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# 3 The implementation of the *No Child Left Behind Act*: toward performance-based federalism in US education policy

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## 3.1 Introduction

In his last public policy speech at the end of his two-term presidency, George W. Bush chose to highlight his accomplishments in education reform in the General Philip Kearny School in Philadelphia. Seven years after the passage of the *No Child Left Behind Act* (NCLB), the President claimed that ‘fewer students are falling behind’ and ‘more students are achieving high standards’ (Eggen and Glod 2009). To address the concern that testing is punitive, the President commented, ‘How can you possibly determine whether a child can read at grade level if you don’t test? To me, measurement is the gateway to true reform’. This debate over the benefits and limitations of the federal Act continues as the Barack Obama administration begins to work on the reauthorisation of legislation. President Obama supports the federal role to strengthen accountability, including annual student testing. At the same time, he sees the need to provide additional resources to schools so they can improve teacher quality and improve student readiness for post-secondary opportunities.

Federal assertiveness in NCLB is a significant departure from a long held tradition of federal permissiveness. The federal government has been mindful that States have the constitutional authority over public education and that the American public adheres to the ethos of local control over public schools. The United States, in essence, maintains a decentralised education system. With the enactment of the federal NCLB, however, a more activist federal government seems to have emerged. To be sure, it is clearly not ‘nationalisation’ of education since there is no

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national examination and States continue to design their own academic standards and decide on how to intervene in persistently under performing schools. Nonetheless, the federal law requires all States to apply federal criteria in holding schools accountable. A central feature is the requirement that students in selected grade levels must be tested annually in reading and mathematics and that the results be used as evidence to meet the academic proficiency targets as established by the Adequate Yearly Progress (AYP) to avoid federally-defined interventions.

Given the fundamental shift in the role of federal government following the enactment of NCLB, this paper examines the policy's institutional context, programmatic design, and implementation lessons. Several issues will be addressed. First, how does NCLB depart from the traditional federal role? Second, what are the key benchmarks on academic proficiency? Third, how does federal benchmarking reconcile with a decentralised system of education? Fourth, to what extent are State and Local governments responding to the NCLB sanctions and incentives, including growth in charter schools, contracting services, and restructuring low-performing schools? Finally, what are the implications for sustaining performance-based federalism?

### **3.2 From dual federalism to categorical federalism**

Historically, the U.S. federal government has taken a permissive role in education that is consistent with what political scientist Morton Grodzins characterised as 'layer cake' federalism. Article I, Section 8 of the U.S. Constitution specifies the 'enumerated powers' that Congress enjoys and the Tenth Amendment granted State autonomy in virtually all domestic affairs, including education. Sovereignty for the States was not dependent on the federal government but instead came from the State's citizenry. Consistent with this view, in *The Federalist Papers*, published during 1787 and 1788, James Madison suggested a line of demarcation between the federal government and the States. In *Federalist* no. 46, he wrote, 'The federal and State governments are in fact but different agents and trustees for the people, constituted with different powers, and designed for different purposes'. The dual structure was further maintained by local customs, practice, and belief. It came as no surprise that in his description of the American democracy in the mid-nineteenth century, Alexis de Tocqueville opened his seminal treatise by referring to the local government's 'rights of individuality'. Observing State–Local relations in the New England townships, de Tocqueville (2000, p. 63) wrote, 'Thus it is true that the tax is voted by the legislature, but it is the township that apportions and collects it; the existence of a school is imposed, but the township builds it, pays for it, and directs it'. Public education was primarily an obligation internal to the States. The division of power within the federal system was so strong that it continued to preserve State

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control over its internal affairs, including the *de jure* segregation of schools, many decades following the Civil War.

## **Federal involvement**

Federal involvement in education sharply increased during the ‘Great Society’ era of the 1960s and the 1970s. Several events converged to shift the federal role from permissiveness to engagement. With the conclusion of the Second World War, Congress enacted the ‘G.I. Bill’ to enable veterans to receive a college education of their choice. Cold War competition saw the passage of the *National Defense Education Act* in 1958 — shortly after the Soviet Union’s satellite, Sputnik, successfully orbited the earth. At the same time, the 1954 landmark Supreme Court ruling on *Brown v. Board of Education* and the Congressional enactment of the 1964 *Civil Rights Act* sharpened the federal attention to the needs of disadvantaged students. Consequently, the federal government adopted a major antipoverty education program in 1965, Title I of the 1965 *Elementary and Secondary Education Act* (ESEA).

The ESEA, arguably the most important federal program in public schools in the last four decades, signalled the end of dual federalism and strengthened the notion of ‘marble cake’ federalism where the national and sub-national governments share responsibilities in the domestic arena. Prior to the 1965 law, there was political deadlock on the role of federal government in Congress. The States outside of the South were opposed to allocating federal funds to racially segregated school systems. Whereas some lawmakers refused to aid religious schools, others wanted to preserve local autonomy from federal regulations. Political stalemates were reinforced through bargaining behind closed doors among the few powerful Congressional committee chairmen (Sundquist 1968).

## **The federal role**

The eventual passage of ESEA and other social programs marked the creation of a complex intergovernmental policy system (see also Fenna, this volume). To avoid centralisation of administrative power at the national level, Congress increased its intergovernmental transfers to finance State and Local activities. During the presidency of Lyndon B. Johnson, categorical (or specific purpose — see Fenna, this volume) programs, including Title I, grew from 160 to 380. By the end of the Carter administration in 1980, there were approximately 500 federally-funded categorical programs. Particularly important was the redistributive focus of many of these categorical programs that were designed to promote racial desegregation,

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protect the educational rights of the learning disabled, assist English language learners, and provide supplemental resources to children from at-risk backgrounds. Despite several revisions and extension, ESEA Title I, for example, continues to adhere to its original intent ‘to provide financial assistance ... to local educational agencies serving areas with concentrations of children from low-income families to expand and improve their educational programs . . . which contribute particularly to meeting the special educational needs of educationally deprived children’ (ESEA of 1965).

Federal engagement in redistributive policy is reflected in its spending priorities. As suggested in table 1, federal contribution accounted for 8.5 per cent of the total revenues for public elementary and secondary education during 2006-07, a noticeable increase from 6.6 per cent in 1995-96. This increase occurred at a time when per pupil total spending rose from \$8833 to \$11 941 in real terms.

More importantly, growth in federal aid continues to associate with the policy focus on disadvantaged populations. As suggested in table 2, federal aid to programs for special-needs students showed persistent growth in real dollar terms. Between 1996 and 2005, these programs amounted to over 60 per cent of the total federal spending in elementary and secondary schools. The Title I program for the education for the disadvantaged increased from \$8.9 billion to \$14.6 billion in 2005 constant dollars. Federal aid in special education more than doubled, while the school lunch program increased its funding from \$9.8 billion in 1996 to \$12.2 billion in 2005. Head Start also jumped by 50 per cent in real dollar terms during this period. This trend of growing federal involvement in programs for the disadvantaged continues in the Obama Administration (see table 7 and the discussion later in the paper).

Redistributive federal grants have also taken on several institutional characteristics. First, under the grants-in-aid arrangement, the federal government provides the funds and sets the programmatic direction, but the delivery of services is up to State and Local agencies. Second, categorical grants focus on well-defined eligible students and only they would receive the services. Third, non-supplanting guidelines have ensured that federal resources are not diverted away from the eligible beneficiaries. Fourth, because categorical grants are widely distributed to schools and districts across many Congressional districts, bipartisan political support remains strong for these programs.

## **Money without results**

As public schools show mixed performance, policy makers become growingly concerned about the effectiveness of federal grants. The passage of *Improving*

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*America's Schools Act* (IASA) during the Clinton administration in 1994 signalled the beginning of federal efforts to improve program coordination and to allow for public school choice and competition. Among the most important features in the IASA was a provision that encouraged State and Local education agencies to coordinate resources in schools with high percentage of children who fell below the poverty line. The 'school wide' initiative was designed to phase out local practices that isolated low-income students from their peers in order to comply with the federal auditing requirement on the 'supplement nor supplant' guideline. Further, the IASA enabled public school competition with the allocation of federal charter school start up planning grants.

The IASA also aimed at monitoring schools that persistently failed to meet State proficiency standards. However, the legislation did not specify the consequences when schools repeatedly fell short of the federal expectations. IASA required States to adopt standards aligned with State assessments, but allowed them full autonomy to make instructional, governance, and fiscal policy decisions to support their academic performance standards. The political reality was that holding schools and districts accountable to high-stakes mandates was not feasible under IASA. There was very little enforcement of the IASA provisions and few States made substantial progress in meeting its requirements.

In short, categorical federalism takes a primary focus on the level of resources, regulatory safeguards, and other 'inputs' to meet the learning challenges of special-needs students. In providing supplemental funds to State and Local government, the federal government has not pressed for accountability in student achievement. However, with the *No Child Left Behind Act* (NCLB) of 2001, the federal government aims at combining an input-based framework with outcome-based accountability. In this regard, NCLB constitutes the latest evolution in our intergovernmental system in education in the United States.

### **3.3 Beyond categorical federalism: performance-based benchmarking in NCLB**

The passage of the 2001 *No Child Left Behind Act* marked the beginning of a serious effort toward performance-based federalism. For some analysts, NCLB has changed the terms of federal-State relations to such an extent as to represent a 'regime change'. In his historical review of the federal role, McGuinn (2005) sees NCLB as a 'transformative' moment in that well-entrenched political interests depart from their traditional policy positions. Conservatives were ready to set aside their strong belief in local control and to endorse a visibly stronger federal presence

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in education. Liberals moved to support a fairly comprehensive set of accountability measures, including annual testing of students in core subject areas with consequences. The de-alignment of traditional political relationships, as I might characterize the enactment of NCLB, embodies a fundamentally different set of ideas, interests, and institutions. Education now occupies centre stage in the political discourse at the national level.

## **The NCLB regime**

With NCLB, all students and schools are required to meet Adequate Yearly Progress (AYP), a set of standards that are established through State-specified academic proficiency plans. All schools, including Title I schools, must test all of their students and report their test scores by racial, income, and other special need categories. More specifically, the 2001 law requires annual testing of students at the elementary grades in core subject areas, mandates the hiring of ‘highly qualified teachers’ in classrooms, and grants State and Local agencies substantial authority over failing schools. By linking the progress of schools and teachers to achieving a nationally specified rate of progress on State tests, these federal requirements aim at shaping curriculum and instruction in the classroom. In other words, federal mandates are no longer limited to schools that serve predominantly disadvantaged students as defined under categorical federalism. Instead, federal NCLB performance-based expectations apply to all students in all schools.

## **Focus on school-level and subgroup achievement**

To determine if a school meets Adequate Yearly Progress annually in NCLB, student achievement is aggregated by grade and by subject area for each school. The School-level report includes the share of students proficient in each of the core content areas; student participation in testing; attendance rates; graduation rates; and dropout rates. Equally important, depending on their socio-economic characteristics, schools are required to report the academic proficiency of students in the following subgroups: economically disadvantaged students; students from major racial and ethnic groups; students with disabilities; and Limited English Proficiency (LEP) students. All students in grades 3 through 8 and an additional grade in high school are tested annually in mathematics, reading/language arts, and science.

In this regard, NCLB has made the achievement gap within a school more transparent for accountability purposes. By showing the percentage of students in each subgroup who attain proficiency in the academic content areas tested, the school must face the challenge of uneven distribution of academic outcomes. In

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their study of Florida, Hall, Wiener, and Carey (2003) found that some schools that received an ‘A’ under the state’s own accountability system would no longer be labelled as successful. For example, the research team found an ‘A’ school where about 50 per cent of the students were proficient in reading and mathematics. The school was made up of 31 per cent white and 59 per cent black students. It had 57 per cent low-income students. The achievement data showed that while 90 per cent of the white students achieved proficiency in reading and mathematics, the proficiency rates for black and low-income students were only at 22 per cent in reading and 15 per cent in mathematics. In other words, the reporting requirements on subgroups have made the data on achievement gap accessible to the public.

### **Adequate yearly progress**

NCLB allows each State to decide its own pace for reaching the federal goal of 100 per cent proficiency by 2014. Within this time frame, States are required to specify the annual targets on the percentage of students who meet the State proficiency standards in the core subject areas. These annual, measurable targets are known as ‘Adequate Yearly Progress’ (AYP). Districts, schools, and various subgroups are required to meet the AYP in order to avoid sanctions. According to the legislative intent of NCLB, States are required to identify a starting point of per cent proficient and establish the annual increments it will take for schools to reach proficiency. Schools are allowed to average the per cent proficient for each subgroup over two consecutive academic years, as well as over all grade levels tested in the school to calculate whether the school has made AYP.

NCLB uses a straightforward, absolute score cut-off in determining whether a school or a subgroup meets AYP. This ‘status’ approach has been criticised for its lack of consideration for academic gains that may not have resulted in reaching the proficiency cut-off standard. For example, a student who was over a year behind in reading could make achievement gains equalling a grade level of improvement and still be below proficient. In response to these concerns, the U.S. Department of Education has granted waivers (see Fenna, this volume) to several States to experiment with growth models for determining AYP (Olson and Hoff 2005). More recently, the Obama administration indicated its support for using academic growth as a measure for meeting AYP.

The goal of having the AYP is to connect current level of student achievement to the ultimate objective of reaching 100 per cent proficiency by 2014. The base line is set for 2002-03, where States were given the discretion to define their starting points in terms of the percentage of students who reached proficiency in the 2002-03 school year in language arts and mathematics. These starting points specify

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how far schools have to go over the 12-year period in order to reach 100 per cent academic proficiency by 2014. Table 3 summarizes the starting point, the AYP, and the end goal as specified in a sample of State accountability plans. AYP targets vary by content area and grade level. However, these targets are applied to all students, including members of various subgroups. For example, Florida established the starting point for all grade levels at 30.68 per cent and 37.54 per cent for Language Arts and Math respectively. Michigan, on the other hand, has established separate starting points for elementary, middle, and high school grades in both language arts and math.

The pace of meeting AYP varies among States. For example, Arizona, Arkansas, Hawaii, and South Carolina, among others, have relatively low starting points compared to Colorado, Georgia, and Tennessee. The former would have to make greater progress on their standards in order to meet the 100 per cent proficiency target by 2014. States' accountability plans suggest three broad patterns to ensure that students reach proficiency: equal yearly goals; steady stair-step; and accelerating curve (Wong and Nicotera 2006). In the equal yearly goals approach, the AYP targets are set as equal increments every year until the 2014 deadline for 100 per cent proficiency. Annual equal increments are calculated by subtracting the starting point proficiency from 100 and then dividing by 12. The steady stair-step approach increases the AYP targets incrementally every two or three years to meet the 2014 deadline. In the third approach, States create an accelerating curve for improvement where the per cent of students meeting proficiency will rise slowly in the initial years but with greater gains occurring closer to the 2014 deadline.

The extent to which a district or a school meets AYP is affected by the number and size of students in the subgroups. In their analysis of this issue in California, Kim and Sunderman (2005) found that the percentage of schools meeting AYP declines as the number of subgroups rise in these schools. While 78 per cent of the schools with only one subgroup met the reading AYP in 2003, only 25 per cent of the schools with six subgroups were able to do so. When the authors considered the AYP data in Virginia, they found that 85 per cent of the schools that met both the State and federal proficiency standards had two or fewer subgroups. Only 15 per cent of the proficiency schools had three or more subgroups.

Because schools with a high concentration of subgroups (such as English Language Learners) may face greater difficulty in meeting AYP targets, the federal government allows schools to meet AYP by fulfilling a 'safe harbor' provision. Under this guideline, a subgroup is deemed as 'meeting' AYP if the percentage of students in the 'below basic proficiency' level is reduced by 10 per cent from the previous year. In Philadelphia, a large urban school district with 266 schools in Pennsylvania, for example, of the 158 schools that made the AYP in 2010, 37 per

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cent of them met AYP by achieving the ‘safe harbor’ target. Nationwide, schools that fail to meet the State proficiency standards are becoming more transparent to the public and policymakers. As Table 4 suggests, during 2005, six States have the majority of the schools that did not meet the AYP. In another sixteen States, as many as 49 per cent of the schools failed the State proficiency standards.

### **Corrective actions directed at persistently low performing schools**

Performance-based federalism is reinforced by federal threats and sanctions. NCLB calls for a set of ‘corrective actions’ when districts and schools fail to make AYP for consecutive years. The AYP applies not only to the overall performance of the school but also specific racial/ethnic and special needs subgroups within a school. Corrective actions and other sanctions, in other words, are aimed at closing the achievement gaps.

Federal sanctions intensify as schools and districts experience consecutive years of academic failure. These sanctions begin with the relatively modest requirement for a school improvement plan, options for families in schools not making adequate yearly progress to transfer to another public or charter school, and the implementation of supplemental educational or tutorial services after-school. In other words, sanctions in the first years of academic failure are not designed to change the school or district structure. Following four consecutive years of failure, NCLB allows for the more intensive sanctions. These include State-driven interventions that alter school governance and hiring decisions, such as school or district takeovers and replacement of personnel in poorly performing schools. It has been estimated that about 5000 schools in the US are eligible targets for the more drastic sanctions.

## **3.4 The challenge of implementing performance-based accountability**

The emergence of performance-based federalism has created implementation challenges in the intergovernmental policy system. The federal government has relied primarily on State and Local capacity to implement the policy. Manna (2006) argues that ‘borrowing strength’ from State governments can facilitate federal capacity in the education policy arena where the social licence is historically weak. At the same time, tensions arise when many State and Local systems have limited capacity in analysing large scale data on student performance on an ongoing basis, in providing alternative instructional services in failing schools, and in making achievement and other schooling information more transparent to parents in a

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timely manner. As Manna (2010) observes, the federal goal to promote accountability tends to conflict with the reality of school and district practices.

### **Pace of implementation shaped by states**

During the initial implementation phase, States took incremental steps in meeting the federal legislative expectations. With dozens of states suffering from budgetary shortfalls in the 2000s, States delayed their response to seemingly costly federal mandates (on which, see Fenna, this volume). According to a 50-State report card on the first anniversary of the federal legislation, only five States received federal approval on their accountability plan (Education Commission of the States 2003). Further, only half of the States were prepared to monitor performance of various subgroups and to undertake corrective actions in failing schools. Over 80 per cent of the States were not ready to meet the federal expectation on placing highly qualified teachers in the classroom. It was only during the fourth year of NCLB that all the States had their accountability plans approved by the federal government. As Table 4 shows, in 2004-05, only 27 States (or 52.9 per cent) had at least 75 per cent of their schools meeting the federal AYP requirements. State capacity to meet AYP was seriously challenged as the proficiency cut-off level continued to rise toward the 100 per cent level on proficiency for all students.

Because States established their baseline that shaped AYP, academic proficiency was not uniformly defined. In an analysis of low-performing high schools, Balfanz and others (2007) found that schools in States with lower proficiency standards were more likely to make AYP. Schools in States with fewer subgroups for NCLB accountability purpose were also more likely to meet AYP. Further, the study found that some states focused on proficiency in 11<sup>th</sup> or 12<sup>th</sup> grade and graduate rates, thereby ignoring students who dropped out of the school system prior to the 11<sup>th</sup> grade testing time. In other words, variations in State academic standards made it difficult to assess the progress of NCLB across different states.

### **Resistance on testing requirements and accountability**

Political opposition to NCLB arose in a number of States over the testing and accountability provisions (Wong and Sunderman 2007). First, States registered their opposition with legislative actions. In 2004, the Virginia House passed a resolution calling on Congress to exempt States such as Virginia, that had a well-developed accountability plan in place, from the NCLB requirements. The resolution called NCLB ‘the most sweeping federal intrusion into state and local control of education in the history of the United States, which egregiously violates the time-honoured

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American principles of balanced federalism and respect for state and local prerogatives' (House Joint Resolution No. 192, passed January 23, 2004). The resolution passed 98 to 1, with the lone dissenter a Democrat. Further, after extensive lobbying by the Bush administration, the Republican controlled Utah House modified a law that would have prohibited that State from participating in NCLB. Instead, the law was amended to prohibit the State and Local districts from implementing NCLB unless there was adequate federal funding (H.B. 43 1<sup>st</sup> Sub, passed 10 February 2004). Other States — including Vermont, Hawaii, Connecticut, North Dakota, Oklahoma, and New Hampshire — passed similar resolutions. Indeed, during the first two years of NCLB implementation, the National Conference of State Legislatures identified 28 States that considered resolutions or bills requesting waivers, more flexibility and/or money, or that would prohibit the State from spending its own funds to comply with NCLB or even participating in the NCLB program. Moreover, in March 2004, the chief State school officers from fifteen States sent Education Secretary Rod Paige a letter asking for more flexibility in determining which schools were making adequate yearly progress.

Second legal action was taken against the federal government. The first legal challenge came from a coalition of districts in Michigan, Texas, and Vermont and the National Education Association, the nation's largest teachers' union. The plaintiffs argued that NCLB imposed federal mandates without adequate financial support. In November 2004, a federal judge in the US District Court for the Eastern District of Michigan rejected the challenge. The ruling stated that Congress had the authority to specify policy conditions on States (Janofsky 2005, p. A14). Subsequent rounds of appellate court decisions led to the U.S. Supreme Court, which decided in 2010 not to interfere with the earlier district court decision.

Another suit was filed by Connecticut against the U.S. Department of Education. That State sought full financial support from the federal government for the \$41 million State fund it spent to implement NCLB between 2002 and 2008 (Walsh 2010). The State also claimed that the federal agency had acted in an 'arbitrary and capricious manner' in deciding on State requests for waivers and exemption (Janofsky 2005, p. A14). For example, Connecticut cited that the Department of Education rejected the State's request for testing the students every other year instead of annually. The U.S. Court of Appeals dismissed the suit in July 2010 because the federal government had not taken any actions against Connecticut on NCLB implementation. The three-judge panel stipulated, however, that Connecticut could take administrative action against the federal government.

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## **Limited implementation on choice and supplemental education services (SES)**

Incremental steps were taken by States and districts on those NCLB provisions that aimed to reshape public education. Corrective actions provided a good example. A 2007 U.S. Department of Education study showed that participation in school choice and supplemental education services (SES) varied by grade level, with elementary school students having the highest participation rates. African American students had the highest participation rates in SES and above average participation rates in choice. Hispanic students had higher participation than Whites in SES, but lower participation rates than Whites in choice. Overall, participation in SES led to statistically significant improvement on math and reading scores, and spending more years in SES led to greater improvement in achievement. There was no significant effect on achievement from participating in the transfer option; however, the authors note that the small sample size of nine urban districts limited the power of this observation.

Case studies on the implementation of transfer options for student in low-performing schools generally found limited degree of local implementation. In his study of California, for example, Betts (2007) observed that school choice, as stipulated by NCLB, was largely underutilised throughout the State. In the initial year that schools were required to offer bussing for students who wish to transfer, some of this problem may be attributed to the timing of data being available to school districts, and, thus to parents. Additional reasons for limited implementation included the failure of districts to communicate clearly to parents the choice program, an inadequate number of places in better performing schools, and lack of parental interest in moving their children to schools outside of their neighbourhood.

The California case also showed that participation rates in SES were low, though not nearly as low as for the transfer option. Difficulties cited by State personnel with regard to implementing SES included a general lack of information about State-approved providers; districts were tardy in providing parents with information about SES; and some districts did not allow non-district providers to work on district property. Districts also had a considerable number of complaints/concerns about SES providers. Finally, like school choice, one of the greatest impediments to participation in SES was the substance and form of communications sent by districts to parents.

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## **Cautions on school restructuring to turnaround low performance**

While NCLB relied on State Education Agencies to implement the law's provisions, it did not pay adequate attention to their capacity to carry out the responsibility (Sunderman and Orfield 2006). After all, State intervention in low performing schools prior to NCLB was limited and not very effective (Mintrop 2004; Mintrop and Trujillo 2005; Sunderman and Orfield 2006). Not surprisingly, implementation studies found largely limited State and Local response to adopt the more drastic restructuring options. Even when schools persistently failed for consecutive years, States and districts were more likely to stay away from school turnarounds, where the principal and the majority of the staff would be replaced. Instead, most restructuring efforts aimed at extending the school day, bringing in outside expertise, and instituting modest changes to school governance. Indeed, implementation studies suggested that States generally narrowed the pool of schools that were targets for restructuring. For example, in Illinois, only 27 per cent of the districts that enrolled a substantial number of Title I students in 2004-05 were required to implement restructuring strategies, including personnel reassignment. In New York State, the number of Title I students receiving supplemental tutorial services grew from 31,700 in 2002-03 to 70 600 in 2005-06. In other words, the State took three years to increase from 13 per cent to 32 per cent of Title I students who were eligible for these services (Center on Innovation and Improvement 2006).

## **Need for organisational accommodation**

Facing Local and State resistance, the U.S. Department of Education relaxed certain requirements on a case-by-case basis (Sunderman 2006; Hess and Petrilli 2006). Among the first policy changes the federal government made concerned the inclusion of students with disabilities and English language learners into the State accountability system. The policy shift was in response to State and Local objections to holding all students with disabilities to grade-level standards and the challenges of implementing the NCLB requirements for English language learners. States with a higher concentration of these two subgroups were more likely to be identified for improvement than those without these subgroups, resulting in some of the best schools in a State being identified as needing improvement.

Additional policy accommodation came in response to parts of the law that were not working well, and if strictly enforced would mean the loss of Title I funds to many States. For example, as the deadline for having all teachers highly qualified approached in 2005-06, it became clear that States would not reach the 100 per cent goal. In October 2005, Secretary Spellings announced a policy change that allowed States additional time to meet the highly qualified teacher requirements (Spellings

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2005). With these changes, NCLB shifted from being one national policy applied uniformly on all jurisdictions to one dependent on what each State could negotiate with the federal administration. Following the tradition of ‘marble cake’ federalism in education, the federal government seems ready to address State concerns or risk further eroding political support for the law.

An example of intergovernmental accommodation in the urban context was Chicago’s success in gaining federal approval to provide tutoring programs for students in schools that failed the AYP. Under NCLB, districts that did not meet AYP, including most large urban districts, were prohibited from providing supplemental instructional services after school to their students. The U.S. Department of Education required that Chicago replaced its own services with outside vendors in January 2005. Mayor Daley stepped in and put his political capital behind the district CEO’s decision to continue the district services. In a series of private meetings between the Mayor and the US Secretary of Education, compromise was reached. In return for the district’s continuation of its supplemental services, the city agreed to reduce barriers for private vendors to provide tutorial services. When the compromise was formally announced by Secretary Spellings in early September in Chicago, Mayor Daley hailed the efforts as the ‘beginning of a new era of cooperation’ across levels of government in education (New York Times, 9 February 2005, p. A11). Similar waivers were subsequently granted in such cities as New York City and Boston. Clearly, intergovernmental negotiation is likely to be intense over the implementation of NCLB in complex urban systems.

### **Building a reliable data tracking system**

State and Local agencies face a capacity gap in data management and tracking system. The Data Quality Campaign, a non-governmental organisation, focuses on the necessary elements in creating a ‘robust longitudinal data system’ where each State would gather data on the same student while they are in school. The student data are matched with other data files, such as teacher records and instructional support programs. According to the Data Quality Campaign (2008), a robust State-wide data system, features ten elements. These include a unique State-wide student identifier that matches individual student achievement and other information; a unique teacher identifier that links teachers to their students; and individual student data collected from public school through college.

Based on a 2009 survey on the ten key elements of a rigorous, longitudinal data tracking system on individual student performance, the Data Quality Campaign found that twelve States have instituted all ten elements, while 34 States have eight

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or more (Data Quality Campaign 2010a). While all fifty States reported that their data systems have State-wide student identifier for tracking academic performance (including graduation and dropout), only 24 States adopted a State-wide teacher identifier that matched students to teachers. In these States with more robust systems, the Governor's office has played a critical role. In Delaware, two-term Democratic Governor Thomas Carper successfully pushed through a comprehensive education accountability plan between 1993 and 2000. A key feature of Governor Carper's reform was to link individual student's test scores to teachers. The 2000 reform plan enabled a professional standards board to use students' test achievement as the basis for 'at least 20 percent of the performance reviews given to teachers, administrators, and other instructional staff members' (Sack 2000). Governor Carper's successor, Governor Ruth Ann Minner, continued to insist on using student achievement to hold teacher accountable (Johnston 2005)

Seeing the need to utilise the data system, the Data Quality Campaign started surveying the States on their policies and practices to use data to improve student achievement in 2009. The first survey, published in January 2010, focused on ten actions that link State-wide data across P-20 and the workforce, expand data access to key stakeholders, and ensure professional capacity to use data for instructional practices (Data Quality Campaign 2010b). The survey found that only eight States were tracking individual students across P-20 and the workforce sectors, an assurance required for Phase 2 State fiscal stabilisation funds. While ten States reported strategies in sharing individual student progress data with educators, fewer than half of the States provided aggregated data reports to key stakeholders. To meet the federal performance-based expectations, States must improve their data utilisation to support student success.

### **Facing classroom realities**

The NCLB accountability standards faced implementation realities in a multi-layered policy system. District administrators, school principals, and teachers were in the 'trenches'. Based on their clients' needs and the organisational reality, educators often bring forth a different view on what can be done. As part of a larger study on NCLB implementation, Sunderman and her collaborators illuminated implementation challenges at the district and school level during the first two years. In *NCLB Meets School Realities: Lessons from the Field*, Sunderman and her colleagues (2005, p. ix) argued that the NCLB had expanded federal involvement in education by 'reaching far more deeply into core local and state education operations.' Federal requirement on annual testing of core subjects in the elementary grades is seen as directly shaping curriculum and instruction. To approach NCLB from the classroom level, the research team conducted a teacher

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survey with schools that were either struggling or improving in Fresno CA and Richmond VA during spring 2004. The survey showed that teachers generally recognised the value of focusing on student achievement generally had increased the amount of time allocated to test the core subjects due to NCLB. However, they were less certain on how failing schools would be sufficiently motivated by sanctions alone. An overwhelming percentage of the surveyed teachers saw the importance of collaborating with experienced administrators and seasoned teacher mentors. In other words, teachers saw the need to balance sanctions with professional development, curriculum support, and committed administrators.

### **3.5 Broadening of performance-based federalism in the Obama era**

#### **Focus on school turnarounds**

The Obama Administration continues the push for more direct district intervention in persistently low performing schools. In his proposal to reauthorize the federal law in elementary and secondary education, Secretary Duncan argued for four strategies to ‘turnaround’ the nation’s lowest performing 5 per cent of the schools (or approximately 5000 schools). The federal government has committed \$5 billion during 2010-12 to support these efforts. The four strategies tighten the approaches that were established under NCLB, allowing for fewer district options. More specifically, the Duncan strategies include:

- *Turnaround school* under a new principal who can recruit at least half of the teachers from the outside
- *Transformation school* that strengthens professional support, teacher evaluation, and capacity building
- *Restart school* will reopen as either a charter school or under management by organizations outside of the district
- *School closure* that results in moving all the students to other higher-performing schools.

In making its first School Improvement Grants (SIG) to support school turnarounds, the Obama administration allocated \$3 billion to over 730 schools in 44 States in December 2010. Of these schools, an overwhelming number of them (71 per cent) had chosen the ‘transformation’ option while very few decided to use either ‘restart’ (5 per cent) or ‘school closure’ (3 per cent). The remaining 21 per cent opted for the ‘turnaround’ option where the principal and a majority of the teaching staff were

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replaced (Klein 2011). Equally important, only 16.5 per cent of the students in all the SIG schools were white, as compared to 44 per cent African American and 34 per cent Hispanic.

### **Carrot and stick approach on new reform assurances**

The Obama administration has strengthened the NCLB-like accountability system by making new federal investment in public education. In return, the federal government requires State and Local government to meet a set of new expectations on reforming public education. The *American Recovery and Reinvestment Act* of 2009 (ARRA) redefined the latest federal involvement in public education in several aspects.

First, ARRA created the ‘State Fiscal Stabilization Fund’ program to save over 300 000 teaching jobs in public schools during the time when many States and districts instituted fiscal retrenchment. Second, in return for federal stabilisation support, States are expected to meet federal expectations on education reform. Among the reform assurance areas are: 1) more equitable distribution of well-trained, well-qualified teachers to address students with greater needs; 2) ongoing monitoring of student progress with a data system that links pre-K to college and career development; 3) developing and implementing standards on college- and career-ready standards; and 4) taking effective actions to turnaround the persistently lowest-performing schools. Third, ARRA substantially expands federal funding in several categorical program areas, including education for the disadvantaged children (or Title I program), IDEA program for special education students, and financial assistance for eligible college students.

Equally important, ARRA invites States to submit their best ideas on system transformation and school innovation for the national competition for the Race to the Top program. Delaware and Tennessee were selected as the first two grantees of the first round of Race to the Top competition in April 2010. The second round of competition resulted in awarding ten States and Washington DC.

The winning applications submitted by Delaware and Tennessee share several features in their approach on transforming public education. First, teacher accountability is prominent. A system of teacher evaluation is established. Student achievement becomes a ‘cornerstone’ of this new assessment system, according to the Tennessee education commissioner. Delaware will use the annual evaluation results to remove teachers who are rated as ‘ineffective’ for consecutive years. Second, a system of support is developed to enhance professional capacity. Delaware plans to hire 35 data coaches to train teachers using data for instructional

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improvement. The State also will hire 15 ‘development’ coaches to support principals and teachers in highest need schools. Third, external partners, such as Mass Insight Education and Research Institute, will be brought in. Fourth, the two States were successful in gaining approval from key stakeholders on the reform agenda in the long term. During the application, then Tennessee Governor Phil Bredesen was able to gain the endorsement on the application from all the gubernatorial candidates. To ensure institutional commitment, the two States set up administrative offices to oversee program implementation. Tennessee opened an ‘achievement school district’ office and Delaware set up a project management division to monitor the implementation of the reform initiatives. Finally, the two States show their support for expanding innovation. Tennessee recently passed a legislation that increases the number of charter schools and broadens student eligibility in school choice.

### **Federal–local alignment on innovation**

To a large extent, ARRA goals align closely with State and Local priorities. Given the economic recession and substantial State budgetary cuts, State and Local governments strongly welcomed the Stabilisation program as a necessary means to fill the gap in teaching and other professional positions. U.S. Secretary of Education Arne Duncan pointed out that the Stabilisation program saved 330 000 teaching jobs across the country. These jobs would have been eliminated in the absence of the federal ARRA funds. The Congressional Budget Office estimated that the ARRA intergovernmental transfers have a multiplier effect as high as 1.9 times when federal dollars are used by State and Local agencies (Congressional Budget Office 2009).

Further, States have made efforts to take on innovative initiatives in recent years. Eighty per cent now have legislation supportive of the creation of charter schools. Charter expansion tends to promote the diverse provider reform model, which aims at system-wide shift to offer a broader mix of service providers as a strategy to raise student performance. Chicago, New York, and Philadelphia provide prominent examples of this approach (Wong and Wisnick 2007). As table 5 suggests, the growing charter school section involves diverse organisations. During 2009-10, there were 4903 charter schools enrolling about 1.67 million students. Of these schools, 492 are managed by Education Management Organizations (including for-profit and non-profit organizations) and 573 are managed by Charter Management Organizations. The diverse provider approach is likely to expand in the coming years.

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With the widening use of corrective actions under NCLB, the issue of holding schools and teachers accountable has gained public support. In several States, governors and legislatures are beginning to experiment with differential compensation for educators. Florida and Texas, for example, provide individual cash bonuses to teachers for standardised test results. Arizona, Minnesota, and North Carolina connect part of the teacher salaries to student achievement. In Minneapolis and Denver, union leadership actively participated in negotiating with the management to redesign the teacher compensation package. Denver's ProComp Agreement did not eliminate collective bargaining. Instead, it gained voters' approval for new taxes to pay for the expanded salary schedule that takes into account four factors: knowledge and skills; professional evaluation; market incentives; and student growth. In response to State and Local interest in compensation reform, the federal government has expanded its investment in supporting alternative compensation initiatives. As shown in table 6, the federal Teacher Incentive Fund initiative has grown from \$99 million to \$443 million over the last 5 years. In other words, the policy conditions created by NCLB and ARRA will continue to facilitate State and Local innovation.

### **3.6 Can federal activism on accountability be sustained?**

Federal activism on education accountability is now at a cross roads as President Obama pushes forward his own education agenda. On one hand, the Obama Administration has shown its strong support for performance-based accountability. Both the President and his Secretary of Education, for example, take the position that student performance matters in teaching employment and compensation. Recent public opinion polls indicate a clear majority supportive of teacher accountability. On the other hand, the sustainability of the new policy paradigm meets implementation challenges in the decentralised system. There are legal challenges filed against the annual testing requirements and other federal provisions. In Congress, federal education reform has shown partisan polarisation. The economic stimulus package, which included federal school aid, won Congressional passage without a single Republican vote in the House and only three Republican votes in the Senate. There remains political concern about federal infringement of State and Local control in education.

To students of implementation, the controversy, conflict, and resistance should come as no surprise. After all, when federal expectations are ambitious and encompassing, as they are in the federal NCLB, the organisational routine and the political status quo are being called into question. When lofty goals meet the

operational reality of federalism, we are likely to see implementation tension and intergovernmental conflict (Pressman and Wildavsky 1973; Peterson, Rabe and Wong 1986). At the same time, with the passage of time, implementation problems are likely to become more manageable as stakeholders at all levels of the government adjust their expectations (Peterson, Rabe and Wong 1986). As NCLB matures, the process of borrowing strength is likely to facilitate the institutionalisation of new policy norms and operational procedures. As NCLB ages, can the federal system reconcile the early conflicts? Does NCLB facilitate creative mechanisms to resolve these conflicts?

It remains to be seen how the performance-based paradigm will be fully institutionalized in our intergovernmental policy system. After all, categorical management remains highly routinised in the way government operates at all three levels. Nonetheless, given growing public concerns on school performance and the adoption of innovative practices, the new politics of accountability has elevated the federal role in education, an arena where States have always played a dominant role. Regardless of the future of the *No Child Left Behind Act* and the reform assurances established in the Obama administration, federal benchmarking in education has earned a prominent place in American federalism.

**Table 3.1 Per pupil spending in public schools by sources of revenue in the US, 1996–2007**

	<i>Per pupil expenditure</i>		<i>Source of revenue</i>		
	<i>Constant 2008 dollars</i>	<i>% increase over previous period</i>	<i>Federal %</i>	<i>State %</i>	<i>Local %</i>
1995-1996	8833	–	6.6	47.5	45.9
1998-1999	9535	7.9	7.1	48.7	44.2
2001-2002	10 443	9.5	7.9	49.2	42.9
2004-2005	9978	-4.5	9.2	46.9	44.0
2006-2007	11 941	19.7	8.5	47.6	43.9

*Sources:* US Department of Education, National Center for Education Statistics, *Biennial Survey of Education in the United States, 1919-20 through 1955-56*; *Statistics of State School Systems, 1957-58 through 1969-70*; *Revenues and Expenditures for Public Elementary and Secondary Education, 1970-71 through 1986-87*; and Common Core of Data (CCD), 'National Public Education Financial Survey', 1987-88 through 2006-07.

**Table 3.2 US federal expenditures for elementary and secondary education**

	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005
Special-needs programs (in millions of 2005 dollars)										
Education for the disadvantage	8853.9	8763.1	9367.0	7839.4	9673.1	9541.2	10 039.3	11 944.1	12 909.3	14 638.2
Special education	4010.8	4022.2	4383.4	5209.7	5612.9	6416.0	7599.3	9012.1	10 079.7	10 226.5
Head start	4443.7	4843.6	5208.9	5460.4	5973.6	6841.0	7096.6	7076.2	7003.9	6843.2
Child nutrition programs	9802.3	10 099.6	10 262.1	10 407.3	10 835.6	10 528.0	11 131.7	11 493.3	11 586.1	12 163.9
Bilingual education	229.7	220.6	247.9	634.9	563.0	494.4	na	na	na	na
Native American education	96.3	68.1	63.1	76.0	74.1	93.2	112.8	123.1	118.28	129.9
<i>Subtotal</i>	27 436.7	28 017.2	29 532.4	29 627.7	32 732.3	33 913.8	35 979.7	39 648.8	41 697.3	44 001.7
Percent changes in special-needs programs over previous period	-	2.1	5.4	0.32	10.5	3.6	6.1	10.2	5.2	5.5
Federal spending for elementary and secondary education										
<i>Total (millions of 2005 dollars)</i>	43 818.4	43 171.5	44 914.5	46 818.0	49 685.8	53 842.0	57 270.0	62 914.4	64 775.9	67 959.2
Percent change over previous period	-	-1.5	4.0	4.2	6.1	8.4	6.4	9.9	3.0	4.9
Special-needs programs as percentage of federal spending (millions of 2005 dollars)	62.61	64.90	65.75	62.71	65.88	63.10	62.82	63.02	64.37	64.75

na not available.

Source: US Department of Education, National Center for Education Statistics, *Digest of Education Statistics*, 2005 (table 358), 2004 (table 366), [www.nces.ed.gov](http://www.nces.ed.gov).

**Table 3.3 Meeting the AYP: state variation in starting points and AYP target patterns as defined in a sample of the 2002-03 accountability plans**

State	AYP target patterns	Starting points		
		Grade	Language arts	Math
Arizona	Steady Stair-Step (Two Year Increments)	3	44%	32%
		3	32%	20%
		5	31%	7%
		High School	23%	10%
California	Equal Yearly Goals	2-8	13.6%	16.0%
		High School	11.2%	9.6%
Delaware	Equal Yearly Goals	All	53.9%	30.0%
Florida	Steady Stair-Step (Three Year Increments)	All	30.68%	37.54%
Kentucky	Equal Yearly Goals	Elementary	47.5%	22.73%
		Middle	45.6%	16.51%
		High School	19.26%	19.84%
Massachusetts	Steady Stair-Step (Two Year Increments)	All	39.7%	19.5%
Michigan	Steady Stair-Step (Three Year Increments) & Accelerating Curve from 2010-2014	Elementary	38%	47%
		Middle	31%	31%
		High School	42%	33%
New Hampshire	Steady Stair-Step (Three Year Increments)	3-8	60%	64%
		High School	70%	52%
New Jersey	Steady Stair-Step (Three Year Increments)	4	68%	53%
		8	58%	39%
		11	73%	55%
New Mexico	Equal Yearly Goals	All	37%	16%
New York	Steady Stair-Step (Three Year Increments)	4	123 AMO	136 AMO
		8	107 AMO	81 AMO
		11	142 AMO	132 AMO
North Carolina	Steady Stair-Step (Three Year Increments)	3-8	69%	75%
		10	52%	55%
North Dakota	Equal Yearly Goals	4	65.1%	45.7%
		8	61.4%	33.3%
		12	42.9%	24.1%
Ohio	Steady Stair-Step (Three Year Increments) & Equal Goals from 2010-2014	All	40%	40%

(continued next page)

**Table 3.3 (continued)**

State	AYP target patterns	Starting points		
		Grade	Language arts	Math
Oklahoma	Steady Stair-Step (Three Year Increments)	All	622 API, 1500 is 100%	648 API, 1500 is 100% proficient
Oregon	Steady Stair-Step (Three Year Increments)	All	40%	39%
Pennsylvania	Steady Stair-Step (Three Year Increments)	All	45%	35%
Texas	Equal Yearly Goals	All	46.8%	33.4%
Virginia	Steady Stair-Step (Two Year Increments)	All	60.7%	58.4%
Washington	Equal Yearly Goals	4	53.8%	30.3%
		7	30.8%	17.6%
		10	49.5%	25.4%

**AMO** Annual Measurable Objective. **API** Academic Performance Index.

Source: Selected 2003 Approved State Accountability Plans, <http://www.ed.gov/admins/lead/account/stateplans03/index.html>.

**Table 3.4 Number of states by percentage of schools that met the adequate yearly progress (AYP)**

% schools meeting AYP for each state	2002–03	2003–04	2004–05
0–25%	2	2	0
26–50%	5	1	6
51–74%	22	18	16
75–100%	13	25	27
na	9	5	2

N=51, which includes 50 states and Washington, DC. **na** Not available.

Source: Compiled from data accessed at website at each of the state education agencies.

**Table 3.5 Number of charter schools managed by ‘diverse service providers’**

<i>Provider Type</i>	<i>2007-08</i>	<i>2009-10</i>
Freestanding	3421	3838
Education Management Org	454	492
Charter Management Org	436	573
Total	4311	4903
Total Student Enrollment	1 289 449	1 665 779
Percent White	38.3	38.9
Percent Black	31.4	32.2
Percent Hispanic	24.2	23.2

Source: National Alliance for Public Charter Schools, various reports.

**Table 3.6 Federal incentives in supporting performance-based compensation for teachers and principals**

	<i>FY 2006</i>	<i>FY 2009</i>	<i>FY 2010</i>
Federal appropriation	\$99 million	\$200 million	\$442 million
No. new awards	33	20	62

Source: US Department of Education, Teacher Incentive Fund, <http://www2.ed.gov/programs/teacherincentive/awards.html>.

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