

AMERICA'S NEW CIVIL RIGHTS MOVEMENT

Education Reform, Public Charter Schools and No Child Left Behind

By Jonathan C. Augustine

[C]harter schools are publically financed and open to any child, but they are run by entities other than the conventional local school district. Typically, they are operated by nonprofit organizations that rely on donations to provide seed money to launch the school but then use the same amount, or less taxpayer money per pupil, as is doled out to the public schools for ongoing operations. Those who run charters are accountable for the school's performance. However, they are free to manage as they wish, which includes the freedom to hire teachers who are not union members.

— **Steven Brill**, *Class Warfare: Inside the Fight to Fix America's Schools* 8 (Simon & Schuster 2011)

January 2012 marked the 10-year anniversary of President George W. Bush signing the No Child Left Behind Act of 2001 (NCLB),¹ legislation designed to close the achievement gap in public education. Indeed, as former Secretary of Education Rod Paige expressed, closing the achievement gap between black and white students was NCLB's primary goal.² Over the last decade, in addition to "education reform" becoming a common catchphrase, the concept has become reality in Louisiana with New Orleans front and center on a national stage as America's first majority charter school city.³ Moreover, with indications the state's Recovery School District (RSD) will operate failed local schools in perpetuity, the paradigm of school governance existing prior to NCLB is clearly a thing of the past.

In *Brown v. Board of Education*,⁴ the United States Supreme Court placed access to educational opportunities at the heart of the 20th century Civil Rights Movement (the Movement).⁵ Moreover, in *Grutter v. Bollinger*,⁶ a case decided almost 50 years after *Brown*, the court affirmed this time-honored philosophical position.⁷ As a successor to several other reform-oriented enactments, NCLB placed education reform and closing the achievement gap between black and white students at the pinnacle of a 21st century civil rights movement where Louisiana is leading the way.⁸

NCLB's History and Legacy: From Sputnik to Louisiana's RSD

In the wake of World War II and the Cold War's intensification, concerns arose as to whether the United States could keep up with the Soviet Union in math and science after the 1957 launch of the Soviet Union's space satellite Sputnik.⁹ Consequently, along with the United States' socially changing dynamics — fueled largely by the then-ongoing Movement — policymakers pressured public schools to quantify educational improvement measures to ensure America would not lose the "space race."¹⁰

Accordingly, in 1965, the year following Congress' enactment of the famed Civil Rights Act of 1964, Congress passed the Elementary and Secondary Education Act (ESEA).¹¹

ESEA's signature item, with the goal of helping solve problems facing economically disadvantaged children, was its Title I, the federal government's single largest education aid program.¹² Dr. John H. Jackson, a former White House education policy advisor, member of the Louisiana Bar and president of the national Schott Foundation for Public Education, describes the statute as follows:

The ESEA outlined a clear federal role for education and doubled federal aid for public schools. The ESEA was designed as both a federal implementation and enforcement mechanism for providing equitable educational opportunities as well as desegregation incentives for Southern school districts, as *de jure* districts were barred from funds. The *Brown* decision, coupled with the impact of the 1964 Civil Rights Act and the 1965 ESEA, placed the United States on a course toward sustaining its position as a global leader of opportunity and democracy.¹³

Indeed, for 30 years after ESEA's enactment, Congress poured hundreds of millions of dollars into public education, unfortunately, however, with only lackluster results.

According to Rod Paige, the Secretary of Education under whom NCLB was enacted, the modern day educational accountability movement began with President George H.W. Bush's 1991 Education Summit, with its policy recommendations later codified in President Bill Clinton's Improving America's Schools Act of 1994 (IASA).¹⁴ With the fundamental premise that *all children* could master challenging content and complex problem-solving skills when expectations are high, the IASA served as a practical precursor to NCLB by initiating major funding reform.

IASA required that local school boards develop plans to increase achievement to

continue receiving money. As evidenced by annual assessments, however, IASA proved unsuccessful as a reform measure as American students continued to lag behind their foreign peers.¹⁵ Amid an increase in the black-white achievement gap in public education, Congress passed NCLB as a bipartisan attempt to improving public education.

Louisiana's Statutory Agent of Reform: The RSD and the Proliferation of Charter Schools

In the decade following NCLB's enactment and its arguably unique effect in Louisiana, the state has become home to the "great experiment" for at least two reasons. First, in the wake of Hurricane Katrina, the state Department of Education and the Orleans Parish School Board have received significant national attention in their rebuilding efforts.¹⁶ Second, as previously highlighted, New Orleans is the United States' first majority charter school city.¹⁷ Consequently, Louisiana's RSD is indeed the center of national attention.

After NCLB's January 2002 effective date, the Legislature responded with Act 9 of the 2003 legislative session creating the RSD.¹⁸ Consistent with the Legislature's clear intent to reform academic standards, once a local school is deemed academically unacceptable for a period of four consecutive years, "the school *shall be removed from the jurisdiction of the local school board... and transferred to the jurisdiction of the Recovery School District...*"¹⁹ Further consistent with the clear intent to reform public education following Hurricane Katrina, the Legislature provided for a "district in crisis" to be transferred to the state-run RSD.²⁰ Consequently, 107 of 116 schools in New Orleans were subject to state takeover.

As a result of the foregoing, charter schools have become commonplace in Louisiana by providing parents and caregivers the much-needed "choice" to

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educate their children. Consistent with other states' models for reform, flexibility and choice were cornerstones of NCLB.²¹ For example, in January 2009, the Board of Elementary and Secondary Education (BESE) accepted the recommendation of Paul Pastorek, a member of the Louisiana Bar then serving as Superintendent of Education, and placed operational control of eight eligible schools in Baton Rouge within the RSD, while subsequently announcing plans to issue charters to non-profit organizations authorized by the National Association of Charter School Authorizers.²²

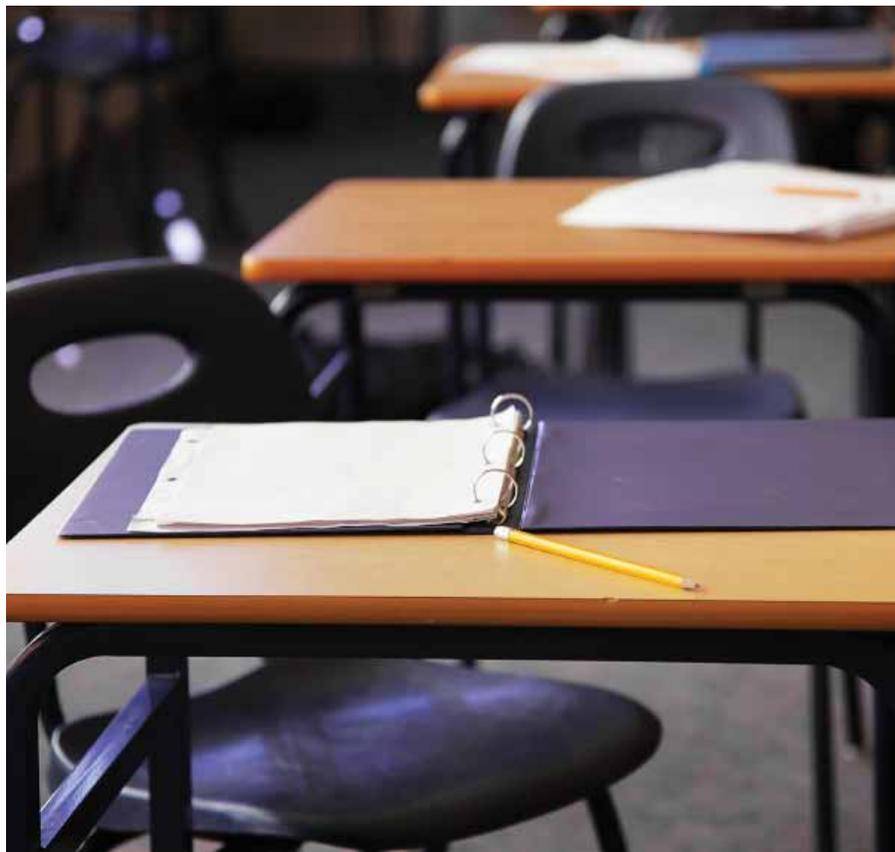
Furthermore, in addition to the charter movement's stabilized base of operations, charter schools appear to be the wave of the future if more and more academically unacceptable schools are taken over as the requisite school performance score baseline continues to rise, presumably as an attempt to keep American students in step with their foreign counterparts. In noting this likely trend, Tulane University's Cowan Institute provides the following:

School Performance Scores range from 0.0 to either 236.4 or 266.7 (depending on the grade configuration of the school). A school's baseline SPS is calculated by averaging the previous two years of school performance data and is used to give a school a performance rating label. Schools with a Baseline SPS of 140 or above receive a rating of five stars. Schools with an SPS below 60, as of 2007, are deemed "Academically Unacceptable." After NCLB, the state set a target of having all schools reach an SPS of 120 or above by 2014.²³

As far as Louisiana is concerned, therefore, Type 5 Charter Schools will likely be operational for decades to come.²⁴

Challenges to Education Reform in Louisiana

Notwithstanding the national spirit of education reform that has soundly taken foot in Louisiana, there are still



obstacles to holistic structural change. While in recent years the state has made significant improvements in public education, including nationally recognized accountability and teacher quality reforms, and being recognized among national leaders in education technology efforts and early childhood education initiatives,²⁵ Louisiana is still challenged by ongoing desegregation litigation, poverty²⁶ and anti-reform laws like the Louisiana Teacher Tenure Act (TTA).²⁷

According to the United States Commission on Civil Rights, 42 Louisiana school districts have ongoing desegregation cases pending in the state's respective federal district courts.²⁸ In desegregation cases, matters of operational control and governance rest with the district court, which has a mandatory concern for racial parity and not necessarily academic performance.²⁹ Consequently, as school districts attempt to implement and institutionalize reform and follow the dictates of the RSD law to assume operational control of failed schools, there is arguably an inherent tension between a district court's concern for racial parity and the Department's concern for academic

achievement.

Furthermore, Louisiana is often colloquially described as "land-rich and cash-poor." The state's percentage of children living in poverty is higher than the percentage of children living in poverty in the entire United States, with more than two-thirds of the state's public school students living in low-income households.³⁰ Because there remains a higher concentration of black children attending Louisiana's public schools, poverty and *de facto* school segregation seem to go hand-in-hand.

Finally, the TTA continually proves to be an obstacle to holistic education reform. The law gives public school teachers tenure in office and arms them with a protective shield against discharge, suspension or demotion for causes other than those expressly provided by statute.³¹ Although the law was originally intended to protect teachers from political pressure after a three-year probationary period in which they earned tenure,³² its current application makes it almost impossible to make some of the much-needed changes in education reform.

Author's Anecdotes

Many African-American policymakers argue NCLB and education reform are part of a new civil rights movement.³³ In contrast to those arguments, on Sept. 23, 2011, America's first black president, Barack Obama, announced a NCLB waiver program for the respective states.³⁴ In this author's opinion, any such waiver would be a mistake and arguably push back academic gains. If anything, NCLB should be strengthened, *not* "watered down." Specifically, the author suggests two reform-oriented measures by which Congress can strengthen education reform even more. Congress should: (1) require a periodic review of school board and district superintendent effectiveness; and (2) require that states modify their teacher tenure laws to receive Title I funding.

First, teachers often anecdotally complain that incentive pay should not be tied to student achievement. Fair is fair. A uniform application would require that school board members and superintendents would be evaluated to determine their effectiveness, too. Second, with respect to modifying tenure laws, the charter school movement's national popularity clearly suggests that voters want schools to have localized autonomy and discretion in making the necessary personnel changes to improve student achievement. As an example, the standards for teacher removal under the TTA are almost impossible to meet.³⁵ At a minimum, therefore, the current standards should be modified.

Education reform cannot be isolated. It requires a synergistic relationship between parents and caregivers, the local school and/or school district, and community stakeholders like businesses and faith-based organizations. As the new civil rights movement in America, education reform also requires more, *not less*, federal intervention to ensure *Brown's* previously-referenced proclamation is realized. Indeed, education is the very foundation of good citizenship.

The opinions expressed herein are the author's alone and do not necessarily represent those of his employer.

FOOTNOTES

1. 20 U.S.C. §§ 6301-6304, Pub. L. 107-110, 115 Stat. 1425.

2. *See, generally*, Rod Paige and Elaine Witty, *The Black-White Achievement Gap: Why Closing It is the Greatest Civil Rights Issue of Our Time* (Amacom 2010).

3. Danielle Holley-Walker, "The Accountability Cycle: The Recovery School District Act and New Orleans' Charter Schools," 40 Conn. L. Rev. 125, 128 (2007).

4. 347 U.S. 483 (1954).

5. *Id.* at 493 (providing that education is the most important function of state and local governments and the very foundation of good citizenship).

6. 539 U.S. 306 (2003).

7. *Id.* at 331 (citing *Brown v. Board of Education*, 347 U.S. 483, 493 (1954)).

8. *See, generally*, Jonathan C. Augustine and Craig M. Freeman, "Grading the Graders and Reforming the Reform: An Analysis of Public Education Ten Years After No Child Left Behind," 57 Loy. L. Rev. 237 (2011).

9. Scott S. Cowen Inst. for Pub. Educ. Initiatives at Tulane Univ., *Public School Performance in New Orleans: A Supplement to the 2008 State of Public Education in New Orleans Report 4* (January 2009) (internal citations omitted).

10. *See id.*

11. 20 U.S.C. § 6301, Pub. L. 89-10, 79 Stat. 27-58.

12. Nick Lewin, "The No Child Left Behind Act of 2001: The Triumph of School Choice Over Racial Desegregation," 12 Geo. J. on Poverty L. & Pol'y 95, 101 (2005).

13. John H. Jackson, "From Miracle to Movement: Mandating a National Opportunity to Learn," in *The State of Black America 2009: Message to the President 62* (Nat'l Urban League 2009).

14. Paige and Witty, *supra* note 2 at 107 (discussing Pub. L. No. 103-382, 108 Stat 3518).

15. *See, generally*, Laurence Steinberg, *Beyond the Classroom: Why School Reform Has Failed and What Parents Need to Do* (Simon & Schuster Paperbacks 1996) (providing a detailed analysis of the lowering of all academic achievement in public education with particular emphasis on the growing disparity between black and white school children).

16. *See, e.g.*, Robert A. Garda, Jr., "The Politics of Education Reform: Lessons from New Orleans," 40 J.L. & Educ. 57 (2011); *see also* Inst. on Race & Poverty at the U. of Minn. L. Sch., *The State of Public Schools in Post-Katrina New Orleans: The Challenge Creating Equal Opportunity* (May 10, 2010).

17. *See* Holley-Walker, *supra* note 3 at 128.

18. La. R.S. § 17:1990.

19. La. R.S. § 17:10.5 (A)(1) (emphasis added).

20. *Id.* §§ 10.6 & 10.7.

21. Paige and Witty, *supra* note 2 at 15.

22. *See, generally*, Will Sentell, "BESE Votes to Takeover Eight Failing EBR Schools," *The Advocate*, Jan. 15, 2009, at A1.

23. Cowen Report, *supra* note 9 at 10.

24. Under Louisiana law, there are five different types of charter schools. *See, generally*, La. R.S. § 17:3973(2)(b); *see also* Wendy Parker, "The Color Choice: Race and Charter Schools," 75 Tul. L. Rev. 563, 577-80 (2001). Specific to the Department assuming operation of preexisting schools deemed academically unacceptable for four consecutive years, however, state law is clear that such schools will operate under a Type 5 Charter. La. R.S. § 17:3973(2)(b)(v)(aa).

25. *See* Education's Next Horizon, Education Briefing Book: A Primer for Policymakers on Louisiana K-12 Education 19-27 (March 2008).

26. *See id.* at 28.

27. La. R.S. § 17:443.

28. United States Commission on Civil Rights, *Becoming Less Separate?: School Desegregation, Justice Department Enforcement and the Pursuit of Unitary Status* 141-45 (2007).

29. *See* Augustine and Freeman, *supra* note 8 at 261; *see also* Kristi L. Bowman, "A New Strategy for Pursuing Racial and Ethnic Quality in Public Schools," 1 Duke F. for L. & Soc. Change 47, 52 (2009) (internal citations omitted).

30. Briefing Book, *supra* note 25 at 28.

31. Reed v. Orleans Parish School Board, 21 So.2d 895 (La. App. Or. 1945).

32. *Rousselle v. Plaquemines Parish School Board*, 93-1916 (La. 2/28/94), 633 So.2d 1235, 1242.

33. *See, e.g.*, Kevin P. Chavous and Benjamin F. Chavis, Jr., "Every Child Deserves a Chance" (Feb. 11, 2011), available at: <http://blog.baeo.org/2011/02/20/chavous-chavis-every-child-deserves-a-chance/> (last visited Oct. 23, 2011) (commenting in an Internet blog published by the Black Alliance for Educational Options).

34. <http://www.npr.org/2011/09/23/140750871/obama-announces-no-child-left-behind-state-waivers> (last visited Oct. 23, 2011).

35. *See, e.g.*, Jones v. Rapides Parish School Board, 634 So.2d 1197 (La. App. 3 Cir. 1993) (chronicling teacher Donald Jones' multiple infractions, including showing junior high students an "R" rated movie, dismissal by his school board, and court-ordered reinstatement under the TTA).

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