

The Problem with “Implementation is the Problem”:  
A Short History of No Child Left Behind

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## INTRODUCTION: A PLETHORA OF PARADOXES\*

It's popular in Washington to declare No Child Left Behind an excellent statute (even "99.9% pure," as Secretary Margaret Spellings claimed), but complain about its "implementation."<sup>1</sup> For example, Senator Edward Kennedy, one of the law's architects, recently said, "The No Child Left Behind Act contains essential reforms for the nation's schools. It's time to keep the promise of those reforms for all students across the country. The Administration's implementation of the reforms has been inadequate and ideological...its ineffective implementation has undermined the reforms it said were so important."<sup>2</sup> Representative George Miller, another of the law's creators, recently said at a Business Roundtable forum that "I think I would give it an A in terms of the goals that it has... And on implementation, I would give it a C."<sup>3</sup> At a similar forum in 2003, civil rights advocate Kati Haycock gave the law "an A for grabbing people's attention" but "a C on implementation so far."<sup>4</sup>

Note that these are *proponents* of the law. Its opponents in the education establishment—such as the National Education Association—flog its implementation but don't even pretend to agree with its core provisions.

So berating its "implementation" isn't just a cute way to voice opposition with the Act. Many individuals on Capitol Hill and in advocacy groups appear to sincerely believe that with the right people calling the shots in the U.S. Department of Education, making good decisions, and acting wisely, the law could work as intended.

Examining whether this contention is right—at least when it comes to the law's public school choice, free tutoring, and restructuring provisions—is the aim of this paper.

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## **STUMP THE CHUMPS: THREE POLICY PARADOXES**

The central task of NCLB implementation is translating its aspirational statements and bold principles into action in the real world. Sometimes this is easy, such as when there's great clarity in the statute itself. For example, one principle of NCLB is that its funds should be targeted to the neediest students. Congress wrote this principle into the law with its explicit instructions for the Title I funding formula. The Department of Education didn't need to do much more than follow orders and cut checks.

But that degree of clarity is the exception, not the rule. In many areas of the law, Congress left key issues unresolved. (One good example: the law says that teachers coming through alternate routes to certification can be considered "highly qualified." But in the same breath, it decrees that teachers with "provisional licenses" cannot be deemed highly qualified. Yet most alternate route teachers have provisional licenses. What exactly did Congress intend?)

This isn't terribly surprising. Indeed, NCLB was a hallmark bipartisan bill, and as such it aggregated myriad policy ideas from across the political spectrum. Some of these ideas are complementary; some are directly at odds with one another. Where there was fundamental disagreement among lawmakers, they were often papered over. This is a predictable part of the democratic process. It's how laws get passed.

But for a statute like NCLB to work well at the local level, in real schools, impacting real children, its contradictions must be resolved; its fuzzy notions must be made crystal clear. This is the work of implementation—first and foremost the work of the Department of Education.<sup>5</sup>

How well is the Department of Education doing its job? From my perspective as a former Bush Administration official with some responsibility for implementing NCLB's public school

choice and supplemental educational services (i.e., free tutoring) provisions, I examine how the Department of Education has tackled three key policy paradoxes embedded within the law:

- 1) In order for NCLB's public school choice and free tutoring provisions to work, local school districts must take aggressive actions to inform parents of their options. Yet districts have little incentive to do so.
- 2) Students in schools "in need of improvement" are to be provided with the option of better school choices within the same public school system. But in many big-city districts, there aren't enough good schools to go around.
- 3) School districts are supposed to "restructure"—i.e., overhaul—persistently failing schools, yet these districts rarely have the inclination or political will to do so. Loopholes in the law make bold action even less likely.

What has the Department of Education done to untie these knots? How has policy evolved, or changed with the arrival of a new Education Secretary in 2005? Are Department actions working? And most importantly, do these dilemmas have any chance of ever being resolved? *After all, if these riddles cannot be solved, the fault must be placed on the law itself—not just those charged with carrying it out.* Let's take a look.

### **Policy Paradox #1: How to Get Recalcitrant Districts to Inform Parents of Their Choice Options Under the Law?**

It almost goes without saying: in order for parents to take advantage of school choice programs, they must know that they exist. Ever since the beginning of the school choice movement, reformers have known that getting information to parents is key to programs' success—and one of the greatest challenges. After all, corporations spend hundreds of millions of dollars getting Americans to buy consumer products like soap or cars; cutting through the fog

of information overload—on a shoestring budget—is never easy. This is even more the case when the target audience is poor, overworked, and overwhelmed by life.

Experience has shown that in the early days of any choice program, good parental information is scarce. That helps to explain why each of the nation’s school voucher programs got off to such a slow start. In the federally-funded Opportunity Scholarship program in Washington, D.C., for example, almost half of the available vouchers went unused in the first year of the program because its organizers didn’t have time to adequately inform parents. Similar dynamics can be seen in other voucher and charter school programs nationwide.<sup>6</sup>

So under the best conditions, informing parents of their options under NCLB would be a difficult challenge. But the construction of the law presents a unique problem: it requires local school districts to inform parents of their options, yet doing so is at odds with districts’ own interests. As explained below, many big city districts don’t have many school choice options to offer parents anyway, and few are eager for parents to use the districts’ tutoring dollars at private providers outside the school system’s domain. Plus, if districts don’t spend the required amount on choice or tutoring (a sum equal to 20 percent of their Title I allocation), they can use these dollars for their own initiatives. In other words, it’s not “use it or lose it,” it’s “use it for choice and tutoring or use it as you see fit.”

In a separate chapter, Jay Greene explains the result of these perverse incentives: very few parents know about their options under NCLB, and the information they do receive is misleading, inaccurate, and confusing.

These problems were easy to predict as soon as the law’s ink was dry. Let’s examine what the Department of Education tried to do to address them—and consider why its efforts failed.

***Strategy #1: Appeal to districts to do the right thing.*** The statute is relatively clear—though not elaborate—about districts’ responsibilities when it comes to informing parents. They must provide information “in an understandable and uniform format and, to the extent practicable, in a language that parents can understand.” They must explain why the child’s school is “in need of improvement” in the first place, including “how the school compares in terms of academic achievement to other elementary schools or secondary schools served by the local educational agency and the State educational agency.” They must make clear “the parents’ option to transfer their child to another public school” or “to obtain supplemental educational services for the child.”<sup>7</sup> These notices must come “not later than the first day of the school year” following the identification of a school “in need of improvement.”<sup>8</sup> Districts obligated to provide supplemental educational services must annually give parents a “brief description of the services, qualifications, and demonstrated effectiveness” of each approved tutoring provider in the district.<sup>9</sup>

In the first version of its “Public School Choice Non-Regulatory Guidance,” published in December 2002, the Department built on these basic statutory requirements to encourage districts to provide helpful information to parents: “The [Local Educational Agency] should work together with parents to ensure that parents have ample information, time, and opportunity to take advantage of the opportunity to choose a different public school for their children.”<sup>10</sup> That same month, in its “Supplemental Educational Services Non-Regulatory Guidance,” the Department encouraged districts to “consider multiple avenues for providing general information about supplemental educational services, including newspapers, Internet, or notices mailed or sent to the home.”<sup>11</sup> These suggestions were hardly aggressive, though. At this critical early stage the Department of Education failed to publish a model letter that districts could send to

parents explaining their options; without such guidance many districts wrote opaque missives full of jargon.

The Department took another bite at the apple in August 2003, when it published an updated version of its supplemental educational services guidance. Clearly frustrated about the letters some districts were sending home that actually discouraged parents from taking advantage of free tutoring, the Department added new language. “Any additional information in a notice should be balanced and should not attempt to dissuade parents from exercising their option to obtain supplemental educational services for their child.” The classic compliance-oriented cat-and-mouse game had begun. But this mild rebuke from the Department—in the form of non-binding “guidance”—was hardly going to spur districts to change course.

But the Department didn’t give up. Still trying to appeal to districts’ better angels, in May 2004 it published *Innovations in Education: Creating Strong District School Choice Programs*.<sup>12</sup> This colorful booklet culled “best practices” from five school districts with vast experience implementing their own public school choice programs. Under headings like “Communicate Clearly About NCLB Choice Options” and “Provide Personalized Follow Up,” it gave concrete, actionable advice to districts that wanted to implement the choice provisions effectively. Importantly, it also provided sample letters (from Milwaukee) that demonstrated how districts could communicate to parents in a straightforward, jargon-free way. (The Department’s Office of Innovation and Improvement published similar booklets on supplemental educational services, charter schools, and magnet schools, all of which also offered practical advice on parental outreach.) The Department printed 50,000 copies of these booklets and distributed them widely, and posted a version online. It used the booklet in a variety of forums and conferences.

But at the end of the day, it wasn't for lack of know-how that most districts failed to inform parents effectively; those pesky perverse incentives hadn't gone away. So the Department adopted another strategy: if you can't work through the districts, work around them.

***Strategy #2: Empower the outsiders.*** Though local school districts didn't see much benefit in touting NCLB's choice opportunities, several advocacy groups did. Organizations such as the Black Alliance for Educational Options (BAEO), the Hispanic Council for Reform and Educational Options (HCREO), and the Greater Educational Opportunities Foundation (GEO) viewed parental outreach as the key part of their mission. One of BAEO's objectives, for example, is to "educate Black families about the numerous educational options available."<sup>13</sup>

It made perfect sense, then, to support these organizations when they applied for grants under the Department's Fund for the Improvement of Education (FIE), also known as the "Secretary's discretionary fund." BAEO received grants totaling almost \$1.5 million; HCREO received \$900,000 and GEO almost \$750,000.<sup>14</sup> Each of these groups set out to inform parents of their NCLB options in target cities. Nina Shokraii Rees, the head of the Department's Office of Innovation and Improvement at the time, explains the Department's thinking. "Anyone who has spent any time in an inner city school district knows that the process of educating families about their rights under a complicated law like NCLB can be a time consuming task—and not one that a Title I director in a district office has the time or funding to focus on. Groups like BAEO and HCREO had experience in this area and because they were small and nimble they brought a greater entrepreneurial spirit to the task at hand. Otherwise, we didn't really have a lot of organizations at the time who believed in the spirit of NCLB to help us spread its message."<sup>15</sup>

BAEO's "Project Clarion," for example, launched aggressive outreach campaigns in cities including Detroit, Atlanta, and Philadelphia. Using a mix of radio ads, grass-roots

communication, and media relations, it sought to inform parents of their public school choice and free tutoring options. The project had some success; knowledge of NCLB and its choices increased in BAEO's target cities from 37 percent to 72 percent over the three years of the initiative.<sup>16</sup> (Of course, in some cities, parents learned about options that didn't really exist.)

But discretionary FIE funds were quite limited, and these targeted campaigns couldn't come close to having a national impact. But there was a substantial amount of money (almost \$40 million in 2006) for the Department's Parent Information and Resource Centers program (PIRC). The PIRC program had been lifted from the Office of Elementary and Secondary Education when Secretary Paige created the Office of Innovation and Improvement (OII) in December 2002. As promoting parental choice was a key part of OII's mission, the PIRC program obviously belonged there.

Except its name was a misnomer; it wasn't actually designed to inform parents about their school choice options. A holdover from President Clinton's Goals 2000 law, the PIRCs' primary role was to fund parent education programs, with a focus on early childhood. Regardless, OII officials used the grant application process to establish priorities (i.e., bonus points) for PIRCs willing to do the work of informing parents of their options under NCLB. Many (though not all) of the long-time PIRCs were willing to do so; a few reform-minded groups such as the Center for Education Reform received new grants under the program too. Soon the nation's 70-odd PIRCs were engaging in parental information campaigns of one sort or another—even though the Administration was working to zero-out the program's funding.

The more willing PIRCs, as well as BAEO, HCREO, and GEO, all identified a common challenge: finding a way to communicate clearly to parents about their free tutoring opportunity. (Unlike public school choice, the tutoring provision did not depend on there being an ample

supply of good schools in a district. Most big cities had plenty of willing tutoring providers to go around.) With some extra FIE funds, the Department responded by developing a “free tutoring” poster that local community organizations could place in target neighborhoods. Several hundred thousand posters were printed and distributed nationwide.

It’s hard to know for sure whether any of these nontraditional methods worked. To this day there are no good, comparable city-by-city data on participation rates in public school choice or supplemental educational services, so it’s impossible to know if participation spiked in communities with stronger parent outreach. And in such a big country, with millions of children eligible for choice and free tutoring, even these activities have to be seen as mostly symbolic.

***Strategy #3: Offer carrots.*** While the efforts of outside groups might have had their benefits, at the end of the day what mattered most was whether districts “bought in” to the choice and tutoring provisions and decided to launch aggressive outreach campaigns. After all, districts had some particular advantages. They had access to student information nobody else had: they knew exactly who was eligible for choice and tutoring. They had the power to send information home in students’ backpacks, or, even more importantly, to instruct school principals, counselors, and teachers to give parents information about these options at back-to-school night, during parent/teacher conferences, etc. As the *Innovations in Education* booklets made clear, parents were most likely to trust and act on information coming from their child’s teacher and principal.

So with the arrival of Secretary Margaret Spellings in the second term of the Bush Administration, the Department tried a new tact: replace the law’s perverse incentives (which pushed districts to avoid aggressive parental outreach) with different incentives—those that would encourage them to play ball. In other words, the Department said “let’s make a deal.” It

launched two different pilot programs. First, in August 2005, it allowed four districts in Virginia (and later another 12 districts in four additional states) to flip-flop the order of public school choice and free tutoring. Now districts with schools identified as “in need of improvement” would have to offer supplemental educational services immediately, and could delay public school choice for another year. In return, those districts had to engage in aggressive parental outreach, as tracked by significantly improved participation rates in the public school choice and tutoring programs.<sup>17</sup>

The Department launched a second pilot with the free tutoring provision. Four urban school districts (Anchorage, Boston, Chicago, and Hillsborough County (Florida)) were given permission to serve as tutoring providers even though they were districts “in need of improvement” under the law. (In 2002, Secretary Paige had issued a regulation that disallowed such districts from providing tutoring directly; to say this rankled the big city districts is a vast understatement.) Once again, the deal was that these districts had to show significant progress with parental outreach and student participation. Specifically, they were required to “notify parents of the availability of SES in correspondence that is simply written and in a language that parents can understand...notify parents of the availability of SES by letter to the student’s home and by at least two other means...[and] broadly circulate information in the community about SES.”<sup>18</sup>

These pilots certainly made political sense. Secretary Spellings was under heavy pressure from the education establishment to show greater “flexibility” with the implementation of the law. Even members of Congress had to come to agree that public school choice should come after supplemental educational services. And Spellings felt she had to allow at least some big city districts to serve as tutoring providers, in part to placate the Council of Great City Schools,

which had been a vocal and courageous advocate for the law. So if she was going to make these policy changes anyway, why not get something in return?

But whether she got a good deal remains to be seen. Results from a third-party evaluation of these pilots are not due until February 2007, at the earliest. (And allowing districts to serve as tutoring providers has all kinds of deleterious effects on the supplemental educational services program. For example, a recent *Wall Street Journal* editorial reported that Chicago, Boston, and Hillsborough County are all using “administrative hurdles to make it very difficult for private and faith-based tutoring programs to reach students.”<sup>19</sup>) Of course, no matter what the impact might be in a handful of cities, these pilots will not have had an effect on the larger national picture.

***The dog that didn't bark: Wielding the stick.*** One strategy the Department of Education has still not adopted is getting tough with wayward states and districts. This isn't the case for the law as a whole; the Administration has shown remarkable courage in withholding administrative funds from states for various infractions, such as not testing new elementary school teachers before they enter the classroom (as required under the law's “highly qualified teachers” provision) or failing to include English Language Learners or special education students in the state's assessment system.<sup>20</sup>

So why did the Department not take the same actions when it came to choice and tutoring? Simple: it's a matter of grey. The examples cited above are black-and-white: either states tested their new teachers, or they didn't. The law was clear about what was required; enforcing the statute is fairly straightforward. This is not the case for parental outreach and information, because most districts were, in fact, living up to the *letter* of the law. They sent parents letters about their choices, and posted information online. Sure, the letters were full of

jargon, written to dissuade parents from taking advantage of their options, and a wholly inadequate mechanism for breaking through information overload anyway. But “going through the motions” is not illegal. Simply said, the Department did not have grounds to take action.

As Rees explains, “The Department (as an enforcement body) didn't have a track record for withholding funds from school districts which meant we needed to review all problems very carefully and ensure that we had the legal grounds to withhold money...At the end of the day, we relied mainly on the bully pulpit. When we noticed instances of malfeasance, we sent letters to or called states asking them to look into the matter - these actions usually served their desired goals.”<sup>21</sup>

Of course, not everyone sees it that way. In March 2006, the Alliance for School Choice, in collaboration with Los Angeles-based Coalition on Urban Renewal and Education (CURE), filed a lawsuit which sought to force action against the Compton and Los Angeles school districts for failing to provide public school choice under the law. They complained that the districts failed to explain to parents their right to send their children to higher performing schools, and that the federal government failed to implement its own law. The legal outcome is not yet certain, but Spellings reacted by asking the state of California to look into the matter, and by insinuating that the state's vast administrative funds could be withdrawn if it didn't take the issue seriously. Still, this might be all bluster. As long as the districts sent the required letters and posted information online, neither the state nor the feds can touch them for failing to embrace the “spirit” of the law.

Which brings us back to the law itself. Perhaps it should have listed several explicit steps districts had to take beyond just sending letters home to parents. Perhaps it should have disallowed districts from keeping leftover choice and tutoring dollars, thus giving them less

incentive to “hide the ball” from parents. Or maybe there’s nothing the federal government can do to force districts to inform parents of options the districts would rather pretend didn’t exist.

### **Policy Paradox #2: How to Make “Public School Choice” a Reality When There Aren’t Enough Good Public Schools to Go Around?**

This paper has already discussed the “demand” side of parental choice—the importance of informing parents of their options. But what about the supply side? Of course, in order for school choice to work, parents need choices—and not just any choices, but good choices. Thus, there needs to be “capacity” in good schools—in the form of empty seats—or the ability and incentives for good schools to expand their capacity (by growing, replicating, etc.) so they can serve more students.

This isn’t news to the school choice movement, which has at least two answers to the “capacity” problem. Charter schools are one. Most charter laws were explicitly designed to lead to the creation of new schools of choice. The “charter” mechanism also provides a check on quality—at least if the schools’ sponsors are willing to close them down if they fail to achieve the results spelled out in their charter.

Private school vouchers are the other answer. At the least, vouchers boost “capacity” by making private and parochial schools available to students who couldn’t otherwise afford them. Many of these schools—especially Catholic schools in big cities—have empty seats. The more generously funded vouchers, such as those in Milwaukee and Washington, D.C., also provide incentives for enterprising private schools to expand their capacity, as the public dollars can fully cover their expenses. Capacity, then, is elastic, but also quite sensitive to policies and incentives.<sup>22</sup>

Enter NCLB's public school choice provisions. They speak entirely to the demand side of school choice—by mandating that parents of children in struggling schools be given other options—but do nothing to address the supply side. They simply assume that these other options are plentiful. But what if they are not?

Of course, that's not the worse part. As other commentators have noted, NCLB's choice provisions actually provide disincentives for schools to identify excess capacity, or to create such capacity.<sup>23</sup> Because many students eligible for public school choice are likely to be low-performing themselves, potential "receiving" schools are wary of accepting them for fear that their own tests scores will drop—putting them at risk for being labeled "in need of improvement." And these students don't bring any additional funds. So good schools have few incentives to fess up to empty seats if they have any, much less create new seats if they don't.

So if you're the federal agency charged with implementing this challenging provision, what do you do? Close your eyes and hope for the best.

**"No excuses"** The law's directive is clear enough: "In the case of a school identified for school improvement under this paragraph, the local educational agency shall, not later than the first day of the school year following such identification, provide all students enrolled in the school with the option to transfer to another public school served by the local educational agency, which may include a public charter school, that has not been identified for school improvement under this paragraph, unless such an option is prohibited by State law."<sup>24</sup>

Almost immediately, the heads of big city school systems raised red flags, complaining that they didn't have enough schools "not identified for school improvement" to serve all their eligible children. As Arne Duncan, the head of the vast Chicago Public Schools, said later, "It's not like we have a lot of high-performing schools at 50% capacity."<sup>25</sup>

Senior officials in the Department of Education felt little pity for these leaders, since they were the same ones who had worked to defeat the President’s original choice proposal, which would have expanded capacity by providing parents the option of choosing private schools. To lay down a line in the sand, the Department worked quickly to make it clear that “lack of capacity is no excuse” for not implementing public school choice. In June 2002, Secretary Paige sent a letter to all of the state chief school officers explaining that “A school district is obligated to provide choice to all eligible students, subject to health and safety code requirements (regarding facility capacity). Transferring students should be treated as students who have moved into the receiving school’s attendance zone and allowed to enroll in class and other activities on the same basis as other children in the school.”<sup>26</sup>

Despite this admonition, in the fall of 2002—as the first school year under the NCLB regime began—districts across the country used “lack of capacity” as an excuse to not provide public school choice to thousands of students. The *Boston Globe* told the story well in its August 2002 article, “Few So Far Use Law Allowing School Transfers.” It went on to explain: “In Chicago, 29,000 students were eligible for transfers, 2,400 sought them, and 1,165 got them...Los Angeles United School District said it had room to move just 100 of the 230,000 eligible children...”<sup>27</sup>

Clearly district leaders hadn’t bought into the provision, as is clear from a *Los Angeles Times* article, also from August 2002. “Just to move children from one building to another building does not guarantee that they are going to learn that much better,” said L.A. superintendent Roy Romer. “We can take the existing school and make it work.”

Baltimore superintendent Carmen Russo concurred. “You want to live up to the letter and spirit of ‘No Child Left Behind’ as a school district. But in the long run, the answer to this is that all of our schools have to be better so no one has to flee them.”<sup>28</sup>

These sentiments found voice in the many written comments submitted to the Department in response to its draft Title I regulations. They are summarized in the discussion section of the final regulations, published in December 2002: “Several commenters maintained that existing overcrowding of schools, teacher shortages, transportation difficulties, class-size limits, health and safety concerns, and other capacity issues may prevent many LEAs from implementing the public school choice option...One commenter, for example, recommended that the final regulations permit LEAs to preclude transfers to schools that have reached their ‘maximum instructional capacity under State or local laws or ordinances.’”

These comments only stiffened the Department’s spine. It responded, “...the [Elementary and Secondary Education Act] does not permit an LEA to preclude choice options on the basis of capacity constraints. Rather, the statute requires an LEA to take measures to overcome issues such as overcrowding, class size limits, and health and safety concerns, that otherwise might prevent the LEA from complying with Title I public school choice requirements...The expectation is that LEAs will need to find ways to provide choice, consistent with their obligations to provide a healthy and safe learning environment.” It wrote a new regulation which was crystal clear: “An LEA may not use lack of capacity to deny students the option to transfer.”<sup>29</sup>

It was a shot across the bow. But where, exactly, was this capacity to come from? The Department didn’t have any bright ideas. In its “Public School Choice Non-Regulatory Guidance,” also published in December 2002, the Department merely repeated itself: “If an LEA

does not have sufficient capacity in the schools it has offered under its choice plan to accommodate the demand for transfers, the LEA must create additional capacity or provide choices of other schools.”<sup>30</sup>

A long, cold war between the Department and the big city districts ensued. Administration officials repeated their mantra, “capacity is no excuse,” at every possible chance. And districts just went on denying transfers to students, because there was nowhere for them to go. Yet for all of its big talk, the Department of Education never seriously threatened to take away money. Why not? Rees explains: “I think the capacity issue caused a political problem. It’s one thing to ask districts to open the doors to tutoring when thousands of tutors are waiting to tutor kids but it’s another to ask a cash strapped district to offer choice when it doesn’t have many good schools to offer as an option - or the means to start a new school from scratch.”<sup>31</sup>

To be sure, the Department monitored the states’ implementation of public school choice and, at times, sent letters requesting particular actions. For example, when the Jefferson County school system (in Louisville) made a unilateral decision to delay public school choice for a semester, the Department contacted the Kentucky Department of Education requesting an investigation. (Jefferson County reversed its decision.) Such black-and-white situations were rare, though. As other districts went through the motions, the Department sat by and did little. After all, it couldn’t answer a basic question: how were districts supposed to create new seats in good schools?

***The Golden Rule.*** Meanwhile, as the “capacity is no excuse” position hardened, the Office of Innovation and Improvement quietly set out to help answer this question. In line with the Golden Rule—he who has the gold makes the rules—it created priorities for scarce Charter

School Program and Magnet School Assistance Programs grants that pushed states and districts to target these dollars to communities with inadequate capacity for public school choice. (More fundamental changes would require a change in the statute.)

These efforts might have helped at the margins. Still, in order to solve the capacity challenge nationwide, someone needed to come up with better solutions. To that end, in its February 2004 update of the “Public School Choice Non-Regulatory Guidance,” the Department offered ten ideas for districts befuddled by capacity constraints, including “reconfiguring, as new classrooms, space in receiving schools that is currently not being used for instruction...expanding space in receiving schools, such as by reallocating portable classrooms...encouraging the creation of new charter schools within the district...modifying either the school calendar or the school day, such as through ‘shift’ or ‘track’ scheduling...easing capacity by initiating inter-district choice programs with neighboring LEAs or even by establishing programs through which local private schools can absorb some of the LEA’s students.”<sup>32</sup>

This last suggestion raised eyebrows among observers. Kristen Tosh Cowan, a partner with education law firm Brustein and Manasevit, told a May 2004 conference that “the guidance from the feds is quite interesting here,” though, at the same time, “we’ve been hearing a lot of strong language, but we haven’t seen any enforcement,” even though “there’s certainly a lot of fodder out there for enforcement.”<sup>33</sup>

Indeed, it appears that these ideas disappeared into the ether. Districts ignored them and, with the 2004 election fast approaching, the Department gave up any hopes of tough enforcement. After all, the Administration had little appetite to explain to voters why their high performing schools were being forced to go to a “shift” schedule, or why their school

playgrounds had made room for portables. The truth was that all of these capacity-building strategies were either politically difficult, expensive, or took years to implement. (Creating new charter schools, for one, depended on getting state policy right: lifting caps, ensuring fair funding, helping with facilities, etc. Even then, creating new schools would take years.) So the Department began to speak softly and threw away its big stick. Perhaps the lack of capacity was a decent excuse for not offering choice, after all.

### **Policy Paradox #3: How to Force Districts to “Restructure” Their Own Schools?**

While NCLB’s public school choice and supplemental services provisions can be dressed up in the language of “options” and “opportunities,” its restructuring provision is a cold, hard “sanction.” It is meant to be a gun aimed at the heads of failing schools: get better, or else. It is designed to put out of their misery those schools that have failed to make “adequate yearly progress” for six long years. But importantly, it expects school districts to actually pull the trigger.

Here’s how Congress said it: “The local educational agency shall implement one of the following alternative governance arrangements for the school consistent with State law: (i) Reopening the school as a public charter school. (ii) Replacing all or most of the school staff (which may include the principal) who are relevant to the failure to make adequate yearly progress. (iii) Entering into a contract with an entity, such as a private management company, with a demonstrated record of effectiveness, to operate the public school. (iv) Turning the operation of the school over to the State educational agency, if permitted under State law and agreed to by the State.”<sup>34</sup>

This is strong medicine, to be sure. But Congress went on to include two loopholes which would make much of this “tough love” approach crumble. First, the infamous fifth option for

schools in restructuring: “(v) Any other major restructuring of the school’s governance arrangement that makes fundamental reforms, such as significant changes in the school’s staffing and governance, to improve student academic achievement in the school and that has substantial promise of enabling the school to make adequate yearly progress...” And second, the collective bargaining loophole (which had also been in previous versions of the Elementary and Secondary Education Act): “Nothing in this section shall be construed to alter or otherwise affect the rights, remedies, and procedures afforded school or school district employees under Federal, State, or local laws (including applicable regulations or court orders) or under the terms of collective bargaining agreements, memoranda of understanding, or other agreements between such employees and their employers.”<sup>35</sup>

Doug Mesecar, a Congressional aide in the House Education and Workforce Committee at the time of the law’s enactment, and later a senior Department of Education staffer, explained the genesis of these loopholes. “The collective bargaining language was simply a reality if we wanted a bipartisan bill. As for the ‘fifth option’ in restructuring, the Republicans didn’t think it would become as big a loophole as it has.”<sup>36</sup>

The implications of this statutory language are clear with a close read. First, the whole law’s “get tough” approach rests on the willingness of school districts to aggressively implement one of four total makeovers: turn the school into a charter school; dismiss all or most of the staff; turn the school over to private management; or turn it over to the state. But districts aren’t expected to do any of those things if they conflict with state law. In many states—those without charter school laws and those that have reached their cap on the number of charters—that means that the charter school option is out. Few states authorize state takeovers of schools, so forget that one. Private management might be possible, if unpopular, though the entire education

management industry can only handle a few hundred new takeovers a year. And as for firing the staff? Collective bargaining makes that impossible in most places around the country.

Is it little surprise, then, that the Administration has not made “restructuring” a top implementation priority? Let’s take a look at what it has done to try to make lemonade out of these lemons.

***Flip-flop-flip on collective bargaining.*** The Administration quickly recognized that collective bargaining could be a big obstacle to the implementation of the law’s restructuring (and corrective action) provisions. Though the language cited above appears fairly restrictive, the Department still wanted to push as hard as it could on the issue. So in its August 2002 “Notice of Proposed Rulemaking” (i.e., draft regulations published for comment), it floated the following two aggressive regulations: “Any State or local law, regulation, or policy adopted after January 8, 2002 may not exempt an LEA from taking actions it may be required to take with respect to school or school district employees to implement [the law’s improvement, corrective action, and restructuring provisions].” And: “When the collective bargaining agreements, memoranda of understanding, [etc.] are renegotiated, an LEA must ensure that those agreements do not prohibit actions that the LEA may be required to take with respect to school or school district employees to implement [the law’s improvement, corrective action, and restructuring provisions].”<sup>37</sup>

The national teachers unions went ballistic. The American Federation of Teachers, for example, stated in its written comments that the proposed regulations “would attempt to work a retroactive application of a new rule, it would impinge on the sovereign power of states guaranteed by a federal form of government to construct their relationship with their employees, and it would impinge on the associational rights of school employees.”<sup>38</sup>

The Department caved, removing those regulations from the final package. To save face, it provided a legal explanation when its final regulations were published sans the collective bargaining policies: “The Secretary believes that [the collective bargaining section of NCLB] was not intended to deny LEA and school leaders the management tools needed to implement effective LEA and school improvement measures, which may often involve changes in the assignment and duties of LEA and school personnel. However, the Secretary agrees that the proposed regulations arguably were inconsistent with a strict reading of the NCLB Act, and may have conflicted with applicable State and local laws.”<sup>39</sup>

The teachers unions had won this battle, but some within the Department continued to fight a guerilla war. Soon after the regulations were final, Secretary Paige sent a letter on this topic to Michael Casserly, the executive director of the Council of Great City Schools, the substance of which was finally incorporated into Department “guidance” in July 2006. It publicly reasserted that collective bargaining agreements were not supreme: “An LEA that accepts funds under Title I of the ESEA must comply with all statutory requirements, notwithstanding any terms and conditions of its collective bargaining agreements. Although section 1116(d) does not invalidate employee protections that exist under labor law or under collective bargaining and similar labor agreements, it does not exempt SEAs, LEAs, and schools from compliance with Title I, Part A. It is the Department’s view that such agreements should not exempt school officials from any obligations related to the purpose of Title I, or the school improvement, corrective action, or restructuring requirements in section 1116.”<sup>40</sup>

The unions were not impressed. “A letter to Casserly and a Q&A in guidance clearly do not have the same legal weight as the regs,” Michele McLaughlin, assistant director for

educational issues at the American Federation of Teachers, told the *Title I Monitor*. “If I were a state or district, I would be mindful of what ED said in the December 2002 regs.”<sup>41</sup>

Indeed. While life may be full of second acts, if the Department wanted a second chance at its policy on collective bargaining, it needed to revise the actual regulations. While the language in the guidance might be helpful to reform-minded superintendents who want to push the issue with their unions, in legal terms it represents little more than the Department seizing the Bully Pulpit.

*The infamous loophole.* As this drama on collective bargaining unfolded, the Department did very little to address the biggest loophole in the law—that allowing districts great leeway in identifying “any other major restructuring of the school’s governance arrangement that makes fundamental reforms, such as significant changes in the school’s staffing and governance.” Its December 2002 Title I regulations did not attempt to narrow districts’ range of options. Nor did its January 2004 “LEA and School Improvement Non-Regulatory Guidance.” It was not until its July 2006 update of this guidance that the Department finally addressed the issue head-on—perhaps because by then it had become apparent that districts were abusing this loophole to implement reforms much less aggressive than the ones lawmakers envisioned. (Several papers in this volume consider the implications at the local level.)

The guidance provides examples of what an “other major restructuring of the school’s governance” might entail: “Change the governance structure of the school in a significant manner that either diminishes school-based management and decision making or increases control, monitoring, and oversight of the school’s operations and educational program by the LEA; Close the school and reopen it as a focus or theme school with new staff or staff skilled in the focus area (e.g., math and science, dual language, communication arts); Reconstitute the

school into smaller autonomous learning communities (e.g., school-within-a-school model, learning academies, etc.); Dissolve the school and assign students to other schools in the district; Pair the school in restructuring with a higher performing school so that K-3 grades from both schools are together and the 4-5 grades from both schools are together; Expand or narrow the grades served, for example, narrowing a K-8 school to a K-5 elementary school.”<sup>42</sup>

These are all reasonable ideas, and basically represent various forms of reconstitution and reopening. But as they are only found in “guidance,” they are merely suggestions. Districts are free to ignore them; there’s little reason to believe that most districts will do anything else.

It’s clear that on both the collective bargaining and the “alternative governance” fronts, the Department failed to take aggressive action that might have mitigated the problems with the statutory language. But it’s far from certain whether different policies would have helped. At the end of the day, is it possible to force fundamental reforms on districts that don’t support them?

## **CONCLUSION: OF HUBRIS AND HUMILITY**

Let’s return to the original question posed by this paper: could NCLB work as intended with the right people calling the shots in the Department of Education, making good decisions and acting wisely? When it comes to the law’s failings, is “implementation” really to blame?

To be sure, there have been missteps. Administration officials could have moved faster to model the kind of parent information and outreach expected from districts. They could have signed “flexibility agreements” with districts willing to expand choice capacity over the long run (especially by creating charter schools), rather than just talking big and doing nothing. They could have issued regulations making it harder for districts to roll leftover money intended for choice and tutoring into other programs, creating stronger incentives for making these provisions

work. And they certainly could have done more to close the “alternative governance” loophole in the restructuring provision, and to provide a consistent policy with respect to collective bargaining.

These actions might have helped at the margins. But they wouldn’t have changed the basic story line. Many districts would still go through the motions when it came to informing parents of their options. There would still be too few good schools to go around in most big cities, making the law’s “public school choice” provisions meaningless. And most districts would still find ways to avoid implementing the law’s tough-love restructuring sanctions. As far as this author knows, nobody inside or outside of the Administration has figured out ways to fundamentally solve these policy paradoxes. Thus, no matter how well-staffed the upper echelons of the Department of Education, these dilemmas wouldn’t go away.

And of course, these aren’t the only policy paradoxes in the law, or even in its “cascade of sanctions.” There are plenty of others. For example, school districts are supposed to play the honest broker in implementing supplemental educational services, but have strong incentives not to create a level playing field for their competitors. States are supposed to hold tutoring providers accountable for boosting student achievement, but it’s unclear how much academic gain it’s fair to expect from 40 hours of tutoring, or how best to measure it. And states are supposed to hold districts accountable for getting school choice information to parents before the start of the school year, but many of those same states aren’t even releasing the list of eligible schools by that time. None of these thorny issues are amenable to easy answers from Washington.

However, that doesn’t mean that changing the law is necessarily the solution (though I provide a few ideas below). There might be *no* solution to some of these problems because they are inherent in our federalist system. Federal policymakers should consider three lessons:

- 1) **While it's hard to force recalcitrant states and districts to do things they don't want to do, it's impossible to force them to do those things well.** Put another way, the federal government can coerce states and districts to follow the letter of the law, but not the spirit of the law. So notes get sent home informing parents of their choice options, but they are filled with jargon and written in 8-point type. When it comes to identifying extra seats for the public school choice program (must less expanding capacity), districts go through the motions. And when it's time to "restructure" persistently failing schools, districts choose the path of least resistance. There's very little the federal government can do address this behavior—either through law or regulation.
- 2) **The 40-year-old machinery of federal policymaking is ill suited to reforming the system.** Ever since the ESEA was enacted in 1965, the federal government has relied on its relationship with state education agencies, and their relationships with local school districts, to implement federal statutes. This worked reasonably well when the task at hand was distributing money. But as Chester E. Finn, Jr. has argued, it's unrealistic to think that this education establishment can now be used to reform the education system itself.<sup>43</sup> Districts that do not want to offer their parents choices cannot be expected to do a good job informing parents or aggressively building capacity for school choice. And those that don't want to get tough with their failing schools or pick fights with their unions can't be expected to do so, just because of demands from Washington. While NCLB has given political cover to reform-minded superintendents to push fundamental change, it can't force recalcitrant leaders to get on board the reform bandwagon. If Uncle Sam wants to reform school systems, it must find someone other than school systems (perhaps governors or mayors?) to do the job.

3) **The federal government is better at following than leading.** While NCLB deserves credit for being bold when it comes to expanding parental options and forcing radical change on persistently failing schools, it turns out that such boldness is less a blessing than a curse. Where the implementation of the law has gone most smoothly is where at least a handful of states and districts have already paved the way. It made sense for NCLB to adopt “standards-based reform” as its dominant strategy, as federal lawmakers could learn lessons from Texas, North Carolina, and other early adopters. But there were few models for how to force recalcitrant districts to implement choice programs they didn’t buy into, or how to create a new marketplace of tutoring providers, or even what to do with persistently failing schools. As a matter of pragmatism, the federal government is better off following the lead of reform-minded states and districts, rather than breaking new ground.

All three lessons imply the need for greater humility when Congress reauthorizes NCLB. This is difficult for lawmakers and reformers to swallow. After all, the temptation to use federal policy to push for fundamental, transformative change is ever-present. But wishing doesn’t make something so, and the federal government can’t snap its fingers and create schools of choice where they don’t exist, or tough-minded superintendents where there are none.

What does this mean for NCLB’s “cascade of sanctions”? Here are some suggestions, all of which require Congressional action. First and foremost, the federal government should get out of the business of mandating school choice on a universal basis. Experience has shown that Uncle Sam does not have the tools to force districts to implement school choice when the districts don’t believe in it. Instead, Congress could offer grants to willing districts (or even municipalities) that willingly embrace choice as part of their school reform strategy. (The

Department’s \$30 million Voluntary Public School Choice program already does this at small scale; expanding it dramatically would be a good start.) Federal funds can provide a catalyzing effect, but they will only work with a willing partner on the ground.

The federal government should also acknowledge that school districts are not well suited to be objective arbiters of information for parents, and should give the job of informing families to other organizations. The Parent Information and Resource Centers program, for instance, could be retooled and expanded to play this role.

Existing federal funds should be better targeted to the creation of new “capacity” for school choice. Charter School Program grants, especially, should be redesigned to focus predominantly on boosting the supply of high quality schools of choice in communities desperately lacking in them.

Congress should fix some of the law’s disincentives by allocating funding, specifically for choice and tutoring, and not allowing districts to use leftover money for anything else. If “use it or lose it” is the order, districts will be more likely to use it—and to provide real choices to parents.

Finally, Congress should offer incentives to districts willing to intervene aggressively in failing schools, including extra money, regulatory relief, or allowing them to drop the “needs improvement” label from schools as soon as they are restructured.

None of these incremental reforms are as bold and exciting as NCLB’s promise that every child trapped in a failing school would have an exit, or its admonition that bad schools must get better or be shuttered. But they are more in line with the capabilities and political realities of the federal government. Meanwhile, most reforms are going to have to develop the old fashioned way—from the bottom-up. Perhaps that’s not such a bad thing, after all.

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- <sup>1</sup> “As 2 Bushes Try to Fix Schools, Tools Differ,” by Sam Dillon, *New York Times*, September 28, 2006.
- <sup>2</sup> “SENATE DEMOCRATS CALL FOR EFFECTIVE IMPLEMENTATION OF SCHOOL REFORMS,” press release from the office of Senator Edward Kennedy, September 13, 2004, accessible at: [http://kenedy.senate.gov/newsroom/press\\_release.cfm?id=71490759-029C-4BD9-A2C4-F821BF274157](http://kenedy.senate.gov/newsroom/press_release.cfm?id=71490759-029C-4BD9-A2C4-F821BF274157).
- <sup>3</sup> Testimony from “No Child Left Behind Forum: Assessing Progress, Addressing Problems, Advancing Performance,” The Business Roundtable, September 20, 2006, available at <http://www.businessroundtable.org/taskForces/taskforce/document.aspx?q=7075BF159F849514481138A77EC1851159169FEB56A36B7AE>.
- <sup>4</sup> Testimony from “Is No Child Left Behind Working? A Progress Report,” The Business Roundtable, December 3, 2003, available at <http://www.businessroundtable.org/pdf/NCLBFinalTranscript.pdf>.
- <sup>5</sup> This is not unique to No Child Left Behind or even to the Education Department; see, for example, *Implementation* by Jeffrey L. Pressman & Aaron Wildavsky, University of California Press, 1973.
- <sup>6</sup> See, for example, “Viewpoint: New EdChoice Voucher Program a Success,” by Matthew Carr, The Buckeye Institute, June 12, 2006, at <http://www.buckeyeinstitute.org/article/715>.
- <sup>7</sup> NCLB, 1116(6)
- <sup>8</sup> NCLB, 1116(e)(i)
- <sup>9</sup> NCLB, 1116(E)(2)
- <sup>10</sup> U.S. Department of Education, *Public School Choice Draft Non-Regulatory Guidance*, December 4, 2002, question D-4.
- <sup>11</sup> U.S. Department of Education, *Supplemental Educational Services Draft Non-Regulatory Guidance*, December 12, 2002, question E-2.
- <sup>12</sup> U.S. Department of Education, Office of Innovation and Improvement, *Innovations in Education: Creating Strong District School Choice Programs*, Washington, D.C., 2004.
- <sup>13</sup> Black Alliance for Educational Options Web site, “About Us,” as viewed October 13, 2006.
- <sup>14</sup> Author correspondence, via email, with Department official, October 2006.
- <sup>15</sup> Author correspondence via email, October 26, 2006.
- <sup>16</sup> JM Consulting, Inc., *BAEO Project Clarion Three Year Final Evaluation Report*, May 2006.
- <sup>17</sup> Margaret Spellings letter to Thomas M. Jackson, Jr., “Request for a flexibility agreement to provide supplemental educational services in lieu of public school choice, to students attending Title I schools in the first year of school improvement,” August 25, 2005.
- <sup>18</sup> Margaret Spellings letter to Joel I. Klein, “Flexibility agreement on behalf of the New York City Department of Education (NYCDOE) to permit NYCDOE to provide supplemental educational services,” November 7, 2005.
- <sup>19</sup> “Spellings Exemptions,” *Wall Street Journal*, October 31, 2006.
- <sup>20</sup> See, for example, Lynn Olson, “Department Raps States on Testing,” *Education Week* (July 12, 2006); Julie Blair, “Critics Question Federal Funding of Teacher Test,” *Education Week* (October 8, 2003); Joetta L. Sack, “Utah Passes Bill to Trump ‘No Child’ Law,” *Education Week* (April 27, 2005); and Christina A. Samuels, “Alternate Assessments Proving to Be a Challenge for States,” *Education Week* (October 11, 2006).
- <sup>21</sup> Author correspondence via email, October 26, 2006.
- <sup>22</sup> Robert K. Vischer, “Racial Segregation in American Churches and Its Implications for School Vouchers,” *The Florida Law Review* (April 2001).
- <sup>23</sup> Frederick M. Hess and Chester E. Finn, Jr., ed. *Leaving No Child Behind?: Options for Kids in Failing Schools*. New York, NY: Palgrave Macmillan, 2004.
- <sup>24</sup> NCLB, 1116(E)(i)
- <sup>25</sup> “No way out: the No Child Left Behind Act provides only the illusion of school choice,” by Lisa Snell, *Reason*, October 1, 2004, No. 5, Vol. 36; Pg. 34.
- <sup>26</sup> Rod Paige letter to education officials, June 14, 2002, available at <http://www.ed.gov/policy/elsec/guid/secletter/020614.html>.
- <sup>27</sup> Mary Leonard and Anand Vaishnav, “Few So Far Use Law Allowing School Transfers,” *Boston Globe*, August 29, 2002.
- <sup>28</sup> Duke Helfand, “School Choice Falling Short,” *Los Angeles Times*, August 17, 2002.
- <sup>29</sup> National Archives and Records Administration, *Federal Register*, Vol. 67, No. 231, December 2, 2002, Part IV: Department of Education, 34 CFR Part 200.44.
- <sup>30</sup> U.S. Department of Education, December 4, 2002, question E-7
- <sup>31</sup> Author correspondence via email, October 26, 2006.

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<sup>32</sup> *Public School Choice Draft Non-Regulatory Guidance*, U.S. Department of Education, February 6, 2004, question E-8.

<sup>33</sup> Travis Hicks, "Lawyer: NCLB Guidance may pave way for vouchers," *Education Daily*, May 6, 2004.

<sup>34</sup> NCLB section 1116(8) (B).

<sup>35</sup> NCLB section 1116(9)

<sup>36</sup> Author correspondence via email, November 16, 2006.

<sup>37</sup> National Archives and Records Administration, *Federal Register*, Vol. 67, No. 151, August 6, 2002, Part IV: Department of Education, 34 CFR Part 200.54, proposed rules.

<sup>38</sup> As reported by the Education Intelligence Agency, September 23, 2002, available at <http://www.eiaonline.com/archives/20020923.htm>.

<sup>39</sup> National Archives and Records Administration, *Federal Register*, Vol. 67, No. 231, December 2, 2002, Part IV: Department of Education, 34 CFR Part 200, discussion of comments, section 200.54.

<sup>40</sup> *LEA and School Improvement Non-Regulatory Guidance*, U.S. Department of Education, July 21, 2006, question G-14.

<sup>41</sup> "School Improvement Guidance Takes Tough Stance on Restructuring," *Title I Monitor*, date?.

<sup>42</sup> *LEA and School Improvement Non-Regulatory Guidance*, U.S. Department of Education, July 21, 2006, question G-8.

<sup>43</sup> Chester E. Finn, Jr., "Archaic architecture, creaky machinery," *The Education Gadfly* Vol. 4, No. 31 (August 26, 2004).