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SCHOOL VOUCHERS: ARE URBAN STUDENTS SURRENDERING RIGHTS FOR CHOICE?

Carol L. Ziegler* and Nancy M. Lederman**

I. Introduction

If "excellence" was the education buzzword of the 1980s, "choice" has already established itself as the buzzword for the 1990s. The introduction last spring of President Bush's America 2000 Excellence in Education Act¹ to underwrite state and local programs which provide vouchers to enable parents to choose public, private or religious schooling for their children, has moved "school choice" to the forefront of the national education reform agenda. Nowhere is this more prevalent than in urban centers, where the breakdown of the public education system has been the focus of considerable attention and debate.

Supporters argue that choice is an important tool for improving a failing public system of elementary and secondary education by utilizing principles of free market competition to weed out failing schools and improve mediocre ones. Choice, it is said, will increase the diversity of educational programs available to meet the particular needs and interests of students, extend to poor and minority families the opportunity that affluent families now have to avoid poorly run and overcrowded urban schools and increase parental involvement, which is believed to be a significant factor in student achievement. Supporters point to successful school choice programs, like those in East Harlem's District 4,² as models for school reform.

The distinction between choice programs wholly within the public system and those which include private and religious schools is often

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1. H.R. 2460, 102nd Cong., 1st Sess.; S. 1141, 102nd Cong., 1st Sess. (1991).

2. See *infra* notes 17-22 and accompanying text.

obscured in the debate over school choice.³ As a result, when school reformers speak about increasing and facilitating choice in schooling decisions, they may be speaking of radically different, and often mutually exclusive, things. Not only does the use of the term choice by supporters of vouchers, evoking as it does the “liberal” side of the abortion rights debate, confuse the ideological landscape, the praise of public models like District 4 in East Harlem as exemplars of choice obscures profound political and educational differences.

In the debate over school choice programs, as in many other public policy debates, semantics shed more heat than light. As the Cheshire Cat said to Alice in Lewis Carroll’s *Alice in Wonderland*, words mean what we want them to mean. Likewise, choice means many things to many people. It can mean choice within the public school system for a limited number of students, or for greater numbers or even all students in the form of “magnet schools” or “alternative” schools designed to offer special programming to meet particular needs. It can also mean allowing parents and students to opt out of public education altogether by using vouchers to underwrite private and religious education.

To speak of choice in public schooling as pioneered by Anthony Alvarado, community schools superintendent of the East Harlem School District in the 1970s, and the “educational choice” programs endorsed and funded under President Bush’s America 2000 Education proposals as part of the same trend, is to mix proverbial apples and oranges. The most obvious difference between them is, of course, the exclusively public nature of the District 4 movement in contrast to the mandated inclusion of private and parochial schools in the choice programs supported by the President’s proposal. Beyond the First Amendment church-state entanglement concerns that inevitably emerge in this debate are sharply divergent views about the personal and political purposes of schooling, the values each seeks to promote and the nature of parental, student and staff involvement in the process. Thus, while each touts “choice” as a path to “excellence,” these

3. See Joe Nathan, *More Public School Choice Can Mean More Learning*, EDUCATIONAL LEADERSHIP, Oct. 1989, at 51. National Gallup polls have found widespread support for choice among public schools. A 1987 poll (Gallup and Clark) found that 71% of the public (and 77% of adults of color) feel that parents should have the right to choose among public schools. The same poll found that only about 44% of the public support programs involving private and religious schools, a considerable minority but far smaller than the group favoring public school choice. Thus, when the public is asked to distinguish between wholly public choice programs and those including private schools, the extent of that support would appear to depend on whether private and religious schools are included in choice programs.

educational models define excellence and how to achieve it in radically different ways.

Moreover, the "privatization" of education in New York City through the use of vouchers would mean the loss of legally defined procedural and participatory rights for students and parents. Furthermore, it would permit schools to exclude those students who are difficult to teach on the theory that other schools will take them. Such forces would facilitate nothing more than the racial and economic segregation which already characterizes private school admissions. For these reasons, the use of vouchers will have a profound and, in our view, adverse impact on the social and political role of schooling which should be at the forefront of the debate in New York City over school choice.

II. America 2000: The Bush Administration's School Voucher Proposal

The America 2000 Excellence in Education Act, as proposed by President Bush and his Education Secretary, Lamar Alexander, was introduced in Congress on May 23, 1991.⁴ The bill authorizes \$700.5 million for fiscal year ("FY") 1992 for several educational initiatives including: (1) \$180 million for the creation of a "New American School" in each Congressional district; (2) \$100 million in FY 1992 to make "Merit School" awards to public or private elementary or secondary schools whose students demonstrate competence in the new national core curriculum; (3) teacher training and teacher recognition awards along with alternative certification for teachers and school principals; (4) \$200 million in FY 1992 for assistance for "parental choice" programs; and (5) a national core curriculum consisting of English, mathematics, science, history and geography, as well as national standardized tests to assess "educational progress." In addition, the bill gives the Secretary of Education the authority to loosen regulations on federal spending for local schools.

Although the proposals for a national curriculum and national tests have engendered considerable debate in the educational community,⁵ it is the school voucher proposal which has attracted the most atten-

4. H.R. 2460, 102nd Cong., 1st Sess.; S. 1141, 102nd Cong., 1st Sess. (1991). The bill was introduced in the House of Representatives by Rep. Robert Michel (R-IL), Rep. William Goodling (R-PA) and several others. The bill was introduced in the Senate by Sen. Claiborne Pell (D-RI), Sen. Orrin Hatch (R-UT) and Sen. Nancy Kassebaum (R-KS).

5. For an excellent discussion of President Bush's America 2000 education proposal by leading commentators in the educational community, see generally PHI DELTA KAP-PAN, Nov. 1991.

tion. The bill defines an eligible "parental choice" program as one which allows parents to select a public or private school and which provides financial support to a significant number of parents to allow them to make this choice.⁶ In addition to the \$200 million FY 1992 authorization in grants to Local Education Agencies ("LEAs") offering choice programs, the bill also amends Chapter 1 of Title I of the Elementary and Secondary Education Act, which provides aid to schools serving low-income children.⁷ This amendment requires LEAs to provide Chapter 1 services to each child residing in the LEA who is eligible for services and participating in the LEA's choice program.⁸ If this is not feasible, the LEA will provide the parents of the child with the per capita share of Chapter 1 funds. Finally, the bill's school voucher proposal authorizes the Secretary of Education to spend \$30 million in FY 1992 to make grants to state and local education authorities as well as private agencies and organizations to operate "nationally significant models of educational choice."⁹

Significantly, the plan was defeated in the Senate. In its place, the Senate passed an alternate education reform bill, which was sponsored by Senator Edward Kennedy (D-Mass.) and adopted by the Senate Labor and Human Resources Committee which Kennedy chairs.¹⁰ The Kennedy proposal forbids the use of federal funds to support non-public education while authorizing \$850 million to help states and localities diversify and strengthen curriculums, improve teacher training and develop programs to lower drop-out rates for high school students. Three-quarters of the money is earmarked for schools with low achievement records.¹¹ On January 23, 1992, the Senate rejected an amendment to this bill proposed by Senator Orrin Hatch, a sponsor of the Administration's proposals, which would have given low-income parents subsidies with which to purchase private education.

A. Vouchers versus Public School Choice

The essential difference between vouchers and public school choice is the inclusion of private and religious institutions as alternatives in the voucher program. First proposed by conservative economist Milton Friedman in the 1950s and 1960s, voucher proposals in their

6. H.R. 2460, 102nd Cong., 1st Sess., Title V, Part A (1991).

7. H.R. 2460, 102nd Cong., 1st Sess., Title V, Part B (1991).

8. *Id.*

9. H.R. 2460, 102nd Cong., 1st Sess., Title V, Part D (1991).

10. See Clifford Krauss, *Senate Approves Bill to Improve Schools*, N.Y. TIMES, Jan. 29, 1992, at A12.

11. S. 1790, 102nd Cong., 1st Sess. (1991).

contemporary form gained currency in academic circles in the early 1970s.¹² In California, support for vouchers was politically harnessed in 1981, but the effort failed to garner the votes necessary to mandate an educational voucher plan. Although school vouchers were supported by President Ronald Reagan during his first term, this initial wave of interest subsided in the face of strong political opposition, most notably from teacher unions, as school reformers returned to other available reform strategies including public school choice programs.¹³ While political support for vouchers waned in the 1980s, school choice programs within the public system gained a substantial following in many state education departments and municipal boards of education.

Currently, forty states have school choice programs of some kind.¹⁴ The most comprehensive of these programs is embodied in the series of laws passed by the Minnesota Legislature in the mid-1980s.¹⁵ Minnesota provides for the enrollment of secondary school students into "programs of excellence" outside their resident district, includes post-secondary options for high school students, and offers an enrollment options program under which school districts lose the power to prevent students from leaving to attend schools in other districts, unless the movement will have a negative impact on desegregation.¹⁶

Choice programs in New York City's East Harlem community school district (District 4), where all sixth graders are required to select a junior high school program,¹⁷ and in Cambridge, Massachusetts, where all neighborhood schools at the K-8 level are options,¹⁸ have also attracted national attention.

Anthony Alvarado, community superintendent of District 4 in the

12. See Michael A. Rebell, *Educational Voucher Reform: Empirical Insights from the Experience of New York's Schools for the Handicapped*, 14 URB. LAW. 441, 442 (1982).

13. *Id.* at 441.

14. See Nathan, *supra* note 3, at 53. Often connected to, or developed as part of school desegregation strategies, public school choice plans include the following elements: (1) local school district run magnet schools, schools within schools and alternatives programs from which parents select; (2) state program development funds to enable local school districts to develop public school options; (3) statewide or regional magnet schools funded by cooperating districts or directly by the state; (4) open enrollment plans which enable students to move across district lines without the permission of the school district in which they reside; (5) post-secondary option plans which allow high school students to attend college level programs with state or local funds paying their tuition and fees.

15. Kathleen Sylvester, *Schools of Choice: A Path To Educational Quality or 'Tiers of Inequity'?*, GOVERNING, July 1989, at 53.

16. *Id.*

17. *Id.* at 50.

18. *Id.* at 53-54.

1970s, is credited with inventing school choice.¹⁹ By encouraging teachers to develop new "theme" schools within, but not defined by, existing school buildings, and implementing them through "creative disobedience" to many school organization rules imposed by the central administration, Alvarado turned widespread educational failure into what has been characterized by many as nothing less than an educational miracle. District 4's first schools of choice were the East Harlem Performing Arts School, the Better Education Through Alternatives or B.E.T.A. School for students in trouble and the Central Park East Elementary School (now joined by the Central Park East Secondary School). These schools were followed by many others so that currently students can choose from a bilingual school to a school for health and biomedical studies to a maritime school. In the early days, students could choose one of these new schools or attend the school in their residential zone. Since 1983, when choice was made mandatory, every sixth grader chooses a junior high school from among the diverse options available.

Observers of the District 4 experiment, including Robert Wagner, Jr., former president of the New York City Board of Education, have noted that its success may be tied as much to inspired and inspiring school leadership as to choice.²⁰ Alvarado, who is currently the community superintendent of District 2, which includes Greenwich Village and midtown Manhattan's East Side, continues to promote and facilitate diverse school choices but remains skeptical that choice itself is a "magic bullet" for poor schools. Warning that choice can distract attention from "some of the nastier educational failures that we can continue to promulgate," Alvarado rejects the free market theory that school choice will drive out bad schools because parents will refuse to support them.²¹ Education cannot and should not be run through a competition in which some businesses succeed and others die, he asserts, because "when one school dies, it is kids who are dying."²²

In light of this tempered enthusiasm for choice by the school leader credited with inventing it, it is ironic that the success of choice in the public schools has encouraged voucher proponents to return to their original agenda for school reform. Although the use of vouchers which extend school choice beyond the public school system has not

19. *Id.* at 50.

20. CENTER FOR EDUCATIONAL INNOVATION, MANHATTAN INSTITUTE FOR POLICY RESEARCH, *THE RIGHT TO CHOOSE: PUBLIC SCHOOL CHOICE AND THE FUTURE OF AMERICAN EDUCATION* No. 2, at 29-33 (1989).

21. Sylvester, *supra* note 15, at 54

22. *Id.* at 53.

yet been enacted in any significant way anywhere in the nation,²³ President Bush seems to have made school vouchers the cornerstone of his promise to be the "Education President."

B. Opposition to Vouchers

Opposition to vouchers comes from predictable quarters. Civil liberties organizations with First Amendment concerns like the American Civil Liberties Union and the American Jewish Committee condemn the voucher provisions of the President's bill, as do teacher union officials including Albert Shanker of the American Federation of Teachers and Keith Geiger of the National Education Association. State and local public school officials, New York City education advocacy organizations like the Public Education Association and Advocates for Children, along with the group that Denis Doyle of the conservative Hudson Institute has called the "education policy analysts in exile," have also weighed in against the plan.²⁴

The criticisms most often leveled against vouchers are that their use will undercut needed support for public education, run afoul of the First Amendment proscription against religious entanglement and create two separate, unequal and *de facto* racially and economically segregated school systems.

Their merits notwithstanding, these criticisms fail to address the specific way in which vouchers would alter the social and political aspects of American schooling by separating schools from democratic institutions and ideals. The connection between public schooling and democratic government has been a basic tenet of American political thought since it was articulated by Thomas Jefferson in the first decades of the 19th century. The privatization of education that vouchering would entail is nothing less than a radical repudiation of that ideal.

In New York City, that ideal expresses itself in the public schools' commitment to serving all children regardless of economic background or educational need, and in the protection of that commitment through procedural safeguards for students and detailed procedures for ensuring meaningful parental involvement in specified

23. Michael deCourcy Hinds, *School Voucher Plan Stalls in Pennsylvania*, N.Y. TIMES, Dec. 13, 1991, at A30. Pennsylvania has come the closest to enacting a state-wide voucher plan which incorporates public, private and religious schools. In December 1991, the Pennsylvania House of Representatives defeated a bill by a vote of 114 to 89 which would have provided a \$900 education voucher to the parents of every school child to be spent at the public, private or religious school of their choice. The State Senate had previously passed a similar tuition voucher bill. *Id.*

24. Denis P. Doyle, *America 2000*, PHI DELTA KAPPAN, Nov. 1991, at 186.

areas of school policy and school decision-making.²⁵ In many instances, these safeguards and procedures would be eliminated or eroded for students and parents who are "vouchered" into non-public schools.

III. The Effect of Vouchers on the Present School System

A. The Rights of Students

The power of public school officials to discipline students and exclude them from school for misconduct or academic deficiency was, historically, unencumbered by constitutional or statutory limits. School attendance, while compulsory, was deemed a privilege which school officials, acting *in loco parentis*, could withdraw from truant, disobedient or hard-to-teach children. It was the Supreme Court's decision in *Brown v. Board of Education*²⁶ which, in formulating its primary message of racial equality, announced a new meaning for education, and with it, created the notion of educational entitlements. Student rights advocates echoing the Court's words²⁷ argued that education was so fundamental to the exercise of economic and political rights in the United States that constitutional protections should attach.

As a result of these efforts to "constitutionalize" public education, public school students are currently entitled to due process protection from school suspension and expulsion as a matter of federal constitutional and New York State Education law.²⁸ The United States Supreme Court has further held that when students are suspended or excluded from attendance at school, they are deprived of a cognizable

25. See *infra* notes 27-62 and accompanying text.

26. 347 U.S. 483 (1954).

27. Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education in our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is the principal instrument in awakening the child to cultural values, in preparing him for later professional training and in helping him adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.

Id. at 493.

28. N.Y. EDUC. LAW § 3214(3)(a)(1) (McKinney 1981). Under New York State law, public school officials may suspend a student who is "insubordinate or disorderly, or whose conduct otherwise endangers the safety or morals, health or welfare of others." However, for suspensions in excess of five days, a "fair hearing" upon "reasonable notice," at which the student has the right to representation by counsel, and the right to question and present witnesses, is required. *Id.*

liberty and property interest under the Fourteenth Amendment to which due process protection attaches.²⁹

Perhaps no other school system in the nation has responded as aggressively to the belief that public schooling is a "right" than has New York City. In addition to the protections provided by federal constitutional law, the New York City public school system has established a detailed set of substantive and procedural rules designed to protect the rights of public school students.

New York City's student discipline rules are premised on the notion that suspension from school is a serious deprivation of a student's educational rights which may interfere with or discourage continued school attendance and should, therefore, be viewed as a last resort. The rules permit suspensions only when alternatives such as guidance intervention, parent involvement, mediation and conflict resolution have been tried and failed³⁰ and only for "overt behavior which prevents the orderly operation of class and other activities or presents a clear and present danger to school personnel or students."³¹ Accordingly, students may not be suspended for truancy, poor academic behavior, smoking cigarettes or other misconduct which does not present a threat to the safety of others.

Moreover, the use of disciplinary measures throughout the school system is subject to citywide rules designed to insure uniformity and consistency and to prevent racially discriminatory or otherwise arbitrary uses of school discipline. In this regard, the Central Board of Education has promulgated "Citywide Standards of Conduct and Uniform Disciplinary Measures" ("Discipline Code") which lists infractions, their designated level of severity and the minimum and maximum disciplinary action which must or can be taken by school officials in response.

Promulgated as Resolutions of the Central Board of Education and further codified as Regulations of the Chancellor, the New York City public school system has created a body of school law which establishes specific grounds for suspension, requires school principals to

29. *Goss v. Lopez*, 419 U.S. 565 (1975). The Court determined that for a short-term suspension of 10 days or less, a student is entitled to oral and written notice of the charges against him and if he denies those charges, he or she may be given the opportunity to present his version of the facts.

30. NEW YORK CITY BOARD OF EDUCATION, BOARD OF EDUCATION CITYWIDE STANDARDS OF CONDUCT AND UNIFORM DISCIPLINARY MEASURES (May 21, 1986) (as amended May 22, 1991).

31. CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK, REGULATIONS OF THE CHANCELLOR A-440, 441 (May 31, 1991) [hereinafter CHANCELLOR'S REGULATIONS].

conduct pre-suspension investigations,³² determines who has the authority to suspend, requires detailed notice to parents³³ and creates rights in the hearing and appeal process, including access to student records³⁴ and the authority to subpoena witnesses at certain suspension hearings. Extensive procedural safeguards exist not only with regard to the more serious superintendent's suspensions, which depending on the age and maturity of the student can result in suspension for a calendar year, but also for five-day principal's suspensions.

1. *Hearing Rights*

Suspension hearings are formal adversarial proceedings at which both the student and the school may be represented by an advisor or an attorney.³⁵ All hearings must be documented by a tape-recorded transcript. The burden of proof is on school officials to prove by a preponderance of substantial and competent evidence that the student engaged in the behavior alleged. No finding may be based exclusively on hearsay, although hearsay is admissible. The hearing officer may

32. CHANCELLOR'S REGULATION A-412(IV)(E), A-440(II)(B)(5), A-441(II)(B)(5)(a). Prior to requesting a superintendent's suspension, school principals must conduct a preliminary investigation. The principal must inform the student of the alleged misconduct. If the student denies the charges, the principal must explain the evidence to the student and allow the student to explain his or her side of the story. When an incident occurs in the school building, the principal must obtain handwritten statements from at least two witnesses, as well as signed statements from the parties involved, as to the specific circumstances surrounding the incident. School officials are affirmatively obliged to take statements from all available witnesses. *Id.*

33. CHANCELLOR'S REGULATION A-440(II)(B)(11), A-441(II)(B)(11). The superintendent must inform parents by regular and certified mail that the student has been suspended, the specific reasons for the suspension, including the time, date and place of the incident, that the student may not return to school during the suspension period and the time and place of the suspension hearing which is required to be held within five days of the suspension. This notice must inform the parents of their rights to, and the advisability of, representation by an advisor or attorney and the right to question complaining witnesses and present witnesses and evidence on behalf of the student. With regard to high school suspensions, students are parents must also be given a non-binding list of the witnesses expected to testify on behalf of the school. *Id.*

34. CHANCELLOR'S REGULATION A-820 (VI)(A), (B). In addition to the access rights generally provided to parents by federal law and Chancellor's Regulations, parents of suspended students may request school records pertaining to the incident involved in the suspension, including the security officer or teacher's incident reports. Other school records, including a record of prior disciplinary infractions, teachers' and guidance counsellors' comments, attendance and lateness records, test scores and grades may be used only in the dispositional stage and may not be used in determining the validity of the charges. *See also* Family Educational Rights and Privacy Act, 20 U.S.C. § 1232(g) (1992).

35. MANUAL ON STUDENT SUSPENSIONS IN NEW YORK CITY PUBLIC SCHOOLS 13 (prepared by the Advocates for Children of New York, Inc., revised Sept. 1991) [hereinafter MANUAL ON STUDENT SUSPENSIONS].

question witnesses even if the school is represented by its own staff advisor. After the school presents its case, the parents may directly, or through an advisor or attorney, present witnesses and evidence on behalf of the student. If a subpoenaed witness is unavailable, parents may request an adjournment which may not exceed two days unless the student is reinstated. At the conclusion of the fact-finding phase, the hearing officer must prepare a written statement of her findings of fact and her recommendation for disposition.³⁶

2. *Alternative Instruction*

Suspended students are entitled to receive homework and the opportunity to take or make up state or city exams, or any exam which may significantly affect their grades.³⁷ In addition, students are required to receive alternative instruction during the pre-hearing suspension period as well as during a continued suspension if one is imposed as a penalty following a hearing.

If charges are dismissed after a hearing or if a post-hearing determination indicates that the student has not committed the offense charged, all records relating to the suspension are expunged. If the charges are sustained, the superintendent has the discretion to "seal" these records (keeping them apart from the rest of a student's school records) or to expunge them upon graduation or departure from the New York City public school system.³⁸

3. *Appeals and Reinstatement*

Superintendent's suspensions of elementary or junior high school students are appealable to the appropriate community school board; for high school students the appeal is to the Chancellor. Suspensions may be further appealed to the Central Board of Education and then to the State Commissioner of Education. Where continued suspension is imposed as a penalty after a hearing, students may petition for reinstatement and receive a readmission conference no later than ten days following the superintendent's receipt of the petition.³⁹

These procedural and substantive safeguards foster a sense of entitlement to education for all children and ensure fair process to students who are charged with either minor or serious infractions of school rules. As a practical matter, these regulations militate against the removal of students who are difficult to teach or troublesome from

36. *Id.* at 15.

37. *Id.*

38. *Id.* at 19.

39. *Id.* at 20.

the school which they are entitled to attend. They therefore ensure that, except for a limited number of competitive secondary schools, public schools will be inclusive and not exclusive institutions.

In contrast, non-public schools are inherently exclusive, rather than inclusive institutions, subject only to market forces and population demographics. They are not required to accept students who seek to enroll and can terminate the enrollment of admitted students at any time and without cause.

Students currently attending private and religious schools in New York City do not receive any of these procedural protections afforded at the federal, state or city level, or the entitlements inherent in public education. Private school operators are not considered state actors subject to Fourteenth Amendment due process constraints⁴⁰ and nothing in the voucher plans which have been proposed suggests that students attending non-public schools through vouchers would acquire rights previously granted public school students. Even if acceptance of vouchers by private school operators converted them to state actors, local rules granting more meaningful protections than the minimal due process guarantees required by the Constitution would not apply.

Concern that vouchers will create a two-tiered system of schools divided along economic and racial lines reflects a sense of what might happen if individual schools are under no obligation to enroll or retain "difficult" students. Indeed, one commentator has noted that it is the very desire of many parents to separate their children from those less desirable students whose participation is currently protected that accounts for the growing appeal of school choice.⁴¹

B. The Rights of Special Education Students

Vouchers will also affect the extent of the procedural protections afforded special education students, albeit less dramatically. Under

40. See *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982).

41. See Gilbert T. Sewell, *America 2000: An Appraisal*, PHI DELTA KAPPAN, Nov. 1991, at 204. Sewell contends that school choice has an immense and growing appeal among parents, many of whom are more upset by drug-infested playgrounds and insensitive educational bureaucrats than by classroom deficiencies. They desire schools that meet their own needs and suit their own tastes. Some children come to school brimming with tales of Beatrix Potter. Others have never seen a book, cannot identify colors and need medical attention more than arithmetic. Education always interacts with home values, and its success turns on the habits, beliefs and notions of acceptable behavior. Many parents have watched public schools become unsafe, unacademic and unresponsive to change — places that they choose to avoid even if it means paying tuition. These parents and others welcome the relief and flexibility that unrestricted school choice may herald. *Id.* at 208.

New York City rules, special education students may only be suspended in an "emergency circumstance",⁴² and not simply for misconduct that is a manifestation of their handicapping condition. These protections extend beyond those mandated by New York State Education Law⁴³ and the Federal Education of All Handicapped Children Act.⁴⁴ An emergency circumstance is defined as a major behavioral incident which presents a clear and present danger of injury to the student, other students or school personnel, or which is so highly insubordinate or disorderly as to significantly impair the education of other students.⁴⁵ The Central Division of Special Education must approve all suspensions, and except where weapons are involved, suspensions are limited to the five-day principal's suspension period. Unless a student is being reevaluated on an expedited basis, he or she is to be returned to school immediately following the five-day suspension.⁴⁶ As noted above, federal law requires some due process if school officials seek to change the placement of special education students or suspend them for disciplinary reasons. These protections apply whether the student is served directly in a public school or, by contract arrangement, in a private facility. In fact, New York City imposes its regulations governing the suspension of special education students as a condition in its contracts with private service providers, although the extent of enforcement may be minimal.

For the most part, private schools serve particular categories of special education students in "handicapped-only" programs. Only a very few non-public schools in New York City currently include special education students and programs along with, or as part of, their regular education program. There is no reason to believe that the presence

42. CHANCELLOR'S REGULATION A-445 (II).

43. N.Y. EDUC. LAW § 4401 (McKinney 1981 & Supp. 1992).

44. 20 U.S.C. § 1401 (1992). This 1976 law establishes the right to a free appropriate public education in the least restrictive environment for children with handicapping conditions, including due process hearings in which parents can challenge evaluations, placement and service provision decisions. State and local education authorities may contract with non-public special education and related service providers but, in so doing, public school officials are required to assure that these students receive the law's protections notwithstanding their placement in non-public facilities.

With regard to suspensions of special education students, the United States Supreme Court has held that keeping a handicapped child out of school for longer than 10 days constitutes a change of placement, which can only be initiated after a review by a Committee on Special Education, a body of teachers, special educators and parents required by the federal handicapped education law. *Honig v. Doe*, 484 U.S. 305 (1988).

In 1991, the title of the law was amended to the Individuals with Disabilities Education Act (IDEA).

45. CHANCELLOR'S REGULATION A-445 (II).

46. CHANCELLOR'S REGULATION A-445 (IV) (C).

of vouchers will change this essentially segregated system. On the contrary, the current configuration of private special education programs makes it reasonable to believe that privatization will increase the exclusion of special education students from academic and social interaction with regular education students. Also, for students in need of special education services, the impact of vouchers is most likely to be seen in the increased number of self-contained placements and the concomitant decline in less restrictive placements.

C. The Rights of Parents

In New York City, parental involvement and participation in the public schools is a function of particular school system policies and regulations reinforced by elected community school boards.⁴⁷ The New York City public school system has enacted a statement of policy and a detailed regulatory scheme to ensure parental participation in decision-making in a variety of issues including curriculum, student discipline, budget and personnel matters.

The participatory rights acknowledged and expected in New York City public schools are extensive, and without parallel in the private schools. They run the gamut, ranging from the purely advisory to the shared decision-making of school-based management which characterizes the public schools' commitment to meaningful parental involvement.⁴⁸

1. Consultation

New York Education Law requires parents associations to be established in all the city's public schools.⁴⁹ To foster the vitality of these associations, parents are granted the right to consultation through parents associations in a host of matters ranging from curriculum, discipline and safety, to budget matters and collective bargaining.⁵⁰ An elaborate "consultation hierarchy" incorporates mandated consultation with parents associations by principals, district-wide "parent federations" and "presidents' councils" which advise superintendents,

47. N.Y. EDUC. LAW § 2590 (McKinney 1981 & Supp. 1992). This law established a system of locally elected community school boards in New York City. It was seen in part as a way of empowering parents and encouraging their greater involvement in their children's education. In addition to the creation of school boards, it mandated the creation of parent associations in all the city's public schools and set forth detailed reporting requirements to parents.

48. See *infra* notes 49-62 and accompanying text.

49. N.Y. EDUC. LAW §§ 2590-d, 2590-h (McKinney 1981 & Supp. 1992).

50. Parents Associations and the Schools, Board of Education Policy Statement, New York City Public Schools, Oct. 26, 1976.

and a Parents Advisory Council that meets regularly with the Chancellor.

2. *Information*

That meaningful communication with parents requires a sharing of information is recognized in the various injunctions enforcing dissemination. Parents are granted the right to "full and factual information pertaining to matters of pupil achievement," including but not limited to: annual reading scores, comparison of the achievement of pupils in comparable grades and schools, as well as the record of achievement of the same children as they progress through the school.⁵¹ The Chancellor is required to make public "to the associations" minimum educational standards and curriculum requirements for all schools, as well as the results of his examinations and evaluations pertaining to the educational effectiveness of the schools throughout the city.⁵² Parents associations must be informed about the procedures and timetable for standardized tests in a manner "understandable to parents," and be granted access each September to any required reports from the previous year, such as information on how funds allotted to and collected by the school have been spent, including the General Organization ("GO") funds.⁵³ Upon request, parents are entitled to receipt of copies of calendars and minutes of public meetings of community school boards and the City Board of Education.⁵⁴

3. *Access to and Control of Student Records*

Federal law grants parents in the public schools access to their children's school records. In addition, they have the right to exercise control over access, use and dissemination of personally identifiable information in these records for other than educational purposes.⁵⁵ The rights in this law also apply to any eligible student over the age of eighteen.

51. *Id.* at 5.

52. *Id.* at 6.

53. *Id.* at 5-6.

54. *Id.* at 5.

55. Family Educational Rights and Privacy Act, 20 U.S.C. 1232(g). *See also* CHANCELLOR'S REGULATION A-820. A parent's right to "access" includes the right to inspect her child's records upon request, to make notes or duplicate such records to have professional staff assist in explaining or interpreting the records and the right to challenge an entry and appeal an entry. Access rights are granted to non-custodial parents as well, subject to a verification procedure. Release of information to third parties requires informed consent by the parent, except where there exists a court order, applicable state law or lawfully issued subpoena.

4. Personnel Decisions

In the area of personnel, New York City is unique in the degree to which it seeks the involvement of parents in decisions ranging from hiring professional staff to recommendations for tenure. Law, policy and regulations set forth a detailed and significant role for parents in employment decisions regarding teachers, supervisors, principals and superintendents.

As designated members of "screening committees," parents are involved in every step of the process of selection and appointment for all school-based supervisory positions above the level of teacher throughout the city, and for certain other district and central positions.⁵⁶ Parents establish selection criteria for candidates, review and screen resumes, select candidates for interview, interview and evaluate candidates and offer written recommendations of a prescribed number of candidates for consideration by the appropriate appointing authority.

In the thirty-two decentralized community school districts, parents are also included in the process for selection and appointment of school superintendents by the community school boards. As members of screening committees, they develop selection criteria for candidates, review and screen resumes, select candidates for interview, interview and evaluate candidates and prepare and transmit written recommendations of at least four candidates for consideration by the community school board for its consideration.⁵⁷ When the community school board has to fill a vacancy on the board, it must first consult with the "presidents' council" or with one of the other representative parents associations, which submits recommendations in writing.⁵⁸ Parents have also been involved in the selection process for the Chancellor's position.⁵⁹

56. CHANCELLOR'S REGULATION C-30. This regulation governs the selection, assignment and appointment of pedagogical supervisors and administrators. For school-based and school-related pedagogical positions, such as principals and assistant principals, the committee from which candidates will be recommended must include a minimum of 6 to a maximum of 10 parents of students attending the school, constituting a majority on the committee. Regulations require that parents be representative of various groups in the school, e.g. special education or bilingual education.

57. Memorandum from Joseph A. Fernandez, Chancellor of the New York City Public Schools, to Community School Board Presidents, Mar. 20, 1990, entitled *Revised Special Circular No. 37: Minimum Standards and Procedures for the Selection of Community Superintendants*. For selection of a community superintendent, regulations require a screening committee with representation of parent associations from the local school district. For renewal or extension of a superintendent's contract, the parent associations in the district must be consulted. The membership of each association must be provided with the opportunity to indicate its support or concerns about the incumbent.

58. N.Y. EDUC. LAW § 2590 (c) (8) (McKinney 1981 & Supp. 1992).

59. Although not required by policy or regulation, the selection process for the city

5. *Tenure Decisions*

Although parents have no rating responsibilities for professional staff, they do have an advisory role in tenure decisions through parents associations. They must be informed of the criteria for evaluating teachers and administrative staff and given procedural information including timetables for evaluation. In addition, parents are granted specific information on what personnel are beginning their probationary period. In evaluating personnel, the rating officer must include consideration of any valid and timely complaints.⁶⁰

6. *School-Based Management/Shared Decision-Making*

Even more ambitious in seeking out parent involvement is the current experiment with "school-based management/shared decision-making" initiated by Chancellor Joseph Fernandez and now being run in 200 of the city's public schools. Under regulations issued two years ago,⁶¹ school-based teams of parents, students and teachers are involved in advisory, planning and oversight functions at the school site.

One of the goals of the program is to increase opportunities for parent participation.⁶² The program is based on the idea that students, parents and staff within the school community have unique needs which can best be identified and addressed by them. The creation of school-based teams of parents and school personnel fosters the opportunity to create innovative approaches to increase student achievement at the classroom level. Teams are encouraged to experiment with a wide variety of curricula, instructional strategies, staff development models and organizational approaches, and to redefine roles, relationships and responsibilities.

Participating schools receive allocations directed for planning activities, and may be granted waivers from certain categorical program restrictions. To qualify as a participating school, the school's team must have meaningful parent representation.

These regulations and policies are designed to facilitate and encourage a strong partnership between home and school to help stu-

schools chancellor which resulted in the appointment of Chancellor Joseph A. Fernandez involved the inclusion of parent representation on the screening committee.

60. Parents Associations and the Schools, Board of Education Policy Statement, New York City Public Schools, Oct. 26, 1976, at 6.

61. Memorandum from Joseph A. Fernandez, Chancellor, New York City Public Schools, to Community School Board Members, Mar. 26, 1990, entitled *Special Circular No. 41: Request for Proposal: Voluntary Participation in School-Based Management/Shared Decision-Making*.

62. *Id.* at 2.

dents succeed in school. They reflect the tenet of educational faith that parents are the primary educators of their children, and that their involvement in their children's schooling is an important determinant of their children's achievement. Significantly, the mechanisms ensuring parental involvement in New York City's public schools are wholly unavailable in the private schools. Nor would they become available under the America 2000 or any other voucher proposal. Despite the oft-repeated argument of voucher proponents that there is no better way to get parents involved than giving them a voice in choosing their children's schools, the voice that would be heard is a muted one indeed compared to the chorus currently being raised in the New York City public school system.

IV. Conclusion

Although First Amendment concerns have predominated in the debate over school choice, other important democratic ideals are at stake. Ironically, the commentators who have recognized this connection between good schooling and democratic controls have seen them as incompatible.

Politics, Markets and America's Schools,⁶³ the seminal school choice study, postulates that a redesigned education system should vest authority directly in the schools, parents and students. Thus, the study argues, the school system should be disengaged from institutions of democratic control, such as federal and state government, to the greatest extent possible. These advocates propose a free market system — with or without vouchers — in which schools are run autonomously, without governmental bureaucratic controls, as a way to improve schooling.

In fact, the schools that have been the successful models of "choice," like those in New York's East Harlem school district, have either seized or been granted some degree of autonomy in developing their own approaches to schooling. However, what supporters of the privatization of education ignore is that this autonomy is realized in public school systems like New York City's through a host of mechanisms which are *grounded* in law and policy, and are unavailable in the private schools. As such, this autonomy is built upon the underlying premise of our public schools, which is that all are included and that citizens should actively participate in decision-making. Those

63. JOHN E. CHUBB & TERRY M. MOE, *POLITICS, MARKETS AND AMERICAN SCHOOLS* (1990).

mechanisms empower parents, as well as teachers and students, in a way that does not, and cannot exist in the private sector.

The rights of parents and students which are acknowledged and expected in our public schools are a direct extension of the Jeffersonian ideal of a nation enlightened through education. A voucher system that includes private schools inevitably involves a false choice between these accepted rights and "choice" in schooling. Thus, the challenge in education reform remains in the improvement of public education and not in its abandonment, and in strengthening the ties between schooling and democracy rather than in severing them.

