

**HARMONIZING NO CHILD LEFT BEHIND'S  
RESTRUCTURING PROVISION AND STATE CHARTER  
SCHOOL LAWS: THE NEED FOR AUTONOMY, FLEXIBILITY,  
AND ADEQUATE RESOURCES**

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I. INTRODUCTION

The No Child Left Behind Act of 2001 (NCLB) instilled new urgency in the quest to improve America's public schools.<sup>1</sup> NCLB requires schools to meet state-defined performance benchmarks, and schools that fail to do so are deemed as in need of "school improvement," "corrective action," or "restructuring" and are subject to escalating penalties.<sup>2</sup> The most severe sanction occurs after a school fails to meet a state's benchmarks for six consecutive years and, therefore, must fundamentally reform its governance operations through the process of restructuring.<sup>3</sup> NCLB delineates five ways in which a school may restructure, one of which is the charter conversion option, whereby a school reopens as an independent entity but still operates within the public school system.<sup>4</sup> Charter schools provide autonomous and alternative education models. Since these schools are governed according to state law, however, many states micromanage charter schools to the point that they are virtually indistinguishable from traditional public schools.<sup>5</sup> A tension arises between

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<sup>1</sup> LAUREN MORANDO RHIM, RESTRUCTURING SCHOOLS IN BALTIMORE: AN ANALYSIS OF STATE AND DISTRICT EFFORTS 7 (2004), *available at* <http://www.ecs.org/clearinghouse/53/24/5324.doc>.

<sup>2</sup> 20 U.S.C. § 6316(b) (Supp. II 2002).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> Sandra Vergari, *Introduction to THE CHARTER SCHOOL LANDSCAPE* 1, 2 (Sandra Vergari ed., 2002).

NCLB's focus on fundamental restructuring and charter school statutes that do not allow for a complete overhaul of a school's governance structure.

NCLB imparts lofty goals of achievement and accountability, mandates the goal of full proficiency in reading and mathematics by the 2013–14 school year, and demarcates steps that state and local educational agencies must take to achieve that goal.<sup>6</sup> A cornerstone of this law is its robust emphasis on accountability, explicit in the notion that the goal of leaving no child behind will be attained only if schools are held accountable for improving achievement.<sup>7</sup> As a result, NCLB requires states to track progress through student performance on standardized tests.<sup>8</sup> States must use these test results to determine whether a school is making progress towards attaining proficiency, which is defined under NCLB as Adequate Yearly Progress (AYP).<sup>9</sup> Broadly speaking, AYP is a state-specified benchmark of whether a school has satisfactorily improved in its academic performance towards achieving the long-term goal of proficiency.<sup>10</sup>

In the initial four years of a school failing to make AYP, NCLB requires increasingly remedial actions, beginning with a probationary period and culminating in corrective action.<sup>11</sup> A school that fails to make AYP for one year enters a “warning year,” but the school is not sanctioned *per se*.<sup>12</sup> When a school is in its second or third year of failing to make AYP, it is labeled as in need of “school improvement,” whereby the school district must develop a plan to turn around the school, offer choices for students to transfer to non-failing public schools, and provide free after-school tutoring from a provider of the parent's choice.<sup>13</sup> After four years of failing to make AYP, the school is identified as in need of “corrective action,” and the school district must take more severe action, such as replacing school staff and instituting a new curriculum.<sup>14</sup>

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<sup>6</sup> OFFICE OF ELEMENTARY AND SECONDARY EDUC., LEA AND SCHOOL IMPROVEMENT: NON-REGULATORY GUIDANCE (REVISED) 1 (2006), *available at* [www.ed.gov/policy/elsec/guid/schoolimprovementguid.pdf](http://www.ed.gov/policy/elsec/guid/schoolimprovementguid.pdf).

<sup>7</sup> *Id.*

<sup>8</sup> 20 U.S.C. § 6311(a)(1) (Supp. II 2002).

<sup>9</sup> *Id.* § 6311(b)(2).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* § 6316.

<sup>12</sup> REBECCA WOLF DiBIASE, ECS POLICY BRIEF: STATE INVOLVEMENT IN SCHOOL RESTRUCTURING UNDER NO CHILD LEFT BEHIND IN 2004–05 SCHOOL YEAR 2 (2005), *available at* <http://www.ecs.org/clearinghouse/64/28/6428.pdf>.

<sup>13</sup> 20 U.S.C. § 6316(b)(1)–(6).

<sup>14</sup> *Id.* § 6316(b)(7).

After five years of failing to meet AYP, NCLB requires a school to create a plan for restructuring—a complete overhaul of the school’s governance.<sup>15</sup> If the school fails to meet AYP for a sixth year, it must undertake the onerous task of implementing the restructuring plan.<sup>16</sup> NCLB requires that the school fundamentally reform its governance operations by choosing one of five restructuring options: (1) chartering, (2) turnarounds, (3) contracting, (4) state takeovers, or (5) “other fundamental reforms that alter a school’s governance.”<sup>17</sup>

Each restructuring option is intended to usher in a systemic reform in how the school is governed.<sup>18</sup> Chartering involves the school district closing the current school and reopening it as a public charter school.<sup>19</sup> Turnarounds require the school district to replace all or most of the school staff, including the principal, who are relevant to the school’s failure.<sup>20</sup> Under the contracting option, the school district closes the current school and reopens it as a school managed by an outside entity, such as a private management company.<sup>21</sup> A state takeover involves turning over the failing school to the state.<sup>22</sup> Finally, the school district may choose the “other” restructuring option, in which the school makes a fundamental reform in the governance structure with the “substantial promise of enabling the school to make adequate yearly progress.”<sup>23</sup>

Chartering, when employed within a suitable framework, fulfills the central purpose of NCLB’s restructuring provision—fundamentally reforming the “failing” school’s governance operations. This Comment examines the relationship between inflexible state charter laws that undermine a charter school’s autonomy and NCLB’s focus on restructuring options that radically alter a school’s governance operations. Because chartering is a creature of state statute, certain charter schools are encumbered by unreasonable restrictions. State laws promulgating stringent requirements of accountability are weaker than they may appear at first glance, and, in turn, the charter schools are constrained and unable to live up to NCLB’s re-

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<sup>15</sup> *Id.* § 6316(b).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* § 6316(b)(8)(B).

<sup>18</sup> WOLF DI BIASE, *supra* note 12, at 2.

<sup>19</sup> 20 U.S.C. § 6316(b)(8)(B)(i) (Supp. II 2002).

<sup>20</sup> *Id.* § 6316(b)(8)(B)(ii).

<sup>21</sup> *Id.* § 6316(b)(8)(B)(iii).

<sup>22</sup> *Id.* § 6316(b)(8)(B)(iv).

<sup>23</sup> *Id.* § 6316(b)(8)(B)(v).

quirement of a fundamental reform in governance.<sup>24</sup> Several core indispensable features of a charter school serve to distinguish charter schools from traditional public schools. State charter laws that deny autonomy and flexibility and do not grant adequate resources create charter schools that are materially indistinguishable from the traditional public school model. Such rigid laws are inconsistent with the purpose and framework of NCLB's restructuring provision and thus are impermissible options.

An analysis of NCLB, focusing on its enactment and purpose, provides the background for this remedial legislation in the beginning of Part II. The NCLB discussion includes a close examination of two critical components of the law: AYP and restructuring. Part II ends with a discussion of NCLB's five restructuring options. Part III analyzes the purpose and elements of a charter school and, in doing so, distinguishes charter schools from traditional public schools. In the context of this discussion of NCLB and charter schools, Part IV fleshes out the charter-school option in light of NCLB's goals. This Comment identifies the irreducible elements of a charter school—autonomy, flexibility, and adequate resources—and concludes that a charter-school framework that does not include these fundamental elements is inconsistent with NCLB's purpose and goals and, as a result, is impermissible under the statute.

## II. NCLB: AN OVERVIEW

### A. *The Education Reform Movement and NCLB's Inception*

The promise of change resonated in President George W. Bush's signature as he signed NCLB into law on January 8, 2002, and declared the beginning of a "new era" in American public education.<sup>25</sup> The federal government enacted the law to "ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education"<sup>26</sup> and to promote high-performing schools, amidst a grow-

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<sup>24</sup> Jennifer Hochschild, *Rethinking Accountability Politics*, in *NO CHILD LEFT BEHIND?: THE POLITICS AND PRACTICE OF SCHOOL ACCOUNTABILITY* 108 (Paul E. Peterson & Martin R. West eds., 2003). Note that "strong laws" are not laws that impose more rules, but just the opposite—laws that allow for greater flexibility.

<sup>25</sup> Press Release, Office of the White House Press Secretary, President Signs Landmark Education Bill (Jan. 8, 2002), available at <http://www.whitehouse.gov/news/releases/2002/01/20020108-1.html>; see also Elisabeth Busmiller, *Focusing on the Home Front, Bush Signs Education Bill*, N.Y. TIMES, Jan. 9, 2002, at A1.

<sup>26</sup> 20 U.S.C. § 6301 (Supp. II 2002).

ing public awareness of the need to better educate America's children.<sup>27</sup>

To truly understand the significance of NCLB, it is necessary to examine the law in the context of a broader education reform effort. NCLB is the latest step in the reform movement, which seeks to ensure uniform and measurable school accountability.<sup>28</sup> Released by the federal government in 1983, *A Nation at Risk*—the first step in the movement—reported the decreased competitiveness of American students in the international market and called for a diverse range of educational reforms in hopes of reversing the downward trend in American public education.<sup>29</sup> This publication pushed the nation toward the idea of accountability, principally by raising educational issues higher on political agendas.<sup>30</sup> More specifically, it introduced novel ideas and proposed basic reforms, such as the need for students to be given more challenging tasks, for teachers to be better trained and compensated, and for states to strengthen their commitment to quality education.<sup>31</sup>

As the education reform movement gained momentum, the federal government's actions to ensure the successful improvement of the public education system intensified. In 1994, Congress amended the Elementary and Secondary Education Act of 1965 (ESEA)<sup>32</sup> through the passage of the Improving America's Schools Act (IASA).<sup>33</sup> The signature component of the ESEA, and thereafter the IASA, is Title I, the federal government's single largest education aid program, aimed at helping disadvantaged students in kindergarten through twelfth grade.<sup>34</sup> NCLB reauthorizes the IASA and the ESEA and further requires that school districts receiving Title I funding de-

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<sup>27</sup> OFFICE OF ELEMENTARY AND SECONDARY EDUC., *supra* note 6, at 1.

<sup>28</sup> Danielle Holley-Walker, *The Accountability Cycle: The Recovery School District Act and New Orleans' Charter Schools*, 40 CONN. L. REV. 125, 128–31 (2007).

<sup>29</sup> NAT'L COMM'N ON EXCELLENCE IN EDUC., *A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM* (1983), available at <http://www.ed.gov/pubs/NatAtRisk/index.html>; see also CATO HANDBOOK FOR CONGRESS: POLICY RECOMMENDATIONS FOR THE 108TH CONGRESS 307 (Edward H. Crane & David Boaz eds., 2003), available at <http://www.cato.org/pubs/handbook/hb108/hb108-29.pdf>.

<sup>30</sup> Martin R. West & Paul E. Peterson, *Introduction to NO CHILD LEFT BEHIND?: THE POLITICS AND PRACTICE OF SCHOOL ACCOUNTABILITY* 6 (Paul E. Peterson & Martin R. West eds., 2003).

<sup>31</sup> *Id.*

<sup>32</sup> 20 U.S.C.S. § 7801 (2000) (now included as part of the 2001 NCLB).

<sup>33</sup> 20 U.S.C. § 6301 (Supp. II 2002). The IASA of 1994, Pub. L. No. 103-382, 108 Stat. 3618 (1994) (codified as amended at 20 U.S.C. §§ 6301–7941 (2003)) was enacted on October 20, 1994, to reauthorize the ESEA.

<sup>34</sup> *Id.*

velop coherent and rigorous academic standards and that all students attain proficiency within twelve years.<sup>35</sup>

NCLB represents a bipartisan compromise that increases the role of the federal government in education.<sup>36</sup> Moreover, the legislation reflects the federal government's commitment to equal education for all children, regardless of race or socioeconomic status.<sup>37</sup> Although the law marks a distinguishable shift in the degree of federal power over education, scholars have debated the extent of the shift. One scholar described NCLB as a "step toward institutionalizing various types of market-driven reforms" by requiring school districts to offer choice, provide access to supplemental services, and reform schools.<sup>38</sup> Conversely, other academics have taken a more extreme position on the impact of NCLB, calling it a "massive shift" in federal power over education.<sup>39</sup> Still others hail the law as particularly remarkable in light of the U.S. Constitution's silence on the federal government's role in education.<sup>40</sup>

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<sup>35</sup> Andrew Rudalevige, *No Child Left Behind: Forging a Congressional Compromise*, in *NO CHILD LEFT BEHIND?: THE POLITICS AND PRACTICE OF SCHOOL ACCOUNTABILITY* 26 (Paul E. Peterson & Martin R. West eds., 2003). Curiously, NCLB does not define one level of proficiency that all students must attain within twelve years. Rather, NCLB leaves it to individual states to determine what constitutes academic proficiency. BELLA ROSENBERG, *WHAT'S PROFICIENT?: THE NO CHILD LEFT BEHIND ACT AND THE MANY MEANINGS OF PROFICIENCY* 2 (2004), <http://www.aft.org/pubs-reports/downloads/teachers/WhatsProficient.pdf>. Therefore, academic proficiency may vary greatly from state to state. For a detailed discussion of proficiency, see *id.*

<sup>36</sup> Busmiller, *supra* note 25, at A1.

<sup>37</sup> Shavar D. Jeffries, *The Structural Inadequacy of Public Schools for Stigmatized Minorities: The Need for Institutional Remedies*, 34 *HASTINGS CONST. L.Q.* 1, 38 (2006) ("NCLB is the culmination of [a] growing federal role, requiring states, among other things, to meet more rigorous academic standards, implement annual testing in specified grades, ensure schools employ 'highly qualified' teachers, and initiate federally defined accountability regimes.").

<sup>38</sup> RHIM, *supra* note 1, at 7.

<sup>39</sup> Thomas Rentschler, *No Child Left Behind: Admirable Goals, Disastrous Outcomes*, 12 *WIDENER L. REV.* 637, 642 (2006). Another journalist went so far as to assert that NCLB is the most important education plan since *Brown v. Board of Education*, which outlawed school segregation in 1954. *Other Opinion: Failure Flunking No Child Left Behind*, *TIMES LEADER* (Pa.), May 3, 2005, at A9.

<sup>40</sup> Ralph D. Mawdsley & J. Joy Cumming, *School District Accountability, Special Education Students, and the Dilemma of High Stakes Testing: An Australia-United States Comparison*, 188 *EDUC. LAW REP.*, 2004, at 1, 2 (citing MICHAEL W. LAMORTE, *SCHOOL LAW: CASES AND CONCEPTS* 2-3 (2007)). The Tenth Amendment of the U.S. Constitution has been historically construed as reserving the powers involving education to individual states' domain. *Id.*

*B. NCLB's Driving Force Is Accountability*

The federal government passed NCLB with the promise to change the culture of the nation's schools,<sup>41</sup> to ensure a fair, equal, and significant opportunity to obtain a high-quality education for all children.<sup>42</sup> The U.S. Department of Education highlights four pillars that sustain the ideals of NCLB: (1) accountability, (2) flexibility, (3) research-based education, and (4) parent options.<sup>43</sup> Each of these pillars stems from NCLB's underlying goal of creating high-performing schools throughout the country. However, the law's cornerstone pillar is the accountability provision, which builds upon the notion of rigorous academic content and high achievement standards.<sup>44</sup>

NCLB emphasizes accountability by requiring schools to meet state-specified standards, and the failure to meet these standards will result in sanctions.<sup>45</sup> NCLB seeks to hold schools accountable if they are under-performing, or "failing," by requiring states to measure student performance and to ensure that students attain proficiency in reading and math by the 2013–14 school year.<sup>46</sup> Schools are rated according to their AYP, a benchmark which requires a state-specified percentage of students to meet proficiency standards on assessment tests.<sup>47</sup> To receive federal aid, every state must establish a set of standards and a comprehensive testing plan for measuring proficiency of those standards.<sup>48</sup> NCLB requires that state educational agencies (SEAs) and local educational agencies (LEAs) annually review the status of every school to ensure that the school is reaching AYP.<sup>49</sup>

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<sup>41</sup> WOLF DiBIASE, *supra* note 12, at 1.

<sup>42</sup> 20 U.S.C. § 6301 (Supp. II 2002).

<sup>43</sup> U.S. Dep't of Educ., *Overview: Four Pillars of NCLB* (July 1, 2004), <http://www.ed.gov/nclb/overview/intro/4pillars.html>.

<sup>44</sup> OFFICE OF ELEMENTARY AND SECONDARY EDUC., *supra* note 6, at 1.

<sup>45</sup> 20 U.S.C. § 6311(b)(2).

<sup>46</sup> *Id.* § 6311.

<sup>47</sup> *Id.* § 6311(b)(2)(C) (Supp. II 2002).

"Adequate yearly progress" shall be defined by the State in a matter that: (i) applies the same high standards of academic achievement to all public elementary school and secondary school students in the State; (ii) is statistically valid and reliable; (iii) results in continuous and substantial academic improvement for all students; (iv) measures the progress of public elementary schools, secondary schools, and local educational agencies and the State . . . ; (v) includes separate measurable annual objectives for continuous and substantial improvement . . . .

*Id.* § 6311(b)(2)(C)(i)–(v).

<sup>48</sup> *Id.* See generally West & Peterson, *supra* note 30, at 1–2.

<sup>49</sup> OFFICE OF ELEMENTARY AND SECONDARY EDUC., *supra* note 6, at 1.

Schools that continuously fail to meet AYP targets face increasingly punitive measures.<sup>50</sup> The yardstick of success is standardized testing. Accountability is ultimately accomplished by the tabulation of test scores, which are used to determine whether schools are making AYP toward full proficiency.<sup>51</sup> Annual local and state district report cards inform governmental agencies and parents about a school's progress.<sup>52</sup> Students at schools that fail to meet these standards may transfer to other schools in the same district and, if a school chronically fails to make adequate progress, the school is subject to escalating consequences, ultimately culminating in restructuring.<sup>53</sup>

The unifying principles of the other three pillars—flexibility, research-based education, and parent options—are access and choice. Parents with children attending low-performing schools have new options under NCLB. For example, school districts must tell parents if their child is enrolled in a Title I school that has been identified for school improvement, corrective action, or restructuring.<sup>54</sup> NCLB requires that the LEA make a choice available for students by the first day of the school year following the school year in which the LEA administered the assessments that resulted in the school being deemed as in need of improvement.<sup>55</sup> At a minimum, this notification must inform parents that their child is eligible to attend another public school and identify each public school in the district that the parent can select.<sup>56</sup> Moreover, NCLB grants parents access to free after-school tutoring if their child attends a school marked in need of improvement.<sup>57</sup>

*C. Drastic Times Call for Drastic Measures: The Restructuring Provision of NCLB*

NCLB prescribes escalating stages of intervention to ensure that students at struggling schools are supplied with increasing amounts of assistance.<sup>58</sup> After failing to make AYP for one year, the school is warned, but there is no formal sanction; rather, it is at this time that

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<sup>50</sup> 20 U.S.C. § 6316(b).

<sup>51</sup> *Id.* § 6311.

<sup>52</sup> OFFICE OF ELEMENTARY AND SECONDARY EDUC., *supra* note 6, at 1.

<sup>53</sup> *Id.*; see also 20 U.S.C. §6316 (b)(8)(B) (Supp. II 2002).

<sup>54</sup> 34 C.F.R. § 200.36(b)(4) (2007).

<sup>55</sup> OFFICE OF ELEMENTARY AND SECONDARY EDUC., *supra* note 6, at A-1.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at B-6, E-4.

<sup>58</sup> *Id.*

the AYP clock starts ticking. After another year of failing to make AYP, the school is identified for “school improvement.”<sup>59</sup> At this stage, the school must offer students the choice to attend an AYP-satisfying school.<sup>60</sup> If a school fails to make AYP for three consecutive years,<sup>61</sup> the school district must continue to provide the students with the option to transfer to another public school.<sup>62</sup>

During the initial three years of a school failing to make AYP, the sanctions imposed symbolize the theme of change. For example, school districts may contract out with private organizations to provide supplemental educational services to increase academic enrichment for students attending schools in need of improvement.<sup>63</sup> Allowing school districts and parents to choose private providers for services, such as tutoring, symbolizes a level of fundamental change in the school’s structure, which is traditionally controlled by the public sector. In effect, this choice places pressure on the school and other public providers to improve.<sup>64</sup>

After failing to make AYP for four consecutive years, the school district must continue to offer the choice to transfer and a range of supplemental services, but it must also implement “corrective actions.”<sup>65</sup> Corrective actions “substantially and directly” respond to the “consistent academic failure of a school.”<sup>66</sup> They are “significant in-

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<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at B-6.

<sup>61</sup> The labels designated to schools after each year of failing to make AYP can be rather confusing. Since a formal label is not placed on the school after one year of failing to make AYP, this year can be thought of as the “Warning Year.” It is not until two consecutive years of failing to make AYP that a school is designated as being in “School Improvement Year 1.” Therefore, a school that fails to make AYP for three consecutive years is actually in “School Improvement Year 2.” See generally OFFICE OF ELEMENTARY AND SECONDARY EDUC., *supra* note 6, at B-1–H-1.

<sup>62</sup> 20 U.S.C. § 6316(b)(5) (Supp. II 2002).

<sup>63</sup> OFFICE OF ELEMENTARY AND SECONDARY EDUC., SUPPLEMENTAL EDUCATIONAL SERVICES: NON-REGULATORY GUIDANCE A-1 (2005), available at <http://www.ed.gov/policy/elsec/guid/suppsvcsguid.doc>. “Supplemental educational services must be provided outside of the regular school day. Supplemental educational services must be high quality, research-based, and specifically designed to increase student academic achievement.” *Id.*

<sup>64</sup> The downstream effect of choice is a highly contested question that is beyond the scope of this Comment, but must be acknowledged. See, e.g., JULIAN R. BETTS ET AL., DOES SCHOOL CHOICE WORK? EFFECTS ON STUDENT INTEGRATION AND ACHIEVEMENT 3–4 (2006), available at [http://www.ppic.org/content/pubs/report/R\\_806JBR.pdf](http://www.ppic.org/content/pubs/report/R_806JBR.pdf); JULIE BERRY CULLEN ET AL., THE EFFECT OF SCHOOL CHOICE ON STUDENT OUTCOMES: EVIDENCE FROM RANDOMIZED LOTTERIES (2003), available at <http://ideas.repec.org/p/nbr/nberwo/10113.html>.

<sup>65</sup> 20 U.S.C. § 6316(b)(7).

<sup>66</sup> *Id.*

tervention[s]”<sup>67</sup> designed to correct the school’s chronic failure to make AYP.<sup>68</sup> Identifying a school for corrective action indicates the LEA’s intention to take greater control of the school’s governance and to have a more hands-on approach to the school’s decision-making processes. Moreover, this label signals that the initial approaches to school improvement have been unsuccessful and that more extreme action is necessary to bolster learning conditions and progress.<sup>69</sup>

If “school improvement” and “corrective action” interventions prove unsuccessful, the school finally meets the fate of restructuring, a fundamental governance reform.<sup>70</sup> School restructuring is a two-step process. The first step begins after a school fails to make AYP for five consecutive years.<sup>71</sup> At that time, the school must develop a plan for restructuring.<sup>72</sup> After failing to make AYP for six consecutive years, the school enters the second step and must implement the restructuring plan.<sup>73</sup> Generally, when a school is in restructuring status, the LEA must make crucial and substantive efforts to overhaul the governance of that school.<sup>74</sup>

NCLB permits five options for school restructuring:

- (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.
- (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

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<sup>67</sup> OFFICE OF ELEMENTARY AND SECONDARY EDUC., *supra* note 6, at F-1.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 21.

<sup>70</sup> *Id.* at 5.

<sup>71</sup> 20 U.S.C. § 6316(b)(8)(A) (Supp. II 2002).

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* § 6316(b)(8)(B).

<sup>74</sup> OFFICE OF ELEMENTARY AND SECONDARY EDUC., *supra* note 6, at G-1.

adequate yearly progress . . . .<sup>75</sup>

Federal regulations explain the kind of restructuring contemplated by NCLB. These rules define restructuring as a “major reorganization of a school’s governance arrangement” by a LEA that: “(1) makes fundamental reforms . . . to improve student academic achievement in the school; (2) has substantial promise of enabling the school to make AYP . . . ; and (3) is consistent with State law.”<sup>76</sup>

NCLB’s restructuring provision unambiguously requires fundamental reforms in school governance. The concept of fundamental reform is even more apparent when the restructuring option is viewed in the context of its precipitating sanctions of “school improvement” and “corrective action.” To demonstrate just how pervasively this theme is woven into each of the five options, it is vital to briefly analyze each option. Option (i) permits the school to close and reopen as a charter school.<sup>77</sup>

Option (ii), the turnaround option,<sup>78</sup> imposes fundamental change by requiring schools to replace staff who are responsible for the school’s failure, including the principal.<sup>79</sup> While entire staff replacement is a viable route under this option, research indicates that many of these schools are “turned around” by merely replacing the principal or members of the administration.<sup>80</sup> Often, there will not be substantial teacher replacement in these schools. For that reason, turnaround is a common option for satisfying NCLB’s restructuring provision because it only has a minimal impact on the teachers remaining in a restructured school.<sup>81</sup> Nevertheless, this option constitutes a fundamental reform because it literally changes the composition of the governing body at the school.

Option (iii), the contracting option, requires fundamental governance change by compelling a school to contract out to a private or non-profit organization.<sup>82</sup> The school district closes the school and

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<sup>75</sup> 20 U.S.C. § 6316(b)(8)(B).

<sup>76</sup> 34 C.F.R. § 200.43 (2007).

<sup>77</sup> 20 U.S.C. § 6316(b)(8)(B)(i) (Supp. II 2002). Since this option is the crux of the present Comment, it will be further analyzed in Parts III and IV.

<sup>78</sup> CTR. FOR COMPREHENSIVE SCH. REFORM AND IMPROVEMENT, SCHOOL RESTRUCTURING UNDER NCLB: WHAT WORKS WHEN? A GUIDE FOR EDUCATION LEADERS 3 (2006). Some scholars have referred to this option as the “reconstitution” option. *E.g.*, BETTY MALEN ET AL., RECONSTITUTING SCHOOLS: “TESTING” THE “THEORY OF ACTION” 113–32 (2002).

<sup>79</sup> 20 U.S.C. § 6316(b)(8)(B)(ii).

<sup>80</sup> CTR. FOR COMPREHENSIVE SCH. REFORM AND IMPROVEMENT, *supra* note 78, at 43.

<sup>81</sup> *Id.*

<sup>82</sup> 20 U.S.C. § 6316(b)(8)(B)(iii).

reopens it as a school managed by an outside governing unit with a well-established record of success, such as an education management organization (EMO).<sup>83</sup> The school district selects the EMO to manage the school and monitors the EMO's performance.<sup>84</sup> The district retains some level of control because it can rescind the contract if student achievement does not improve.<sup>85</sup> This option represents a substantial reform because it involves an entirely innovative governance model. American education institutions have historically been public enterprises.<sup>86</sup> Therefore, contracting out a public enterprise (i.e., a traditional public school) to a private entity is a radically novel alternative.

Option (iv), known as a state takeover, also requires fundamental change by turning the school operations over to the SEA.<sup>87</sup> There are compelling reasons why an LEA would command a state takeover. The LEA might invite such action when the district is unable to govern the restructuring decision process for all of the failing schools in its district.<sup>88</sup> A district may adopt this option if it does not have the capability to manage the implementation of restructuring in each individual school, because such oversight is logistically impossible.<sup>89</sup> Analogous to the other restructuring options, this option represents a significant reform because of the longstanding tradition of local educational control in our society.

Finally, option (v) permits the school to restructure by choosing another form of major restructuring.<sup>90</sup> The statutory provision explicitly requires fundamental reforms in governance with "substantial promise" of allowing the school to make AYP.<sup>91</sup> Although the law does not specify how this option can be implemented, proposed examples include significant changes to accommodate the needs of a small sub-group of under-achieving students, such as creating smaller learning communities.<sup>92</sup> This restructuring option may also be help-

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<sup>83</sup> CTR. FOR COMPREHENSIVE SCH. REFORM AND IMPROVEMENT, *supra* note 78, at 7.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> William Haft, *Charter Schools and the Nineteen Century Corporation: A Match Made in the Public Interest*, 30 ARIZ. ST. L.J. 1023, 1024 (1998).

<sup>87</sup> 20 U.S.C. § 6316(b)(8)(B)(iv) (Supp. II 2002).

<sup>88</sup> CTR. FOR COMPREHENSIVE SCH. REFORM AND IMPROVEMENT, *supra* note 78, at 19.

<sup>89</sup> *Id.*

<sup>90</sup> 20 U.S.C. § 6316(b)(8)(B)(v). The broad, and somewhat ambiguous, language of option (v) indicates that this option is really a catch-all, encompassing the scope and essence of the restructuring provision. The four preceding options are examples of how the catch-all may be practically implemented.

<sup>91</sup> *Id.*

<sup>92</sup> CTR. FOR COMPREHENSIVE SCH. REFORM AND IMPROVEMENT, *supra* note 78, at 8.

ful for schools in which a new leader has been hired and, while the school continues to fail to make AYP, the new leader has achieved some improvements, albeit not a satisfactory turnaround.<sup>93</sup> In this instance, there is the expectation that with training and support, the new leader can become a “turnaround” leader.<sup>94</sup>

*D. America’s Public Schools Are “Restructuring”*

In the aftermath of NCLB’s passage, SEAs and LEAs face the daunting task of ensuring academic achievement and progress. Since many schools are now in the restructuring phase, or rapidly approaching this point, an analysis of the restructuring provision is both a relevant and important discussion. However, NCLB gives very little guidance on how restructuring should be implemented,<sup>95</sup> notwithstanding its palpable effect.

In the 2005–06 school year, approximately six hundred schools in the nation were in the restructuring phase.<sup>96</sup> Since many more schools will meet this fate in the upcoming years, school restructuring will have significant consequences, not just for state and national leaders, but for communities across the nation.<sup>97</sup> Statistical projections estimate that nearly 2000 schools will be in restructuring in the 2007–08 school year and 3200 schools in the 2008–09 school year.<sup>98</sup>

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<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> Congress left to the states the standards to be set, the design of testing instruments, and the administration of accountability systems. West & Peterson, *supra* note 30, at 8–9. As a result, states differ in their methods of creating and implementing standardized tests.

<sup>96</sup> Bryan C. Hassel, Emily Ayscue Hassel & Lauren Morando Rhim, *Introduction: Overview of Restructuring*, in HANDBOOK ON RESTRUCTURING AND SUBSTANTIAL SCHOOL IMPROVEMENT 9, 10 (Herbert J. Walberg ed., 2007) (citing National Center for Education Statistics, *Participation in Education* (Washington D.C., 2005)), available at <http://www.centerii.org/survey/downloads/Restructuring%20Handbook.pdf>. This is not even an accurate representation of low-performing schools, since most states have not been tracking AYP long enough for schools to enter restructuring. *Id.*

<sup>97</sup> See, e.g., RON BRADY, CAN FAILING SCHOOLS BE FIXED? 28–31 (2003), available at [http://www.edexcellence.net/doc/failing\\_schools.pdf](http://www.edexcellence.net/doc/failing_schools.pdf).

<sup>98</sup> Hassel et al., *supra* note 96, at 10 (citing Center on Education Policy, *From the Capital to the Classroom: Year Four of the No Child Left Behind Act* (Washington D.C., 2006)). Current periodicals also emphasize the growing number of schools in restructuring. See, e.g., Diana Jean Schemo, *Bush Proposes Broadening the No Child Left Behind Act*, N.Y. TIMES, Jan. 25, 2007, at A1 (“[T]here were currently about 1,800 of these schools across the country, where students have failed to meet state targets for reading and math for more than five years.”).

Restructuring has been largely an urban phenomenon.<sup>99</sup> In the 2005–06 school year, approximately ninety percent of schools in restructuring were located in urban districts.<sup>100</sup> Moreover, the restructuring in fifteen school districts accounted for nearly one-half of all schools in restructuring.<sup>101</sup>

Although NCLB delineates five options for restructuring, the precise courses of action are omitted from the statute's text.<sup>102</sup> Consequently, specific approaches to each of the restructuring options vary widely among the states.<sup>103</sup> Most states have opted for a hands-off approach, attained through option (v).<sup>104</sup> The Government Accountability Office reported that forty percent of schools facing restructuring selected option (v), thereby making "other" changes, such as creating smaller learning communities.<sup>105</sup> However, such minor steps toward restructuring are incompatible with the goal of NCLB's restructuring provision, which explicitly requires fundamental reform.<sup>106</sup> The federal government intended for the restructuring provision to serve as a last resort, only after the school has failed to meet AYP for several consecutive years and the preceding penalties have proven unsuccessful.<sup>107</sup> SEAs and LEAs that "restructure" by merely creating smaller learning communities, replacing a few teachers, or changing textbook publishers are not adhering to the requirement of fundamental reform. Each state has a legal responsibility to ensure compliance with the federal mandate of a fundamental reform.<sup>108</sup>

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<sup>99</sup> Julie Kowal & Bryan C. Hassel, *Remedies in Action: Four "Restructured" Schools, in NO REMEDY LEFT BEHIND: LESSONS FROM A HALF-DECADE OF NCLB 267, 269* (Frederick M. Hess & Chester E. Finn Jr. eds., 2007).

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> 20 U.S.C. § 6316(b)(8)(B) (Supp. II 2002).

<sup>103</sup> WOLF DI BIASE, *supra* note 12, at 3.

<sup>104</sup> *Id.*

<sup>105</sup> David J. Hoff, *Some Schools Take No Restructuring Action, GAO Finds*, EDUC. WK., Sept. 12, 2007, at 21. Although option (v) has been interpreted as a laissez-faire approach, this Comment contends that Congress actually intended for that option to be just as drastic a measure as the other four options in the restructuring provision.

<sup>106</sup> *See* 20 U.S.C. § 6316(b).

<sup>107</sup> WOLF DI BIASE, *supra* note 12, at 3.

<sup>108</sup> This Comment seeks to analyze and interpret the restructuring provision itself, and demonstrate how individual state laws either promote or inhibit successful restructuring. The ongoing and contentious debate about assessing academic achievement and methods for accountability is beyond the scope of this Comment.

### III. CHARTER SCHOOLS: ALTERNATIVES TO THE TRADITIONAL PUBLIC SCHOOL FRAMEWORK

#### A. *What Is a Charter School?*

Charter schools are “legally and fiscally”<sup>109</sup> autonomous public schools operated under a charter granted by a state’s government.<sup>110</sup> A charter school’s grant may be authorized by various entities. Depending on state laws, charter school authorizers may include state education boards, universities, and most commonly, local school districts.<sup>111</sup> The founding charter is a legal agreement between the authorizer and the school’s governing body, which describes the school’s management, goals, and autonomy.<sup>112</sup> Typically, charter schools are founded and established by educators, community groups, or private organizations that function under a contract, generally for three to five years.<sup>113</sup> The majority of charter schools in the United States are new schools starting from scratch, while the “close-and-reopen” option—whereby a traditional public school closes and reopens as a charter school (as would be the case with NCLB restructuring)—is less common.<sup>114</sup>

The steady growth of the charter school movement has garnered national, albeit controversial, attention. Currently, forty states and

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<sup>109</sup> Vergari, *supra* note 5, at 2.

<sup>110</sup> CHESTER E. FINN, BRUNO V. MANNO & GREGG VANOUREK, CHARTER SCHOOLS IN ACTION: RENEWING PUBLIC EDUCATION 14–15 (2000). The charter school movement was created in the midst of stagnant results in education and rose to prominence with the backing of two powerful reform movements, the accountability and choice movements. Tom Loveless, *Charter School Achievement and Accountability, in NO CHILD LEFT BEHIND?: THE POLITICS AND PRACTICE OF SCHOOL ACCOUNTABILITY* 177, 177–78 (Paul E. Peterson & Martin R. West eds., 2003). The charter school movement began in 1991, when Minnesota passed the first charter school law, with California following suit in 1992. U.S. Charter Schools, *History of Charter Schools*, [http://www.uscharterschools.org/pub/uscs\\_docs/o/history.htm](http://www.uscharterschools.org/pub/uscs_docs/o/history.htm) (last visited Jan. 7, 2008). By 1995, nineteen states enacted charter laws, and by 2003, the number of states with charter laws expanded to forty. *Id.* The federal government has authenticated charter schools since the inception of the Public Charter Schools Program in 1994. Vergari, *supra* note 5, at 1.

<sup>111</sup> Paul A. Herdman, Nelson Smith & Cynthia Skinner, *Charter Schools and the New Federal Accountability Provisions*, EDUC. PERFORMANCE NETWORK POL’Y BRIEF, Mar. 2002, at 5.

<sup>112</sup> MATTHEW D. ARKIN & JULIE M. KOWAL, REOPENING AS A CHARTER SCHOOL 4 (2005), *available at* <http://www.centerforcsri.org/pubs/restructuring/KnowledgeIssues2Chartering.pdf>.

<sup>113</sup> TODD M. ZIEBARTH, CLOSING LOW-PERFORMING SCHOOLS AND REOPENING THEM AS CHARTER SCHOOLS: THE ROLE OF THE STATE I (2004).

<sup>114</sup> ARKIN & KOWAL, *supra* note 112, at 5.

the District of Columbia have charter school laws.<sup>115</sup> Moreover, there are an estimated 4303 charter schools throughout the country, and 1,259,571 students attending such schools.<sup>116</sup> For the 2008–09 school year, 355 new charter schools opened nationwide.<sup>117</sup>

Statistics, however, do not truly capture the essence of what it means to be a charter school. In order to understand the phenomenon and its implications, a proper examination explores how charter schools differ from traditional public schools. First and foremost, charter schools are independent from the school district and are given a higher degree of autonomy in managing the school in exchange for a greater degree of accountability.<sup>118</sup> A major reason often cited for the rapid expansion of the charter school movement is the privilege to be “exempt from burdensome, stifling, innovation killing features” of the traditional public school model.<sup>119</sup> The charter school concept has been depicted as an understated but powerful method of offering innovative choice in public education without the characteristic micromanagement of government bureaucracies.<sup>120</sup> Charter schools share certain qualities of traditional public schools in that they receive government funding and cannot charge tuition.<sup>121</sup> However, charter schools are exempt from many state restrictions

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<sup>115</sup> NAT'L ALLIANCE FOR PUB. CHARTER SCHS., GROWTH AND QUALITY IN THE CHARTER SCHOOL MOVEMENT: 2008 DASHBOARD 1 (2008), [http://www.publiccharters.org/files/publications/Charter\\_Dashboard\\_2008.pdf](http://www.publiccharters.org/files/publications/Charter_Dashboard_2008.pdf).

<sup>116</sup> *Id.* The Center for Education Reform reports slightly different statistics for the 2008–09 school year: 4568 charter schools, and 1,341,687 students in charter schools. Ctr. for Educ. Reform, *National Charter School Data: 2008–2009 New School Estimates*, [http://www.edreform.com/\\_upload/CER\\_charter\\_numbers.pdf](http://www.edreform.com/_upload/CER_charter_numbers.pdf) (last visited Dec. 28, 2008).

<sup>117</sup> Ctr. for Educ. Reform, *All About Charter Schools*, <http://www.edreform.com/index.cfm?fuseAction=document&documentID=1964> (last visited Dec. 28, 2008).

<sup>118</sup> Robin D. Barnes, *Group Conflict and the Constitution: Race, Sexuality, and Religion: Black America and School Choice: Charting a New Course*, 106 YALE L.J. 2375, 2380 (1997) (citing National Survey and Analysis of Charter School Legislation: A Report to the Citizens of the State of Connecticut I-1 (Institute for Responsive Education Report 1996)).

<sup>119</sup> Robert J. Martin, *Rigid Rules for Charter Schools: New Jersey as a Case Study*, 36 RUTGERS L.J. 439, 442 (2005) (citing SEYMOUR B. SARASON, CHARTER SCHOOLS: ANOTHER FLAWED EDUCATION REFORM? vii (1998)).

<sup>120</sup> *Id.* (citing Bruno V. Mano, *How Charter Schools are Different: Lessons and Implications from a National Study*, 79 PHI DELTA KAPPAN 488 (1998)).

<sup>121</sup> Joseph O. Oluwole & Preston C. Green, III, *Charter Schools Under the NLCB: Choice and Equal Educational Opportunity*, 22 ST. JOHN'S J. LEGAL COMMENT. 165, 177–78 (2007) (citing Aaron Jay Saiger, *The Last Wave: The Rise of the Contingent School District*, 84 N.C. L. REV. 857, 881 (2006) (commenting that charter schools are public because they “receive only public funds, and may not require tuition”)).

and regulations in exchange for a promise to fulfill the educational mission enumerated in the charter grant.<sup>122</sup>

Pursuant to federal law, the government has developed a definition that charter schools must satisfy in order to qualify for federal funding.<sup>123</sup> Salient features of the charter school definition limit the term to public schools with certain qualities. For example, charter schools are “exempt from significant State or local rules that inhibit the flexible operation and management of public schools.”<sup>124</sup> The school must be nonsectarian in its programs, admission policies, and employment practices and not affiliated with a religious institution.<sup>125</sup> Furthermore, the school is voluntary, may not charge tuition, and admits students on a lottery basis if more students apply for admission than can be accommodated.<sup>126</sup>

The evolution of federal charter school legislation began with the IASA of 1994.<sup>127</sup> The IASA was adopted two years after Minnesota enacted the first charter school law and at a time when very few other states had such legislation.<sup>128</sup> Congress subsequently amended the federal legislation through the Charter School Expansion Act of 1998.<sup>129</sup> Congress again amended the legislation as part of NCLB, which provided further funding opportunities for charter schools by enacting the Innovative Programs and the Public Charter Schools Program for the design and implementation of charter schools.<sup>130</sup>

#### B. *Charter Schools Are Laboratories for Reform*<sup>131</sup>

The charter school movement is an ideal avenue for incubating change within the American public education system.<sup>132</sup> As previously

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<sup>122</sup> *Id.*

<sup>123</sup> See Strengthening and Improvement of Elementary and Secondary Schools Act, Pub. L. No. 103-382, 108 Stat. 3518 (codified at 20 U.S.C. § 8061 (2000)), *repealed by* No Child Left Behind Act of 2001, Pub. L. No 107-110, 115 Stat. 1425 (codified at 20 U.S.C. §§ 7221-7225g (2000)).

<sup>124</sup> 20 U.S.C. § 7221i(1)(A) (2000).

<sup>125</sup> *Id.* § 7221i(1)(E).

<sup>126</sup> *Id.* § 7221i(1)(F), (H).

<sup>127</sup> *Id.* § 8061.

<sup>128</sup> Martin, *supra* note 119, at 525 n.82.

<sup>129</sup> Pub. L. No. 105-278, 112 Stat. 2682 (1998). “The thrust of this act was to elicit more funding for and to impose greater accountability on charter schools.” Martin, *supra* note 119, at 458.

<sup>130</sup> Martin, *supra* note 119, at 458. (citing Pub. L. No 107-770, 115 Stat. 1425 (2002)).

<sup>131</sup> Molly O’Brien, *Education and the Constitution: Shaping Each Other and the Next Century: Free at Last? Charter Schools and the “Deregulated” Curriculum*, 34 AKRON L. REV. 137, 139 (2000).

mentioned, the majority of the schools currently in NCLB restructuring are located in low-income, minority school districts.<sup>133</sup> Nationally, “charter schools serve a larger proportion of minority and low-income students.”<sup>134</sup> For example, in the 2004–05 school year, fifty-eight percent of charter school students belonged to a minority racial or ethnic group.<sup>135</sup> Even more startling, fifty-four percent of charter school students were eligible for free or reduced-price lunch,<sup>136</sup> and “charter schools are three times as likely to be located in big-city school districts as are traditional public schools.”<sup>137</sup> The fact that schools in NCLB restructuring and charter schools serve a similar population naturally leads to the proposition that the two can work hand-in-hand.

Charter school proponents embrace the concept of school choice as a way to increase competition among schools and offer necessary alternatives to “deteriorating, badly managed, and obsolete educational programs.”<sup>138</sup> Not only do charter schools serve the students within their school buildings, but they promote healthy competition by prompting the improvement of traditional public schools. Traditional public schools must improve or risk losing students and the funding attached to them.<sup>139</sup> Of course, charter schools are not the only solution for incubating educational reform. However, because they have demonstrated growing success in advancing academic achievement among low-performing, disadvantaged students, and because they encourage flexibility, charter schools logically should be at the strategic forefront.<sup>140</sup>

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<sup>132</sup> Victoria J. Dodd, *American Public Education and Change: Not an Oxymoron*, 17 ST. LOUIS U. PUB. L. REV. 109, 120 (1997).

<sup>133</sup> Kowal & Hassel, *supra* note 99, at 269.

<sup>134</sup> ARKIN & KOWAL, *supra* note 112, at 5.

<sup>135</sup> HOPES, FEARS AND REALITY: A BALANCED LOOK AT AMERICAN CHARTER SCHOOLS IN 2005 15 (Robin J. Lake & Paul T. Hill eds., 2005), available at [http://eric.ed.gov/ERICDocs/data/ericdocs2sql/content\\_storage\\_01/0000019b/80/27/ff/72.pdf](http://eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/27/ff/72.pdf).

<sup>136</sup> ALISON CONSOLETTI & JEANNE ALLEN, 2007 ANNUAL SURVEY OF AMERICA'S CHARTER SCHOOLS 3, 10 (2007). Moreover, charter schools “target services to students at both ends of the instructional spectrum who are being failed by the ‘one-size-fits-all’ educational system: teen parents, special education students, adjudicated youth, English language learners.” *Id.*

<sup>137</sup> ARKIN & KOWAL, *supra* note 112, at 6.

<sup>138</sup> Barnes, *supra* note 118, at 2380.

<sup>139</sup> Although beyond the scope of this Comment, the robust debate about the effects of choice on traditional public school systems, particularly whether public schools are in fact induced to improve because of the success of charter schools, should be acknowledged. See, e.g., BETTS ET AL., *supra* note 64, at 3–4.

<sup>140</sup> NAT'L ALLIANCE FOR PUB. CHARTER SCHS., CREATING THE SCHOOLS OUR NATION NEEDS: NCLB REAUTHORIZATION AND THE PROMISE OF PUBLIC CHARTER SCHOOLS 1

The most unique characteristic of a charter school is that its continued existence is tied to its performance.<sup>141</sup> Unlike a traditional public school, the threat of being closed down constantly looms over a charter school. As noted earlier, the charter school movement stemmed from an era where accountability and choice were pervasive themes in education.<sup>142</sup> However, a potential conflict exists between these dueling themes. A requisite element of choice is that the school is free to create its own goals and to govern itself independently.<sup>143</sup> On the other hand, accountability systems impede upon the concepts of choice and freedom—defining benchmarks for achievement reduces the autonomy of charter schools.<sup>144</sup> In turn, charter schools with below-level test scores are in jeopardy of closing down, even if parents choose to send their children to these “autonomous” schools.<sup>145</sup>

#### IV. HARMONIZING NCLB AND CHARTER SCHOOL LAWS: CAN THE TWO JOIN TOGETHER TO FORM A UNITED FRONT?

An analysis of charter schools must begin with a simple truth: not all charter laws are created equal. An obvious yet often overlooked attribute of charter schools is that they are creatures of state law and, therefore, the level of autonomy varies significantly from state to state.<sup>146</sup> The strength of a charter school law directly bears upon the “quantity and viability” of charter schools.<sup>147</sup> Expanding upon this issue is another fact: NCLB’s restructuring provision requires fundamental change in a school’s governance. Naturally, state

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(2007), available at [http://www.publiccharters.org/files/publications/file\\_NAPCS\\_NCLB\\_Statement\\_Singles\\_for\\_Web\\_1\\_.pdf](http://www.publiccharters.org/files/publications/file_NAPCS_NCLB_Statement_Singles_for_Web_1_.pdf). Under NCLB, chartering need not be the first alternative to improving a school, but rather the last option after a school has passed through the phases of “school improvement” and “corrective action.” See Hassel et al., *supra* note 96, at 10.

<sup>141</sup> Barnes, *supra* note 118, at 2407.

<sup>142</sup> Loveless, *supra* note 110, at 177.

<sup>143</sup> *Id.* at 192.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> ARKIN & KOWAL, *supra* note 112, at 4.

<sup>147</sup> Martin, *supra* note 119, at 510 (quoting Ctr. for Educ. Reform, *Charter School Laws Across the States: Ranking and Scorecard*, at iv–vi, tbl. 1 (8th ed. 2004)). Note that “strong laws” are not laws that impose more rules, but just the opposite—laws that allow for greater flexibility. *Id.* at 511. The notions of quantity and viability will be fleshed out in the upcoming section, but a basic understanding is necessary. Both terms denote the level and range of capability granted under state law. Quantity refers to the number of charter schools permitted under state law. Viability refers to the charter school’s freedom to institute an innovative structure while simultaneously adhering to the state law’s regulations and guidelines.

charter laws that do not allow for fundamental change are incompatible with the federal law.

Many states have promulgated rules on the extent to which charter conversion is a permissible restructuring option under NCLB.<sup>148</sup> These practices fall into three categories: (1) states permitting charter conversions; (2) states disallowing them; or (3) states that are silent on chartering options.<sup>149</sup> The relationship between state laws and NCLB's restructuring options that radically alter a school's governance structure are examined in the forthcoming sub-sections.

A. *"Going Charter" Under NCLB Should Symbolize the Opportunity to Start Fresh*

In theory, chartering under NCLB allows a public school to reopen with a "clean slate."<sup>150</sup> The framework gives the school greater flexibility than the traditional public school model. When a school starts fresh, it has the freedom to "build [its] culture, routines, and systems from the ground up" and "an opportunity to develop from the start the kind of coherence that is a hallmark of effective schools."<sup>151</sup> However, starting fresh is unlikely to be successful unless state lawmakers develop sound and adaptable systems to implement it.<sup>152</sup>

In reality, charter schools often are not afforded a truly clean slate. Many charter laws bog down conversion charters with excessive baggage.<sup>153</sup> As a result, these laws either provide disincentives for schools to convert or they undermine the flexibility essential for a charter school to succeed as a restructured school. The effect is that, in many states, a charter school's "institutional design is not all that different from traditional public schools."<sup>154</sup> If the purpose of restructuring is to provide "a fresh start, a blank slate, a New Deal," then this end is not achieved by rigid state laws.<sup>155</sup> Rather, the result

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<sup>148</sup> TODD ZIEBARTH, ECS STATENOTES ACCOUNTABILITY: STATE POLICIES FOR SCHOOL RESTRUCTURING 1 (2004), available at <http://www.ecs.org/clearinghouse/57/02/5702.pdf>.

<sup>149</sup> See *id.* at 5.

<sup>150</sup> ARKIN & KOWAL, *supra* note 112, at 5.

<sup>151</sup> BRYAN C. HASSEL & LUCY STEINER, STARTING FRESH: A NEW STRATEGY FOR RESPONDING TO CHRONICALLY LOW PERFORMING SCHOOLS 3 (2003), available at <http://www.publicimpact.com/high-stakes/startingfresh.pdf>.

<sup>152</sup> *Id.* at 5.

<sup>153</sup> Nelson Smith, *Charters as a Solution? So Far, States and Districts Have Opted for Anything But*, EDUC. NEXT, Winter 2007, at 59.

<sup>154</sup> Jeffries, *supra* note 37, at 63.

<sup>155</sup> Smith, *supra* note 153, at 59.

is that the conversion charter school is structurally indistinguishable from the traditional public school.

Simply labeling a school a “charter” could not have been what Congress intended when including chartering as a restructuring option under NCLB. A mere “charter” label is certainly not a step in the direction toward fundamental reform intended by NCLB’s restructuring provision. To the contrary, each restructuring option requires a substantial reorganization of a school’s governance that will enable the school to make AYP.<sup>156</sup> The chartering option is no different—the restructured school, that is the newly created charter school, must be fundamentally different than the original school that failed to meet AYP for six consecutive years. Thus, a charter conversion that does not yield such a reform in governance is impermissible under NCLB.

*B. Conditions for Success: Autonomy, Flexibility, and Adequate Resources*

Based on this analysis of individual state charter laws, this Comment proposes three indispensable characteristics of the kind of charter law contemplated by NCLB’s restructuring provision: (1) autonomy, (2) flexibility, and (3) adequate resources. Charter laws that do not contain these characteristics result in schools that are materially indistinguishable from traditional public schools and thus inconsistent with NCLB’s goal of fundamental reform. Since these three elements are abstract concepts, this Comment also outlines concrete examples of each element.

1. Autonomy

Autonomy is an indispensable characteristic of a strong charter school law, because it gives charter schools the ability to make independent decisions regarding structure and governance, free from bureaucratic constraints.<sup>157</sup> Concrete examples of autonomy in charter school laws include sovereignty to plan curriculum and freedom from collective bargaining agreements.

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<sup>156</sup> 34 C.F.R. § 200.43 (2007).

<sup>157</sup> William Haft, *Charter Schools and the Nineteenth Century Corporation: A Match Made in the Public Interest*, 30 ARIZ. ST. L.J. 1023, 1058 (1998) (citing Chester Finn et al., *Charter Schools in Action: Final Report, Part III*, at 2 (1997) (“Under a strong law, the state’s charter schools are essentially self-governing . . . . They are accountable for their results but free to produce those results as they see fit.”)).

The first example of autonomy in a charter law is the freedom to design an innovative curriculum.<sup>158</sup> One of the benefits of converting a traditional public school to a charter school is the ability to create a new curriculum and pedagogy that will trigger higher levels of student learning.<sup>159</sup> State rules that preclude such innovation undermine the innovative benefits of charter schools. Since charter schools are governed under the public school system, there is often a set of standards in place for developing the curriculum. However, charter schools should be granted greater autonomy in their opportunity to build upon these existing standards. Creating a unique and challenging curriculum is vital to the construction of a successful charter school.<sup>160</sup> Some state charter laws micromanage curriculum planning and these restrictions prevent the autonomy necessary for creative teaching and innovative learning.

Another example of autonomy necessary for charter schools to succeed in light of NCLB's restructuring provision is freedom from collective bargaining agreements. Collective bargaining agreements spell out the "terms and conditions of principal and teacher employment and thus greatly restrict the capacity of local administrators to manage schools effectively."<sup>161</sup> Such agreements may dictate conditions such as the length of the school year and school day, as well as hiring criteria.<sup>162</sup> Collective bargaining agreements are especially exhausting for charter schools, which seek to function as autonomous governing entities. For example, teachers in Rhode Island are required to be part of the district's bargaining unit and are subject to the district's employment terms and conditions, causing strain between some charter school principals and teachers.<sup>163</sup>

Freeing charter schools from collective bargaining agreements does not mean that charter school staff should not have the opportunity to bargain as a unit. Rather, such autonomy allows charter school staff to tailor agreements in a way that will best suit the unique needs of the school. Some charter laws bind teachers in conversion charter schools to collective bargaining agreements, whereas teachers

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<sup>158</sup> CONSOLETTI & ALLEN, *supra* note 136, at 11.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at 1, 11.

<sup>161</sup> Jeffries, *supra* note 37, at 43.

<sup>162</sup> *Id.*

<sup>163</sup> CTR. FOR EDUC. REFORM, THE SIMPLE GUIDE TO CHARTER SCHOOL LAWS: A PROGRESS REPORT 24 (Jeanne Allen & Anna Varghese Marcucio eds., 2005), available at <http://www.edreform.com/upload/simpleguide.pdf>.

in start-up charter schools are granted more leeway.<sup>164</sup> For example, teachers in New Jersey charter conversion schools are bound by collective bargaining agreements, but teachers in start-up charter schools have the option to be bound or to negotiate as a separate unit.<sup>165</sup> This distinction results in charter conversions being more entangled in the issues concerning traditional public schools, since both are under the same bargaining units. For instance, the length of the school day is governed by the terms of a collective bargaining agreement.<sup>166</sup> Many charter schools find it necessary to have a longer school day to meet the needs of the students.<sup>167</sup> Under a state charter law, such as New Jersey's, the charter school cannot make the school day any longer than what has been bargained for by the teacher's union.

## 2. Flexibility

The second irreducible element of a strong charter school statute is flexibility, which, akin to autonomy, grants charter schools the sovereignty necessary to ensure success. Since charter schools often attract minority students who achieved at relatively low levels in a traditional public school, charter schools need flexibility to guarantee these students' success in an innovative school model.<sup>168</sup> This flexibility allows the charter school to respond to the unique circumstances and needs of its students.<sup>169</sup> Tangible examples of flexibility include: longer charter grants, flexible timetables, elimination of the cap on the number of charters granted, more streamlined and efficient authorization of charter schools, and the ability to bypass case-by-case granting of waivers from regulation.

The first example of flexibility in a charter law is longer charter grants. Charter schools are established through limited-term contracts must be renewed at the end of the contract period.<sup>170</sup> In thirty-

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<sup>164</sup> See generally ECS STATENOTES, STATE COMPARISONS—STATE POLICIES FOR CHARTER SCHOOLS (2007), <http://mb2.ecs.org/reports/Report.aspx?id=113> (last visited Sept. 6, 2008).

<sup>165</sup> N.J. STAT. ANN. § 18A:36A-14 (2007); ECS STATENOTES, *supra* note 164.

<sup>166</sup> See generally Jeffries, *supra* note 37, at 43.

<sup>167</sup> CONSOLETTI & ALLEN, *supra* note 136, at 12.

<sup>168</sup> In contrast to traditional public schools, charter schools encounter serious challenges to their survival. One study reported that eleven percent of charter schools nationwide have closed, although the reasons for closure vary greatly (e.g., academic, financial, managerial). CONSOLETTI & ALLEN, *supra* note 136, at 5.

<sup>169</sup> FINN ET AL., *supra* note 110, at 14–15.

<sup>170</sup> OFFICE OF RESEARCH AND IMPROVEMENT, DEP'T OF EDUC., THE STATE OF CHARTER SCHOOLS: FOURTH YEAR REPORT 12 (2000), available at <http://www.ed.gov/pubs/charter4thyear/>.

one states, charter grants range between three and five years in duration.<sup>171</sup> Arizona and the District of Columbia, both ranked as having “strong” charter laws, have the longest charter terms of all the states with fifteen years.<sup>172</sup> Longer charter grants are useful, if not essential, to a charter school’s success because the grants give incentive for charter school founders to invest time and resources in forming a charter school.<sup>173</sup> Furthermore, extended charter grants give a charter school the opportunity to mold itself to the students’ needs as time progresses. Since many charter schools serve low-performing students, the school may need time to ensure long-term success.<sup>174</sup>

Similar to longer charter grants, adaptable timetables provide a charter school with more time to stand on its own. Research on restructuring in general, and more specifically as related to charter conversions, has confirmed that a fast timeline for instituting restructuring can lead to chaos and poor results.<sup>175</sup> One study of states’ implementation of the restructuring option under NCLB reported that few schools chose the chartering option, in part because the NCLB timetable does not align with the state’s charter application process.<sup>176</sup> For example, in post-Katrina New Orleans, Louisiana’s SEA announced in October 2004 that certain district schools would be converted to charter status, and the SEA awarded charter grants to nonprofit organizations in April 2005.<sup>177</sup> The schools were then slated to open as soon as October 2005.<sup>178</sup> Leaders involved in these types of conversions often desire longer planning periods, which are critical to success.<sup>179</sup> It should be noted that there are avenues to circumvent the issue of stringent timelines, all of which can be adapted to fit within a state’s charter statute. These solutions include allowing the school to be shut down for a year during renovations and planning, opening the restructured school in the earliest grade only and

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<sup>171</sup> *Id.*

<sup>172</sup> CTR. FOR EDUC. REFORM, *supra* note 163, at 6–7. According to one report, Arizona was ranked as having the strongest charter school law, and the District of Columbia’s law was ranked third among the nation’s charter school laws. *Id.*

<sup>173</sup> Charter schools are typically founded by educators, community groups, or private organizations. ZIEBARTH, *supra* note 113, at 1.

<sup>174</sup> See, e.g., NAT’L ALLIANCE FOR PUB. CHARTER SCHS., *supra* note 140, at 1.

<sup>175</sup> E.g., MALEN ET AL., *supra* note 78, at 113–32.

<sup>176</sup> WOLF DIBIASE, *supra* note 12, at 4.

<sup>177</sup> Lili LeGardeur, *Recovery Roll Call: Four Previously Failing Schools Will Open Next Year as State-Governed Charter Academies*, LA. WEEKLY, May 30, 2005, available at <http://www.louisianaweekly.com/weekly/news/articlegate.pl?20050530j>.

<sup>178</sup> ARKIN & KOWAL, *supra* note 112, at 15.

<sup>179</sup> *Id.* at 15–16. However, allowing for too much time to plan the charter school can “erode a very necessary sense of urgency.” *Id.* at 16.

expanding each year thereafter, and granting the charter early, providing adequate time to plan.<sup>180</sup>

A third type of flexibility requires eliminating state-imposed caps on the number of charters granted. State-imposed charter caps serve to limit or slow the growth of charter schools and are often employed as political tools in disguise. Recent reports show that twenty-five states plus the District of Columbia have state-imposed caps on the number of charter schools.<sup>181</sup> Moreover, there are nine states for which such caps are “severely constraining growth” of charter schools.<sup>182</sup>

State-imposed caps can take various forms, including caps on the number of schools or on the number of students attending the schools. For example, Illinois has a “[l]imit of sixty charter schools for the state, with a maximum of thirty in Chicago, fifteen in Chicago suburbs, and fifteen in the rest of the state.”<sup>183</sup> These restrictions present a serious problem in Chicago, where there are currently twenty-nine charter schools open and, therefore, room for only one more.<sup>184</sup> As another example, Rhode Island has a cap of twenty charters in the entire state, and charter schools may serve no more than four percent of the state’s school age population.<sup>185</sup> Furthermore, in Missouri, charter schools are permitted only in Kansas City and St. Louis, and a maximum of five percent of the operating public schools in each of these cities may be converted to charters.<sup>186</sup> With respect to state-imposed caps on the number of students in schools, Connecticut limits the percentage of students in charter schools per district, as well as the number of students that enroll in specific schools.<sup>187</sup>

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<sup>180</sup> *Id.* It should be noted that the problem with the last of these three solutions is that granting the charter early requires making an early assumption about a school’s AYP performance, namely that the school will fail to make AYP. *Id.*

<sup>181</sup> LISA STULBERG, BEYOND THE BATTLE LINES: LESSONS FROM NEW YORK’S CHARTER CAPS FIGHT 1 (2007), [http://www.crpe.org/cs/crpe/download/csr\\_files/pub\\_ncsrp\\_battlelines\\_jun07.pdf](http://www.crpe.org/cs/crpe/download/csr_files/pub_ncsrp_battlelines_jun07.pdf).

<sup>182</sup> 105 ILL. COMP. STAT. ANN. 5/27A-4 (West 2007); *see also* TODD ZIEBARTH, PEELING THE LID OFF STATE-IMPOSED CHARTER SCHOOL CAPS 3 (2007), *available at* [http://www.publiccharters.org/files/publications/file\\_Issue\\_Brief\\_3\\_09\\_07rgb.pdf](http://www.publiccharters.org/files/publications/file_Issue_Brief_3_09_07rgb.pdf). These states are Hawaii, Illinois, Massachusetts, Missouri, New York, North Carolina, Ohio, Rhode Island, and Utah. *Id.* at 1.

<sup>183</sup> ZIEBARTH, *supra* 182, at 3–4.

<sup>184</sup> *Id.* “The lack of available charters will likely cause a delay in the mayor’s initiative to close up to 70 low-performing schools and reopen them as 100 or more small schools, one-third of which will be charter schools.” *Id.*

<sup>185</sup> R.I. GEN. LAWS § 16-77-8 (2007).

<sup>186</sup> MO. REV. STAT. § 160.400 (2007).

<sup>187</sup> CONN. GEN. STAT. § 10-66BB (2007). With aid from Governor Jodi Rell, the Connecticut Legislature amended this cap to allow charters with an established re-

Proponents of caps maintain that charter schools are an unproven experiment; that charter schools destabilize school districts; that charter schools undermine systemic alteration; and that charter schools run contrary to the idea of public school education.<sup>188</sup> The proper response to these arguments is to propose a compromise, in which state-imposed caps are maintained in some way. One option is for states to tie caps to charter quality, as opposed to an arbitrary number or percentage. Artificial limitations do not serve a valid purpose, but rather are illogical or political in nature. A second option is to allow schools restructuring under NCLB to convert to charter schools, even if this would exceed the state's cap.<sup>189</sup> This alternative would be especially helpful in school districts where there are too few schools to which students can transfer, thereby broadening the educational choices for students surrounded by failing schools.<sup>190</sup>

A fourth example of flexibility in a state charter law involves the authorizers of charter schools. As previously mentioned, charter authorizers review grant proposals and distribute charter grants. Gaining approval to establish a charter school is one of the first barriers to entry.<sup>191</sup> In eleven states, limits on the number of charters that may be authorized by particular persons or entities exist.<sup>192</sup> The problem with limiting which people can authorize charters is that political agendas often take center stage, and these designs "are likely to redistribute to charters much of the bureaucratic micromanagement applicable to traditional public schools."<sup>193</sup>

Contrasting state charter school laws' stance on authorizers demonstrates the drastic variation in state laws. Again, the charter law in Arizona is often cited as an ideal framework. Arizona, which has been ranked as having the best charter law in the nation, has the most number of charter schools in a state, with 469 schools operating

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cord of success to increase enrollment to eighty-five students per grade. ZIEBARTH, *supra* note 148, at 2.

<sup>188</sup> STULBERG, *supra* note 181, at 2.

<sup>189</sup> *Id.*

<sup>190</sup> *Id.* "The relatively small number of students taking advantage of NCLB's choice options in underserved communities is well documented, as are the huge waiting lists for public charter schools in these same jurisdictions. The problem is one of supply, and one that charters can help solve." *Id.*

<sup>191</sup> John F. White, Arnold F. Shober & Paul Manna, *Analyzing State Charter School Laws and Their Influence on the Formation of Charter Schools in the United States*, paper prepared for the Am. Pol. Sci. Ass'n 2003 Ann. Meeting, Philadelphia, PA, at 9, <http://www.lafollette.wisc.edu/wcss/docs/WitteShoberManna-APSA-03.pdf>.

<sup>192</sup> TODD ZIEBARTH, STUNTING GROWTH: THE IMPACT OF STATE-IMPOSED CAPS ON CHARTER SCHOOLS 3 (2006).

<sup>193</sup> Jeffries, *supra* note 37, at 63.

as of April 2007.<sup>194</sup> Arizona allows for numerous persons or entities to authorize a charter grant, including local school boards, the state board of education, or the state board for charter schools.<sup>195</sup> In stark contrast, New Jersey allows only the State Commissioner of Education to authorize charter schools.<sup>196</sup>

The final example of flexibility in charter laws is the ability to bypass case-by-case granting of regulation waivers. Regulation waivers limit the number of government regulations to which the charter school must adhere. Case-by-case bypassing is a severely restrictive means of controlling charter schools, operating as yet another obstacle to achieving both flexibility and autonomy. Some states are unwilling to budge and refuse to bypass major regulations, while other states require charters schools to apply for an exemption of each regulation, a time-consuming and unnecessarily bureaucratic process. In the 2001–02 school year, only approximately two-thirds of states reported that charter schools were exempt from certain basic requirements: the length of the school day or year (sixty-eight percent); faculty hiring and firing policies (sixty-five percent); and other teacher policies, such as tenure requirements (sixty-one percent).<sup>197</sup> Although waivers from regulations are often included in state charter laws, crucial rules concerning student achievement, governing personnel, and fiscal matters often are not initially waived. This additional hurdle symbolizes the systemic pattern of bureaucratic obstacles.

A national survey concluded that only one-third of charter schools receive automatic waivers from state policies and regulations, while many other schools receive waivers on a case-by-case basis.<sup>198</sup> Once again, states vary as to their approach to waivers. In Connecticut, a charter school application may include requests to waive provisions of the general statutes and regulations.<sup>199</sup> In Nevada, certain exemptions from particular regulations and policies may be negotiated and specified in the charter grant or requested later through a waiver process.<sup>200</sup>

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<sup>194</sup> NAT'L ALLIANCE FOR PUB. CHARTER SCHS., NUMBER OF CHARTER SCHOOLS AND STUDENTS IN THE 2006–07 SCHOOL YEAR (2007), available at [http://www.publiccharters.org/files/publications/2007\\_Charter\\_Numbers\\_1\\_.pdf](http://www.publiccharters.org/files/publications/2007_Charter_Numbers_1_.pdf).

<sup>195</sup> ARIZ. REV. STAT. § 15-183 (LexisNexis 2007); ECS STATENOTES, *supra* note 164.

<sup>196</sup> N.J. REV. STAT. § 18A:36A-3 (2000).

<sup>197</sup> ARKIN & KOWAL, *supra* note 112, at 14; SRI INT'L, EVALUATION OF THE PUBLIC CHARTER SCHOOLS PROGRAM: FINAL REPORT 31 (2004).

<sup>198</sup> SRI INT'L, *supra* note 197, at 31.

<sup>199</sup> CONN. GEN. STAT. § 10-66BB (2001); *see also* ECS STATENOTES, *supra* note 164.

<sup>200</sup> NEV. REV. STAT. § 386.550 (2003); *see also* ECS STATENOTES, *supra* note 164.

Some regulations are a necessary evil to ensure accountability for charter schools. However, such government regulations should not severely impede upon a charter school's need for flexibility. Limiting across-the-board regulations to those including overall educational achievement—such as student academic growth—and procedural mandates—such as healthy-and-safety and anti-discrimination rules—are sufficient to hold charter schools accountable while simultaneously freeing them from unnecessary constraints.<sup>201</sup>

### 3. Adequate Resources

Resources are intertwined with a school's governance structure. For example, the capability to attract highly qualified teachers and administrators rests on the capacity to compensate these persons with competitive salaries. Additionally, the ability to focus attention and resources on achievement rests on the ability to shift attention away from financial constraints. While funding is a critical factor in providing adequate resources, money alone does not necessarily lead to better schools. It is well documented that “thinly-funded schools can sometimes be superb and that lavishly-funded schools can be awful.”<sup>202</sup>

Critics often charge that charter schools are stealing money from public schools.<sup>203</sup> However, since charters *are* public schools, the money directed toward them is not being “drained” from the public education system.<sup>204</sup> Rather, it is following the student from the traditional public school to a charter school. Unfortunately, “misinformed debates” regarding the financial impact of charter schools impedes the efforts to create high-performing charter schools.<sup>205</sup> Even though charter schools may cause a short-term financial nuisance for a school district, this effect is counteracted by viewing charter schools as long-term investments, both financially and academically.<sup>206</sup>

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<sup>201</sup> Jeffries, *supra* note 37, at 64.

<sup>202</sup> THOMAS B. FORDHAM INST., CHARTER SCHOOL FUNDING: INEQUITY'S NEXT FRONTIER ix (2005), available at <http://www.edexcellence.net/doc/charter%20School%20Funding%202005%20FINAL.pdf>. This statement is applicable to both traditional public schools and charter schools.

<sup>203</sup> MATTHEW ARKIN & BRIAN C. HASSEL, THE BOTTOM LINE: SIX MYTHS ABOUT THE FINANCIAL IMPACT OF PUBLIC CHARTER SCHOOLS 1 (2007).

<sup>204</sup> *Id.* at 2.

<sup>205</sup> *Id.*

<sup>206</sup> *Id.* at 2, 6.

Nevertheless, funding does matter to the survival of the charter school system.<sup>207</sup> Charter laws that provide more resources in a timely, non-bureaucratic fashion are more likely to have high-achieving charter schools.<sup>208</sup> Most charter laws address funding in at least two ways.<sup>209</sup> First, the charter law usually allots a level of operational funding.<sup>210</sup> For instance, California's charter law states that charters must be accorded "operational funding that is equal to the total funding that would be available to a similar school district serving a similar pupil population."<sup>211</sup> According to a study conducted by the Fordham Foundation, however, California charter schools receive 31.5% less funding per pupil than traditional public schools.<sup>212</sup> Second, the charter law provides a list of expenses to be funded directly by the charter school.<sup>213</sup> For example, Tennessee's law states that charter schools are in charge of transportation costs.<sup>214</sup>

Charter schools, although a growing part of America's educational landscape, are funded at significantly lower levels than traditional public schools.<sup>215</sup> Concrete examples of resources include, but are not limited to, the following: start-up funds, per-pupil funding, facilities funding, leniency with debt accrual, and technical support. The lack of each of these resources stems from some form of a defect in the state's charter law or implementation of its law.

The first type of resource necessary for a strong charter law is start-up funds. Finding money to start a charter school is a large and often insurmountable hurdle. For example, if a charter organization knows that it will need to seek renewal at the end of its short grant, the organization may be less likely to commit the initial investment to start the school.<sup>216</sup> Most states do not provide start-up or planning grants to charter schools, but of course, there are some exceptions. For instance, California provides charter schools with a loan fund for

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<sup>207</sup> Gary Miron, *Strong Charter School Laws Are Those That Result in Positive Outcomes*, THE EVALUATION CTR. AT W. MICH. UNIV., 2005, at 6, [http://www.wmich.edu/evalctr/charter/aera\\_2005\\_paper\\_charter\\_school\\_laws.pdf](http://www.wmich.edu/evalctr/charter/aera_2005_paper_charter_school_laws.pdf).

<sup>208</sup> *Id.*

<sup>209</sup> SOLVING THE CHARTER SCHOOL FUNDING GAP: THE SEVEN MAJOR CAUSES AND WHAT TO DO ABOUT THEM 2 (Shaka L.A. Mitchell & Jeanne Allen eds., 2005) [Hereinafter FUNDING GAP].

<sup>210</sup> *Id.*

<sup>211</sup> CAL. EDUC. CODE § 47630 (Deering 2007).

<sup>212</sup> THOMAS B. FORDHAM INST., *supra* note 202, at 28.

<sup>213</sup> FUNDING GAP, *supra* note 209, at 2.

<sup>214</sup> TENN. CODE ANN. § 49-13-114 (2007).

<sup>215</sup> THOMAS B. FORDHAM INST., *supra* note 202, at 1.

<sup>216</sup> Sheri Williams, *State Foundation of Charter Schools in Kansas*, 6 KAN. J.L. & PUB. POL'Y 103, 114 (2004).

as much as \$250,000 and allows up to five years for repayment.<sup>217</sup> Georgia permits \$5000 planning grants.<sup>218</sup> New Mexico's legislature annually appropriates money to a charter school stimulus fund to support both conversion and start-up charter schools.<sup>219</sup>

The next, and perhaps most powerful, ingredient for granting adequate resources in a strong charter law is per-pupil funding. Most charter schools receive substantially less money than traditional public schools.<sup>220</sup> This disparity exists despite eleven state supreme courts having held that charter schools are public schools and are therefore entitled to the same financial resources as traditional public schools.<sup>221</sup> According to one report, the per-pupil funding disparity ranged from \$414 in North Carolina to \$3638 in Missouri.<sup>222</sup> On average, charter funding falls short of traditional public school funding by \$1801 per pupil, or 21.7%.<sup>223</sup> Only in Minnesota do charter schools actually receive more per-pupil funding dollars (102.4%) than their traditional public school peers.<sup>224</sup>

Weak charter laws automatically put charter schools at a funding disadvantage, particularly with respect to per-pupil funding. For example, New Jersey's charter school law guarantees only ninety percent of the funds that traditional public schools receive,<sup>225</sup> but that percentage is not an accurate reflection of how much charters actually receive per pupil.<sup>226</sup> New Jersey Supreme Court decisions have mandated "thorough and equitable" funding for impoverished school districts, known as Abbott Districts.<sup>227</sup> Since the principle of "thorough and efficient" is a product of judicial determination, and New Jersey's charter law fails to refer to this type of funding, only fifty-seven percent of per pupil dollars actually reaches charter schools in the most under-achieving Abbott Districts.<sup>228</sup>

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<sup>217</sup> ECS STATENOTES, *supra* note 164.

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

<sup>220</sup> THOMAS B. FORDHAM INST., *supra* note 202, at 6.

<sup>221</sup> *E.g.*, Balt. City Bd. of Sch. Comm'rs v. City Neighbors Charter Sch., 929 A.2d 113 (Md. 2007). *See generally* FUNDING GAP, *supra* note 209, at 1.

<sup>222</sup> THOMAS B. FORDHAM INST., *supra* note 202, at 6.

<sup>223</sup> *Id.*

<sup>224</sup> *Id.* at 1–2. This somewhat minor advantage is a result of the needier student population served in Minnesota's charter schools. *Id.*

<sup>225</sup> N.J. STAT. ANN. § 18A:36A-12(b) (Supp. 2008).

<sup>226</sup> FUNDING GAP, *supra* note 209, at 3.

<sup>227</sup> *See* Abbott v. Burke, 710 A.2d 450, 454 (N.J. 1998); Abbott v. Burke, 495 A.2d 376, 380 (N.J. 1985); FUNDING GAP, *supra* note 209, at 3.

<sup>228</sup> FUNDING GAP, *supra* note 209, at 3.

Other examples of state charter laws that cause a severe disparity between charter schools and traditional schools are easily found. Using data from the 2001–02 school year, the Fordham Foundation observed that traditional public schools in Dayton, Ohio, received \$10,802 per pupil, whereas charter schools received only \$7510, resulting in a thirty percent discrepancy.<sup>229</sup> Additionally, in 2005, the Franklin City School Board in New Hampshire chose to cut district funding for the Franklin Career Academy charter school from a flat \$82,000 total expenditure to one dollar.<sup>230</sup> This harsh reduction exposed a major flaw in New Hampshire’s charter law, namely the local district’s ability to capriciously reduce funding for charter schools.<sup>231</sup>

The third example of a resource essential for a strong charter law is facilities funding. Generally state laws prevent charter schools from receiving facilities funding, forcing charters to lease or purchase a building on the open market and to do so using the already limited per-pupil subsidy.<sup>232</sup> On the other hand, states generally give traditional public schools a free building and state funding for additional capital needs.<sup>233</sup> Since charter schools may not be allotted funds to purchase or lease facilities, they are forced to use money that would otherwise go to academic efforts. In effect, “[w]hen charters need to spend operating dollars on bricks and mortar, the effort to build achievement can falter,<sup>234</sup> and they may forgo highly qualified staff.<sup>235</sup> The California Court of Appeals addressed this issue in *Sequoia Union High School District v. Aurora Charter High School*,<sup>236</sup> in which a school district in Redwood City, California, one of the wealthiest cities in the state, filed suit to stop Aurora Charter School from receiving facilities funding.<sup>237</sup> Sequoia argued that it had no legal obligations to

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<sup>229</sup> THOMAS B. FORDHAM INST., *supra* note 202, at vii.

<sup>230</sup> FUNDING GAP, *supra* note 209, at 3.

<sup>231</sup> *Id.*

<sup>232</sup> Jeffries, *supra* note 37, at 63.

<sup>233</sup> *Id.* (citing Caroline M. Hoxby, *Achievement in Charter Schools and Regular Public Schools in the United States: Understanding the Differences*, <http://www.innovations.harvard.edu/cache/documents/4848.pdf>) (“Charter school students are more likely to have a proficiency advantage if their state has a strong charter school law that gives the schools autonomy and that ensures that charter schools get funding equal to at least 40 percent of the total per-pupil funding of regular public schools.”).

<sup>234</sup> ZIEBARTH, *supra* note 192, at 5.

<sup>235</sup> FUNDING GAP, *supra* note 209, at 8.

<sup>236</sup> 5 Cal. Rptr. 3d 86 (Cal. Ct. App. 2003).

<sup>237</sup> *Id.* at 90.

Aurora.<sup>238</sup> The court disagreed, ruling that Sequoia must provide facilities funding.<sup>239</sup>

Yet another example of adequate resources for charter schools comes in the form of the state law's stance on debt accrual. Some state charter laws ban or severely limit charter schools from incurring debt. One scholar notes that lifting these bans would permit charters to make multi-year contracts with educational service vendors, much like traditional public schools do.<sup>240</sup> Furthermore, eliminating the debt accrual ban would allow for more efficient and stable planning.<sup>241</sup>

The DOE has created a program to alleviate some of the debt burdens charter schools face. The Credit Enhancement for Charter School Facilities Program offers financial assistance to charter schools.<sup>242</sup> In order to "leverage funds for charter school facilities, grant recipients may . . . guarantee and insure debt to finance charter school facilities."<sup>243</sup> This program represents the federal government's interest in providing aid to charter schools. The DOE notes that "[u]nlike traditional local education agencies, charter schools often lack the ability to issue low risk, general obligation bonds backed by property taxes."<sup>244</sup> Parallel to this federal program, strong state charter laws include similar programs to facilitate a charter school's growth and success.

The final way in which resources impact the strength of a state's charter law is through technical support. This example is unique in the realm of resources, because it does not constitute traditional monetary support, unlike the aforementioned examples. Technical assistance is "practical advice offered by an expert source that addresses specific areas for improvement."<sup>245</sup> Examples of technical assistance include the following: data analysis (helping the school analyze results of state assessment tests), identification and implementation of strategies (helping the school choose effective instructional strategies and ensuring that the staff receives professional

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<sup>238</sup> *Id.*

<sup>239</sup> *Id.* at 94.

<sup>240</sup> Martin, *supra* note 119, at 519.

<sup>241</sup> *Id.*

<sup>242</sup> 34 C.F.R. § 225.1 (2007).

<sup>243</sup> U.S. Dep't of Educ., *Credit Enhancement for Charter School Facilities*, <http://www.ed.gov/programs/charterfacilities/index.html> (last visited Jan. 7, 2008).

<sup>244</sup> *Id.*

<sup>245</sup> OFFICE OF ELEMENTARY AND SECONDARY EDUC., *supra* note 6, at 14.

development), and budget analysis (helping the school in revising its budget to ensure funding that will increase student achievement).<sup>246</sup>

Technical assistance is generally provided by SEAs, charter school authorizers, and charter school resource centers.<sup>247</sup> Ensuring that technical assistance will be provided is essential to a charter school's success, particularly during the planning stages.<sup>248</sup> This resource proves important in two respects. First, similar to facilities funding, technical assistance allows charter schools to focus their attention and economic resources on other matters. Second, SEA-aided assistance ensures that charter schools are successfully teaching students and, moreover, that students are likely to meet state standards, an issue that returns to the earlier discussion of state benchmarks and AYP.

## V. CONCLUSION

Achievement and accountability are the hallmarks of NCLB. Schools that do not meet state-mandated achievement benchmarks are, in turn, held accountable through a series of escalating penalties, from "school improvement" to "corrective action," and ultimately culminating in "restructuring."<sup>249</sup> NCLB's restructuring provision requires schools to fundamentally reform their governance after failing to meet AYP for six consecutive years.<sup>250</sup> Each of the five restructuring options requires a radical, systemic change in governance. Notably, the chartering option involves the school district closing down the "failing" school and reopening it as a charter school.<sup>251</sup> On the surface, the charter restructuring option symbolizes a clean slate for the school.<sup>252</sup> In reality, however, many state charter school laws obstruct the school's ability to truly transform its governance structure in compliance with NCLB's restructuring provision.

Charter laws that bog down charter schools with unnecessary and stifling regulations result in schools that are materially indistinguishable from traditional public schools, which is inconsistent with the goals of NCLB.<sup>253</sup> In order for these goals to be met, charter laws must possess three indispensable characteristics: autonomy, flexibil-

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<sup>246</sup> *Id.*

<sup>247</sup> Miron, *supra* note 207, at 5.

<sup>248</sup> *Id.*

<sup>249</sup> 20 U.S.C. § 6316(b) (Supp. II 2002).

<sup>250</sup> *See* 20 U.S.C. § 6316(b) (8) (B).

<sup>251</sup> *Id.* § 6316(b) (8) (B) (i).

<sup>252</sup> *See* ZIEBARTH, *supra* note 148, at 5.

<sup>253</sup> Smith, *supra* note 153, at 59.

ity, and adequate resources. These elements ensure that charter conversion schools truly represent a fundamental reform in governance, which is the underlying principle of NCLB's restructuring provision. To do any less would betray the promise to change the culture of the nation's schools in order to guarantee all children a "fair, equal, and significant opportunity" to attain a high-quality education.<sup>254</sup>

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<sup>254</sup> 20 U.S.C. § 6301.