



**Education Commission**  
of the **States**

# **TWO YEARS AND COUNTING: CHARTER SCHOOLS AND NO CHILD LEFT BEHIND**

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## OVERVIEW

If the No Child Left Behind Act (NCLB) was intended as a “two-by-four” to shake complacency out of American public education, it has already succeeded. There are qualms, quibbles and gripes from Maine to Hawaii, but every state, school district and school knows it is now fully accountable for the performance of all students, and failure to improve test scores will bring heavy consequences.

In the two years since its enactment, NCLB has brought both satisfaction and apprehension to charter schools. On the one hand, NCLB largely adopts the high-stakes charter model as an accountability framework for all public schools – and in fact, pays an additional compliment by allowing districts to convert their low-performing schools into charters.

At the same time, NCLB has complicated the accountability relationship between charter schools and their authorizers – as well as created new paperwork burdens – by requiring charter schools to measure and report the same across-the-board indicators as all other public schools, no matter the terms of the original charter.

But the sky has not fallen, and the direst predictions are still just predictions. This may just be a matter of timing, since NCLB’s standards ratchet up annually, and since many charter schools are too new to qualify for corrective actions. It also may be a function of the U.S. Department of Education’s regulatory approach, which has consistently treated charters as public schools subject to the array of NCLB rules – while at the same time leaving the “how” deliberately ambiguous. And it may have something to do with the economics of NCLB; while state and local governments already complain that NCLB is an “unfunded mandate,” its direct costs have yet to hit charter schools in a big way.

This paper looks at how NCLB has begun affecting the American charter school community, and points toward both the promising and worrisome signs on the horizon.

# ACCOUNTABILITY

NCLB and subsequent guidance by the U.S. Department of Education deliver a powerful message: Charter schools are subject to the same accountability as all other public schools. Yet in practical terms, this message is being implemented through somewhat different means, and with consequences that may differ in form if not substance.

All states and the District of Columbia have now won preliminary approval from the Department of Education for the accountability plans required under NCLB. Because the plans were compiled on tight timelines, following a workbook format that asked for broad definitions applicable across all public schools, the state plans devote almost no ink to charter schools. States were required by Department guidance to consult with charter leaders in compiling the plans; anecdotes from the field suggest that the level of consultation ranged from impressive, to casual, to none at all. Nonetheless, the plans set the stage on which charter accountability will play out.

## **Assessments**

The notion of leaving *no* child behind is embodied in NCLB's strategy for administering and reporting standardized tests. NCLB establishes a goal of 100% proficiency in reading and math for all students, within 12 years, and requires states to create annual benchmarks for "adequate yearly progress" (AYP) toward that goal. It further requires that they break down achievement results by population groups. So for the first time, students in poverty, those with disabilities and English language learners cannot be overlooked or excluded in an effort to improve overall averages.

In pursuit of this goal, NCLB puts in place a single testing framework for the entire country, requiring that by the 2005-06 school year, reading and math be tested for all students in all schools, grades 3-8, and then at least once in grades 10-12. NCLB also requires that by the 2006-07 school year, science must be tested at least once in grades 3-5, 6-9 and 10-12, although science outcomes will not figure in the AYP measure.

Since many state assessment systems currently check achievement only at selected grades (for example, 4, 7 and 11), these new testing requirements will fill off-year testing gaps and produce a vast source of longitudinal data. For the first time, all states will be able to follow the progress of individual students over time, and create "value-added" evaluations that show the impact of schools (and even individual teachers) on their learning. Many states however, are likely to miss this opportunity. While NCLB explicitly encourages creation of longitudinally linked databases, it reduces the incentive for their use by insisting that AYP be defined against proficiency-based benchmarks rather than measures of growth.

No state has directly challenged NCLB by creating a true value-added assessment model. This may turn out to be a serious problem for charter schools that serve underachieving populations. Students who arrive in 9th grade bearing 4th-grade reading skills will need some time to catch up, even in the most rigorous academic environments. During that time, their average performance is likely to land below the state benchmark for AYP, especially since that benchmark escalates every year or two. So a state accountability system that only tells what percentage of a given school's students are at the 60th percentile in reading performance tells nothing about the achievement of a school that moves students from the 10th to the 30th percentile in a single year.

Some states however, have looked for "wobble room" in fashioning accountability systems to suit the NCLB guidelines – and to the surprise of many observers, the Department of Education has shown flexibility in approving creative state plans.

Some states will maintain dual systems, keeping an existing state accountability structure, but also complying with federal proficiency-reporting requirements. While this is causing some confusion (since

schools may win gold stars under the state system and then be listed as “in need of improvement” relative to AYP), it has enabled the few states using value-added methods to continue. Florida will keep its A-Plus program, which awards points to schools whose lowest-performing students gain at a rate comparable to the norm group in the state, enhancing the program to meet NCLB standards. Arizona will continue rewarding schools that achieve significant academic gains, based on growth of individual students over time, even if the schools do not meet state standards.

Louisiana’s plan has two tiers. One measures AYP in the conventional sense, including each factor and student group defined in NCLB; the other includes a school’s overall population, and measures performance in a wider range of subjects (English language arts, mathematics, science and social studies). In addition to attendance, this second tier tracks dropout rates rather than graduation rates, awarding incentive points to schools that keep students in school until they have mastered standards, rather than emphasizing a four-year timeframe. This method could provide some comfort for charter schools that serve at-risk student populations.

In a few cases, the Department has allowed index strategies, which create summary scores by measuring performance based on progress against proportionally weighted goals. Delaware and Oregon, for example, award points based on differential weights for reading and writing assessments within the broad “language arts” category.

Delaware’s plan also includes a novel component called “tracking back” that apportions student results to each of the schools that students have attended in the year leading up to the state exam. This method may relieve some of the accountability burden for charter schools that inherit low-performing students. It is relatively simple in concept: The scores of a school’s 3<sup>rd</sup> graders, in their first year of taking mandatory NCLB tests, also count in the accountability matrix for the kindergarten, 1<sup>st</sup> and 2<sup>nd</sup> grade they attended. Once the state has implemented annual testing in 2005-06, this method will still be used for the K-3 grade range and in the 6-9 and 10-12 grade ranges, but annual tests in grades 4-8 will be counted only against the current school.

Finally, in approving state accountability plans in May 2003, the Department of Education provided an additional and quite welcome signal of flexibility concerning *when* assessment results produce consequences. The Department gave the nod to several state plans, among them Ohio, Florida and West Virginia, which said that new schools (not those resulting from reorganizations or redistricting) are not subject to AYP determinations until successive years of assessment results are available.<sup>1</sup> In most cases, this means starting the “clock” for performance consequences at the end of the school’s second year. Given the accumulating evidence that charter schools typically take some time to get organized before achievement starts to climb,<sup>2</sup> this is a welcome interpretation. It also removes one potential roadblock from districts and states that want to embrace a reform strategy based in new-school creation, whether they are charters or not.

### **Sample Size**

The impact of accountability provisions on charter schools will be mitigated somewhat by states’ decisions on the sample-size question. NCLB allows states to determine the minimum number of students that assures statistical validity for school or subgroup results and that shield test results of individual students from public disclosure. States have mostly chosen a range of 30-40 students as the basic count for accountability purposes, and several have established higher numbers for target groups. Oklahoma, for example, uses a minimum sample size of 30, but a sample size of 52 for students with disabilities. The state’s rationale is that these students are found throughout both the school’s general population and within other subgroups, and the higher number should cut down on double or triple counting of the same student for several AYP calculations. Texas and California count subgroup performance only if there is a minimum of 50 students *and* they constitute a certain percentage of overall student population.<sup>3</sup>

While most charter schools will have more than the minimum number of students required for whole-school accountability reporting, this provision of the law will keep many smaller charters out of harm’s way, and off corrective-action lists, due to small student groups failing to make state AYP standards.

### ***Additional Indicators***

In addition to test scores, AYP is based on graduation rates for high school students and an additional indicator, determined by the states, for elementary and middle schools (in most cases, states have chosen attendance rates). This provision may provide a special boost to chartered high schools by comparison to their counterparts in traditional school systems. Since so many chartered high schools are too new to have graduated a full four-year cohort, aggregate data on their graduation rates is hard to come by. But small, personalized chartered high schools should be able to retain and graduate a significantly higher percentage of students than the large urban high schools from which they are drawing their student bodies.

### ***Contracts and Consequences***

NCLB most directly confronts the charter model by prescribing a set of “corrective actions” clearly more suited to conventional school districts than to the contractual relationship between charter schools and authorizers. The Department of Education deftly (and wisely) finessed the issue in its written guidance.

First, the Department said that authorizers must administer charter accountability including corrective actions – but added as little elaboration as possible: “If a charter school fails to meet AYP requirements, then the charter school authorizer must take actions as required by NCLB.”<sup>4</sup>

Second, the guidance decoupled state AYP benchmarks from charter contracts: “If authorizers wish, they may choose to incorporate the AYP definition into charter contracts, especially for new schools, but NCLB does not explicitly require this step.” The practical consequence of this ruling is that AYP failure alone need not abrogate the charter or trigger dire consequences (although many authorizers will choose to include it in contracts anyway, since charters have the same obligation as other public schools to pursue AYP).

Third, the guidance underscored that NCLB is a floor rather than a ceiling: “Nothing in NCLB prohibits... the development of future contracts that meet or exceed the Title I accountability requirements of NCLB.”<sup>5</sup> This is a good thing, since charter schools should be judged on more than reading and math scores and attendance or graduation rates. A charter school’s contract should address its mission, its ability to be a financially viable and going concern, and its commitment to providing equal access and complying with the laws of the land – and attainment of AYP represents only a part of what a good authorizer evaluates when renewal time comes around.

# TEACHER QUALITY

According to NCLB, a “highly qualified” teacher is one who:

1. Has obtained full state certification as a teacher or passed the state teacher licensing examination and holds a license to teach in the state, and does not have certification or licensure requirements waived on an emergency, temporary or provisional basis
2. Holds at least a bachelor’s degree
3. Has demonstrated subject-area competence in each of the academic subjects in which the teacher teaches, in a manner determined by the state and in compliance with Section 9101(23) of NCLB.

Charter schools need not worry about the first demand as long as they are located in one of the five states that provide outright exemption from teacher certification requirements. In the other 34 states with charter laws, however, schools will still have to ensure certification for some or all of their teacher corps. But all charter teachers will have to hold at least a bachelor’s degree, and show that they know their subject – and this may be a trickier proposition in the charter sector than in traditional school systems.

Free to hire from nontraditional sources, some charter schools enlist artists to teach art, engineers to teach science and bankers to teach math. Twenty years of professional experience may now have to be supplemented by passing a state exam or acquiring a new degree.

Charter schools often weave academic content through multidisciplinary projects, led by teachers degreed in a single area. And especially in their early years, most charters are small and lightly staffed – meaning that teachers may cover several subjects in the course of a day. So far, the Department of Education is indicating that teachers must demonstrate proficiency in every subject they teach. That may place a significant burden on charter teachers and charter school budgets.

For charter schools, whose whole premise is an emphasis on outcomes rather than inputs, the need to demonstrate quality through credentials may seem backwards. Tennessee has taken an approach far more congenial to the charter model by allowing teachers to meet the “highly qualified” standard by using student test-score gains. As *Education Week* puts it, this is “an attempt to link good teaching with what students actually learn.”<sup>6</sup> (A novel idea!) But Tennessee is establishing a serious “value-added” assessment system using longitudinal student-level data – and thus is one of the few states able to make data-based judgments about the performance of individual classroom teachers.

## AUTHORIZERS

NCLB is clear in saying that state law determines how the legislation's accountability provisions are applied to charter schools. In nonregulatory guidance issued in March 2003, the Department of Education amplified that provision by saying that charter authorizers are to have the primary role: "The charter authorizer is responsible for holding charter schools accountable for Title I, Part A provisions unless state law specifically gives the (state education agency) direct responsibility for charter school accountability."<sup>7</sup> In fact, the Department defined that role expansively to include, for example, supervision of teaching quality requirements.

Yet authorizers are still feeling their way in interpreting what the statute means in terms of their day-to-day responsibilities. For authorizers that are also local education agencies (LEAs) – that is, traditional school districts – the task may look relatively simple. Since NCLB prescribes that all public schools be part of each state's accountability system, districts can collect the same performance data from charters as are collected from all other public schools. For nondistrict authorizers, NCLB may mean a number of things, including:

- Realigning their reporting systems to accommodate categories of information never anticipated in the charter
- Notifying parents that their children are in schools that are failing to make adequate yearly progress
- Exploring just who is responsible for compliance with special education law
- Taking on more oversight responsibility on teacher credentialing and administration of English-proficiency tests
- Significantly modifying contracts to accommodate newly required "corrective actions" for underperforming schools.

## NCLB AND THE CHARTER MARKET

The jury is still out on how NCLB will affect supply-and-demand trends in the charter marketplace. In the first months after enactment, the charter community seemed equally divided between “irrational exuberance” and bleak pessimism. Some celebrated because they think NCLB will swell charter school enrollments as parents exercise their option to move kids out of chronically failing district schools. Others moped for precisely the same reasons: an influx of kids from poor schools may drive down the test scores of high-performing charters. Charter conversions, as permitted under NCLB, may truly be a double-edged sword, if it simply means slapping a “charter” label on a district’s troubled schools.

It is too early to tell if either mood is justified. The conversion provision only kicks in after public schools have not responded to two years of corrective actions, which are preceded by two years of “needs improvement” status. So if there is a trend toward mass conversions of dysfunctional district public schools, it will not be visible until the 2005-06 school year.

NCLB’s choice provisions, allowing an immediate exit from dangerous or failing schools, got off to a bumpy start. Chicago conducted a lottery for 270,000 students eligible for transfers. Only 19,246 replies came in, and of the 1,097 lottery winners selected, only 481 chose to transfer. Similar stories occurred around the country, with low demand meeting negligible supply.<sup>8</sup> Parents often did not learn about the program until it was too late, had little information about the school options and, in the end, found far too few decent schools justifying a daily trip outside the neighborhood.

NCLB clearly names charter schools as an acceptable choice for parents seeking a better deal. But in recent months, as school districts have struggled to find sufficient numbers of choice options, the Department of Education has broadened its interpretation of the NCLB language. In one online conference, for example, Secretary of Education Roderick Paige explained that the task was to identify *choices*, not just schools. Districts, he said, “can use supplemental services sooner, can create charter schools, and can create schools inside of schools. They can even use technology to provide choices and options for students.”<sup>9</sup>

This contrasts rather sharply with regulations adopted just last December by the Department: “In the case of a school identified for school improvement under Sec. 200.32, for corrective action under Sec. 200.33, or for restructuring under Sec. 200.34, the LEA must provide all students enrolled in the school with the option to transfer to another public school served by the LEA.”<sup>10</sup> This change in posture may assuage fears, or mitigate anticipation, of a stampede to charter schools.

### ***AYP as a Leading Indicator***

Another impact of NCLB that will surely shape the market for charter schools is whether they show up less or more frequently than traditional public schools on state lists of “schools in need of improvement.”

In its 2003 report on American education, the Brookings Institution’s Brown Center said that charter schools remain overrepresented on lists of “failing” schools in the 10 states studied. Drawing on accountability reports on state Web sites as of August 2003, Brookings found 24.6% of charters failing, compared to 21.3% of all public schools. But it noted that there had been a wider gap in 2002 (18.6% of charters compared to only 12.3% of all schools), so “the overrepresentation is shrinking.”<sup>11</sup> The study also noted that failure in accountability systems is predicated on two aspects of test scores – level and gain – and while the most current cohort of charter schools still lags in terms of performance levels, they are making significant gains that are keeping many off the “failing” lists.

It is difficult to know however, what role NCLB plays here, since the state systems that produce the lists consulted by Brookings are not necessarily aligned with those states’ benchmarks for determining “adequate yearly progress” (AYP). For example, California’s Academic Performance Index, or API, which for several years has served as that state’s basic accountability yardstick, is organized around both absolute and growth standards. Growth targets are calculated as 5% of the distance between the school’s

current score and the statewide performance target of 800. To be targeted for intervention – that is, to be on the “failing” list – schools must fall in the lower half of distribution on the API and also must fail to meet growth targets.

The API score is being used by the state as an “additional indicator” for purposes of calculating adequate yearly progress – but the targets are calculated differently. To be credited with adequate progress in the 2002-03 school year, a school must show growth of one point or must have a 2003 growth score of at least 560. So a school can satisfy this requirement with a small gain and still fall short of the 5% growth demanded by the regular API system.

While the Brookings report shows 52% of California charters on “failing” lists vs. 45% of all public schools, a separate analysis by the Charter School Development Center (CSDC), a California nonprofit, sees the picture differently. Looking strictly at attainment of adequate yearly progress in the categories mandated by NCLB, the CSDC reports that about 35% of charter schools fail in at least one AYP category vs. the 39% of California’s Title I schools currently listed.<sup>12</sup>

It will be a while before state lists of “failing” or “needs improvement” schools can be used as an accurate gauge of real quality. The definition of failure hinges on state-by-state determination of performance standards, and several states have made dramatic adjustments after hundreds of schools showed up on initial lists. In states where very few charter schools are being reported on improvement lists, the relative newness of the schools may be a factor. Inclusion in these lists requires at least two years of AYP failure, and new charters that start slow may find themselves listed in their third year of operation. Also, NCLB’s sample-size rules play an important role. A school with just 14 special education students may be serving them poorly – but failure by that one group will not trigger “improvement” because the state requires that at least 30 such students take the test for the results to count.

### ***Danger in Numbers***

Another driver in the legislation is “persistently dangerous schools.” Given the perceived level of disorder in many urban schools, some charter proponents think NCLB will provoke an exodus to smaller, more cohesive charter schools. Again, it was left to the states to devise their own criteria for “persistently dangerous,” and the result reminds one of Daniel Patrick Moynihan’s famous *American Scholar* article “Defining Deviancy Down.” Forty-four states report no – zero – persistently dangerous schools, and the rest, just a few each.<sup>13</sup>

So while safety is often cited in parent and student surveys as an important reason for choosing schools, states are providing little evidence to help them make an informed choice.

## PAPERWORK

Finally, it must be observed that the best intentions of the No Child Left Behind Act may be blunted by the way it appears at the school level – as another engine for generating reports and paperwork.

Since charter schools are often treated as local education agencies for federal grant purposes, their reporting burden under NCLB has increased. The legislation contains some paperwork chores that can make life difficult for smaller schools.

For example, NCLB establishes parents' right to know whether their child is being taught by a highly qualified teacher. Schools have an obligation to notify parents if their child's teacher does not fit the definition of "highly qualified." The motivation behind this provision is as obvious as it is pure: let parents know their child is not getting access to the most skilled practitioner, and they will demand action, or choose another school. But a charter school that hires a practicing artist two credits shy of a college degree now has to prepare a letter not only informing parents of the situation, but explaining why it thinks that teacher is in fact suitable for that class. And then it must deal with the calls and e-mails that follow. For a small school lacking a phalanx of front-office secretaries, this kind of correspondence represents a major commitment of time and energy.

## CONCLUSION

NCLB is the Great Equalizer. Its explicit intent is to ensure no child gets lower expectations, less attention and fewer resources because of race, poverty or disability. NCLB may have a similar effect on schools, shining a light on some that work wonders with disadvantaged kids, while holding up to shame some well-financed and highly regarded schools that are resting on their laurels.

In the post-NCLB accountability environment, charter schools will probably not worry much about scrutiny itself. They are created through public processes, with publicly announced goals and periodic inspection; they already take state tests; and they confront the most drastic accountability consequences known to public education – outright shutdown – if they fail.

What is more worrisome are the potential side-effects of NCLB: administrators already wearing two or three hats (not at all uncommon in charter schools) now burdened with additional reports and explanations; founders less likely to open schools for at-risk kids because by definition, such schools will tend to miss AYP targets; additional expenses related to new teacher quality standards.

NCLB's framers mitigated some of these problems via a couple of escape valves: exemption of very small schools from accountability consequences, and a "safe harbor" provision that will keep schools from missing AYP if they can show at least some progress by student groups who miss the actual mark. The Department of Education also has made clear that authorizers are in charge of charter school accountability, which should provide charters with a knowledgeable hearing when problems arise.

To charter supporters still viewing NCLB with dread, the best response may be a reminder that all public schools are now in the same boat. Every traditional public school is beginning to experience the kind of high-stakes accountability that charter schools have always known. By leveling the playing field in this way, NCLB may open the door to a useful new dialogue among all public educators about accountability for student learning.

## ENDNOTES

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- <sup>1</sup> From state Title I consolidated plans, available at <http://www.ed.gov/admins/lead/account/stateplans03/index.html>.
- <sup>2</sup> See, for example, The Brown Center on Education Policy, *How Well Are American Students Learning? The 2002 Brown Center Report on American Education* (Washington, DC: The Brookings Institution, 2002), p. 33.
- <sup>3</sup> State Title I consolidated plans.
- <sup>4</sup> U.S. Department of Education, *The Impact of the New Title I Requirements on Charter Schools: Non-regulatory Guidance* (Washington, DC: U.S. Department of Education, March 24, 2003), p. 6.
- <sup>5</sup> U.S. Department of Education.
- <sup>6</sup> Keller, Bess, "Snapshot of 'Highly Qualified' Teachers is Fuzzy," *Education Week*, September 10, 2003.
- <sup>7</sup> U.S. Department of Education, *The Impact of the New Title I Requirements on Charter Schools: Non-regulatory Guidance* (Washington, DC: U.S. Department of Education, March 24, 2003), p. 5.
- <sup>8</sup> Borg, Linda, "Most Rhode Island Parents Choose to Ignore School Choice," *Providence Journal*, September 6, 2003.
- <sup>9</sup> Goodman, Elissa, "New York City's Schools Fear a Wave of Transfers," *The New York Times*, September 30, 2003.
- <sup>10</sup> Title I – Improving the Academic Achievement of the Disadvantaged: Final regulations. 34 CFR Part 200, December 2, 2002 (Federal Register Volume 67, Number 231).
- <sup>11</sup> The Brown Center on Education Policy.
- <sup>12</sup> Agostini, Michael, Charter Schools Development Center, e-mail to author, October 8, 2003.
- <sup>13</sup> Dillon, Sam, "Threshold for Dangerous Schools Under New Law Is Too High, Critics Say," *The New York Times*, September 30, 2003.