children are attending failing schools. This information is changing the terms of the national debate over school reform.")

7. *Brown v. Bd. of Educ. (Brown I)*, 347 U.S. 483 (1954).

8. See, e.g., *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007); see also *Missouri v. Jenkins*, 515 U.S. 70 (1995). The argument of educational inequality logically developed from the *Brown* Court's ruling that de jure segregation of public schools violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. As a matter of practical application, although state legislatures may have abolished statutes requiring local school districts to maintain segregated school facilities, thus ending de jure segregation, the Court subsequently authorized busing as a means to achieve racial diversity because of the remaining practical effects of de facto segregation, especially in the South, where resistance was greatest. Consequently, in a supplemental opinion to *Brown I*, the Court ordered the desegregation of public schools "with all deliberate speed." *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294, 301 (1955). According to three noted legal historians and law professors:

The final round of the arguments in the school desegregation cases commenced on April 11, 1955, lasting for more than thirteen hours over four days. Just over a month later, on May 31, 1955, the final *Brown* decision, *Brown II*, was issued.

application, however, the past decade has proven true the old cliché—Hindsight is always twenty-twenty. Considering NCLB through the twenty-twenty lens of hindsight, it is obvious the law has significant ancillary effects.

Assuming a student exercises NCLB's choice provision and transfers to a school that meets its academic benchmarks, the rhetorical question becomes what happens to the failing school from which the student transferred. In many states, the practical reality is that charter schools have proliferated, assuming control of "failed" public schools, thereby allowing for ongoing experimentation with educational reform measures.⁹ Indeed, in

In a compromise position, one that would allow decades to pass before full implementation of the original decree, the Supreme Court remanded the case to the district courts with directions to implement desegregation "with all deliberate speed." The justices hoped that the ambitious timetable would give white southerners an opportunity to adjust to what would be a drastic change in their customs, under the guidance of federal judges in local communities.

ROBERT J. COTTROL, RAYMOND T. DIAMOND, & LELAND B. WARE, *BROWN V. BOARD OF EDUCATION: CASTE, CULTURE, AND THE CONSTITUTION 184-85* (Univ. Press of Kan. 2003). In reality, however, "[s]outhern officials seized the phrase as license to desegregate at a pace of their own choosing and, accordingly, their integration efforts all but ceased." RAWN JAMES, *ROOT AND BRANCH: CHARLES HAMILTON HOUSTON, THURGOOD MARSHALL, AND THE STRUGGLE TO END SEGREGATION 234* (Bloomsbury Press 2010). "Ultimately, the question would not be whether public schools in Louisiana would be desegregated, but rather whether they would survive the political undermining of their public support." JOHN MAGINNIS, *THE POLITICS OF REFORM, PAR: 50 YEARS OF CHANGING LOUISIANA 32* (Public Affairs Research Council 2000); see also CHARLES J. OGLETREE, JR., *ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF-CENTURY OF BROWN V. BOARD OF EDUCATION 127-28* (W.W. Norton & Co., Inc. 2004) (detailing how *Brown II* placed enforcement of the Court's desegregation mandate within the discretion of the federal district courts and the problems those judges had in the Deep South). One of *Brown II*'s effects, recently proving to be an obstacle to the reform contemplated by NCLB, has been the fact that *Brown II* put supervision of non-unitary school districts—those still party to desegregation cases—within the exclusive purview of the federal district courts, as opposed to local school boards or state departments of education. See, e.g., NAACP LEGAL DEF. AND EDUC. FUND & THE CIVIL RIGHTS PROJECT OF UNIV. OF CAL. AT L.A., *STILL LOOKING TO THE FUTURE: VOLUNTARY K-12 SCHOOL INTEGRATION 5-6* (2008), available at

http://naacpldf.org/files/publications/Still_Looking_to_the_Future_Voluntary_K-12_School_Integration;_A_Manual_for_Parents,_Educators_and_Advocates.pdf. As a foundational matter, it is important to understand *Brown I* and *Brown II* because the racially polarized schools addressed therein are the very basis for the inherent inequalities NCLB sought to eradicate.

9. Even before NCLB's passage in 2001, "[c]harter schools have multiplied rapidly in the United States as a result of parental demand and state legislation. The first charter schools opened in Minnesota in 1992, and as of 2006, there were roughly 4,000 operating in 40 states and the District of Columbia, enrolling about one million students." WALBERG, *supra* note 6, at 28. Furthermore, according to a 2002 analysis, one that was admittedly conducted before the practical effects of

the wake of NCLB, reforming education and encouraging accountability have become so popular in the United States that education reform exists under a clearly discernable business model.¹⁰

The purpose of this Article, written ten years after NCLB's enactment, is to analyze the practical effect of NCLB's theoretical solutions to public education. Using Louisiana's public education system as the real-world model for the law's application, the authors ultimately recommend specific solutions for the President and Congress to consider as they contemplate changes to NCLB. The authors, like other education advocates referenced herein, support a tripartite partnership approach to educating public school children. Effective public education requires a synergy among three groups: (1) the local school district or individual school; (2) the local community, particularly faith-based and business organizations; and (3) the students, parents, guardians, or primary caretakers.

This Article begins by examining national developments in education reform and then transitions to examine the intricacies of education reform in Louisiana under NCLB. Part II identifies the national societal conditions that NCLB was enacted to address, particularly issues of race in education and the

NCLB could be analyzed,

[c]harter schools are another popular type of public school choice, but most of the charter activity is concentrated in a handful of states. For example, in 2000 five states accounted for 57% of the 2,069 charter schools operating in the U.S.: Arizona (408), California (261), Michigan (181), Texas (178) and Florida (151). Charter schools take public money but are typically free of many of the rules and regulations that burden traditional public schools. For example, Arizona charter schools can hire virtually anyone as a teacher (regardless of paper credentials) and pay any salary.

Goodman, *supra* note 5, at 380 (citing Roy Appleton, *Charter Schools Face Renewal Test*, DALLAS MORNING NEWS, Dec. 31, 2000, at 1A). Conceptually, therefore, and consistent with the previously referenced parental demand and activity in the respective state legislatures,

[s]tate legislatures have responded to growing demands for improving public schools and student achievement levels by authorizing charter schools and other innovative educational approaches. Charter schools . . . permit the delegation of certain management functions to non-school district entities, including private entities

DESKTOP ENCYCLOPEDIA OF AMERICAN SCHOOL LAW 463 (Steve McEllistrem, Patricia Grzywacz & James A. Roth eds., Oakstone 2002).

10. See, e.g., ROBERT J. BROWN & JEFFERY R. CORNWALL, *THE ENTREPRENEURIAL EDUCATOR* 8-13 (Scarecrow Press, Inc. 2000) (discussing the role entrepreneurs play in education reform); see also Michael A. Rebell & Robert L. Hughes, *Schools, Communities, and the Courts: A Dialogic Approach to Education Reform*, 14 YALE L. & POL'Y REV. 99, 100-03 (1996) (discussing stages of educational reform around the standards and accountability model).

phenomena known as the “achievement gap.” Part III explores congressional efforts prior to NCLB aimed at national education reform, and Part IV details the current federal reform agenda under NCLB.

In Part V, the Article’s emphasis shifts to examine the reasons for NCLB’s unique effects and shortcomings in Louisiana. In particular, Part V identifies the state and local stakeholders in Louisiana’s public education system, while Part VI explores the interactions between these entities in the event of local school or school district “failure.” Part VII gives an overview of the obstacles to education reform in Louisiana: poverty, ongoing desegregation litigation, and state teacher-tenure laws, while Part VIII offers several proposed reforms to NCLB. Part IX concludes by explaining how the proposed reforms to NCLB will further the federal goal of eliminating the achievement gap by promoting the synergistic relationship between local stakeholder groups that is necessary to achieve long-term national education reform.

II. LAYING THE FOUNDATION: THE NEED FOR NATIONAL PUBLIC EDUCATION REFORM

A. A LOWERING TIDE SINKS ALL SHIPS, ESPECIALLY THOSE TRANSPORTING BLACK CHILDREN

To understand the significance of what NCLB sought to reform, it is necessary to establish the condition of public education prior to NCLB’s enactment. There are at least two sad truths about the pre-NCLB status of public education in the United States. First, the vertical gap between black and white students has significantly dropped over the last thirty-plus years. Second, the horizontal gap between black and white students has significantly increased, while overall standards and achievement have uniformly plummeted.¹¹

With respect to the vertical drop, in recent years researchers have observed a uniform decrease in educational achievement among *all* students. In 1996, a noted education researcher opined as follows:

The data on student achievement in America during the past

11. See LAURENCE STEINBERG, BEYOND THE CLASSROOM: WHY SCHOOL REFORM HAS FAILED AND WHAT PARENTS NEED TO DO 45–46 (Simon & Schuster Paperbacks 1996) (internal citations omitted).

twenty-five years point to an inescapable conclusion: American student achievement today is barely at the level it was in the mid-1970s, and in many respects, student achievement is significantly lower than it was twenty-five years ago. Although we have tried our best to find alternative explanations for the decline, the evidence clearly shows that the achievement drop is genuine, substantial, and pervasive across ethnic, socioeconomic, and age groups. Moreover, there is no indication from recent assessments that this situation is changing, and some indication, as evidenced in recent reports on declining SAT scores, that it is worsening once again. To top it all off, our definition of educational excellence has eroded nearly to the point of meaninglessness, and yet, only a handful of students qualify for the dubious distinction of placing in the top category. As my colleague Dan Koretz, writing for the Congressional Budget Office in 1986 concluded, the existence of an “overall drop in the achievement [entailing] sizeable declines in higher-level skills, such as inference and problem-solving, is beyond question.”¹²

There is an old saying that “[a] rising tide lifts all boats.” Since the 1970s, the tide has been falling and all boats have apparently been sinking. This problem is particularly pronounced in the African-American community.¹³

In discussing his research on educational achievement among various ethnic groups, Dr. Steinberg and his team of researchers noted the following:

Although we did not intend our study to focus primarily on ethnic differences in achievement and other aspects of adolescent development, we were struck repeatedly by how significant a role ethnicity played in structuring young people’s lives, both inside and outside of school. Youngsters’ patterns of activities, interests, and friendships were all influenced by their ethnic background. Moreover, we could not ignore the fact that students of different ethnic groups

12. LAURENCE STEINBERG, *BEYOND THE CLASSROOM: WHY SCHOOL REFORM HAS FAILED AND WHAT PARENTS NEED TO DO* 45–46 (Simon & Schuster Paperbacks 1996).

13. *Id.* at 88–90 (discussing empirical data supporting the proposition that Asian students outperformed both white and Latino students, while African-Americans’ achievement scores were the lowest of the four ethnic groups that were the subject of the case study).

experienced markedly different degrees of success and failure in school.¹⁴

In specifically addressing the achievement gap between the subjects of his research, Dr. Steinberg wrote that

[o]ne of the most consistent observations reported by social scientists who study achievement in this country is that Asian-American students perform, on average, substantially better than their white peers, who in turn outperform their black and Latino counterparts. This finding has emerged over and over again, whether the index in question is based on school grades or performance on standardized tests of achievement.¹⁵

Among black school children, therefore, school performance was apparently the worst, in comparison to other ethnic groups.¹⁶ Indeed, the achievement gap has been and continues to be a very real and empirically measurable phenomenon.

In light of this disappointing and empirically discernable trend, the federal government has been proactive in attempting to address the decline.¹⁷ For example, according to authors

14. STEINBERG, *supra* note 11, at 78-79.

15. *Id.* at 83.

16. *Id.*

17. Well before NCLB was enacted, through either litigation or legislation, the federal government intervened to assist the states. For example, in tracing the Civil Rights Era from the Court's *Brown I* decision in 1954, the federal government has acted proactively in addressing the achievement gap, a very serious problem. See WALBERG, *supra* note 6. As one noted national educational advocate wrote,

Brown launched America on a course to augment the growth of our nation, civil society and economy by providing equitable educational opportunities to those the law had for centuries denied. A decade later, the passage of the Civil Rights Act [of 1964], along with the 1965 Elementary and Secondary Education Act (ESEA), as part President Lyndon B. Johnson's "War on Poverty" would provide additional federal fiscal and policy support for the expansion of opportunities to U.S. citizens. The ESEA outlined a clear federal role in education and doubled federal aid for public schools. The ESEA was designed as both a federal implementation and enforcement mechanism for providing equitable educational opportunities as well as desegregation incentives for Southern school districts, as de jure districts were barred from funds. The *Brown* decision, coupled with the impact of the 1964 Civil Rights Act and the 1965 ESEA, placed the United States on a course toward sustaining its position as a global leader of opportunity and democracy.

JOHN H. JACKSON, *From Miracle to Movement: Mandating a National Opportunity to Learn*, in THE STATE OF BLACK AMERICA 2009: MESSAGE TO THE PRESIDENT 62 (Nat'l Urban League 2009). Additionally, although not referenced by Dr. Jackson, A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM, the 1983 presidential education commission report was also important in that it argued that the nation's schools were failing and called for fundamental reform. See SCOTT S. COWEN INST.

Elaine Witty and Rod Paige (former U.S. Secretary of Education), the modern day educational accountability reform movement began with President George H.W. Bush's 1991 Education Summit, with its policy recommendations later codified in President William J. Clinton's Improving America's Schools Act of 1994.¹⁸ Secretary Paige, the U.S. Secretary of Education under whom NCLB became law, provided the following assessment of NCLB's effect on the achievement gap: "The NCLB literally changed the culture of public education in the United States, and in concert with other factors, caused improvement primarily in math and to a lesser extent reading, especially for minority populations."¹⁹

B. THE CLASSIC POLITICAL QUESTION ABOUT MONEY IN EDUCATION REFORM: IS LESS MORE OR VICE VERSA?

While there are a variety of perspectives on the impact of government fiscal allocations on education reform, there are generally two broad camps: the "Increasers" and the "Changers." There are typically identifiable policy patterns between the two major political parties in the United States. Generally speaking, so-called "liberals" traditionally favor increased fiscal allocation to remedy educational deficiencies, and so-called "conservatives" often favor drastic change models.²⁰

Education reformers in the "Increaser" camp often "point to deficiencies in funding for school innovation, firmly believing that their programs would work if only they were adequately supported."²¹ Conversely, education reformers in the "Changer"

FOR PUB. EDUC. INITIATIVES AT TULANE UNIV., PUBLIC SCHOOL PERFORMANCE IN NEW ORLEANS: A SUPPLEMENT TO THE 2008 STATE OF PUBLIC EDUCATION IN NEW ORLEANS REPORT 5 (Jan. 2009) (internal citations omitted).

18. ROD PAIGE & ELAINE WITTY, *THE BLACK-WHITE ACHIEVEMENT GAP: WHY CLOSING IT IS THE GREATEST CIVIL RIGHTS ISSUE OF OUR TIME* 107 (Amacom 2010).

19. *Id.*

20. See STEINBERG, *supra* note 11, at 51–56; see also Matthew Ladner & Matthew Brouillette, *The Impact of Charter Schools and Public School Choice on Public School Districts in Wayne County, Michigan*, 45 HOW. L.J. 395 (2002) (internal citations omitted).

21. STEINBERG, *supra* note 11, at 54. By way of example, Chaka Fattah, an African-American Democratic member of the House of Representatives, supports this argument. In addressing NCLB, Fattah opined that

No Child Left Behind has left a critical piece of the student performance puzzle unaddressed. We should never use a child's lack of resources as justification for expecting less of them, we are foolish to ignore the gross inequity of resource distribution. It is as if we are teaching students . . . to swim in pools without water, then lamenting their inability to compete with Michael Phelps.

CHAKA FATTAH, *Needed: Equality in Education*, in *THE STATE OF BLACK AMERICA*

camp typically argue that more money will not facilitate education reform, similar to the following:

Resource-based reforms have attempted to improve schools. They include such measures as increased funding, new textbooks, wiring schools for internet access, renovating or updating school facilities, reducing class sizes (more teachers per pupil), and other measures that require greater financial expenditures. Scholars have studied the relationship between per-student spending and achievement tests scores since the publication of the Equality of Educational Opportunity (better known as the Coleman Report) in 1966. Coleman, a leading sociologist, concluded that factors such as per pupil spending and class size do not have a significant impact on student achievement scores. Yet, despite this and subsequent findings, many lawmakers and educators continue to believe that additional resources and funding will somehow eventually solve the problems within the educational system.

Economist Erik Hanushek and others have replicated Coleman's study and even extended it to international studies of student achievement. The finding of thirty-one years of research is clear: better education cannot be bought.²²

There is clearly much that can be said about the theoretical differences between the two camps, both presumably dedicated to educational reform.²³

2009: MESSAGE TO THE PRESIDENT 59 (Nat'l Urban League 2009). One can logically assume, therefore, that Congressman Fattah would be an "Increaser."

22. Ladner & Brouillette, *supra* note 20, at 400-01 (internal citations omitted).

23. In further support of the argument that increased spending does *not* necessarily correlate with increased student achievement, a federal district court judge in a school-desegregation case tried a "sky is the limit" solution. It did not work.

The Kansas City (Missouri) School District provides the perfect illustration of the inefficacy of increasing resources to improve academic and social outcomes. In 1985, a federal judge directed the district to devise a "money-is-no-object" education plan to improve the education of black students and encourage desegregation. Local and state tax payers were ordered to fund this experiment. As a result, Kansas City spent more money per pupil, on a cost-of-living adjusted basis, than any of the 280 largest school districts in the United States. The money bought fifteen new schools, an Olympic-sized swimming pool with an underwater viewing room, television and animation studios, a twenty-five-acre wildlife sanctuary, a zoo, a robotics lab, field trips to Mexico and Senegal, and higher teachers' salaries. The student-to-teacher ratio was the lowest of any major school district in the nation at thirteen to one. By the time the experiment ended in 1997, costs had mounted to nearly \$2 billion.

Yet, test scores did not rise. And there was less student integration than there

III. CONGRESSIONAL PRECURSORS TO NCLB

A. ELEMENTARY AND SECONDARY EDUCATION ACT OF 1965

The federal government planted the roots of NCLB almost fifty years ago. The Elementary and Secondary Education Act (ESEA) of 1965 was part of President Lyndon B. Johnson's "Great Society" known as the "War on Poverty."²⁴ ESEA's initial goal was to provide enhanced funding to help solve the problems facing economically disadvantaged children.²⁵ Over the next thirty years, ESEA poured hundreds of billions of dollars into public education.²⁶

ESEA delivers federal dollars to State Educational Agencies (SEAs),²⁷ which funnel money to local school boards (also known as Local Educational Agencies or LEAs) to supplement educational objectives. While ESEA provides a variety of resources for LEAs, they receive the bulk of support through Title

was before, rather than more.

Ladner & Brouillette, *supra* note 20, at 402; *see also* Goodman, *supra* note 5, at 379-80. Goodman, in discussing the failed Kansas City experiment, opined that "[t]his is an amazing outcome. According to academic studies, Kansas City could improve student achievement by just giving the children their bus fare and sending them to a school in the suburbs. Instead, the city spent \$2 billion and achieved nothing." *Id.*

24. 20 U.S.C. § 6301 (2002). The Elementary and Secondary Education Act of 1965 was originally enacted April 11, 1965. It underwent a series of minor revisions from 1965 through 1978. The Act was extensively revised and restated by the Education Amendments Act of Nov. 1, 1978, Pub. L. No. 95-561, 92 Stat. 2143. Subsequently, it was extensively revised and restated again in 1988 as the Augustus F. Hawkins–Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988, Pub. L. No. 100-297, 102 Stat. 130, and classified to 20 U.S.C. § 2701. It was extensively revised and restated again by the Improving America's Schools Act of Oct. 20, 1994, Pub. L. No. 103-382, 108 Stat. 3518, and classified to 20 U.S.C. § 6301. Finally, the Act underwent extensive amendments, renumbering, reorganization of subject matter, and expansion of provisions by Act of Jan. 8, 2002, Pub. L. No. 107-110, 115 Stat. 1425 (also called the No Child Left Behind Act of 2001).

25. Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, § 201, 79 Stat. 27-58, Declaration of Policy.

26. For the fiscal year 2010, Congress appropriated \$14.5 billion to Title I, Part A of the Elementary and Secondary Education Act of 1965 (ESEA). U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-258, ELEMENTARY AND EDUCATION ACT: POTENTIAL EFFECTS OF CHANGING COMPARABILITY REQUIREMENTS 1 (2011) *available at* <http://www.gao.gov/new.items/d11258.pdf>.

27. U.S. DEPT. OF EDUC., OFFICE OF THE UNDERSECRETARY, NO CHILD LEFT BEHIND: A DESK REFERENCE 20 (2002), *available at* <http://www2.ed.gov/admins/lead/account/nclbreference/index.html?src=rt> [hereinafter NCLB DESKTOP REFERENCE].

I funds.²⁸ The funds help offset the extra cost of educating disadvantaged students.²⁹ ESEA's reach has been tremendous; as many as ninety percent of public schools receive Title I funds.³⁰

Title I targets schools with high concentrations of low-income families.³¹ Federal funding is contingent upon eligible students failing to meet educational benchmarks. For the first fifteen years of its existence, Title I's goal was to ensure that economically disadvantaged children could perform at the basic level of achievement.³² The program failed to meet even that pedestrian goal.³³

B. IMPROVING AMERICA'S SCHOOLS ACT OF 1994

Though ESEA was renewed with revisions three times,³⁴ education officials began to question the benefit of the program. As early as 1988, federal officials began to challenge the efficacy of ESEA.³⁵ Under President William J. Clinton, Congress passed

28. Title I is the funding mechanism of ESEA. As the largest federal program funding elementary and secondary education, Congress allocates billions (more than \$14 billion in 2010) through Title I for additional instructional staff, professional development, extended-time programs, and other strategies for raising student achievement in high-poverty schools. NCLB DESKTOP REFERENCE, *supra* note 27, at 13.

29. Nick Lewin, *The No Child Left Behind Act of 2001: The Triumph of School Choice Over Racial Desegregation*, 12 GEO. J. ON POVERTY L. & POL'Y 95, 101 (2005) (citing John F. Jennings, *Title I: Its Legislative History and Promise*, in TITLE I: COMPENSATORY EDUCATION AT THE CROSSROADS (Geoffrey D. Borman et al. eds., 2001)).

30. *Id.* at 101-02; *see also* U.S. GEN. ACCOUNTING OFFICE, PUB. NO. HEHS-00-171, TITLE I PRESCHOOL EDUCATION: MORE CHILDREN SERVED, BUT GAUGING EFFECT ON SCHOOL READINESS DIFFICULT (2000).

31. *See* Pub. L. No. 89-10, *supra* note 25.

32. Amy Reichbach, *The Power Behind the Promise: Enforcing No Child Left Behind to Improve Education*, 45 B.C. L. REV. 667, 674 (2004). "Basic levels of achievement" are measured by the National Center for Education Statistics in the U.S. Department of Education. *Id.* The National Assessment of Educational Progress (NEAP), commonly referred to as "the nation's report card," provides a continuing assessment of academic growth among America's schoolchildren. LAMAR ALEXANDER & H. THOMAS JAMES, THE NATION'S REPORT CARD: IMPROVING THE ASSESSMENT OF STUDENT ACHIEVEMENT—REPORT OF THE STUDY GROUP; WITH A REVIEW OF THE REPORT BY A COMMITTEE OF THE NATIONAL ACADEMY OF EDUCATION (Cambridge, MA: Nat'l Acad. of Educ., 1987). Officials began measuring growth using a national assessment in 1968. *Id.*

33. *See* ALEXANDER & JAMES, *supra* note 32.

34. *See* 20 U.S.C. § 6301 (2002), *supra* note 24.

35. *See* Omnibus Trade & Competitiveness Act of 1988, Pub. L. No. 100-418, Title VI, 102 Stat. 1107.

the Improving America's Schools Act (IASA) of 1994.³⁶ The fundamental premise of the Act was that "all children can master challenging content and complex problem-solving skills . . . when expectations are high and all children are given the opportunity to learn challenging material."³⁷ Before IASA, LEAs could receive Title I funds under ESEA as long as they had enough eligible (i.e. poor) children in a system. IASA forced LEAs to develop plans to increase achievement in order to receive funding.³⁸ Success was measured at least annually through assessments and "any additional measures or indicators" that SEAs developed to track progress.³⁹ But students did not progress—after pouring hundreds of billions of dollars over more than 25 years, American students still lagged behind their foreign peers.⁴⁰ Education officials failed to narrow the achievement gap between rich and poor students.⁴¹

IV. NO CHILD LEFT BEHIND ACT OF 2001

In the face of the growing achievement gap, President George W. Bush signed NCLB into law.⁴² NCLB's "supply-side reform . . . aims to create a more effective supply of educational services through the pressures of accountability and institutional reform."⁴³ The NCLB blueprint for reform incorporated four features: (1) "stronger accountability for results"; (2) "greater flexibility for states, school districts[,] and schools in the use of federal funds"; (3) "more choices for parents of children from disadvantaged backgrounds"; and (4) "an emphasis on teaching methods that have been demonstrated to work."⁴⁴

36. Improving America's Schools Act of 1994, Pub. L. No. 103-382, 108 Stat. 3518. The Improving America's Schools Act followed the Goals 2000: Educate America Act, Pub. L. No. 103-227, 08 Stat. 125 (repealed 2002), which allocated funds for states and communities that developed standards for students. See Chinh Q. Le, *Looking to the Future: Legal and Policy Options for Racially Integrated Education in the South and the Nation*, 88 N.C. L. REV. 725 (2010).

37. Pub. L. No. 103-382.

38. *Id.*

39. *Id.* § 1116.

40. NCLB DESKTOP REFERENCE, *supra* note 27, at 9.

41. *Id.*

42. No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2002).

43. Craig Livermore & Michael Lewchuck, *Centralized Standards and Decentralized Competition: Suggested Revisions for No Child Left Behind to Create Greater Educational Responsiveness Toward Disempowered Minority Groups*, 33 SETON HALL LEGIS. J. 433, 457 (2009).

44. NCLB DESKTOP REFERENCE, *supra* note 27, at 9.

A. STRONGER ACCOUNTABILITY FOR STATE AND LOCAL EDUCATIONAL AGENCIES

NCLB mandates annual assessments in reading and math for students from third through eighth grade.⁴⁵ Under NCLB, SEAs are responsible for developing the test for students, and states may not receive federal funds under Title I unless they have implemented acceptable plans to measure growth.⁴⁶ States are also required to publicize and disseminate the results of testing before the beginning of the next school year.⁴⁷ These annual “report cards” allow parents to compare schools and make informed decisions about educational options.

B. FLEXIBILITY AND LOCAL CONTROL

NCLB also provides more flexibility for LEAs in the use of Title I funds. Prior to NCLB, Title I money was targeted specifically for disadvantaged students. LEAs were not allowed to reduce funding for disadvantaged children and then offset that reduction with Title I funds.⁴⁸ Under NCLB, LEAs have the authority to transfer up to fifty percent of federal funding to other approved programs without separate approval.⁴⁹ This flexibility, in theory, allows local schools to address their particular needs⁵⁰ to enhance educational opportunities.

C. ENHANCED PARENTAL CHOICE

The school “report cards” are designed to help parents make informed decisions about their children’s education. Parental choice allows parents to act on those informed decisions. Parents of children in under-performing schools are given a broader range of options. If a child’s school fails to meet standards for two years, the child’s parent(s) may choose to enroll the child in a higher performing school (including a charter school). Local school districts are required to provide transportation.⁵¹ Students attending schools that fail to meet standards for three

45. *Id.*

46. 20 U.S.C. § 6316(a)(1)(A) (2002).

47. 20 U.S.C. § 6316(a)(1)(C) (2002); 20 U.S.C. § 6316 (a)(2) (2002).

48. 20 U.S.C. § 6321(b) (2002).

49. NCLB DESKTOP REFERENCE, *supra* note 27, at 10. Approved programs under NCLB include Improving Teacher Quality State grants, Educational Technology, Innovative Programs, Safe and Drug Free Schools programs. *Id.*

50. *Id.* Schools may use the funds to improve things like hiring, teacher pay, or training. *Id.*

51. NCLB DESKTOP REFERENCE, *supra* note 27, at 10.

years may receive supplemental services like summer school, after school services, or tutoring.⁵²

D. EMPHASIS ON TEACHING METHODS

All teachers hired after NCLB and working in programs supported by Title I funds must be “highly qualified.”⁵³ NCLB funds may also be used to support “scientifically based” instruction in reading programs.⁵⁴ NCLB aims to improve the quality of education by providing opportunities for the professional development of teachers.⁵⁵ It also promotes “schoolwide reform” by ensuring access “to effective, scientifically based instructional strategies and challenging academic content.”⁵⁶

NCLB aimed to provide more choice for parents and students by relying on market forces to shape school improvement. The practical effect of NCLB on a national scale was much more complicated, due to differences in state systems and varying degrees of local school board control. To narrow the scope of the discussion, this Article focuses on NCLB’s effects in Louisiana.

V. LOUISIANA’S PUBLIC EDUCATION SYSTEM

In conducting an informal broad-based national survey to determine which state has adopted the most reform-oriented initiatives to change the education paradigm, the authors considered Minnesota, Michigan, Arizona, and Louisiana because of the proliferation of charter schools in those states since NCLB’s enactment.⁵⁷ Ultimately, the authors chose to focus on the

52. *Id.* at 10-11.

53. 20 U.S.C. § 6319(a)(1) (2002).

54. 20 U.S.C. § 6301(9) (2002). *See also* 20 U.S.C. § 6368 (2002), which requires “scientifically based reading research” for professional development and assessment.

55. 20 U.S.C. § 6301(10) (2002).

56. 20 U.S.C. § 6301(9) (2002).

57. The United States’ first charter schools opened in Minnesota in 1992, after action by the state’s legislature. *See* WALBERG, *supra* note 6. In following Minnesota’s lead, Michigan adopted charter school legislation in 1993. As evidence of the wide-spread popularity of charter schools, it has been documented that

[i]n 1993, Michigan Governor John Engler announced to a joint session of the state legislature that “public education is a monopoly, and monopolies don’t work.” With these words, he signaled his support for . . . charter schools and shortly thereafter, Michigan became the fourth state in the nation to pass a charter school law. Then in 1996, the governor and legislature passed “schools-of-choice” legislation, which gave parents and students a greater range of choices within the government school system. By 2000, nearly 50,000 students were attending over 170 charter schools across the state.

intricacies of Louisiana's public school system and its respective school districts for several reasons. In particular, Louisiana is a southern state with many segregated school districts, and its efforts to rebuild the Orleans Parish School System (OPSS) in the aftermath of Hurricane Katrina (Katrina)⁵⁸ have received national attention. Arguably, NCLB has a unique effect in Louisiana for at least two reasons. First, New Orleans and the OPSS are the subject of what has been deemed "the great experiment," because New Orleans is the first majority charter school city in the United States.⁵⁹ Second, because Louisiana has so many segregated school districts operating under federal district court supervision in ongoing desegregation litigation, school choice under NCLB is really at the discretion of the federal bench.⁶⁰

Ladner & Brouillette, *supra* note 20, at 395 (internal citations omitted). Arizona originally passed charter school legislation in 1994. Since then, it has been referred to as "the nation's most expansive charter school system." Frederick M. Hess & Robert Maranto, *Letting a Thousand Flowers (and Weeds) Bloom: The Charter Story in Arizona*, in *THE CHARTER SCHOOL LANDSCAPE* 54 (Sandra Vergari ed., 2002).

The Louisiana Charter School Law, LA. REV. STAT. ANN. § 17:3971 (2010), was initially passed by Act 192 of the 1995 legislative session, with an effective date of June 30, 1997. Now in Louisiana—specifically in New Orleans—more than half of the city's school children attend charter schools. "[T]he share of students attending charter schools in the city of New Orleans soared from 2 percent in 2004, to 57 percent in 2009, making New Orleans the city with the highest percentage of charter school students in the nation." INST. ON RACE & POVERTY AT THE U. OF MINN. L. SCH., *THE STATE OF PUBLIC SCHOOLS IN POST-KATRINA NEW ORLEANS: THE CHALLENGE OF CREATING EQUAL OPPORTUNITY* 25 (May 15, 2010) available at http://www.irpumn.org/uls/resources/projects/THE_STATE_OF_SCHOOLS_IN_NEW_ORLEANS.pdf (citing National Alliance for Public Charter Schools, 2009).

58. See, e.g., Danielle Holley-Walker, *The Accountability Cycle: The Recovery School District Act and New Orleans' Charter Schools*, 40 CONN. L. REV. 125 (2007); Nghana Lewis, *After Katrina: Poverty, Politics, and Performance in New Orleans Public Schools*, 11 LOY. J. PUB. INT. L. 285 (2010); see also Robert A. Garda, Jr., *The Politics of Education Reform: Lessons from New Orleans*, 40 J.L. & EDUC. 57 (2011).

59. See Holley-Walker, *supra* note 58, at 128 (citations omitted).

60. As of 2008, the predominantly black high school in Pointe Coupee Parish, Louisiana entered academically unacceptable status for the fourth consecutive year. Consequently, under NCLB, the students were entitled to attend another school. In rural Pointe Coupee Parish, however, there was only one other high school, predictably a predominately white school, located almost a forty-five minute drive from the predominately black school. Additionally, under Louisiana state law, the failed predominately black school was to be transferred to the Recovery School District. See LA. REV. STAT. ANN. § 17:10.5(A)(1) (2010) (describing the obligation to transfer the failed school to the Recovery School District using the mandatory language "shall" opposed to the discretionary language "may"). Consequently, in what the authors believe to be first-of-its kind litigation in the United States, in April 2008, pursuant to Rule 24 of the Federal Rules of Civil Procedure, the Louisiana Department of Education and state Board of Elementary and Secondary

As a foundational matter, the reader has already seen anecdotal as well as empirical data supporting the proposition that NCLB was motivated by a desire to remedy racial issues in education.⁶¹ Indeed, the United States has a sordid history on the subject of race,⁶² as does Louisiana, a state in the Deep South.⁶³ Before addressing the sensitive issues of race in education in Louisiana, it is necessary to identify the structural components of Louisiana's public educational system and explain how those components function and interact. With this foundation, the reader can then examine the intersection of race and education in Louisiana.

A. AN OVERVIEW OF THE GENERAL LEGAL FRAMEWORK: WHO'S IN CHARGE OF PUBLIC EDUCATION IN LOUISIANA?

The Constitution of the State of Louisiana vests the Louisiana legislature with the responsibility of establishing and maintaining a public education system to provide for the education of the people of Louisiana.⁶⁴ It also created the office of the superintendent of education, within the Louisiana Department of Education (the Department) and the state's governing education board, the Louisiana Board of Elementary

Education (hereinafter "the State") moved U.S. District Court Judge James J. Brady of the Middle District of Louisiana for status as intervenors—seeking intervention as a matter of right and alternatively, permissive intervention—in *Boyd v. Pointe Coupee Parish School Bd.*, 569 F. Supp. 501 (M.D. La. 1983) such that the state could takeover operation of the failed black high school. Although counsel's arguments, made against wide-spread opposition, were ultimately successful, it became glaringly evident that NCLB as currently constituted does not give the State or policy makers the authority to either provide choice or takeover operational control of a failed school. Consequently, in Section VIII *infra*, where the authors make policy recommendation, they suggest that, at a minimum, NCLB should be amended.

61. See generally, PAIGE & WITTY, *supra* note 18.

62. See, e.g., A. LEON HIGGINBOTHAM, JR., *IN THE MATTER OF COLOR: RACE & THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD* (Oxford Univ. Press 1978).

63. See generally, Jonathan C. Augustine & Hon. U. Gene Thibodeaux, *Forty Years Later: Chronicling the Voting Rights Act of 1965 and Its Impact on Louisiana's Judiciary*, 66 LA. L. REV. 453, 478-80 (2006) (discussing some of Louisiana's racial problems in voting and litigious matters wherein African-Americans sought judicial redress to making Equal Protection Clause challenges to problems dealing with race); see also Jonathan C. Augustine, *Rethinking Shaw v. Reno, the Supreme Court's Benign Race-Related Jurisprudence and Louisiana's Recent Reapportionment: the Argument for Intermediate Scrutiny in Racial Gerrymandering According to the Voting Rights Act*, 29 S.U. L. REV. 151 (2002) (discussing the problem of race in Louisiana such that the Voting Rights Act remains a necessity to ensure fair and equitable elections).

64. LA CONST. art. VIII, § 1.

and Secondary Education (BESE),⁶⁵ which serves as an administrative and policy-making body. The Louisiana Revised Statutes also devotes an entire title to education-related laws.⁶⁶

The Louisiana legislature created the Department and empowered the superintendent to create divisions within the Department to assist the superintendent in the performance of his or her constitutional duties.⁶⁷ The Department's respective divisions include, but are not limited to, the following:

- (1) Executive office of the superintendent;
- (2) Office of Management and Finance;
- (3) Office of Student and School Performance;
- (4) Office of School and Community Support;
- (5) the Special School District; and
- (6) the Recovery School District.⁶⁸

B. IDENTIFYING THE PLAYERS: WHO ARE THE STAKEHOLDERS WITHIN LOUISIANA'S EDUCATIONAL FRAMEWORK?

The organization of Louisiana's public educational system creates several stakeholders. Stakeholder groups are often pitted against one another, particularly in litigious matters, when there is an attempt to implement NCLB's reform measures and change the status quo. The three major stakeholder groups in the system are the local school boards, the state, and the teachers. At the local level, public education in Louisiana is governed by elected school boards, who collectively form the membership of the Louisiana School Boards Association (LSBA). However, when individual schools or entire local school districts fail, much of the local boards' authority is assumed by the state, i.e., BESE and the Department. Notwithstanding the local school board's involvement in the day-to-day operation of public schools, BESE and the Department have express responsibility for providing educational opportunities to Louisiana citizens.⁶⁹ Teachers

65. See LA. CONST., art. VIII, §§ 2, 3.

66. See generally, LA. REV. STAT. ANN. § 17:1 (2001).

67. See LA. REV. STAT. ANN. § 17:24 (2001).

68. See EDUCATION'S NEXT HORIZON, EDUCATION BRIEFING BOOK: A PRIMER FOR POLICYMAKERS ON LOUISIANA K-12 EDUCATION 33 (March 2008) [hereinafter EDUCATION BRIEFING BOOK].

69. See generally, LA. CONST. art. VIII, § 1.

protected by the Louisiana Teachers Tenure Act (TTA)⁷⁰ or their representatives, often in the form of teachers' unions, form the third stakeholder group.⁷¹

1. THE LOCAL PLAYERS: LOCAL SCHOOL BOARDS AND SUPERINTENDENTS

At the local level, elementary and secondary education in Louisiana is governed by school boards in each of the sixty-four parishes.⁷² Generally, each parish has one school district; however, exceptions to the general rule of one school district per parish include Baker, Bogalusa, and Monroe, as well as the Zachary⁷³ and Central Community School Districts.⁷⁴ Local school boards may vary in size from five to fifteen members.⁷⁵ Thus, statewide, there are sixty-nine school districts consisting of a total of six hundred and fifty-five school board members.⁷⁶

Under the Louisiana constitution, only local school boards have the power to tax: "Each parish school board . . . shall levy annually an ad valorem maintenance tax not to exceed five mills on the dollar of assessed valuation on property subject to such taxation within the parish . . ." ⁷⁷ Additionally, local school boards are also authorized to levy specific purpose property taxes with the approval of local voters. These property taxes must be limited to an aggregate of seventy mills on the net taxable property for school operations, excluding debt service. Furthermore, local sales taxes may comprise the other major source of local revenue for school districts, with the caveat that revenue from local sales taxes must be limited to three percent.

In addition to their taxing authority, local boards have local policy making authority⁷⁸ and the authority to hire or fire their

70. LA. REV. STAT. ANN. § 17:441-446 (2001).

71. While there are several teacher unions, or professional teacher organizations, in Louisiana, the state's largest groups are the Louisiana Federation of Teachers (<http://la.aft.org>), an affiliate of the American Federation of Teachers, and the Louisiana Association of Educators (<http://www.lae.org>), an affiliate of the National Education Association. Many members of said organizations received tenure under the TTA.

72. LA. REV. STAT. ANN. § 17:51 (2001).

73. § 17:64 (2001).

74. § 17:66 (2010).

75. See EDUCATION BRIEFING BOOK, *supra* note 68, at 34.

76. *Id.*

77. LA. CONST. art. VIII, § 13(C).

78. See generally, LA. REV. STAT. ANN. § 17:81 (2010).

local superintendent. Outside of an official meeting, school board members do not have any more authority over the school system than any other citizen.⁷⁹ The superintendent manages the day-to-day operations of the local school district and carries out the board members' operational policy-making authority.

Members of local school boards are elected in accordance with the Louisiana Election Code, Title 18 of the Louisiana Revised Statutes.⁸⁰ To be eligible for membership on a local school board, an individual must be literate.⁸¹ Any person who seeks membership on a local school board must have attained eighteen years of age, must have resided in the state for the preceding two years, and must have actually been domiciled in the district from which he or she seeks election for the preceding year.⁸²

2. THE STATE PLAYERS:

a. Board of Elementary & Secondary Education

BESE's creation is recognized in both the Louisiana Revised Statutes and the Louisiana constitution. By constitutional authority, BESE is responsible for the supervision and control of the public elementary and secondary schools, vocation-technical training, and special schools under its jurisdiction. As a consequence of this role, BESE has "budgetary responsibility for all funds appropriated or allocated by the state for those schools, all as provided by law."⁸³ BESE's duties and responsibilities include budgetary control over all education dollars in Louisiana. It is required to adopt a Minimum Foundation Program (MFP) for the equitable allocation of MFP funds to parish and city school systems.⁸⁴ With respect to BESE's membership, the board is

79. See, e.g., Charles Lussier, *Attorney Addresses Board Management*, THE ADVOCATE, May 7, 2010, at B2.

80. LA. REV. STAT. ANN. § 17:52(C) (2001).

81. *Id.* § 17:52(D) (2001).

82. LA. REV. STAT. ANN. § 17:52(E)(1) (2001); see also *Johnson v. Augustine*, 06-1690, p. 6-7 (La. App. 1 Cir. 8/29/06); 943 So. 2d 466, 470.

83. LA. CONST. art. VIII, § 3(A).

84. LA. REV. STAT. ANN. § 17:7(2)(a). Louisiana's MFP is the primary vehicle for the funding of public education. LA. CONST. art. VIII, § 13(B). The MFP must be adopted by BESE and approved by the legislature. *Id.* It determines the cost of the minimum foundation program of education in all public elementary and secondary schools and helps to allocate the fund equitably on a per pupil basis to local school districts, the Recovery School District (RSD), as well as to the Southern and LSU Laboratory Schools. *Id.* Funding through the MFP is in the form of a block grant

composed of eleven members, three of whom are appointed by the governor, with consent of the senate. All eleven members serve a term of four years.⁸⁵

b. The Newest Player: Recovery School District

In response to NCLB's passage and enactment in 2001, the Louisiana legislature passed Act 9 during its 2003 legislative session, which created the Recovery School District (RSD) and made it a new division of the Department.⁸⁶ Pursuant to Act 9, the RSD is legally empowered to take over and operate failed public schools after a BESE vote, and to control and expend the LSD's share of its state and local MFP dollars. However, while the RSD is empowered to administer state and local funds, state law prohibits the RSD from levying taxes: "[It has] no authority to levy a tax, but which shall include authority to seek, expend, manage, and retain funding with all the same authority of any . . . other local public school board"⁸⁷

VI. DYNAMICS BETWEEN VARIOUS STAKEHOLDERS AFTER SCHOOL AND SCHOOL DISTRICT "FAILURE"

A. INDIVIDUAL SCHOOL TAKEOVER

Once a local school is deemed academically unacceptable for a period of four consecutive years, "the school *shall be removed* from the jurisdiction of the local school board . . . and transferred to the jurisdiction of the Recovery School District"⁸⁸ Although the RSD is empowered to take over operational control of failed schools within a district, the LSD retains ownership of the facilities as well as the responsibility for capital maintenance.⁸⁹ Act 9 also created the Type 5 charter school model whereby the state contracts with a non-profit group, which

from the state to the local school district. *Id.* Consequently, school districts are afforded the maximum flexibility possible to spend the funds as they deem appropriate, while satisfying all mandated program requirements. Funds within the MFP are not earmarked for special purposes. However, they are intended, in combination with other funds, to provide for the fiscal operation of school systems. On average, Louisiana's instructional expenditures are nearly 70% of MFP dollars, with 24% being used for non-instructional services and 6% for facilities and construction. *See generally* EDUCATION BRIEFING BOOK, *supra* note 68, at 36-47.

85. LA. CONST. art. VIII, § 3(B); *see also* LA. REV. STAT. ANN. § 17:7(2)(b) (2011).

86. *See* LA. REV. STAT. § 17:1990 (2010).

87. *Id.* § 17:1990(B)(1)(a).

88. LA. REV. STAT. § 17:10.5(A)(1) (2011) (emphasis added).

89. *See id.*

assumes day-to-day responsibility for managing that RSD.⁹⁰ According to statute, Type 5 charter schools are preexisting public schools transferred to the RSD after a state takeover, which are required to maintain open admission policies.⁹¹ Charter schools are operated pursuant to a charter between a non-profit organization and BESE or another public entity.⁹²

B. SCHOOL DISTRICT TAKEOVER

In addition to individual schools, the Louisiana legislature has authorized the state-run RSD to assume control of entire school districts if they are deemed to be academically unacceptable or “districts in crisis.”⁹³ In the wake of Katrina, the OPSS was deemed a “district in crisis,” and 107 of the 116 public schools in New Orleans were subject to state takeover. In chronicling this sequence, Professor Holley-Walker wrote as follows:

On August 29, 2005, Hurricane Katrina began its devastation of the city of New Orleans and eventually became the worst natural disaster in United States history. In the wake of the storm, the New Orleans schools were in disarray—students and teachers dislocated, buildings damaged, and the school district administration disorganized and scattered throughout the United States. Ultimately, the Orleans Parish school board issued public statements that it would

90. Under Louisiana law, there are five types of charter schools. *See generally* LA. REV. STAT. § 17:3973(2)(b) (2001). Specifically, Type 1 charters are new start-up schools, chartered with the local school board; Type 2 charters are either new start-up or conversions, authorized by BESE; Type 3 are conversions chartered with the local school board; Type 4 are new start-up or conversion schools, chartered with BESE; and Type 5, as detailed *infra* note 91, are preexisting schools transferred to the RSD. *Id.*

91. *Id.* § 17:3973(2)(b)(v)(aa). “Type 5, which means a preexisting public school transferred to the recovery School District pursuant to R.S. 17:10.5 or 10.7.” *Id.* As has been noted, “[l]ike all charter schools, Type 5 charter schools are run by independent school operators and have significant autonomy, including the ability to determine the school budget, independently hire teachers and administrators, determine staff salaries, and develop curriculum.” Holley-Walker, *supra* note 58, at 139; *see also* Wendy Parker, *The Color Choice: Race and Charter Schools*, 75 TUL. L. REV. 563, 577-80 (2001).

92. *See* LA. REV. STAT. § 17:3973(2)(b)(v)(aa).

93. *See id.* §§ 17:10.6, 10.7. In 1989, New Jersey became the first state to take over a local school district. Joseph O. Oluwole & Preston C. Greene, III, *State Takeovers of School Districts: Race and the Equal Protection Clause*, 42 IND. L. REV. 343, 343 (2009) (internal citations omitted). That year alone, Kentucky, New Mexico, South Carolina, Texas, and West Virginia also enacted district takeover laws. *Id.* By 2004, twenty-nine different states had followed suit. *Id.*

not be able to reopen the New Orleans public schools that school year.

Due to these circumstances, Governor Kathleen Blanco determined that in order to reopen New Orleans' public schools in the 2005-2006 school year, the state would have to fill the gap left by the local school board. In order to provide the state with the necessary authority to oversee the local schools, a November 2005 special session of the Louisiana legislature expanded the definition of a "failed" school under the Recovery School District Act. Previously a "failed" school under the RSDA was a school that was deemed "academically unacceptable" for four consecutive years. Once a school had "failed," it would be placed under the auspices of the RSD, to be administered and controlled by the state instead of the local school board. In the November 2005 special session, the legislature expanded the definition of "failed" school to include all schools that scored below the state average and that were operated in school systems designated as being in "Academic Crisis." Based on this new definition, 107 schools previously organized in the Orleans Parish School District were transferred to the control of the RSD.⁹⁴

This drastic reform measure in New Orleans was also the focus of *res nova* litigation in Louisiana's state courts.⁹⁵

C. CHARTER SCHOOLS: AGENTS OF REFORM AND NATURAL CONSEQUENCES OF SCHOOL AND DISTRICT TAKEOVERS

The increasing prevalence of charter schools is a statewide phenomenon in Louisiana. In January 2009, BESE accepted the recommendation of Louisiana Superintendent of Education Paul Pastorek and voted to take over several schools and transfer them

94. Holley-Walker, *supra* note 58, at 135-36 (internal citations omitted).

95. As an additional nuance in New Orleans, the OPSS, which is not party to ongoing desegregation litigation whereby operational control of the local schools rests with the federal district court, was one of Louisiana's few school districts that was the subject of a long-standing collective bargaining agreement (CBA). Consequently, the contractual obligations associated with the CBA and the state, acting through the legislature, obviously affected the CBA's private party contractual obligations through its legislation; thus, litigation was filed arguing the state violated the Contracts Clauses of the United States and Louisiana Constitutions by passing legislation that impaired a private party's right to contract. *See, United Teachers of New Orleans, et. al. v. State Bd. of Elementary & Secondary Educ.*, 07-0031 (La. App. 1 Cir. 3/26/08); 985 So. 2d 184. The constitutional challenge that was the subject of the litigation was ultimately unsuccessful. *Id.* at 199.

to the RSD.⁹⁶ In East Baton Rouge Parish alone, BESE voted to assume operational control of eight out of twelve eligible schools.⁹⁷ Shortly thereafter, the superintendent announced his plans to issue Type 5 charters to non-profit entities for the day-to-day management and operation of the schools.⁹⁸

Prior to Katrina, the OPSS was the worst performing school district in the state.⁹⁹ It was in severe financial disarray and was

96. See generally, LA. REV. STAT. § 17:10.5 (2003); see also Will Sentell, *BESE Votes to Takeover Eight Failing EBR Schools*, THE ADVOCATE, January 15, 2009, at A1.

97. *Id.* Moreover, the anticipated transfer of the failed schools to the RSD was the subject of much public controversy. See Charles Lussier, *Board Considers Lawsuit to Stop, Limit Takeovers*, THE ADVOCATE, Jan. 16, 2009, at A1. Ultimately, a class of parents in East Baton Rouge Parish filed suit to prevent the scheduled takeover. Charles Lussier, *Parents Sue Over Schools: Plaintiffs Claim EBR Takeover Violates State Law*, THE ADVOCATE, Feb. 17, 2009, at A1. *Triplett v. Bd. of Elementary and Secondary Educ. (Triplett I)* sought to enjoin the anticipated transfer because the BESE, the RSD, or both had not established “alternative schools” for students with disciplinary issues, as required by LA. REV. STAT. ANN. § 17:416.2, such that children who were either suspended or expelled from an RSD-operated school in East Baton Rouge Parish could attend an alternative school rather than be subject to violating truancy laws. *Triplett v. Bd. of Elementary and Secondary Educ. (Triplett I)*, 09-0691 (La. App. 1 Cir. 7/13/09), 21 So. 3d 401. Because of the litigation’s racial and political overtones, the plaintiffs were joined as amicus curiae by the Baton Rouge branch of the National Association for the Advancement of Colored People, former Louisiana House Speaker Pro Tempore Joseph A. Delphit, and the Louisiana Black Leadership Assembly, as well as the Louisiana Association of Educators and East Baton Rouge Federation of Teachers. Ultimately, the plaintiffs’ claim was unsuccessful, 21 So. 3d at 413, as was a subsequent attempt to nullify the courts’ original ruling. *Triplett v. Bd. of Elementary and Secondary Educ. (Triplett II)*, 09-1554 (La. App. 1 Cir. 5/7/10); 39 So. 3d 750.

98. As previously referenced, the Louisiana legislature passed Act 9 in 2003 to create the RSD as an intermediate educational unit within the Department. See *supra* note 90 and accompanying text. The legislation provides for the local school system from which the school was transferred to maintain the responsibility of capital maintenance and improvements for the school facility. LA. REV. STAT. ANN. § 17:1990(4)(a) (2011). Act 9 also created a model for a Type 5 charter school, a model that allows BESE to enter into agreements with non-profit organizations on the management of individual schools. See *supra* note 90 and accompanying text. The Type 5 charter is directly related to NCLB and Louisiana’s complementary choice provisions in that the so-called failed public school is “taken-over,” and transferred into the RSD with the expectation a charter will be issued to a non-profit for the day-to-day operation, management and rehabilitation of the failed school. *Id.* The National Association of Charter School Authorizers (NACSA) typically plays a certifying role in the process. See, e.g., NATIONAL ASSOCIATION OF CHARTER SCHOOL AUTHORIZERS, <http://qualitycharters.org> (last visited Sept. 20, 2011).

99. EDUCATION BRIEFING BOOK, *supra* note 68, at 106-07; see also Cindy Chang, *Katrina Reurites the Book on Education in New Orleans*, TIMES-PICAYUNE, Aug. 26, 2010, available at http://www.nola.com/katrina/index.ssf/2010/08/hurricane_katrina_swept_away_y.ht

subject to a federal investigation for widespread fraud and corruption.¹⁰⁰ After the takeover by the RSD and the influx of charter schools, New Orleans now has the largest percentage of charter schools and the largest percentage of public school students attending charter schools of any district in the nation.¹⁰¹ It is apparent that public school transformation in New Orleans,¹⁰² indeed across the entire state of Louisiana, will be facilitated by the charter school movement only if these new charters develop into great schools for at-risk children.¹⁰³

To further expand charters, specifically charter education in Louisiana, the schools—whether start-up or takeover—must have stable and secure funding. In the common parlance of lawmakers, charters need a dedicated revenue stream. The state legislature has obviously created a mechanism for funding Type 5 charter schools in that the funds previously administered by the local school district are diverted to the RSD. Outside of the RSD, however, other charter schools are in a much less stable position. Consequently, in the era of reform, although “more money” may not necessarily correlate to better results,¹⁰⁴ “some money” is clearly essential. Plain and simple, developing more charter schools in the future depends on stable funding sources like inclusion in the MFP.

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100. EDUCATION BRIEFING BOOK, *supra* note 68, at 107.

101. Holley-Walker, *supra* note 58, at 137 (internal citations omitted).

102. In New Orleans, local universities have been engaged in the charter school reform process. “The University of New Orleans (UNO) and Southern University at New Orleans (SUNO) operate charter schools. Xavier [University] is creating a [m]ath and [s]cience professional development center. Tulane University opened the Scott Cowen Institute to support charter schools.” EDUCATION BRIEFING BOOK, *supra* note 68, at 109. New Orleans’s new educational paradigm, therefore, is presumably focused on at least two of the three legs depicted in the Three-Legged Education Stool.

103. See generally, Cindy Chang, *New Orleans Public Schools Assessment 5 Years After Hurricane Katrina*, TIMES-PICAYUNE, July 30, 2010, available at http://www.nola.com/education/index.ssf/2010/07/new_orleans_public_schools_ass.html; see also Joseph O. Oluwole & Preston C. Green, III, *Charter Schools Under the NCLB: Choice and Equal Educational Opportunity*, 22 ST. JOHN’S J. LEGAL COMMENT. 165, 177-78 (2007) (internal citations omitted).

104. See *supra* note 23 and accompanying text.

VII. OBSTACLES TO EDUCATION REFORM IN LOUISIANA

A. ANALYZING THE SITUATION AND IDENTIFYING THE PROBLEMS

Over the last decade, Louisiana has arguably made great strides in education reform.¹⁰⁵ The state can boast of nationally recognized accountability and teacher quality efforts.¹⁰⁶ Louisiana also ranks among national leaders in education technology efforts and early childhood education initiatives.¹⁰⁷ Moreover, a significant area of the “improvement” reported in Louisiana has been the state’s increased school funding.¹⁰⁸

In spite of Louisiana’s improvement in those areas, the state is still ranked near the bottom nationally in school climate and results-based education.¹⁰⁹ Louisiana’s ongoing efforts to improve public education are undermined by a backdrop of natural catastrophes,¹¹⁰ poverty, desegregation cases where school districts have failed to meet unitary standards, and the politics of teacher-tenure laws that prevent merit-based selection in local school districts. These are clearly long-term problems that require sustained long-term solutions.

1. POVERTY AS A SIGNIFICANT CHALLENGE TO EDUCATION IN LOUISIANA

In describing Louisiana’s economic challenges, politicians often refer to the state as “land rich and cash poor.” The percentage of children living in poverty in Louisiana is higher

105. See, e.g., EDUCATION BRIEFING BOOK, *supra* note 68, at 27 (citing a 2008 report from EDUCATION WEEK lauding Louisiana and the District of Columbia for efforts to improve teacher quality).

106. *Id.*

107. *Id.* at 19.

108. *Id.* at 16-17. An argument can be made, however, that a closer look presents the question of whether this so-called funding increase is actually a cause for celebration. For example, from 1999 to 2003, state and local funding for pre-K increased by \$709 million (18%). At the same time, however, enrollment decreased by 33,627 (5%). Consequently, per student funding rose by \$1,335 (23% factored with inflation, however, only a 9% increase). *Id.* at 28-29.

109. *Id.* at 9.

110. In addition to Katrina making land fall on August 29, 2005 and devastating the Greater New Orleans Metropolitan Area, Hurricane Rita made land fall on September 23, 2005 causing significant devastation in several of Louisiana’s southwestern parishes. Moreover, the state again made national news in April 2010 during the British Petroleum Deepwater Horizon explosion and oil spill.

than the percentage of children living in poverty in the nation.¹¹¹ More than two-thirds of Louisiana's public school students live in low-income households.¹¹² This phenomenon is most remarkable when considered in conjunction with the fact that Louisiana's K-12 enrollment has significantly dropped over the last several years and is predicted to continually do so, while the state's non-public school enrollment has traditionally been double the national average of ten percent.¹¹³ Not surprisingly, there is a higher concentration of black students in Louisiana's public schools, exacerbating the problem of racial poverty.¹¹⁴ This also presents a significant challenge within inherently segregated public school systems.

2. ONGOING DESEGREGATION LITIGATION AS A PROBLEM IN EDUCATION REFORM EFFORTS

Over fifty years after *Brown*,¹¹⁵ numerous school districts in Louisiana remain mired in ongoing school desegregation lawsuits that were originally filed in the 1950s and 1960s. According to a September 2007 report from the United States Commission on Civil Rights, forty-two schools districts in Louisiana have ongoing desegregation cases pending in federal courts.¹¹⁶ Desegregation cases present a significant obstacle to BESE and the Department as a whole as they seek to improve public education and expand charter schools, because desegregation cases are *not* about academic improvement. In accordance with *Brown v. Board of Education*,¹¹⁷ such cases are about achieving racial parity in school systems.¹¹⁸

111. EDUCATION BRIEFING BOOK, *supra* note 68, at 28.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Brown v. Bd. of Educ. (Brown I)*, 347 U.S. 483 (1954).

116. See UNITED STATES COMMISSION ON CIVIL RIGHTS, BECOMING LESS SEPARATE?: SCHOOL DESEGREGATION, JUSTICE DEPARTMENT ENFORCEMENT AND THE PURSUIT OF UNITARY STATUS 141-45 (2007), available at <http://www.law.umaryland.edu/marshall/usccr/documents/cr120079.pdf> [hereinafter CIVIL RIGHTS].

117. *Brown I*, 347 U.S. 483 (1954).

118. See, e.g., Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, in CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT 8 (Kimberlé Crenshaw et al. eds., New Press 1995) (discussing the foregoing as a perspective held by many advocates in the civil rights community); see also Kristi L. Bowman, *A New Strategy for Pursuing Racial and Ethnic Equality in Public Schools*, 1 DUKE F. FOR L. & SOC. CHANGE 47, 52 (2009) (internal citations omitted).

After the Supreme Court's ruling in *Brown*, that de jure segregation in public schools was an unconstitutional violation of the Equal Protection Clause of Amendment XIV, many states—especially those in the South—along with local school districts, ignored or actively resisted the Court's ruling. A decade after the landmark decision, few schools districts had taken any steps to implement any racial desegregation programs.¹¹⁹ Consequently, many litigants filed suit against their local school boards and school systems requesting that the federal courts enjoin de jure school segregation, or de facto school segregation. In Louisiana, where forty-two of the local school districts had not been declared unitary by the respective federal district courts, many litigants filed similar lawsuits seeking injunctions.¹²⁰

After *Brown*, many cases addressing alleged ambiguities in the Court's dictate to desegregate public schools worked their way up to the Supreme Court. Most notably, in *Green v. County School Board of New Kent County*¹²¹ the Supreme Court emphasized the respective district courts' responsibility to compel school districts to operate integrated schools.¹²² *Green* held that federal courts should monitor school systems until the vestiges of de jure segregation were eliminated and spurred widespread federal court supervision of school districts or school boards that were operating "dual" school systems.¹²³ Thus, under *Green* federal courts are required, to the extent practical, to evaluate every facet of school operation to ensure local school systems are making good faith efforts to transition from a dual system to one that is unitary in order to be released from federal court supervision.¹²⁴

Because the standard in *Green* did not provide a clear guideline as to when federal court supervision should end, in the early 1990s, the Supreme Court revisited its general standards for unitary status in two cases: *Board of Education of Oklahoma City Public Schools v. Dowell*¹²⁵ and *Freeman v. Pitts*.¹²⁶ In *Dowell*, the Court ruled that a declaration of unitary status is

119. CIVIL RIGHTS, *supra* note 116, at 5.

120. *Id.* at 141-45.

121. *Green v. Cnty. Sch. Bd. of New Kent Cnty.*, 391 U.S. 430 (1968).

122. *Id.* at 436-39 (discussing, *inter alia*, *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294).

123. *Id.*

124. *Green v. Cnty. Sch. Bd. of New Kent Cnty.*, 391 U.S. 430, 439 (1968).

125. *Bd. of Educ. of Okla. City Pub. Sch. v. Dowell*, 498 U.S. 237 (1991).

126. *Freeman v. Pitts*, 503 U.S. 467 (1992).

appropriate if a school district demonstrates that it has complied with a judicial desegregation order since it was entered and the vestiges of past discrimination are eliminated.¹²⁷ In *Freeman*, however, the Court expanded the scope of *Dowell* by holding that school districts do not need to achieve unitary status as to all aspects of school administration to obtain partial relief in those areas in which success has been achieved.¹²⁸ Together, *Dowell* and *Freeman* provide the most current roadmap for school districts that seek to achieve unitary status and regain control of their school systems.¹²⁹ However *Green* provided the basis for both decisions.¹³⁰

a An Analysis of *Green*

By the late 1960s, little had changed as a result of the Supreme Court's order to desegregate public schools "with all deliberate speed."¹³¹ In 1968, only a month after the assassination of Martin Luther King, Jr., the Court issued its decision in *Green*, thereby establishing specific standards by which desegregation efforts could be judged. In assessing whether a school district had eliminated the vestiges of de jure segregation, federal courts must, to the extent practical, look at every facet of school operations.¹³² In particular, the *Green* Court identified six factors that should be examined:

- (1) student assignment;
- (2) faculty assignment;
- (3) staff assignment;

127. *Dowell*, 498 U.S. at 249-50.

128. *Freeman*, 503 U.S. at 497-99.

129. According to a 2007 U.S. Department of Justice report, as recent as 2000, there were 430 open desegregation cases on the Department's "open list." See CIVIL RIGHTS, *supra* note 116, at 1 (citing U.S. Dep't of Justice, Civil Rights Division, Response to U.S. Commission on Civil Rights' Interrogatories and Document Requests 2 and 26 (May 17, 2007)). As of 2007, however, the number decreased to 266. See CIVIL RIGHTS, *supra* note 116.

130. CIVIL RIGHTS, *supra* note 116, at 7. The United States Department of Justice has played and continues to play a critical role in the enforcement of educational opportunities. The Department of Justice's Educational Opportunities Section, a component of the its Civil Rights Division, is charged with enforcing federal statutes that prohibit discrimination in public education and is authorized to initiate or intervene in desegregation lawsuits pursuant to Titles IV, VI, and IX of the Civil Rights Act of 1964. Pub. L. No. 88-352, 78 Stat. 241, (1964).

131. See *Brown II*, 349 U.S. at 301.

132. See *Green v. Cnty. Sch. Bd. of New Kent Cnty.*, 391 U.S. 430, 435 (1968).

- (4) transportation;
- (5) extracurricular activities; and
- (6) facilities.¹³³

Additionally, for the first time, the Supreme Court used the term “unitary” to describe a school system that had transitioned from a segregated, racially dual system, to a unitary, desegregated system.¹³⁴

b. Desegregation After *Green*

In the 1970s, after having ordered that desegregation should proceed without further delay, the Supreme Court’s rulings focused on how to implement *Green*.¹³⁵ Arguably, busing was and remains the most hotly contested measure of implementation promulgated by the Supreme Court in the decades after *Green*.

In *Freeman v. Pitts*,¹³⁶ the Supreme Court ruled that courts may incrementally remove judicial supervision in favor of local control.¹³⁷ In relevant part, the Court wrote that “[r]eturning schools to the control of local authorities at the earliest practicable date is essential to restore their true accountability in our governmental system.”¹³⁸ The Court also opined that the *Green* factors should not be a rigid framework and noted that courts may conduct an inquiry into the quality of education to determine whether other elements of the school system are in need of judicial supervision to ensure full compliance with the consent decree.¹³⁹ In other words, while very significant, the *Green* factors are not the only consideration in determining whether unitary, or partial unitary, status should be declared.

Most notably, the Court in *Freeman* set forth three primary

133. *Id.*

134. *Id.* at 435-36.

135. *See, e.g.*, *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971) (authorizing the use of busing); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (holding that inequalities in school funding do not deny equal protection); *see also* *Milliken v. Bradley II*, 433 U.S. 267 (1977) (holding that courts may order states to pay for compensatory and remedial programs for school children who have been subjected to segregation).

136. *Freeman v. Pitts*, 503 U.S. 467 (1992).

137. *Freeman v. Pitts*, 503 U.S. 467, 490 (1992). (citing *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 410 (1977)).

138. *Id.*

139. *Id.* at 492-93.

factors for judicial consideration in determining whether judicial supervision should be terminated:

- (1) whether there has been full and satisfactorily compliance with those aspects of the consent decree where supervision is to be withdrawn;
- (2) whether retention of judicial control is necessary to achieve compliance; and
- (3) whether the school district has demonstrated a good-faith commitment to the whole of the court's decree¹⁴⁰

The practical effect of a pending desegregation order is that federal regulations like NCLB are not applicable. Judges *may* allow local school districts to participate in reform efforts, but judicial oversight is a complicating circumstance that could ultimately rob local school districts or reform-oriented states, like Louisiana, of the opportunity to implement NCLB's reform model.¹⁴¹

3. THE PROBLEM OF POLITICS IN SCHOOL REFORM: LOUISIANA'S TEACHER-TENURE LAWS

Another potential obstacle to school reform efforts is the system's inability to make personnel changes unfettered by state human resource policies. The fundamental premise of teacher-tenure laws is that the United States Constitution requires that

140. *Id.* at 491.

141. *See, e.g., supra* note 60 and its discussion on *Boyd v. Pointe Coupee Parish School Board*, desegregation litigation still pending in the United States District Court for the Middle District of Louisiana. 569 F. Supp. 501 (M.D. La. 1983). Further, as an example of the inherent tension that may exist between local school districts and the Department/BESE, there is arguably financial incentive for local school districts to not seek unitary status. As Professor Bowman noted,

[A] declaration of unitary status is a mixed blessing for a school district wanting racial/ethnic diversity in its schools, for various reasons. First, a unitary district has significantly less access to funding for initiatives to equalize educational opportunity for children of different racial and ethnic groups than a district still under court supervision. Second, a unitary district wades into uncertain and potentially treacherous waters if it uses anything other than colorblind measures to address continuing (albeit *de facto*) racial/ethnic isolation in its schools. Third, although many school desegregation cases have been closed in recent years, public opinion suggests that racial and ethnic equality in public education is not the norm.

Bowman, *supra* note 117, at 51 (internal citations omitted); Monika L. Moore, Note, *Unclear Standards Create an Unclear Future: Developing a Better Definition of Unitary Status*, 112 YALE L.J. 311, 322-23 (2002); *see also* CIVIL RIGHTS, *supra* note 116, at 13 (internal citations omitted).

teachers receive procedural due process¹⁴² before they can be relieved of duty. This vested property right that the Constitution grants teachers can be a significant obstacle to making necessary personnel changes in failing schools or school districts.

The fundamental tenet of procedural due process and the protections it affords individuals are rooted in the Due Process Clause of the Fourteenth Amendment, which provides in relevant part that “no *state* shall deprive any person of life, liberty, or property without due process of law”¹⁴³ While the Department and BESE are obviously both considered “the state” because the Louisiana constitution authorizes the state legislature to create parish and city school boards,¹⁴⁴ local school districts are also considered creatures of the state for the purposes of constitutional Due Process protections.¹⁴⁵

The Teachers Tenure Act (TTA)¹⁴⁶ gives Louisiana public school system teachers tenure in office and arms them with a shield that protects them against discharge, suspension, or demotion for causes other than those provided by statute.¹⁴⁷ The law was originally intended to protect teachers from political pressure and arbitrary administrative decisions.¹⁴⁸ Under

142. There is a well-settled distinction between *substantive* due process, which deals with plain fairness, and *procedural* due process, which addresses the legal safeguards applied to the both the federal and state governments through the Due Process Clauses of the Fifth and Fourteenth Amendments, respectively. *See, e.g.*, ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 419-20 (Aspen Law & Bus. 1997). The materials herein deal exclusively with *procedural* due process, as applied to the states, through Amendment XIV to the United States Constitution.

143. U.S. CONST., amend. XIV (emphasis added).

144. *See generally*, LA. CONST. art. VIII, § 9; *see also*, Mary J. Riley, *The Effect of Present Laws Concerning Tenure and Certification Upon Proposed Programs to Create Incentives for Public School Teachers Toward Excellence*, 12 S.U. L. REV. 133, 141 (1986).

145. *Goss v. Lopez*, 419 U.S. 565, 574 (1975) (citing *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943) (“The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Board of Education not excepted.”); *see Rousselle v. Plaquemines Parish Sch. Bd.*, 93-1916 (La. 2/28/94); 633 So. 2d 1235, 1241 (citing *St. John the Baptist Parish Ass’n of Educators v. Brown*, 465 So. 2d 674 (La. 1985)); *see also Eiche v. Bd. of Elementary & Secondary Educ.*, 582 So. 2d 186 (La. 1991).

146. LA. REV. STAT. ANN. § 17:443 (2011). The law was originally enacted in 1922, and it was amended and reenacted by Acts 58 and 79 of 1936. *Id.*

147. *Reed v. Orleans Parish Sch. Bd.*, 21 So. 2d 895 (La. Ct. App. 1945).

148. *Rousselle v. Plaquemines Parish Sch. Bd.*, 93-1916 (La. 2/28/94); 633 So. 2d 1235, 1242 (citing *Andrews v. Union Parish Sch. Bd.*, 184 So. 574 (La. Ct. App. 1938), *aff’d*, 184 So. 552 (La. 1938); *Reed*, 21 So. 2d at 898; *see also Thorne v. Monroe City*

Louisiana's Teachers Tenure Act, each teacher serves a probationary term of three years, during which the teacher can be discharged without notice or a hearing.¹⁴⁹ After the three-year period, the teacher automatically becomes a permanent teacher.¹⁵⁰ The state can only remove a permanent teacher if it follows the statutory procedure and proves that the teacher is guilty of "willful neglect of duty, or incompetency or dishonesty," which is difficult to establish.¹⁵¹

For example, in *Jones v. Rapides Parish School Board*,¹⁵² the local board dismissed Donald Glenn Jones for showing an "R" rated movie to his junior high reading class. In the three years before showing the movie, administrators admonished Mr. Jones three times for keeping students in a classroom when they were scheduled to attend another class.¹⁵³ Supervisors gave him a "needs improvement" twice for his teaching performance. Officials also reprimanded him for failing to give students a single teacher-made test.¹⁵⁴ The school board did not, however, notify Mr. Jones that they might consider each of these infractions at his tenure hearing. Consequently, on appeal, the district court reversed Mr. Jones' termination and reinstated him

Sch. Bd., 542 So. 2d 490, 491-92 (La. 1989).

149. LA. REV. STAT. ANN. § 17:442 (2001).

150. *Id.*

151. In relevant part, Louisiana's TTA provides as follows:

A permanent teacher shall not be removed from office except upon written and signed charges of willful neglect of duty, or incompetency, or dishonesty, or of being a member of or contributing to any group, organization, movement, or corporation that is by law or injunction prohibited from operating in the state of Louisiana, and then only if found guilty after a hearing by the school board of the parish or city, as the case may be, which hearing may be private or public, at the option of the teacher. At least twenty days in advance of the date of the hearing, the superintendent with approval of the school board shall furnish the teacher with a copy of the written charges. Such statement of charges shall include a complete and detailed list of the specific reasons for such charges and shall include but not be limited to the following: date and place of alleged offense or offenses, names of individuals involved in or witnessing such offense or offenses, names of witnesses called or to be called to testify against the teacher at said hearing, and whether or not any such charges previously have been brought against the teacher. The teacher shall have the right to appear before the board with witnesses in his behalf and with counsel of his selection, all of whom shall be heard by the board at said hearing. For the purpose of conducting hearings hereunder, the board shall have the power to issue subpoenas to compel the attendance of all witnesses on behalf of the teacher. Nothing herein contained shall impair the right of appeal to a court of competent jurisdiction.

LA. REV. STAT. ANN. § 17:443(A) (2001).

152. *Jones v. Rapides Parish Sch. Bd.*, 634 So. 2d 1197 (La. Ct. App. 1993).

153. *Id.*

154. *Id.*

with back pay.¹⁵⁵ Arguably, therefore, the standard of “willful neglect of duty or incompetency or dishonesty” flies in the face of what any parent would want for an educator of their child.

VIII. ADVICE FROM COUNSEL: AFTER 10 YEARS WITH NCLB, WHERE DO WE GO FROM HERE?

As the preceding discussion demonstrates, educational reform under NCLB has been fraught with challenges in Louisiana. After ten years, it is time to address the shortcomings of the reform. The path to success does not involve cutting back on the provisions of NCLB. Instead, Congress should take more steps forward to enhance the effectiveness of the current reform agenda. In particular, Congress should make the following changes.

First, Congress should require state legislatures and local school districts to modify teacher-tenure laws as a condition for Title I funding. It is undisputed that teachers perform a vital service to society, and that the value of their experience should not be underestimated. However, like any other professional, teachers must go when they are ineffective, and that determination can be made on an empirical rather than political basis under NCLB. Federal law already protects older teachers from ageism. The burden should rest on the employee to show that his or her removal was unlawful, not on the school system to prove that the discharge was lawful. As Louisiana law indicates, the standard for removal is laughably high. Modifications that provide principals with more leeway to discharge ineffective teachers are a more sound educational approach.

Second, Congress should mandate a plan and method of regularly assessing the performance of board members and superintendents in developing better school environments. Teachers should not be the only parties subject to review under NCLB. Local school board members, superintendents, and central office administrators must be subject to the same “scientifically proven” methods for measuring success. Districts with failing schools, high dropout rates and low returns for taxpayer investments must also be subject to review. If the single greatest predictor of a child’s academic success is school environment,¹⁵⁶ NCLB must assess the performance of board

155. *Id.* at 1199.

156. Lewin, *supra* note 29, at 128.

members, superintendents, and central office administrators in developing better school environments.

Third, as a condition of receiving Title I funding, Congress should require that states provide local school boards with the tools to assess superintendent performance. States must identify the number of board members and the essential skills they must possess to maximize district performance. States must help local districts minimize administrative red tape and maximize administrator performance.

IX. CONCLUSION

The tripartite partnership is the best model for maximizing stakeholder involvement, and in a state like Louisiana, where charter schools appear to be at the center of a nationally observed experiment, it is arguably the only model that will lead to sustained success in achieving the clear and unequivocal aim of NCLB—closing the achievement gap. In order to reform public education in Louisiana and close the achievement gap, there must be a synergistic relationship between the local school district and individual school, students and parents, and local faith-based and business organizations. Making the proposed changes to NCLB will help further that process in Louisiana.

Local schools—whether traditional public schools or charter schools—as the education providers, need autonomy to make the changes that are necessary to increase student achievement. Moreover, the ongoing desegregation litigation demonstrates that education providers, including BESE and the Department, need express authority to intervene at schools operated by non-unitary school districts. It has been proven repeatedly that one size does not fit all in educating children; thus, local schools must be empowered with the autonomy to make the changes that will most benefit their students. Because this autonomy should include the ability to make personnel decisions, at a minimum, the Louisiana teacher-tenure laws must be revisited.

The second aim of the tripartite partnership is to encourage community engagement in education. Multiple “white papers” from any number of local chambers of commerce provide empirical data to support the proposition that it takes more than a village to raise a child. It takes business involvement, too. In order to encourage local business involvement with local schools—especially charter schools—the state legislature ought to offer tax incentives. If the charter movement is to grow in

Louisiana, it needs fertile soil. Legislative tax incentives would provide a natural link between local schools and local businesses and ensure that they each receive the support they need.

Finally, the proverbial “elephant in the room” is parental involvement. To ensure that all parents and care providers have the opportunity to be actively involved in the educational process, legislative action is absolutely necessary. During the 2009 Louisiana Legislative Session, Baton Rouge Senator Sharon Weston Broome sponsored Senate Bill 194 with the testimonial support of the then-leadership of the East Baton Rouge Parish School Board. The proposed legislation was to create tax incentives for employers who would allow employees, parents, and caretakers compensated time away from the workplace to participate in school-related activities. Although the matter received favorable consideration in committee, it did not survive on the floor of the legislature. More incentive measures to facilitate parental involvement are necessary to achieve the collaborative atmosphere that is conducive to sustained education reform. To be successful, school reform in Louisiana must be holistic, not isolated.