THE ENDANGERED SCHOOL DISTRICT: THE PROMISE AND CHALLENGE OF REDISTRIBUTING CONTROL OF PUBLIC EDUCATION

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ABSTRACT

One constant in American public education reform has been the existence of a single local entity—the school district—with operational responsibility. In some places, that is changing. Fueled by undercurrents in education reform such as the embrace of broader school choice and an increase in state involvement in local education, as well as federal political alignment supporting these undercurrents, some communities are embracing a radical structural reform that redistributes operational control across a series—or portfolio—of autonomous entities.

In such communities—typically large, urban school systems serving a student population that is largely poor and made up of minority students—the term "district" no longer applies. The broad, district-wide authority of a school board and superintendent is being dispersed to a variety of operators, including state education departments, private (i.e., charter school) operators, and the preexisting district itself. Each operator enjoys substantial or even total independence from other operators, generating an autonomy that has not existed within the traditional district structure.

The Endangered School District *describes the causes and ramifications of such a substantial departure from the traditional district model and offers case studies from two communities—New Orleans, Louisiana, and Memphis/Shelby County, Tennessee—at the epicenter of urban education reform. Building on scholarship evaluating the theory of expanded school choice and operational autonomy, these case studies help demonstrate the practical challenges of applying these theories beyond isolated schools to entire educational communities.*

There is great disagreement about the wisdom of transitioning toward a portfolio model for public education. The Endangered School District *simply accepts the development as the emerging trend that it is and offers insight from two communities for making the most of such a radical structural change.*

First, the article describes the undercurrents that are enabling the portfolio strategy and the ramifications—administrative, legal, and philosophical—of moving away from the traditional district model. After introducing the case studies, the article next examines the respective new models in depth in order to

evaluate whether either can deliver as a strategy to increase educational opportunities for students. Specifically, the article identifies the dangers that these structural reforms may simply reorganize the stratified educational systems they seek to eliminate or that they may not be financially, legally, or politically sustainable over time and on such a large scale. Rather than merely identifying these challenges, the article then goes on to identify legal structures—such as state laws or bilateral agreements between public school authorizers and public school operators or even among operators themselves—that can help minimize these risks.

INTRODUCTION

As American public education reform has tinkered its way toward a more perfect system[1] that better delivers on the promise of upward social mobility through equal educational opportunity, one constant has been the existence of a single entity—the school district—with operational responsibility.[2] There have been movements to shift various responsibilities down the chain of command from school board and superintendent to principals and teachers,[3] and more recent efforts to contract with private operators in charter schools or through voucher programs.[4] However, the district model—an elected school board and superintendent controlling public education within a defined geographic area—has remained constant.[5]

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[1] DAVID TYACK & LARRY CUBAN, TINKERING TOWARD UTOPIA: A CENTURY OF PUBLIC SCHOOL REFORM (1997).

[2] John E. Chubb & Terry M. Moe, *Politics, Markets, and the Organization of Schools*, 82:4 AM. POL. SCI. REV. 1065, 1067 (1988) ("Public schools are controlled by democratic authority and administration. The specifics vary from district to district and state to state, but the basic framework is remarkably uniform throughout the country."); *see generally* DAVID TYACK, THE ONE BEST SYSTEM: A HISTORY OF AMERICAN URBAN EDUCATION (1974).

[3] Benjamin Wyman, *Decentralization Continued: A Survey of Emerging Issues in Site-Based Decision Making*, 29 J.L. & EDUC. 255 (2000) (discussing the "school-based decision making" model).

[4] *See, e.g.*, Nina Gupta, *Rationality & Results: Why School Choice Efforts Endure Despite a Lack of Improvement on School Achievement*, 3 J. MARSHALL L. REV. 199, 205-06 (2009-2010) (providing brief history of the choice movement, including both the vouchers and charter school systems).

[5] Even as districts have consolidated or splintered, changing the geographic area served, the basic district structure has remained intact. In the case of splintering districts, such as the Jordan and Canyons school districts in Utah, the structure is multiplied across the new districts; in the case of consolidated districts, such as Louisville-Jefferson County in Kentucky in the 1970s, it is combined. *See* Cunningham v. Grayson, 541 F.2d 538, 539 (6th Cir. 1976) (confirming consolidation of schools in Jefferson County); Kirsten Stewart, *10th Circuit Upholds Creation of New Utah School District*, SALT LAKE TRIB. (Jan. 7, 2010), http://www.sltrib.com/news/ci_14141998 (describing judicial approval of creation of separate district); *see also* Christopher R. Berry & Martin R. West, *Growing Pains: The School Consolidation*

In some places, that is changing. Fueled by a variety of motivations, several communities—large, urban communities with large minority and/or socioeconomically disadvantaged student populations—are embracing a radical structural reform that redistributes operational responsibility for public education across a series of entities.[6]

The term "district" may not accurately capture this emerging model anymore. In communities embracing this new structure, the responsibility of administering public education is no longer exclusively centralized with a school board and superintendent. Instead, operational responsibility is more diffusely distributed across public entities such as the local district(s) and the state, along with private operators, typically in the form of charter schools. Each operator enjoys substantial or even total autonomy from other operators, generating an independence that has not existed within the traditional district structure.[7] This model has often been termed the "portfolio" model since students and parents have a variety of choices in educational programs and even school operators.[8]

For communities that adopt this structural change, it demands a radical redistribution of operational responsibility for public education. This article seeks to describe the causes and ramifications of such a departure and offers case studies from two communities at the epicenter of urban education reform that are in the midst of implementing the new model in different ways. In both places, the structural change has been offered as a way to increase the quality of education, particularly for students not being equitably served by the traditional model.[9] Building on scholarship evaluating the theory of expanded school choice and operational autonomy, these case studies demonstrate the practical challenges

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Movement and Student Outcomes, 26 J.L. ECON. & ORG. 1, 3-4 (2010) (describing history of school consolidation including the fact that thousands of districts have been eliminated through consolidation over the past 80 years).

[6] *See Portfolio School District Network*, CTR. ON REINVENTING PUB. EDUC., http://www.crpe.org/portfolio/districts (last visited May 17, 2013) (identifying more than 30 school districts nationwide the Center recognizes as operating some version of a portfolio district).

[7] *See* Paul Hill & Christine Campbell, *Portfolio School Districts: Strife and Progress in Transforming Public Education in Big Cities* 2-3 (Dec. 2011) [hereinafter "Hill & Campbell, *Strife and Progress*"] (paper prepared for the 37th Annual Conference of the Association for Education Finance and Policy, Mar. 15-17, 2012), *available at* http://www.aefpweb.org/annualconference/papers.

[8] In order to avoid any confusion due to the use of the term "portfolio," which may mean different things to different people, this article uses the term to describe a model whereby school operational decisions are moved outside of a traditional superintendent-school board structure and where independent school operators are held accountable for performance, including by losing its operational authority. *See infra* Part I.A.

[9] *See* Hill & Campbell, *Strife and Progress*, *supra* note 7, at 2 ("In K-12 education the problem to be solved is how to educate all the children in a large city, including those from the most disadvantaged homes, effectively."); TENN. CODE ANN. § 49-13-102(a)(1) (2013) (identifying a purpose of the Tennessee charter school legislation as being to "close the achievement gap between high and low students").

of applying these theories beyond isolated schools to an entire educational community.

Part I of the article will describe what a portfolio model looks like and its theory for expanding educational opportunities, particularly in urban districts where achievement has lagged. This Part seeks to place these structural reforms embracing autonomy within the larger narrative of American education reform, identifying the currents that brought such a movement about, as well as the effects—administrative, legal, and philosophical—of moving away from the traditional district model.

Part II introduces the case studies, describing how incarnations of the portfolio model came about in New Orleans, Louisiana, and Memphis and Shelby County, Tennessee. In post-Katrina New Orleans, the model has produced an unprecedented expansion of the charter school footprint—in 2011, 71% of public school students were being served by sixty charter schools[10]—with charter oversight split between local and state bodies.[11] Meanwhile, the 2011 dissolution of the urban Memphis City Schools triggered a merger process with the surrounding suburban Shelby County Schools that led to a plan to embrace autonomy generally, and the multiple-operator concept specifically.[12] The Shelby County plan relies less on charter schools than in New Orleans, but seeks to create a new structure where multiple autonomous operators, including the traditional district, the state, and charter schools, will coexist to serve a common community.[13]

Utilizing the experiences in New Orleans and Shelby County, Part III offers analysis of the portfolio model that will provide guidance for other communities considering embracing such a radical change. Specifically, this Part will consider (1) the danger of stratification within the portfolio model and (2) the question of long-term sustainability for the model. If this reform movement is to deliver more successfully on the promise for improving educational opportunities for students not being equitably served by the traditional district structure, reforming communities must not ignore the challenges that have surfaced in these two communities. This Part further identifies several legal tools that can aid in addressing such challenges, such as state laws, policies of public authority-granting bodies, and the contractual terms between these bodies and autonomous operators.

Depending upon who is asked, the portfolio model may represent the market-based cure to all of public education's problems or the underhanded privatiza-

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[10] COWEN INST. FOR PUB. EDUC. INITIATIVES, THE 2011 STATE OF PUBLIC EDUCATION IN NEW ORLEANS 7 (2011) [hereinafter COWEN 2011 REPORT], *available at* http://www.coweninstitute.com/wp-content/uploads/2011/07/2011-SPENO-report.pdf (noting that out of eighty-eight schools, sixty are charter schools).

[11] *Id.*

[12] *See infra* Part II.B.

[13] *See infra* Part II.B.iii.

tion of public schools without demonstrated evidence of success.[14] This article does not seek to prove either of these positions. Rather, the article describes an emerging trend in educational policy reform and, accepting it as such, offers insight from two communities for making the most of such a radical structural change. Wave after wave of education reform has fallen short of eliminating the gap in educational opportunity that has plagued American education since its inception and that has been a headwind for so many students. Policy makers and education advocates should maximize the promise of the emerging portfolio model while reducing the risk of it serving as a reform in structure, but not performance. After all, perhaps these days, even more than a half century ago, "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education."[15]

I. THE EMERGENCE OF THE PORTFOLIO MODEL

To evaluate the portfolio model, it is crucial to understand (1) what the model is, (2) where it came from, and (3) the ramifications—legal and otherwise—of transitioning from the traditional district model to the portfolio model. At its core, the portfolio model is about embracing the concept of spreading operational authority for public education across a wide variety of entities.[16] In some ways, it is a continuation or evolution of other currents in public education reform targeted at the persistent problem of poor achievement in urban districts. For example, accountability and choice have dominated education policy discussions over the past two decades—the portfolio model embraces hyper-accountability in the sense that operators who fail to deliver will have their authority to run schools removed.[17] Similarly, the portfolio model furthers the market theory of education underlying the school choice and charter school movement by expanding choice across not only educational programs, but even school operators.[18] Though not without critics, the portfolio model enjoys support from both ends of the political spectrum; federal policies of both the Bush and Obama administrations have promoted the model's emergence.[19] However, such a profound redistribution of responsibility has many ramifications. Foundationally, removing the school board as the primary

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[14] For support of the portfolio model, see, *e.g.*, PAUL HILL, PROGRESSIVE POL'Y INST., PUT LEARNING FIRST: A PORTFOLIO APPROACH TO PUBLIC SCHOOLS (2006) (on file with author). For criticism of the model, see, *e.g.*, Diane Ravitch, *Bobby Jindal vs. Public Education*, EDUC. WK. BLOG: BRIDGING DIFFERENCES (Mar. 6, 2012, 9:41 AM), http://blogs.edweek.org/edweek/Bridging-Differences/2012/03/bobby_jindal_vs_public_educati.html (characterizing New Orleans school reform as "turning the children over to private management, breaking the teachers' union, and hiring inexperienced, uncertified teachers").

[15] Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).

[16] *See infra* Part I.A.

[17] *See infra* Part I.A (discussing "contingent" nature of portfolio model).

[18] *See infra* Part I.B.i.

[19] *See infra* Part I.B.iii.

school operator represents a shift in the relationship between a community and its schools as accountability for performance is shifted away from the traditional elected school board to the (mostly) unelected school operators.[20] Further, there are legal and administrative effects as more autonomy is given to various operators on issues such as relationships with employees or contract partners and opportunities for the efficient use of resources.[21] Part I seeks to provide a definition of the portfolio model, background on its development, and an introduction to some of the practical and theoretical changes that follow from shifting responsibility from a single district to a multiplicity of operators.

A. *What Is the Portfolio Model?*

Though there is great dispute about the wisdom and efficacy of the portfolio model, critics and proponents agree on its foundational principles.[22] At the core, the portfolio model embraces multiple operators within a public education community, autonomy for school operators for school-level decisions, and flexibility within the structure so that operators that succeed are rewarded and those that do not are held accountable.[23] Each of these features is discussed in turn.

The potential operators of public schools within the portfolio model are extensive and diverse. Within a single community, students may attend public schools that may be operated by:

- the traditional school district(s);
- the state education department;
- individual charter school operators;
- charter school networks operating multiple schools;
- groups, such as a local college or university, operating a school on the basis of a non-charter contract with the school district; or
- virtual school operators who may not be located in the area but who are licensed to serve public school students within the community.[24]

Further, charter or virtual school operators may obtain their authority to operate a school from several places, typically the local district or the state.[25] Thus, there are both multiple operators and multiple authorizers working within

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[20] *See infra* Part I.C.

[21] *See infra* Part I.C.

[22] *See supra* note 14.

[23] *See* Hill & Campbell, *Strife and Progress*, *supra* note 7, at 2-3.

[24] In Tennessee, K12, Inc., a for-profit virtual school operator, serves students throughout the state as permitted by statute. *See* TENN. CODE ANN. § 49-16-204.

[25] TENN. CODE ANN. § 49-13-104(4) (defining "chartering authority" as either the local board of education or the state's achievement school district); *see also* Jane Roberts, *State, Not Boards May Soon Approve Charter Schools in Tennessee*, COM. APPEAL (Jan. 14, 2013), http://www.commercialappeal.com/news/2013/jan/14/state-not-school-boards-may-soon-approve-charter/ (discussing proposed legislation to create a state-level authorizer).

a single community so that the complete list could include district-authorized charters, state-authorized charters, and so on.

In addition to these public schools operating as part of the portfolio model, other operators will exist outside of the public education structure. Wholly autonomous private or home school operators fill out the broader educational landscape and even may serve publicly-funded students through voucher programs.[26]

The portfolio model thus expands the answer to the question of who is in charge of education within a community. Gone are the centralized single-server school district and superintendent. Autonomy in operation is the norm as school operators are granted the flexibility to serve diverse student populations.[27] For example, independent operators may have the ability to alter the length of the school day or school year, develop a tailored curriculum, or make their own hiring and staffing decisions.[28] Autonomy can exist both for charter schools, which are operated completely independently, and for schools that remain within the traditional district structure but have been granted or have earned autonomy.[29] The only constraints are some state and federal laws,[30] and whatever the operator has negotiated in its contract with its authority-granting body.[31]

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[26] In Louisiana, a voucher program has been in operation in New Orleans since 2008 and was recently expanded statewide. *See* LA. REV. STAT. ANN. § 17:4011 (2012).

[27] PAUL HILL ET AL., PORTFOLIO SCHOOL DISTRICTS FOR BIG CITIES: AN INTERIM REPORT, CTR. ON REINVENTING PUB. EDUC. 6 (2009) [hereinafter INTERIM REPORT], http://www.crpe.org/publications/portfolio-school-districts-big-cities-interim-report ("The school . . . must therefore have the freedom of action necessary to adapt its use of time, money, talent, and instructional materials to meet the particular needs of its students.").

[28] TENN. CODE ANN. § 49-13-102(b) (noting that charter schools are allowed "maximum flexibility to achieve their goals"); *See* Tennessee Dep't of Education, "Charter Schools Frequently Asked Questions," *available at* http://www.tn.gov/education/fedprog/Charter_Schools_FAQs.shtml (last visited Apr. 2, 2013).

[29] Hill & Campbell, *Strife and Progress*, at 13-14; *see also* LAUREN SARTAIN, ET AL., SRI INT'L, HIGH SCHOOL REFORM IN CHICAGO PUBLIC SCHOOLS: AUTONOMOUS MANAGEMENT AND PERFORMANCE SCHOOLS 1 (2009), *available at* http://policyweb.sri.com/cep/publications/AMPS_final.pdf.

[30] For example, charter schools are not exempt from requirements such as state compulsory education or federal non-discrimination laws. *See, e.g.*, TENN. CODE ANN. § 49-13-105(b) (providing a list of items that cannot be waived in a charter agreement between an LEA and a charter school operator).

[31] Charter schools operate on the basis of a contract between a charter authorizer—typically the local district or the state—and the charter operator. The terms of that contract may vary for each authorizer and may include a wide variety of topics that could limit or expand the autonomy of the charter school operator. In addition, this contract may include provisions whereby the charter school contracts back with the district for some services, such as facilities, health services, or transportation. Although this is the model for charter school operators, it could also apply to any school being granted autonomy. *See* Hill & Campbell,

However, in order to succeed, the portfolio model requires that these independent operators be held to common standards, which leads to the third element of the portfolio model. This feature has often been described as the "contingency" of schools.[32] Rather than the permanent existence of public schools regardless of performance, the portfolio model makes the individual operators' continued authority to operate a school contingent on performance.[33] This feature thus mandates that success for individual schools be consistently monitored, typically through state-administered testing.[34] If the model is functioning correctly, the identity of school operators will not be static, but rather, will constantly change depending on the success or failure of individual operators.[35] Operators that fail will have to alter their practices or risk losing their operating authority; operators that succeed will continue, may expand, and there is the potential for sharing successful approaches across the broader educational community.[36]

The portfolio model is a significant shift from the traditional district structure for public education. Its embrace of multiple operators and operational autonomy replace the centralized administration of schools. Its adoption of conditional authority shifts accountability from a large district down to an individual school and increases both the benefits of success and the consequences for fail-

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Strife and Progress, *supra* note 7, at 13-14; *see also* LAUREN SARTAIN, ET AL., *supra* note 29, at 1; COL. DEP'T OF EDUC., CHARTER SCHOOL FREQUENTLY ASKED QUESTIONS, *available at* http://www.cde.state.co.us/cdechart/faq.asp (noting that some charter schools do have agreements with their district for bus service).

[32] *See, e.g.*, Aaron Jay Saiger, *The Last Wave: The Rise of the Contingent School District*, 84 N.C. L. REV. 857, 863 (2006) (describing the jurisdiction of the school district as "contingent" upon performance). The "contingency" concept, however, can be applied even more strongly with regard to schools, whose very existence, like the district discussed by Saiger, depends upon meeting performance expectations. INTERIM REPORT, *supra* note 27, at 6 ("Schools' existence and freedom of action are contingent on performance.").

[33] INTERIM REPORT, *supra* note 27, at 7 ("A district fully committed to portfolio management would hold all schools, educators and providers, no matter whether they are district employees or outsiders, equally accountable for performance defined by student achievement and attainment, abandoning less productive schools and arrangements, and sustaining or expanding more productive ones.")

[34] Hill & Campbell, *Strife and Progress*, *supra* note 7, at 22-24.

[35] KENNETH J. SALTMAN, GREAT LAKES CTR. FOR EDUC. RES. & PRAC., URBAN SCHOOL DECENTRALIZATION AND THE GROWTH OF "PORTFOLIO DISTRICTS" 4 (2010), *available at* http://nepc.colorado.edu/publication/portfolio-districts (labeling the process by which failing operators are replaced as "creative destruction" or "churn").

[36] *See* TRANSITION PLANNING COMM'N, TRANSITION PLAN FOR THE MERGER OF MEMPHIS CITY SCHOOLS AND SHELBY COUNTY SCHOOLS 95 (2012) [hereinafter TRANSITION PLAN], http://www.ourvoiceourschools.org/sites/346/uploaded/files/Transition_Plan__June_29_2012.pdf (discussing the proposed Innovation Zone, including the Director of District Innovation tasked with ensuring that school-level innovations are shared district-wide).

ure. In most communities, the traditional district model remains the norm.[37] However, the landscape is fracturing in many districts, particularly in large urban districts serving high concentrations of minority or low socioeconomic status students.[38] An eclectic set of forces has converged to support the recent emergence of the portfolio model as an alternative structure for public education.

B. *Undercurrents in Educational Reform Enabling the Portfolio Model's Emergence*

i. The Market Theory of Education

An historical fact of American public education has been the presence of disparities in education available across demographic lines, such as race, socioeconomic status, or geography.[39] Although once there had been legal barriers to equitable educational opportunity, the disparity is most often currently discussed in terms of "gaps" in educational opportunity or achievement.[40] These gaps persist despite decades of reforms aimed to reduce them. In some districts, previous reforms such as student integration or school finance equalization have reached a practical, political, or fiscal endpoint, leaving communities "stuck."[41] For example, the pre-merger Memphis City Schools had a student

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[37] The portfolio advocacy group, the Center for Reinventing Public Education, identifies thirty-four districts as having some elements of the portfolio model. *Portfolio District Network*, *supra* note 6. Large districts that do not appear on the list, such as the Charlotte-Mecklenburg Schools, continue to operate a traditional district model even though there are increasing numbers of charter schools in such districts. Ann Doss Helms, *Charter Schools Enrollment Surging*, CHARLOTTE OBSERVER, Apr. 14, 2012, http://www.charlotteobserver.com/2012/03/30/3174096/enrollment-at-charter-schools.html.

[38] *Portfolio School District Network*, *supra* note 6 (identifying more than thirty school districts nationwide the Center recognizes as operating some version of a portfolio district, including Chicago, Detroit, and New York City).

[39] The list included in text is certainly not exhaustive. There have been disparities across gender, native language and national origin, and disability status as well. *See* MARTHA MINOW, IN BROWN'S WAKE: LEGACIES OF AMERICA'S EDUCATIONAL LANDMARK (2010).

[40] The "gap" concept has become almost too ubiquitous for definition and is utilized across the political spectrum. *See, e.g.*, RONALD F. FERGUSON, TOWARD EXCELLENCE WITH EQUITY: AN EMERGING VISION FOR CLOSING THE ACHIEVEMENT GAP 79-116 (2007) (discussing evidence of proposals aimed at closing "Black-White Test Score Gap," including preschool programs, tracking, class size, and teacher quality); ABIGAIL THERNSTROM & STEPHAN THERNSTROM, NO EXCUSES: CLOSING THE RACIAL GAP IN LEARNING 11-23 (2003) (describing the evidence demonstrating an academic achievement gap based on race).

[41] *Memphis City Schools 2011 Report Card*, TENN. DEPT. OF EDUC. (2011) [hereinafter MCS 2011 Report Card], *available at* http://edu.reportcard.state.tn.us/pls/apex/f?p=200:1:3769473975710120::NO::: (showing that Memphis City Schools had a student population that was 92.1% minority, including 83% African American, and had per-pupil spending of $11,324 compared to the state average of $9,084).

population that was more than 90% minority and had the highest per pupil funding in Tennessee[42]—given such a situation, the possibility for substantial student integration or additional finance reform was remote. Proponents of the portfolio model offer it as a novel solution for such communities, placing it within the line of school reform attempting to eliminate disparities in educational opportunities.[43] In essence, it is an attempt to confront stubborn disparities for communities that seem to have run out of other options.

Specifically, the portfolio model is a more immediate extension of two of the more recent education reform movements: the accountability movement and the school choice movement. The release of *A Nation at Risk* in 1983, which warned of a "rising tide of mediocrity" in public schools,[44] triggered a movement of reform premised on states setting ambitious academic standards that would hold districts, schools, and students accountable for meeting them. Though previously pursued in many states, the accountability movement was federally endorsed with the passage of the No Child Left Behind Act of 2001 (NCLB).[45] Under NCLB, federal law mandates that states generate standards, create assessments (i.e., standardized tests) to assess performance, and hold schools and districts accountable for performance.[46] For example, schools that fail to meet targets for a certain number of years would be subject to a variety of interventions, including replacing school staff, instituting a new curriculum, extending the school day or school year, or reopening as a charter school.[47]

Parallel to this movement toward standards and accountability was a growing embrace of school choice as a strategy for education reform.[48] The choice movement rests upon the theory that a diversity of educational options empowers students and parents to choose the most appropriate educational program for themselves.[49] It is typically justified "either for reasons of equity (all students should have the opportunity to choose a good school) or efficiency (competition will improve all schools)."[50] In the initial incarnation of choice programs for school improvement, such as magnet programs, the diverse educational options were developed, managed, and operated by the school district, the same

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[42] *Id.*

[43] INTERIM REPORT, *supra* note 27, at 3 ("Fifty-five years after *Brown*, it is still not possible to say that any school district has fully attained this goal [of providing effective instruction for all students].").

[44] JAMES RYAN, FIVE MILES AWAY, A WORLD APART: ONE CITY, TWO SCHOOLS, AND THE STORY OF EDUCATIONAL OPPORTUNITY IN MODERN AMERICA 242 (2010).

[45] No Child Left Behind Act of 2001, 20 U.S.C. §§ 6301–6600 (2001).

[46] 20 U.S.C. § 6311 (2001).

[47] 20 U.S.C. § 6316(b)(7)-(8) (2001).

[48] RYAN, *supra* note 44, at 8-10.

[49] James Ryan & Michael Heise, *The Political Economy of School Choice*, 111 YALE L.J. 2043, 2011-15 (2002) (describing connection between school choice, competition, and school improvement).

[50] RYAN, *supra* note 44, at 183.

operators that oversaw any other public school.[51] However, an extension of the competition justification eventually yielded the development of independently-operated but publicly-funded charter schools, signaling that choice may mean not only a diversity of educational options, but a diversity of school operators, many of which are operating autonomously.[52]

Both accountability and school choice embrace a "market model" of education reform that rests on the premise that competition among schools can lead to educational innovation and that tests and accountability are necessary to allow the market to function in eliminating failing enterprises.[53] Even the term "portfolio" calls upon the market metaphor, with an educational community retaining investments (i.e., schools) that "perform" and getting rid of those that do not produce adequate student achievement.[54] Proponents even use the phrase "R&D" to describe the process by which a portfolio model might pursue innovative strategies and expand successful ones to "customize the supply of learning options to their communities' diverse needs."[55]

The portfolio model represents a more comprehensive embrace of the market theories supporting the accountability and choice movements. Clearly, the embrace of multiple operators, including local and state level bodies and a growing number of charter operators, represents an extension of competition-fostering choice for students. The independence of these operators only enhances the competition. However, the "cost" of that autonomy in operation is a more robust system of accountability where the very existence of a school becomes contingent on performance.[56]

ii. Removing District Control and Redistributing It in Two Directions

Additionally, two seemingly contradictory currents have contributed to the removal of operational power from the traditional district. Pulling in one direction has been a long-standing enthusiasm for local control of education; pulling

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[51] *See* Martha Minow, *Confronting the Seduction of Choice: Law, Education, and American Pluralism*, 120 YALE L.J. 814 (2011) (providing a long history of use of choice in American public education, including the use of choice to avoid desegregation decrees in the 1960s, and underscoring skepticism about the use of choice to increase, rather than decrease, equity of educational opportunity. Noting that the choice of opting out of public education for private schools has historically had the effect of furthering inequities).

[52] *Id.* at 834.

[53] Hill & Campbell, *Strife and Progress*, *supra* note 7, at 2 ("By constantly reviewing school and student outcomes, as well as school climate and neighborhood need, the portfolio manager knows which schools are both performing well and trending well, which schools have the possibility of improving, and which schools must be replaced with high quality options that are right for the affected students.").

[54] SALTMAN, *supra* note 35, at 3.

[55] INTERIM REPORT, *supra* note 27, at 7.

[56] Hill & Campbell, *Strife and Progress*, *supra* note 7, at 22 ("With autonomy comes accountability.").

in the other is a newly-developed tendency for states to intervene in districts that are not performing.

According to the Supreme Court,

> No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process.[57]

Although the Supreme Court in *Milliken* was speaking in support of protecting local control by preventing district lines from being crossed in implementing a desegregation remedy, the concept of local control and autonomy need not be limited to district-level control. Indeed, the Court has recognized the right of parents to control their children's education, autonomy at the most local level of all—the family.[58] The portfolio model embraces a local control at the school level, on the spectrum between parents and the district: "The school, not the district, is directly responsible for instruction and must therefore have the freedom of action necessary to adapt its use of time, money, talent, and instructional materials to meet the particular needs of its students."[59] This embrace of hyper-local control with the school as the primary unit by which success is judged builds upon the accountability structure of NCLB. In addition, it is a continuation of earlier movements toward decentralization of educational decision-making where school personnel, community groups, or both were empowered to make decisions about budgets, personnel, and programs.[60] However, the portfolio model goes further than both NCLB and earlier decentralization efforts by reducing the authority of the traditional district and embracing a landscape in which some entities entirely separate from the district can operate or authorize schools. Specifically, states can play an increased role within the portfolio model.

While the portfolio model moves control from the district to the school level, its emergence coincides with a trend toward moving authority in the opposite direction, giving states broader authority to intervene in and remove authority from school districts.[61] Further, school finance reforms resulted in states con-

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[57] Milliken v. Bradley, 418 U.S. 717, 741-42 (1974).

[58] *See* Pierce v. Soc'y of Sisters, 268 U.S. 510, 534-35 (1925) (holding that a law mandating public school attendance "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of chil*dren [sic] under their control"); *see also* Meyer v. Nebraska, 262 U.S. 390, 400 (1923) ("Corresponding to the right of control, it is the natural duty of the parent to give his children education suitable to their station in life.").

[59] INTERIM REPORT, *supra* note 27, at 6.

[60] SALTMAN, *supra* note 35, at 2 (noting School-Based Management or Shared Decision Making as examples); *see generally* Wyman, *supra* note 3.

[61] Federal Race to the Top Guidelines awarded points for states for having "the legal, statutory, or regulatory authority to intervene in the State's persistently lowest-achieving

tributing an increasing proportion of educational funding, thus generating "renewed interest in controlling the use of state monies."[62] These two forces—increased investment by states and persistent failure to meet state standards in some districts—led to a wave of "New Accountability," which includes allowing states to take over schools or even entire districts.[63] For example, in Louisiana, the state created the Recovery School District (RSD) prior to Hurricane Katrina with the authority to take over any school labeled "academically unacceptable" and to run the school in "whatever manner . . . most likely to bring the school to an acceptable level of performance."[64] These programs thus inserted the state as an operator within a local community, putting in place a potential piece of a multi-operator portfolio model and removing the norm of the traditional district being the sole operator of local schools.

iii. Federal Alignment on the Portfolio Model

Finally, and perhaps most importantly, there is political alignment at the federal level in support of these various trends—accountability, choice, school-level autonomy, and increased state involvement in local communities—giving rise to the portfolio model. As discussed below, both the Bush and Obama administrations have utilized federal policies to push education reform in the directions that the portfolio model embraces.

NCLB did so directly, by mandating that states adopt an accountability scheme and suggesting that charter school conversion be one type of intervention for schools that failed to perform.[65] In addition, the Bush administration made substantial federal dollars available for the development of charter schools, a funding source that directly influenced the development of post-Katrina education in New Orleans.[66]

Although the Obama administration has not passed a comprehensive education reform bill, it has nonetheless utilized two mechanisms specifically to influence education reform: money available through its Race to the Top (RTTT)

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schools." U.S. DEP'T OF EDUC., RACE TO THE TOP EXECUTIVE SUMMARY 10 (2009) [hereinafter RTTT EXECUTIVE SUMMARY], *available at* http://www2.ed.gov/programs/racetothetop/executive-summary.pdf; *see also* INST. ON EDUC. LAW & POL'Y, FIFTY-STATE REPORT ON ACCOUNTABILITY, STATE INTERVENTION AND TAKEOVER, *available at* http://ielp.rutgers.edu/docs/developing_plan_app_b.pdf (2002) (noting that, as of 2002, 24 states allow for state takeover of school districts).

[62] Saiger, *supra* note 32, at 872 (noting that between 1930 and 2003, state funding changed from 20% to nearly 50% for public education).

[63] *Id.* at 874 (noting that nearly half of the states have "taken over" at least one school district since 1989).

[64] LA. REV. STAT. ANN. § 17:10.5(A)–(B).

[65] 20 U.S.C. §6316(b)(8)(B)(i).

[66] Daniel Kiel, *It Takes a Hurricane: Might Katrina Deliver for New Orleans Students What Brown Once Promised?*, 40 J.L. & EDUC. 105, 131, n.155 (2011).

program and waivers for states from NCLB.[67] Specifically, RTTT allowed states to compete for $4.35 billion in stimulus funding and evaluated state proposals based on a variety of criteria.[68] Among the highest-valued criteria were "ensuring successful conditions for high-performing charters and other innovative schools"[69] and a variety of "State Success Factors" aimed at demonstrating the state's commitment to, among other things, "holding participating LEAs . . . accountable for progress and performance, and intervening where necessary."[70] Many states responded to the Administration's priorities by altering laws in ways that would support the goals articulated by RTTT. For example, in Tennessee, the state that received the largest initial award of RTTT funds,[71] the legislature convened an extraordinary session during which it removed the cap on charter schools and created a state-level Achievement School District (ASD) with the power to intervene in consistently failing schools by running such schools directly or authorizing a charter school operator to take over the school.[72]

In addition, as the mandated proficiency targets of NCLB became increasingly unattainable, states began to apply to the Obama Administration for waivers from compliance with the law.[73] These waivers, where granted, allowed states to redefine their accountability schemes and presumably would be granted only where the replacement schemes reflected the preferences of the Administration.[74] Again, the experience of Tennessee is instructive. Under the replacement scheme, schools in the bottom 5% of performance on state

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[67] *See* Joseph P. Viteritti, *The Federal Role in School Reform: Obama's "Race to the Top,"* 87 NOTRE DAME L. REV. 2087, 2105 (2012) ("The collaboration between the federal and state governments that resulted from the RTTT initiative was not just significant from a policy perspective; it also marked a milestone in the evolution of federalism as it pertained to education.")

[68] RTTT EXECUTIVE SUMMARY, *supra* note 61, at 2.

[69] *Id.* at 3.

[70] *Id.* at 6. In addition, the criteria provide a smaller number of points for "[t]he extent to which the State has the legal, statutory, or regulatory authority to intervene *directly* in the State's persistently lowest-achieving schools . . . and in LEAs that are in improvement or corrective action status." *Id.* at 10 (emphasis added).

[71] Richard Locker, *Tennessee Wins Big in Race to the Top School Funding*, COM. APPEAL, Mar. 29, 2010, http://www.commercialappeal.com/news/2010/mar/29/feds-pick-tennessee-delaware-race-top-education-gr/.

[72] TENN. DEP'T OF EDUC., FIRST TO THE TOP EXECUTIVE SUMMARY 1-2 (2009), *available at* http://www.tennessee.gov/education/doc/TNFirsttotheTopExecSummary.pdf.

[73] *See NCLB/ESEA Waiver Watch*, CTR. ON EDUC. POL'Y, http://www.cep-dc.org/page.cfm?FloatingPageID=21 (last visited Apr. 15, 2013) (describing the process of applying for a waiver and providing maps of states applying for waivers). For additional general information regarding the NCLB waiver process, see the Department of Education's dedicated web page. *ESEA Flexibility*, U.S. DEP'T OF EDUC., http://www2.ed.gov/policy/elsec/guid/esea-flexibility/index.html.

[74] Joy Resmovits, *No Child Left Behind Waivers Granted to 33 U.S. States, Some With*

assessments would be taken over by the ASD for five years, thus removing local district authority over such schools.[75] Tennessee's waiver request was granted in fall 2011.[76]

Thus, both the Bush and Obama administrations have supported the movements that provide the theoretical and practical bases for the portfolio model. Both administrations have supported charter schools and state interventions, each of which has the potential to remove operational authority from the traditional district and increase the autonomy for a series of school operators within a single community. Similarly, both administrations have firmly embraced accountability schemes that make continued operation of a school contingent upon performance. These policy endorsements of the market model of education suggest that the portfolio model, which is a logical extension of the market concepts embraced by accountability and choice, is likely to continue to grow. Such growth, of course, has many ramifications as some communities move away from the traditional district toward this new model.

C. *Effects of Transitioning to a Portfolio Model*

The shift from a traditional district to a portfolio model requires a massive change in thinking. Generations of Americans have grown accustomed to the single-provider model, which developed in support of the early American philosophical ideal of public education as being a "common" experience that would create a citizenry for the young country.[77] The traditional district model provides commonality both administratively and temporally. At any given moment, all public school students in a community share a common superintendent and school board generating some uniformity in policies. Further, generations of public school students are served by a continuously-existing district in continuously-existing schools, many of which have the same names and may even be in the same facilities that served prior generations. Not only is a student within the same district as her friends across town, but she may also be in the same district—even the same school—that served her parents.

The portfolio model interrupts both of these commonalities. The embrace of multiple operators eliminates commonality across a district, shrinking the "common" education community to the size of an individual school. Addition-

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Strings Attached, HUFF. POST (July 19, 2012, 12:01 AM), http://www.huffingtonpost.com/2012/07/19/no-child-left-behind-waiver_n_1684504.html.

[75] U.S. DEP'T OF EDUC., ESEA FLEXIBILITY REQUEST: TENNESSEE 35 (2012), *available at* http://www2.ed.gov/policy/eseaflex/approved-requests/tn.pdf.

[76] CNN Wire Staff, *10 States Freed from 'No Child Left Behind' Requirements*, CNN (Feb. 10, 2012, 5:24 AM), http://www.cnn.com/2012/02/09/politics/states-education/.

[77] *See* MICHAEL J. KAUFMAN & SHERELYN R. KAUFMAN, EDUCATION LAW, POLICY, AND PRACTICE: CASES AND MATERIALS 17-19 (2d ed. 2009) (discussing the educational philosophies of Benjamin Franklin, Thomas Jefferson, Benjamin Rush, and Horace Mann and claiming that, to several of the Founders, "The public's interest was in providing opportunity for young Americans to gain skills needed for democratic citizenship.").

ally, the contingency of continuous operation means that only successful options will remain in existence to serve another generation. Thus, the transition to a portfolio model is not only a radical structural shift for public education, but also a substantial philosophical break from the norm. Not surprisingly, the model most typically emerges in districts experiencing moments of extraordinary crisis, such as state or mayoral takeover,[78] district dissolution,[79] or a massive natural disaster.[80] As communities utilizing the portfolio model begin to be evaluated, success could lead to further growth even without such crises in other communities. But regardless of context, the shift to a portfolio model leads to a variety of legal, fiscal, and administrative changes from the district model that affect the way public schools serve a community.

Perhaps of greatest importance, the portfolio model substantially alters the relationship between the public education provider and the public. In a traditional district, the public elects a local board with ultimate oversight and governance responsibilities.[81] Democracy provides the foundational accountability for the district—citizens unhappy with the direction of schools can petition school board members or elect new ones to push for changes, such as in student assignment policies,[82] special programs, or the identity of the superintendent. In a portfolio model, that accountability lever is weakened, if not eliminated, as the power of the school board diminishes. In a portfolio model, the board may have operational responsibility for some schools, but almost certainly a smaller share than under the traditional model.[83] Instead, the board may serve more in an oversight role, with its responsibilities limited to reviewing applications from independent school operators, such as charter schools, and considering whether to extend operational authority for a longer period.[84] Further, there are

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[78] For example, in New York City, one of the cities studied by the Center on Reinventing Public Education as having implemented a portfolio model, mayoral control of schools was granted in 2002. INTERIM REPORT, *supra* note 27, at 13. A similar mayoral takeover occurred in Washington, D.C., in 2007. *Id.* at 15.

[79] *See infra* Part II.B. (discussing dissolution of Memphis City Schools and resulting merger with Shelby County Schools).

[80] *See infra* Part II.A. (discussing restructuring of public education in New Orleans following Hurricane Katrina).

[81] *See, e.g.*, TENN. CODE ANN. §§ 49-2-201(a)(1), 49-2-203.

[82] The recent experience in Wake County, N.C., is instructive. There, successive school board elections brought in first, in 2009, a wave of new members who halted the district's assignment plan aimed at maintaining socioeconomically integrated schools, and next, in 2011, a second group of reformers who hope to restore some elements of the old assignment plan. *See* T. Keung Hui et al., *Democrats Again Control Wake School Board*, RALEIGH NEWS & OBSERVER (Nov. 9, 2011), http://www.newsobserver.com/2011/11/09/1629974/democrats-again-control-wake-school.html.

[83] *See supra* Part I.A.

[84] *See, e.g.*, TENN. CODE ANN. §§ 49-13-108 (district approval of charter applications), § 49-13-121 (renewal process).

likely to be some schools within a community that have no connection with the school board at all, being authorized and/or operated directly by outside entities, such as the state.[85] In place of the democratic accountability of an elected school board emerges a performance-based accountability for individual schools, a shift that reduces the power of the community at-large even as it may increase the power of the immediate population served by a particular school. Given the power to depart the school if dissatisfied, the school's immediate population has the potential to exert more direct accountability on school policies and direction. However, as with the democratic accountability in a traditional district, the success of the new accountability in generating broader success in public education will be entirely contingent on how those with the power ultimately exercise that accountability.[86]

In addition to the philosophical and governance shifts accompanying an embrace of the portfolio model are a substantial number of more practical effects. For example, most state and federal education laws are written on the assumption that school districts (or LEAs, local education agencies) will serve as a centralized and primary school operator within a community.[87] The presence of multiple operators acting autonomously was likely not contemplated and some laws will thus need reexamining. These could include major laws such as state accountability programs or school funding formulas.[88] In addition, new laws may be appropriate to help facilitate more successful operation under the portfolio model. This could include both (1) logistical success by encouraging efficient use of resources and sharing of services across autonomous providers and (2) academic success by ensuring that performance measurements are fairly and consistently applied across independent operators.

Further, the increased autonomy in school operation will have a significant impact on relationships with parties currently in contractual relationships with a traditional district. This would include vendors, but more importantly, employees—i.e., teachers and teachers' unions.[89] Indeed, teachers' unions have a

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[85] One scholar surveying this landscape has noted that "[i]n a polyarchic distribution of power among districts, mayors, state departments of education, federal bureaucrats, charter schools, and parents choosing schools in markets, even the address for school reform in unclear, and the nature of potential remedies even less so." Saiger, *supra* note 32, at 861.

[86] *See infra* Part III.

[87] *See, e.g.*, 20 U.S.C. § 6316(b)(1)(A) (noting that it is the duty of the local education agency (i.e., the district) to identify schools that fail to make adequate yearly process under No Child Left Behind). This language presupposes that every school operates under the authority of an LEA. Under a portfolio model, this may not be the case as the authority for school operation may be granted directly from the state. *See supra* note 24.

[88] *See, e.g.*, TENN. CODE ANN. § 49-3-314 (requiring that state education funds be distributed annually to school districts) and § 49-1-602 (implementing portions of the state accountability program and describing how LEAs will be evaluated based on student achievement data).

[89] Saiger, *supra* note 32, at 908-10 (arguing that the transition from the traditional district

great deal to lose by this transition and have been among the most vocal sources of resistance.[90] As hiring and other contractual decisions are largely left to autonomous operators, those who had served the existing district could see their collective influence diminished.

Fiscally, one potential side effect of utilizing a series of autonomous school operators is a loss in efficiencies provided by a central administration. Running counter to the portfolio model's emergence has been a general trend toward consolidating smaller school districts to obtain such efficiencies.[91] Avoiding duplication in staffing and services and enjoying the cost savings of doing so has been one of the primary strengths of the traditional district.[92] Whereas a district may shift personnel and resources to the places where they are most needed, a series of autonomous schools may need to each independently hire staff and purchase supplies to serve their own student population. For example, a district may assign a drama instructor to different schools on different days or shift band equipment from one school to another based on demand. An independent school operator would lack that flexibility and could end up either paying for too much or too little based on the need of its student population. The problem is perhaps most significant in providing services to students with disabilities.[93] As discussed above, this could be mitigated with new laws or even contractual clauses facilitating collaboration in efficiently sharing resources within a community embracing the portfolio model, but such laws or contracts are not yet the norm.

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model greatly reduces "the power and autonomy once enjoyed by the urban, educational employment regime.").

[90] Kevin S. Huffman, *Charter Schools, Equal Protection Litigation, and the New School Reform Movement*, 73 N.Y.U. L. REV. 1290, 1302-03 (1998) (describing union opposition to charter school legislation and broader school choice programs); *see also* Jonathan P. Krisbergh, *Marginalizing Organized Educators: The Effect of School Choice and "No Child Left Behind" on Teacher Unions*, 8 U. PA. J. LAB. & EMP. L. 1025, 1035-36 (2006) (citing JAMES G. CIBULKA, THE NEA AND SCHOOL CHOICE, IN CONFLICTING MISSIONS?: TEACHERS UNIONS AND EDUCATIONAL REFORM 155 (Tom Loveless ed., Brookings Inst. Press 2000), which "explain[s] that teachers' unions oppose choice programs which allow the transfer of students out of the public school district because such programs lead to 'revenue declines for districts that suffer a net loss of resident pupils' which leads to the loss of teaching jobs").

[91] Christopher R. Berry, *School Consolidation and Inequality*, in BROOKINGS PAPERS ON EDUCATION POLICY 49, 50-55 (2007), *available at* http://muse.jhu.edu/journals/brookings_papers_on_education_policy/v2006/2006.1berry.pdf. Indeed, in Tennessee, the creation of new school districts was prohibited in the early 1980s. TENN. CODE ANN. § §49-2-501(b)(3) (1982).

[92] *See* William F. Fox, *Reviewing Economies of Size in Education*, 6 J. EDUC. FIN. 273, 273 (1981) (discussing the alleged economic advantage of larger schools and centralized school districts in the context of district consolidation). Such advantages could be lost in a portfolio model served by multiple autonomous operators. *See infra* Part III.B.i.

[93] *See* Robert Garda, *Culture Clash: Special Education in Charter Schools*, 90 N.C. L. REV. 655 (2012).

Similarly, efficient use of physical facilities could be negatively impacted in the shift to a portfolio model. Even as districts incorporate more charter schools without a full embrace of the portfolio model, use of structural resources can become a difficult issue. As charter schools serve additional students, often in facilities not owned or operated by the district, districts can be left with more classroom space than they need.[94] This situation becomes even more significant as the traditional district is responsible for educating far fewer students in a portfolio model. Again, the problem could be mitigated with laws, policies, or contracts that facilitate collaboration among the district and autonomous operators—such as leasing classroom space or entire buildings—but there has yet to emerge a consensus on precisely how to do this.[95]

Finally, transitioning to a portfolio model could affect the structure of local education funding. In a traditional district, the district is the recipient of funds from public funding sources, such as the state and federal governments and whatever local body has a taxing authority for the district. The revenues collected are part of an overall district budget and are dispersed as needed within the district.[96] For charter schools, the district typically keeps a portion of those funds, but passes much of the funding on directly to the charter school on a per pupil basis.[97] Thus, when a student enrolls in a charter school, the district loses both its responsibility for educating that student (she is being served by another school operator) and much of the per pupil public funding supporting that student. As with personnel, resources, and facilities, the district loses the flexibility to utilize financial resources in an efficient way. Again, in a portfolio model, this issue is magnified. Dollars, just as drama teachers, band equipment, and classroom space, will be distributed diffusely rather than pooled, meaning that individual schools will be funded based on enrollment rather than need and the flexibility to fund based on need will be diminished. As the district's position shifts from adopting a budget to support the majority of students in a community to serving as a pass-through to independent school operators for a sizable amount of its budget,[98] the very nature of "public" funding for "common"

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[94] *See* Matthew Ladner & Matthew J. Brouillette, *The Impact of Charter Schools and Public School Choice on Public School Districts in Wayne County, Michigan*, 45 How. L.J. 395, 405 (2001) (noting a report indicating that the loss of more than 5% of a district's student population to charter schools would cause a negative financial impact).

[95] *See* Transition Plan, *supra* note 36, at 137-39 (describing proposals for shared services among operators to "address the reduction in scale for each operator as enrollment becomes more distributed").

[96] For an example of funding from Tennessee, see Daniel Kiel, *A Memphis Dilemma: A Half-Century of Public Education Reform in Memphis and Shelby County from Desegregation to Consolidation*, 41 U. Mem. L. Rev. 787, 812 (2011).

[97] *See, e.g.*, Tenn. Code Ann. § 49-13-112(a) ("A local board of education shall allocate to the charter school an amount equal to the per student state and local funds received by the LEA . . . .").

[98] The connection could be even more attenuated with the funding for students at schools

schools is altered. The practical and political effects of this shift are unknowable.

Many of the effects discussed above are simply larger scale versions of the effects when charter schools begin serving students within a traditional district. To date, the relationship between districts and charter operators has been somewhat confrontational as entities compete for students.[99] Embracing the portfolio model will require greater collaboration among competitors to minimize the practical issues involved with moving to a multi-operator system as a way of capturing some of the efficiencies of a centralized district even as much operational authority is shifted to autonomous operators. Without such collaboration, the sustainability of the portfolio model as a structure serving students well would be in doubt.[100]

D. *An Initial Caution on the Limits of Structural Reforms*

Discussion of the portfolio model can elicit strong emotions from both proponents and critics. However radical the structural change is in the shift from a traditional district to the portfolio model, it does not alter one fundamental element that is the most crucial aspect of quality education—the teacher-student relationship.[101] Quality teaching and engaged students are the foundation of all successful education, a truth that has remained constant even in schools that were racially segregated, underfunded, or both.[102] Thus, although structural reforms generate important public policy debates, they are inherently limited. Neither district structure nor the identity of a school's operator directly addresses underlying factors that contribute to the strength of an individual teacher or the engagement of an individual student. Any successful educational community, whether operating as a traditional district or under the portfolio model, will require strong teachers and engaged students.[103]

Still, public education remains the most significant investment of local and

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operated with no connection to the district (i.e., state operated or authorized), such as the RSD or ASD schools. *See infra* Part II.

[99] *See* Sandra Vergari, *Charter Schools: A Significant Precedent in Public Education*, 59 N.Y.U. ANN. SURV. AM. L. 495, 509 (2003); James Forman, Jr., *Do Charter Schools Threaten Public Education: Emerging Evidence from Fifteen Years of a Quasi-Market for Schooling*, 2007 U. ILL. L. REV. 839, 840 (2007) (summarizing the rhetoric and causes of confrontation between traditional boards and charter schools).

[100] *See infra* Part III.B.

[101] *See, e.g.*, Raj Chetty, John N. Friedman, & Jonah E. Rockoff, *The Long-Term Impact of Teachers: Teacher Value-Added and Student Outcomes in Adulthood*, Nat'l Bureau of Econ. Research Working Paper No. 17699 (2012) (finding substantial long-term effects of high quality teachers).

[102] *Id. See also* 20 U.S.C. § 6319(a)(2) (2002) (setting out No Child Left Behind requirement that all teachers be "highly qualified" by the end of the 2005-2006 school year).

[103] It has been suggested that portfolio districts can serve as a talent magnet for teachers in that they allow flexibility in teacher hiring and compensation that has not typically been

state tax dollars[104] and the structure of its delivery is a crucial policy issue. At the moment, there is broad political support for the theories underlying the portfolio model.[105] As such, it is appropriate to evaluate whether the model can succeed. Within this article, that evaluative process begins with an understanding of two districts at the forefront of this structural reform.

II. Case Studies in Redistributing Control of Public Education

After years of education reform, both New Orleans and Memphis found themselves stuck. Achievement lagged and schools served a largely homogenous student population of poor, minority students. Pockets of achievement and diversity were sources of both pride and resentment as they, along with nearby suburban and private schools, underscored the disparities in educational opportunity within these communities.[106] As different circumstances generated moments to reexamine this status quo in both New Orleans and Memphis, a common phrase emerged: once-in-a-lifetime opportunity.[107] In both communities, that opportunity has led to a movement towards a portfolio model and has been accompanied by a convergence of support from national players in education reform—both governmental[108] and private[109]—that has led each to be labeled an "epicenter" for education reform. The plans that are emerging in the two communities are not identical, but represent portfolio models with varying points of emphasis. In New Orleans, charter schools serve as the primary operator of schools, whereas the central district will remain a substantial operator

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present in a traditional district. Hill & Campbell, *Strife and Progress*, *supra* note 7, at 15-19.

[104] State and local spending on education totaled $789 billion in 2012, the highest total among categories of spending including health care, welfare and transportation. Of that, approximately $470 billion was spent on pre-primary and secondary education. Government Spending Details, Fiscal Year 2013, http://www.usgovernmentspending.com/year_spending_2013USbn_13bs1n_5020#usgs302 (last visited Apr. 2, 2013).

[105] *See supra* Part I.B.iii.

[106] For New Orleans, see *infra* Part II.A.i. For Memphis, see *infra* Part II.B.i.

[107] *See* Transition Plan, *supra* note 36, at 20; Stanley J. Bordelon, *Making the Grade? A Report on Special Education, New Orleans Charter Schools, and the Louisiana Charter Schools Law*, 11 Loy. J. Pub. Int. L. 441, 441 (2010) (citing RSD Legislatively Required Plan 4 (2006), *available at* http://www.louisianaschools.net/lde/uploads/8932.doc).

[108] Both communities have enjoyed federal support through Race to the Top, NCLB Waivers, and other federal grant programs. Regarding New Orleans, see Daniel Kiel, *supra* note 66, at 131, n.155. Regarding Memphis, see *supra* notes 71-76.

[109] Both communities have involvement from national players in education reform such as The Bill & Melinda Gates Foundation, Teach for America, and New Leaders for New Schools. Not everyone is pleased with the direction or influence these organizations yield, but they, along with governmental actors, are very much in the mix in both reforming communities. *See, e.g.*, Valerie Strauss, *What Ravitch Told KIPP and Teach for America*, Wash. Post Answer Sheet Blog, Nov. 17, 2010.

within the shifting framework in Memphis and Shelby County. This Part provides both background information for each community as well as details about the model each is developing, providing context for evaluating the models' potential.

A. *Orleans Parish, Louisiana*

i. Educational Structure Prior to Hurricane Katrina (August 2005)

Prior to Hurricane Katrina, New Orleans operated a traditional district model and, like many other urban districts, was not achieving success in confronting gaps in educational opportunity. The primary school operator was the Orleans Parish School Board (OPSB), an elected body of seven members from throughout Orleans Parish that was ultimately responsible for approving budgets and hiring a superintendent to whom all schools within the district reported.[110] Previous waves of education reform, such as integration and school finance, had been tried with little success.[111] By the turn of the twenty-first century, any further integration within Orleans Parish schools was implausible since the district's student population was almost entirely African American[112] and finance reform seemed to have run its course.[113]

Meanwhile, by state accountability measures, the district had long lagged behind state and national averages in student achievement. Specifically, in 2004-2005, the district ranked 67th out of 68 districts in Louisiana and 63% of the district's schools were labeled academically unacceptable under Louisiana's NCLB accountability system.[114] The district had some history with utilizing choice as a strategy for increasing educational opportunities, though choice programs had more often received criticism for widening gaps by creating a

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[110] "The city of New Orleans and Orleans Parish operate as a consolidated government and have since 1805." Kiel, *supra* note 66, at 106, n.3.

[111] On New Orleans school desegregation, *see id.* at 113-23. On Louisiana school finance litigation, *see* Scott R. Bauries, *State Constitutional Design and Education Reform: Process Specification in Louisiana*, 40 J.L. & EDUC. 1, 37-42 (2011).

[112] The pre-Katrina student population was 94% African American. La. Dep't of Educ., School Accountability Reports 2004-2005, http://www.doe.state.la.us/data/school_accountability_reports.aspx.

[113] *See* Charlet v. Legislature, 97-0212 (La. App. 1 Cir. 6/29/98); 713 So. 2d 1199 (holding that the state's funding scheme complied with state constitutional mandate); Jones v. State Bd. of Elementary & Secondary Educ., 2005-0668/0669 (La. App. 1 Cir. 11/4/05); 927 So. 2d 426 (rejecting another constitutional challenge to the state's school funding scheme). *See generally* Jackie Ducote, *The Education Article of the Louisiana Constitution*, 62 LA. L. REV. 117, 131-34 (2001) (describing the state's school funding scheme, the Minimum Foundation Program).

[114] La. Dep't of Educ., 2004-2005 District Accountability Rankings, http://www.louisianaschools.net/lde/uploads/8604.pdf; La. Dep't of Educ., 2004-2005 Accountability Summary Results, http://www.louisianaschools.net/lde/uploads/8103pa.pdf (noting also that 68 of the state's 134 academically unacceptable schools were in Orleans Parish).

"colony" of high achievement within the struggling district.[115] The district represented the type of urban district Coleman's report had identified as most "at risk" and was thus ripe for major structural change.

In addition, even before the hurricane, the ingredients that have enabled the emergence of the portfolio model as the structural change to address this situation were already present in Orleans Parish. Most significantly, as the district's performance and governance troubles continued, the move to increase state involvement in local school operation in New Orleans gained traction. In 2003, the state Board of Elementary and Secondary Education (BESE) developed a constitutional amendment and legislative package that would allow BESE to take over any failing school and turn it over to the state's newly-created Recovery School District (RSD).[116]

Even as it increased state involvement, the legislation simultaneously laid the foundation for moving control away from the district to the school level with an increase in autonomous school operators. For example, it exempted from the state's limit on charter schools any charter school created as a result of a school's transfer into the RSD.[117] This statute suggests a preference that schools in the RSD's jurisdiction be operated in a "manner . . . most likely to bring the school to an acceptable level of performance"—converting them to charter schools.[118]

With the traditional district's power as the sole operator of schools in the parish threatened, New Orleans public school students quickly found themselves in the middle of a power struggle between the OPSB, the superintendent, and the state that ultimately led to the superintendent's departure in April 2005.[119] This departure completed the tenure of the district's eighth superinten-

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[115] Brian Thevenot, *Drawn Apart: New Orleans Public Magnet Schools Represent Both an Answer to Failed Integration and a New Kind of Segregation—by Class and Academic Ability*, NEW ORLEANS TIMES PICAYUNE, May 18, 2004, at A1 (In 1988, activist Carl Galmon claimed that the district had "created a colony within the school system at the expense of black students.").

[116] *See generally* 2003 La. Acts 9; LA. REV. STAT. ANN. § 17:1990 (2012); *see also* Kiel, *supra* note 66, at 125-27. A school would be subject to RSD takeover in the event that it was labeled "academically unacceptable" under the state's accountability scheme and the local board failed to construct or implement an adequate turnaround plan or if the school received the "academically unacceptable" label for four consecutive years. At the time of the amendment's ratification, 54 of the OPSB's 118 schools became eligible for state takeover.

[117] LA. REV. STAT. ANN. § 17:3973(B)(v) (2012) (creating "Type 5" charter schools consisting of those created by the RSD from a preexisting school); LA. REV. STAT. ANN. § 17:3983 (2012) (regarding the lack of a limit on Type 5 charter schools).

[118] LA. REV. STAT. ANN. §§ 17:10.5(A)(1), 17:10.5(B) (2012).

[119] In 2003, the local board had unanimously opposed Act 9 so as to give the new superintendent, Tony Amato, time to turn around schools before RSD takeover, but subsequently began to criticize Amato's work. This triggered more state intervention in the form of legislation meant to clarify the division of power, giving substantially more power to the superin-

dent since 1998, a turnover rate triple the national average.[120] In addition to the achievement and governance struggles, the district was in financial shambles at the close of the 2004-2005 school year.[121]

This was the lay of the land during the summer of 2005. The centralized OPSB still operated nearly all the schools in the district despite the legislation enabling RSD takeover, but there was a perceived need for massive change and the legal foundation was present for radical structural reform embracing multiple operators' broader autonomy. When Hurricane Katrina arrived in August 2005, the trigger to that structural reform came with it.

ii. Educational Structure After Hurricane Katrina

Hurricane Katrina rendered complete what had seemed to be building even before the storm arrived: the end of public education in Orleans Parish in its preexisting form. What would follow would indeed be a radical reimagination of how public education could be structured in a community.

In the immediate aftermath of the storm, several elements worked to accelerate the shift toward the portfolio model. First, the federal government made a substantial amount of money available for the repair and expansion of charter schools, thus representing federal support for the transition to the portfolio model.[122] The OPSB, financially troubled before the hurricane and desperate for any assistance available after it, jumped at the opportunity and in October 2005 unanimously approved twenty charter applications converting district schools into charter schools.[123] In addition, the state legislature built on its pre-hurricane legislation to create an additional mechanism for schools to be taken

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tendent than the school board. Despite this legislation's passage, the power struggle continued and climaxed with Amato's resignation after a failed attempt to create a new magnet school. *See, e.g.*, Brian Thevenot, *Superintendent's Powers Reaffirmed; Attorney General Sides with Amato on Law*, NEW ORLEANS TIMES PICAYUNE, Dec. 16, 2004; Stephanie Grace, *Hasty "Defense of Amato Act" Shows Flaws*, NEW ORLEANS TIMES PICAYUNE, Apr. 12, 2005; Brian Thevenot, *Amato Fell Out of Favor Hard, Fast; Law to Save Him Became His Undoing*, NEW ORLEANS TIMES PICAYUNE, Apr. 17, 2005; Brian Thevenot, *Besieged Amato Calls It Quits; Schools Chief Suffered Utter Loss of Support*, NEW ORLEANS TIMES PICAYUNE, Apr. 13, 2005.

[120] COWEN INST. FOR PUB. EDUC. INITIATIVES, THE 2010 STATE OF PUBLIC EDUCATION IN NEW ORLEANS 3 (2010) [hereinafter COWEN 2010 REPORT], http://www.coweninstitute.com/wp-content/uploads/2010/12/CI-SPENO-Facilities-Dec-2010.pdf.

[121] *See* Michael Schwam-Baird & Laura Mogg, *Is Education Reform in New Orleans Working?*, 11 LOY. J. PUB. INT. L. 163, 165-66 (2010); Kiel, *supra* note 66, at 123-24.

[122] Kiel, *supra* note 66, at 131, n.155.

[123] *See* Catherine Gewertz, *New Orleans Adopts Plan for Charters*, EDUC. WK., Oct. 19, 2005; Steve Ritea, *Board Approves Charters for 20 Schools; They Include 7 of the East Bank*, NEW ORLEANS TIMES PICAYUNE, Oct. 29, 2005. *See also* Kiel, *supra* note 66, at 131; *see* Schwam-Baird & Mogg, *supra* note 121, at 170. This conversion was only made possible with the waiving of certain state law requirements by Governor Kathleen Blanco.

over and potentially converted into charter schools by the RSD. Whereas the 2003 legislation had laid out fairly specific and limited criteria for a local school to be removed from local control, the post-hurricane bill allowed for any school scoring below the state *average* in a district declared "academically in crisis"—a label that applied only to Orleans Parish—to be RSD-eligible.[124]

The federal dollars encouraged and the post-hurricane legislation enabled a decrease in OPSB authority and an increase in charter schools. The results were massive. Only two schools had been taken over under the previous legislation, but in November 2005, more than 100 Orleans Parish schools were transferred to the state RSD's jurisdiction.[125] Combined with the chartering of OPSB schools, this led to a situation where OPSB, the entity that had previously operated nearly all the schools in New Orleans, only operated four schools by the end of 2005.[126] Almost immediately, the centralized power of a traditional district had been dispersed to charter operators and to the state.

Although the move toward broader structural autonomy had begun in the months immediately following Hurricane Katrina, the dislocation of much of the city's population meant that the new model would not begin in earnest until students returned. Students have returned in the years that followed, although the district is substantially smaller in its post-Katrina state.[127] The public school population remains predominantly African American and poor, with demographics comparable to those prior to the storm.[128] The educational structure, however, is dramatically altered.

Dozens of school operators are running schools with broad autonomy. The largest operator is the RSD itself, which directly operates 23 schools serving 8,779 students (22% of the community's public school students).[129] Although

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[124] *See* LA. REV. STAT. ANN. § 17:10.7(A)(1) (2012). This was a result of Act 35 in 2005, which amended the pre-hurricane statutes. The only limitation contained in the new legislation was that schools could only be transferred to RSD's jurisdiction through 2008 (subsequently amended to 2009), suggesting the emergency nature of the legislation. LA. REV. STAT. ANN. § 17:10.7(A)(2) (2012); 2008 La. Acts 737. *See also* Schwam-Baird & Mogg, *supra* note 121, at 168-70.

[125] *See* La. Att'y Gen. Op. No. 07-0103 (June 13, 2007); *see also* Schwam-Baird & Mogg, *supra* note 121, at 168-69.

[126] Kiel, *supra* note 66, at 132.

[127] While there were more than 64,000 students in New Orleans in 2004-2005, there were 39,877 in 2009-2010. *Compare* statistics from La. Dep't of Educ., Orleans Parish District Report Card 2004-2005, http://www.doe.state.la.us/Lde/pair/sps2005/rptcards/2005DRC036.pdf, *with* COWEN 2011 REPORT, *supra* note 10, at 5.

[128] In 2004-2005, the New Orleans student population was 93.5% African American and 73.4% economically disadvantaged (free or reduced price lunch); in 2009-2010, it was 89% African American and 84% economically-disadvantaged. *Comparing* statistics from La. Dep't of Educ., Orleans Parish District Report Card 2004-2005, http://www.doe.state.la.us/Lde/pair/sps2005/rptcards/2005DRC036.pdf *with* COWEN 2011 REPORT, *supra* note 10, at 6.

[129] COWEN 2011 REPORT, *supra* note 10, at 2, 5.

RSD was not initially conceived as an entity that would operate schools, but rather as one that would oversee charter operators, a lack of high quality charter school applications led/forced RSD to directly run many schools.[130] Over time, the number of RSD direct-run schools has diminished, and the RSD's stated goal is to turn over all the schools it operates to charter operators.[131] In addition to RSD, the OPSB continues to directly operate five schools. The remainder of the sixty public schools in Orleans Parish are operated as autonomous charter schools.[132]

FIG. 1: TYPES OF SCHOOLS IN NEW ORLEANS (2010-2011)

Operator-School Type	Number of Schools	Number of Students
RSD Direct Operation	23	8,729
RSD Charter Schools	46	19,433
OPSB Direct Operation	5	3,058
OPSB Charter Schools	11	7,529
BESE Charter Schools	3	1,078

The sixty charter schools in the city serve 71% of public school students, by far the highest percentage of students in charter schools in the nation.[133] That proportion, however, obscures just how fragmented the system of schools is. First, there are three distinct charter school authorizers within Orleans Parish: the RSD, the OPSB, and the BESE. Thus, charter schools are being authorized, overseen, and ultimately held accountable by three separate entities, one local (OPSB) and two state (RSD and BESE). In total, there are more than forty charter operators serving students in Orleans Parish.[134] Some operate a single school, while others operate networks of schools. For example, the Knowledge Is Power Program ("KIPP"), a national leader in charter operation, has six schools in Orleans Parish.[135] The largest charter operator, Algiers Charter Schools Association, has nine schools serving 5,532 students,[136] a population that represents 13.9% of public school students in the city.

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[130] Schwam-Baird & Mogg, *supra* note 121, at 174-75.

[131] According to former RSD Superintendent Paul Vallas, "In two to three years, this district is going to be almost exclusively made up of charter and independent schools that may not be legally charters but they have all the autonomy, flexibility, and independence that charters do." Stephen Maloney, *Momentum Continues for Switch to Charters*, NEW ORLEANS CITY BUS., Jan. 12, 2009.

[132] COWEN 2011 REPORT, *supra* note 10, at 2, 5.

[133] COWEN 2011 REPORT, *supra* note 10, at 7.

[134] COWEN INST. ON PUB. EDUC. INITIATIVES, THE 2012 STATE OF PUBLIC EDUCATION IN NEW ORLEANS 10 (2012) [hereinafter Cowen 2012 Report], *available at* http://www.coweninstitute.com/wp-content/uploads/2012/07/SPENO-20121.pdf.

[135] COWEN 2011 REPORT, *supra* note 10, at 2.

[136] COWEN 2011 REPORT, *supra* note 10, at 19-20, Appendix.

This multi-operator model has been accompanied by other substantial changes facilitating broader choice for students and parents among the autonomous school options. Significantly, no New Orleans school assigns students based on geographical attendance zones any longer; rather, every school in the city is open to any student in the city. Other than a handful of schools that have selective admissions criteria, enrollment decisions are based entirely on choice.[137] State law requires the open access policy for schools either directly operated by or authorized by RSD—the majority of schools in the city.[138] State law further mandates that transportation be provided for students in schools operated or authorized by RSD.[139] This requirement represents a sizable cost for an entity already facing budgetary difficulties.[140]

The new system of public education in New Orleans represents an embrace of the portfolio model. Multiple school operators are acting autonomously within a context that incorporates both local and state oversight and, if the system works properly, will be held to accountability standards making their continued authority contingent on student achievement. The New Orleans model relies heavily on charter schools to constitute the portfolio model and it has served as the most comprehensive example of embracing multiple autonomous operators within a single community. As other communities facing similar circumstances to pre-Katrina New Orleans consider a similar transition away from the traditional district model, many are looking to New Orleans.[141] One such community is Memphis and Shelby County, Tennessee, a community facing a massive structural change of its own.

B. *Shelby County, Tennessee*

i. Educational Structure Prior to Dissolution of the MCS Charter (December 2010)

As the schools of New Orleans were undergoing massive structural change in the wake of Hurricane Katrina, the urban schools of Memphis just up the river reflected the pre-Katrina predicament of public education. In 2010, the Memphis City Schools (MCS) served a population that was almost entirely African American (85%) and economically disadvantaged (87%).[142] Given the

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[137] Kiel, *supra* note 66, at 135-36 (noting that RSD schools are open access by law and many OPSB schools have adopted an open access policy as well).

[138] LA. REV. STAT. ANN. §§ 17:3991(B)(3), 17:1990(F) (2012).

[139] COWEN 2010 REPORT, *supra* note 120, at 23.

[140] *See* Darran Simon, *Cuts Set at Orleans Schools; Layoffs to Counter Budget Woes OK'd*, NEW ORLEANS TIMES PICAYUNE, July 1, 2009.

[141] *See, e.g.*, Dana Brinson et al., New Orleans-Style Education Reform: A Guide for Cities; Lessons Learned, 2004-2010, New Schools for New Orleans and Public Impact, (2010), http://www.newschoolsforneworleans.org/documents/03012012NOLAstylereform.pdf.

[142] Tenn. Dep't of Educ., Memphis City Schools 2010 Report Card, http://edu.reportcard.

demographics, integration—either racially or socioeconomically—was not feasible within the district and Tennessee's experience with finance reform had not led to dramatic changes.[143] Further, as in New Orleans, the schools did not fare well under Tennessee's accountability system, with only 40% in "good standing" under NCLB.[144]

MCS operated as a traditional district with an elected board and superintendent, though with some elements of broader choice and autonomy. There had long existed a series of "optional" schools open to all students within the district, offering specialized programs, such as fine arts or advanced academics.[145] As with the magnet schools in New Orleans, the highest academically achieving of these optional schools had student populations that were disproportionately white.[146] Optional schools had some degree of flexibility in their academic program, but even greater autonomy was enjoyed by the more than twenty charter schools the district had authorized by 2010.[147]

Although these options—optional and charter schools—evince some embrace of choice and autonomy *within* MCS, the broader metropolitan area was also served by a parallel suburban system that operated for and was governed by citizens of Shelby County living outside of the Memphis city limits.[148] That district, Shelby County Schools (SCS), also operated as a traditional district with its own superintendent and elected board.[149] Although they actually shared a physical building for their central administrative offices, the two districts operated separately and served very different student populations.[150] In

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state.tn.us/pls/apex/f?p=200:1:8029928217329822::NO::: [hereinafter MCS 2010 Report Card].

[143] Lee A. Harris, *Memphis Sings 'Soul' Music, Rural Does Country: School Finance Litigation in Tennessee*, 4 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 315, 342 (2004) (noting that school finance litigation had tended to operate to the advantage of smaller, rural districts rather than larger, urban ones).

[144] Kiel, *supra* note 96, at 816.

[145] For a full list of optional schools and specialties, see http://www.mcsk12.net/optional_schools/.

[146] For example, in 2010, the city's highest performing high school, White Station High School, had a student population that was 40% white within a district that was only 7% white. *See* MCS 2010 Report Card, *supra* note 142. In the interest of full disclosure, it is worth noting that I attended White Station High School in the 1990s.

[147] *See* list of schools for Memphis City Schools available on MCS 2010 Report Card, *supra* note 142.

[148] Kiel, *supra* note 96, at 806. The districts had been created just after the Civil War and had served separate student populations—Memphis and non-Memphis—since that time. Indeed, even as the boundaries and distribution of students shifted dramatically over time, the primary distinction—MCS serving Memphians, SCS serving the rest of the county—remained.

[149] *Id.* at 811.

[150] Sam Dillon, *Merger of Memphis and County School Districts Revives Race and Class Challenges*, N.Y. TIMES, Nov. 5, 2011, at A18 (referring to the corridor and double-locked

2010, SCS had a majority white population (54%), served far fewer economically disadvantaged students (37%), and achieved more success as judged by the state's standards.[151] Thus, public education in greater Memphis reflected the urban-suburban divide solidified in the decades after *Milliken* signaled that district boundaries would be protected even if they allowed for de facto racial segregation and disparate achievement.[152]

While this urban-suburban dichotomy in student makeup and achievement was typical of urban communities across the county, what followed in Memphis was anything but. There had long been talk of consolidating the two systems, an idea thought to promote efficiency, equity, or both.[153] Over time, the idea had developed into a political non-starter[154] and merger of the school systems had been intentionally omitted from a recent proposal to merge city and county governments.[155] The districts seemed destined to continue on their parallel paths, while sharing a primary local funding source in the Shelby County government.[156] However, as the county's property tax base continued to shift from within to outside Memphis,[157] the school board became concerned that the

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doors separating the shared headquarters of the two districts); Zack McMillin, *Memphis, Shelby County Schools Collaborate Ahead of Merger*, COM. APPEAL (Nov. 7, 2011), http://www.commercialappeal.com/news/2011/nov/07/city-county-schools-collaborate/ ("At the Board of Education office complex off Hollywood, where Memphis City Schools and the Shelby County Schools have coexisted side by side for more than four decades, there is a second-floor walkway connecting the two districts.").

[151] Tenn. Dep't of Educ., Shelby County Schools 2010 Report Card, http://edu.reportcard.state.tn.us/pls/apex/f?p=200:1:369-40-534448325::NO::: [hereinafter SCS 2010 Report Card].

[152] *See generally* Milliken v. Bradley, 418 U.S. 717 (1974); *see also* RYAN, *supra* note 44, at 105-07.

[153] Kiel, *supra* note 96, at 824-29.

[154] For a description of some of the history of resistance to efforts to unify schools racially, *see* Daniel Kiel, *Exploded Dream: Desegregation in the Memphis City Schools*, 26 LAW & INEQUALITY 261 (2009); MARCUS POHLMANN, OPPORTUNITY LOST: RACE AND POVERTY IN THE MEMPHIS CITY SCHOOLS (2010).

[155] Clay Bailey, *Forum Presents Pros, Cons of Consolidation Matters*, COM. APPEAL, Sept. 21, 2010. Even with schools omitted, the proposed consolidation failed when it was soundly rejected by Shelby County voters outside of the city of Memphis, a harbinger of the resistance to the school merger that would follow. Clay Bailey, *Consolidation: Memphis Suburbs' Rejection of Merger "Loud and Clear,"* COM. APPEAL, Nov. 4, 2010.

[156] All residents of Shelby County, including those within the City of Memphis, paid a county school tax that was distributed on a per pupil basis to MCS and SCS. In 2010, this meant that $255 million went to MCS and $115 million to SCS, a split (69%/31%) that reflected the sizes of the districts. County funding represented approximately 40% of each district's revenues in 2010. Kiel, *supra* note 96, at 812. In addition, Memphis residents paid a school tax to the city that was distributed only to MCS, a contribution that had led to controversy and that represented approximately 10% of the MCS budget. *Id.* at 829-30.

[157] By 2008, only 63% of Shelby County's property tax wealth was located within Mem-

shared, countywide local funding would be replaced by a system where each district was responsible for raising its own funds.[158] To preempt this perceived threat to the sustainability of MCS funding, the MCS board voted 5-4 in December 2010 to dissolve the district, essentially putting itself out of business.[159] A figurative hurricane had arrived that would force the community to reconsider its system of public education.

ii. Process for Transition to a Merged Countywide School System

Just as in the immediate aftermath of the hurricane in New Orleans, tremendous uncertainty developed about what would follow the dissolution of MCS. Since the 100,000 MCS students would no longer be served by that district, responsibility for their education would be transferred to SCS, an effect that would immediately triple SCS in size.[160] There was no legal roadmap for how that process would unfold or who would be responsible for implementing it.[161] The process was described by various leaders as a "merger," a "consolidation," and even a "hostile takeover."[162] Into this void stepped the Tennessee General Assembly, which passed a law in early 2011 that would govern the dissolution/merger process.[163] Specifically, the law mandated that a twenty-one-person Transition Planning Commission (TPC) be appointed to generate a merger

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phis city limits. *See* Steve Redding et al., *Impact of a Special School District on Memphis and Shelby County*, UNIV. OF MEMPHIS REG'L ECON. DEV. CTR., 15 (2008), http://www.mcsk12.net/boc/docs/Impact%20Spec%20school%20districtLR.pdf. *See also* Kiel, *supra* note 96, at 808 (chart detailing the population shift from within to outside Memphis city limits from 1950 to 2010).

[158] Steve Redding et al., *Impact of a Special School District on Memphis and Shelby County*, UNIV. OF MEMPHIS REGIONAL ECON. DEV. CENTER (May 2008). *See also* Kiel, *supra* note 96, at 832-33.

[159] Memphis City Schools, Resolution to Surrender Charter of Memphis City Schools, Dec. 20, 2010. The surrender was overwhelmingly endorsed in a citywide referendum in March 2011. Zack McMillin & Jane Roberts, *Memphis Voters OK School Charter Surrender*, COM. APPEAL, Mar. 8, 2011.

[160] This would occur because in the absence of any other school districts within the county, the county district would be responsible for fulfilling the constitutional and statutory obligation to provide public education. *See* Tenn. Const. art. XI, § 12; TENN. CODE ANN. § 49-6-302 & 403 (requiring school districts to provide as many elementary (302) and high (403) schools as necessary to serve students within their jurisdiction).

[161] Kiel, *supra* note 96, at 834-40.

[162] Campbell Robertson, *Memphis Votes for County to Run Schools*, N.Y. TIMES, Mar. 8, 2011 ("[S]uburban residents were outraged, seeing the maneuver as a hostile takeover by a much larger, poorer and more complicated school district."). State Senator Mark Norris, representing a district in suburban Shelby County, appears to have been the first to use the "hostile takeover" phrase. Otis Sanford, *Petition Aggravates Contentious School Issue*, COM. APPEAL, July 1, 2012.

[163] S.B. 25, 107th Gen. Assemb., 1st Reg. Sess. (Tenn. 2011) (amending TENN. CODE ANN. § 49-2-502(b)). The bill, made law in February 2011, was introduced by legislators

plan.[164] The law further delineated a variety of items that the plan must address.[165] The merger plan required the state's approval on certain items and would be approved and ultimately implemented by a school board so that the merged district would begin operation within three years.[166] In Shelby County, therefore, joint operation would begin for the 2013-2014 school year.

Predictably, the dissolution and new legislation led to a lawsuit that quickly incorporated a wide variety of issues.[167] For example, to the extent the law required board approval of the merger plan, it was unclear which board would do the approving.[168] The MCS board seemed to expire after the dissolution of the district's charter, but the existing SCS board had been elected only from suburban areas and could not be charged with making decisions that would affect the Memphians who had taken no part in those elections.[169] In August 2011, the court upheld the majority of the new legislation dictating the merger process, ruled that the current SCS board could not constitutionally approve the merger plan, and encouraged the parties to come to an agreement on board makeup during the transition period.[170] With the judge playing an active role in negotiations, the parties ultimately agreed to create a unified countywide school board to be seated in October 2011.[171] The unified board would be responsible for the continued separate operation of the two districts as well as approval and implementation of the merger plan from the TPC.[172]

Shortly after this resolution, the TPC members were appointed and began

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Mark Norris and Curry Todd, representing suburban Shelby County, and is generally known as the Norris-Todd Act.

[164] TENN. CODE. ANN. § 49-2-502(b)(2) (providing for appointments by the county mayor, the county school board, the city school board, and state actors, as well as *ex officio* commission membership for the county mayor and the chairs of the county and city school boards).

[165] TENN. CODE ANN. § 49-2-502(b)(2) (incorporating list of items from TENN. CODE ANN. § 49-2-1201(i) [a district consolidation statute], including a plan for the administrative organization of the proposed consolidated system).

[166] TENN. CODE ANN. § 49-2-502(b)(1). *See* Bd. of Educ. of Shelby Cnty. v. Memphis City Bd. of Educ., No. 2:11-cv-02101-SHM-cgc, 2011 WL 3444059, at *50 (W.D. Tenn. Aug. 8, 2011) ("The Board must consider and, as it deems appropriate, approve and implement the comprehensive transition plan developed by the transition planning commission and reviewed by the Department of Education.").

[167] Bd. of Educ. of Shelby Cnty. v. Memphis City Bd. of Educ., No. 2:11-cv-02101-SHM-cgc, 2011 WL 3444059 (W.D. Tenn. Aug. 8, 2011).

[168] *Id.* at *51-54.

[169] *Id.*

[170] *Id.* at *59-61.

[171] *See generally* SCS Board Consent Decree, Bd. of Educ. of Shelby Cnty. v. Memphis City Bd. of Educ., No. 2:11-cv-02101-SHM-cgc (W.D. Tenn. Sept. 28, 2011), EDF No. 32 [hereinafter SCS Board Consent Decree].

[172] The unified countywide board would have twenty-three members, including the nine preexisting MCS board members, the seven preexisting SCS board members, and seven

developing a plan for merging a 100,000-student urban school district into a 50,000-student suburban one.[173] Central to that process would be creating the administrative structure of the merged countywide district.

iii. Landscape for the Educational Structure in a Merged District

Although consolidation of two systems into a 150,000-student countywide district seems antithetical to the spirit of the portfolio model, currents similar to those that enabled the transition in New Orleans informed the TPC's process for developing its recommended structure. Again, federal dollars and state legislative changes accelerated the process. Of greatest significance were changes to Tennessee's education laws adopted in the state's pursuit of funding under the federal Race to the Top program in 2010. Specifically, the state eliminated its cap on charter schools and created a statewide Achievement School District (ASD) to serve the state's lowest performing schools in a way similar to Louisiana's RSD.[174] Tennessee was one of only two states awarded funding in the first round of Race to the Top,[175] which accelerated the creation of the ASD and charter school growth.

In addition, the state applied for and received a waiver from NCLB.[176] As part of this process, Tennnessee created "innovation zones" that would initially be supported with federal money and would create school clusters with broader autonomy to serve students in low-performing schools.[177] Although these schools would still formally report to the superintendent, they would receive broader latitude to ensure that innovative educational strategies would be "developed, implemented, assessed, and shared."[178] Thus, independent of the merger process, multiple operators would serve public school students in Shelby County. Specifically, existing and newly-created charter schools, along

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newly-appointed members from districts across the county appointed by the Shelby County Commission. SCS Board Consent Decree, *supra* note 171, at 11-13.

[173] TRANSITION PLAN, supra note 36, at 22.

[174] *See* TENN. CODE ANN. § 49-1-614 (responsibilities of the Achievement School District); S.B. 7005, 2010 Tenn. Laws Ex. Sp. Sess. Pub. Ch. 2 (Tennessee's First to the Top legislation passed in support of the Race to the Top application); H.B. 1989, 2011 Tennessee Laws Pub. Ch. 466 (removing cap on charter schools).

[175] Richard Locker, *Tennessee Wins Big in Race to the Top School Funding*, COM. APPEAL, Mar. 29, 2010.

[176] U.S. Dep't of Educ., ESEA Flexibility Request: Tennessee, 35 (2011), http://www2.ed.gov/policy/eseaflex/approved-requests/tn.pdf; *see* S.B. 2208, 2012 Tenn. Laws Pub. Ch. 962 (2012); Jane Roberts, *Tennessee Receives No Child Left Behind Waiver*, COM. APPEAL, Feb. 10, 2012.

[177] Richard Locker & Jane Roberts, *Memphis Schools to Get Millions in Federal Funds to Boost Performance*, COM. APPEAL, May 10, 2012.

[178] Press Release, State of Tennessee, Haslam Signs Legislature Redefining School Accountability, May 10, 2012, https://news.tn.gov/node/8803 (announcing receipt of Innovation Zone grant from federal School Improvement grant program).

with the ASD, would remove students from the authority of the traditional district models of the existing districts.[179] Further, schools in the innovation zone would be granted greater autonomy even within the traditional district model.[180] Each of these changes was enabled with encouragement, financial and otherwise, from the federal Department of Education.[181]

Further, as the TPC began its process in a series of "listening sessions," it became clear that the concept of local control and autonomy had broad support throughout the county.[182] This sentiment was expressed most vociferously in the suburbs. The county's six suburban municipalities quickly began exploring the possibility of creating new municipal school districts to avoid being part of the merged system.[183]

Given this landscape, the TPC crafted its administrative structure amid the reality that a growing number of students would not be served by traditional district operation and a substantial segment of the population sought levels of autonomy closer to the school level. In recognition of this, the TPC recommended a "Multiple Achievement Paths" model that embraced the concepts of multiple operators within the community and broader autonomy for schools operated both by independent and district operators.[184] However, the "Multiple Achievement Paths" model did not completely abandon a centralized local district as New Orleans has.[185] Instead, the model called for the district to continue to serve more students than any other operator in the county.[186] This compromise occurred because the structural reform in Shelby County was not pursued under extreme exigency, as in New Orleans. Shelby County learned

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[179] TRANSITION PLAN, supra note 36, at 173-74 (providing financial impact of non-merger-related departure of students to ASD or charter schools).

[180] *Id.* at 95-97. Specifically, Innovation Zone schools were recommended to operate with extended learning time. *Id.* at 97 (Recommendation #98).

[181] *See supra* notes 71-72, 74.

[182] TRANSITION PLAN, *supra* note 36, at 23-27.

[183] The potential creation of separate municipal school districts as a reaction to the merger of MCS and SCS merits an exploration of its own that is beyond the scope of this article. Briefly, the six suburban municipalities sought studies on the feasibility of creating new school districts and pushed for changes in state law to enable them to pursue that path. There is currently litigation regarding a broad range of topics related to municipal districts. For an example of the feasibility studies, see Southern Educational Strategies, LLC, *Feasibility Study Regarding the Creation of a Municipal School District in the City of Bartlett, Tennessee* (Jan. 16, 2012), http://cityofbartlett.org/DocumentView.aspx?DID=1257. For information on the continuing campaign to create municipal districts, *see, e.g.*, CITIZENS OF COLLIERVILLE, http://www.citizensofcollierville.com/ (last visited Feb. 18, 2013), MY GERMANTOWN SCHOOLS, http://www.mygermantownschools.com (last visited Feb. 18, 2013), and BETTER BARTLETT SCHOOLS, http://www.betterbartlettschools.org, (last visited Feb. 18, 2013) (web pages urging votes in favor of creating municipal school districts).

[184] TRANSITION PLAN, *supra* note 36, at 90.

[185] *Id.*

[186] *Id.*

from the challenges New Orleans has encountered, particularly in terms of equity among various school operators and in providing services to unique populations.[187] In addition, just as the RSD has not been able to fully cease direct school operation in New Orleans, the potential for enough quality charter school operators to emerge to serve Shelby County's much larger student population is low.

Looking forward, the schools in Shelby County may be divided into four broad categories: (1) schools directly operated by the Shelby County School Board (SCSB) and its superintendent, divided into geographic regions; (2) schools operated within or authorized by the district's semi-autonomous "Innovation Zone"; (3) charter schools authorized and held accountable by SCSB; and (4) schools, charter or direct-run, within the jurisdiction of the state ASD.[188] The spread of operational authority among these various actors—the state, the local district and its regions, charter operators and networks—represents an embrace of both the practical reality in Shelby County and the structure of a portfolio model.

The TPC's recommendation, however, is only a first step in the reform of public education in Shelby County. Its implementation will be difficult and will be led by the school board with the most power to lose in the transition to a portfolio model as students are served by other operators and the Board loses its per-pupil funding for those students. This dynamic—a requirement of buy-in from the very body with the most to lose—adds significant risk and reward to the transition in Shelby County. The risk is that the recommendation will not be implemented with fidelity to the spirit of the portfolio model; the reward would be that the school board could establish a path whereby the various operators can coexist constructively. By managing a culture of competitive collaboration that includes the continued existence of a traditional (if smaller) district while embracing the reality of autonomous operators within a community, the emerging scheme in Shelby County could provide a portfolio model more easily accessible to other communities than the massive shift to charter schools in New Orleans. Whether either model can be successful educationally, however, will be the ultimate test. In the next Part, this Article will consider several potential—and familiar—shortfalls that these structural reforms present, using the experiences in Orleans Parish and Shelby County as primary reference points.

III. ANALYSIS: MAKING THE MOST OF THE PORTFOLIO MODEL

The portfolio model, as other education reform movements before it, has been presented as a mechanism for bridging the persistent inequities in American public education. It is undoubtedly a radical break from the traditional

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[187] *Id.* at 88 (describing findings from research that were utilized in development of the TPC's recommended administrative structure and identifying New Orleans specifically).

[188] *Id.* at 90.

district model that has served many communities for generations.[189] However, a mere shift in model, no matter how radical, will not inherently raise educational quality for the students—generally of low income and minority—whom the American public educational system has historically failed to serve equitably.[190] The goal should be not only a change in structure but also an increase in student success. If districts embracing the transition to the portfolio model are to see such a change, they must be cognizant of several features that could threaten to render the transition to a portfolio model a process that simply recreates, or even exacerbates, old problems within a new structure. Of particular importance to a largely decentralized community of autonomous schools are concerns about stratification and sustainability.

A. *Stratification*

The murkiest element of the portfolio models emerging in New Orleans and recommended for Shelby County is the contingency element—whether and how schools that fail to perform will be held accountable. This, however, is the most important of the three foundational elements of the portfolio model.[191] It does little good to have multiple operators running schools autonomously if there are no prospects for ensuring that such operators will be doing so successfully. The entire concept of school choice rests on the premise that failing schools will be eliminated from the "market," leaving students and parents with only quality choices from which to choose.[192] The history of American public education over the past half century suggests that where low quality schools remain, those schools will be populated disproportionately by minority and low-income students who have the greatest need for an education that can provide the path to the upward social mobility underlying the American dream.

Prior to shifting to a portfolio model, the use of school choice in New Orleans and Memphis reflected the danger of stratification, and this danger is magnified with a broader embrace of multiple operators. In both communities, magnet schools were often criticized as being beneficiaries of district favoritism.[193] Such criticisms often included a racial element, but the basic thrust

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[189] *See supra* Part I.

[190] DAVID TYACK, THE ONE BEST SYSTEM: A HISTORY OF AMERICAN URBAN EDUCATION 11 (1974) ("Despite frequent good intentions and abundant rhetoric about 'equal educational opportunity,' schools have rarely taught the children of the poor effectively—and this failure has been systematic, not idiosyncratic.").

[191] *See* Danielle Holly-Walker, *The Accountability Cycle: The Recovery School District Act and New Orleans' Charter Schools*, 40 CONN. L. REV. 125, 140–41, 155–56 (2007) (explaining the accountability problems in New Orleans after the increase of charter schools post-Katrina, and proposing a solution).

[192] SALTMAN, *supra* note 35, at 4. *See also* Chubb & Moe, *supra* note 2, at 1068.

[193] In MCS, magnet schools were known as optional schools. In New Orleans, magnet schools have been the subject of substantial controversy, including an investigation by the U.S. Department of Education's Office of Civil Rights in 1998 challenging enrollment prac-

comes from a sense of fairness. The problem is not that high quality schools exist within the district; it is that high quality schools are not universally available. The fact that a magnet school population is disproportionately white would be less troubling if it were not also the case that the school was a high-performing exception in a district with low overall achievement.[194] Students who do not have the opportunity—through academic success or qualification, parental involvement, or geographic accident—to enroll in the district's high quality schools are left to attend "schools of last resort" which are often racially and socioeconomically isolated and are perceived to be inferior.[195]

A portfolio model that replicates this situation would be a failure. However, the decentralized model itself could actually increase the risk of stratification as autonomous operators serve a narrower group with little concern for equity across the broader community. As opposed to a reform strategy like student integration, where standardization of experience across groups is the lever for achieving equitable opportunity, autonomy provides wider variability in the educational experience.[196] The separation of students into groups served by independent operators could turn charges of "separate and unequal" schooling opportunities into fact—students could be served by deliberately separate and unaffiliated school operators delivering unequal educational opportunities.[197] To avoid this outcome, a portfolio model must take deliberate steps to ensure: (1) broad accessibility across operators; (2) high quality throughout the educational community; and (3) genuine mechanisms for improving or eliminating operators that fail to meet standards. This can be done through, for example, state law, in agreements with autonomous operators (such as charter agree-

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tices where 90% of the district's white population was enrolled in magnet schools. *See* Jeffrey Meitrodt, *N.O. Magnet Schools Are Criticized as Elitist; Board to Expand Criteria for Admissions Magnets*, TIMES-PICAYUNE, Mar. 29, 1998, at B1. *See also* Brian Thevenot, *Drawn Apart: New Orleans Public Magnet Schools Represent Both an Answer to Failed Integration and a New Kind of Segregation—by Class and Academic Ability*, TIMES-PICAYUNE, May 18, 2004 (In 1988, activist Carl Filmon claimed that the district had "created a colony within the school system at the expense of black students.").

[194] Meitrodt, *supra* note 193, at B1.

[195] INST. ON RACE & POVERTY, THE STATE OF PUBLIC SCHOOLS IN POST-KATRINA NEW ORLEANS: THE CHALLENGE OF CREATING EQUAL OPPORTUNITY 32-33 (2010), *available at* http://www.law.umn.edu/uploads/47/13/4713aa9c88439fffea3aff6575246976/35a_THE_STATE_OF_SCHOOLS_IN_NEW_ORLEANS.pdf (describing RSD direct run schools as "schools of last resort" in the New Orleans model).

[196] Hill & Campbell, *Strife and Progress*, *supra* note 7, 8 ("Choice is meaningful only if schools are free to differ").

[197] *See supra* Part I. *See also* Jane Roberts, *Memphis City Schools Officials Pondering Funding Dilemma*, COM. APPEAL (Memphis), Nov. 19, 2010, http://www.commercialappeal.com/news/2010/nov/19/school-board-sweats-options/ (quoting MCS Board member Tomeka Hart as saying, "I have no intention of saying we should remain separate and more unequal").

ments), or in local or state policies setting out preconditions for the granting of autonomy.[198]

i. Access

Historically, stratification due to disparate access has occurred in many contexts. For example, during segregation, access to the best facilities and resources was restricted to white students. Similarly, with regard to district geographic separation, a lack of access to higher quality educational opportunities occurred in some areas due to the structure of district lines.[199] In order for a portfolio model to avoid this same result, schools operated by different operators must be accessible to broad groups of students—accessible in terms of the actual potential to attend as well as physically accessible. If the market model of education is to succeed, it must operate within a *functioning* market where choice is genuine.[200] The theory that the market model will push all schools to improve rests on the incentive provided by threat of student departure from schools and operators that are not performing.[201] If the threat of departure is not real because of lack of access to alternative operators, then the entire theory collapses and the potential for a stratified system of public education increases.[202] Further, ensuring students access to different options diminishes the determinism for students who may be initially assigned to lower quality or less appropriate schools.[203] The process for ensuring accessibility in a portfolio model implicates, most directly, policies for student assignment and transfer as well as services for transporting students to their schools.

There are a variety of ways in which schools may be inaccessible to students in a way that creates stratification within an educational community. They may be inaccessible due to lack of knowledge or information on the part of potential students and families about a school's programs and theories, or even its exis-

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[198] *See, e.g.*, TENN. CODE ANN. § 49-13-110(a) (describing written agreement required between a charter school and its district authorizer).

[199] *See, e.g.*, Aaron J. Saiger, *The School District Boundary Problem*, 42 URB. LAW. 495 (2010).

[200] Susan L. DeJarnatt, *School Choice and the (Ir)Rational Parent*, 15 GEO. J. ON POVERTY L. & POL'Y 1, 6-8 (2008).

[201] The potential loss of students is the greatest incentive to success because funding, particularly for independent schools like charters, is based entirely on the size of the student population. A low number of students means a small school operator's budget. Huffman, *supra* note 90, at 1301 ("Schools will then be forced to either improve or lose students, and schools that fail to demonstrate success will close down . . . .").

[202] Chubb & Moe, *supra* note 2, at 1068 ("Lacking a real exit option, many parents and students will choose a public school despite dissatisfaction with its goals, methods, or personnel.").

[203] I mean "less appropriate" in the sense that a student who wants to study art should be able to access the arts school even if the student's home school would be a good school.

tence.[204] They may be inaccessible because the process for enrollment—either at a particular school or across different schools with different operators and different procedures—is cumbersome or confusing, dissuading students from exercising a choice.[205] They may be inaccessible because seats are unavailable or restricted, require special circumstances and talents, or are distributed in a way that favors some and disfavors others.[206] Finally, they may be inaccessible simply because students have a hard time physically getting from their homes to where the school is located.[207] Each type of inaccessibility problem above calls for a different remedy. Some remedies are present in New Orleans and have been proposed in Shelby County to help mitigate the danger of stratification.[208]

As an initial matter, students and families should know as much about the various schools and operators as possible so that they can make informed evaluations about which school or operator is right for them.[209] This should include both objective information about school performance and subjective materials describing the distinctive nature of a particular school's programs.

Once information about school options is available, a crucial part of ensuring accessibility will be the initial student assignment.[210] This is done very differ-

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[204] Huffman, *supra* note 90, at 1317-18 ("If parents do not know that charter schools exist or cannot ascertain the purpose of each school, they will not make 'bad' choices, but will choose through uninformed passivity. The nature of charter schools creates a heightened danger of astute parents choosing before less informed parents.").

[205] Stephanie Simon, *Special Report: Class Struggle—How Charter Schools Get Students They Want*, REUTERS (Feb. 15, 2013, 8:42 AM), http://www.reuters.com/article/2013/02/15/us-usa-charters-admissions-idUSBRE91E0HF20130215.

[206] *Id.*; *see also* Erica Frankenburg & Genevieve Siegel-Hawley, *Equity Overlooked: Charter Schools and Civil Rights Policy*, CIVIL RIGHTS PROJECT (2009), http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/equity-overlooked-charter-schools-and-civil-rights-policy (discussing increased racial segregation in charter schools); *but see* Gary Ritter et al., *A Closer Look at Charter Schools and Segregation*, 10:3 EDUCATIONNEXT 69 (2010), *available at* http://educationnext.org/files/EdNext_20103_69.pdf (responding to Civil Rights Project report on charter school segregation).

[207] Huffman, *supra* note 90, at 1318-19 (noting that the availability of transportation may be required to ensure effective choice).

[208] This list of potential types of inaccessibility leaves out the context in which the word "accessible" is most typically utilized: students with disabilities. For discussion of how schools in a portfolio model may be inaccessible to students with disabilities, *see infra* Part III.B.ii.

[209] COWEN INST. FOR PUB. EDUC. INITIATIVES, SPOTLIGHT ON CHOICE: PARENT OPINIONS ON SCHOOL SELECTION IN NEW ORLEANS 4 (2013), *available at* http://www.coweninstitute.com/wp-content/uploads/2013/01/Choice-Focus-Groups-FINAL-small.pdf (recommending "access to relevant and reliable information" to facilitate parental decision making).

[210] *See, e.g.*, Monica Teixeira de Sousa, *Compelling Honesty: Amending Charter School Enrollment Laws to Aid Society's Most Vulnerable*, ABA Section on State and Local Government Symposium (2012), *available at* http://www.americanbar.org/content/dam/aba/

ently in New Orleans and as proposed in Shelby County.[211] In New Orleans, no geographic school zones exist, so all schools require an application for enrollment.[212] After some initial difficulties with implementing a consistent enrollment process across autonomous operators, many schools came together to adopt a uniform application process so that families had common paperwork and deadlines.[213]

In contrast, the TPC recommended that initial school assignments in Shelby County should continue to be based on neighborhood.[214] This is even true for some charter schools, such as those authorized by the ASD to serve students who had been in the community's lowest-performing schools.[215] As a result, transfer policies within Shelby County will have a broader impact on accessibility than initial assignments. The TPC's plan has adopted an expansion of transfer types so that any student can apply to transfer to any school with space, theoretically making all schools within the county open to all students.[216] Some schools in both districts, however, maintain selective enrollment criteria, such as demonstrated academic or artistic success, that cut against broad accessibility.[217]

Where schools have more demand than space available, both New Orleans and Shelby County have instituted a lottery system to help ensure that limited

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events/state_local_government/2012/10/2012_fall_councilmeeting/Teixeira_de_Sousa_Paper.authcheckdam.pdf (proposing changes to charter school enrollment to enhance equity).

[211] Part II, *supra*.

[212] *See supra* Part II.A.

[213] *See* Robert Garda, *The Politics of Education Reform: Lessons from New Orleans*, 40 J. L. & EDUC. 57, 89-90 (2010) (describing the initial process as "fractured and confusing," noting that RSD schools have adopted a common application, though OPSB schools have not, but reporting that, by 2009, 84% of parents agreed that the registration process was uncomplicated) (citing COWEN INST. FOR PUB. EDUC. INITIATIVES, PUBLIC EDUCATION THROUGH THE PUBLIC EYE: A SURVEY OF NEW ORLEANS VOTERS AND PARENTS, 2-3, (Dec. 2009), *available at* http://www.coweninstitute.com/wp-content/uploads/2009/12/CI_Poll_Voter_Toplines.pdf).

[214] TRANSITION PLAN, *supra* note 36, at 98.

[215] *See* TENN. CODE ANN. § 49-13-106(b)(2)(B) (noting that parents with children attending an existing school converting to a charter school may choose whether to remain in that school); TENN. CODE ANN. § 49-13-113(b)(2)(A)(i) (giving highest priority for charter school enrollment to students enrolled in the existing school prior to conversion to a charter).

[216] TRANSITION PLAN, *supra* note 36, at 98 (recommending maintaining existing transfer types of the existing systems and expanding them to include the entire district).

[217] Such enrollment criteria may contribute positively to the quality of schools and the diversity of specialized programs, as discussed in Part III.A.ii., *infra*, but they clearly—and deliberately—act as a barrier to access. For example, at Overton High School, a creative and performing arts school in Memphis, students must complete an interview and audition as part of the application process. See http://www.mcsk12.net/optional_schools/school_detail/59.

seats are distributed as fairly as possible.[218] In Shelby County, the proposed move to a lottery even for district-operated schools is a substantial change from the previous policy where the schools of highest demand—the optional schools of MCS—were primarily filled by parents sleeping at the school board to wait in line for first-come, first-served access.[219] The lottery was intended to replace a procedure which advantaged involved and wealthier families with one that provides broader access across the community.[220]

Although these policies may open enrollment up more broadly in theory, the most significant barrier for students trying to access schools is transportation.[221] Lack of transportation is more likely to affect low-income students as an accessibility barrier.[222] In New Orleans, this problem is largely addressed because RSD schools (serving 22% of the community's students) are required to provide transportation for students.[223] The TPC's plan in Shelby County does not offer such accessibility-enhancing student transportation, utilizing a policy that only provides transportation for students attending their neighborhood school and living outside a defined radius.[224]

Both New Orleans and Shelby County have taken steps to reduce stratification occurring due to disparate accessibility of schools, though neither seems to have eliminated the problem entirely. New Orleans has more flexibility given the relative physical sizes and student population sizes of the two communities, and does more to confront the practical problem of getting students to schools; however, this is a significant financial investment.[225]

In order to ensure accessibility throughout a portfolio model, there must be accurate and accessible information at the outset, flexible student assignment policies (both initial assignment and transfer) that allow students genuine choice, fair procedures (such as a lottery) for high demand schools so that all students have a chance to enroll, and as much transportation as possible to facilitate accessibility. Enabling these features will require policymakers to craft policies that dictate practices such as a lottery requirement for oversub-

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[218] *See* LA. REV. STAT. ANN. § 17.3991(C)(1)(c)(i); TENN. CODE ANN. § 49-13-113(b)(2)(B).

[219] TRANSITION PLAN, *supra* note 36, at 98. *Id.* at 87 (noting current MCS policy of parent lines for oversubscribed schools); Jane Roberts, *Parents Line Up to Enroll Children for Prime Memphis School Assignments*, COM. APPEAL, Apr. 8, 2010.

[220] *Id.*

[221] Raquel Aldana, *When the Free-Market Visits Public Schools: Answering the Roll Call for Disadvantaged Students*, 15 NAT'L BLACK L.J. 26, 47 (1998) (arguing that in districts that adopt broad choice plans, parents who cannot pay for transportation are "placed at a severe disadvantage").

[222] *Id.*

[223] COWEN 2010 REPORT, *supra* note 120, at 23.

[224] *See* MEMPHIS CITY SCH., TRANSPORTATION FAQS, http://www.mcsk12.net/dot/FAQ_Transportation.asp#q1.

[225] *See infra* Part III.B.i.

scribed charter schools[226] or mandating that transportation be provided.[227] In addition, in crafting contracts of autonomy with charter schools or individual district-operated schools, autonomy-granting authorities (such as the state or the local district) can utilize that process to demand that all schools adhere to common and flexible enrollment and transfer policies.[228] Of particular concern in this regard will be requirements for charter school operators to serve all students,[229] so that they will not gain any advantage by serving a cherry-picked student population and so that all schools will genuinely be accessible to all students.[230] Broad access, however, is only one part of a model that avoids stratification.

ii. Quality

Although access is crucial, the reality confronting large urban systems is that not all students will be able to access their ideal school. This could be due to space limitations, enrollment requirements, transportation costs, or simply a family's lack of diligence in evaluating and choosing among a community's schools.[231] Given this, there is a danger that such students would be left to attend schools of last resort. Within the community, there would thus be high quality schools that families have chosen for their children and lower quality schools that no student would "choose" to attend, but that exist nonetheless to

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[226] *See* LA. REV. STAT. ANN. § 17.3991(C)(1)(c)(i); TENN. CODE ANN. § 49-13-113(b)(2)(B).

[227] TENN. CODE ANN. § 49-13-114 (making transportation an optional service for charter schools).

[228] TRANSITION PLAN, *supra* note 36, 98 (recommending centralized enrollment system including charter and ASD schools); COWEN INST. FOR PUB. EDUC. INITIATIVES, SPOTLIGHT ON CHOICE: PARENT OPINIONS ON SCHOOL SELECTION IN NEW ORLEANS 4 (2013), *available at* http://www.coweninstitute.com/wp-content/uploads/2013/01/Choice-Focus-Groups-Fl-NAL-small.pdf (recommending single application for New Orleans school choice).

[229] TENN. CODE ANN. § 49-13-113(b) (mandating that charter schools enroll any eligible child who submits a timely application, and noting priorities for enrollment in oversubscribed schools).

[230] The criticism about charter schools cherry-picking students is multi-layered. Some critics point to admissions and recruitment practices that tend to either prohibit or discourage students who are likely to be more difficult to educate from entering the school. This research is particularly well developed with regard to students with disabilities. In addition, some criticize charter school practices that lead struggling students to leave the school, a result that has the effect of making the school appear more successful. In either case, the school is made less accessible to certain students. *See generally*, Christopher Lubienski & Peter Weitzel, *Choice, Integration, and Educational Opportunity: Evidence on Competitive Incentives for Student Sorting in Charter Schools*, 12 J. GENDER, RACE & JUST. 351 (2009); Natalie Lacireno-Paquet et al., *Creaming versus Cropping: Charter School Enrollment Practices in Response to Market Incentives*, 24 EDUC. EVALUATION & POL'Y ANALYSIS 145 (2002).

[231] *See supra* notes 204-207 and accompanying text.

meet the obligation of serving all students.[232] Historically, school choice has acted to exacerbate rather than ameliorate such stratification.[233] School finance reform litigation, in contrast, operated on the hope that even if broader access to schools with wealthier students could not be guaranteed for low-income students, increased funding could improve the quality of the schools low-income students *were* attending.[234]

Further, one of the promises of the portfolio model is that independent schools will be able to innovate and utilize distinct strategies to serve students. Avoiding stratification by access implicates procedural mechanisms, such as enrollment and transfer policies, to ensure all students can access schools operated by disparate operators in a portfolio model.[235] The demand for high quality requires more substantive mechanisms to ensure both that schools of last resort reach common standards for quality and that successful innovations developed within the model can be shared across autonomous operators so that they reach more students and quality increases across the community.

A primary challenge within a portfolio model is developing a common definition for success.[236] This challenge is deepened by the fact that school operators are likely to be serving student populations with different needs. For example, a school in suburban Shelby County will serve a student population that is, on average, already achieving at a higher level than a school in inner-city Memphis.[237] Defining quality in a way that accurately captures the perform-

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[232] "Schools of last resort" may be operated by any type of operator, including the district, the state, or a charter operator. For instance, a low-performing charter school may nonetheless enroll many students due to either practical convenience or the inaccessibility of higher-performing schools to students. *See* INST. ON RACE & POVERTY, THE STATE OF PUBLIC SCHOOLS IN POST-KATRINA NEW ORLEANS: THE CHALLENGE OF CREATING EQUAL OPPORTUNITY 32-33 (2010), *available at* http://www.law.umn.edu/uploads/47/13/4713aa9c88439fffea3aff6575246976/35a_THE_STATE_OF_SCHOOLS_IN_NEW_ORLEANS.pdf (describing RSD direct-run schools as "schools of last resort" in the New Orleans model).

[233] Minow, *supra* note 51, at 814 (providing history of use of choice in American public education). Minow summarizes a long history of choice, including the use of choice to avoid desegregation decrees in the 1960s, and underscores skepticism about the use of choice to increase, rather than decrease, equity of educational opportunity. Indeed, the choice of opting out of public education for private schools has historically had the effect of furthering inequities.

[234] RYAN, *supra* note 44, 121-22.

[235] *See supra* Part III.A.i.

[236] TRANSITION PLAN, *supra* note 36, at 42 (recommending creation of a common definition of high quality school to be utilized throughout the community).

[237] *See, e.g.*, DAVID AND LUCILE PACKARD FOUNDATION ET AL., GETTING READY: FINDINGS FROM THE NATIONAL SCHOOL READINESS INDICATORS INITIATIVE 7 (2005), *available at* http://www.gettingready.org/matriarch/d.asp?PageID=303&PageName2=pdfhold&p=&PageName=Getting+Ready+-+Full+Report%2Epdf ("Studies show that at least half of the educational achievement gaps that exist between poor and non-poor children already exist at kindergarten entry.").

ance of operators serving different student populations is necessary to truly evaluate how operators are doing.

In Orleans Parish, state accountability standards are the primary metric common across the autonomous school operators.[238] This is a useful starting point, but inadequate to address concerns about generating a system of unequal schools. Some of the harshest criticism of New Orleans' experience has concerned the "last resort" nature of the RSD direct-operation schools.[239] These schools serve 8,779 students or 22% of the public school population, enrolling a disproportionately high number of African American, socioeconomically disadvantaged, and special education students[240] and achieving at the lowest level among school types.[241] The comparisons are even less favorable when compared to the community's highest performing schools, the OPSB-authorized charter schools, which enroll a white population ten times the community average,[242] have fewer than half the percentage of special education students,[243] and score well above state averages.[244] These figures suggest that different operators are having different levels of success and that minority and low-income students continue to be served by the least successful operators. However, given the differing student populations, it is difficult to know if RSD is doing "worse."

Within New Orleans, the response has been to continue removing schools from direct RSD operation, converting them to charter schools.[245] And, taken as a whole, RSD-authorized charter schools do perform better while serving a student population with demographics similar to RSD direct-operation schools.[246] However, this analysis—as well as the comparison with OPSB

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[238] In the school report cards prepared by the Louisiana Department of Education, performance on state LEAP scores is the determining factor in calculating the school's Student Performance Score, which in turn dictates the "grade" the school receives. Other criteria, including teacher quality under NCLB standards and class size, are also documented on the report card. *See* La. Dep't of Educ., 2010-2011 School Report Cards, http://www.louisianabelieves.com/accountability/school-letter-grades.

[239] INST. ON RACE & POVERTY (now the Inst. on Metro. Opportunity), THE STATE OF PUBLIC SCHOOLS IN POST-KATRINA NEW ORLEANS: THE CHALLENGE OF CREATING EQUAL OPPORTUNITY 32-33 (2010), *available at* http://www.law.umn.edu/uploads/47/13/4713aa9c88439fffea3aff6575246976/35a_THE_STATE_OF_SCHOOLS_IN_NEW_ORLEANS.pdf.

[240] COWEN 2011 REPORT, *supra* note 10, at 6-7 (noting that the RSD student population is 96% African American and 86% low socioeconomic status, while the parish's entire public school population is 88% African American and 84% low socioeconomic status; similarly, RSD student population is 13% special education students compared to 9% overall).

[241] *Id.* at 9-10 (School Performance Scores [SPS] for RSD schools are around 48, compared to 75 for the broader parish-wide public school population).

[242] *Id.* at 6.

[243] *Id.* at 7.

[244] *Id.* at 9.

[245] *See infra* Part III.A.iii.

[246] COWEN 2011 REPORT, *supra* note 10, at 6-10 (RSD charters serve a 94% African

charter schools above—limits the comparison to charter-authorizer rather than drilling down to school operator. Within the broader group of RSD-authorized charter schools, some are performing better than others, with School Performance Scores under Louisiana's accountability scheme ranging from 120.6 (at KIPP McDonogh 15) to 53.8 (at Esperanza Charter School).[247] Thus, students being served by lower-performing operators are not limited to those in RSD direct-operation schools.

While these statistics are important, it is far more difficult to evaluate just how successful or unsuccessful individual operators are than simply looking at student achievement data.[248] While the portfolio model in New Orleans has largely stopped there, the schools in Shelby County are seeking a more comprehensive standard for school quality.[249] First, Tennessee can utilize both student achievement and student growth as metrics of school performance.[250] The student growth metric is intended to take into account not only the performance of students, but also the degree to which students performed better or worse than expectations.[251] In addition, the TPC has recommended that the community develop a common definition of "high quality" school and has included an aspiration that all schools, regardless of operator or authorizer, strive to meet

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American, 93% low socioeconomic, 8% special education student population—only the special education figure is substantially lower than the comparable number [13%] in RSD direct-operation schools).

[247] *Id.* at 19-20. The state average is 91 and the average of public schools in New Orleans is 77. Similarly, some RSD direct-operation schools are scoring far higher than the average of similar schools. For example, the A.P. Tureaud Elementary School, an RSD direct-operation school, has an SPS of 76.3.

[248] W. James Popham, *Why Standardized Tests Don't Measure Educational Quality*, 56:6 EDUC. LEADERSHIP 8, 8-9 (1999), *available at* http://www.ascd.org/publications/educational-leadership/mar99/vol56/num06/Why-Standardized-Tests-Don't-Measure-Educational-Quality.aspx ("Standardized achievement tests have a different measurement mission than indicating how good or bad a school is. Standardized achievement tests should be used to make the comparative interpretations that they were intended to provide. They should not be used to judge educational quality.").

[249] TRANSITION PLAN, *supra* note 36, at 42 (recommending creation of a common definition of high quality school to be utilized throughout the community).

[250] Tennessee's student growth is referred to as TVAAS, or Tennessee Value-Added Assessment System. As with other value-added models, it is based on comparison of a student's actual performance to the student's anticipated performance as predicted by prior performance. TENN. DEP'T OF ED., TVAAS FACT SHEET, http://www.tn.gov/education/assessment/doc/TVAAS_Fact_Sheet.pdf.

[251] By this metric, SCS, which scores significantly higher in achievement than MCS, does not outshine MCS as substantially. In growth, SCS scores Cs and Ds, but receives all As in achievement. *Shelby County Schools 2011 Report Card*, TENN. DEPT. OF EDUC. [hereinafter SCS 2011 Report Card], http://edu.reportcard.state.tn.us/pls/apex/f?p=200:40:330586 5053302822::NO:::. MCS achievement scores lag well behind (3 Fs and a D), but growth scores are similar (2 Cs, 1 D, and 1 F). MCS 2011 Report Card, *supra* note 41.

this definition.[252] Although the definition is left open by the plan, the TPC does recommend developing a list of courses that must be offered at all schools to ensure that a student will have common offerings wherever enrolled.[253]

The need for these more comprehensive standards for ensuring high quality schools throughout the community is perhaps greater in Shelby County since students will initially be assigned to neighborhood schools and geography will continue to have a substantial effect on which school a student attends. However, any community transitioning to a portfolio model must account for the fact that all schools, regardless of operator and educational program, must be high achieving if the model is to serve all students within a community.

In addition, the TPC plan does a better job at attempting to capture the benefits of innovation possible within the portfolio model and sharing them across school operators. The plan calls for collaboration between the traditional district, charter school operators, and the state ASD.[254] Facilitating this collaboration are both the Innovation Zone, which is specifically tasked with developing strategies for serving low-performing schools and sharing successes throughout the community,[255] and an office within the central district office for planning and development.[256]

In both communities, broader success will be achieved where the multiple operators serving students can function within a culture of collaborative competition. Although the relationship between traditional districts and charter schools—and among charter schools themselves—has not traditionally been a productive one,[257] the philosophical change to a portfolio model where such actors are all part of a community-wide effort of public education will work best with cooperation among operators that better serves a broader range of students. The TPC has recommended the creation of a community group to serve as both watchdog and advocate for public education.[258] Similar groups

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[252] TRANSITION PLAN, *supra* note 36, at 42.

[253] *Id.* at 42 ("The TPC recognizes and values the importance of community schools and believes that the ultimate goal should be for each school in the district to offer a variety of rigorous, college-preparatory courses. . . . [T]he TPC recommends that the district establish a rigorous set of core courses to be offered across all schools at a given grade level.").

[254] *See id.* at 90-91 (Recommendation 90(c)).

[255] *Id.* at 95 (noting that within the Office of Innovation is a recommended Director of District Innovation responsible for ensuring that "school-level innovations are shared district-wide, so that all schools can benefit from the best practices of other schools[.]"). *See also* TENN. CODE ANN. § 49-13-131 (state law mandating that the state Department of Education develop a mechanism for sharing best practices learned from charter school operators).

[256] TRANSITION PLAN, *supra* note 36, at 11 ("The purpose of the Office of Planning and Performance Management is to have a consolidated, district-wide view into performance, enrollment and student needs across the district—and across school types.").

[257] Garda, *supra* note 213, at 91.

[258] TRANSITION PLAN, *supra* note 36, at 47. Among the tasks suggested for the communi-

have emerged in New Orleans already.[259] The presence of such external groups is essential in a portfolio model where no single entity is in charge.

It is impossible for a portfolio model to avoid having some schools that are "better" than others. However, to avoid the stratification in quality that has plagued American public education, communities transitioning to a portfolio model should establish common and broad definitions of school quality that take into account differences in student populations.[260] This should probably be done through an external group that can apply the definition across the fractured landscape of operators and authorizers.[261] In addition, a significant opportunity for influencing quality will arise at the moment operational authority or autonomy is granted. For example, a rigorous review of charter school applications is essential. Similarly, if a superintendent plans to grant autonomy to a school within the traditional district portion of a portfolio model, proper vetting of the school's principal and the school's prospects for success are crucial from the outset. The portfolio model requires a dispersion of authority—that dispersion need not be without strings. One string could be inclusion in a community-wide effort to share best practices, or agreement to submit to common standards developed for all school operators. The culture of collaborative competition can thus be nurtured (rather than merely hoped for) with deliberate policy choices and even contract terms as a school board or state-run district (RSD or ASD) grants autonomy within the portfolio model.

iii. Accountability

Just as access-focused policies alone cannot eliminate the fact that some students will not be able to attend their school of choice, it is unrealistic to rest the success of a portfolio model on the idea that all schools will be of high quality. Some schools and operators simply will not succeed. Where the portfolio model breaks most substantially with the traditional district structure is that operators who do not succeed will not, in theory, continue to operate schools.[262] The intervention in the event that a school is not performing is far more dramat-

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ty collaborative is tracking performance within the county's schools on meeting milestones from kindergarten readiness to post-secondary completion. *Id.* at 37 (Recommendation 6).

[259] *See, e.g.*, NEW SCHOOLS FOR NEW ORLEANS, www.newschoolsforneworleans.org (last visited Feb. 18, 2013); ORLEANS PUBLIC EDUCATION NETWORK, http://www.opennola.org/home/ (last visited Feb. 18, 2013).

[260] TRANSITION PLAN, *supra* note 36, at 42 (recommending a common definition of "high-quality school").

[261] In New Orleans, there are multiple external groups present that can and have served this function, including the Cowen Institute for Public Education Initiatives at Tulane University (www.coweninstitute.com) and New Schools for New Orleans (www.newschoolsforneworleans.org). In Memphis, the TPC recommends the creation of a broad-based community collaborative. TRANSITION PLAN, *supra* note 36, at 47.

[262] *See supra* Part I.A.

ic within the portfolio model.[263] However, in order for this theory to succeed in practice, the contingent nature of an operator's authority to run a school must be genuine.[264] Consequences for failure must be real and must be clear.[265] Where operators fail to meet common standards within the portfolio model, a structure of accountability should be implemented to intervene in a meaningful way so that students will not be "stuck" being served by an unsuccessful school operator. This final mechanism for avoiding stratification is the most difficult, but the most crucial. Without it, the portfolio model merely replaces a traditional district with another stratified and entrenched status quo.[266]

A baseline method of accountability for autonomous school operators within a "market" of public education is the potential loss of students.[267] Many portfolio advocates point to this incentive to succeed as enough on its own to ensure that only quality operators will survive and those that do not succeed will be left with empty schools.[268] This is not enough. For a variety of reasons, allowing the education market to sort itself out is more likely to increase rather than decrease stratification if parents and students do not exercise their power to hold operators accountable.[269] There is a need, therefore, for a robust scheme of evaluation and intervention for autonomous operators within the portfolio model.

Both Louisiana and Tennessee have general accountability structures in place that apply to schools within the portfolio model.[270] Following the states' receipt of waivers from NCLB mandates, the current accountability schemes increase state involvement by turning over the lowest-performing schools (by newly-adopted measures) to the respective state turnaround districts, RSD and ASD.[271] Within a portfolio model, this reassigns operational or authorization

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263 *See supra* Part I.A.

264 SALTMAN, *supra* note 35; Chubb & Moe, *supra* note 2.

265 *Id.*

266 And the new status quo may be more expensive and less efficient. *See infra* Part III.B.

267 Chubb & Moe, *supra* note 2.

268 *See supra* Part I.A.

269 *See* Fang Lai et al., *Can Parents Make Well-Informed School Choices?* 2 (2007), *available at* http://emlab.berkeley.edu/users/webfac/groland/e261_f07/lai.pdf ("[G]iving parents the freedom of school choice might lead to unintended social stratification."); *see also* Susan DeJarnatt, *School Choice and the (Ir)Rational Parent*, 15 GEO. J. ON POVERTY L. & POL'Y 1, 38 (2008) ("If a parent sticks with her own choice sets—that is, her existing social capital—then stratification is likely to remain.").

270 LA. REV. STAT. ANN. §§ 17:391.3-391.7 (2013); TENN. CODE ANN. § 49-1-602, et seq. (2013).

271 U.S. DEP'T OF EDUC., LOUISIANA'S ESEA FLEXIBILITY REQUEST 75-76 (2012), *available at* http://www2.ed.gov/policy/eseaflex/approved-requests/la.pdf; U.S. DEP'T OF EDUC., TENNESSEE'S ESEA FLEXIBILITY REQUEST 56-59 (2012), *available at* http://www2.ed.gov/policy/eseaflex/approved-requests/tn.pdf.

oversight from the local district to the state, though only for the lowest performing schools.[272]

In addition, both states have statutes governing the granting of charters and reauthorization for charter schools.[273] These statutes lay out criteria and a timeline for a charter authorizer—either the local district or state—to consider in evaluating charter applications. For example, Louisiana calls for an evaluation of progress that considers student performance and the financial status of the school at the conclusion of the charter school's third year.[274] Depending upon performance, the charter school can be renewed for a period of between three and ten years or may be revoked.[275] Similarly, the Tennessee statute calls for an evaluation based on the academic and fiscal performance of the school after five years and allows for removal of a charter school's authority or a renewal for a ten-year term.[276] In both states, charters can be immediately revoked in the event that there is major malfeasance by the school operator.[277]

In both the general accountability scheme and charter school laws, state law provides a useful foundation for accountability, but fails to provide the multifaceted evaluation of quality or the flexibility in interventions required to maximize the potential of the portfolio model. Both evaluation schemes utilize fairly limited criteria in evaluating a school's success or failure, focusing almost exclusively on student achievement, while the intervention is limited to the question of whether to renew or revoke operational authority.[278] In addition, the accountability schemes provide remedies for only the lowest performing schools, while the charter school laws only apply to charter schools.

In practice, the New Orleans case study demonstrates the mixed results that come from imposing laws designed for a different context onto a portfolio model. On one hand, the number of RSD direct-run schools—schools that

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[272] In Tennessee, the bottom 5% of schools based on performance are eligible for ASD takeover. In 2012-2013, five schools in Shelby County were handed over to ASD; the ASD will control an additional nine schools in 2013-2014. Motoko Rich, *Crucible of Change in Memphis as State Takes On Failing Schools*, N.Y. TIMES, Apr. 3, 2013, http://www.nytimes.com/2013/04/03/education/crucible-of-change-in-memphis-as-state-takes-on-failing-schools.html?pagewanted=all.

[273] LA. REV. STAT. ANN. § 17:3971 (1997); TENN. CODE ANN. § 49-13-108 (2012).

[274] LA. REV. STAT. ANN. § 17:3992(A)(1) (2012).

[275] *Id.* § 17:3992 (2012).

[276] TENN. CODE ANN. § 49-13-121 (2013).

[277] LA. REV. STAT. ANN. § 17:3992(C) (2012); *see also* TENN. CODE ANN. § 49-13-122 (2013) (mentioning material violations of the terms of the charter's failure to make academic progress, or evidence of fiscal mismanagement).

[278] LA. REV. STAT. ANN. § 17:3992(A)(2)(a) (2012) ("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."); LA. REV. STAT. ANN. § 17:3992(A)(1); TENN. CODE ANN. § 49-13-121(b) ("[T]he chartering authority shall rule by resolution, on whether to approve or deny the renewal application.").

have generally performed below the other school types—has continuously declined.[279] This advance has occurred, however, more due to the philosophical disposition within the RSD than because of an effective accountability structure.[280] In addition, some charter schools have closed even in these early years, providing some evidence that charter authorizers have the wherewithal to make the threat of charter revocation genuine.[281] Still, this is hardly evidence of an efficiently functioning public education market. Instead, the presence of both a state and local charter school authorizer and the ostensibly temporary role of the state in overseeing schools within New Orleans have created a confusing context for schools and for the broader community. For example, as the fifth school year after Hurricane Katrina arrived, schools scrambled to present renewal applications to their respective state or local authorizer and some requested to remain under RSD's jurisdiction rather than be returned to the local board's oversight.[282] Confusion about standards and process is not ideal for a model that requires clear systems of accountability in order to deliver on its potential to generate a system of high-quality autonomous schools.

Shelby County faces a similar dynamic with the presence of both a local and state authorizer and the lack of a clear path for the return (or not) of authority from the ASD back to the local board. In addition, since Shelby County will rely less on charter school expansion, a more robust accountability scheme must be applied to district-operated schools. If the Shelby County model is truly to be an alternate portfolio model that allows for the continued existence of a traditional district embracing the spirit of autonomy and contingency even for district-operated schools,[283] then those schools must have clear standards and consequences for failing to meet them. Ideally, the standards and conse-

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[279] In 2009-2010, there were 33 RSD direct-run schools. COWEN 2010 REPORT, *supra* note 120, at 9. In 2011-2012, there were 16. COWEN 2012 REPORT, *supra* note 134, at 9.

[280] Former RSD Superintendent Paul Vallas predicted, "In two to three years, this district is going to be almost exclusively made up of charter and independent schools." Stephen Maloney, *Momentum Continues for Switch to Charters*, NEW ORLEANS CITYBUSINESS, Jan. 12, 2009.

[281] *See* Sarah Carr, *What Happens When Charter Schools Close?*, TIMES-PICAYUNE, Mar. 24, 2012, *available at* http://www.nola.com/education/index.ssf/2012/03/what_happens_when_charter_scho.html.

[282] Garda, *supra* note 213, at 81-84, 93-94; *see also* Cowen Inst. for Pub. Educ. Initiatives Pol'y Brief, *Returning Schools to Local Control: An Analysis of the RSD Return Policy and Its Implications* 4-5 (2011), *available at* http://www.coweninstitute.com/wp-content/uploads/2011/12/Returning-Schools-to-Local-Control-Dec-2011.pdf (discussing the implications of renewal and jurisdiction choice).

[283] There are many good reasons that the continued existence of a traditional district within the portfolio model could be advantageous, such as taking advantage of efficiencies in providing services throughout the public education community. *See infra* Part III.B. (noting that the charter model may be fiscally and administratively unsustainable and that the likelihood of finding enough quality charter operators to serve 150,000 students is low).

quences applied to the district-as-operator would be the same as those applied to any operator, such as a charter school. Such a common accountability scheme across operators and authorizers would help reduce stratification by creating uniformity in both evaluative criteria and interventions.

To effectively manage a portfolio model, the criteria utilized to evaluate operational success should be multi-faceted, including both student achievement and other indicators, such as student growth, curricular diversity and depth, and even long-term student outcomes. The evaluations of operators should occur at fairly short intervals, allowing the evaluator a genuine sense of what is occurring on the ground on an ongoing basis. In addition, evaluators working on legally-imposed timelines should not be the only trigger for interventions. Dissatisfied parents or students should have the power to trigger an intervention without having to disrupt their education by changing schools. Finally, the interventions need not be limited to simply renewing or revoking operational authority. Operators should be supported with flexible interventions to help them succeed, such as through sharing best practices across operators. Because switching schools can be disruptive for students, the model would benefit from interventions aimed to avoid school closings if possible. However, the threat of losing operational authority must remain genuine to ensure that students are not stuck in perpetually failing schools.

While state law may not provide the requisite system of accountability to accomplish these changes, there is again an opportunity to utilize the charter authorization process or the granting of autonomy even outside of the charter school context to ensure that schools run by different operators will subscribe to a common set of standards and consequences. Further, the presence of independent entities within the community to evaluate the model's success in intervening in failing situations can help ensure that all schools are held to common standards. Such interventions need not be limited to removing operational authority. Rather, utilizing relatively short intervals for evaluation and encouraging support for struggling operators through the collaborative competition concept could diminish the need for the disruption caused when an operator loses its authority entirely. Finally, despite the fact that no single entity is genuinely in charge within the portfolio model, the common standards and accountability scheme could provide the uniform touchpoint for all schools within the model that would ensure that stratification across autonomous operators are minimized.

To the extent that stratification persists, the model must be capable of consistently intervening to remove authority from failing operators. Though this is an important part of the portfolio concept, it also sets up (deliberately) a pattern of school openings and closings where authority may be transferred repeatedly. Particularly in a community with as many public school students as are in Shelby County, such a model will require a substantial number of quality operators, including the district itself. Whether such a constant "churn" of school opera-

tors is sustainable will be one of the great questions as the portfolio model continues to emerge as an alternative district structure.

B. *Sustainability*

One element that makes the traditional district model attractive to policymakers is the potential for achieving economies of scale and distributing resources as needed throughout a large system. The past several decades have seen many smaller districts consolidate to achieve these benefits by conserving limited financial, academic, and human resources.[284] Mostly, consolidating school districts ensures that public education can move forward in a sustainable way. A transition to the portfolio model moves in the opposite direction, fracturing operational authority and weakening the ties binding schools in a community to one another. Many of the efficiency-enhancing benefits of the traditional district model might be lost in the transition, as multiple operators are providing duplicate services at their own locations.

Since the portfolio model is newly emerging, significant questions arise as to how sustainable the model is over a long period of time. These questions are even more pressing since the portfolio model, by its nature, requires an evolutionary process whereby successful models are expanded and unsuccessful operators eliminated. Sustainability questions exist across multiple areas, including financial, administrative or legal, and political sustainability. Financially, it is unclear how successful autonomous operators can be without "soft" external funds to supplement per-pupil public funding and how substantially the loss of that per-pupil funding will impact the traditional district that remains. Relatedly, the costs on autonomous operators of providing legally-required services, such as special education, without the support of a central district raise questions about how a portfolio model can fulfill legal obligations. In addition, for larger districts the portfolio model requires a substantial number of qualified operators. Whether there are enough high quality school operators to serve a large student population remains to be seen. Finally, although the portfolio model currently enjoys political support at the federal level and in many states, there is no guarantee that local communities will embrace it. The model will be difficult to sustain successfully without public buy-in.

i. Financial Sustainability

Managing a portfolio model with broad student access to high quality schools throughout a community is likely to be more expensive than operating a traditional, centralized district. New operators' start-up costs are significant.[285] Autonomous schools may have to locate and pay for their own facilities. Each operator will have to provide services—such as school lunches—

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[284] *See* Berry & West, *supra* note 5, at 1 (describing mass school district consolidations from 1930 to 1970).

[285] Demonstrating the federal role in charter expansion, Congress passed legislation mak-

without the economies of scale provided by a central district. Additionally, communities that wish to enhance access by providing transportation to facilitate choice will likely have higher transportation costs. To date, many of these expenses have been covered by grant money—private and public—in excess of the public funding schools receive.[286] In addition to the higher operation costs, the dispersion of students away from a central district could have a negative financial impact on schools that remain in the traditional district model within a community embracing multiple autonomous school operators. To the extent the district will continue to exist, as in Shelby County, stable fixed costs for items like pension payments and declining revenue from the loss of students could strain district budgets. Thus, the financial picture raises questions about both the source of funding to support the model over the long term and the educational effect of shifting funds and students away from the traditional district.

In New Orleans, per-pupil expenditures in 2007-2008 were double what they had been in the year prior to Hurricane Katrina.[287] Whether that level of elevated funding could be sustained was questionable. Some of the increase was attributable to one-time costs in the aftermath of the natural disaster, such as the need for new textbooks, but both the local district and state RSD have seen substantial budget cuts more recently[288] and spending is declining toward state averages.[289] A significant strain on current budgets in New Orleans is the statutory requirement that transportation be provided for RSD schools.[290] Some such schools spend double the state average on transportation costs.[291] The availability of federal money enabled the model to develop despite such high start-up costs;[292] private money further supported the transition.[293] Neither of these funding sources—federal or philanthropic—is assured into the future,

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ing money available to assist with these high start-up costs. *See* 20 U.S.C. § 7221 *et seq.* (2002).

[286] COWEN 2012 REPORT, *supra* note 134, at 37 (identifying financial sustainability as a challenge and noting that many costs were covered by non-recurring funds).

[287] COWEN 2011 REPORT, *supra* note 10, at 14 (2004-2005 pupil expenditures were $7,893, while 2007-2008 per pupil expenditures were $15,557).

[288] *See, e.g.*, Simon, *supra* note 140 (describing budget cuts for the 2009-2010 school year).

[289] COWEN 2011 REPORT, *supra* note 10, at 14.

[290] *See id.* at 15 (explaining that "transportation spending at some RSD charter schools is as high as 12 percent").

[291] *Id.* at 15.

[292] *See* Kiel, *supra* note 66, at 131 (describing federal funding immediately following the hurricane) and 137 (describing additional federal funds through FEMA for rebuilding of school facilities in New Orleans).

[293] *See* Garda, *supra* note 213, at 92 (noting that some charter schools have received hundreds of thousands of dollars in private funding to aid their efforts); *see also* Forman, *supra* note 99, at 869-73.

raising questions about whether even current spending levels can be maintained.

Shelby County has also benefited from an infusion of federal and philanthropic funding, such as through Race to the Top and grants supporting the creation of the Innovation Zone.[294] However, since Shelby County will be more dependent on the continued existence of a traditional district as one element of a portfolio model, a more significant financial concern is the impact on that district of moving students to schools run by autonomous operators. The projected financial impact on the traditional district of losing students to ASD or charter schools is approximately $10 million.[295] In addition, the TPC estimated that moving to the "Multiple Achievement Paths" model would cost approximately $1 million more than adopting a traditional district model,[296] although the plan recommends a variety of cost-saving measures to close the financial gap, such as cutting central office staff and outsourcing custodial services.[297] Further, as students continue to transition away from district-operated schools, the district will face future budget cuts to account for declining revenues even as short-term fixed costs remain stable. Making such cuts without a negative impact on the educational services in district-operated schools will require careful planning and difficult choices for the school board.

A further financial strain within the portfolio model is the requirement that each operator provide a variety of services to students, such as lunches, transportation, or special education services. The loss of economies of scale gained by a large, centralized district will drive the overall cost for providing such services up. In addition to the financial effect, this dynamic raises questions about the legal sustainability of the model in providing required services, as discussed below.[298] To date, the relationship between districts and other operators, particularly charter schools, has tended to make these financial difficulties worse rather than better. If a portfolio model is to succeed, the same culture of collaborative competition that will be needed to support a broad spectrum of high quality schools will be required to ensure that limited financial resources are used wisely. Again, the autonomy-granting process offers the promise of establishing a unified plan for the use of resources so that autonomous schools are not as dependent on external funds and district-operated schools are not as vulnerable to decreases in the overall district student population. This could

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[294] Locker & Roberts, *supra* note 177.

[295] TRANSITION PLAN, *supra* note 36, at 172-73.

[296] *See id.* at 174 (anticipating that additional positions within the Office of Innovation and Office of Strategic Planning and Performance could cost $2 million, but also anticipating grant funding for the Office of Innovation).

[297] *Id.* at 175 (identifying $106 million in potential efficiencies resulting from changes recommended in the Transition Plan). Note, however, that while transitioning students away from the traditional district has an impact on balancing the budget, an even larger impact is driven by the elimination of local funding from the City of Memphis.

[298] *See infra* Part III.B.ii.

include provisions in charters that mandate sharing of some services, such that charter operators will essentially pay the district to provide, for example, food services. In addition, it could include incentives for charter applicants to take on some of the district's fixed costs for items like facility maintenance so that the financial impact on the district will be minimized.[299] The management of finances is always of utmost importance in public education, but the portfolio model presents unique challenges to ensure a financially sustainable course for communities.

ii. Administrative/Legal Sustainability

The conventional perspective on school choice is that students choose schools, but there are some instances of choice working in the opposite direction, with school operators picking the students they wish to serve.[300] There is a growing literature describing this perspective and highlighting more subtle ways in which school operators assure a more favorable student population.[301] Indeed, the contingent nature of the portfolio model incentivizes such behavior. Without proper policies to ensure that operators are able to and do serve all students, the portfolio model is at risk of failure, either because of failure to meet legal obligations or failure to effectively address the educational disparities it was allegedly designed to confront.

In this regard, perhaps the greatest threat to the emerging model in New Orleans is the prospect of a multitude of lawsuits accusing autonomous operators of failing to provide federally-required special education services.[302] A class-action suit along these lines was filed in 2010 and remains pending.[303] This problem arises from the administrative inefficiency that corresponds to the financial inefficiency inherent in the fractured portfolio model. The obligation of autonomous operators to provide duplicative services produces not only the prospect that doing so will come at a greater cost, but also that it will not be done as effectively or even that it will not be done at all. With regard to special education, the accusation is that some operators attempt to avoid enrolling such students to minimize costs.[304] Indeed, while RSD direct-operation schools

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[299] Changes to state law regarding charter authorization could help facilitate this as well.

[300] *See generally* Lubienski & Weitzel, *supra* note 230; Lacireno-Paquet et al., *supra* note 230.

[301] *Id.*

[302] *See* Garda, *supra* note 93, at 674 (explaining that charter schools are subject to a range of differing special education requirements); *see also* U.S. Gov't Accountability Office, *Charter Schools: Additional Federal Attention Needed to Help Protect Access for Students with Disabilities* 1 (June 2012) (describing a class action suit on behalf of students with disabilities whose rights were allegedly violated by New Orleans charter schools).

[303] P.B. et al. v. Pastorek, 2:10-cv-04049-JCZ-KWR (E.D. La. 2010). The state's motion to dismiss the case was denied in April 2011.

[304] Garda, *supra* note 93, at 681 ("From the beginning of the charter movement, there were concerns that charter schools were not educating their fair share of disabled students.").

serve a student population that is 13% special education, the population in RSD charter schools is only 8% special education.[305] Locally-authorized charters serve an even smaller percentage.[306]

Regardless of the merits of the discrimination charges in New Orleans, the portfolio model must demonstrate the capacity for serving all students if it is to provide a realistic alternative to the traditional district model. The fractured nature of school operation, however, makes this task difficult. In Shelby County, the continued presence of the central district to provide neighborhood schools throughout the community helps ensure that not all efficiencies are lost. Although some might criticize the continued district presence as a watering down of the portfolio model, it addresses a critical flaw being exposed in New Orleans by maintaining a centralized capacity for providing required services to diverse student populations. Whereas autonomous operators in New Orleans have nowhere to turn besides each other for cooperation in providing, for instance, special education services,[307] any operator in Shelby County has access to the resources and capacity of the central district to fulfill its legal obligation to serve all students. As with other services, autonomous operators can contract back with the district to ensure that special education students receive an appropriate public education regardless of who is operating their school.

The continued presence of the central district addresses another problem encountered in New Orleans and inherent in a large district embracing the portfolio model—a lack of quality independent operators. While the plan was always to transition to a charter-dominated public education field in New Orleans, there were too few quality operators in the years just after the hurricane to meet this goal.[308] The RSD, which intended to act solely as a charter authorizer and not a school operator, was forced to take on the task of operating schools as a result. The public education population in Shelby County is four times larger than in Orleans Parish, making the need for quality operators even greater. However, rather than ceding authority and hoping that quality operators apply, the central district in Shelby County will continue to operate many schools and will have the luxury of waiting patiently for the highest quality operators to apply. In this way, the transition to a portfolio model can be managed smoothly and effectively. Even if this strategy lengthens the time for such a transition, it does so with the benefit of making the transition in a way that will assure that the model can last.

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[305] COWEN 2011 REPORT, *supra* note 10, at 7.

[306] *Id.* (locally-authorized charters serve a population that is only 5% special education students).

[307] *See* La. Ass'n of Public Charter Sch., *LA Special Education Coop* (2010), *available at* http://lacharterschools.org/sped-coop.html (launching the LA Special Education Coop to "help schools build capacity to increase SPED students' academic achievement and to help schools stay in compliance").

[308] Kiel, *supra* note 66, at 132-33, n.174.

iii. Political Sustainability

Notably absent thus far has been any mention of how the transition to a portfolio model might impact public education employees, including teachers. The fragmentation of operational authority has the potential to reduce the power of teachers and unions to bargain over employment terms. Indeed, teachers' unions have stood largely opposed to charter schools in general and to the transition to portfolio models in particular.[309] And not without reason. Following Hurricane Katrina, nearly all teachers in New Orleans were fired and the union disbanded.[310] Similarly, when a school in Shelby County is transferred to the authority of the ASD or a charter school, the students are still assured of space in the school, but the teachers are not.[311]

Thus, while the portfolio model enjoys political support from both parties at the federal level and within many statehouses, there are important, organized groups opposed to its expansion. In addition, if the model creates stratification in a way that large groups are not being equitably served or if it generates high costs and negative publicity due to lawsuits regarding accessibility, there is a danger of diminished local support that could impact the utility, if not the structure, of the model. The surest remedy to avoiding this fate is demonstrated success. However, circumstances can make maintenance of public support for the portfolio model—and with such support, the chances for the model's continued use—more or less likely. These begin with the transition and initial implementation itself and continue throughout the life of operation under a portfolio model.

A significant contributor to the seemingly insurmountable status quo many districts—particularly urban districts like pre-Katrina New Orleans and pre-merger Memphis—face is the lack of public confidence that the district is capable of success. This challenge is difficult to confront because, for many citizens and for varying reasons, the only points of contact with public education come through paying local taxes and watching the local news. This dynamic is double-edged regarding transitioning to a portfolio model. On one hand, the

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[309] *See generally* Paul T. Hill, Lydia Rainey, & Andrew J. Rotherham, *The Future of Charter Schools and Teachers Unions: Results of a Symposium, National Charter School Research Project* (2006), *available at* http://www.ncsrp.org/downloads/charter_unions.pdf.

[310] Kiel, *supra* note 66, at 133-34. The United Teachers of New Orleans filed a suit challenging the constitutionality of the legislation that enabled the shift in power from the Orleans Parish board to the RSD, but was unsuccessful. *See* United Teachers of New Orleans v. BESE, 985 So.2d 184, 196 (La. App. 1 Cir. 2008). However, a class action wrongful termination suit brought by teachers did result in a judgment for the plaintiffs. *See* Oliver v. Orleans Parish Sch. Bd., Civ. Dist. Ct. for the Parish of Orleans, No. 2005-12244 (Judgment) (June 20, 2012).

[311] TENN. CODE ANN. § 49-13-106(a)(2) (describing creation of ASD schools for students zoned to attend an ASD-eligible school); TENN. CODE ANN. § 49-1-614(g)(2) (providing discretion with the ASD to determine if teachers in a school that is converted to ASD's authority will remain).

lack of confidence in the district supports an embrace of alternate operators. But on the other hand, the general hopelessness in public education undermines the prospects for all operators. If a portfolio model is to succeed over the long term, there will have to be a reverse of this lack of public confidence in public education and increased engagement from communities in the larger work of education. This public support is particularly crucial where educational achievement gaps are caused, in part, by factors outside of the control of the school district, such as poverty. In such situations, community support may not only be rhetorical or political, but also tangible in the form of support programs for students in need.

As New Orleans and Shelby County undertook the work of transitioning the structure of public education in their communities, they did so under very different circumstances that demonstrate some of the elements necessary for a successful transition. In New Orleans, there was an unprecedented amount of political space within which substantial (radical) reform could be undertaken. Indeed, the city was absent of its citizens. When people began to return to Orleans Parish, the future of public schools was only one of a multitude of massive issues involved in rebuilding the devastated community. The hurricane thus provided a clean break from the past that allowed for the transition and embrace of the new model to begin without significant political interference.[312]

Although in Shelby County the planning process itself was largely apolitical, it took place within a very complex broader political context that was detrimental to the prospects of a uniformly supported transition. The appointed TPC went about drafting its merger plan in the immediate aftermath of a lawsuit that included every major governmental body in the county[313] and alongside vigorous efforts to create new municipal school districts within the suburbs.[314] Midway through the process, the state legislature altered the rules for creating mu-

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[312] One reading of this could be that the hurricane allowed for policymakers to implement reforms that would affect an absent population without any political check on that process. *See* NAOMI KLEIN, THE SHOCK DOCTRINE: THE RISE OF DISASTER CAPITALISM 5 (2007) ("Within nineteen months, with most of the city's poor residents still in exile, New Orleans' public school system had been almost completely replaced by privately run charter schools."). There is undoubtedly some degree of truth to this charge. The massive increase in state presence after the hurricane had been resisted by New Orleans legislators before the hurricane, and many have been critical of this "power grab." *See, e.g.*, KENNETH SALTMAN, CAPITALIZING ON DISASTER: TAKING AND BREAKING PUBLIC SCHOOLS 50-51 (2007) ("The state of Louisiana took control of roughly 90% of the schools").

[313] The lawsuit was filed by the Shelby County School Board against the Memphis City School Board, the City of Memphis, the Shelby County Commission, and the state of Tennessee, among others. Bd. of Educ. of Shelby Cnty., 2011 WL 3444059 (W.D. Tenn. Aug. 8, 2010).

[314] *See supra* Part II.B.iii.

nicipal school districts, an action that led to a countersuit.[315] Thus, even if the TPC's process was internally free of political interference, the fate of the plan and the future of public education in Shelby County were not.

Another initial advantage in New Orleans was consistency between the party responsible for planning and implementing the transition. Following the hurricane, nearly all schools in New Orleans were handed over to the state RSD, an entity that could be counted on to faithfully implement what was largely a state-driven transition.[316] Adding to the drama in Shelby County was the fact that while the TPC was given the authority to draft the plan, it had essentially no role in implementation.[317] That task was left to the new, countywide Shelby County School Board, an entity with a great deal to lose through an embrace of a portfolio model.[318] Further, as the TPC handed the school board its plan in June 2012, school board members were beginning to campaign for August elections in which three of the seven races featured two incumbents running against one another.[319] Even if the school board may have been inclined to adopt and implement the TPC's recommended plan, the political circumstances were not favorable.

Whereas in New Orleans there was both political space to devise a plan and political muscle to implement it, Shelby County was faced with an apolitical body drafting a plan amidst a tense political environment and handing that plan over to a divided school board for implementation.[320] Further complicating the board's implementation task was the fact that several of the TPC's recommendations, such as closing more than twenty schools, would be politically difficult in the best of circumstances. Opposition to the outsourcing of city custodians

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[315] In November 2012, the federal district court for the Western District of Tennessee held that the statutes that had authorized the creation of municipal districts in Shelby County violated the Tennessee constitution. Bd. of Educ. of Shelby Cnty., No. 2:11-cv-02101-SHM-cgc, 2012 WL 5930770, at *28 (W.D. Tenn. Nov. 27, 2012). The efforts to create municipal districts continue as the General Assembly took up new legislation aimed at enabling creation of such districts without violating the Tennessee constitution during its spring 2013 session. Jane Roberts, *Tennessee House Panel OKs Municipal Schools Bill*, COM. APPEAL, Mar. 26, 2013, http://www.commercialappeal.com/news/2013/mar/26/tennessees-house-education-committee-passes-suburb/.

[316] *See supra* Part II.A.

[317] Bd. of Educ. of Shelby Cnty., 2011 WL 3444059, at *50 (W.D. Tenn. Aug. 8, 2010) (noting that the school board—not the TPC—is responsible for implementation, and concluding that "The Board must consider and, as it deems appropriate, approve and implement the comprehensive transition plan developed by the transition planning commission and reviewed by the Department of Education.").

[318] *See supra* Part II.B.ii.

[319] *See* Zack McMillin, *It's Member vs. Member for School Board, State Legislature*, COM. APPEAL, Apr. 5, 2012, *available at* http://m.commercialappeal.com/news/2012/apr/05/79-candidates-file-shelby-county-run-aug-2-electio/.

[320] *See id.*

and suburban bus drivers from public employee unions was vocal.[321] For a school board made up of twenty-three members, some of whom were running against one another, others of whom were openly campaigning for secession to municipal suburban school districts, and others of whom were heavily sympathetic to union concerns and the potential impact in poor neighborhoods of school closings, the prospects for implementation true to the spirit of the portfolio model were not good. Thus, the political sustainability of the model in Shelby County was in doubt from the outset.[322]

Of course, the transition in New Orleans was not without controversy and litigation of its own.[323] However, the political space present at the outset allowed for the new model to get started without significant disruption and as the new model became the new normal, public opinion was generally positive.[324] The two top contributors to public satisfaction were likely the sense that families were able to enroll students in one of their top choice schools and that the schools appeared to be achieving better than those in existence prior to the hurricane.[325] Still, this public support is tenuous. The model will have to continue to demonstrate academic success and address problems within the model, such as the difficulty of serving special education students.

Managing the political enthusiasm for public education within the portfolio model will require the same type of collaboration across operators necessary for success in handling other challenges. Narrow focus on support only for individual schools could be counterproductive if the public—or the elected leaders making funding decisions—lose faith in the underlying concept of autonomy for multiple operators. The success of a few schools within a failing

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[321] Michael Kelley, *Shelby School Board Takes Four Hours to Vote for Custodial Outsourcing*, COM. APPEAL, Feb. 28, 2013, http://www.commercialappeal.com/news/2013/feb/28/shelby-school-board-takes-four-hours-to-vote-for/.

[322] The TPC attempted to obtain public support for its plan, which did receive strong endorsements from state officials and within the community through a community engagement process in development and a public rollout of the plan. However, most of the public presentations were dominated by questions and concerns rather than enthusiastic support for the plan. *See* Cindy Wolff, *Crowd Shares Concerns of Memphis-Shelby County Schools Merger*, COM. APPEAL, Jan. 11, 2012, *available at* http://m.commercialappeal.com/news/2012/jan/11/crowd-shares-concerns-of-merger/; *see also* Michael Kelley, *Fears of Instability Plague Memphis-Shelby County Schools' Transition Planning Commission*, COM. APPEAL, Jan. 21, 2012, *available at* http://m.commercialappeal.com/news/2012/jan/21/fears-of-instability-plague-transition/.

[323] Note the UTNO lawsuit, the employees' wrongful termination suit, and now, the special education class action, all mentioned *supra*.

[324] Kiel, *supra* note 66, at 143.

[325] *See* Cowen Inst. for Pub. Educ. Initiatives Research Brief, *K-12 Public Education Through the Public Eye: Parents' Perceptions of School Choice* (Dec. 2011) (discussing factors contributing to public satisfaction). Further supporting the optimistic opinion of the new model in New Orleans is the fact that some, though not all, are lauding achievement gains in the community, thus reversing the narrative of disarray that preceded the hurricane.

model will not lead to long-term sustainability for any independent operator. Maintaining public support will require addressing the stratification dangers present in the system by achieving sustained academic success across operators, genuine intervention for failing operators, and accessibility throughout the community to good schools. It will further require transparency and consistency in sharing information about performance, providing the public with accurate comparative information that preferably goes beyond simply reporting student achievement scores. It will only be success that sustains the model. This apparent alignment in interests among students and operators—academic success being the imperative for both—is perhaps the most promising shift offered by the portfolio model and its greatest hope that it will prove to be a model that can be sustained.

CONCLUSION

As Orleans Parish and Shelby County progress through the early stages of their respective once-in-a-lifetime opportunities, each community will encounter challenges in ensuring that their emerging portfolio models will enhance the educational opportunities within their communities. Although there is enthusiasm about such a radical shift away from the traditional district model, the embrace of school-level autonomy and multiple operators, including the state, will not succeed without deliberate attention to the model's most significant pitfalls. A model that is only a reform in structure, but not in outcome, would be a waste of an opportunity. Similarly, a model that cannot deliver due to financial, legal, or political drawbacks will, over the long term, render the scholarly debate about the wisdom of such a large-scale embrace of the market model to have been a waste of effort. There is much to learn from New Orleans and Shelby County to help avoid these fates, but neither model has eliminated the threats of stratification or unsustainability. As portfolio models develop, continued attention within the legal structures that support the model—state law and the bilateral agreements between authorizers and operators—can enable the maximization of educational benefits for students while minimizing the danger that the future will look eerily similar to the past for struggling urban education systems.