

COMMENT

UNTANGLING PUBLIC SCHOOL GOVERNANCE: A PROPOSAL TO END MEANINGLESS FEDERAL REFORM AND STREAMLINE CONTROL IN STATE EDUCATION AGENCIES

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*“School reform today is like a freight train, and I’m out on the tracks saying, ‘You’re going the wrong way!’”*¹

I. INTRODUCTION

Jane is a new teacher at John Adams High, and it is her first day of work. Although her students do not report to school until the following week, her schedule is full. First she must set up her classroom, then attend her first professional development session,

1. Sam Dillon, *Scholar’s School Reform U-Turn Shakes Up Debate*, N.Y. TIMES (March 2, 2010), <http://www.nytimes.com/2010/03/03/education/03ravitch.html?pagewanted=all> (quoting educational historian Diane Ravitch discussing her about-face concerning education reform).

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and finally, meet with her mentor teacher.

Excited to see her classroom, Jane arrived early. When she got inside, she saw a Smart Board, which was one of the hottest pieces of technology at the time. Jane went to the school office to search for the cables needed to make the board work. There, she discovered that they did not have the cables and that none of the boards actually work. As it turns out, the technology grant that the school used to purchase the boards had been depleted before they could provide training on the boards. Since no one knew what to do with the boards, the majority of the cables had been left lying around and were either lost or stolen. Even worse, upon returning to her classroom, Jane quickly found that her board was permanently mounted on top of the traditional chalkboard, leaving no space on which to write notes. As a result, Jane's only option was to write notes on sheets of bulletin board paper that she taped to the multi-thousand dollar piece of equipment.

Moving on to the next task of the day, Jane went to the professional development session. The session was entitled *Reading Rocks: Kids Who Read Succeed*. According to the presenter, this new program was built on the premise that music helps struggling readers improve their reading skills. The teachers were given stacks of handouts detailing the strategies that this reading program employs, which included "funky flute phonics" and "supersonic stress patterns." The teachers were told to take the information home to learn about this program over the next week, and that starting Monday, the first day of school, all teachers must implement this program in their classrooms for at least twenty minutes per day. Jane asked if this applied to all teachers because, after all, she was a French teacher, and her class was only fifty minutes long to begin with. The principal intervened and reiterated that *all* teachers, regardless of their subject matter, were required to use this program because the school's reading scores were low, and if the scores were not raised this year, the school would be subject to federal sanctions.

Finally, the day was coming to a close, and the spunk that Jane felt that morning was waning. Before she could leave school, however, Jane went to her meeting with her assigned mentor, Ms. Smith the Spanish teacher. Jane expressed her concern about *Reading Rocks* to Ms. Smith—specifically how she was concerned that, with twenty minutes of reading and only thirty minutes of French, she would never make progress in her

subject matter, and that she was not qualified to teach reading. Ms. Bardelfino replied, “Look, Jane, you’re new, so I’ll explain how it goes. *Reading Rocks* is one of the new, federally backed reforms that we needed to adopt to get funding. There were fifty like it before, and there will be fifty more in the future. It is a phase, and it will not last past October. So, for the first month of school, pass out the sample worksheets that they gave you, play the CD, and keep records that you implemented the program sufficiently. Before you know it, they will have moved on to something else, and *Reading Rocks* won’t be your problem anymore.”

Unfortunately, this story is not an exaggeration of the realities of public education today.² “In spite of a national penchant for ‘tinkering toward utopia,’ . . . ceaseless efforts to improve schools have yielded uneven and unpredictable results.”³

This Comment attempts to unravel the cause of this perpetual struggle and proposes a starting point for meaningful reform.

Education is a vital part of society, affecting every person in America in some way; therefore, interest in education has always been high. From the founding of public education, leaders struggled over how schools should function.⁴ As a result, school governance was frequently reconfigured, and the authority to control schools was incrementally centralized into larger and larger governing bodies.⁵ As time passed, the federal government, although it always played at least a limited role in education, became more and more influential.⁶ With the passage of the Elementary and Secondary Education Act in 1965, the floodgates burst, and the federal government entered the arena of education reform with unprecedented force.⁷

2. Direct quotations have been paraphrased. Although *Reading Rocks* does not exist, and the author concedes that all of these events did not transpire in one day, all of the events in the introduction are based on actual experiences of public high school teachers.

3. Thomas B. Timar, *The Institutional Role of State Education Departments: A Historical Perspective*, 105 AM. J. EDUC. 231, 233 (1997).

4. See *infra* Section II(A).

5. See *infra* Sections II(B)–II(E).

6. See *infra* Section II(C)–II(D).

7. See *infra* Section II(D).

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The stream of federal involvement has continued ever since. Reforming the United States' public education system has become one of the nation's most enduring hot topics. Presidents Clinton, G.W. Bush, and Obama have championed reform, often gaining significant political momentum from their education platforms.⁸ Unfortunately, due to education reform's "celebrity status," the flashiness of proposed reforms often outweighs their actual capacity to effect change. James E. Ryan offered this reflection:

[E]ducation reform is notoriously beset by fads Most often, because the reforms (predictably) fail to produce significant and uncontested improvements in a short period of time, politicians and the public lose interest, especially if another new reform is dangled in front of them, promising the impossible. Demonstrating again the perpetual triumph of hope over experience, politicians and the public often discard the "failed" reform and rush to embrace the new one.⁹

Thus, since the mid-twentieth century, the federal government has tossed reform after reform at schools.¹⁰ When their efforts do not work after a short period of time, officials become frustrated or crack under societal pressures and try something new.¹¹

The result of this method is dismal. Reforms are not researched before they are implemented, nor are they given time to succeed.¹² Federal reforms create policies, but do not provide for implementation.¹³ Compounding this implementation problem is the fact that educators often lack the interest or the capability to implement the utopic policies that they had no role in developing.¹⁴ Because federal reforms are often insufficient, local and state governments also implement reforms, which results in layers of rules and reforms that have been stacked one

8. See Nick Anderson, *Clinton Details Education Reform Plan*, L.A. TIMES (May 20, 1999), <http://articles.latimes.com/1999/may/20/news/mn-39105>; Erik W. Robelen, *'No Child' Law Remains at Top of Bush Record*, EDUCATION WEEK (2004), <http://www.edweek.org/ew/articles/2004/09/29/05bush.h24.html>.

9. James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U. L. REV. 932, 985 (2004).

10. See Appendix A.

11. Ryan, *supra* note 9, at 985.

12. *Infra* Section III(B)(1)(a).

13. *Infra* Section III(B)(1)(b).

14. *Infra* Section III(B)(1)(b)(i).

on top of the other, often in conflict with each other.¹⁵ The result is “a vastly complex enterprise, shaped by many forces, such as state legislatures, governors, chief state school officers, multiple levels of bureaucracy, various levels of government, the courts, public and private-interest groups, textbook publishers, testing services, foundations, think tanks, colleges and universities.”¹⁶ Not only does this create considerable tension between all of the varying bodies, but it also muddles responsibility and weakens accountability.¹⁷

Not surprisingly, this system yields dismal results. Schools have made minimal progress in both reading and mathematics even though federal involvement and spending has soared.¹⁸ Reading scores for seventeen-year-old students taking a nationwide assessment climbed only one point between 1971 and 2008, even though federal spending on elementary and secondary education more than doubled between 1975 and 2009.¹⁹

A major deficiency in education reform is not a lack of interest in progress, nor is it a lack of innovation and policy; the deficiency lies in implementation of policies. As was pointed out fifteen years ago, “in the midst of the most sustained and intense educational reform effort in [fifty] years, there is much opposition

15. THOMAS TIMAR & DAVID TYACK, *THE INVISIBLE HAND OF IDEOLOGY: PERSPECTIVES FROM THE HISTORY OF SCHOOL GOVERNANCE* 14 (1999), available at <http://www.ecs.org/clearinghouse/13/55/1355.htm>.

16. *Id.*

17. Noel Epstein, *Introduction: Who Should be in Charge of Our Schools*, in *WHO'S IN CHARGE HERE: THE TANGLED WEB OF SCHOOL GOVERNANCE AND POLICY* 1, 1 (Noel Epstein ed., 2004).

18. B.D. RAMPEY ET AL., *NAEP 2008 TRENDS IN ACADEMIC PROGRESS* 2 (National Center for Education Statistics 2009-479, 2009) available at <http://nces.ed.gov/nationsreportcard/pdf/main2008/2009479.pdf>; U.S. Dep't of Educ., *Digest of Education Statistics: 2010*, NAT'L INSTITUTE OF EDUC. STATISTICS (2011), available at, http://nces.ed.gov/programs/digest/d10/ch_4.asp [hereinafter *Digest of Education Statistics:2010*].

19. See Timar, *supra* note 3; *Digest of Education Statistics: 2010*, *supra* note 18; B.D. RAMPEY ET AL., *NAEP 2008 TRENDS IN ACADEMIC PROGRESS* 9 (National Center for Education Statistics 2009-479, 2009) available at <http://nces.ed.gov/nationsreportcard/pdf/main2008/2009479.pdf>. Reading scores on the National Assessment for Educational Progress (NAEP) for seventeen-year-old students averaged at 285 in 1971 and 286 in 2008, reaching a peak of 290 in 1988, 1990 and 1992. Math scores on the NAEP for seventeen-year-old students averaged 304 in 1973 and 306 in 2008, reaching a peak of 308 in 1999. It is worth mentioning that somewhat more significant gains were made in mathematics by nine and thirteen-year-old students, rising fifteen and twenty-one points, respectively.

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to the creation of an infrastructure to achieve its goals.”²⁰ Therefore, a broad remedy to education reform is the creation of an institutionalized body to properly implement reforms. This solution begs the question—who should this body be? One option is to continue down the current path, which would mean an increase in the federal role. Alternatively, there can be an about face, resulting in a weakened federal role and increased governance by a separate entity. Because the federal government is not in a position to expand funding and effectively implement reforms, this Comment proposes the latter option—specifically, the expansion of state education agencies so that they may implement elementary and secondary education reform.

In support of this proposal, this Comment seeks to explore the current state of education, how it became the system it is today, and why massive changes must be made. Section II navigates the evolution of school governance—specifically the roles of federal, state, and local government. Additionally, Section II gives an overview of education reform efforts in the recent past and in the present day. Section III analyzes the problems found in those specific federal reform efforts, and then broadens its focus to explain why the federal government is not suited to govern education. Section IV proposes the removal of the federal government education reform, and that reinvention of state education agencies to achieve more specialized and accountable education reform at the local level. Additionally, Section IV defends potential challenges to this proposal. Finally, Section V will briefly conclude.

II. BACKGROUND: THE EVOLUTION OF GOVERNMENTAL INVOLVEMENT IN EDUCATION

An understanding of the evolution of education in the United States is vital in comprehending how to reform it. Since the founding of the United States, education reform has been incrementally morphing. This Section looks briefly at this historical evolution, starting with local control at the birth of the nation all the way to the nearly centralized state of education today, with a focus on the roles that local, state, and federal government played at each step.²¹ Once the historical perspective is established, this Section will break down recent and current

20. Timar, *supra* note 3, at 234.

21. *Infra* Sections II(A)–(D).

federal reforms and conclude with a brief look at modern state and local involvement²².

A. EARLY HISTORY OF PUBLIC K–12 EDUCATION

At the beginning of the nineteenth century, as the nation emerged from a colonial period marked by strong democratic localism, American schools were privately run.²³ Local citizens had the freedom to shape their schools according to the customs and values of each individual community.²⁴ The result of this was “an institutional hodgepodge” composed of widely varied schools including, but not limited to: sectarian schools, private academies for the elite, schools for the poor, and schools for certain ethnicities.²⁵ Under this system, federal and state involvement was practically invisible.

Due to several political forces and a desire to both preserve and advance American society, common schools emerged in the 1840s.²⁶ These schools were meant to be a “great equalizer,” and focused on teaching citizenship and ending poverty.²⁷ Reformers maintained that the way to achieve more standardized schools was to centralize control in state education departments.²⁸ Even though reformers successfully won their bid to create such departments, the idea met heavy resistance, which resulted in the creation of very weak, almost ceremonial, state agencies.²⁹ State departments of education only employed an average of two people—a superintendent and a clerk—and even though the legal framework for the departments existed, many local districts ignored any authority that states asserted.³⁰ So, even though state agencies existed in theory, that theory was most often the

22. *Infra* Sections II(E)–(F).

23. Timar, *supra* note 3, at 237.

24. *Id.* at 237-38.

25. Timar & Tyack, *supra* note 15, at 3; Timar, *supra* note 3, at 237.

26. Michael W. Kirst, *Turning Points: A History of American School Governance*, in WHO'S IN CHARGE HERE: THE TANGLED WEB OF SCHOOL GOVERNANCE AND POLICY 14, 17 (Noel Epstein ed., 2004).

27. DAVID TYACK, THOMAS JAMES, & AARON BENAVIDE, LAW AND THE SHAPING OF PUBLIC EDUCATION 1785-1954, 16-17 (Univ. of Wis. Press 1987); Rosemary C. Salomone, *Common Schools, Uncommon Values: Listening to the Voices of Dissent*, 14 YALE L. & POL'Y REV. 169, 174 (1996).

28. Kirst, *supra* note 26, at 18-20.

29. Timar, *supra* note 3, at 239.

30. Salomone, *supra* note 27, at 175; Kirst, *supra* note 26, at 16,18; Timar, *supra* note 3, at 239-40.

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extent of their presence.³¹

As the nineteenth century came to a close, education was more organized than it had been historically, but it was still chaotic. Structurally, local districts formed on the town, county, or annex level—depending on each area’s preference—resulting in a highly fractured system.³² In terms of curriculum and instruction, common schools were run by layperson trustees and untrained teachers, not professional educators.³³

As was noted, states had a theoretical presence, but little actual control. Likewise, the federal government was restrained to minimal involvement, mainly taking on the role of encouraging the development of public schools by providing land and some funding.³⁴ The federal Office of Education, created in 1867, did not have the power to mandate any action by the schools.³⁵ Its main purpose was to improve education by providing information to educators.³⁶ Thus, despite some changes, local control continued to be the main form of public school governance.

B. TURN OF THE TWENTIETH CENTURY: REDEFINING LOCAL CONTROL

At the turn of the twentieth century, as the United States’

31. Timar, *supra* note 3, at 239-40.

32. Kirst, *supra* note 26, at 18.

33. *Id.* at 17-18.

34. Specifically, the Northwest Ordinance created townships. Each township had 36 sections which measured one square mile each, and one in every 36 sections was to be rented to create money for education, resulting in over seventy-seven million acres of land dedicated to public schools. Diane Stark Rentner, *A Brief History of the Federal Role in Education: Why it Began & Why It's Still Needed*, CENTER ON EDUC. POLICY 6-7 (1999), available at <http://www.cepd-c.org/displayDocument.cfm?DocumentID=110>. Additionally, proceeds from taxes levied on land sales were pledged to local schools. Kirst, *supra* note 26, at 18. Interestingly, one scholar points out that “[t]he federal government was good at distributing benefits, if less than successful in regulating how they were employed.” Timar & Tyack, *supra* note 15, at 13.

35. Nat’l Library of Educ., The History of NLE: Office of Education Library—Early Years, <http://www2.ed.gov/NLE/histearly.html> (last modified April 3, 2006).

36. *Id.* The Office of Education was first an independent office, then was absorbed into the Department of the Interior. Nat’l Library of Educ., The History of NLE: Reorganized Office of Education Library, <http://www2.ed.gov/NLE/histreorg.html> (last modified April 3, 2006); Kirst, *supra* note 26, at 22-23. In 1972, the National Institute of Education was created, which was a predecessor of the National Library of Education. Nat’l Library of Educ., The History of NLE: NIE Library, <http://www2.ed.gov/NLE/histearly.html> (last modified April 3, 2006).

population swelled and the Industrial Revolution took hold, education, like most other areas of society, began to see rapid change. Many citizens were not enchanted by the common school's progress, and people grew skeptical of the ward politicians who were running local school boards.³⁷ Moreover, the districts that had been created during earlier structuring efforts were much too fractured, and the leaders of the wards often advanced personal goals through the schools.³⁸

To remove power from their hands, further centralization appeared to be the answer. Ward-level districts were consolidated into city-wide districts.³⁹ These districts, in turn, were run by one superintendent.⁴⁰ Furthermore, under the new industrial influence of science and research as a means of success, local schools began relying on education experts rather than lay trustees and politicians.⁴¹ As new education professionals emerged, so did the modern concepts of aligning teaching to a standard curriculum and accountability.⁴²

During the centralization effort of this time, federal activity remained mostly stagnant, but the states' involvement grew.⁴³ Despite the states' increased involvement, their role was first and foremost a supportive role, not a regulatory one, limited to

37. Timar & Tyack, *supra* note 15, at 14; Kirst, *supra* note 26, at 19.

38. Kirst, *supra* note 26, at 19. The city of Philadelphia, for example, had forty-three districts in 1905. *Id.* Census data from 1900 and 1910 indicate that the population in 1905 would have been between 1.3 and 1.5 million residents. *Population History of Philadelphia from 1790-1990*, BU PHYSICS, <http://physics.bu.edu/~redner/projects/population/cities/philadelphia.html> (last visited June 14, 2013).

39. Kirst, *supra* note 26, at 19.

40. *Id.* The decision to put a single superintendent in charge of each district was inspired partly by the recent successes that new industrial factories had enjoyed when they employed a single plant manager. *Id.* at 20.

41. Timar & Tyack, *supra* note 15, at 15.

42. Kirst, *supra* note 26, at 20. Accountability is

the concept that individuals (e.g. students, teachers, or administrators) or organizations (e.g. schools, school districts, or state departments of education) should be held responsible for improving student achievement and should either be rewarded for their success or sanctioned for their lack of success in doing so. In education, accountability requires measurable proof that teachers, schools, districts, and states are teaching students efficiently and well.

Diane Ravitch, *Edspeak: A Glossary of Education Terms, Phrases, Buzzwords, and Jargon* 8 (2007).

43. Timar, *supra* note 3, at 242. In 1900, the number of state education department employees totaled 177 nationwide. *Id.* In 1930, these departments employed nearly 1,800 people. *Id.*

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activities such as participating in finance litigation, some curriculum development, and establishing parity between rural and urban schools.⁴⁴ States were not researching and formulating the substantive regulations, and they were not a threat to the local control of schools.⁴⁵ Rather, professional reformers researched best practices and reported back to state legislatures on what regulations to pass.⁴⁶ The reformers then relied on states to turn their reforms into legislation, thus shaping the modern school.⁴⁷

C. POST-WAR: SCHOOL SUPERINTENDENTS FALL FROM GRACE

Those who urged centralization boasted that, under their system, education would reach a higher level of standardization, accountability, and equality than was possible in the older, more fractured system.⁴⁸ These experts were very confident, and, for the most part, people trusted them and gave them broad power and discretion.⁴⁹ The public mostly stayed out of education, leaving it in the hands of superintendents.⁵⁰

However, confidence shrank due to two major, post-War events: Sputnik and *Brown v. Board of Education*.⁵¹ Previously thought to be world leaders in science and technology, the Soviets triumph in the space race bruised the United States' ego.⁵² In looking for a place to lay blame, the public pointed fingers at public schools and the superintendents who ran them for providing students with sub-par instruction, thus leading to defeat.⁵³ Furthermore, professionals from outside the field of education criticized state education departments for providing an unbalanced education by serving the needs of just a few professional reformers.⁵⁴

44. Timar, *supra* note 3, at 242-43 (noting that “real power over educational decision making resided with professional organizations, notably school superintendents”).

45. Timar & Tyack, *supra* note 15, at 18.

46. *Id.* at 16. “Be sure you are right, then go ahead” was the motto of one NEA reformer. *Id.*

47. *Id.*

48. *Id.* at 15.

49. Kirst, *supra* note 26, at 21; Timar & Tyack, *supra* note 15, at 17.

50. Timar, *supra* note 3, at 244.

51. Kirst, *supra* note 26, at 21.

52. *Id.*

53. *Id.*

54. Timar, *supra* note 3, at 245 (providing Arthur Bestor's criticism describing

In addition to the challenges to curriculum and rigor brought on by Sputnik, the United States Supreme Court's decision in *Brown v. Board of Education* rattled the public's confidence in local schools even further.⁵⁵ As the country discovered that many of the superintendents it previously trusted were, in many cases, furthering pervasive, institutional segregation, the country began to scrutinize the social failures of schools as well.⁵⁶ The stage was now set for the entrance of the federal government and its sweeping reforms.

D. THE RISE OF FEDERAL INVOLVEMENT

Despite initial hesitance to intrude on local control, the federal government began to show more concern for public education, as the societal pressures of the 1950s and 1960s proved to be too much for local control to bear.⁵⁷ The 1960s marked a massive shift to federal education reform. In 1965, President Johnson finally succeeded in passing the first substantively significant piece of federal education legislation when he passed the breakthrough Elementary and Secondary Education Act (ESEA).⁵⁸ The ESEA had two purposes: first, to further Johnson's "War on Poverty," and second, to provide incentives and sanctions for school desegregation.⁵⁹ To achieve these goals, the ESEA for the first time provided funds to schools with heightened levels of poverty in exchange for compliance with certain conditions, such as compliance with certain civil rights' laws.⁶⁰ In addition to the ESEA, the public's newfound concern

"state education systems as closed systems that serve narrow professional interests" and bodies that control schools "by excluding dissident voices"). See *supra* Section II(B).

55. Kirst, *supra* note 26, at 22. *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (rejecting the "separate but equal" doctrine in the realm of public schools).

56. Kirst, *supra* note 26, at 22.

57. Up until this point in history, a majority agreed that, due to the Tenth Amendment, the federal government had no role in education. Kirst, *supra* note 26, at 22 ("[B]etween 1862 and 1963, Congress had considered unrestricted general aid to schools thirty-six times and had rejected it thirty-six times."). As a result, federal involvement usually extended to the logistics of education—making sure schools existed, collecting data, encouraging school formation in rural areas—but not to regulations on *how or what* to teach. See *supra* Section II(A).

58. Kirst, *supra* note 26, at 22.

59. Derek W. Black, *The Congressional Failure to Enforce Equal Protection Through the Elementary and Secondary Education Act*, 90 B.U. L. REV. 313, 336 (2010).

60. *Id.* at 336-37.

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for education came with an increase in lawsuits filed against local schools.⁶¹ Consequently, the federal and state courts began establishing rights for various marginalized student groups, such as minorities, non-English speakers, females, and disabled children.⁶²

This boom of activity set the pace for education governance today. Schools districts once controlled by the decisions of a single superintendent were suddenly faced with a barrage of policies created by the federal government and the courts.⁶³ The entire structure of school governance shifted as special interests multiplied, and the once dormant federal government churned out regulations in an attempt to fix what local control had created.⁶⁴ Although these reforms were made with outwardly noble intentions of equality, their result created a web of governance that is seemingly impossible to untangle. Michael Kirst explains:

Today's overlapping and complex categorical aids, which restrict spending to specified programs and purposes, evolved as a mode of federal action on which a number of otherwise competing education interests could agree. This collection of categoricals, which dominated national education politics from 1965 to the election of President Ronald Reagan in 1980, was not the result of any rational plan for federal intervention but rather the outcome of political bargaining and coalition formation.⁶⁵

The role of the states also changed dramatically in two ways. First, because professional reformers were no longer in agreement, state legislatures began to take sides, and as a result,

61. See Kirst, *supra* note 26, at 23.

62. *Id.* See, e.g., *Lau v. Nichols*, 414 U.S. 563 (1974) (holding that schools must take affirmative steps to aid the education of English Language Learners); *Plyer v. Doe*, 457 U.S. 202 (1982) (holding that undocumented immigrant children have the right to attend public schools); *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982) (first Supreme Court case dealing with special education). See also Diane Ravitch, *THE TROUBLED CRUSADE: AMERICAN EDUCATION 1945-1980* 162-63 (1983).

63. Between 1787 and 1965, about twenty-seven federal programs were created that concerned education in some way. Compare that to the approximately 113 federal programs that touched education between 1965 and 2010 (fifty-five years). *Digest of Education Statistics: 2010*, *supra* note 18.

64. Timar & Tyack, *supra* note 15, at 21.

65. Kirst, *supra* note 26, at 24.

states began to have a more planned and concerted role in shaping education.⁶⁶ Most importantly, however, states became the go-betweens charged with enforcing federal programs and dispersing federal funding to local schools.⁶⁷ Still, while the states' conduit role for federal funds increased state *involvement*, it did not increase state *influence*.⁶⁸ Because local districts had to apply to states for federal money, states had the opportunity to create applications and standards for granting these requests. The states, however, often did not seize this opportunity and instead made funding decisions using pre-made federal forms and "tended to rubber stamp local applications."⁶⁹

Local districts also morphed once federal programs and funding entered the scene. Once the innovators of instruction, local districts began focusing on the implementation of federal programs in order to attain more money.⁷⁰ Indeed, "[a] study of local implementation suggests that the imperative to meet funding deadlines made states and districts forget priorities," and education suffered.⁷¹

E. MODERN FEDERAL GOVERNANCE

In 1983, already active federal reform efforts received another boost with the publication of *A Nation at Risk*.⁷² Written in an alarming tone, *A Nation at Risk* stated that the United States' educational foundations were "being eroded by a rising tide of mediocrity that threaten[ed] our very future as a Nation and a people" and called for educational reform supported by the

66. Kirst, *supra* note 26, at 24.

67. Timar & Tyack, *supra* note 15, at 19-20. As local and federal / state policy grew further and further apart, the states took on a much more regulatory role that focused on compliance with federal programs. *Id.* at 19. This role would become both more complicated and more important in the coming years and federal regulation would explode.

68. Timar, *supra* note 3, at 247.

69. *Id.*

70. Kirst, *supra* note 26, at 33-34.

71. Timar, *supra* note 3, at 247.

72. THE NAT'L COMM'N ON EXCELLENCE IN EDUC., *A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM* (1983) available at http://datacenter.spps.org/uploads/sotw_a_nation_at_risk_1983.pdf [hereinafter "NATION AT RISK"]. It is generally agreed in most writings on education reform that this publication forever changed the face of education. Robert A. Garda, Jr., *Coming Full Circle: The Journey from Separate but Equal to Separate and Unequal Schools*, 2 DUKE J. CONST. L. & PUB. POL'Y. 1, 22-24 (2007).

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federal government.⁷³ *A Nation at Risk* went on to list the deficiencies of the American education system.⁷⁴ Consequently, federal activity intensified as the nation reacted to this assessment, resulting in several substantial pieces of legislation from all presidential administrations throughout the 1990s and into the new millennium.⁷⁵ The following Section will evince this increasingly strong regulatory role of the federal government. Section II(E)(1) details Goals 2000 and the Improving America's Schools Act; Section II(E)(2) will discuss No Child Left Behind; Section II(E)(3) will explore President Obama's education reforms; and Section II(E)(4) will explore Congress's plan to reauthorize the ESEA.

1. GOALS 2000 AND THE IASA

Passed in March 1994, Goals 2000, as the name indicates, outlined specific national education goals to be met by the year 2000.⁷⁶ The eight goals to be accomplished by 2000 were: (1) every child should be ready to attend school; (2) all schools will have a graduation rate of at least 90%; (3) all students will be proficient in the core subjects, as demonstrated by their passing of state tests in grades four, eight, and twelve; (4) teachers will be provided with increased and improved opportunities for professional development; (5) the United States will rank first in the world in math and science; (6) every adult will be literate; (7) all schools will be drug, alcohol, firearm, and violence free; and (8) parental involvement will increase.⁷⁷

Goals 2000 was an integral part of President Clinton's Improving America's Schools Act (IASA), which is the Act that reauthorized the ESEA in 1994.⁷⁸ The IASA made funding to states contingent on submitting a plan for the state's education system to incorporate the provisions of Goals 2000, along with

73. NATION AT RISK, *supra* note 72.

74. *Id.* The findings listed include many startling revelations, such as: "In many schools, the time spent learning how to cook and drive counts as much toward a high school diploma as the time spent studying mathematics, English, chemistry, U.S. history, or biology." *Id.*

75. See Appendix A.

76. Goals 2000: Educate America Act, Pub. L. No. 103-227, 108 Stat. 125 (1994) (codified at 20 U.S.C. §§ 5801-6084 (1994)).

77. 20 U.S.C. § 5812(1)-(8) (1994).

78. Benjamin Michael Superfine, *New Directions in School Funding and Governance: Moving From Politics to Evidence*, 98 KY. L.J. 653, 674 (2009-2010).

other provisions.⁷⁹ The requisite material to be included in the plans was complex, but on a broad level, the IASA required states to include a plan for creating high quality standards and assessments and a definition for adequate yearly progress.⁸⁰ This legislation, however, distributed funds based on the submitted plan only and lacked an enforcement mechanism that would require follow through, which made it more of a series of suggestions, rather than an imposition of affirmative duties on the states.⁸¹

2. NO CHILD LEFT BEHIND

Due to the IASA's implementation problems, the year 2000 came and went with none of Goals 2000's aims being met.⁸² Then, the ESEA became eligible for reauthorization again, and President George W. Bush answered this call with the No Child Left Behind Act (NCLB).⁸³ NCLB passed in 2002 with strong bipartisan support and aimed to provide equal educational opportunities for all students so that they could receive a quality education by at least attaining the state's minimum standards for education.⁸⁴ The legislation was sweeping. It proposed to reach its goal by addressing the following: state teaching standards, standards alignment curriculum and assessments, teacher accountability, school accountability, state accountability, teacher quality, the special needs of traditionally low-achieving students, the achievement gap, distribution of resources, flexibility to local schools, enrichment and accelerated content, access to researched strategies, access to challenging content, more professional development, and even parental involvement.⁸⁵

The major affirmative duties imposed by NCLB include the creation of challenging standards, regular statewide testing to ensure that all students meet those standards, and the requirement that schools hire teachers who have demonstrated

79. Improving America's Schools Act, Pub. L. No. 103-382, 108 Stat. 3518 (1994).

80. See 20 U.S.C. § 6311(2)(A)-(C) (2006) (indicating provisions of the ESEA when it was the IASA).

81. See Superfine, *supra* note 78, at 674.

82. *Id.*

83. 20 U.S.C. §§ 6301-6578 (2002).

84. *Id.* § 6301; John Spencer, *Updating 'No Child Left Behind:' Change, or More of the Same*, 3 ORIGINS (June 2010), <http://origins.osu.edu/article/updates-no-child-left-behind-change-or-more-same>.

85. 20 U.S.C. § 6301(1)-(12) (2002).

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competence in their subject areas (better known as “highly qualified teachers”).⁸⁶ The provisions of NCLB are familiar in much reform legislation, such as the IASA; however, it is NCLB’s timeline for success that is controversial.⁸⁷ NCLB requires all students to be “proficient” by 2014, a mere twelve years after the Act’s passing.⁸⁸ In progressing toward this goal, states must set uniform targets of progress, known as annual measurement objectives, by which the adequate yearly progress of each school can be tracked.⁸⁹ Annual measurement objectives must increase incrementally every two to three years, and all students and subgroups of students must hit the target.⁹⁰ The subgroups, which are groups such as racial minorities and English language learners, are in place to assure that *all* students are progressing, not just the majority.⁹¹ Failure to meet annual measurement objectives and failure to make adequate yearly progress results in a “in need of improvement” label and various sanctions that increase in severity.⁹² The end of the road for a failing school is one of five turnaround options which include (1) chartering the failing schools,⁹³ (2) replacement of the staff that is tied to the

86. 20 U.S.C. § 6311(h)(4)(G) (2006).

87. See *supra* Section II(E)(1); Diane Ravitch, *Obama Grants Waivers to NCLB and Makes a Bad Situation Worse*, THE DAILY BEAST (Feb. 10, 2012, 12:00 AM), <http://www.thedailybeast.com/articles/2012/02/10/obama-grants-waivers-to-nclb-and-makes-a-bad-situation-worse.html>.

88. Ryan, *supra* note 9, at 933. While the timeline for Goals 2000 was only six years, the important difference is that Goals 2000 were goals with no punishments attached whereas NCLB has severe punishments for those who fail to reach the 100% proficiency goal in 2014.

89. *Id.* at 940-43.

90. *Id.* at 940-41. For example, if Louisiana sets an AMO of seventy percent of students passing for 2012, all schools that receive funding under NCLB must hit that seventy percent goal. This goal applies to the school as a whole, as well as to subgroups like English Language Learners or African-American students. *Id.* at 940. That means that if the school in general or any one of the subgroups fails to have a seventy percent passage rate, that school has not made appropriate AYP.

91. *Id.* at 940-41.

92. Ryan, *supra* note 9, at 942.

93. A charter school is defined as a

publicly funded school that, in accordance with an enabling state statute, has been granted a charter exempting it from certain state or local rules and regulations. A charter school may be newly created, or it may previously have been a public or private school; it is typically governed by a group or an organization (e.g., a group of educators, a corporation, or a university) under a contract or charter with the state or local district. This governing organization may be nonprofit or for-profit. In return for public funding and autonomy, the charter school must meet accountability standards. A school’s charter is reviewed periodically, typically every three to five years, and can be revoked if the school does not meet its goals or is poorly managed. A charter school is like a

failure, (3) contracting with an outside school to operate the school, (4) turning the school over to the state, and (5) other means of restructuring that make “fundamental changes.”⁹⁴

Looking back to earlier federal legislation, it becomes clear that NCLB sharply deviates from the norm—it does not make suggestions or simply earmark funding for certain goals; it mandates and ties the receipt of funds to concrete successes and failures.⁹⁵ Funding to states is contingent on reaching the mandates that NCLB puts forth, whereas previous legislation merely set goals to strive toward.⁹⁶

3. PRESIDENT OBAMA’S REFORMS

The Obama administration entered education reform with fervor and urgency, and even though NCLB is still the law, this administration has nonetheless introduced a number of new reforms. In 2009, President Obama launched the Race to the Top Fund (RTF).⁹⁷ Additionally, President Obama’s long-term plan, laid out in a document entitled *A Blueprint for Reform*, calls for reauthorization and refining of the ESEA.⁹⁸ Finally, after the Blueprint received a lukewarm reception by Congress, President Obama authorized the Secretary of Education to grant “NCLB flexibility,” or waivers from certain NCLB provisions, in order to relieve the pressure of NCLB immediately.⁹⁹ Each of these separate reforms will be discussed in the following sections.

school district with only one school, managed by its own board of directors. Each state defines the requirements for charter schools somewhat differently in its enabling legislation.

Ravitch, *supra* note 42, at 41-42.

94. Ryan, *supra* note 9, at 943.

95. See *supra* Section II(E)(2); Claudia Wallis & Sonja Steptoe, *How to Fix No Child Left Behind*, TIME, 2-3 (May 24, 2007), available at <http://www.schwartzman.org.br/simon/blog/nclb.pdf>.

96. Compare Section II(E)(1), with Section II(E)(2).

97. See U.S. DEP’T OF EDUC., RACE TO THE TOP PROGRAM EXECUTIVE SUMMARY (Nov. 2009), available at <http://www2.ed.gov/programs/racetothetop/executive-summary.pdf> [hereinafter RTF Executive Summary].

98. See *infra* Section II(E)(3)(b); U.S. Dep’t of Educ. & Office of Planning, Evaluation and Policy Development, *A Blueprint for Reform: The Reauthorization of the Elementary and Secondary Education Act 2* (Mar. 2010), available at <http://www2.ed.gov/policy/elsec/leg/blueprint/blueprint.pdf> [hereinafter ESEA Blueprint for Reform].

99. See *infra* Section II(E)(3)(c); Arne Duncan, *Escaping the constraints of ‘No Child Left Behind’*, WASHINGTON POST (Jan. 6, 2012), http://www.washingtonpost.com/opinions/escaping-the-constraints-of-no-child-left-behind/2012/01/06/gIQAYmqfP_story.html.

2013] **Federal Government & Education Reform** 417**a. Race to the Top Fund**

The Race to the Top Fund is designed to promote “innovative strategies that are most likely to lead to improved results for students, long-term gains in school and school system capacity, and increased productivity and effectiveness.”¹⁰⁰ The RTF takes the form of a competition, awarding grant money to those states that submit the best plans.¹⁰¹ The “best plans” include steps to enhance standards and assessments, improve their current systems for data collection and use, increase the effectiveness and equal distribution of teachers, and turn around struggling schools.¹⁰² Peer-reviewers determine the winners, using a rubric to assign point values to certain reforms and plans.¹⁰³

The executive branch initially dedicated \$4.35 billion to the RTF, which was distributed in three phases.¹⁰⁴ In March 2010, during Round One, a total of \$600 million was awarded to Delaware and Tennessee.¹⁰⁵ During Round Two, in August 2010, \$3.4 billion was distributed amongst Massachusetts; New York; Washington, D.C.; Florida; Georgia; Hawaii; Maryland; North Carolina; Ohio; and Rhode Island.¹⁰⁶ Finally, during Round

100. U.S. DEP’T OF EDUC., NOTICE OF PROPOSED REQUIREMENTS, *available at* <http://www2.ed.gov/programs/racetothetop/interim-notice-proposed-requirements.pdf>.

101. RTF Executive Summary, *supra* note 97, at 2.

102. *Id.*

103. Monica Teixeira de Sousa, *A Race to the Bottoms? President Obama’s Incomplete and Conservative Strategy for Reforming Education in Struggling Schools or the Perils of Ignoring Poverty*, 39 STETSON L. REV. 629, 645 (2010); U.S. DEP’T. OF EDUC., RACE TO THE TOP PROGRAM EXECUTIVE SUMMARY 3 (Nov. 2009) *available at* <http://www2.ed.gov/programs/racetothetop/executive-summary.pdf>. The peer-reviewers, who must apply or be nominated to be considered for selection, are education policy experts who are not federal employees that are chosen by the U.S. Department of Education. See U.S. Dep’t of Educ., *Race to the Top: Peer Reviewer Selection Process*, <http://www2.ed.gov/programs/racetothetop/peer-reviewer-selection-process.pdf> (last visited July 13, 2013).

104. U.S. DEP’T OF EDUC., RACE TO THE TOP: MARYLAND REPORT YEAR 2: SCHOOL YEAR 2011-2012 1, 2 (Feb. 1, 2013), *available at* <http://www2.ed.gov/programs/racetothetop/performance/maryland-year-2.pdf>.

105. Press Release, U.S. Dep’t of Educ., Delaware and Tennessee Win First Race to the Top Grants (Mar. 29 2010), *available at* <http://www2.ed.gov/news/pressreleases/2010/03/03292010.html>.

106. Press release, U.S. Dep’t of Educ., Nine States and the District of Columbia Win Second Round Race to the Top Grants (Aug. 24, 2010), *available at* <http://www.ed.gov/news/press-releases/nine-states-and-district-columbia-win-second-round-race-top-grants>.

Three,¹⁰⁷ in December 2011, the government announced that Arizona, Louisiana, New Jersey, Pennsylvania, Colorado, Illinois, and Kentucky would share the remaining \$200 million.¹⁰⁸ Furthermore, the government has budgeted another \$550 million in the 2012 budget for further rounds of Race to the Top.¹⁰⁹

b. Blueprint for Reform

The Blueprint for Reform details President Obama's plan to reauthorize the ESEA.¹¹⁰ The Blueprint focuses on five core areas: (1) implementation of college and career ready standards, (2) teacher and principal effectiveness, (3) equity and opportunity for all students, (4) rewarding excellence, and (5) promoting innovation.¹¹¹ Some of the main features include increasing the rigor of the standards by working with local universities, using allocated funds to retain only the best teachers, promoting the shift of those teachers to high-need schools, and turning around, chartering, or closing those schools in the bottom five percent for achievement in the state.¹¹² Congress's response to President Obama's push for reauthorization was unenthusiastic. It became clear that Congress had no intention to use President Obama's plan to reauthorize, but rather that they intended to push a package of bills through piece by piece (discussed *infra*, Section III(A)(4)), therefore Obama's blueprint is likely to remain just that.¹¹³

107. Phase Three had an additional requirement for states to use their award money to come up with plans to emphasize science, technology, engineering, and math. Press release, U.S. Dep't of Educ., Department of Education Awards \$200 Million to Seven States to Advance K-12 Reform (Dec. 23, 2011), *available at* <http://www.ed.gov/news/press-releases/department-education-awards-200-million-seven-states-advance-k-12-reform>.

108. *Id.*

109. Press Release, U.S. Dep't of Educ. The 2012 Race to the Top Fund Continues Investments in Statewide Systems of High Quality Early Education Programs (Apr. 9, 2012) *available at* <http://www.ed.gov/news/press-releases/2012-race-top-fund-continues-investments-statewide-systems-high-quality-early-ed>.

110. ESEA Blueprint for Reform, *supra* note 98, at 6.

111. *Id.* at 3-6.

112. *Id.* at 4-12.

113. See *President Obama Calls on Congress to Reform No Child Left Behind Now*, THE NAT'L COALITION FOR HISTORY (Mar. 16, 2012, 2:21 PM), <http://historycoalition.org/2011/03/16/president-obama-calls-on-congress-to-reform-no-child-left-behind-now/>.

c. NCLB Flexibility

Finding himself in yet another stalemate with Congress, President Obama invited the states to apply for waivers to NCLB that grant flexibility from the law's rigid rules.¹¹⁴

The criteria used in determining whether a waiver will be granted is very much in line with most other reforms the Obama administration has championed, which include the implementation of "college-and career-ready" standards," "differentiated accountability, recognition, and support policies and systems," and an evaluation of administrative and reporting requirements in an attempt to rid the system of "duplicative or burdensome" requirements.¹¹⁵ One of the most substantial effects is that, with a waiver, states are allowed to set different annual measurement objectives for different districts, schools, or even subgroups within a school, which would result in fewer schools failing to make adequate yearly progress and receiving sanctions, but also leads to the potential for minority groups to be left behind.¹¹⁶

4. CONGRESS'S REAUTHORIZATION PLAN

Finally, as the Obama administration continues to release reform after reform, Congress introduced five new bills for approval.¹¹⁷ These bills have many goals, including: elimination of duplicative federal programs created under NCLB;¹¹⁸ expansion of charter schools by providing financial incentives to

114. "Although Congress has begun the process of reauthorizing NCLB, we can't wait for the extended legislative process to be completed. States and school districts need relief from NCLB right now." Arne Duncan, *Escaping the constraints of 'No Child Left Behind'*, WASHINGTON POST (Jan. 6, 2012), http://www.washingtonpost.com/opinions/escaping-the-constraints-of-no-child-left-behind/2012/01/06/gIQAYmqpfP_story.html.

115. Wayne Riddle, *Frequently Asked Questions Regarding the Secretary of Education's Waiver of Major ESEA Requirements*, CENTER ON EDUC. POLICY 4-5 (Sept. 29, 2011), available at <http://www.cepdc.org/displayDocument.cfm?DocumentID=372>.

116. *Id.* at 4. This is significant for several reasons. First, it will allow states to set different AMOs for certain groups. For example, English Language Learners may have an AMO of 50, whereas Asian/Pacific Islander students may have an AMO of 85. Consequently, fewer schools should be labeled as failing, because it should be easier to make AYP.

117. *See infra* notes 118-22.

118. Setting New Priorities in Education Spending Act, H.R. 1891, 112th Cong. (1st Sess. 2011).

states who replicate or expand successful charter schools;¹¹⁹ an increase in local flexibility in the spending of federal funding;¹²⁰ continuation of state standards and linked assessments as well as accountability reports linked to those assessments;¹²¹ encouragement of effective teaching through grants for more professional development and performance-based pay;¹²² and promotion of innovation through use of local competitive grant programs.¹²³

As can be seen in the preceding section, the federal role in education reform has been on a rapid and steady rise. With each new reform comes a new layer of regulations with which it is increasingly difficult to comply. As will be seen in the following section, however, even as the federal government exerts its authority, activity continues on the state and local level, which only further complicates education reform and governance.

F. MODERN ROLE OF STATE EDUCATION DEPARTMENTS AND LOCAL DISTRICTS

Historically a passive and secondary body, state departments of education quickly took on the role of enforcers when federal activity became commonplace.¹²⁴ As local districts resisted the proper implementation of federal programs, states took on the image of bureaucratic overseers with “clipboards and checklists.”¹²⁵

Despite this image and the perpetual struggle to gain real power, states have often been the innovators of popular educational policies. For example, NCLB was borrowed from

119. Empowering Parents Through Quality Charter Schools Act, H.R. 2218, 112th Cong. (1st Sess. 2011). The resolution passed in the House with an overwhelming majority (365-54) and is awaiting a Senate vote. Press release, Educ. & The Workforce Comm., House Approves First Education Reform Legislation (Sept. 13, 2011), *available at* <http://edworkforce.house.gov/News/DocumentSingle.aspx?DocumentID=259659>.

120. State and Local Funding Flexibility Act, H.R. 2445, 112th Cong. (1st Sess. 2011).

121. Student Success Act, H.R. 3989, 112th Cong. (2d Sess. 2012).

122. *Id.*

123. Encouraging Innovation and Effective Teachers Act, H.R. 3990, 112th Cong. (2d Sess. 2012), *available at* <http://www.gpo.gov/fdsys/pkg/CRPT-112hrpt459/pdf/CRPT-112hrpt459-pt1.pdf> (last visited July 13, 2013).

124. Timar, *supra* note 3, at 250, 253.

125. *Id.* at 251.

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Texas's accountability programs.¹²⁶ Charter schools were originally conceived by a Michigan teacher and initially endorsed through legislation in Minnesota.¹²⁷ School voucher programs as a method of providing choice for underserved populations have their roots in Wisconsin as early as 1989, whereas the first federally funded voucher program did not appear until 2004.¹²⁸ Connecticut is a leader in the construction of standardized tests, and produces some of the most prepared students.¹²⁹ Thus, as these few examples show, states are designing reforms even though their efforts are often stifled.¹³⁰

III. ANALYSIS AND CRITIQUE: THE FAILED AND INADEQUATE FEDERAL MODEL FOR EDUCATIONAL REFORM

As societies in the United States and around the world have advanced, the United States has grappled with how to change education to fit societal needs. Thus far, the United States' treatment of education reform has been largely reactionary, and as a result, the modern education system is an accidental patchwork of reforms and rights.¹³¹ Furthermore, the development of varied and competing governance structures has

126. Linda McSpadden McNeil et al., *Avoidable Losses: High-Stakes Accountability and the Dropout Crisis*, 16 EDUC. POL'Y ANALYSIS ARCHIVES 1, 1 (2008), available at <http://epaa.asu.edu/epaa/v16n3/>.

127. Ted Kolderie, *Ray Budde and the Origins of the "Charter Concept"*, EDUCATION EVOLVING (June 2005), http://www.educationevolving.org/pdf/Ray_Budde.pdf.

128. *Publicly Funded School Voucher Programs*, NAT'L CONFERENCE OF STATE LEGISLATURE, <http://www.ncsl.org/issues-research/educ/school-choice-vouchers.aspx> (last visited May 28, 2012). School vouchers actually originated in the 1800s in Maine and Vermont because the sparsely populated, rural areas of those states did not always have schools for children to attend. *Id.* Under the Maine and Vermont programs, if there was no school, the district could pay for the students to go to the nearest public school. *Id.* Vouchers were also used in the South in the Civil Rights Era to promote segregation and allow white students to use vouchers at private, all white institutions. James Forman, Jr., *The Secret History of School Choice: How Progressives Got There First*, 93 GEO. L.J. 1287, 1288 (2005). Today's vouchers are used in the school choice movement to provide children in low-achieving districts with more options. Robert Alt, *Cleveland's School Voucher Program: The Politics and the Law*, 6 ON PRINCIPLE 1, 6 (1998), available at <http://www.ashbrook.org/publicat/onprin/v6n1/alt.html>.

129. See *infra* Section III(B)(2).

130. See *infra* Section III(B)(1)(a).

131. Paul T. Hill, *Recovering from an Accident: Repairing Governance with Comparative Advantage*, in WHO'S IN CHARGE HERE: THE TANGLED WEB OF SCHOOL GOVERNANCE AND POLICY 75, 75 (Noel Epstein ed., 2004).

weakened accountability and muddled responsibilities.¹³²

This Section begins by analyzing the problems with the current system, and then uses these specific problems as a backdrop to analyze the overarching problem with all federal regulation of education—mainly that it creates an exoskeleton of education policy that manages to be both overly burdensome as well as insufficient to effect real change.

A. THE FAILURE OF FEDERAL REFORMS

This Section analyzes and details the major problems found in federal reforms beginning with a discussion of NCLB in Section III(A)(1), followed by an analysis of Race to the Top in Section III(A)(2), and, finally, a critique of NCLB waivers and Congress's proposed bills in Section III(A)(3). Additionally, each section will specifically look at the tendencies of these reform efforts to act as overlays of each other. This discussion will provide a basis for further analysis of more fundamental issues to be discussed in Subsection B.

1. NCLB'S DEMISE

Passing with great hope and fanfare, NCLB quickly fell flat in the eyes of many, and is now generally considered a failure.¹³³ NCLB was the first piece of federal legislation to place tight restrictions on schools, which is a laudable goal in spite of the program's failure. Ironically, it was the tight restrictions that led to its failure.¹³⁴ In addition, many of the provisions in NCLB created perverse incentives to schools that have the potential to harm the very groups they are trying to help.¹³⁵ Further, implementation of the Act proved difficult. Section III(A)(1)(a) will discuss the "perverse incentives," and Section III(A)(1)(b) will detail the lack of enforcement.

a. "Perverse Incentives"¹³⁶

Since its passing, critics have identified several glaring problems with NCLB. Due to NCLB's wildly unattainable

132. Timar & Tyack, *supra* note 15, at 20.

133. Ravitch, *supra* note 87.

134. *See generally*, Ryan, *supra* note 9.

135. *Id.*; *infra* Section III(A)(1)(a).

136. *See* Ryan, *supra* note 9, at 944-78 (discussing these "perverse incentives" and their "unintended consequences").

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adequate yearly progress goals, many schools are unable to keep up, which leads to sanctions and the stigmatizing “needs improvement” label.¹³⁷ Once a school is labeled as needing improvement, as the 2,000 schools that failed to make adequate yearly progress for five straight years have been labeled, no one knows what to do.¹³⁸ The federal government does not have a meaningful way to help schools in need of improvement other than by prescribing a few radical options that are not “always feasible or affordable.”¹³⁹ Even when an option is feasible, it is unclear whether the option provided “will raise [the schools’] performance,” and so the result is often only “minor tinkering” with failing schools.¹⁴⁰ Minor tinkering does not raise achievement. Furthermore, the structure of the NCLB and its strict adequate yearly progress requirements lead to significant problems—impeding achievement and promoting segregation.¹⁴¹

Because the “needs improvement” label garners so much stigmatization, the label puts pressure on state and local school boards to find a way to avoid this label.¹⁴² In their panic to relieve this pressure and meet NCLB’s goals, state and local school boards face four options: (1) strive in vain to reach the unattainable goal, (2) lower their adequate yearly progress goals so that they may be reached and hope that NCLB is reauthorized before the 2014 goal, (3) decline the funding attached to NCLB and thus avoid the regulations, or (4) make assessments easier or lower the cut-off score needed to be deemed “proficient.”¹⁴³ Unfortunately, schools have been choosing the fourth option and lowering their standards, evidenced by the rise in student proficiency on state exams with a concurrent drop or stagnation in overall reading and math skills on national exams.¹⁴⁴

137. Ryan, *supra* note 9, at 942.

138. Wallis & Steptoe, *supra* note 95, at 7.

139. *Id.*

140. *Id.*

141. Ryan, *supra* note 9, at 934.

142. See Wallis & Steptoe, *supra* note 95, at 4-6.

143. *Id.* at 4-6, 9. Note that the second option, wherein a school lowers their yearly progress goals, will only be helpful if NCLB is overhauled when, and if, the ESEA is reauthorized. If NCLB remains in force, then the overarching goal for 2014 remains 100% success regardless of each individual school’s interim goals.

144. Wallis & Steptoe, *supra* note 95, at 8-9. This is further emphasized by noting that states that have retained high standards are often plagued with the highest incidence of “failing school” labels. Michael Heise, *The Political Economy of Education Federalism*, 56 EMORY L.J. 125, 144 (2006).

Even more troubling, schools sometimes choose a fifth option of trying to weed out subgroups who keep them from making AYP. Because “schools that contain an African American or economically disadvantaged subgroup are much more likely to fail to make adequate yearly progress than those that do not,” schools have an incentive to exclude low-performers.¹⁴⁵ This has been accomplished in many ways—first, by setting a high minimum threshold for creation of subgroups, meaning, for example, that schools would need to have forty Latino students before having to count them as a subgroup.¹⁴⁶ Therefore, if there are only thirty-nine Latino students, they can be lumped in with the majority and not accounted for separately.¹⁴⁷ Alternatively, schools can reject transfer students from traditionally low-achieving groups.¹⁴⁸ Finally, some schools have even labeled low-achieving students as “disabled” so that they may be exempted from testing all together, thereby not affecting the schools performance scores.¹⁴⁹

b. Lack of Enforcement

In addition to NCLB’s unintended side effects, the effects *actually* intended are not being aggressively pursued. Some provisions are not being enforced merely because their enforcement is impractical or impossible. For example, one of the sanctions for a school in need of improvement is that they must make tutoring available for eligible students; however, only fifteen percent of those students received tutoring.¹⁵⁰ The source of this low percentage is unclear, but one question that naturally arises is: How can someone in Washington, D.C. determine whether children in Honolulu and New Orleans are getting after-

145. Ryan, *supra* note 9, at 961-62.

146. *Id.* at 962.

147. *Id.* “In Texas, for example, schools must ‘count’ the performance of racial or ethnic subgroups if at least [ten percent] of the students fall within the subgroup. As Kane and Staiger report, among schools that had exactly nine percent Latino students-and thus did not have to disaggregate their scores-[forty-two percent] were rated ‘exemplary,’ while less than [twenty percent] of schools with exactly [ten percent] Latino students achieved that status.” *Id.*

148. *Id.* at 962.

149. Ryan, *supra* note 9, at 962 n.133.

150. Diane Ravitch & John Chubb, *The Future of No Child Left Behind*, 9.3 EDUCATION NEXT 49, 53 (2009), available at http://educationnext.org/files/ednext_20093_48.pdf.

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school tutoring?¹⁵¹ The answer is simple: They cannot under the system that currently exists. It is not feasible for the U.S. Department of Education, as it currently exists, to ensure that a single school thousands of miles away is providing after-school tutoring to its students. Only with a complete restructuring of the Department of Education, involving local offices and extreme oversight, is this type of enforcement possible.

On the other hand, some provisions are not enforced because the legislated alternatives simply do not exist. For example, NCLB created an option for students who attend a failing school that would allow them to transfer into a “good school.”¹⁵² In 2004–2005, only about one percent of students who were eligible actually transferred.¹⁵³ This is due largely to the fact that there were no passing schools to which they could go.¹⁵⁴ In these situations, the federal government can pass as many laws providing as many options as it wants, but if the option does not exist, it is impossible to take advantage of it, and the law is rendered useless.

2. A RACE TO THE TOP?

One of the fundamental problems with NCLB is its misunderstanding of the problems that education faces.¹⁵⁵ By imposing a punitive system to reform schools, the law assumes that local schools have the resources and knowledge to educate all students, but simply refuse to do it.¹⁵⁶ It is safe to assume, however, that most school districts would make yearly growth goals if it were as easy as somebody telling them to do so. The first step, then, in reversing the effects of NCLB is recognizing that the problem goes much deeper than that, and that more fundamental change to the entire system must be made.¹⁵⁷

President Obama seemed, at first, to understand exactly that. Using the RTF and NCLB waivers, President Obama

151. Ravitch & Chubb, *supra* note 150, at 53-54.

152. Wallis & Steptoe, *supra* note 95, at 7.

153. *Id.*

154. *Id.*

155. Linda Darling-Hammond, *Evaluating ‘No Child Left Behind,’* THE NATION 1, 1 (May 21, 2007), available at <http://www.thenation.com/article/evaluating-no-child-left-behind#>.

156. *Id.*

157. *Id.*

announced plans to reverse the “race to the bottom” effect created by NCLB.¹⁵⁸ Furthermore, he planned to reauthorize the ESEA, thus ridding the world of NCLB in a more permanent way.¹⁵⁹ In furtherance of these goals, President Obama released unprecedented amounts of money to education and instituted numerous reform efforts, all in the name of increasing achievement and innovation while promoting greater flexibility to the states.¹⁶⁰ These programs, however, mainly recycle previously failed reforms and come with their own set of problems. Section III(A)(2)(a) will explore the problems presented by mandated flexibility, and Section III(A)(2)(b) will discuss inadequate funding.

a. Mandated Flexibility

Although Race to the Top is couched in rhetoric of flexibility and state innovation, it is truly just another set of mandates to follow to get federal funding. To get the large sums of money that the Obama administration is handing out, states must “win” the Race to the Top competition by scoring high marks on a rubric.¹⁶¹ In order to earn high marks on the rubric, states must show evidence that they are enacting certain reforms in their schools.¹⁶² Furthermore, some policies promoted under the RTF are nearly identical to NCLB policies that created the perverse incentives discussed above.¹⁶³ For example, the four turnaround methods that are touted under the RTF are the same models that led to stagnated achievement under NCLB.¹⁶⁴ Race to the Top gives little more flexibility than NCLB.¹⁶⁵

158. See *Ending the ‘Race to the Bottom,’* N.Y. TIMES (Mar. 11, 2009) http://www.nytimes.com/2009/03/12/opinion/12thu1.html?_r=0.

159. Press release, U.S. Dep’t of Educ., Obama Administration’s Education Reform Plan Emphasizes Flexibility, Resources and Accountability for Results (Mar. 15, 2010), available at <http://www.ed.gov/news/press-releases/obama-administrations-education-reform-plan-emphasizes-flexibility-resources-and>.

160. See *supra* Section II(E)(3).

161. See Race to the Top: Appendix B Scoring Rubric, <http://www2.ed.gov/programs/racetothetop/scoringrubric.pdf> (last visited July 13, 2013).

162. *Id.*

163. Teixeira de Sousa, *supra* note 103, at 638-39.

164. Compare Section II(E)(2), with Section II(E)(3)(a).

165. Teixeira de Sousa, *supra* note 103, at 638-39.

b. Inadequate Funding

Beyond recycling the same failed efforts of reforms past, the RTF also underfunds the reform effort by only providing funds to specific states and by demanding more results than the award can ever fund.¹⁶⁶ RTF is a competition, meaning that many states that apply will lose. The losing states will not receive *any* funding despite having spent “an ‘enormous’ amount of time and money” preparing their applications, and both changing their laws and putting reforms in motion in order to stay in the “race.”¹⁶⁷ Even if states do win, the eye-popping amount of funds awarded to the Race to the Top winners have sharply declined, starting at \$500 million and \$100 million per winner in Round One and dipping to approximately \$30 million per winner in later rounds.¹⁶⁸ While this sounds like a considerable sum, as many have recognized, the federal funding available is merely “a Band-aid for the huge cuts in State funding to our schools in recent years.”¹⁶⁹ Moreover, it costs States so much money simply to apply to RTF, and then so much money to implement the reforms and comply with federal red tape, that the benefit of winning does not outweigh the costs.¹⁷⁰ The RTF leaves most of the funding for the proposed reforms to the states, and leaves the federal contribution to education at about ten-and-one-half percent of all education expenditures.¹⁷¹ The RTF, although it sounds like a promising new reform, truly falls in line with the other fads and reinforces the “myth that persistently lowest-achieving schools can be ‘fixed’ on the cheap.”¹⁷²

3. “WAIVING” THE WHITE FLAG

Recently, key players in federal government have expressed

166. Maureen Downey, Arne Duncan: Will follow Race to the Top progress in Georgia. “If any state does not implement well, we will simply stop funding them.” AJC.COM (Aug. 21, 2010, 2:26 PM), <http://blogs.ajc.com/get-schooled-blog/2010/08/24/arne-duncan-will-follow-race-to-the-top-progress-in-georgia-if-any-state-does-not-implement-well-we-will-simply-stop-funding-them/>.

167. *Id.*; Joy Pullman, *Louisiana Rejects Race to the Top, Citing Federal Red Tape*, HEARTLAND (Nov. 4, 2011), <http://news.heartland.org/newspaper-article/2011/11/04/louisiana-rejects-race-top-citing-federal-red-tape>.

168. *See supra* notes 105, 107.

169. Downey, *supra* note 166 (quoting Georgia’s Democratic candidate for school chief, Joe Martin).

170. Pullman, *supra* note 167.

171. Teixeira de Sousa, *supra* note 103, at 636.

172. *Id.* at 631.

concern that they are ill equipped to deal with education reform. When announcing the first group of states to be granted NCLB waivers, President Obama stated that, “if we’re serious about seeing our children reach their full potential, the best ideas aren’t just going to come from here in Washington.”¹⁷³ Furthermore, while describing their Flexible Funding Act, the Education and Workforce Committee stated that the goal of the legislation was to ensure that “[i]nstead of Washington bureaucrats making the decisions for superintendents, school leaders, and teachers, local officials will be able to make funding decisions based on what they know will help improve student learning.”¹⁷⁴ The following subsections analyze the two newest federal actions in education, and their estimated impact on the current state of education. Section III(A)(3)(a) will analyze NCLB flexibility and how it adds yet another layer of reform, and Section III(A)(3)(b) will discuss Congress’s proposed education bill package.

a. NCLB Flexibility: Another Layer of Reform

As frustrations with the strict mandates of NCLB grow, promises of flexibility have become more and more appealing.¹⁷⁵ In the seven-week span between President Obama’s announcement about the waivers and the first deadline, eleven states applied for waivers.¹⁷⁶ Currently, the U.S. Department of Education has granted waivers for thirty-nine states and the District of Columbia, and an additional eight states, Puerto Rico, and the Bureau of Indian Education have applications that are still under review.¹⁷⁷ Thus, with only five states declining the

173. *10 states freed from some ‘No Child Left Behind’ requirements*, CNN.COM (Feb. 10, 2012, 5:24 AM), <http://www.cnn.com/2012/02/09/politics/states-education> [hereinafter *10 States Freed*].

174. Encouraging Innovation and Effective Teachers Act, H.R. 3990, 112th Cong. (2d Sess. 2012), available at <http://www.gpo.gov/fdsys/pkg/CRPT-112hrpt459/pdf/CRPT-112hrpt459-pt1.pdf> (last visited July 13, 2013).

175. Press Release, U.S. Dep’t of Educ., 11 States Seek Flexibility from NCLB to Drive Education Reforms in First Round of Requests (Nov. 15, 2011), available at <http://www.ed.gov/news/press-releases/11-states-seek-flexibility-nclb-drive-education-reforms-first-round-requests> [hereinafter 11 States Seek Flexibility].

176. *Id.* The U.S. DOE approved eleven in February 2012. Press Release, U.S. Dep’t of Educ., 26 More States and D.C. Seek Flexibility from NCLB to Drive Education Reforms in Second Round of Requests (Feb. 29, 2012), available at <http://www.ed.gov/news/press-releases/26-more-states-and-dc-seek-flexibility-nclb-drive-education-reforms-second-round>.

177. *ESEA Flexibility*, U.S. DEPT OF EDUC., <http://www2.ed.gov/policy/elsec/guid/esea-flexibility/index.html> (last updated July 9,

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invitation to apply for a waiver, it is clear that states are ready to be free from federal mandates. It is unclear, however, whether these waivers truly grant the freedom that they promise, or whether President Obama overstates the concession that he is making.

While it is true that flexibility is being granted, it is granted based on compliance with a new set of federal mandates.¹⁷⁸ These federal mandates, although they encourage a variety of approaches among states, still suffer from the same problems as many other reforms because they are un-researched and reactionary.¹⁷⁹ For example, states were granted waivers for the following reasons:

Massachusetts . . . set a goal to slash its number of underperforming students by half within six years; Colorado is setting up a comprehensive online database of assessment measures, among other steps; and New Jersey is developing an “early warning” system in an effort to prevent students from dropping out of school.¹⁸⁰

Assuming that the states were not already devising plans to implement these strategies, the plans submitted in the first round of waiver applications were developed between the time that President Obama announced the availability of waivers and the time that the state’s applications were due, not even a two-month period.¹⁸¹ Two months is not enough time to develop meaningful plans for reform, and so these types of rushed plans result in the same type of fad reform that persisted in the past several decades.¹⁸² Furthermore, “[i]ssuing new demands in exchange for relief could result in greater regulations and confusion for schools and less transparency for parents.”¹⁸³ Thus,

2013).

178. See generally ESEA Flexibility Policy Document: Principles for Improving Student Academic Achievement and Increasing the Quality of Instruction, U.S. DEPT OF EDUC., <http://www2.ed.gov/policy/elsec/guid/esea-flexibility/index.html> (last updated June 7, 2012). See *supra* Section II(E)(3)(c).

179. See Ravitch, *supra* note 87.

180. 10 States Freed, *supra* note 173.

181. 11 States Seek Flexibility, *supra* note 175.

182. See Jenny House, *State and District NCLB Waivers: Good News and Bad News*, THE JOURNAL (Mar. 12, 2013), <http://thejournal.com/Articles/2013/03/12/State-and-District-NCLB-Waivers-Good-News-and-Bad-News.aspx?Page=2>.

183. 10 States Freed, *supra* note 173 (quoting two members of the House

the stack of regulations just continues to grow.

b. Congress's Bill Package: The True Surrender

If any body of the federal government is surrendering in the education reform battle, it is Congress. The five-bill package introduced by the Education and Workforce Committee presents a number of reform efforts with one common theme—flexibility from federal mandates.¹⁸⁴ The New Priorities Act defunds or consolidates many federal programs.¹⁸⁵ The Flexibility Act allows states and schools to move federal funds freely between more federal programs so that they may use more discretion on who benefits from federal funds.¹⁸⁶ Of the five main goals of the Student Success Act, three are related to loosening the federal government's hold on education.¹⁸⁷ The Quality Charter Schools Act gives funding priority to states who remove caps on the number of charter schools allowed in their state.¹⁸⁸ While this

Education and Workforce Committee).

184. See *supra* Section II(E)(4). See also *Some Movement on ESEA*, NAT'L ALLIANCE OF BLACK SCH. EDUCATORS (Sept. 22, 2011), http://www.nabse.org/leg_ESEA.html.

185. Educ. & Workforce Comm., Bill Summary: Setting New Priorities in Education Spending Act, http://edworkforce.house.gov/UploadedFiles/SUMMARY_-_Setting_New_Priorities_in_Education_Spending_Act.pdf (last visited May 29, 2013).

186. *Id.* For example, a school district could take money that was formerly designated for certain uses, such as extra support for English Language Learners, and spend it on computers for the entire school. Many fear that this bill would allow local governments to siphon money away from low-income students, which removes the long-standing protections that the ESEA established in 1965. Press Release, Statement by Kati Haycock, President of The Education Trust, on the State and Local Funding Flexibility Act (July 12, 2011), *available at* <http://www.edtrust.org/dc/press-room/press-release/statement-on-the-state-and-local-funding-flexibility-act>; Jeremy Ayers, *Cutting and Running on Education Again*, CENTER FOR AMERICAN PROGRESS (July 7, 2011), <http://www.americanprogress.org/issues/education/news/2011/07/07/10009/cutting-and-running-on-education-again/>.

187. Educ. & Workforce Comm., Bill Summary: The Student Success Act, http://edworkforce.house.gov/UploadedFiles/The_Student_Success_Act_Summary.pdf (last visited May 29, 2013). Three of the five main goals of the Student Success Act are: (1) “[m]aintaining and strengthening long-standing protections for state and local autonomy, (2) “[r]eturning responsibility for student achievement to states, school districts, and parents, while maintaining high expectations,” and (3) “[p]roviding states and school districts greater flexibility to meet students’ unique needs.” *Id.*

188. Educ. & Workforce Comm., Bill Summary: The Empowering Parents Through Quality Charter Schools Act, http://edworkforce.house.gov/UploadedFiles/HR_2218_Bill_Summary.pdf (last visited May 29, 2013).

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appears to have no effect on local control, it actually has a large impact because local districts authorize over half of charter schools.¹⁸⁹ Thus, even if the local district does not run the charter school, the local district will decide if the school is meeting standards and is able to continue operating, and the local district will thus have considerable control over the charter school. Finally, the Encouraging Innovation Act gives states more flexibility, thus more control, when evaluating teachers by setting “five broad parameters that must be included in any evaluation system,” rather than mandating specific and onerous evaluation requirements as Race to the Top and NCLB waivers do.¹⁹⁰

It seems, therefore, that Congress’s bill package essentially seeks to remove the onerous burdens of NCLB waivers, and RTF, and replace them with broad guidelines and suggestions. If the bill package passes, it appears that local schools and states will have increased power to spend money where they need it and will not be forced to implement un-researched and ill-fitting federal programs. Innovation and funds allocation will be back in the hands of the educators. The federal government will provide ten percent of education expenditures, and the professionals will decide how to use it.

This scenario should sound familiar because, if these bills pass, education will find itself back in the hands of local control.¹⁹¹ As history should have taught us, local control of

189. Fifty-two percent of charter schools are run by local education agencies, with state education agencies authorizing nineteen percent of charters. *Fourth Annual Report on NASCA’s Authorizer Survey: The State of Charter School Authorizing 2011*, NATIONAL ASSOCIATION OF CHARTER SCHOOL AUTHORITIES 1, 5 (Jan. 2012), http://www.qualitycharters.org/images/stories/pdfs/publications/nacsa2011_state_of_charter_school_authorizing.pdf(Figure 1.1).

190. Educ. & Workforce Comm., The Encouraging Innovation and Effective Teachers Act Summary for Introduction, http://edworkforce.house.gov/UploadedFiles/The_Encouraging_Innovation_and_Effective_Teachers_Act_Summary_for_Introduction.pdf (last visited May 29, 2012).

191. There is a lot of controversy surrounding the bills, so it is unclear whether they could pass without substantial alteration. Many argue that the bills “only have the support of Republicans, not Democrats,” and “[t]he top Democrat on the education committee, Rep. George Miller, D-Calif., has already said he doesn’t like the legislation. . . . [Therefore,] it’s an open question whether [Republicans] can pick up support from other Democrats later on in the process.” Alyson Klein, *Kline ESEA Bills Would Squelch the Federal Role in K-12*, EDUCATION WEEK (Feb. 9, 2012, 8:28 PM), http://blogs.edweek.org/edweek/campaign-k-12/2012/02/what_are_the_biggest_differenc.html. However, it is worth noting that the first bill up for vote—the Quality Charter School Act—easily passed through the house with seemingly

schools is far too unreliable and fragmented.¹⁹² Therefore, even though Congress promises high standards and accountability, there is no way for them to keep this promise. So, once again, the reactionary method of federal reform goes one step too far. With NCLB, the federal role was too burdensome. Under Congress's proposed system, the federal role is eviscerated, and there is not a replacement system in place. Without a plan to replace the federal role, the reform effort is likely to falter further as the system pieces itself back together.

B. THE [IMPOSSIBLE] FEAT OF FEDERAL REFORM

Subsection B takes a step back from the specific reform efforts, and looks at federal reform as a whole in order to prove that federal education reform never succeeded, because it is an impossible feat. Although each federal reform promised groundbreaking legislation that is superior to previous efforts, all of the federal reforms in the past two decades are fundamentally the same. On the whole, all of the federal government's reforms end up simultaneously being both overly burdensome and insufficient to make any real change. The exoskeleton of educational policy that has been created provides a rigid structure of lofty goals, but lacks the enforcement mechanisms and the resources to do anything at all.¹⁹³ The rigid structure is built on a series of poorly researched "rapid fire reforms." The only mechanism by which the government has to push this structure on the states and local districts is money, and as this section will show, that money is not enough.¹⁹⁴ Furthermore, the federal government is forcing reforms on all fifty states, even though some states already had successful programs in place and there is no evidence that the program will work effectively across the country.¹⁹⁵ Section III(B)(1) analyzes the exoskeleton of policy that is created by a combination of unrealistic policy and inadequate implementation. Section III(B)(2) then looks at the feasibility of applying one reform to fifty states.

bipartisan support (146 Democrats and 219 Republicans voted in favor of the bill, while only forty-one Democrats and thirteen Republicans voted against it.). Office of the Clerk, House of Rep., Final Vote Results for Roll Call 705, <http://clerk.house.gov/evs/2011/roll705.xml> (last visited May 29, 2013).

192. *See supra* Sections II(A)-(B).

193. *See infra* Section III(B)(1).

194. *See infra* Section III(B)(1)(b)(ii).

195. *See infra* Section II(B)(2).

1. THE EXOSKELETON OF POLICY

On a broad level, one that is much broader than education policy alone, ambitious federal policies are often difficult to implement because there is a large gap between the theory of the policy and the actual ability to put the theory into practice.¹⁹⁶ There are many reasons for this gap, one being that the policy put forth by the federal government must pay the “political price of passage.”¹⁹⁷ This price consists of two components— attractiveness and flexibility—and ultimately weakens the strength of the policy.

Policy may be considered attractive for many reasons, such as the perceived level of impact it will have and the speed at which it is enacted.¹⁹⁸ Therefore, once the public perceives a “crisis,” politicians have to react quickly for their actions to have high appeal. The result is that their policy often rests more on rhetoric and hope, than on actual research itself.¹⁹⁹ Moreover, their proposed solution must generally be wide-reaching and hard-hitting, even if common sense indicates that it will be too difficult to enact or that failure is likely.²⁰⁰ Economic research has shown that the further a policy stretches from standard procedure, the more likely it is to fail or have perverse side effects; thus, these types of reforms, although attractive, will likely have a high failure rate.²⁰¹ When failure occurs, the policy must be reformed, which creates a vicious cycle of policy after policy.²⁰² Section III(B)(1)(a) explores this method of “rapid fire reform” and why it is not suited to govern educational policy.

Second, because legislation must pass through a Congress composed of members with vastly different viewpoints and agendas, policies must be flexible enough to please representatives of all fifty states. As seen in the recent

196. DAVID K. COHEN & SUSAN L. MOFFITT, THE ORDEAL OF EQUALITY: DID FEDERAL REGULATION FIX THE SCHOOLS? 15 (2009).

197. *Id.* at 3.

198. ADRIAN PERRY ET AL., INSTINCT OR REASON: HOW EDUCATION POLICY IS MADE AND HOW WE MIGHT MAKE IT BETTER, 4 (2010) available at <http://www.educationaotearoa.org.nz/storage/ea-magazine-files/2012/autumn/How%20education%20policy%20is%20made%20-%20CfBT.pdf>.

199. *See id.* at 5-6.

200. *See id.*; Ryan, *supra* note 9 at 985.

201. Cohen & Moffitt, *supra* note 196, at 14-15.

202. *See* Ryan, *supra* note 9, at 985.

congressional impasses, this type of agreement is not easily reached, and the policies suffer as a result.²⁰³ With every concession of flexibility comes a chance for failure, and the result is a set of regulations with no substance or enforcement potential.²⁰⁴ Even if the initial policies or goals were sound, the policies will likely never make any real, widespread change.²⁰⁵ Section III(B)(1)(b) will explore the difficulty in implementing these innovations.

a. The Sustainability of “Rapid Fire Reforms”

Educational policy is wrought with unrealistic expectations.²⁰⁶ What makes these expectations unrealistic is not necessarily their content, but rather their timeline. As noted earlier, one factor that makes education policy attractive is the speed with which it can reform schools. Therefore, dates and deadlines are attached to everything. Not only will X legislation make every student do Y, it will do it quickly by a specific date, Z. These types of expectations put practitioners and policy makers in a race against the clock, and the way to meet these deadlines is by an under-researched “quick fix.”

Take the example of charter schools. Charter schools have existed since 1992, but their effectiveness was not discussed in a national study until June 2009.²⁰⁷ In the 17 years between their

203. The recent fiscal cliff impasse provides such an example. See Jennifer Steinhauer, *A Showdown Long Foreseen*, N.Y. TIMES (Dec. 30, 2012), <http://www.nytimes.com/2012/12/31/us/politics/fiscal-crisis-impasse-long-in-the-making.html>.

204. See Cohen & Moffitt, *supra* note 196, at 2-3.

205. For example, the passage of the ESEA in 1965 aimed for the lofty goal of equality among the races by providing funds to states according to their poverty level. *Id.* But, at the same time, it had to appease conservative legislators by not telling states how to allocate those funds. *Id.* at 3. These types of concessions seriously undercut the effectiveness of the policy that ESEA aimed to reach. *Id.*

206. Take the last four presidents, for example: In 1990, President George H.W. Bush promised that by 2000, we would be number one in math and science in the world. In 1994, President Clinton promised that by 2000, all students would pass standardized tests in math and science in the fourth, eighth, and twelfth grades. Goals 2000: Educate America Act, Pub. L. No. 103-227, 108 Stat. 125 (1994) (codified at 20 U.S.C. §§ 5801-6084 (1994)). In 2002, President George W. Bush promised that all states would have 100 % proficiency by 2014. 20 U.S.C. §§ 6301-6578 (2002) (NCLB). In 2010, President Obama promised that by 2020, the United States would lead the world in college completion. See ESEA Blueprint for Reform, *supra* note 98, at 6.

207. *Charter Schools*, EDUCATION WEEK, <http://www.edweek.org/ew/issues/charter-schools/> (last updated May 25, 2011); See

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emergence and study, charter schools have been touted for their ability to improve education.²⁰⁸ Two of NCLB's five turnaround options involved a charter school.²⁰⁹ Much of President Obama's reform effort centers around creating more charter schools, and his Race to the Top Program prompted many states to change their laws to favor charter schools.²¹⁰ Much of this occurred *prior to* their effectiveness being verified. Unfortunately, the 2009 study showed patchy results from charter schools. Five states saw significant growth in achievement in charter schools, while six states saw a decline.²¹¹ In fact, "[m]ost studies have found that charters, on average, are no better than public schools" and charter schools "have never outperformed traditional public schools."²¹²

The charter school example shows the danger of jumping into reforms without first researching them. States that are waist-deep in the charter movement, and even *changing their laws*, are now finding out that charter schools may not work.²¹³ Two options present themselves: (1) commit time and effort to making the charter idea work, or (2) throw out the charter idea for a new movement. If history continues as it has, most states will choose the latter option of throwing out the "failed" reform.²¹⁴ Nobody wants to see education take steps backwards, but many are unwilling to wait for positive effects to be seen. In the race against time, many are losing focus and simply tossing a kitchen sink of reforms at education, creating a vicious cycle of reform.

CTR. FOR RESEARCH ON EDUC. OUTCOMES, MULTIPLE CHOICE: CHARTER SCHOOL PERFORMANCE IN 16 STATES 1 (June 2009), http://credo.stanford.edu/reports/MULTIPLE_CHOICE_CREDO.pdf [hereinafter CREDO].

208. See CREDO, *supra* note 207, at 6.

209. Ryan, *supra* note 9, at 943.

210. Take, for example, Indiana, North Carolina, Maine, Michigan, etc. Press Release, Office of the Press Secretary, Fact Sheet: The Race to the Top (Nov. 2, 2009), available at <http://www.whitehouse.gov/the-press-office/fact-sheet-race-top>.

211. CREDO, *supra* note 207, at 3.

212. Diane Ravitch, *The Big Idea – it's bad education policy*, L.A. TIMES, 1 (Mar. 14, 2010), <http://articles.latimes.com/2010/mar/14/opinion/la-oe-ravitch14-2010mar14>.

213. See, CREDO, *supra* note 207, at 6 (noting mixed results in charter school performance); Press Release, The White House, Office of the Press Secretary, Fact Sheet: The Race to the Top (Nov. 4, 2009), available at <http://www.whitehouse.gov/the-press-office/fact-sheet-race-top>.

214. Ryan, *supra*, note 9, at 985.

b. Implementation of Innovations

Once the policy has been created and the states accept federal money, the policies must be enforced, for better or worse. As noted above, however, there is a gap between the policy created and its implementation. As seen in the aftermath of NCLB, this gap is often filled with perverse incentives and unenforced promises, or what this Comment will refer to as *incompetence*. The term *incompetence* is not used in the general, negatively connoted sense, but rather refers to the inability of individual schools and states to enforce the new policies. The competence that a school or teacher or district has to implement a new policy relies heavily on how far the policy strays from the current policy and practice.²¹⁵ The more radical the change, the lower competence falls.²¹⁶ Incompetence can be improved, but that requires an increase in support and training.²¹⁷ This is not to say that drastic reforms cannot succeed, but rather that they cannot succeed without more support.²¹⁸ Section III(B)(1)(b)(i) will explore implementation by schools and teachers, and Section III(B)(1)(b)(ii) will discuss implementation by funding.

i. Implementation by Schools and Teachers

The federal government has thus far relied on schools and teachers to implement reforms; however, in most situations, schools and teachers lack the capability to do so because the federal reforms are presented from such a high-up and abstract federal level.²¹⁹ Capability, in the context of policy implementation, is comprised of the implementer's interest, practices, knowledge, values, will, and money.²²⁰ Take the *Reading Rocks* example from the Introduction. *Reading Rocks* was a federal program that was to be implemented in the schools. Jane will likely not succeed in implementing this reform for

215. Cohen & Moffitt, *supra* note 196, at 35.

216. *Id.*

217. *See id.* at 35-42.

218. "Today it would take an act of almost unimaginable political daring to create public schools that deliver an education of equal quality and utility to all children; and yet, an equivalent act of daring was mounted during the mid-nineteenth century to establish free schooling for all children—boys and girls—at the expense of historically hostile tax payers." Stephen Lassonde, 42 J. SOC. HIST. 522, 525 (2008) (reviewing WILLIAM J. REESE, AMERICA'S PUBLIC SCHOOLS: FROM THE COMMON SCHOOL TO "NO CHILD LEFT BEHIND" (2005)).

219. *See generally*, Cohen & Moffitt, *supra* note 196, at 17-20.

220. *Id.* at 25, 39.

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multiple reasons: (1) she was not properly trained in the program and in teaching reading in general, and so she lacks the skill to do so; and (2) she lacks interest because she is a French teacher and will want to actually teach French. Ms. Smith will also fail at implementation because (1) her past experiences of being stuck in an endless barrage of “new programs” lowered her interest and will to implement the program, and (2) she does not value the federal program’s benefits.²²¹

This analysis is easily transposed onto real-life reforms handed down to local practitioners. For example, in the charter school context, transitioning from a traditional school model to a charter school involves a significant shift in the status quo, and so the shift has the potential to create a high level of incompetence. Because the task of expanding charter schools is left entirely in the hands of state and local officials, successful implementation of this reform rests on the interests, practices, values, skill, will, and money of the local administrators and teachers. Put in this light, it is easier to see why charter schools have variable results—they are being run by people with different levels of capability and only the perfect combination of practitioners will succeed. The federal government can mandate or suggest as many charter schools as they desire, but if the practitioners lack the capability to make them succeed, the charter school is a useless tool. Thus, it would be more advantageous to only create charter schools where a state has the manpower to maintain them. In areas where this reform is not needed and smaller changes can be made, there is no need to waste resources in creating charter schools.

This process applies to every reform that the federal government is trying to push through. So, when one massive federal bill tries to expand charter schools, train teachers, increase accountability, and update standards, the weight on the practitioners becomes too heavy for the fragile school structure to bear. The many variables that exist in enforcing reform must be overseen very closely and reinforced with strong local support, a task that the federal government is not currently equipped to handle. Teachers and principals who resist change will have to

221. See James S. Liebman & Charles F. Sabel, *A Public Laboratory Dewey Barely Imagined: The Emerging Model of School Governance and Legal Reform*, 28 N.Y.U. REV. L. & SOC. CHANGE 183, 213-16 (2003). See generally, Cohen & Moffitt, *supra* note 196, at 19-20.

be monitored. Further, the different reforms that are being tried will have to be tested and tweaked constantly. One agency cannot accomplish this type of oversight for all fifty states.

ii. Implementation by Funding

Federal spending on education has almost tripled since 1970; yet, student achievement has stagnated.²²² The gap between spending and school improvement is likely related to two factors: first, the money the federal government is supplying is inadequate to reach the goals it sets; and second, money has a less significant effect on the success of education than it is generally believed to have.

Although the amount that the federal government spends on education sounds extreme, especially in relation to what it spent half a century ago, the amount of money provided by the federal government only amounts to an average 8.9% of total education expenditures, with states contributing an average of 47.1% and local governments covering about 43.9%.²²³ Thus, the federal government's contribution to education spending accounts for nearly the same percentage of overall spending that did federal land grants did in the 1800s.²²⁴ Thus, federal expectations and demands have risen disproportionately with the percent of funding supplied.

Furthermore, despite what many have historically believed, it is not certain that increased spending has a significant effect on raising student achievement. In 1965, "[w]hen the ESEA became law, most supporters believed that better education would follow more money. . . . Experience has shown that things are not nearly so simple. . . ." ²²⁵ Moreover, it has been recognized that on the local level, "if we just work on getting more money and use it the same old way without raising expectations or professional development, then there will be only modest improvement in the

222. Andrew J. Coulson, *Has Federal Involvement Improved America's Schools*, CATO.ORG (Nov. 5, 2009), http://www.cato.org/pub_display.php?pub_id=10941.

223. *Funding Gaps 2006*, THE EDUCATION TRUST 1, 14 (Jan. 1, 2006), available at <http://www.edtrust.org/sites/edtrust.org/files/publications/files/FundingGap2006.pdf>. Actual percentages vary amongst states with the federal government contributing as much as 19.2% of funds to Alaska's education expenditures, but as little as 4.3% to New Jersey's total expenditures. *Id.*

224. See TYACK ET AL., *supra* note 27, at 22.

225. Cohen & Moffitt, *supra* note 196, at 14.

schools.”²²⁶

2. SQUARE REFORM, ROUND STATE: WHY ONE REFORM DOES NOT WORK NATIONWIDE

Experience with NCLB shows that one reform does not fit all states, and forcing states to do certain things creates more harm than good.²²⁷ Forcing states to adopt certain reforms can stifle state-level innovation and destroy successful programs already in place, in addition to causing the state to waste precious funds implementing duplicative programs.²²⁸ Moreover, even if a state does not currently have a system in place in certain areas, the federally backed reform is not guaranteed to work in each locality.²²⁹ While states may borrow from each other’s reforms, it is unlikely that each state can succeed with identical reforms, as will be shown below.

An excellent example of this negative effect of federal reform may be found in Connecticut. In a 2005 lawsuit challenging NCLB, Connecticut alleged that

“[f]or over twenty years, the plaintiff State of Connecticut has implemented effective assessment and accountability measures for its school districts. Through its ‘state-wide mastery examination,’ known as the Connecticut Mastery Test (CMT), Connecticut has led the country in the comprehensive nature and high-quality of its assessments of all of its students, and in its efforts in focusing attention and resources on low performing school districts. Connecticut’s CMT statutory scheme has been successful, for Connecticut’s students are ranked as among the highest achieving in the nation.”²³⁰

Despite the fact that the state already had successful systems in place, NCLB allegedly caused the state to spend around \$41.6

226. *How Do We Fund Our Schools?*, PBS.ORG (Sept. 5, 2008) <http://www.pbs.org/wnet/wherewestand/reports/finance/how-do-we-fund-our-schools/197/> (quoting Allan Odden, Professor in the Department of Educational Leadership and Policy Analysis at the University of Wisconsin-Madison).

227. *See supra* Section III(A)(1).

228. *See supra* Section III(A).

229. *See supra* Section III(A)(2).

230. Complaint, *Connecticut v. Spellings*, No. 05CV01330, 2005 WL 4115087 (D. Conn. Aug. 22, 2005).

million to comply with its mandates.²³¹ Furthermore, with the implementation of “rigorous” standardized tests, NCLB mandates discouraged Connecticut from using these exams in favor of federally backed exams not aligned to the state’s curriculum.²³² This type of wasteful spending and despecialization of reforms is taking away from effective research and reform within the states.

Another example is Kentucky’s massive reforms in the Kentucky Education Reform Act of 1990.²³³ This sweeping legislation, described as “probably the boldest of any educational reforms at the State level” since the development of common schools in the nineteenth century, reformed the finance system in addition to adopting daring changes to the way children are educated.²³⁴ For example, the legislation eliminated grade levels in elementary schools, blended subjects, and added medical services to needy schools.²³⁵ Like most political reforms, the effects of KERA are heavily debated, but what is certain is that KERA essentially eliminated interdistrict funding disparities, and that Kentucky’s latest NAEP scores are on par with or higher than national averages.²³⁶ In analyzing the impact of the changes

231. *Connecticut v. Duncan*, 612 F.3d 107, 115 (2d Cir. 2010). Connecticut is not the only state having these problems. Local districts in Michigan, Texas, and Vermont, along with the National Education Association, also challenged the law on similar grounds. *Sch. Dist. of Pontiac v. Sec’y of the Dep’t of Educ.*, 584 F.3d 253 (6th Cir. 2009). To reduce costs, the Secretary of Education suggested that Connecticut remove the costly portions of its exam—such as the open-ended questions that involved problem-solving and critical thinking—and replace them with lower cost multiple choice questions. Darling-Hammond, *supra* note 155, at 2.

232. *Id.* “Connecticut, which assesses students with open-ended tasks like designing, conducting and analyzing a science experiment (and not coincidentally ranks first in the nation in academic performance), sued the federal government for the funds needed to maintain its assessments on an ‘every child, every year’ basis. The Education Secretary suggested the state drop these tasks for multiple-choice tests.” *Id.*

233. H.B. 940, 1990 Leg. (Ky. 1990).

234. Greg Winter, *Kentucky’s Revamp of School Funding Shows That More \$ Does Not Necessarily Provide a Better Education For Everyone*, PARENTADVOCATES.ORG (Dec. 6, 2004), http://www.parentadvocates.org/nicecontent/dsp_printable.cfm?articleID=5264.

235. *Id.* See also William H. Hoyt, *An Evaluation of the Kentucky Education Reform Act*, CTR. FOR BUS. AND ECON. REFORM, http://cber.uky.edu/Downloads/kentucky_education_reform_act.htm (last visited July 20, 2013).

236. *Id.*; *National Assessment of Educational Progress: State Profiles*, NAT’L CTR. FOR EDUC. STATISTICS, <http://nces.ed.gov/nationsreportcard/states/> (last visited July 20, 2013).

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made, the federal government itself recognized that it is “unwise to suggest that all states could profit equally” from one set of reforms, as these were specially tailored to Kentucky’s then-woefully underperforming schools.²³⁷

Second, the needs of individual schools vary widely within districts, let alone within states and within the nation. Therefore, even if there is not a successful program in place on the state level, a federally mandated program will not necessarily fill that gap.²³⁸ Again, taking charter schools for example, Monica Teixeira de Sousa notes:

Secretary Duncan has publicly stated that the reform measures he is encouraging states to adopt, charter schools among them, have been proven effective when implemented on a small scale. It has not been shown, however, that charter schools will be any more effective when called upon to educate the majority, rather than a minority, of students currently attending this Nation’s struggling schools.²³⁹

As a matter of fact, it is thought that some charter schools are successful because they only educate the most motivated students from low-achieving areas.²⁴⁰ This is due to the fact that students usually have to apply to a charter school; thus, only those parents and children who are looking for a way out of the public schools make the effort to apply.²⁴¹ Further, charter schools can recommend that problem students not return or can expel those students, meaning that the lowest of the low-performers are concentrated in public schools, who cannot refuse them, at exceedingly high rates.²⁴² Thus, if charter schools were implemented on a large scale, there is no guarantee that they could improve achievement for all students, including the ones that are most difficult to educate.²⁴³

The varying needs of schools must be addressed on a local, small-scale basis. There is not a single answer or a quick fix because “[e]ducation is a slow, arduous process that requires the

237. Winter, *supra* note 234.

238. *See, e.g., id.*

239. Teixeira de Sousa, *supra* note 103, at 660.

240. Ravitch, *supra* note 212.

241. *Id.*

242. *Id.*

243. *Id.*

work of willing students, dedicated teachers and supportive families, as well as a coherent curriculum.”²⁴⁴ One idea will not cure all education problems, and attempting to force that idea on states only further harms our already injured public school system.

IV. PROPOSING STATES AS INSTITUTIONAL CENTERS OF EDUCATION REFORM

In abandoning the current system of fad reforms, it must be accepted that “large-scale educational reform is unlikely in the absence of an institutional center to shape policy, aggregate interests, and control and channel conflict.”²⁴⁵ This realization begs the question: Where should this institutional center be placed? Three options exist: (1) the federal government, (2) local schools, or (3) states. This Comment proposes that the states become centers of education reform that work directly with the local schools to propel constructive change. History has taught us that extensive local control was fragmented and unreliable, and the modern failure of increased federal intervention should make us wary of complete federal control.²⁴⁶ Furthermore, it has become clear that overlapping governance by multiple bodies creates a confusing and unaccountable system.²⁴⁷ With a cooperative of state and local control, led by strong state institutional centers, this proposal has the potential to create a balanced system in which real reform can occur.

Section IV(A) will outline the proposed changes and why those changes will create a better chance for useful reform. Section IV(B) will then address and rebut possible challenges to this proposal, including why the federal government and local schools should not be centers of reform, and how the federal government will be removed from reform.

A. THE CASE FOR THE STATES

In 1973, the Supreme Court of the United States noted that Education, perhaps even more than welfare assistance, presents a myriad of “intractable economic, social, and even

244. Ravitch, *supra* note 212.

245. Timar, *supra* note 3, at 235.

246. *See supra* Sections II(A), III.

247. *See* Timar & Tyack, *supra* note 15, at 14.

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philosophical problems.” The very complexity of the problems of financing and managing a statewide public school system suggests that ‘there will be more than one constitutionally permissible method of solving them,’ and that, within the limits of rationality, “the [State] legislature’s efforts to tackle the problems” should be entitled to respect.²⁴⁸

Despite this sage advice, the federal government persisted in trying to control education. It is time for the power struggle to come to an end, and for states to take control of the complex endeavor of regulating public education. Section IV(A)(1) will discuss this Comment’s proposed changes to state education agencies, and Section IV(A)(2) will analyze why this proposal would succeed.

1. PROPOSED CHANGES TO STATE EDUCATION AGENCIES

This Section does not suggest another bureaucratic structure, but rather suggests learning-centric bodies that facilitate the education process. Under this proposal, systemic changes to the current system would be necessary. State education agencies would not be mere paper-pushers who dole out funds; they would be involved in the learning and reform process. This would require a massive expansion of state education boards to include enough experts to cover all schools.

State education agencies would serve a proactive and reactive regulatory function. Their regulation will be proactive in terms of funding. All funds raised for education should be deposited into the state agency. The state will then adequately and equitably disburse these funds to ensure that poorer districts are not short-changed.²⁴⁹ The reactive regulatory function of the proposed agency would be charged with monitoring the progress of local schools. As is currently the case, data would be kept on all schools concerning test scores, dropout rates, suspension rates, etc. However, rather than using the data to enforce an arbitrary scheme of winners and losers, the proposed state agency would

248. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 42 (1973) (internal citation omitted).

249. What would constitute an “adequate and equitable” allocation of funds has been the topic for years of school finance litigation and is beyond the scope of this Comment. For more information on that topic, see Garda, *supra* note 72; see generally, Liebman & Sabel, *supra* note 221.

simply be there to ensure upward movement and provide support to those schools that stagnate or decline.

This regulation may be achieved, in part, by an overhauled system of professional development. For many, the notion of professional development conjures images of overworked teachers, excited to have an afternoon off from teaching, eating Danishes and discussing new methods of instruction in the school library.²⁵⁰ The professional development espoused by this proposal differs in that it does not flatly present new strategies for the curious teacher to try on her own, but consists of “mutual education for teachers [that serves as] a lever for reorganizing schools and districts in response to (ever more refined) diagnoses of their shortcomings.”²⁵¹ This type of professional development consists of master teachers working with other teachers to determine what needs to be fixed and how to fix it.²⁵² Data would be used to inform change instead of to determine who wins or loses. This proposal maintains that this type of gradual, flexible, and informed change that is a result of ground-level educators and state-level experts working together is the best method by which to improve achievement in all schools.²⁵³

For example, imagine the following: in the ABC Local School District, achievement across schools varies. The lowest performing school has a passing rate of only thirteen percent on the state exam; the highest performing school enjoys a ninety percent rate. Two years after working with master teachers to improve both schools, the thirteen percent school has climbed to fifty percent and the ninety percent school has climbed to ninety-four percent. Under the restrictive programs with arbitrary cut-offs for “success,” both schools could be in trouble. The fifty percent school would likely still be considered to be failing because only half of its students passed the state exam. The other school could be in trouble for only gaining four percent on

250. This portrait of professional development is influenced by both Liebman and Sablel's *Public Laboratory*, *supra* note 221, at 217, as well as the author's personal experiences as a teacher.

251. *Id.* at 216-17.

252. *Id.* at 217.

253. “Policy “[i]mplementation in the United States generally is regarded as a single act of compliance or noncompliance. Policy makers in other industrialized countries, in contrast, tend to regard implementation as a mediated process requiring many structural supports and occurring over a long period of time.” Timar, *supra* note 3, at 233 (internal citation omitted).

the exams.

Under this Comment's proposal, neither school would face sanctions. Although it would be ideal to see a school with a thirteen percent proficiency rate move to 100 percent in two years, it is unlikely. Under this proposal, so long as the thirteen percent school was moving upwards, towards a goal of 100 percent, its doors would stay open and it would continue to receive funding, perhaps more funding than other schools. Conversely, the school with the ninety percent proficiency rate would need to progress differently. Obviously, such a school will not be able to jump five percent a year like a lower achieving school could because the school will only be doing fine-tuning. As part of their reactive function, the state education agency would be responsible for tracking this data and making adjustments and interventions where necessary by collaborating with the school and its teachers. Because upward movement will be the focus rather than timelines and thresholds for success, the pressure on local schools can be alleviated and real progress can be made.

2. WHY THIS STRUCTURE WILL WORK

Centering education governance in the states will create a balance that local and federal governance has yet to find. States are small enough to respond to local needs, yet large enough to have the resources to respond to those needs. They can respond through a continuation of their current programs, the innovation of new programs, or by looking to other states for guidance. Further, states are small enough to oversee their classrooms, and to partner with the teachers in order to get to the root of their local problems. This Section explores these attributes. Section IV(A)(2)(a) will discuss local solutions for local problems; Section IV(A)(2)(b) will detail the continuation of successful solutions; Section IV(A)(2)(c) will introduce the innovation of new solutions; and Section IV(A)(2)(d) will present a combination of Top and Bottom Down Reform.

a. Local Solutions for Local Problems

This proposal calls for people to end their reliance on a "Big Idea."²⁵⁴ As noted earlier, the same reform that fails on a large

254. See Ravitch, *supra* note 212 (combating the notion that there is a pancea for education, and encouraging reformers to come to terms with the fact that education is a long struggle).

scale may prove successful on a small scale. Under this proposal, all reforms would be imposed on a fairly small scale with close monitoring and tailoring. For example, despite the general finding that charter schools are not the cure-all that many claim them to be, charter schools do have positive effects in some locales.²⁵⁵ Most notably, in Louisiana, a state whose failures in public education were highlighted nationally after Hurricane Katrina, charter schools actually showed statistically significant growth in both reading and math scores.²⁵⁶ The growth shown by these charters was significantly more promising than in other states.²⁵⁷ Thus, Louisiana may want to continue researching this option for reform in some areas. Conversely, Ohio, which showed statistically significant declines in achievement in charter schools, may want to consider other avenues.²⁵⁸ Regardless of the reform, this proposal allows local solutions.

b. Continuation of Successful Solutions

As noted earlier, expansive federal oversight can force states to replace successful programs with non-specialized and un-researched federal reforms. This would not happen under the proposed system because the federal government is out of the equation. Rather than scrambling to meet new mandates, states can continue the programs they have and use funds that would be spent on innovating completely new reforms to tweak current systems that are doing well or show promise of future success. Such attention to detail and persistence in implementation is not possible under the federal timeline for reform.

c. Innovation of New Solutions

As noted earlier, the federal government does not have the resources to enforce and monitor its reforms in a meaningful way.²⁵⁹ Under federal reform, situations like Jane's useless Smartboard in the hypothetical in the Introduction often arise. The federal government provides money for a certain purpose, like innovation through technology, and the school must find a way to use that technology within the confines of the mandate and can make decisions that are forced and illogical, such as

255. CREDO, *supra* note 207, at 6.

256. *Id.* at 37.

257. *Id.* at 36-37.

258. *Id.* at 37.

259. *See supra* Section III(B).

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purchasing Smartboards. Because implementation is lacking and funding is insufficient, the forced innovations fail, as did the Smartboard innovation, where the boards were purchased but not integrated.

It seems more effective to spend resources on developing successful innovations that are needed rather than prescribed. Before the federal reforms tied state education agencies up in red tape, states had begun to innovate their own solutions.²⁶⁰ Under the most recent federal mandates, this innovation has been both stifled (in the case of NCLB) and rushed (in the case of RTF). The hallmarks of federal reform are limited funding and implementation by the carrot and stick approach.²⁶¹ Thus, under the federal system there must be winners and losers, those who pass and those who fail. The lines that divide these categories are completely arbitrary, and in the case of NCLB, have led schools to take drastic measures to meet arbitrary goals.²⁶² Under the proposed system, arbitrary federal goals would be removed, thus freeing states to innovate at a calm, thoughtful pace. For years, the federal government has assumed that states have the capacity to innovate, as evidenced by their skeletal reforms. This proposal allows states the chance to do exactly that.

d. A Combination of Top-Down and Bottom-Up Reform

The top-down policy method of the federal government, and even of local districts that simply hand down orders to schools, is not an effective method of reform. These types of policies have the ability to “constrain but not construct” and necessarily require some sort of local adaptation in order to succeed.²⁶³ Due to the many factors discussed above, such as incapability to adapt or lack of resources, the local adaptation needed for implementation of top-down reforms rarely occurs.²⁶⁴ Conversely,

260. *See supra*, Section III(B)(2).

261. *See supra* Section II(E).

262. A difference of one point could make the difference between making AYP and not making AYP under NCLB. Likewise, one less point on the RTF rubric could cause a state to miss out on millions of dollars. Nobody can argue that there is a real difference between a state with eighty points and a state with eighty-one points. However, the distinction must be made in order to decide who wins.

263. Linda Darling-Hammond, *Instructional Policy into Practice: “The Power of the Bottom Over the Top,”* 12 EDUC. EVALUATION & POL’Y ANALYSIS, 339, 341 (1992).

264. *See supra* Section III(B).

the bottom-up method, which requires individual educators to innovate reform and then cause that reform to spread, is also inadequate because it causes too much variation and inefficiency.²⁶⁵ Therefore, this proposal combines the two methods and provides for the harmonization of the top-down reforms of state agencies and the bottom-up reforms of individual educators.

B. POSSIBLE CHALLENGES TO THE PROPOSAL

Critics may ask why we should choose to essentially reinvent the wheel at such a pivotal time in education reform. They may argue that the current system should just be refined and that control should not be handed over to states, which have less experience in controlling educational reform. Given the history of state governments, this is a valid concern. States historically delegated themselves to inferior roles when it comes to education, first yielding to the progressive reformers of the early 1900s, then to local and federal governments.²⁶⁶ However, this Comment maintains that local and federal government failed in successfully reforming education for a century, and a fresh start is needed. Section IV(B)(1) will discuss why there should not be a return to local control of education; Section IV(B)(2) will explain why the states do not need the federal government to implement effective education reform; and Section IV(B)(3) will discuss why it is possible to remove the federal government from education reform.

1. WHY NOT RETURN TO LOCAL CONTROL?

Local schools, at least theoretically, ran themselves up until the middle of the twentieth century.²⁶⁷ This experience shows us that a return to complete local control is not the best solution because it is inefficient and creates unequal schools.

Local control often relies on bottom-up reform, which, although it is responsive to local needs, is highly inefficient.²⁶⁸ Under this type of system, ground-level educators innovate solutions to daily problems with the good solutions eventually

265. See *infra* Section IV(B)(1).

266. See *supra* Sections II(A)-(D).

267. *Supra* Section II(A).

268. Charter schools, which often operate as their own independent district, best exemplify the inefficiency of local control because they illustrate the difficulty of running an entire school without sharing resources.

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making their way into general practice. This fractured approach leads to a situation wherein schools within mere miles of each other are forced to reinvent the wheel with every effort they make. Because each district should be fundamentally engaging in the same fundamental activities—teaching and learning—it would be beneficial to have an overarching, state-level agency that can facilitate collaboration and synchronization of districts.

In addition to being inefficient, local control of schools promotes inequality in both funding and outcomes. Because local property taxes remain the single most important source of education funding different districts will have different levels of funding based on the wealth of the local citizens.²⁶⁹ Even after decades of litigation and numerous state and federal interventions, the gap in funding between wealthy and poor districts persists largely due to the fact that, in their attempts to close the gap, states have not interfered with how much money a district can raise for fear of trouncing local control.²⁷⁰ If education were returned to the hands of local districts, this gap would persist. Therefore, another actor must be allowed to take control of all funding, not just the minimum threshold.

Finally, if each district is governing education in its own way with varying amounts of funding and distinct demographics, it should be of no surprise that the districts' achievement varies widely. The more variation that exists in the system, the harder it is to get to one uniform result. Studies have routinely shown that instructional policy is “imprecisely and differentially followed from place to place,” so a larger governing body is required to serve as a guiding hand in an otherwise isolated and fractured system.²⁷¹

2. DO STATES *NEED* THE FEDERAL GOVERNMENT?

Some may argue that the federal government has always had a role in education, even in the so-called golden age of local control, so the harsh truth is that states need the federal government as a source for both innovation and funding. This argument falters because, while it is true that the federal government has always played a role, it has historically been

269. Laurie Reynolds, *Skybox Schools: Public Education as Private Luxury*, 82 WASH. U. L.Q. 755, 756-57 (2004).

270. *Id.* at 759.

271. Darling-Hammond, *supra* note 263, at 340.

muted. No one can deny that the federal government's modern role in education is vastly different than it was one hundred years ago. One hundred years ago, the federal government was simply supporting and encouraging the development of the common school.²⁷² Land and money were not tied to reform policies enacted by the federal government.²⁷³ It was not until the federal government began to proactively reform that federal involvement became problematic. Therefore, the best response is that federal government needs to get out of education reform, but not necessarily out of education.

If the federal government were to serve as the institutional center of reform, it would have to find a way to reduce the incompetence that currently plagues the system, meaning that it would have to ratchet up the level of support it provides along with its policies. This option would be a total overhaul and unprecedented enlargement of the federal government's presence in education.²⁷⁴ More money would have to be spent, and federal education agencies would have to set up local bodies to oversee local efforts. Because this is both unlikely and undesirable, it is not a viable solution.

3. IS IT EVEN POSSIBLE TO REMOVE THE FEDERAL ROLE?

Similar to the previous argument, some will maintain that the federal government is too involved in education to be removed. Without the federal government, things like funding under the ESEA and financial aid are not possible. Answers to these questions require a clear look at the federal role as it currently exists, as well as the proposed changes. First, recall that federal funds only make up about ten percent of spending on education—a figure that has remained unchanged over the last century and a half.²⁷⁵ While that percentage represents a large sum of money, it will not be missed if the states are not wasting resources trying to keep up with federal reforms.²⁷⁶ Second, this

272. See *supra* Section II(A).

273. See *supra* Section II(A).

274. Lassonde, *supra* note 218. "Today it would take an act of almost unimaginable political daring to create public schools that deliver an education of equal quality and utility to all children; and yet, an equivalent act of daring was mounted during the mid-nineteenth century to establish free schooling for all children—boys and girls—at the expense of historically hostile tax payers." *Id.*

275. Teixeira de Sousa, *supra* note 103, at 636.

276. See, Bruce Alpert, *Five States Chosen to Compete for Federal Education*

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Comment points out that the federal government should step out of *reform* but not necessarily education itself. This Comment proposes to remove federal influence from educational policy and reform in public, K-12 schools. Therefore, this proposal has no bearing on financial aid for post-secondary education, nor does it even propose that funding for K-12 schools be reduced. If the federal government is comfortable providing funding to the schools without imposing intricate and intrusive reforms as the ones discussed above, it is free to do so under this proposal.

V. CONCLUSION

Recall the quotation at the beginning of this Comment: “[Education] reform today is like a freight train,” and it is “going the wrong way.”²⁷⁷ The train started slowly with the dominance of profession reformers in the early twentieth century quietly defining the “right way” to operate a public school. It picked up steam as the skeptical public needed reassurance in the 1950s and 1960s. Finally, after the publication of *A Nation at Risk*, the train reached full speed, and has been barreling in the same direction ever since.

Consequently, the United States has been recycling reform after reform, frantically trying to repair the system. These reforms have not been effective, partly because they have questionable foundations in research, partly because there is no effective implementation scheme in place, and partly because they are being forced into schools that do not want to or are unable to make them work locally.

As the nation thinks about its next step in education, it must decide whether it wants to stop the train or let it plow ahead. Moving forward on this track is not the answer, so stopping is the only solution. The federal government must remove itself from education reform, and states must rise to the challenge of effecting meaningful change.

Lindsey H. Chopin

Funds that Louisiana Opted to Bypass, (Apr. 10, 2012, 10:10 AM) http://www.nola.com/politics/index.ssf/2012/04/five_states_chosen_to_compete.html (criticizing Louisiana’s decision not to compete in Race to the Top because it provides more red tape than funding).

²⁷⁷. Dillon, *supra* note 1.

APPENDIX²⁷⁸

The following is a timeline of federal legislation concerning public K-12 education.

- 1787** *Northwest Ordinance* authorized land grants for the establishment of educational institutions.
- 1867** *Department of Education Act* authorized the establishment of the U.S. Department of Education.
- 1917** *Smith-Hughes Act* provided for grants to states for support of vocational education.
- 1935** *Bankhead-Jones Act* (Public Law 74-182) authorized grants to states for agricultural experiment stations.
- 1941** *Amendment to Lanham Act of 1940* authorized federal aid for construction, maintenance, and operation of schools in federally impacted areas. Such assistance was continued under Public Law 815 and Public Law 874, 81st Congress, in 1950.
- 1943/44** *School Lunch Indemnity Plan* (Public Law 78-129) provided funds for local lunch food purchases. *Surplus Property Act* (Public Law 78-457) authorized transfer of surplus property to educational institutions.
- 1946** *National School Lunch Act* (Public Law 79-396) authorized assistance through grants-in-aid and other means to states to assist in providing adequate foods and facilities for the establishment, maintenance, operation, and expansion of nonprofit school lunch programs. *George-Barden Act* (Public Law 80-402) expanded federal support of vocational education.
- 1949** *Federal Property and Administrative Services Act* (Public Law 81-152) provided for donation of surplus property to educational institutions and for other public purposes.

278. Digest of Education Statistics: 2010, *supra* note 18.

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- 1950** *Financial Assistance for Local Educational Agencies Affected by Federal Activities* (Public Law 81-815 and Public Law 81-874) provided assistance for construction (Public Law 815) and operation (Public Law 874) of schools in federally affected areas.
- 1954** *Educational Research Act* (Public Law 83-531) authorized cooperative arrangements with universities, colleges, and state educational agencies for educational research. *School Milk Program Act* (Public Law 83-597) provided funds for purchase of milk for school lunch programs.
- 1958** *National Defense Education Act* (Public Law 85-864) provided assistance to state and local school systems for strengthening instruction in science, mathematics, modern foreign languages, and other critical subjects; improvement of state statistical services; guidance, counseling, and testing services and training institutes; higher education student loans and fellowships; foreign language study and training provided by colleges and universities; experimentation and dissemination of information on more effective utilization of television, motion pictures, and related media for educational purposes; and vocational education for technical occupations necessary to the national defense. *Education of Mentally Retarded Children Act* (Public Law 85-926) authorized federal assistance for training teachers of the disabled.
- 1961** *Area Redevelopment Act* (Public Law 87-27) included provisions for training or retraining of people in redevelopment areas.
- 1962** *Manpower Development and Training Act* (Public Law 87-415) provided training in new and improved skills for the unemployed and underemployed. *Migration and Refugee Assistance Act of 1962* (Public Law 87-510) authorized loans, advances, and grants for education and training of refugees.

- 1963** *Vocational Education Act of 1963* (Part of Public Law 88-210) increased federal support of vocational education schools; vocational work-study programs; and research, training, and demonstrations in vocational education.
- 1964** *Civil Rights Act of 1964* (Public Law 88-352) authorized the Commissioner of Education to arrange for support for institutions of higher education and school districts to provide in-service programs for assisting instructional staff in dealing with problems caused by desegregation. *Economic Opportunity Act of 1964* (Public Law 88-452) authorized grants for college work-study programs for students from low-income families; established a Job Corps program and authorized support for work-training programs to provide education and vocational training and work experience opportunities in welfare programs; authorized support of education and training activities and of community action programs, including Head Start, Follow Through, and Upward Bound; and authorized the establishment of Volunteers in Service to America (VISTA).
- 1965** *Elementary and Secondary Education Act of 1965* (Public Law 89-10) authorized grants for elementary and secondary school programs for children of low-income families; school library resources, textbooks, and other instructional materials for school children; supplementary educational centers and services; strengthening state education agencies; and educational research and research training. *Higher Education Act of 1965* (Public Law 89-329) provided grants for university community service programs, college library assistance, library training and research, strengthening developing institutions, teacher training programs, and undergraduate instructional equipment. Authorized insured student loans, established a National Teacher Corps, and provided for graduate teacher training fellowships. *School Assistance in Disaster Areas Act* (Public Law 89-313) provided for assistance to local education agencies to help meet exceptional costs resulting from a major disaster.

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- 1966** *International Education Act* (Public Law 89-698) provided grants to institutions of higher education for the establishment, strengthening, and operation of centers for research and training in international studies and the international aspects of other fields of study. *Model Secondary School for the Deaf Act* (Public Law 89-694) authorized the establishment and operation, by Gallaudet College, of a model secondary school for the deaf.
- 1967** *Education Professions Development Act* (Public Law 90-35) amended the Higher Education Act of 1965 for the purpose of improving the quality of teaching and to help meet critical shortages of adequately trained educational personnel.
- 1968** *Elementary and Secondary Education Amendments of 1968* (Public Law 90-247) modified existing programs, authorized support of regional centers for education of children with disabilities, model centers and services for deaf-blind children, recruitment of personnel and dissemination of information on education of the disabled; technical assistance in education to rural areas; support of dropout prevention projects; and support of bilingual education programs. *Handicapped Children's Early Education Assistance Act* (Public Law 90-538) authorized preschool and early education programs for disabled children. *Vocational Education Amendments of 1968* (Public Law 90-576) modified existing programs and provided for a National Advisory Council on Vocational Education and collection and dissemination of information for programs administered by the Commissioner of Education.
- 1970** *Elementary and Secondary Education Assistance Programs, Extension* (Public Law 91-230) authorized comprehensive planning and evaluation grants to state and local education agencies; provided for the establishment of a National Commission on School Finance. *National Commission on Libraries and Information Services Act* (Public Law 91-345) established a National Commission on Libraries and Information Science to effectively utilize the nation's educational resources. *Office of Education*

Appropriation Act (Public Law 91-380) provided emergency school assistance to desegregating local education agencies. *Environmental Education Act* (Public Law 91-516) established an Office of Environmental Education to develop curriculum and initiate and maintain environmental education programs at the elementary/secondary levels; disseminate information; provide training programs for teachers and other educational, public, community, labor, and industrial leaders and employees; provide community education programs; and distribute material dealing with the environment and ecology. *Drug Abuse Education Act of 1970* (Public Law 91-527) provided for development, demonstration, and evaluation of curricula on the problems of drug abuse.

1974 *Education Amendments of 1974* (Public Law 93-380) provided for the consolidation of certain programs; and established a National Center for Education Statistics. *Juvenile Justice and Delinquency Prevention Act of 1974* (Public Law 93-415) provided for technical assistance, staff training, centralized research, and resources to develop and implement programs to keep students in elementary and secondary schools; and established, in the U.S. Department of Justice, a National Institute for Juvenile Justice and Delinquency Prevention.

1975 *Indian Self-Determination and Education Assistance Act* (Public Law 93-638) provided for increased participation of Indians in the establishment and conduct of their education programs and services. *Harry S Truman Memorial Scholarship Act* (Public Law 93-642) established the Harry S. Truman Scholarship Foundation and created a perpetual education scholarship fund for young Americans to prepare and pursue careers in public service. *Education for All Handicapped Children Act* (Public Law 94-142) provided that all children with disabilities have available to them a free appropriate education designed to meet their unique needs.

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- 1977** *Career Education Incentive Act* (Public Law 95-207) authorized the establishment of a career education program for elementary and secondary schools.
- 1978** *Education Amendments of 1978* (Public Law 95-561) established a comprehensive basic skills program aimed at improving pupil achievement (replaced the existing National Reading Improvement program); and established a community schools program to provide for the use of public buildings.
- 1979** *Department of Education Organization Act* (Public Law 96-88) established a U.S. Department of Education containing functions from the Education Division of the U.S. Department of Health, Education, and Welfare (HEW) along with other selected education programs from HEW, the U.S. Department of Justice, U.S. Department of Labor, and the National Science Foundation.
- 1980** *Asbestos School Hazard Detection and Control Act of 1980* (Public Law 96-270) established a program for inspection of schools for detection of hazardous asbestos materials and provided loans to assist educational agencies to contain or remove and replace such materials.
- 1981** *Education Consolidation and Improvement Act of 1981* (Part of Public Law 97-35) consolidated 42 programs into 7 programs to be funded under the elementary and secondary block grant authority.
- 1983** *Education of the Handicapped Act Amendments of 1983* (Public Law 98-199) added the Architectural Barrier amendment and clarified participation of children with disabilities in private schools.
- 1984** *Education for Economic Security Act* (Public Law 98-377) added new science and mathematics programs for elementary, secondary, and postsecondary education. The new programs included magnet schools, excellence in education, and equal access. *Human Services Reauthorization Act* (Public Law 98-558) created a Carl D. Perkins scholarship program, a National Talented Teachers Fellowship program, a Federal Merit

Scholarships program, and a Leadership in Educational Administration program.

- 1986** *Handicapped Children's Protection Act of 1986* (Public Law 99-372) allowed parents of children with disabilities to collect attorneys' fees in cases brought under the Education of the Handicapped Act and provided that the Education of the Handicapped Act does not preempt other laws, such as Section 504 of the Rehabilitation Act. *Drug-Free Schools and Communities Act of 1986* (Part of Public Law 99-570), part of the Anti-Drug Abuse Act of 1986, authorized funding for FYs 1987–89. Established programs for drug abuse education and prevention, coordinated with related community efforts and resources, through the use of federal financial assistance.
- 1988** *Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988* (Public Law 100-297) reauthorized through 1993 major elementary and secondary education programs, including Chapter 1, Chapter 2, Bilingual Education, Math-Science Education, Magnet Schools, Impact Aid, Indian Education, Adult Education, and other smaller education programs. *Stewart B. McKinney Homeless Assistance Amendments Act of 1988* (Public Law 100-628) extended for 2 additional years programs providing assistance to the homeless, including literacy training for homeless adults and education for homeless youths.
- 1989** *Children with Disabilities Temporary Care Reauthorization Act of 1989* (Public Law 101-127) revised and extended the programs established in the Temporary Child Care for Handicapped Children and Crises Nurseries Act of 1986. *Childhood Education and Development Act of 1989* (Part of Public Law 101-239) authorized the appropriations to expand Head Start programs and programs carried out under the Elementary and Secondary Education Act of 1965 to include child care services.

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- 1990** *Excellence in Mathematics, Science and Engineering Education Act of 1990* (Public Law 101-589) was established to promote excellence in American mathematics, science, and engineering education by creating a national mathematics and science clearinghouse, and creating several other mathematics, science, and engineering education programs.
- 1992** *Ready-To-Learn Act* (Public Law 102-545) amended the General Education Provisions Act to establish Ready-To-Learn Television programs to support educational programming and support materials for preschool and elementary school children and their parents, child care providers, and educators. *NAEP Assessment Authorization* (Public Law 103-33) authorized use of the National Assessment of Educational Progress (NAEP) for state-by-state comparisons.
- 1994** *Goals 2000: Educate America Act* (Public Law 103-227) established a new federal partnership through a system of grants to states and local communities to reform the nation's education system. The Act formalized the national education goals and established the National Education Goals Panel. *Safe Schools Act of 1994* (Part of Public Law 103-227) authorized the award of competitive grants to local educational agencies with serious crime to implement violence prevention activities such as conflict resolution and peer mediation.
- 1998** *Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999* (Public Law 105-277) enacted the Reading Excellence Act, to promote the ability of children to read independently by the third grade; and earmarked funds to help states and school districts reduce class sizes in the early grades. *Charter School Expansion Act* (Public Law 105-278) amended the charter school program, enacted in 1994 as Title X, Part C of the Elementary and Secondary Education Act of 1965.

- 1999** *Education Flexibility Partnership Act of 1999* (Public Law 106-25) authorized the Secretary of Education to allow all states to participate in the Education Flexibility Partnership program.
- 2001** *50th Anniversary of Brown v. the Board of Education* (Public Law 107-41) established a commission for the purpose of encouraging and providing for the commemoration of the 50th anniversary of the 1954 Supreme Court decision *Brown v. Board of Education*.
- 2002** *No Child Left Behind Act of 2001* (Public Law 107-110) provided for the comprehensive reauthorization of the Elementary and Secondary Education Act of 1965, incorporating specific proposals in such areas as testing, accountability, parental choice, and early reading. *Reauthorization of the National Center for Education Statistics and the Creating of the Institute of Education Sciences of 2002* (Public Law 107-279) established the Institute of Education Sciences within the U.S. Department of Education to carry out a coordinated, focused agenda of high-quality research, statistics, and evaluation that is relevant to the educational challenges of the nation.
- 2005** *Student Grant Hurricane and Disaster Relief Act* (Public Law 109-67) authorized the Secretary of Education to waive certain repayment requirements for students receiving campus-based federal grant assistance if they were residing in, employed in, or attending an institution of higher education located in a major disaster area, or their attendance was interrupted because of the disaster. *Natural Disaster Student Aid Fairness Act* (Public Law 109-86) authorized the Secretary of Education during FY 2006 to reallocate campus-based student aid funds to institutions of higher learning in Louisiana, Mississippi, Alabama, and Texas, or institutions that have accepted students displaced by Hurricane Katrina or Rita. The law also waived requirements for matching funds that are normally imposed on institutions and students. *Hurricane Education Recovery Act (HERA)* (Public Law 109-148, provision in the Defense Department Appropriations Act for FY

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2006) provided funds for states affected by Hurricane Katrina to restart school operations, provide temporary emergency aid for displaced students, and assist homeless youth. The law also permitted the Secretary of Education to extend deadlines under the Individuals with Disabilities Education Act for those affected by Katrina or Rita.

2006 Public Law 109-211 reauthorized the “ED-FLEX” program (under the Education Flexibility Partnership Act of 1999), under which the Secretary of Education permits states to waive certain requirements of federal statutes and regulations if they meet certain conditions. Public Law 109-323 extended, for an additional year (through September 30, 2007), the period for which the Secretary of Education may waive certain fiscal requirements for states in which the President declared disaster areas as a result of Hurricanes Katrina and Rita.

2007 *America COMPETES Act* (or “*America Creating Opportunities to Meaningfully Promote Excellence in Technology, Education, and Science Act*”) (Public Law 110-69) creates new STEM (science, technology, engineering, and mathematics) education programs in various agencies, including the Department of Education. *The College Cost Reduction and Access Act of 2007* (Public Law 110-84) reduces interest rates on student loans and makes other amendments to the Higher Education Act of 1965 to make college more accessible and affordable. *Permanent extension of the Higher Education Relief Opportunities for Students Act of 2003* (HEROES Act) (Public Law 110-93) gives the Secretary of Education authority to waive or modify any statutory or regulatory provision applicable to the student financial assistance programs under Title IV of the Higher Education Act of 1965 as deemed necessary in connection with a war or other military operation or national emergency.

2009 *American Recovery and Reinvestment Act of 2009* (Public Law 111-5) provides about \$100 billion to state education systems and supplemental appropriations for several Department of Education programs. (Funding

for Race for the Top comes from ARRA).

- 2010** *Health Care and Education Reconciliation Act of 2010* (Public Law 111-152) included, as Title II, the “SAFRA Act” (also known as the “Student Aid and Fiscal Responsibility Act”). The SAFRA Act ended the federal government’s role in subsidizing financial institutions that make student loans through the Federal Family Education Loan (FFEL) Program under Part B of Title IV of the Higher Education Act of 1965 (HEA), and correspondingly expanded the Federal Direct Student Loan Program administered by the Department of Education under Part D of Title IV of the HEA. Public Law 111-226 provided an additional \$10 billion to states and school districts, through an “Education Jobs Fund” modeled closely on the State Fiscal Stabilization Fund created by the 2009 Recovery Act, to hire (or avoid laying off) teachers and other educators.