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The Accountability Cycle: The Recovery School District Act and New Orleans' Charter Schools

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The post-Hurricane Katrina New Orleans public schools present a crucial moment in the history of two strands of the broader education law reform movement: accountability and charter school legislation. The Article explores the application of the Louisiana Recovery School District Act and concludes that implementation of the Act has resulted in a proliferation of charter schools in New Orleans, making New Orleans the first majority public charter school system in the United States. This first majority charter school district presents essential questions for legislatures and courts, including whether these autonomous, experimental public schools will actually succeed in improving student achievement.

The federalization of accountability requirements for public schools through NCLB is resulting in the decline of the traditional public school system governed by local school boards. In its stead, there is a rise of public school systems run by states that take over administration of the failing traditional public schools. One outcome of state management of local public schools is that states will likely be unable to run the local public schools on a day-to-day basis and will turn to private entities to administer the public schools in the place of the traditional school district bureaucracy. Charter schools are likely to become one of the major privatization methods used by states to improve failing schools. Charter schools become an attractive alternative because the state or local school district is able to enter into a contract (charter) with a privately run entity to administer the failing school. The state provides the per-pupil funding for each student attending the charter school, and the charter school operators are left with the autonomy to hire staff, determine curriculum, and shape school policy.

The Article identifies this phenomenon—federal and state laws allowing charter schools to become an alternative to failing traditional public schools, and then those charter schools facing similar challenges—as accountability cycling. The New Orleans' public schools after Hurricane Katrina are a case study that demonstrates that accountability measures, such as the NCLB and the RSDA, may lead to the decline of the traditional public school system and replace that system with privately run, autonomous charter schools that are only loosely supervised by the State. Legislative and administrative solutions are necessary to address the problem of the accountability cycle. State legislatures should consider amending charter school legislation to acknowledge that charter schools opened to fill the void for failing traditional public schools are a different model than other charter schools. State educational agencies should develop additional expertise in the oversight and regulation of charter schools, including promulgating more focused regulations for chartering schools such as the consideration of best charter school practices.

ARTICLE CONTENTS

I. INTRODUCTION	127
II. THE IMPACT OF HURRICANE KATRINA ON NEW ORLEANS’ PUBLIC SCHOOL SYSTEM.....	132
A. A BRIEF HISTORY OF THE NEW ORLEANS PUBLIC SCHOOLS	132
B. NEW ORLEANS’ PUBLIC SCHOOLS POST-HURRICANE KATRINA.....	136
III. THE ACCOUNTABILITY CYCLE	140
A. PHASE ONE: NCLB AND THE RECOVERY SCHOOL DISTRICT ACT.....	140
B. PHASE TWO: CHARTER SCHOOLS PROVIDE AN ALTERNATIVE FRAMEWORK	142
C. PHASE THREE: CHARTER SCHOOL ACCOUNTABILITY	147
IV. ADDRESSING THE ACCOUNTABILITY CYCLE.....	152
A. RECONCILING ACCOUNTABILITY AND CHARTER SCHOOL STATUTES ..	155
B. INCORPORATING “BEST PRACTICES” INTO STATE REGULATIONS.....	157
C. PROMOTING CHARTER SCHOOL EXPERTISE IN STATE EDUCATIONAL AGENCIES.....	161
V. CONCLUSION.....	163



The Accountability Cycle: The Recovery School District Act and New Orleans' Charter Schools

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I. INTRODUCTION

Pre-Hurricane Katrina, the New Orleans, Louisiana public schools presented one of the bleakest pictures in the American public education system.¹ Less than 25% of New Orleans' elementary schools had a majority of students who achieved basic proficiency in English and math.² Student performance on the Graduate Exit Exam ("GEE") was also extremely poor, with only 30–35% of high schools meeting basic proficiency levels in English and math.³ Under any standard or measurement, the public education system in New Orleans was failing.⁴

In 2003, the Louisiana legislature reacted to these failures and the passage of the federal No Child Left Behind Act ("NCLB" or "NCLBA") by passing the Recovery School District Act ("RSDA").⁵ The most important provision of the RSDA, from an accountability standpoint, was that any school not meeting adequate yearly progress⁶ for four consecutive years would be taken over by the state and placed under the control of the state Recovery School District ("RSD").⁷

Due to the new requirements of the RSDA, the New Orleans public schools were already in an official crisis by the time Hurricane Katrina caused massive flooding in New Orleans in August 2005. Over 60 of the

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¹ See *infra* Part II.A.

² RECOVERY SCHOOL DISTRICT LEGISLATIVELY REQUIRED PLAN 8 (2006), available at <http://www.louisianaschools.net/1de/uploads/8932.doc>.

³ *Id.* at 9.

⁴ See *infra* Part II.A.

⁵ LA. REV. STAT. ANN. § 17:10.5(A) (2007); see also *infra* Part III.A.

⁶ "Adequate yearly progress" ("AYP") is the term used to connote whether student scores on state standardized tests are progressing each year toward the ultimate goal of students being proficient in a given subject. See 20 U.S.C. § 6311(b)(2)(C) (2000) (stating that a state should adopt an AYP standard that applies "high standards of academic achievement," is statistically reliable, results in "substantial academic improvement for all students," and includes annual objectives).

⁷ LA. REV. STAT. ANN. § 17:10.5(A)(1)(d); see also *infra* Part III.A.

116 public schools in New Orleans were placed under the control of the RSD.⁸ After the storm, the Orleans Parish School Board determined that it would be unable to open public schools in New Orleans for the 2005–2006 school year.⁹ Governor Kathleen Blanco and the Louisiana legislature responded by pledging that the state would reopen the public schools.¹⁰ In order to make this pledge possible, in November 2005 the Louisiana legislature expanded the RSDA definition of failing schools to include all Louisiana schools that scored below the state average on standardized tests and that were operated in school systems in “Academic Crisis.”¹¹

This new statutory definition allowed 107 of New Orleans’ 116 public schools to be designated for takeover by the RSD.¹² The RSD stated that its goal was to use the hurricane as a “once-in-a-lifetime opportunity to create a fundamentally better public education system in New Orleans.”¹³ In the 2006–2007 school year, fifty-four schools were open in the city.¹⁴ Nearly 60% of the public schools currently open in New Orleans are charter schools.¹⁵ Charter schools are generally defined as “legally and fiscally autonomous educational entities operating within the public school system under contracts or charters.”¹⁶

Partially as a result of the hurricane, the traditional public school system in New Orleans administered by the Orleans Parish School Board essentially came to an end. New Orleans is now the first majority charter school district in the United States.¹⁷

This Article examines the post-Hurricane Katrina New Orleans public schools as a crucial moment in the history of two strands of the broader education law reform movement: accountability and charter school

⁸ See *infra* Part II.B.

⁹ See *infra* Part II.B.

¹⁰ See RECOVERY SCHOOL DISTRICT LEGISLATIVELY REQUIRED PLAN, *supra* note 2, at 5 (describing the focus of the Plan, which was created by the Governor and the Louisiana legislature).

¹¹ See *infra* Part II.B.

¹² See *infra* Part II.B.

¹³ RECOVERY SCHOOL DISTRICT LEGISLATIVELY REQUIRED PLAN, *supra* note 2, at 4.

¹⁴ See *infra* tbl.1.

¹⁵ See *infra* tbl.1.

Charter schools, by definition, are schools of choice that operate with more autonomy (and fewer regulations) under a charter or contract issued by a public entity, such as a local school board, public university, or state board of education. Charter school contracts, usually 3 to 5 years in length, provide school operators with more responsibility than district run schools. In exchange for this autonomy, charter schools have enhanced accountability: A charter school contract can be canceled if the school is not able to provide evidence of success by the end of the contract period

Katrina E. Bulkley & Priscilla Wohlstetter, *Introduction to TAKING ACCOUNT OF CHARTER SCHOOLS: WHAT’S HAPPENED AND WHAT’S NEXT?* 1, 1 (Katrina E. Bulkley & Priscilla Wohlstetter eds., 2004).

¹⁶ Sandra Vergari, *Introduction to THE CHARTER SCHOOL LANDSCAPE* 1, 2 (Sandra Vergari ed., 2002).

¹⁷ See *infra* note 83 and accompanying text.

legislation. The Article explores the application of the Louisiana Recovery School District Act and concludes that implementation of the Act has resulted in a proliferation of charter schools in New Orleans, making New Orleans the first majority public charter school system in the United States. This first majority charter school district presents essential questions for legislatures and courts, including whether these autonomous, experimental public schools will actually succeed in improving student achievement.

Accountability—the notion that states and/or the federal government expect local schools to meet certain standards as to performance on standardized test scores, attendance numbers, graduation rates or the school will face escalating sanctions—has become a central focus of the education reform movement, which seeks to guarantee a quality education for all American children.¹⁸ The fervor for education reform continues to intensify because policymakers and the public have acknowledged that quality public education may be the most important civil rights movement of the twenty-first century.¹⁹ Of special concern to policymakers is the continuing achievement gap between the educational performance of African-American and Latino school children and that of their white counterparts.²⁰ The cornerstone of the last decade of education reform legislation is standards-based education.²¹ Prior to the year 2000, over forty states had adopted a standards based curriculum to establish uniform

¹⁸ Aaron J. Saiger, *The Last Wave: The Rise of the Contingent School District*, 84 N.C. L. REV. 857, 873 (2006) [hereinafter Saiger, *The Last Wave*]; see also Aaron J. Saiger, *Legislating Accountability: Standards, Sanctions, and School District Reform*, 46 WM. & MARY L. REV. 1655, 1657 (2005) [hereinafter Saiger, *Legislating Accountability*] (arguing that education reform legislation focused on accountability mark an important shift in efforts to reform troubled school districts).

¹⁹ Courts and legislatures have acknowledged for over half a century that providing public education is one of the most important functions of state and local governments. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 331 (2003) (“We have repeatedly acknowledged the overriding importance of preparing students for work and citizenship, describing education as pivotal to ‘sustaining our political and cultural heritage’ with a fundamental role in maintaining the fabric of society.” (quoting *Plyler v. Doe*, 457 U.S. 202, 221 (1982))); *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483, 493 (1954) (“[E]ducation is perhaps the most important function of state and local governments.”).

²⁰ See Kevin Brown, *The Supreme Court’s Role in the Growing School Choice Movement*, 67 OHIO ST. L.J. 37, 38 (2006) (noting the existence of three persistent achievement gaps: between minority and white children, low income and middle class/upper class children, and urban students and suburban students); Maurice R. Dyson, *Leave No Child Behind: Normative Proposals to Link Educational Adequacy Claims and High Stakes Assessment Due Process Challenges*, 7 TEX. F. ON C.L. & C.R. 1, 2 (2002) (noting that the “dramatic national achievement gap” begins as early as pre-kindergarten with low-income students attending schools that, under any measure, are of less than average quality). One of the objectives of No Child Left Behind is to close the achievement gap. See 20 U.S.C. § 6301 (Supp. IV 2004) (stating that the purpose of NCLB is to insure that “all children have a fair, equal, and significant opportunity to obtain a high-quality education.”).

²¹ See Amy Stuart Wells, *Why Public Policy Fails to Live Up to the Potential of Charter School Reform: An Introduction*, in *WHERE CHARTER SCHOOL POLICY FAILS: THE PROBLEMS OF ACCOUNTABILITY AND EQUITY* 1, 4–6 (Amy Stuart Wells ed., 2002) (tracing the beginning of the standards-based education reform movement to a 1989 National Governors’ Association education summit); Michael A. Rebell & Robert L. Hughes, *Schools, Communities, and the Courts: A Dialogic Approach to Education Reform*, 14 YALE L. & POL’Y REV. 99, 100–03 (1996) (detailing the waves of education reform, including the increasing emphasis on standards and accountability).

requirements for what students should master at each grade level.²²

In 2002, the federal government provided a new layer in accountability-based education reform legislation in the form of the No Child Left Behind Act (“NCLB”).²³ NCLB federalized the requirement that all states adopt state-wide standards and administer yearly assessments to insure that students are meeting those standards.²⁴

Under NCLB, states are also required to hold schools accountable if their students fail to make adequate yearly progress towards achieving the content standards.²⁵ Under NCLB, accountability means providing various alternatives for students in failing schools, including providing supplemental education services, allowing students to transfer to another traditional public school or a charter school, or state takeover of the school.²⁶

This Article argues that the federalization of accountability requirements for public schools through NCLB is resulting in the decline of the traditional public school system governed by local school boards.²⁷ In its stead, there is a rise of public school systems run by states that take over administration of the failing traditional public schools. One outcome of state management of local public schools is that states will likely be unable to run the local public schools on a day-to-day basis and will turn to private entities to administer the public schools in the place of the traditional school district bureaucracy.²⁸ Charter schools are likely to become one of the major privatization methods used by states to improve failing schools.²⁹ Charter schools become an attractive alternative because

²² See GAIL SUNDERMAN ET AL., NO CHILD LEFT BEHIND MEETS SCHOOL REALITIES: LESSONS FROM THE FIELD, at xxix (2005) (noting that all fifty states had standards and accountability systems before the No Child Left Behind Act became law).

²³ See 20 U.S.C. §§ 6301–7941.

²⁴ *Id.* § 6301(1) (stating that high-quality education is accomplished by “ensuring that high-quality academic assessments, accountability systems, teacher preparation and training, curriculum, and instructional materials are aligned with challenging State academic standards so that students, teachers, parents, and administrators can measure progress against common expectations for student academic achievement”).

²⁵ *Id.* § 6311(b)(2)(A) (“Each State plan shall demonstrate that the State has developed and is implementing a single, statewide State accountability system that will be effective in ensuring that all local educational agencies, public elementary schools, and public secondary schools make adequate yearly progress as defined under this paragraph.”); see also James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U. L. REV. 932, 933–34 (2004) (arguing that although NCLB has laudable goals, the accountability provisions may cause states to lower academic standards, create increasing segregation in classrooms, and push lower performing students out of schools altogether).

²⁶ See 20 U.S.C. § 6316 (requiring that parents be informed if a school fails to meet adequate yearly progress and that students have the option of supplemental education services or transfer).

²⁷ See *infra* Part III.A.

²⁸ See *infra* Part III.B.

²⁹ No Child Left Behind explicitly contemplates that charter schools will become an alternative to failing traditional public schools. See 20 U.S.C. § 6316(b)(1)(E)(i) (noting that any local school that fails to make AYP for two years should provide all students enrolled in that school the option to transfer to another public school including a “public charter school”).

the state or local school district is able to enter into a contract (charter) with a privately run entity to administer the failing school.³⁰ The state provides the per-pupil funding for each student attending the charter school, and the charter school operators are left with the autonomy to hire staff, determine curriculum, and shape school policy.³¹ These privately run, autonomous charter schools will face significant challenges, including the pressure to rapidly increase student achievement.³²

The Article identifies this phenomenon—federal and state laws allowing charter schools to become an alternative to failing traditional public schools, and then those charter schools facing similar challenges—as accountability cycling. The New Orleans public schools after Hurricane Katrina are a case study that demonstrates that accountability measures, such as the NCLB and the RSDA, may lead to the decline of the traditional public school system and replace that system with privately run, autonomous charter schools that are only loosely supervised by the State.

Part II of this Article details the history of the New Orleans public schools pre-Hurricane Katrina. Part II also provides background on the passage of the Recovery School District Act and the emergence of charter schools in post-Hurricane Katrina New Orleans.

Part III of the Article will explain the “accountability cycle” by focusing on the broader connection between accountability principles and the creation of charter schools as an alternative to the traditional public school system. Part III will also explore the major challenges to charter schools as an alternative to the traditional public school system: accountability and decentralization. This section will explain why accountability measures such as NCLB will likely also cause the failure of some of the new charter schools. The charter schools will face many of the same challenges of the traditional public schools, leaving them vulnerable to failure of academic standards and eventually the closing of some charter schools. Thus a cycle of accountability is created and sustained.

Part IV recommends legislative and administrative solutions to address the problem of the accountability cycle. Part IV explores the legislative options available to state legislatures that seek to amend charter school legislation to respond specifically to accountability issues. These recommendations will include encouraging state legislatures to amend charter school legislation to acknowledge that charter schools opened to fill the void for failing traditional public schools are a different model than other charter schools. Part IV also recommends that state educational agencies develop additional expertise in the oversight and regulation of charter schools, including promulgating more focused regulations for

³⁰ Bulkley & Wohlstetter, *supra* note 15, at 1.

³¹ *Id.*

³² *See infra* Part III.C.

chartering schools such as the consideration of best charter school practices.

II. THE IMPACT OF HURRICANE KATRINA ON NEW ORLEANS' PUBLIC SCHOOL SYSTEM

A. *A Brief History of the New Orleans Public Schools*

The public schools of New Orleans were organized in 1841.³³ John McDonogh, an eccentric millionaire and noted philanthropist, helped to found the schools with a substantial donation dedicated to educating all children, including “both sexes and all classes and all castes of color.”³⁴ Despite this pledge, the initial public schools of New Orleans were organized exclusively for white children.³⁵ Like the other states of the former Confederacy, the story of public education in Louisiana is a story that revolves around the struggle to maintain the legal separation of the races. The Louisiana Code Noir, passed in 1724, forbade slaves from learning to read or write, except for what was necessary for religious life.³⁶ A similar New Orleans local ordinance from 1830 made it a crime, punishable by up to a month in prison, for anyone to teach a slave to read or write.³⁷

After the Civil War, the federal troops occupying Louisiana established schools for the newly freed slaves.³⁸ The first post-Civil War Louisiana constitution provided for public schools for citizens of all races, stating that “[a]ll children of this state between the years of six and twenty-one shall be admitted to the public schools . . . without distinction of race, color, or previous condition.”³⁹ Based on this new constitutional provision, the New Orleans public schools were desegregated from 1868–1871.⁴⁰

After the federal troops withdrew from Louisiana in 1877, state and local officials began to re-segregate the schools.⁴¹ Paul Trévigne, a black creole New Orleans attorney, filed suit against the state and the Orleans Parish School Board in 1877, arguing that the newly re-segregated schools worked “an irreparable injury to the entire colored population of the city”⁴² This argument would be famously reiterated in the *Brown v.*

³³ LIVA BAKER, *THE SECOND BATTLE OF NEW ORLEANS: THE HUNDRED-YEAR STRUGGLE TO INTEGRATE THE SCHOOLS* 15 (1996).

³⁴ *Id.*

³⁵ *See id.* (stating that not even “free blacks” were allowed to attend).

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at 18.

³⁹ *See id.* at 19–20 (quoting LA. CONST. OF 1868, art. CXXXV).

⁴⁰ BAKER, *supra* note 33, at 22.

⁴¹ *Id.* at 25.

⁴² *Id.* at 21, 28; *see also* Bertonneau v. Bd. of Dirs. of City Sch., 3 F. Cas. 294, 296 (D. La. 1878) (holding that a law providing separate public schools for white and black children is not

Board of Education litigation almost a century later.⁴³ In this 1877 case, the state judge found that the State of Louisiana could educate students of different races separately without violating the state or federal Constitutions.⁴⁴ The court proclaimed that the state was free to “manage its schools in the manner which, in its judgment, will best promote the interest of all.”⁴⁵

The post-Reconstruction Louisiana Constitution of 1879 continued to authorize public schools, but omitted the language that suggested that this education should be provided on a colorblind basis.⁴⁶ Eighteen new public schools were built with the John McDonogh donation from 1877–1889, but these public schools again were for the exclusive use and benefit of white children.⁴⁷ The funding and public school facilities for the education of black children deteriorated significantly during this period.

The public schools of New Orleans remained in this dual and unequal system until the Supreme Court’s decision in *Brown v. Board Education* struck down de jure segregation in the schools.⁴⁸ A.P. Tureaud, a black creole civil rights attorney, filed the case of *Bush v. Orleans Parish School Board* in 1952.⁴⁹ J. Skelly Wright, a famous federal district judge from the

unconstitutional).

In *Bertonneau*, the father of two black children sued the New Orleans board of directors of city schools, the chief superintendent of the public schools, and the principal of Fillmore school for declining to admit his children pursuant to the city schools’ preamble and resolution mandating the separation of the races in schooling. *Id.* at 295. The claim asserted that denying the children the opportunity to attend the same public schools as white children was a deprivation of their equal protection of the law provided by the Fourteenth Amendment of the United States Constitution. *Id.* The court agreed with defendants that there was no deprivation because “[b]oth races are treated precisely alike.” *Id.* at 296. “The state, while conceding equal privileges and advantages to both races, had the right to manage its schools in the manner which, in its judgment, will best promote the interest of all.” *Id.* The court analogized this separation to the state’s ability to educate the sexes separately. *Id.* For the separation applies to both sexes equally, just as the “prohibition applies alike to black and white, and the penalty for disobedience falls with equal severity on both.” *Id.*

⁴³ See *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483, 488 (1954) (noting the plaintiffs’ argument that the segregated schools are inherently unequal due to the presence of de jure segregation and its negative impact on African-American children).

⁴⁴ See *Bertonneau*, 3 F. Cas. 294 at 296 (holding that a law providing separate public schools for white and black children is not unconstitutional); BAKER, *supra* note 33, at 30.

⁴⁵ BAKER, *supra* note 33, at 30; DONALD DEVORE & JOSEPH LOGSDON, *CRESCENT CITY SCHOOLS: PUBLIC EDUCATION IN NEW ORLEANS 1841–1991*, at 10 (1991) (noting that an “ethnic dilemma . . . had paralyzed . . . the schools”).

⁴⁶ BAKER, *supra* note 33, at 31.

⁴⁷ *Id.*

⁴⁸ See *Brown*, 347 U.S. at 495 (concluding that separate educational facilities on the basis of race are inherently unequal).

⁴⁹ BAKER, *supra* note 33, at 8; see also *Bush v. Orleans Parish Sch. Bd.*, 138 F. Supp. 336, 337 (E.D. La. 1956) (holding, in accordance with *Brown v. Board of Education*, that it is unconstitutional to deny children admission to school on the basis of race); Joel W. Friedman, *Desegregating the South: John Minor Wisdom’s Role in Enforcing Brown’s Mandate*, 78 TUL. L. REV. 2207, 2215 (2004) (detailing the history of the *Bush* litigation, including the role of A.P. Tureaud).

Bush was a class action for admission to the Orleans Parish public schools on a non-segregated basis. *Bush*, 138 F. Supp. at 336. “In so far as the provisions of the Louisiana Constitution and statutes in suit require or permit segregation of the races in public schools, they are invalid under the ruling of

Eastern District of Louisiana, found that the public schools of New Orleans should be immediately desegregated.⁵⁰ In 1960, New Orleans became the first large city in the Deep South to desegregate after *Brown*.⁵¹ In the fall of 1960, Ruby Bridges attended the previously all white William Frantz Elementary School, and three other black girls integrated McDonough 19 Elementary School.⁵²

There was massive resistance by white citizens to the desegregation of New Orleans's public schools, and more white students fled from the New Orleans public school system.⁵³ By the mid-1970s, the public schools in New Orleans were overwhelmingly populated by black students from households below the poverty line.⁵⁴ The population of New Orleans pre-Hurricane Katrina was 67% African-American, and 28% white, but the public schools were 93% African-American and only 4% white.⁵⁵ Forty percent of the students in the Orleans Parish school district lived below the poverty line.⁵⁶

An examination of schools in New Orleans in the school year immediately prior to Hurricane Katrina also demonstrates that the New Orleans public schools were failing and in crisis. 63% of the schools in

the Supreme Court in *Brown*." *Id.* at 337.

⁵⁰ *Bush*, 138 F. Supp. at 336–37; see also Friedman, *supra* note 49, at 2220 (noting that one day before the sixth anniversary of *Brown*, Judge Wright became the first judge within the Fifth Circuit to attempt to enforce the Supreme Court decision by setting a deadline for a local school system to desegregate). In 1962, Judge John Minor Wisdom and a panel of the Fifth Circuit affirmed Judge Wright's order and established a comprehensive plan for the desegregation of the New Orleans' public schools. *Id.* at 2234–35.

⁵¹ BAKER, *supra* note 33, at 3.

⁵² *Id.* at 2.

At 9:25 a.m., six-year old Ruby Bridges, wearing a stiffly starched white pinafore with blue leotards and a white ribbon in her hair, stepped out of her mother's brown sedan in front of the all-white William Frantz Elementary School In the face of a barrage of insults and threats, as well as spittle and eggs, hurled at her by the angry throng of placard-carrying, mostly female, demonstrators assembled in front of the school, Ruby and her mother hurriedly entered the yellow brick building under the protective escort of a phalanx of about a dozen federal marshals sent by Judge Wright to prevent state troopers from barring her entry.

Friedman, *supra* note 49, at 2224.

⁵³ See Serena Mayeri, *The Strange Career of Jane Crow: Sex Segregation and Transformation of Anti-Discrimination Discourse*, 18 YALE J.L. & HUMAN. 187, 201 (2006) (noting that New Orleans' public officials vehemently resisted desegregating the public schools after *Brown* and pledged that any desegregation plan must include sex-segregated classrooms); Friedman, *supra* note 49, at 2225 (explaining that in the fall of 1960 after black children began attending Frantz Elementary and McDonough 19, white students boycotted the schools, and not one white student returned to McDonough 19 that school year).

⁵⁴ See Patrick R. Hugg, *Federalism's Full Circle: Relief for Education Discrimination*, 35 LOY. L. REV. 13, 22–23 (1989) (explaining that 90% of the students in New Orleans's public schools were minority students and from households below the poverty line and that a 1988 nationwide standardized test found that "only 17.6% of New Orleans' public school fourth graders tested above the fiftieth percentile in reading, language, and math skills").

⁵⁵ RECOVERY SCHOOL DISTRICT LEGISLATIVELY REQUIRED PLAN, *supra* note 2, at 9.

⁵⁶ *Id.*

New Orleans were “unacceptable” under state standards.⁵⁷ The students in New Orleans were underperforming on the Louisiana standardized test (“LEAP”). Only 41% of New Orleans’s fourth grade public school students met basic math requirements, and 44% met basic English requirements.⁵⁸ By the eighth grade, the statistics were worse, with only 35% passing math standardized testing and a shockingly low 29% being proficient in English.⁵⁹ By high school graduation, only 39% were able to pass the Graduate Exit Exam in math, and 32% in English.⁶⁰ The state’s assessment of these statistics was that “poor academic performance in New Orleans was systemic.”⁶¹ In a survey of the 100 largest school districts in the United States, New Orleans had the seventh highest drop out rate.⁶²

Pre-Hurricane Katrina New Orleans public schools were paradigmatic of the “achievement gap” between African-American and white students. On average there was a gap of 50.6 points in English and 52.8 points in math between black students and white students in the New Orleans public schools.⁶³ This gap was twice as high as the gap in standardized test scores between those groups of students in the rest of Louisiana.⁶⁴

Almost as alarming as the low scores on standardized tests and the gaping differences in achievement between African-American and white students, was the corruption and mismanagement associated with the New Orleans public schools. Prior to the hurricane, the public schools were \$265 million in debt and seven schools were forced to close.⁶⁵ Due to this revenue shortfall, the buildings and infrastructure of the schools were suffering, with \$52 million needed just to bring existing buildings up to building code.⁶⁶ In December 2004, the federal government brought criminal indictments against eleven people related to financial mismanagement of the New Orleans public schools.⁶⁷ By any measure, the public schools prior to Hurricane Katrina were in severe need of reform.⁶⁸

⁵⁷ *Id.* at 8.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* at 9.

⁶⁶ *Id.* at 11.

⁶⁷ *Id.* at 9.

⁶⁸ See Terry O’Connor, *Orleans Parish Public Schools Enter Most Critical Semester*, NEW ORLEANS CITYBUSINESS, Aug. 1, 2005, available at LEXIS, News Library, NOCBUS File. (emphasizing the crisis of the Orleans Parish public schools even before Katrina and lamenting that “[t]eachers deserve better leadership and guidance from the School Board and their superiors”).

B. *New Orleans' Public Schools Post-Hurricane Katrina*

On August 29, 2005, Hurricane Katrina began its devastation of the city of New Orleans and eventually became the worst natural disaster in United States history. In the wake of the storm, the New Orleans schools were in disarray—students and teachers dislocated, buildings damaged, and the school district administration disorganized and scattered throughout the United States.⁶⁹ Ultimately, the Orleans Parish school board issued public statements that it would not be able to reopen the New Orleans public schools that school year.⁷⁰

Due to these circumstances, Governor Kathleen Blanco determined that in order to reopen New Orleans's public schools in the 2005–2006 school year, the state would have to fill the gap left by the local school board.⁷¹ In order to provide the state with the necessary authority to oversee the local schools, a November 2005 special session of the Louisiana legislature expanded the definition of a “failed” school under the Recovery School District Act.⁷² Previously, a “failed” school under the RSDA was a school that was deemed “academically unacceptable” for four consecutive years.⁷³ Once a school had “failed,” it would be placed under the auspices of the RSD, to be administered and controlled by the state instead of the local school board.⁷⁴ In the November 2005 special session, the legislature expanded the definition of a “failed” school to include all schools that scored below the state average and that were operated in school systems designated as being in “Academic Crisis.”⁷⁵ Based on this

⁶⁹ RECOVERY SCHOOL DISTRICT LEGISLATIVELY REQUIRED PLAN, *supra* note 2, at 11. The estimates of the physical damage to school facilities and infrastructure were \$800 million. *Id.*

⁷⁰ See April Capochino, *Katrina Brings Winds of Change for N.O. Schools*, NEW ORLEANS CITYBUSINESS, Dec. 26, 2005, available at LEXIS, News Library, NOCBUS File (acknowledging the devastating effects of Katrina on the Orleans Parish School District and speculating that only seventeen of the 120 schools in the district will reopen by January or Fall of 2006); April Capochino, *Pre-Holiday Layoffs Infuriate N.O. Teachers*, NEW ORLEANS CITYBUSINESS, Dec. 2, 2005, available at LEXIS, News Library, NOCBUS File (criticizing the Orleans Parish School Board's decision to lay off 7500 teachers); Mark Singletary, *New Orleans Charter Schools Should be Kept Away from Orleans Parish School Board*, NEW ORLEANS CITYBUSINESS, June 12, 2006, available at LEXIS, News Library, NOCBUS File (celebrating the Orleans Parish School Board's loss of control of over 90% of local public schools because the board no longer has the opportunity to mismanage the schools); Mark Waller, *Some Private Schools May Reopen, But No Public Schools on City's East Bank Will*, NEW ORLEANS TIMES PICAYUNE, Oct. 12, 2005, available at LEXIS, News Library, NOTPIC File (relaying the communities' frustration with the Orleans School Board's decision not to reopen east bank schools for the 2005–2006 academic year); Interview with Sarah Usdin, President and Founder, New School for New Orleans, in New Orleans, La. (Nov. 30, 2006) (on file with Connecticut Law Review) (noting that the New Orleans public schools were “morally, financially and academically bankrupt”).

⁷¹ RECOVERY SCHOOL DISTRICT LEGISLATIVELY REQUIRED PLAN, *supra* note 2, at 12.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ See *infra* Part III.B for a detailed analysis of the Recovery School District Act.

⁷⁵ RECOVERY SCHOOL DISTRICT LEGISLATIVELY REQUIRED PLAN, *supra* note 2, at 12; see also LA. REV. STAT. ANN. § 17:10.6(B)(1) (2007) (“‘Academically in crisis’ means any local system in which more than thirty schools are academically unacceptable or more than fifty percent of its students

new definition, 107 schools previously organized in the Orleans Parish School District were transferred to the control of the RSD.⁷⁶

The transfer of these schools from OPSD to RSD was seen as “a once-in-a-lifetime opportunity to create a fundamentally better public education system in New Orleans.”⁷⁷ RSD states that it is “focused on opening fundamentally better schools for the returning students, meeting the specific educational needs of every returning student, and laying the groundwork for the creation of a world-class public education system in Orleans Parish.”⁷⁸

With these lofty goals, the practical question presented to the RSD was how to open and operate enough schools to meet the needs of returning students. The RSD decided to approach this issue with a “spirit of flexibility.”⁷⁹ By April 2006, RSD opened three schools and approved six charter schools to open.⁸⁰ At the opening of the 2006–2007 school year there were seventeen traditional public RSD schools and thirty-two charter schools.⁸¹ There were only five traditional public schools overseen by the Orleans Parish School Board.⁸² The result of the Post-Hurricane Katrina legislative plan is that New Orleans is the first majority charter school district in the country.⁸³

attend schools that are academically unacceptable.”).

⁷⁶ RECOVERY SCHOOL DISTRICT LEGISLATIVELY REQUIRED PLAN, *supra* note 2, at 12.

⁷⁷ *Id.* at 4.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* at 5.

⁸¹ *See infra* tbl.1.

⁸² *See infra* tbl.1.

⁸³ Besides post-Hurricane Katrina New Orleans, there are several other states and cities that have a significant number of charter schools. Arizona has been called “the nation’s most expansive charter school system.” Frederick M. Hess & Robert Maranto, *Letting a Thousand Flowers (and Weeds) Bloom: The Charter Story in Arizona*, in *THE CHARTER SCHOOL LANDSCAPE* 54, 54 (Sandra Vergari ed., 2002). Arizona passed its charter school legislation in 1994, and it is the emblematic “strong” charter school law. *Id.* The conservative think tank the Center for Educational Reform designates charter school laws as “strong” based on the presence of several characteristics: no cap on the number of charter schools allowed, multiple charter-granting agencies, no formal evidence of local support required before start-up, greater legal and fiscal autonomy, automatic waiver from state and local laws, and a guarantee of full per-pupil spending. Wells, *supra* note 21, at 9–10. Based on these criteria, Louisiana also has a “strong” charter school law.

The city of Baltimore also has a rapidly growing number of charter schools. As of the 2006–2007 school year, there were sixteen charter schools open in the city. *See* Md. State Dep’t of Education, *Current Charter Schools in Maryland*, http://www.marylandpublicschools.org/MSDE/programs/charter_schools/docs/No_CS_Schools.htm (last visited July 8, 2007) [hereinafter *Current Charter Schools in Maryland*]. This is despite the fact that Maryland passed its charter school legislation in 2003. MD. STATE DEP’T OF EDUC., *AN EVALUATION OF MARYLAND CHARTER SCHOOL PROGRAM* 3 (2006), *available at* <http://www.marylandpublicschools.org/NR/rdonlyres/1CEB8910-211A-47E0-909F-C452B3A76CAB/11238/CSProgramEval.pdf> [hereinafter *AN EVALUATION OF THE MARYLAND CHARTER SCHOOL PROGRAM*].

Table 1: New Orleans' Public Schools 2006–2007⁸⁴

TOTAL CHARTER SCHOOL ENROLLMENT (32 Schools)					
	School Name	Type	Operated By	Selective	Grades
1	Einstein Charter School	Type 1	Local board		K-8
2	Priestly School of Architecture & Construction	Type 1	Local board		9
3	International School of LA	Type 2	Local board	X	K-6
4	Milestone Sabis Academy	Type 2	Sabis		K-8
5	Ben Franklin High School	Type 3	Advocates for Academic Excellence in Education	X	9-12
6	Lusher Charter School	Type 3	Advocates for Arts-Based Education	X	K-11
7	Moton Charter School	Type 3	Advocates for Innovative Schools Inc.		PK-6
8	New Orleans Charter Science & Math High School	Type 3	Advocates for Science and Math		9-12
9	Lake Forest Elementary Charter School	Type 3	Council for Quality Education	X	K-7
10	Warren Easton Senior High School	Type 3	Easton Charter Foundation	X	9-12
11	Audubon Montessori Charter School	Type 3	French and Montessori Education Inc.	X	PK-8
12	Hynes Elementary	Type 3	Local Board		PK-8
13	Alice M. Harte Elementary (ACSA)	Type 4	Algiers Charter Schools Association		K-8
14	Edna Karr Senior High (ACSA)	Type 4	Algiers Charter Schools Association		9-12
15	Dwight D. Eisenhower Elementary (ACSA)	Type 5	Algiers Charter Schools Association		K-8
16	Martin Behrman Elementary (ACSA)	Type 5	Algiers Charter Schools Association		PK-8
17	McDonogh 32 Elementary (ACSA)	Type 5	Algiers Charter Schools Association		PK-8
18	O. Perry Walter Senior High (ACSA)	Type 5	Algiers Charter Schools Association		9-12
19	Tubman Elementary	Type 5	Algiers Charter Schools Association		PK-8
20	William J. Fischer Elementary (ACSA)	Type 5	Algiers Charter Schools Association		PK-8
21	Lafayette Academy	Type 5	Choice Foundation / Mosaica		K-7
22	James Singleton Charter School	Type 5	Dryades YMCA		PK-8
23	Dr. Martin Luther King Jr. Charter School for Science & Tech.	Type 5	Friends of King		PK-8
24	Sophie B. Wright Charter	Type 5	Institute for Academic Excellence		4-8
25	KIPP Believe New Orleans	Type 5	KIPP		5
26	McDonogh 15 School for the Creative Arts	Type 5	KIPP		PK-8
27	Green Charter Elementary	Type 5	Middle School Advocates		K-8
28	McDonogh 28 Middle School	Type 5	New Orleans Charter Schools Foundation / Leona		K-8
29	New Orleans Free School	Type 5	New Orleans Charter Schools Foundation / Leona		K-8
30	Capdau, Pierre A.	Type 5	University of New Orleans		PK-8
31	M.H. Nelson – UNO Charter	Type 5	University of New Orleans		PK-8
32	New Beginnings Early College High School	Type 5	University of New Orleans		9
TOTAL RSD ENROLLMENT (17 Schools)					
	School Name	Type	Operated By	Selective	Grades
33	Banneker Elementary		RSD		PK-8
34	Clark, Joseph		RSD		9-12
35	Craig, Joseph A. School		RSD		PK-8
36	Dibert Elementary		RSD		PK-8
37	Douglass High		RSD		9-12
38	Drew Elementary		RSD		PK-8
39	Habans Elementary		RSD		PK-8
40	Henderson Middle		RSD		PK-8
41	Johnson, James Elementary		RSD		PK-8
42	Laurel Elementary		RSD		PK-8
43	Live oak Elementary		RSD		PK-8
44	McDonogh, John		RSD		9-12
45	Raboulin High		RSD		9-12
46	Reed Elementary		RSD		9-12
47	Reed, Sarah T. High School		RSD		9-12
48	Tureaud Elementary		RSD – Formerly Treme		PK-5
49	Wicker Elementary		RSD – Formerly Treme		PK-8
TOTAL NOPS ENROLLMENT (5 Schools)					
	School Name	Type	Operated By	Selective	Grades
50	Bethune Accelerated Elementary		NOPS	X	PK-8
51	Benjamin Franklin Elementary		NOPS	X	PK-6
52	McDonogh 35 High		NOPS	X	7-12
53	McMain Unified High		NOPS	X	7-12
54	PM High School		NOPS		7-12
TOTAL NEW ORLEANS ENROLLMENT (54 Schools)					

There are five different types of charter schools in the New Orleans school system.⁸⁵ The most prevalent type in the current system is the Type

⁸⁴ Chart provided by John Alford, New Schools for New Orleans (November 2006) (on file with Connecticut Law Review).

⁸⁵ RECOVERY SCHOOL DISTRICT LEGISLATIVELY REQUIRED PLAN, *supra* note 2, at 12–13; *see also* Vergari, *supra* note 16, at 2 (describing the way charter schools are typically established, including being converted from existing schools or starting as a completely new entity). As described below, the Louisiana charter schools may also be either converted from existing schools or started as completely new schools.

5 charter school.⁸⁶ The Type 5 charter schools are authorized by the Louisiana State Board of Elementary and Secondary Education (“BESE”) and overseen by the Recovery School District.⁸⁷ Once a school is placed under the control of the RSD because it is failing, it may be closed and then reopened as a Type 5 charter school.⁸⁸ Like all charter schools, Type 5 charter schools are run by independent school operators and have significant autonomy, including the ability to determine the school budget, independently hire teachers and administrators, determine staff salaries, and develop curriculum.⁸⁹ The Type 5 charter schools are also required to have open admissions policies.⁹⁰

Type 1 and 3 charter schools are authorized for charter by the local school board—in this case, Orleans Parish School Board.⁹¹ These charter schools also have autonomy as to their budgets and management of personnel.⁹² The important distinction between these schools and Type 5 charter schools is that Type 1 and 3 charter schools are permitted to have selective admissions criteria.⁹³ As shown in Table 1, half of the Type 1

⁸⁶ See *supra* tbl.1.

⁸⁷ LA. REV. STAT. ANN. § 17:3983(A)(2)(a)(ii)(c) (2007); RECOVERY SCHOOL DISTRICT LEGISLATIVELY REQUIRED PLAN, *supra* note 2, at 12.

⁸⁸ See RECOVERY SCHOOL DISTRICT LEGISLATIVELY REQUIRED PLAN, *supra* note 2, at 12 (explaining the process by which a “struggling public school[]” may become a Type 5 charter school once under the control of the RSD).

⁸⁹ *Id.* Type 5 charter schools have a number of additional restrictions not in place for the other Louisiana charter schools. For example, Type 5 charter schools in operation for more than two years must “have a teacher certified by the state board teaching every core subject.” LA. REV. STAT. ANN. § 17:3991(C)(6)(b)(ii). Some authors suggest that autonomy is the hallmark of charter school policy. There are three dimensions of school autonomy: control over budget decisions, control of personnel decisions, and control over educational program decisions. The authors argue that school autonomy affects student achievement only when it focuses on improving student instruction. In budgetary matters, the authors found that improved student achievement meant school operators would have significant control over the budget to allow resources to be allocated most efficiently. For personnel decisions, it is important for school operators to foster a professional school culture through hiring, evaluations, rewards, and professional development. The authors also found that selection of “literacy curricula” can help improve instruction and teacher commitment. Priscilla Wohlstetter & Derrick Chau, *Does Autonomy Matter? Implementing Research-Based Practices in Charter and Other Public Schools*, in TAKING ACCOUNT OF CHARTER SCHOOLS: WHAT’S HAPPENED AND WHAT’S NEXT? 53, 53–56 (Katrina E. Bulkley & Priscilla Wohlstetter eds., 2004).

⁹⁰ RECOVERY SCHOOL DISTRICT LEGISLATIVELY REQUIRED PLAN, *supra* note 2, at 12; see also Wendy Parker, *The Color of Choice: Race and Charter Schools*, 75 TUL. L. REV. 563, 577–80 (2001) (discussing the various state laws requiring charter schools be open admission and possible equal protection concerns when charter school legislation allows for consideration of race or gender in the charter school admissions process).

⁹¹ LA. REV. STAT. ANN. § 17:3983(A)(2)(a)(i); see also RECOVERY SCHOOL DISTRICT LEGISLATIVELY REQUIRED PLAN, *supra* note 2, at 13; Parker, *supra* note 90, at 575–76 (explaining that most charter school legislation is restrictive as to who can grant a charter, usually the local school district or the state board of education is the authorizing authority).

⁹² See LA. REV. STAT. ANN. § 17:3991(B)(5), (12) (describing the requirements for grant of a charter).

⁹³ See *id.* § 17:3991(B)(1)(d) (noting that Type 5 charter schools are exempt from the provisions of the charter law that govern permissible admissions criteria); RECOVERY SCHOOL DISTRICT LEGISLATIVELY REQUIRED PLAN, *supra* note 2, at 12 (noting that Type 5 charter schools are required to maintain open-admission policies).

and 3 charter schools are selective admissions schools.⁹⁴

Type 2 charter schools are authorized and overseen by the Louisiana BESE.⁹⁵ These schools operate outside the control of the Orleans Parish School District.⁹⁶ These charter schools may be either start-up charter schools or converted from existing schools.⁹⁷ Proposals for Type 4 charter schools are also made to BESE, but are funded through the local school board.⁹⁸ Type 4 charter schools are also the only type that may be established as a for-profit corporation.⁹⁹ In the post-Hurricane Katrina Orleans' school system, over half of the schools are operated as charter schools.¹⁰⁰ The dominance of charter schools in this new school system demonstrates the decline of the traditional public school system controlled by a local school district.¹⁰¹

III. THE ACCOUNTABILITY CYCLE

This Part will explain the concept of the “accountability cycle” by focusing on the broader connection between accountability principles and the creation of charter schools as an alternative to the traditional public school system. This will include a discussion of the rise of charter schools as a primary alternative for failing public schools and the challenges to charter schools in this new role. This Part also focuses on the potential circularity of the creation of these charter schools, because the charter schools will face many of the same challenges of the traditional public schools, leaving them vulnerable to failure of academic standards and eventually the closing of some charter schools.

A. *Phase One: NCLB and the Recovery School District Act*

The accountability cycle begins when a legislature enacts a statute that creates sanctions for public schools and local school districts whose students fail to meet designated performance goals.¹⁰² This trend is traceable back to the mid-1990s when state legislatures that began to

⁹⁴ See *supra* tbl.1.

⁹⁵ LA. REV. STAT. ANN. § 17:3983(A)(2)(a)(i); RECOVERY SCHOOL DISTRICT LEGISLATIVELY REQUIRED PLAN, *supra* note 2, at 13. The Type 2 charter school proposal is made to BESE instead of the local school board because either (1) the local school board has rejected the charter school proposal, or (2) the local school district is in academic crisis. LA. REV. STAT. ANN. § 17:3983(A)(2)(a)(i)–(ii).

⁹⁶ RECOVERY SCHOOL DISTRICT LEGISLATIVELY REQUIRED PLAN, *supra* note 2, at 13.

⁹⁷ LA. REV. STAT. ANN. § 17:3973(2)(b)(ii).

⁹⁸ *Id.* § 17:3983(A)(2)(b); see also RECOVERY SCHOOL DISTRICT LEGISLATIVELY REQUIRED PLAN, *supra* note 2, at 13.

⁹⁹ LA. REV. STAT. ANN. § 17:3991(A)(1)(a).

¹⁰⁰ Ann Carnns, *Charting a New Course—After Katrina, New Orleans's Troubled Educational System Banks on Charter Schools*, WALL ST. J., Aug. 24, 2006, at B1, available at LEXIS, News Library, WSJNL File.

¹⁰¹ See *supra* note 88 and accompanying text.

¹⁰² See *supra* note 7 and accompanying text.

provide increasing percentages of local education budgets demanded that local school districts (and by extension the schools in those districts) meet certain benchmarks.¹⁰³ Aaron Jay Saiger and other commentators have called this trend the “New Accountability” movement, in which states demand that local school districts exceed certain requirements as to standardized test scores, graduation rates, and attendance rates.¹⁰⁴

This first phase of the accountability cycle gained significant momentum with the passage of the federal No Child Left Behind Act (“NCLB”) in 2001.¹⁰⁵ NCLB requires states to adopt accountability measures, to ensure that schools meet adequate yearly progress (“AYP”), towards the ultimate goal of students being proficient in reading, math, and science.¹⁰⁶

NCLB mandates that states designate schools failing to attain AYP as in need of “improvement, corrective action or restructuring.”¹⁰⁷ A school is designated as in need of “improvement” after two years of failing to meet AYP.¹⁰⁸ After two additional years of failing to meet AYP, a school is marked for “corrective action.”¹⁰⁹ Finally, after five years of AYP failure, a school is labeled as in need of “restructuring.”¹¹⁰ Each of these designations corresponds with a litany of consequences for the individual school and the governing school district.

The NCLB sanctions for failing schools increase in seriousness beginning with providing for supplemental educational services for

¹⁰³ Saiger, *The Last Wave*, *supra* note 18, at 873. Saiger makes a compelling argument that states have recast the problem of underperforming public schools as a problem of government structure. As a result of this conclusion, state legislatures have focused on education reform measures that displace local school district governance with other governing bodies such as the state itself. The accountability movement is causing the formerly “orderly layer cake of school governance” to become mixed with the functions of school governance being assigned to many different entities. *Id.* at 871–72; *see also* Saiger, *Legislating Accountability*, *supra* note 18, at 1657 (arguing that education reform legislation focused on accountability mark an important shift in efforts to reform troubled school districts).

¹⁰⁴ *See* Saiger, *The Last Wave*, *supra* note 18, at 873 & n.79 (detailing the New Accountability statutes passed by state legislatures that require local school districts to exceed minimum achievement levels on standardized test scores, attendance rates, and graduation rates); Vergari, *supra* note 16, at 9 (“The ‘new accountability’ in public education refers to a performance-based system of evaluation, as distinguished from one that is compliance based.”).

Saiger also notes that the New Accountability measures require that when local school districts fail to meet the minimum requirements set by the state, there are escalating sanctions, including requiring technical assistance for the district, or the reorganization of the school district. Saiger, *The Last Wave*, *supra* note 18, at 873. These sanctions limit the autonomy of the school district. *Id.*

¹⁰⁵ No Child Left Behind Act of 2001, 20 U.S.C. §§ 6301–6578 (Supp. IV 2004).

¹⁰⁶ *See id.* § 6311(b)(2)(A) (“Each State plan shall demonstrate that the State has developed and is implementing a single, statewide State accountability system that will be effective in ensuring that all local educational agencies, public elementary schools, and public secondary schools make adequate yearly progress as defined under this paragraph.”).

¹⁰⁷ *Id.* § 6316(b)(1)(D); Danielle Holley-Walker, *The Importance of Negotiated Rulemaking to the No Child Left Behind Act*, 85 NEB. L. REV. 1015, 1022 (2007).

¹⁰⁸ 20 U.S.C. § 6316(b)(1)(A).

¹⁰⁹ *Id.* § 6316(b)(7)(C).

¹¹⁰ *Id.* § 6316(b)(8)(A).

students, allowing students to transfer to other public schools, firing of teachers and administrative staff, then ultimately, state takeover or the reopening of the school as a charter school.¹¹¹ Before NCLB and in response to NCLB, states have adopted four major alternatives to approach school restructuring: reopening the school as a public charter school, replacing all or most of the school staff, entering into a contract with a private management company for operation of the school, and takeover of the school by the state education agency.¹¹²

In order to comply with NCLB, the Louisiana legislature passed the Recovery School District Act (“RSDA”) in 2003.¹¹³ The main provision of the RSDA is that a school that has been labeled as “academically unacceptable” for four consecutive years, under standards set forth by the Louisiana BESE, may be transferred to the jurisdiction of the Recovery School District.¹¹⁴ The Recovery School District then retains jurisdiction over the transferred school until the state board enters into an agreement with the local school board for its return to the school board’s jurisdiction.¹¹⁵ In order to have the school returned to its jurisdiction, the school’s district must present a detailed plan to improve the academic achievement of the school’s students.¹¹⁶ As explained in Part II of this Article, after Hurricane Katrina, the Louisiana legislature expanded the jurisdiction of the RSD to include schools scoring below the state average on Louisiana’s standardized test and in a school district deemed to be in “academic crisis.”¹¹⁷

B. *Phase Two: Charter Schools Provide an Alternative Framework*

As evidenced in the previous section, many legislators, legal scholars, and educational policy experts have contemplated the difficult question of how to hold failing schools accountable. One of the most persistent challenges to an accountability regime is how to restructure failing public schools and provide an alternative framework for the governance of schools if the traditional model of local school district governance has not been successful.¹¹⁸ As discussed in the previous section, under No Child

¹¹¹ See *id.* § 6316(b)(1)(E)(i) (explaining the options for “improvement” schools); *id.* § 6316(b)(7)(C) (explaining the options for “corrective action” schools); *id.* § 6316(b)(8) (detailing the consequences for schools in need of “restructuring”).

¹¹² EDUC. COMM’N OF THE STATES, STATE POLICIES FOR SCHOOL RESTRUCTURING 1 (2004), available at <http://www.ecs.org/clearinghouse/57/02/5702.pdf>.

¹¹³ LA. REV. STAT. ANN. § 17:10.5 (2007).

¹¹⁴ *Id.* § 17:10.5 (A)(1).

¹¹⁵ *Id.* § 17:10.5 (C)(1)(a).

¹¹⁶ *Id.* § 17:10.5 (C)(1)(a)–(b).

¹¹⁷ See *supra* note 76 and accompanying text.

¹¹⁸ See, e.g., Shavar D. Jeffries, *The Structural Inadequacy of Public Schools for Stigmatized Minorities: The Need for Institutional Remedies*, 34 HASTINGS CONST. L.Q. 1, 5–6 (2006) (arguing that public schools serving stigmatized minorities are highly bureaucratic and that institutional remedies,

Left Behind and state accountability statutes, charter schools are proffered as an alternative for failing traditional public schools.¹¹⁹ At least twelve states have included in their accountability legislation that public charter schools are one method that should be used to restructure a traditional public school.¹²⁰

Charter schools established for the purpose of replacing traditional public schools are being recognized as a new model for charter schools and serve as a model that in some important ways strays away from the original charter school principles. The first charter school law in the United States was passed in Minnesota in 1991.¹²¹ A small working group, including a legislator, student advocate, and education policy experts developed a set of guiding principles for the development of charter schools.¹²² Some of the guiding principles for the first charter school legislation included: (1) various “publicly accountable organizations” such as local school districts and the state board of education authorizing the schools; (2) contracts or “charters” that would govern the ongoing relationship between the school operators and the authorizing entity; (3) the standard state and district regulations governing traditional public schools would be waived; and (4) that the charter schools are fundamentally schools of choice selected by the students, parents, teachers, and administrators.¹²³

including charter schools, should be considered as alternatives).

¹¹⁹ See *supra* note 112 and accompanying text; see also Vergari, *supra* note 16, at 10 (“With the exception of high-stakes testing, the charter school policy innovation is perhaps the most prominent performance-based education reform strategy in the United States today.”).

In Maryland, the charter school law was enacted in 2003 after the passage of NCLB. Charter school authorization may be granted by local school systems, but the Maryland State Board of Education is given special authority under the act to grant charters to convert a school in need of “restructuring” under NCLB. AN EVALUATION OF THE MARYLAND CHARTER SCHOOL PROGRAM, *supra* note 83, at 11.

¹²⁰ EDUC. COMM’N OF THE STATES, *supra* note 112, at 2–4.

¹²¹ Joe Nathan, *Minnesota and the Charter Public School Idea*, in THE CHARTER SCHOOL LANDSCAPE 17, 21 (Sandra Vergari ed., 2002).

¹²² *Id.* at 18–20.

¹²³ *Id.* at 20–21. The federal government has supported charter schools since the passage of the federal Public Charter Schools Program in 1994. Vergari, *supra* note 16, at 1. The initial federal budgetary appropriation for charter schools was \$6 million in 1995, and by 2001 the recommended budgetary expenditure was \$200 million. *Id.* at 2.

There have been a number of important legal challenges to charter school legislation, mostly centered upon charter school legislation that included race conscious admissions policies. See, e.g., *Beaufort County Bd. of Educ. v. Lighthouse Charter Sch. Comm.*, 516 S.E.2d 655, 655 (S.C. 1999) (holding that application could be denied on ground that applicant failed to satisfy Charter School Act’s racial composition).

In *Beaufort County*, the South Carolina Supreme Court held that it was not clearly erroneous or arbitrary for the Beaufort School Board to deny the Lighthouse Charter School’s application based on health and safety, civil rights, and racial composition concerns with the application. *Id.* at 658–59. The second issue before the South Carolina Supreme Court was the Attorney General’s finding that the portion of the Charter Schools Act that expressly prohibited enrollment differing from the racial composition of the school district by more than 10% was unconstitutional. *Id.* at 659–60. The court remanded this issue to the circuit court to determine whether the racial balancing provision was unconstitutional. *Id.* at 661; see also Parker, *supra* note 90, at 602–11 (analyzing the possible Equal

The principle that charter schools are based on choice is a principle that is being transformed in what may be called the “conversion” or “accountability” charter school model.¹²⁴ As more traditional public schools fail and charter schools become an option for student transfer or a traditional public school is converted to a public charter school parents, students, and teachers may be forced to choose a charter school because of the lack of traditional public schools available.

The New Orleans schools represent an example of how charter schools are transforming from a choice model to an accountability model. In Louisiana, the major alternative for a failing school under the RSDA is to place it under the jurisdiction of the state-run RSD.¹²⁵ It is clear from the current composition of the schools operating in the 2006–2007 school year that the state is delegating the task of administering the New Orleans public schools.¹²⁶ Over half of the charter schools in operation are Type 5 charters that are overseen by RSD and are essentially autonomous stand-ins for RSD operated schools.¹²⁷ This substantial reliance on the charters indicates that the state may not have the intention, resources, or personnel to administrate individual public schools itself.¹²⁸ Also, the state may find that there is no significant improvement gained in student achievement by simply shifting the governmental institution overseeing the public schools.¹²⁹ In order to fill this void of leadership, resources, and vision, charter school operators provide an attractive alternative.¹³⁰

Protection Clause problems with charter schools catering to a single gender or race).

¹²⁴ Some states, such as California, designate charter schools that are converted from a failing public school as “conversion” charter schools. See Cal. Dept. of Educ., California Charter School Facts, <http://www.cde.ca.gov/sp/cs/re/csfactsapr04.asp> (last visited July 6, 2007).

¹²⁵ See LA. REV. STAT. ANN. § 17:10.5(A)(1) (2007) (“An elementary or secondary school operating under the jurisdiction and direction of any city, parish, or other local school board or any other public entity which is deemed academically unacceptable . . . shall be designated as a failed school. . . . [W]hen . . . the school has been labeled an academically unacceptable school for four consecutive years, the school shall be removed from the jurisdiction of the city, parish, or other local public school board or other public entity and transferred to the jurisdiction of the Recovery School District.”).

¹²⁶ See *supra* tbl.1.

¹²⁷ RECOVERY SCHOOL DISTRICT LEGISLATIVELY REQUIRED PLAN, *supra* note 2, at 12.

¹²⁸ See Saiger, *supra* note 18, at 887 (stating that by embracing the charter school model, the state avoids the significant management problems associated with administration of the schools).

¹²⁹ John McDonough High School is the most compelling example of the likely failure of the Recovery School District to dramatically improve student achievement or school conditions at individual public schools. See Adam Nossiter, *Students After the Storm, Left Alone and Angry*, N.Y. TIMES, Nov. 1, 2006, available at LEXIS, News Library, NYT File (describing the dire conditions at the RSD-administered school, including security problems and the lack of books and other basic supplies); Associated Press, *Struggling New Orleans Schools Are Having Trouble Finding Teachers*, Jan. 24, 2007, available at <http://www.iht.com/articles/ap/2007/01/25/america/NA-GEN-US-Katrina-Finding-Teachers.php> (reporting that traditional public schools in the Recovery School District are having difficulty recruiting teachers, while New Orleans’ charter schools are not facing the same problem); see *infra* Part III.C (commenting on how charter schools face similar accountability challenges as traditional public schools).

¹³⁰ See, e.g., Press Release, Department of Education, *No Child Left Behind* and Charter Schools:

Charter schools provide an attractive alternative primarily because the nature of the charter school is that it is an autonomous entity.¹³¹ Thus, the charter school and its operators are charged with the tasks that typically fall to the local school district: determining curriculum, managing personnel issues, and overseeing school budgets.¹³² Therefore, in the charter school alternative framework a state faced with the prospect of taking over failing public schools will not be forced to act as a local school district; instead, it is simply a chartering authority.

The Louisiana Board of Elementary and Secondary Education (“BESE”) has the responsibility of advising applicants for charter schools, evaluating the charter application, granting charters, and providing oversight of the existing schools.¹³³ This oversight will include decisions as to whether to renew charters for the existing schools based on standards of student performance, financial performance, and adherence to legal and contractual obligations.¹³⁴ States have found that even though this responsibility of chartering schools may be delegated away to privately run entities, such as the National Association of Charter School Authorization (“NACSA”), the oversight of charter schools will undoubtedly demand increased personnel and financial resources at the state level.¹³⁵

States may choose to rely on private entities in the chartering process because of the state’s lack of administrative expertise in the charter school area. In 2000–2001, there were only twenty-one charter schools in all of Louisiana.¹³⁶ In one school year, the city of New Orleans has exceeded the number of charter schools in the rest of the state combined.¹³⁷ BESE officials will be forced to be as or more knowledgeable than charter school operators to provide proper oversight of the charter schools.¹³⁸ This will be difficult in a charter school landscape where many of the charter school operators have experience in the start-up and administration of these

Giving Parents Information and Options (June 2006), available at <http://www.ed.gvo/print/nclb/choice/charter/nclb-charter.html> (“Charter schools’ emphasis on accountability, flexibility and local control make them attractive educational alternatives for many families.”).

¹³¹ See Bulkley & Wohlstetter, *supra* note 15, at 1 (“Charter schools, by definition, are schools of choice that operate with more autonomy (and fewer regulations) under a charter or contract issued by a public entity.”).

¹³² Wohlstetter & Chau, *supra* note 89, at 53; Priscilla Wohlstetter et al., *Charter Schools in California: A Bruising Campaign for Public School Choice*, in *THE CHARTER SCHOOL LANDSCAPE* 32, 37 (Sandra Vergari ed., 2002).

¹³³ See RECOVERY SCHOOL DISTRICT LEGISLATIVELY REQUIRED PLAN, *supra* note 2, at 43–44 (describing state control of charter school authorization and oversight).

¹³⁴ *Id.* at 44.

¹³⁵ See *id.* (stating that the Louisiana Board of Elementary and Secondary Education (“BESE”) will use the NACSA standards to evaluate charter schools).

¹³⁶ Vergari, *supra* note 16, at 9.

¹³⁷ See *supra* tbl.1.

¹³⁸ See *infra* Part IV.C.

schools.¹³⁹ While this experience is an advantage to the charter schools themselves, it means that the state administrative agency may be handicapped in its oversight capabilities.¹⁴⁰

Beyond the autonomous nature of charter schools, another reason that charter schools may be seen by the state as an attractive alternative to traditional public schools is that proponents of charter schools have claimed that these schools have the ability to promote greater student achievement among low income and minority students.¹⁴¹ While the overall politics surrounding race, socioeconomics, and charter schools is complicated, there is no doubt some legal scholars and educational policy experts view charter schools as an important alternative for the most at-risk public school students.¹⁴² This argument takes on additional resonance in a

¹³⁹ See Interview with Carol Christen, Principal, Benjamin Franklin High School, in New Orleans, La. (Dec. 1, 2006) (on file with Connecticut Law Review). For example, the principal of John McDonogh 15 charter school has already been principal at two other charter schools.

¹⁴⁰ See *infra* Part IV.C.

¹⁴¹ See, e.g., Bruce Fuller et al., *Localized Ideas of Fairness: Inequality Among Charter Schools*, in *TAKING ACCOUNT OF CHARTER SCHOOLS: WHAT'S HAPPENED AND WHAT'S NEXT?* 93, 94–99 (Katrina E. Bulkley & Priscilla Wohlstetter eds., 2004) (explaining that grass roots activists in the Latino and African-American community are an important segment of charter school advocates and that charter schools have the potential to provide an alternative to unresponsive traditional public schools); John B. King, Jr., *Fulfilling the Hope of Brown v. Board of Education Through Charter Schools*, in *THE EMANCIPATORY PROMISE OF CHARTER SCHOOLS: TOWARD A PROGRESSIVE POLITICS OF SCHOOL CHOICE* 55, 61–66 (Eric E. Rofes & Lisa M. Stulberg eds., 2004) (detailing the success of Roxbury Preparatory Charter School, a majority African-American charter school in Boston).

¹⁴² One of the most vigorous debates surrounding the charter school movement is the question of whether charter schools promote or devalue the goal of racial or gender equality. See Lisa M. Stulberg, *What History Offers Progressive Choice Scholarship*, in *THE EMANCIPATORY PROMISE OF CHARTER SCHOOLS: TOWARD A PROGRESSIVE POLITICS OF SCHOOL CHOICE* 7, 18–19 (Eric E. Rofes & Lisa M. Stulberg eds., 2004) (discussing the contradictory social science on the issue of whether school choice plans increase racial and socioeconomic segregation).

Some critics of charter schools argue that charter schools are more racially and socioeconomically homogeneous than traditional public schools. See Wells, *supra* note 21, at 15 (“[A] national study by researchers at NYU demonstrated that within their local contexts, charter schools are often more racially and socioeconomically isolated than nearby public schools.”). In order to address these equity concerns, several states’ charter school statutes included “racial balancing” provisions that require the racial makeup of each charter school to mirror the racial makeup of the local school district. Parker, *supra* note 90, at 592–93; see also John G. Moore, Note, *Beaufort County Board of Education v. Lighthouse Charter School Committee: Racial Balancing Provision in South Carolina Charter Schools Act Flunks the Strict Scrutiny Test*, 51 S.C. L. REV. 823, 835 (2000) (describing the invalidation of South Carolina charter school legislation due to the presence of a racial balancing provision).

Charter schools that create single race or single gender environments, including the promotion of black male academies, have also been challenged. Parker, *supra* note 90, at 602; see also Tomiko Brown-Nagin, *Toward a Pragmatic Understanding of Status-Consciousness: The Case of Deregulated Education*, 50 DUKE L.J. 753, 758 (2000) (discussing the equal protection consequences of status-conscious charter school).

Within the larger school choice debate, charter schools have also been criticized as being a method by which public funds are drained from traditional public schools and put under the control of private entities that may favor certain groups of students, including wealthy students or students of particular religious backgrounds. Vergari, *supra* note 16, at 13.

The focus of this Article is the role of charter schools in the accountability-based education reform movement. While this Article does not explore in detail these equity issues, it should be noted

school system such as that in New Orleans, where, prior to the Hurricane, the public schools were 93% black and 40% of the students lived below the poverty line.¹⁴³

Charter schools are promoted by some as particularly beneficial learning environments for minority and low income students for a number of reasons, including: smaller class sizes, culturally sensitive curricula, and community and parent driven school governance.¹⁴⁴ Also, many of the traditional public schools that continue to produce low student achievement on standardized tests serve these at-risk students, making alternative educational environments of even greater importance.¹⁴⁵

C. Phase Three: Charter School Accountability

The third phase of the accountability cycle occurs when “conversion” or “accountability” charter schools begin to experience the same accountability challenges as traditional public schools and ultimately some are unable to meet those challenges. There is a potential circularity in that these conversion charter schools, when measured against the same, or more rigorous, accountability standards as the traditional public schools, will also fail. As one education policy expert has noted:

A key component of the charter school concept is the notion that accountability for rules is replaced by

that there may be serious equity concerns in the emerging New Orleans’s charter schools. Of the thirty-two charter schools currently open, six are selective admission. *See supra* tbl.1. Moreover, of the remaining traditional public schools administered by the Orleans Parish School Board, four out of five are selective admissions. *See supra* tbl.1. The racial makeup of some of the selective admissions schools may not reflect the racial makeup of the city. For example, Benjamin Franklin High School, previously a magnet public school, is now a selective admission charter high school with a largely Caucasian student body. *See* National Center for Education Statistics, <http://nces.ed.gov/ccd/schoolsearch/> (enter “220117000888” as the NCES School ID and search) (noting that approximately 56% of the student body in the 2004–2005 school year was white).

¹⁴³ RECOVERY SCHOOL DISTRICT LEGISLATIVELY REQUIRED PLAN, *supra* note 2, at 9.

¹⁴⁴ *See* Carol Ascher & Nathalis Wamba, *An Examination of Charter School Equity*, in SCHOOL CHOICE AND DIVERSITY: WHAT THE EVIDENCE SAYS 77, 91 (Janelle T. Scott ed., 2005) (synthesizing the social science on charter schools and equity and concluding that some urban charter schools are providing “high-quality educational opportunities to low-income children of color in segregated environments”); Nina K. Buchanan & Robert A. Fox, *Back to the Future: Ethnocentric Charter Schools in Hawai’i*, in THE EMANCIPATORY PROMISE OF CHARTER SCHOOLS: TOWARD A PROGRESSIVE POLITICS OF SCHOOL CHOICE 77, 78–79 (Eric E. Rofes & Lisa M. Stulberg eds., 2004) (tracing the history of ethnocentric charter schools back to the Black Power Movement of the late 1960s and noting that Hawaiian charter schools emphasize cultural traditions and values); Patty Yancey, *Independent Black Schools and the Charter Movement*, in THE EMANCIPATORY PROMISE OF CHARTER SCHOOLS: TOWARD A PROGRESSIVE POLITICS OF SCHOOL CHOICE 125, 125 (Eric E. Rofes & Lisa M. Stulberg eds., 2004) (noting that one quarter of the charter schools currently open were founded to create a new vision for public schooling and one aspect of this idea is providing education for a target population such as at-risk minority students).

¹⁴⁵ *See* King, *supra* note 141, at 59–61 (concluding that educational policy research indicates that in order to bridge the achievement gap “more complex and organic” changes must be made including making charter schools available as an option to the most at-risk students).

accountability for performance. Charter schools engage in a bargain with the public: in return for relief from the bureaucratic rules and regulations imposed on traditional public schools, charter schools are supposed to be held to a higher standard of accountability for results. If a charter school does not meet the provisions of its charter, fails to uphold applicable state and local statutes and rules, or lacks support from parents, teachers, and students, it is to be closed.¹⁴⁶

The third step of the accountability cycle is inherent to the charter school concept itself: it is the notion that, inevitably, some charter schools will fail.¹⁴⁷ Ironically, because the chartering process requires renewal of the charter on average in the first three or five years of the school, charters are likely to close more rapidly than a traditional public school under the requirements of NCLB.¹⁴⁸

The most likely scenario, in which a conversion charter school will fail to meet accountability measures, is it will be unable to improve student achievement on standardized tests. For example, the Louisiana charter school statute provides that the new charter schools must conduct the same standardized testing as any public school.¹⁴⁹ In March of 2007, the LEAP standardized test was administered for the first time in charter schools formed after the Hurricane.¹⁵⁰ Many of the charter school students are the same students that, prior to Hurricane Katrina, were multiple grades behind in terms of English and math skills.¹⁵¹ If students do not demonstrate

¹⁴⁶ Vergari, *supra* note 16, at 10.

¹⁴⁷ *See id.* (noting that as of December 2000, eighty-six charter schools, or four percent of all charter schools open at the time had closed due to failure).

¹⁴⁸ *See, e.g.*, LA. REV. STAT. ANN. § 17:3992(A)(1) (2007) (stating that an approved charter school is valid for an initial period of five years, contingent upon the results of reporting requirements at the end of the third year).

¹⁴⁹ *See* LA. REV. STAT. ANN. § 17:3991(c)(2) (“A charter school shall conduct the pupil assessments required by the state board for pupils in other public schools.”).

¹⁵⁰ *See* Darran Simon, *N.O. Schools Seek LEAP Waiver, Some BESE Members are Cool to Proposal*, NEW ORLEANS TIMES PICAYUNE, Feb. 17, 2007, at Metro 1, available at LEXIS, News Library, NOTPIC File (announcing that LEAP will administer the test to students between March 19 and 23, although some public school officials were urging waiver for students who meet certain requirements); *New School Performance Scores Released; Comparisons Difficult*, US STATE NEWS (BATON ROUGE), Oct. 23, 2006, available at LEXIS, News Library, USSTNW File (acknowledging that Orleans Parish schools opted out of the School Accountability tests for 2006); Interview with Gary Robichaux, Principal, KIPP McDonough 15 Charter School, in New Orleans, La. (Nov. 30, 2006) (on file with Connecticut Law Review) (noting that there is not enough participation by the teaching administration in the development of the LEAP test).

¹⁵¹ *See* Michael Kunzleman, *In Post-Katrina New Orleans, Educators, Students Embrace Charter Schools*, MSN.COM, <http://encarta.msn.com/encnet/Departments/Elementary/?article=InPostKatrina> (last visited May 24, 2007) (stating that the 2007 LEAP tests are the first statistical measure of whether the post-Hurricane charter schools are a viable replacement for the traditional public schools); *see also* MARTIN CARNOY ET AL., *THE CHARTER SCHOOL DUST UP: EXAMINING THE EVIDENCE ON ACHIEVEMENT AND ENROLLMENT* 14 (2005) (noting that Center for Education Reform disputes

significant academic improvement, the state has the authority to refuse to renew the charter.¹⁵² The likely outcome is that some of the charter schools will be unable to produce these results.

Although there is not yet specific student achievement data from the post-Hurricane Katrina charter schools, there have been significant questions raised about the general ability of charter schools to improve student achievement.¹⁵³ The National Center for Education Statistics (“NCES”) gathers information on the national performance of charter school students based on test results from the National Assessment of Educational Progress (“NAEP”).¹⁵⁴ The NCES 2004 and 2006 summaries of the NAEP data reveal that fourth graders in traditional public schools are performing better on both reading and math standardized tests than students in charter schools.¹⁵⁵

Advocates of charter schools sharply criticized the NCES findings on several grounds. First, the charter school advocates claimed that many charter schools are too new to adequately measure the competence of staff and instructional approach.¹⁵⁶ These advocates argue that charter schools should be given more time before these scores are used to hold the schools

comparing charter school and traditional public school student achievement because charter school students typically enter the classroom two or three grade levels below average).

¹⁵² See LA. REV. STAT. ANN. § 17:3992 (A)(2) (2007) (“No charter shall be renewed unless the charter renewal applicant can demonstrate, using standardized test scores, improvement in the academic performance of pupils over the term of the charter school’s existence”); Nathan, *supra* note 121, at 24 (noting that the Minnesota state board of education and the local school district in St. Paul decided to close several of the charter schools they authorized due to poor records of improving academic achievement). *But see* Wohlstetter et al., *supra* note 132, at 44 (noting that California has experienced very few charter school closures, and that as of 2001 no charter schools were closed due to poor student performance).

¹⁵³ See Christopher Lubienski, *Charter School Innovation in Theory and Practice: Autonomy, R&C, and Curricular Conformity*, in TAKING ACCOUNT OF CHARTER SCHOOLS: WHAT HAPPENED AND WHAT’S NEXT 53, 54–57 (2004) (noting that many education reformers and policymakers believed that charter school autonomy would lead to innovative curriculum and instruction that would improve student achievement, but that these assumptions regarding autonomy have proven to be unsubstantiated and possibly wrong); Wells, *supra* note 21, at 11 (“Thus far, there is no strong or consistent evidence that charter schools have improved student achievement—as measured by state-mandated assessments anyway—or that they are being held more accountable for academic outcomes than regular public schools.”). *But see* U.S. DEP’T OF EDUC., OFFICE OF INNOVATION & IMPROVEMENT, INNOVATIONS IN EDUCATION: SUCCESSFUL CHARTER SCHOOLS 1–5 (2004), available at <http://www.ed.gov/admins/comm/choice/charter/report.pdf> [hereinafter SUCCESSFUL CHARTER SCHOOLS] (profiling eight successful charter schools, and listing the types of innovations that charter school operators use to increase student achievement).

¹⁵⁴ CARNOY ET AL., *supra* note 151, at 9.

¹⁵⁵ NAT’L CTR. FOR EDUC. STAT., A CLOSER LOOK AT CHARTER SCHOOLS USING HIERARCHICAL LINEAR MODELING, at vi (2006); *see also* Diana Jean Schemo, *Study of Test Scores Finds Charter Schools Lagging*, N.Y. TIMES, Aug. 23, 2006, at A14, available at LEXIS, News Library, NYT File (discussing the rising performance standards of public school students in general).

¹⁵⁶ CARNOY ET AL., *supra* note 151, at 15. These authors agree with the charter school supporters that the performance of charter schools should not be judged on a single year of data from the NAEP. The authors also agree that performance standards, such as the NCLB standards that measure the “point-in-time” test scores rather than gain scores are flawed. *Id.* at 21–23.

accountable.¹⁵⁷ The charter school advocates also claim that the charter schools service more minority students and more socio-economically disadvantaged students than the traditional public schools, thus accounting for the difference in test scores.¹⁵⁸

While there may be explanations for the superior test performance of traditional public school students over charter school students, the differential results remain. In state-level studies, the underperformance of charter school students has also been documented.¹⁵⁹ One group of educational policy experts examined nineteen different studies from eleven states and the District of Columbia and concluded that “there is no evidence that, on average, charter schools out-perform regular public schools. In fact, there is evidence that the average impact of charter schools is negative.”¹⁶⁰

There are significant implications for the accountability cycle from this social science research indicating that, on average, student achievement does not improve in charter schools. First, it would seem that despite the above evidence the federal government and state legislatures continue to see charter schools as one of the preferred alternatives to replace failing traditional public schools. The legislatures are advocating an alternative to traditional public schools that has not been proven to achieve the goals of accountability legislation—namely improving student achievement.

The U.S. Department of Education, despite the facts revealed in the NCES studies, continues to strongly support charter schools.¹⁶¹ Viewing charter schools as an attractive alternative should be based on a reasoned legislative judgment that these schools will outperform or at least maintain the performance of traditional public schools. The NCES and other studies cited give a strong indication that this is a flawed legislative conclusion.

Another challenge facing the success of charter schools as a replacement for traditional public schools is the increased demands on charter school administrators.¹⁶² One charter school expert has argued that

¹⁵⁷ *Id.* at 22–23.

¹⁵⁸ *Id.* at 13–14. Carnoy and the other authors examine this claim and conclude that while the number of black students attending charter schools is higher than the number of black students in traditional public schools, regular public schools have a greater share of low-income students (of all races) than charter schools. *Id.* at 33–34.

¹⁵⁹ See CARNOY ET AL., *supra* note 151, at 106 (noting that state-level studies strongly suggest that generally charter schools do not outperform traditional public schools even when the charter schools are no longer new).

¹⁶⁰ CARNOY ET AL., *supra* note 151, at 2.

¹⁶¹ See SUCCESSFUL CHARTER SCHOOLS, *supra* note 153, at v (stating that charter schools are perfectly aligned with NCLB and its accountability goals); Press Release, Dep’t of Educ., No Child Left Behind and Charter Schools: Giving Parents Information and Options (May 2007), available at <http://www.ed.gov/print/nclb/choice/charter/nclb-charter.html> (“President Bush and Margaret Spellings are committed to seeing charter schools open in every state.”).

¹⁶² See TERRENCE E. DEAL & GUILBERT C. HENTSCHE, ADVENTURES OF CHARTER SCHOOL CREATORS: LEADING FROM THE GROUND UP 65 (2004) (describing the challenges facing charter

there is a lull in the charter school movement that may be attributed to “sheer exhaustion on the part of charter school founders and educators.”¹⁶³ “[T]he energy and enthusiasm that once sustained this effort to free schools from public bureaucracies, while giving them public funds to educate students, have waned as more and more educators, parents, and would-be educational entrepreneurs have learned that running autonomous schools without adequate support is extremely difficult.”¹⁶⁴

The autonomous nature of charter schools necessarily means that many of the tasks once overseen by the local school district or other government bureaucracy are now delegated to the individual charter school and its operators.¹⁶⁵ Each top school administrator is responsible for a variety of demanding tasks including: overseeing school finance, developing curriculum, hiring and managing teachers and other school staff, and pupil assessments and discipline.¹⁶⁶

One area that charter school administrators may be unfamiliar with is the independent administration and oversight of the school budget.¹⁶⁷ Sound financial management is especially critical because the Louisiana charter school law specifies that this is an area that charter schools will be evaluated on in the charter renewal process.¹⁶⁸ Financial matters will be especially challenging in the post-Hurricane Katrina landscape in which

school operators including one charter school principal who mortgaged his house to keep the school open after government funds were late in arriving); JAMES NEHRING, *UPSTART STARTUP: CREATING AND SUSTAINING A PUBLIC CHARTER SCHOOL* 13–18 (2002) (describing the typical day in the life of a principal-teacher at a charter school in Boston, including communicating with the board of trustees, hosting academics studying the school, disciplining students, and considering financial matters); Wells, *supra* note 21, at 1 (arguing that there is a lull in the charter school movement due to the demands on the charter school operators).

¹⁶³ Wells, *supra* note 21, at 1.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ See Sibyll Carnochan, *Reinventing Government: What Urban School Districts Can Learn From Charter Schools*, in *WHERE CHARTER SCHOOL POLICY FAILS: THE PROBLEMS OF ACCOUNTABILITY AND EQUITY* 54, 60 (Amy Stuart Wells ed., 2002) (noting that charter school management is affected by decentralization in areas such as budgets, personnel, curriculum, and school goals). Carnochan tracks the difficulties with decentralization faced by three charter schools in the Mission Unified School District in California. She notes that decentralization and individual school management lead to significant conflict between charter school operators and school staff and parents. *Id.* at 61.

¹⁶⁷ See Amy Stuart Wells et al., *The Politics of Accountability: California School Districts and Charter School Reform*, in *WHERE CHARTER SCHOOL POLICY FAILS: THE PROBLEMS OF ACCOUNTABILITY AND EQUITY* 29, 43–46 (Amy Stuart Wells ed., 2002) (noting that while many charter-authorized school districts were unsure about how to measure academic accountability, there was significant attention to charter school fiscal accountability).

¹⁶⁸ See LA. REV. STAT. ANN. § 17:3991(B)(5) (2007) (stating that all charter school applications must include a financial and accounting plan); LA. BD. OF ELEMENTARY & SECONDARY EDUC., *CHARTER SCHOOL CONTRACT, FRAMEWORK FOR THE EVALUATION OF LOUISIANA CHARTER SCHOOLS*, at Exh. I 5 (May 2006), available at <http://www.doe.state.la.us/ldc/uploads/10509.pdf> [hereinafter *EVALUATION OF LOUISIANA CHARTER SCHOOLS*] (stating that BESE will annually evaluate charter schools based on financial performance including the school passing an independent audit, being in good standing as to all financial obligations, and timely financial reporting).

money for schools is being allocated by the state and federal government, administered by the state, and in which private funds are also available.¹⁶⁹ New Orleans's charter school administrators will be responsible for conducting private fundraising to supplement the per pupil expenditures from the state and any additional monies from the federal government.¹⁷⁰

IV. ADDRESSING THE ACCOUNTABILITY CYCLE

Barring an about face in the direction of education reform legislation, other urban school districts will likely see a rapid growth in the number of charter schools created to fill the gap created by a failing traditional public school system. The previous section highlighted some of the substantial challenges facing charter schools in this new role. Legislative and administrative solutions are necessary to address many of these issues.¹⁷¹

Legislative solutions are a necessary prescription in these circumstances for several reasons. First, one of the hallmarks of the "New Accountability" movement is the notion that the power and duty to reform public schools is the responsibility of the legislature and administrative agencies, instead of the courts.¹⁷² This principle is central to accountability reforms because the implementation of education reforms is not left to the determination of judges who know little about day-to-day operations of schools. Instead, the legislature sets standards and imposes consequences to make local schools more responsive to overall goals such as increasing student achievement.¹⁷³

The conclusion that public school accountability is primarily the responsibility of legislatures and administrative agencies, instead of the courts, has been recognized by the few courts who have been asked to enforce the accountability provisions of NCLB.¹⁷⁴ In *Save Our Schools v.*

¹⁶⁹ See Interview with Carol Christen, Principal, Benjamin Franklin Charter High School, in New Orleans, La. (Dec. 1, 2006) (on file with Connecticut Law Review) (discussing pressure and confusion of determining what allocations the school already received from the state and federal government hurricane relief funds).

¹⁷⁰ See NEHRING, *supra* note 162, at 174 (showing the budget worksheet for the Francis W. Parker Charter Essential School in Boston which indicates that the second largest revenue source for the school were private grants).

¹⁷¹ See Brown-Nagin, *supra* note 142, at 871–72 (advocating legislative solutions as a method for state legislatures to respond to equal protection concerns raised by some charter school legislation).

¹⁷² Saiger, *Legislating Accountability*, *supra* note 18, at 1656. *But see* James S. Liebman & Charles F. Sabel, *The Federal No Child Left Behind Act and the Post-Desegregation Civil Rights Agenda*, 81 N.C. L. REV. 1703, 1743 (2003).

¹⁷³ *Id.* at 1656–57.

¹⁷⁴ See Sarah D. Greenberger, *Enforceable Rights, No Child Left Behind, and Political Patriotism: A Case for Open-Minded Section 1983 Jurisprudence*, 153 U. PA. L. REV. 1011, 1013 (2005) (examining whether there is a private right of action to enforce the mandates of NCLB); Amanda K. Wingfield, *The No Child Left Behind Act: Legal Challenges as an Underfunded Mandate*, 6 LOY. J. PUB. INT. L. 185, 186–87 (2005) (discussing obstacles to private plaintiffs challenging NCLB, including issues of standing, exhaustion of administrative remedies, and courts' reluctance to interfere in education policy matters).

District of Columbia Board of Education, a community-based nonprofit organization and some its individual members brought suit against state and local officials to seek institutional change in the D.C. public schools and to enforce certain provisions of NCLB.¹⁷⁵ The plaintiffs alleged that the defendants violated their Fifth Amendment rights to due process and equal protection of the laws by operating a public school system well below the national standard.¹⁷⁶ The plaintiffs also claimed that the Department of Education's requirement that D.C. schools comply with NCLB without providing funding to comply with the statute violated their due process rights.¹⁷⁷

The district court characterized the plaintiffs' claims as "a diatribe against the public school system in the District of Columbia" and concluded that most of their claims should be dismissed.¹⁷⁸ The court dismissed Count Five of the plaintiffs' complaint in which they claimed that the D.C. schools suffered from "complete lack of accountability," "overall ineptness," and "gross mismanagement."¹⁷⁹ The court concluded that the plaintiffs failed to identify the due property interest they claim was violated by the defendants' alleged conduct.¹⁸⁰ The court declined to interfere in what it classified as the plaintiffs' "unhapp[iness] with the administration of the public school system and wish that the defendants were more responsive to their complaints."¹⁸¹

The district court also noted that "the Supreme Court has made clear that federal courts should be hesitant to interfere with school management issues."¹⁸² Ultimately, the court concluded that "Plaintiffs' displeasure with the management of the District's schools and the policy decision of various school officials must be dealt with in the political realm."¹⁸³

¹⁷⁵ See *Save Our Schools-Se. & Ne. v. D.C. Bd. of Educ.*, No. 04-01500(HHK), 2006 WL 1827654, at *1 (D.D.C. July 3, 2006).

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at *2.

¹⁷⁸ *Id.* at *1.

¹⁷⁹ *Id.* at *17.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*; see also *Goss v. Lopez*, 419 U.S. 565, 578 (1975) ("Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint By and large, public education in our nation is committed to the control of state and local authorities.") (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)); *Villeneuve v. Carere*, 85 F.3d 481, 488-89 (10th Cir. 1996) ("[A]lthough education is not a 'fundamental right' in the United States, good parents nonetheless have fundamental aspirations about the education of their children. Hence it is not surprising that these convictions should produce conflicts that run equally deep. Yet all disagreements cannot be resolved by the federal courts, especially when they relate to local education policies upon which both warring factions hold deep and sincere beliefs. This question is political, not legal.").

¹⁸³ *Save Our Schools*, 2006 WL 1827654, at *17. Ironically, the only plaintiff's claim that survived was a cause of action against a D.C. charter school. The plaintiffs alleged that Two Rivers charter school was founded by white parents who believed the public schools of D.C. had too many African-American students. *Id.* at *1. The district court refused to dismiss the plaintiffs' equal protection claims against Two Rivers. *Id.* at *17.

In another case, a group of public school parents and the Association of Community Organizations for Reform Now brought suit under 42 U.S.C. § 1983 against New York City local school district officials and the schools' superintendent, claiming violation of NCLB.¹⁸⁴ The plaintiffs claimed that the defendants failed to comply with the accountability provisions of NCLB, specifically, the right of students in New York City and Albany to transfer out of failing schools and receive supplemental education services.¹⁸⁵ The defendants moved to dismiss the plaintiffs' NCLB claim on the basis that the statute does not provide a private right of action.¹⁸⁶

Upon reviewing the NCLB accountability provisions, the district court found that NCLB "contains no procedure for parents or students to seek judicial, administrative, or any other remedies for alleged noncompliance with the dictates of the Act."¹⁸⁷ The court noted that the only remedy in the statute for a state or local school board's failure to comply with the statute's accountability provisions is for the U.S. Department of Education to withhold federal funds from the state until it fulfills the statute's requirements.¹⁸⁸ In applying the *Gonzaga University v. Doe* standard for demonstrating a private right of action under a statute,¹⁸⁹ the district court concluded that "it is clear that Congress did not intend to create individually enforceable rights with respect to the notice, transfer or SES provisions contained in the NCLBA."¹⁹⁰

Save Our Schools and *Association of Community Organizations* indicate that courts will be reluctant to enforce the accountability provisions contained in education reform statutes like NCLB. The courts indicate that these matters of educational policy are best left to policymakers such as Congress and the Department of Education. Thus, legislatures and administrative agencies must address concerns about the role that charter schools play in education reform legislation.

State legislatures and educational agencies seeking to maximize the effectiveness of charter schools in the New Accountability framework should consider the following legislative and administrative actions: (1)

¹⁸⁴ See *Ass'n of Cmty. Orgs. for Reform Now v. N.Y.C. Dep't of Educ.*, 269 F. Supp. 2d 338, 339 (S.D.N.Y. 2003).

¹⁸⁵ *Id.* at 342.

¹⁸⁶ *Id.* at 339.

¹⁸⁷ *Id.* at 342.

¹⁸⁸ *Id.*

¹⁸⁹ *Gonzaga University v. Doe*, 536 U.S. 273 (2002). In *Gonzaga*, the Supreme Court held that an individual may not bring a § 1983 suit to enforce the Family Educational Rights and Privacy Act of 1974 ("FERPA"), because the statutory language failed to create any personally enforceable rights. *Id.* at 276. The district court in *Association of Community Organizations* noted the similarity between FERPA and NCLB, in that they were both created pursuant to Congress' spending power and conditioned the receipt of federal funds on a State's commitment to complying with the statute's requirements. *Ass'n of Cmty. Orgs. for Reform Now*, 269 F. Supp. 2d at 343.

¹⁹⁰ *Ass'n of Cmty. Orgs. for Reform Now*, 269 F. Supp. 2d at 344.

legislatures should amend charter school and accountability legislation to explicitly acknowledge the role of charter schools in the state's accountability model; (2) state educational agencies should incorporate normative standards into charter school authorization and renewal regulations by preferring charter schools that utilize proven "best practices"; and (3) charter school expertise in the state board of education should be promoted by appropriating resources for training and ending delegation of charter school authorization to private entities such as the National Association of Charter School Authorizers.

A. *Reconciling Accountability and Charter School Statutes*

An initial legislative consideration necessary to addressing the accountability cycle problem is for state legislatures to amend charter school and accountability legislation to acknowledge the central role that charter schools will likely play in their state accountability measures. Most state charter school legislation predates No Child Left Behind and the state accountability legislation that followed.¹⁹¹ Thus, many state legislatures have not had sufficient opportunity to consider the emerging role of "conversion" charter schools as a replacement for failing traditional public schools. For example, in Louisiana, the charter school legislation was initially adopted in 1997, while the Recovery School District Act followed over five years later.¹⁹²

In order to acknowledge the charter schools' shifting and expanding role, state legislatures should consider amending their charter legislation to include the new goal of charter schools, which is to replace traditional public schools failing under accountability principles. Louisiana's charter legislation currently states that the purpose of the charter school law is

[t]o authorize experimentation by city and parish school boards by authorizing the creation of innovative kinds of independent public schools for pupils. Further, it is the intention of the legislature to provide a framework for such experimentation by the creation of such schools, a means for all persons with valid ideas and motivation to participate in the experiment, and a mechanism by which experiment results can be analyzed, the positive results repeated and

¹⁹¹ As explained in Part III.A, while many states had accountability provisions prior to the passage of NCLB, NCLB places additional emphasis on providing alternatives, such as transfer to charter schools to students in failing schools.

¹⁹² Compare LA. REV. STAT. ANN. § 17:3972 (2007) (granting school boards the authority to experiment with the creation of charter schools and other independent public schools) with *Id.* § 17:10.5 (2006) (mandating the transfer of schools deemed academically unacceptable pursuant to statewide rules from the jurisdiction of the local school board to the jurisdiction of the Recovery School District).

replicated, if appropriate, and the negative results identified and eliminated. Finally, it is the intention of the legislature that the best interests of at-risk pupils shall be the overriding consideration in implementing the provisions of the Chapter.¹⁹³

The emphasis of the Louisiana charter school legislation is rooted in the original concepts of charter school values: choice, innovation and autonomy in exchange for producing positive results.¹⁹⁴ The current landscape of public schools in New Orleans demonstrates that beyond these original principles, the purpose of the charter schools has expanded to include providing a replacement for failing traditional public schools. Thus, the charter school legislation should include in its goals the need for charter schools to be successful replacements for a traditional public school system.

In order to acknowledge this new role of charter schools, some of the statutory goals and language from accountability statutes should be incorporated into the charter school legislation. For example, in Louisiana's Recovery School District Legislatively Required Plan ("Plan"), the state incorporates the goals of the RSD into a statement on the framework for evaluating Louisiana's charter schools.¹⁹⁵ The Plan notes the general purpose of the charter school law and then states that "the Recovery School District Law has created the Recovery School District for the purpose of improving failing schools and provides for a failed school to be reorganized, as necessary, to most likely bring the school to an acceptable level of performance."¹⁹⁶

The Louisiana legislature should consider incorporating a similar statement into its charter school legislation. By amending the charter legislation to acknowledge that charter schools are a key component in the reorganization of school districts and schools in academic crisis, the legislature will be forced to formally contemplate and either accept or reject the increased importance of charter schools in the public school system.

Surprisingly, even those state legislatures that adopted charter school legislation after NCLB have failed to explicitly acknowledge that charter schools are being used as a tool for reorganizing and replacing failing traditional public schools. For example, Maryland's charter school legislation, passed in 2003, states that its purpose is to encourage

¹⁹³ *Id.* § 17:3972(A).

¹⁹⁴ See Nathan, *supra* note 121, at 20–21 (explaining the original charter school philosophy as developed in Minnesota, including the emphasis on autonomy and innovation).

¹⁹⁵ RECOVERY SCHOOL DISTRICT LEGISLATIVELY REQUIRED PLAN, *supra* note 2, at 43.

¹⁹⁶ *Id.*

innovation and alternatives within the public school system.¹⁹⁷ Despite this claim, charter schools are being authorized predominately in the Baltimore area as a response to the academic failures of the Baltimore school district.¹⁹⁸

The failure of the Maryland legislature to address this reality has led to a number of serious deficiencies in its charter school legislation. For instance, the Maryland legislature has failed to develop policies to assist charter school operators in gaining access to the necessary school facilities.¹⁹⁹ Also, due to ambiguities in the state charter school legislation, there have been ongoing disputes between charter school operators and local school boards as to how the charter schools should be funded.²⁰⁰ A statement of purpose in the charter school legislation would help to direct other refinements in the legislation, such as providing charter schools with adequate facilities and ensuring that these schools are adequately funded so that they will prove to be successful alternatives to failing traditional public schools.²⁰¹

B. Incorporating “Best Practices” Into State Regulations

Current charter school legislation in most states is neutral as to the actual policies and practices of individual charter schools. This neutrality is intentional because a key assumption in the charter school movement is that charter schools should be autonomous and that state and local school district regulations inhibit innovation.²⁰² Charter school legislation typically requires only that the chartering authority determine that the charter operators have met the guidelines to receive a charter.²⁰³ Charter school proposals typically must include plans for financial performance, school organization and governance, and student assessments and

¹⁹⁷ AN EVALUATION OF THE MARYLAND CHARTER SCHOOL PROGRAM, *supra* note 83, at 5.

¹⁹⁸ *See id.* at 12 tbl.1 (showing that sixteen of the twenty-five operating or approved charter schools in Maryland are in the Baltimore public school district). The report also notes that 61% of all students enrolled in Maryland charter schools were previously enrolled in traditional public schools, demonstrating that these schools are being used as a clear alternative to the public school system. *Id.* at 5.

¹⁹⁹ AN EVALUATION OF THE MARYLAND CHARTER SCHOOL PROGRAM, *supra* note 83, at 5.

²⁰⁰ *See City Neighbors Charter Schl. v. Baltimore City Bd. Of Comm’rs*, 906 A.2d 388, 391 (Md. Ct. Spec. App. 2006).

²⁰¹ Louisiana has found a way to provide adequate facilities for its charter schools that replace the traditional public schools. The Recovery School District Act (RSDA) provides that the Recovery School District (RSD) may take over the school buildings of failing schools. LA. REV. STAT. ANN. § 17:1990(B)(4)(a) (2007). The RSD also has the power to allow charter schools to use those school buildings. *Id.*

²⁰² Wohlstetter et al., *supra* note 132, at 37. Although charter school legislation is typically neutral as to the type of curriculum used, and the students enrolled in the charter school, some states such as California and Colorado have included a preference that charter schools focus on servicing at-risk students. *Id.*

²⁰³ *Id.*

performance goals.²⁰⁴ The increasing data demonstrates that charter schools generally are not producing the same or increased student achievement as compared to traditional public schools.²⁰⁵ Such data indicates that modifications are needed in the standards for charter school authorization and renewal.²⁰⁶

The Louisiana charter school legislation provides no particular guidance to charter school operators on the best educational mission or curriculum to adopt in their schools.²⁰⁷ This is likely due to the longstanding concept of charter schools as autonomous entities, even as to fundamental concerns such as school mission. However, with the advent of a majority charter school system in New Orleans, it is incumbent upon the state educational agency and charter authorizing entities to help ensure that these schools are successful.

With the mixed evidence on the general success of charter schools in improving student achievement, state agencies should begin to study the characteristics of successful charter schools and incorporate these “best practices” into regulations for charter authorizers to follow when granting or renewing a charter.²⁰⁸ The incorporation of “best practices” regulations as charter school legislation would not impede innovation or autonomy because charter school operators would not be required to follow the “best practices.” Instead, including these principles would go further in memorializing what types of innovative ideas and experimentation in the charter school context have proved to be successful.²⁰⁹

What are the “best practices” that state agencies should begin to

²⁰⁴ See, e.g., LA. REV. STAT. ANN. § 17:3991(B)(5), (8), (10), (14), (21) (stating that in order for a charter to be approved, the schools plan must include a “financial and accounting plan sufficient to permit a governmental audit;” “[t]he specific academic and other educational results to be achieved;” “[t]he organizational, governance and operational structure of the school;” “[s]chool rules and regulations applicable to pupils including disciplinary policies and procedures;” and “[a] requirement that charter schools regularly assess the academic progress of their pupils”); NAT’L ASS’N OF CHARTER SCHOOL AUTHORIZERS, PRINCIPLES AND STANDARDS FOR QUALITY CHARTER SCHOOL AUTHORIZING 2 (2007), available at http://www.qualitycharters.org/files/public/final_PS_Brochure.pdf (“A quality charter school is characterized by high student achievement, financial stewardship, and responsible governance.”).

²⁰⁵ See *supra* Part III.C.

²⁰⁶ *Id.*

²⁰⁷ See LA. REV. STAT. ANN. § 17:3991(B)(2)–(23) (describing the requirements for a charter school application, with a focus on general statements as to school mission, admission requirements, goals for student achievement, and insurance coverage).

²⁰⁸ For over three decades social scientists have studied the practices of effective schools. King, *supra* note 141, at 57. This literature, known as effective schools research, studies schools where student performance on standardized tests is higher than would be predicted based on the student demographic background. *Id.* This effective practices research and the literature that responds to it, through studies of school culture, is based on the idea that successful school models should be studied and then duplicated. *Id.*

²⁰⁹ The Louisiana charter school statute already claims that one of its goals is to analyze the results of the charter school experiment, then repeat and replicate any positive results. LA. REV. STAT. ANN. § 17:3972A.

incorporate into their regulations? The Department of Education and educational policy experts have studied successful charter school models.²¹⁰ A review of these studies presents some apparent trends. These trends include an emphasis on defining a specific mission for the school, incorporating actual innovative practices such as longer school days and detailed daily progress reports on a student's ability to master required skills, and requiring parental involvement.²¹¹

The Department of Education created the Office of Innovation and Improvement to identify "concrete, real-world examples" of programs that improve public schools.²¹² In 2004, this office conducted a national search for successful charter schools and identified eight model charter school programs.²¹³ The schools were selected based on student performance, the range of school types (in terms of student populations and school structure), and the ability to educate low-income or underperforming students.²¹⁴

Several of the model charter schools identified by the Department of Education may be instructive for state educational agencies considering the role of charter schools as replacements for failing traditional public schools. The Arts and Technology Academy Public Charter School ("ATA") in Washington D.C. opened in 1998 after a traditional public school was closed due to low enrollment.²¹⁵ This is a scenario that may happen to other struggling public schools due to the right of student transfer provided for under NCLB.²¹⁶ ATA's student population is 98% African-American and 97% of the students qualify for the federal free lunch program.²¹⁷ ATA has a focused mission to promote student excellence through incorporating arts education with instruction in reading and math.²¹⁸ The school also utilizes an extended school day and school

²¹⁰ See King, *supra* note 141, at 61, 131, 139, 145, 155 (sharing the experiences of successful charter school operators who lead schools serving minority and low income students); see generally DEAL & HENTSCHE, *supra* note 162 (chronicling first hand accounts of obstacles to the success of charter schools and solutions created by charter school teachers and administrators).

²¹¹ See SUCCESSFUL CHARTER SCHOOLS, *supra* note 153, at 5–15 (describing the elements of effective charter schools).

²¹² *Id.* at v.

²¹³ *Id.*

²¹⁴ *Id.* at 2. Despite the claim that the agency sought to identify charter schools meeting the needs of underserved population, two of the eight identified schools appear to serve mostly white and affluent populations. *Id.* at 2–3.

²¹⁵ *Id.* at 23.

²¹⁶ See No Child Left Behind, 20 U.S.C. § 6316(b)(1)(E)(i) (Supp. IV 2004) (requiring that any school designated for "improvement," notify parents and provide an option for the students to transfer to another public school). An important exception to the NCLB transfer provision is that it is not available if prohibited by state law. *Id.* The RSDA allows parents a transfer option when their student's school is transferred to the control of the RSD. LA. REV. STAT. ANN. § 17:10.5(D) (2007).

²¹⁷ SUCCESSFUL CHARTER SCHOOLS, *supra* note 153, at 23.

²¹⁸ *Id.*

year.²¹⁹ ATA supports an innovative curriculum through a multicultural social studies program and requiring all students to learn Spanish.²²⁰

KIPP (“Knowledge is Power Program”) Academy middle school in Houston was chartered in 1994 and serves predominately minority and low income students.²²¹ KIPP Houston is one of approximately thirty KIPP schools nationwide.²²² KIPP was founded by two Teach for America teachers and has the specific mission “to ‘help [its] students develop academic skills, intellectual habits and qualities of character necessary to succeed in high school, college and the competitive world beyond.’”²²³ KIPP seeks to accomplish this goal through extending student learning time during the week and by requiring students to attend two mandatory Saturdays each month and summer sessions.²²⁴ KIPP focuses on a core high school preparatory curriculum for every student.²²⁵ Also, key to KIPP’s philosophy is the KIPP Commitment to Excellence Form that must be signed by all KIPP parents and promises that parents will comply with the extended school hours, school dress code, and the homework requirements.²²⁶

The implication of these model charter school policies is a blueprint for state educational agencies to incorporate “best practices” regulations in their implementation of charter school legislation. State educational agencies should adopt regulations that direct charter school authorizing entities to identify the following elements in a charter school proposal: (1) a focused and clear school mission statement tailored to meet the needs of the student population; (2) innovative curriculum and school polices, such as an extended school year or school day; and (3) a detailed plan for the

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.* at 35; see also ABIGAIL THERNSTROM & STEPHAN THERNSTROM, NO EXCUSES: CLOSING THE RACIAL GAP IN LEARNING 49–50, 53–55 (2003) (presenting KIPP as a best practices model for charter schools).

Martin Carnoy and his co-authors note that KIPP is widely heralded as the most successful charter school model in the United States. CARNOY ET AL., *supra* note 151, at 51. This claim is generally based on the assertion that KIPP serves disadvantaged minority students and achieves high test scores. *Id.* Carnoy and his co-authors attempt to challenge some of the widely held opinions about the success of KIPP by questioning whether the students that enter KIPP middle schools are actually at-risk, or whether KIPP is simply attracting the best students from high poverty schools. *Id.* at 51–52. Despite their conclusion that “in important ways, KIPP students are not representative of students in regular public schools in disadvantaged communities,” the authors do not challenge the ultimate conclusion that KIPP schools are highly effective. *Id.* at 51.

²²² SUCCESSFUL CHARTER SCHOOLS, *supra* note 153, at 35.

²²³ *Id.*; see also CARNOY ET AL., *supra* note 151, at 51 (noting that KIPP schools are promoted as schools that serve low income minority students and maintain test scores higher than average for the same demographic groups in traditional public schools).

²²⁴ SUCCESSFUL CHARTER SCHOOLS, *supra* note 153, at 35–36; see also CARNOY ET AL., *supra* note 151, at 52–53 (describing KIPP summer sessions meant to prevent “summer setback” for entering fifth grade students).

²²⁵ SUCCESSFUL CHARTER SCHOOLS, *supra* note 153, at 36.

²²⁶ *Id.* at 37.

role of parents including, but not limited to, parents affirming the school's particular mission and school policies.²²⁷

C. Promoting Charter School Expertise in State Educational Agencies

As previously noted, accountability legislation is leading to the declining role of the local school district in the governance of public schools.²²⁸ Accountability statutes that require states to take over failing public schools increase pressure on state educational agencies charged with regulating public schools. This is especially true in the area of charter schools, in which state educational agencies are chartering authorities and also have the responsibility of renewing or canceling existing charters.²²⁹

Some states, such as Louisiana, address these increasing demands by privatizing the charter school authorization and renewal process.²³⁰ This practice wrongfully diverts responsibility to ensure that charter schools do not become a failed experiment from the state. It is essential that charter schools not fail when they are replacements for already failed traditional public schools.²³¹ Some states, such as Arizona, have already seen increasing charter school failure due mostly to financial issues.²³²

In order for the state to provide the necessary support for charter schools and to ensure they do not fail, the state educational agencies must develop expertise in the area of charter schools. Expertise has been the

²²⁷ The Louisiana Legislature codified its charter school requirements in LA. REV. STAT. ANN. § 17:3991(B) (2007). The legislation requires that a charter school proposal contain a statement as to the school's mission. *Id.* § 17:3991(B)(2). This provision does not specify that the school mission statement should be detailed and clearly identify how the mission is tailored to meet the needs of the student population the school is intended to serve. The current statute also requires a description of the education program and how the program meets the needs of at-risk students. *Id.* § 17:3991(B)(7). This statement does not specify that the education program should be innovative or what types of innovations and educational programs have been proven to increase student achievement. The current legislation also states that charter school proposals should contain "policies, programs, and practices to ensure parental involvement." *Id.* § 17:3991(B)(11). The statute should be improved by clarifying the types of parental involvement that have proven to be most effective in increasing student achievement.

²²⁸ See *supra* Part III.A.

²²⁹ See LA. REV. STAT. ANN. § 17:3983(A)(2) (stating that Type 4 and Type 5 charter schools are authorized by BESE, and that Type 2 charter schools may also be authorized through BESE); *Id.* § 17:3992(A)(1) (stating that a school's charter is good for an initial period of five years contingent upon compliance with third year reporting requirements, and that the initial chartering authority is responsible for making a decision on renewing the charter); Bulkley & Wohlstetter, *supra* note 15, at 1 (noting that charters are issued by public entities such as local school boards, public universities, or the state board of education).

²³⁰ See *supra* notes 113–117 and accompanying text.

²³¹ In October 2002 the Center for Education Reform published a study of all charter school closings. The report concluded that of the 2874 charter schools opened, 154 had already closed. The report noted that 58 closed for financial reasons, 52 for mismanagement reasons, and 14 for academic reasons. CARNOY ET AL., *supra* note 151, at 110.

²³² See *id.* at 110 (examining the charter school closures in Arizona); Hess & Maranto, *supra* note 83, at 64–67 (noting that despite substantial support from the state's governor and legislature, nineteen charter schools closed within the statute's first five years due to mediocre educational programs, which led to low enrollment and financial irregularities).

cornerstone of administrative agency theory since the rise of the administrative state in the 1930s.²³³ Courts and legislatures have repeatedly recognized that the ability of an agency to bring specialized knowledge to a particular regulated industry is the central justification for the existence of the administrative agency.²³⁴

In Arizona, policymakers initially made a decision to limit funding for the state agency's regulation of charter schools.²³⁵ The state wanted to avoid creating a bureaucracy around the charter schools.²³⁶ Despite this desire to limit state resources devoted to charter schools, in response to complaints about some of the charters, the state developed a charter school monitoring program.²³⁷ The monitoring program was designed to respond to and investigate complaints from parents, teachers, and charter school opponents.²³⁸

The most efficient way for the Louisiana BESE to develop expertise in the area of charter schools is to take an active role in the chartering, oversight, and charter renewal processes.²³⁹ Authorizing charters will assist the agency in becoming familiar with the details of the financing, curriculum, and student populations of the charter schools they oversee. BESE may need to continue their association with the National Association of Charter School Authorization to assist them with the most administrative aspects of the chartering process, but BESE itself should lead the authorization process.

In Minnesota, the state education department has also attempted to increase its efforts to assist charter school operators.²⁴⁰ After a series of charter school failures in the state due to lack of sufficient funding, low student achievement, or a combination of these factors, the agency began

²³³ See STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE* 59–63 (1993) (“Bureaucracies develop expertise in administration, but also in the underlying subject matter. They normally understand that subject matter at least well enough to communicate with substantive experts, to identify the better experts, and to determine which insights of the underlying discipline can be transformed into workable administrative practices, and to what extent”); WALTER GELLHORN, *FEDERAL ADMINISTRATIVE PROCEEDINGS* 9 (1941) (arguing that a specialized agency such as the Interstate Commerce Commission is capable of providing expert supervision of an industry that develops as the subject matter evolves).

²³⁴ See GELLHORN, *supra* note 233, at 9 (noting the unique ability of specialized agencies to provide particular expertise in their field).

²³⁵ Hess & Maranto, *supra* note 83, at 65.

²³⁶ *Id.*

²³⁷ *Id.* at 65–66.

²³⁸ *Id.*

²³⁹ Louisiana does not have a similar monitoring program. See *EVALUATION OF LOUISIANA CHARTER SCHOOLS*, *supra* note 168, at exh. I.3 (indicating that BESE's tool for evaluating charter schools is the third and fifth year evaluation process where charter schools are required to submit a report). BESE also evaluates charter schools annually as to student performance (through standardized testing), financial performance (through audits and budget review), and legal and contract performance. *Id.* at 4–5.

²⁴⁰ Nathan, *supra* note 121, at 25.

to take a more active role in providing information for charter operators.²⁴¹ The agency sponsors a series of workshops and discussions to educate charter operators on issues of charter school governance, accountability, and the role of charter-authorizing entities.²⁴² This is recognition by the state that its own agency's expertise in the area of charter schools is a vital asset to the success of individual charter schools.

In order to improve state educational agency expertise in the charter school arena, Louisiana should consider adopting a formal charter school monitoring program.²⁴³ Arizona was able to initialize its program with only two full time staffers and part time participation from other agency employees.²⁴⁴ A monitoring program would allow Louisiana BESE to be more responsive to complaints or matters of concern to parents, teachers, and charter operators. An ongoing monitoring system would also alert BESE or other charter authorizers to potential problems facing the charter before the charter's yearly reports and more extensive three and five year reviews.²⁴⁵ This additional commitment is also appropriate considering BESE's role as arguably the most important charter school authorizer in the state.²⁴⁶

V. CONCLUSION

The Post-Hurricane Katrina New Orleans' public school system may be a window through which to preview the future of traditional public schools under New Accountability measures such as No Child Left Behind and the Recovery School District Act. This look into the future of our public school system reveals the increasing importance of fledgling, experimental educational entities personified by the charter schools. The policy choices made by state legislatures and Congress as they consider and reconsider the concept of accountability must begin to reflect the most difficult policy question: will we replace our failing traditional public schools with a better model or simply a different model?

²⁴¹ *Id.* at 25–26

²⁴² *Id.* at 25.

²⁴³ The RSD administrators note that one of the main objectives of RSD is to insure that the RSD charter schools are "of the highest possible quality" by ensuring that the charter schools have adequate support from the state. RECOVERY SCHOOL DISTRICT LEGISLATIVELY REQUIRED PLAN, *supra* note 2, at 5.

²⁴⁴ Hess & Maranto, *supra* note 83, at 66.

²⁴⁵ *See supra* Part III.A.

²⁴⁶ *See supra* Part II.B.