

THE POLITICS OF SUPPLEMENTING FAILURE UNDER NO CHILD LEFT BEHIND: HOW BOTH LEFT AND RIGHT ARE FORCING LOW-INCOME CHILDREN TO CHOOSE BETWEEN A DEFICIENT EDUCATION AND WORKING OVERTIME

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INTRODUCTION

*You can hitch your wagon to the stars, but you can't haul corn or hay in it if its wheels aren't on the ground.*¹

America's low-income children confront a serious dilemma under the No Child Left Behind Act ("NCLB");² they must choose between a regular school day, ill-equipped to meet their needs, or working overtime in a tutoring program to supplement their education. The decision by policymakers to give children this choice—in other words, to render enrollment in tutoring voluntary rather than compulsory—guarantees that only a small number of students will benefit from this provision.³ Under NCLB, children receive tutoring, referred

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¹ Mordecai Pinkney Horton, *Introduction* to MYLES HORTON WITH JUDITH KOHL & HERBERT KOHL, *THE LONG HAUL: AN AUTOBIOGRAPHY* xxiii (Teachers College Press 1998) (1990).

² No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (codified in scattered sections of 20 U.S.C.).

³ See discussion *infra* text accompanying notes 30-121; PAUL TOUGH, *WHATEVER IT TAKES: GEOFFREY CANADA'S QUEST TO CHANGE HARLEM AND AMERICA 2* (Houghton Mifflin Company 2008). Tough's comments on educator and activist Geoffrey Canada's past work with a well-respected nonprofit in New York, devoted to providing services to at-risk students, supports the claim that voluntary programs only help the few students who choose to participate. Tough writes that Canada:

to as Supplemental Educational Services (“SES”),⁴ only if their families request it, and only if they are willing to attend the tutoring program outside the regular school day: after school, on weekends, or during the summer.⁵ SES thrusts low-income children into the role of laborers; just as low-income adults volunteer to work overtime in order to supplement meager wages, these children must volunteer to put in extra hours in order to receive an adequate level of educational benefits. In addition, the design and funding scheme of SES has converted low-income children into conduits for diverting resources away from public schools, where attendance is compulsory, and into the pockets of outside providers of tutoring, where attendance in their tutoring programs is voluntary. The drafters of SES prioritized ideology over scientific evidence in opting for a strategy—voluntary enrollment in educational programs—that is accessible only to a minority of low-income students.⁶ In so doing, these policymakers chose to overlook the realities that low-income children and their families face in navigating educational pathways.

SES received little public attention at the time it was written⁷ and has since been criticized primarily for transforming the signature component of the Elementary and Secondary Education Act of 1965 (“ESEA”),⁸ Title I, into a vehicle for school choice proponents.⁹ Alarming, SES’s most problematic feature, its reliance on voluntary overtime work, is not unique to NCLB. Over the years, both liberals and conservatives have advocated educational interven-

had been the president of a well-respected local non profit organization called the Rheedlen Centers for Children and Families, which operated a handful of programs in upper Manhattan targeted at young people: afterschool drop-in centers, truancy prevention, antiviolence training for the teenagers. They were decent programs, and they all did some good for the kids who enrolled in them. . . . Sure, the five hundred children who were lucky enough to be participating in one of his programs were getting help, but why those five hundred and not the five hundred on the waiting list? Or why not another five hundred altogether? For that matter, why five hundred and not five thousand? If all he was doing was picking some kids to save and letting the rest fail, what was the point?

Id. at 2.

⁴ 20 U.S.C. § 6316(e) (2006).

⁵ *Id.* § 6316(b)(6)(F) (mandating that parents receive notification of the option “to obtain supplemental educational services for the child”); *id.* § 6316(e)(12)(C)(i) (requiring only that SES tutoring services take place “in addition to instruction provided during the school day”).

⁶ See *infra* text accompanying notes 30-121.

⁷ See Paul E. Peterson, *Making Up the Rules as You Play the Game: A Conflict of Interest at the Very Heart of NCLB*, EDUC. NEXT, Fall 2005, at 42, 43 (“[W]hen NCLB was being hatched, afterschool was just an afterthought. The main thrust of the legislation was and remains the need to meet state proficiency standards by 2014.”).

⁸ Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27 (codified at 20 U.S.C. § 6301).

⁹ School choice proponents believe that parents and teachers should have the option “to choose innovative public schools—[such as] charter schools—that are able to meet the individual needs of [] children.” Center for Education Reform, Charter Connection, http://www.edreform.com/Issues/Charter_Connection/index.cfm (last visited Feb. 28, 2010). School choice proponents advocate for this reform as a means for improving America’s public schools. *Id.* Advocacy organizations have critiqued SES “as a thinly veiled attempt to ‘voucherize’ public education.” GAIL L. SUNDERMAN & JIMMY KIM, INCREASING BUREAUCRACY OR INCREASING OPPORTUNITIES? SCHOOL DISTRICT EXPERIENCE WITH SUPPLEMENTAL EDUCATIONAL SERVICES 10 (2004), available at http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/29/dc/9c.pdf.

tions featuring voluntary overtime work for low-income children.¹⁰ Although some of these programs have served as lifelines for students languishing in public schools,¹¹ a careful examination of existing research, along with the challenges individual districts and schools have faced in implementing SES, reveals the folly of both liberal and conservative policymakers' over-reliance on the model of voluntary overtime in the area of education.

The existing research confirms that only a small segment of the targeted low-income student population will take advantage of a voluntary educational offering such as SES.¹² Thus, as a systemic solution, voluntary overtime work is deficient; students must opt in to receive its benefits. Such a contingency clearly undermines the concept of compulsory education for all by allowing students to opt out. Unless educational offerings such as SES become compulsory for all students who need extra help, we will continue to maintain an educational system that is both an inequity and a failure for the students most in need of its services. As such, SES is simply the latest in a long line of piecemeal interventions that ask low-income students to put in additional hours of schoolwork in order to overcome the deficiencies of the regular school day.¹³

Today, many of America's public school parents hope that President Obama will succeed in leading our country to invest fully in public education.¹⁴ While the federal government has taken important first steps under the American Recovery and Reinvestment Act of 2009 ("Recovery Act"),¹⁵ it is very important that we carefully examine the allocation of such investments. Voluntary overtime work may represent a lifeline for some students, but a successful educational agenda must focus on the regular school day by integrating any educational services deemed essential into the compulsory component of public

¹⁰ See *infra* Part III.

¹¹ See *infra* text accompanying notes 135-36 for quotes from students and parents regarding SES's beneficial influence on them and their child. *But see* TOUGH, *supra* note 3, at 2 (supporting the claim that voluntary programs only help the few students who choose to participate).

¹² See *infra* Part I.

¹³ See *infra* Part III. Programs such as the 21st Community Learning Centers, and the freedom schools of past and present are all examples of piecemeal interventions, for they impact only the small number of students who choose to participate in the programs. The larger educational system is not impacted by their presence, nor do the majority of children in public schools benefit from their existence.

¹⁴ See Sandra Tsing Loh, *Public School Parents, Unite!*, NYTIMES.COM, Nov. 19, 2008, <http://campaignstops.blogs.nytimes.com/2008/11/19/public-school-parents-unite/>.

On top of that, Mr. Obama's presidency has indeed set off an emotional sea change: Why look at that, there is new hope for everything, even public schools! I see, amazingly, small green shoots of tentative optimism even among my Left Coast private school Democrats—those who've fallen into a bad habit of mocking public education in every sentence, as though it is a George W. Bush "No Child Left Behind" swamp they'd never deign to venture into, a dumping ground for the unsophisticated, a warehouse for the poor. With any luck, in the next generation, the meritocratic dream conveyed in the ascension of Barack Obama will not hinge on a lucky jaunt at the Punahou School but will be entwined in a narrative that reflects the triumph of public school, a fought-for hearth in which burns the essential goodness, fair-mindedness and optimism of America.

Id.

¹⁵ American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (2009).

education.¹⁶ Currently, low-income students only receive these services if they are able and willing to work overtime.¹⁷

This Article analyzes NCLB's Supplemental Educational Services provision and exposes its shortcomings. Part I introduces the voluntary overtime work approach of SES and highlights its flaws and limitations. Research reveals that the voluntary overtime work model is designed for the exceptional student and does not provide meaningful opportunities to the majority of students in under-performing schools. Part II presents the legal and political context in which policymakers created SES and shows how they failed to assess realistically the many challenges facing students today. In particular, the legislative history reveals that ideology—a blend of free-market and “pull yourself up by your bootstraps” schools of thought—prevailed over an honest assessment of students' needs and drove these policymakers to draft the SES provision of NCLB. Part III presents a larger framework in which to examine SES. It demonstrates that many educational initiatives spearheaded by liberals or enacted under Democratic leadership over the years have also relied on voluntary overtime work by students. A few leading examples include the 21st Century Community Learning Centers,¹⁸ the Mississippi Freedom Schools,¹⁹ and the CDF Freedom Schools.²⁰ There are also many smaller initiatives at the local level that abide by the voluntary overtime model.²¹ Part IV proposes that

¹⁶ SES may be effective for the students whose parents request the tutoring, but many students do not take advantage of services offered on a voluntary basis. *See infra* Part I. SES needs to be part of the regular school day in order to make participation in overtime work mandatory, rather than voluntary.

¹⁷ *See* SUNDERMAN & KIM, *supra* note 9, at 5 (“Supplemental educational services shift the focus from improving poorly performing schools to improving individual student achievement, but only for those requesting services.”).

¹⁸ 21st Century Community Learning Centers, <http://www.ed.gov/programs/21stccclc/index.html> (last visited Feb. 28, 2010) (“This program supports the creation of community learning centers that provide academic enrichment opportunities during non-school hours for children, particularly students who attend high-poverty and low-performing schools.”). For further discussion on 21st Century Community Learning Centers, *see infra* text accompanying notes 294-300.

¹⁹ For further discussion on Mississippi Freedom Schools, *see infra* notes 282-87 and accompanying text.

²⁰ Freedom Schools were initially organized in the South during the peak of the civil rights movement. *Freedom Schools Flourish Throughout New York*, CHILD DEFENDER—NEW YORK (CDF Action Council New York, NY), Aug. 12, 2005, at 1, available at http://www.cdfny.org/News/childfax/2005/CDefender8_12_05.pdf. Today, freedom schools target a broader population and are “structured to motivate young people to become critically engaged in their communities, country and world” in hopes of reducing the nation's academic achievement gap. *Id.* Students that attend freedom schools participate in summer programs, signifying the overtime that students must dedicate in order to succeed in their communities. *See id.* For further discussion on freedom schools, *see infra* text accompanying notes 282-87.

²¹ Many programs assisting disadvantaged, low-income, or at-risk children operate outside of the regular school day and are voluntary. For example, Project Lift is an afterschool program run by the Franklin Community Center, Inc. in Saratoga Springs, New York. Franklin Community Center, Project Lift, http://www.franklincommunitycenter.org/programs_projectlift.asp (last visited Feb. 28, 2010). This afterschool program provides children in grades one through five with the role models and education they need to develop in a positive manner. *Id.* Similarly, the Cultural, Academic and Athletic Program (CAAP) is

the regular school day, which *all* children are compelled to attend, should include services, such as tutoring, that currently are available to low-income students only through overtime work. So long as the benefits of programs such as SES are available only to students who are willing *and able* to opt in, the larger, compulsory system provided to all students will continue to fail.

I. THEY WORK HARD FOR THE MONEY: THE VOLUNTARY OVERTIME WORK MODEL OF SES

SES requires low-income children to volunteer for overtime schoolwork to receive the benefits of tutoring.²² The Merriam-Webster dictionary defines “overtime” as “working time in excess of a standard day or week.”²³ Under NCLB, the standard day is the “school day.”²⁴ NCLB requires only that SES tutoring services take place “in addition to instruction provided during the school day.”²⁵ Thus, NCLB authorizes a variety of agencies to provide tutoring, including approved for-profit and nonprofit entities, school districts, faith-based organizations, and public or private schools.²⁶ Accordingly, the law permits students, through their parents, *to elect*²⁷ to work after the regular school day has ended to obtain the benefit of tutoring.²⁸

Asking children to work in excess of their standard day is problematic, not because they are working an extended day, but because we give them the choice.²⁹ Nonetheless, instead of seeking the school day’s expansion or reconfiguration, SES seeks to remedy the shortcomings of the regular school day by placing what is currently missing outside of the school day entirely. As a result, the regular school day is left behind along with the children in its care.

Because it is voluntary, overtime work in the context of SES excludes those students most in need of tutoring. Although the services are free, tutoring

held during the summer at the University of St. Thomas in Minnesota and brings inner-city and suburban children together. Bulletin Today: UST Hosts Free Summer Programs for At-Risk Kids (Jul. 6, 2009), <http://www.stthomas.edu/bulletin/2009/07/06/ust-hosts-free-summer-programs-for-at-risk-kids/>. This two-day camp program for at-risk youth is free and enrollment is voluntary. *Id.* Cameron University in Oklahoma also hosts a summer program for “at-risk children from around the state,” in which junior high school students get a taste of college life and spend time “doing field research as young scientists.” Louis S. Schafer, *At-Risk Kids Will Be Trained as “Science Detectives” in Oklahoma Program This Summer*, SCHOOLHOUSE PARTNERS BLOG, Apr. 30, 2007, <http://schoolhousepartners.net/blog/?p=29>.

²² See 20 U.S.C. § 6316(b)(6)(F) (2006) (mandating that parents receive notification of the *option to request* “supplemental educational services for the child”).

²³ *Overtime*, MERRIAM-WEBSTER ONLINE DICTIONARY, <http://www.merriam-webster.com/dictionary/overtime> (last visited Feb. 28, 2010).

²⁴ 20 U.S.C. § 6316(e)(12)(C)(i).

²⁵ *Id.*

²⁶ The Act defines such a “provider” as “a non-profit entity, a for-profit entity, or a local educational agency. . . .” *Id.* § 6316(e)(12)(B).

²⁷ *Id.* § 6316(b)(6)(F).

²⁸ Title I recipient schools that fail to make Adequate Yearly Progress (AYP) for a third consecutive year must make SES available “[i]n addition to instruction provided during the school day.” Improving the Academic Achievement of the Disadvantaged, 34 C.F.R. § 200.45(a) (2008).

²⁹ See *infra* note 88 (noting Maryland Assistant Superintendent Ann Chafin’s view on this issue of choice).

is provided only to those students whose parents request it.³⁰ Tutoring requires more parental involvement than simply signing a permission slip; a parent must also select a supplemental services provider from a state-approved list.³¹ In the labor context, overtime work is generally voluntary, as supervisors ask workers to sign up if they are available to work extra shifts.³² Yet the educational context offers no supervisor to make the necessary requests. Students' overtime participation depends on two unreliable methods: children must either make their own request or, as is the case under SES, rely on a parent to do so.³³

SES's major design flaw is the voluntary nature of its overtime work model. First, by requiring a parent to take the initiative, SES's framers ignored many of the reasons behind America's system of compulsory education. Thomas Jefferson understood that education should be available "without regard to wealth, birth or other accidental condition or circumstance[.]"³⁴ A child cannot choose his or her parents. Jefferson believed that this "accidental condition or circumstance," should not dictate the education available to a child.³⁵ Because services under SES's current design are contingent upon a parent's request,³⁶ those students most in want or need of supplemental tutoring are likely to go without it.³⁷ The overtime work model contravenes the very *raison d'être* of a compulsory system of schooling, that "[e]ducation [is] simply too important . . . to be left to the caprice of parental choice[.]"³⁸

Surprisingly, SES allows the "caprice of parental choice"³⁹ to dictate the provision of tutoring, a benefit touted by policymakers as a "safety valve"⁴⁰ for students trapped in under-performing schools. Indeed, because many in our society do not have a very high opinion of low-income parents, it is surprising that policymakers, through SES and other voluntary overtime offerings, decided to entrust them with added responsibility for the education of their children.⁴¹ In her work, Cheryl Fields-Smith points out that low-income and

³⁰ See 20 U.S.C. § 6316(b)(6)(F).

³¹ Any school failing to make AYP under § 6316(b)(5)(B) shall "arrange for the provision of supplemental educational services to eligible children in the school from a provider with a demonstrated record of effectiveness." *Id.* § 6316(e)(1).

³² Ron Bigler, *Unions Give Workers the Power to Fight Forced Overtime*, WORKING LIFE (Labor Research Assoc., New York, N.Y.), Sept. 12, 2002, [www.workinglife.org/wiki/Unions+Give+Workers+the+Power+to+Fight+Forced+Overtime+\(Sep.+12,+2002\)](http://www.workinglife.org/wiki/Unions+Give+Workers+the+Power+to+Fight+Forced+Overtime+(Sep.+12,+2002)).

³³ See 20 U.S.C. § 6316(b)(6)(F).

³⁴ Thomas Jefferson, *A Bill for the More General Diffusion of Knowledge*, in 2 THE WORKS OF THOMAS JEFFERSON 414, 415 (Paul Leicester Ford ed., 1904).

³⁵ *Id.*

³⁶ See 20 U.S.C. § 6316(b)(6)(F).

³⁷ Parents of high-achieving children are more likely to request supplemental services. See *infra* notes 86-7 and accompanying text.

³⁸ MARK G. YUDOF ET AL., EDUCATIONAL POLICY AND THE LAW 13 (4th ed. 2002).

³⁹ *Id.*

⁴⁰ "What's Next for School Choice?": Hearing Before the H. Comm. on Educ. & Workforce, 107th Cong. 7 (2002) [hereinafter *What's Next for School Choice*] (statement of Rep. Boehner, Member, H. Comm. on Educ. & Workforce).

⁴¹ One popular theory explaining the low educational performance of many low-income children is that the poor children's parents are to blame as the result of their "limited linguistic codes," lack of cultural and social capital, and the generally inadequate supports provided by low-income parents for their children's academic success. This theory can be described as a "culture of poverty" explanation. SOCIAL CLASS, POVERTY, AND EDUCATION: POLICY

ethnic-minority parents are often perceived by schoolteachers and administrators as less involved in the education of their child, or simply uninterested.⁴² There is also the reality shared by one Associate Superintendent, who admitted to being very surprised by the large amount of funding allocated for SES given the small number of parents who typically request extra help for their children.⁴³ It is important to understand that there are many reasons why low-income parents may not be able to take advantage of voluntary overtime educational offerings for their children. In addition, the research supporting this assertion is not new and should have been taken into account by policymakers in drafting SES.

A solid body of research shows that parental engagement by middle-class parents tends to be higher than that of working-class parents in a broad range of parental involvement activities that relate to student success.⁴⁴ These activities include communication with school staff, including verbal as well as written communication, and collaboration with the larger community.⁴⁵ Collaboration with the community can include the parent's ability to identify resources in the community that can strengthen her child's education as well as their family life.⁴⁶ A large number of factors account for this difference.

First, working-class parents often find it more difficult to interact with school personnel. Often, parents who have little control over their work schedules find it difficult to visit the school or meet with their child's teacher during the school day. In this manner, these parents are not as able to be involved in their child's schooling as a parent with a more flexible schedule.⁴⁷ The pressure parents may feel to provide financially for their family can also limit the time they have to devote to school-sponsored activities such as the Parent Teacher Association (PTA).⁴⁸ In addition, some parents' past experiences with

AND PRACTICE 11-12 (Bruce J. Biddle ed., 2001); *see also* Cheryl Fields-Smith, *Social Class and African-American Parental Involvement*, in *LATE TO CLASS: SOCIAL CLASS AND SCHOOLING IN THE NEW ECONOMY* 167, 167 (Jane A. Van Galen & George W. Noblit eds., 2007).

⁴² Fields-Smith, *supra* note 41, at 167.

⁴³ SUNDERMAN & KIM, *supra* note 9, at 26 ("According to the Associate Superintendent for Instruction in Buffalo, the amount of money set aside for supplemental services 'seemed excessive based on the number of parents who usually request help for their kids.'").

⁴⁴ *See* Fields-Smith, *supra* note 41, at 168-69.

⁴⁵ *Id.* at 168.

⁴⁶ *Id.*

⁴⁷ *See id.* at 177-78. Fields-Smith provides examples of support activities limited by inflexible work schedules, including visiting the school and volunteering for activities during the school day. *Id.* at 182; *see also* Heather B. Weiss et al., *Making It Work: Low-Income Working Mothers' Involvement in Their Children's Education*, 40 AM. EDUC. RES. J. 879, 881 (2003) ("[W]ork may be particularly challenging for educational involvement among low-income families.").

⁴⁸ The single father of an eighth grader provides an explanation of how his schedule does not provide him with time for school-sponsored activities. "I don't really have that much time to become involved in school activities. PTA meetings are usually scheduled around the time that I have to be at work. I am the bread winner, so a man's gotta provide for his family, and yuh [sic] kno [sic] I am kinda like a single dad (laughs). I have to be there financially for my kids because they need so much." Diane A.M. Archer-Banks & Linda S. Behar-Horenstein, *African-American Parental Involvement in Their Children's Middle School Experiences*, 77 J. NEGRO EDUC. 143, 147 (2008).

their own socioeconomic class and education may lead them to deemphasize their child's education, or even to regard their child's educational aspirations with contempt.⁴⁹ Consequently, working-class parents are less likely to establish productive relationships with their child's teachers and thereby are less likely to know about school events and what generally is taking place in their child's classroom.⁵⁰

The working-class parent's race, culture, and language-minority status can also pose additional obstacles to interaction and communication with school staff. In her ethnographic portrait of recent Mexican immigrants in Las Fuentes,⁵¹ Guadalupe Valdés observed that many parents did not feel "competent enough to deal with school personnel," and "found almost any excuse not to go to the school and '*ponerse en evidencia.*'"⁵² English Language Learner (ELL) parents often simultaneously confront issues of race, class, immigrant status, language proficiency, and level of education.⁵³ Although these parents' concerns about their child's education may be very strong, as members of linguistically and culturally diverse groups, they may view their roles as parents very differently from the mainstream English speaking community.⁵⁴ In fact, none of the families that Valdés interviewed knew about the PTA or volunteering at their children's schools.⁵⁵ Moreover, the solution was not as simple as merely translating notices and flyers into Spanish.⁵⁶ The parents lacked familiarity with how schools in the United States function, including how grades are given, the different subjects taught, and how the schools defined parental involvement in their children's education.⁵⁷

Further distinctions between the manner in which the parents and the teachers in Valdés's study understood their respective roles can be seen in the manner in which mothers viewed the practice of keeping children after school

⁴⁹ Fields-Smith, *supra* note 41, at 169.

⁵⁰ *Id.*

⁵¹ Las Fuentes is the name that Valdés gave to the city in which she conducted her ethnographic study. The city is located within the United States and is just a few hours' drive from the cities of El Paso, Texas, and Juárez, Mexico. GUADALUPE VALDÉS, *CON RESPETO: BRIDGING THE DISTANCES BETWEEN CULTURALLY DIVERSE FAMILIES AND SCHOOLS* 42 (1996).

⁵² *Id.* at 162. Valdés translated the phrase as "show how ignorant or incapable they were."
Id.

⁵³ M. BEATRIZ ARIAS & MILAGROS MORILLO-CAMPBELL, *PROMOTING ELL PARENTAL INVOLVEMENT: CHALLENGES IN CONTESTED TIMES* 7 (2008), available at <http://epsu.asu.edu/epru/documents/EPSSL-0801-250-EPRU.pdf>.

⁵⁴ *Id.* Valdés provides an excellent description of the culturally subjective character of parental involvement. She writes the following about the mothers she interviewed in Las Fuentes:

[They] saw themselves as participating actively in their children's *educación*, that is, in raising their children to be good and well-behaved human beings. They did not, however, see themselves as adjunct schoolteachers. They did not see their role as involving the teaching of school subjects. In their own experience in school, this had been the province of the teacher. Mothers, on the other hand, had been responsible for the moral upbringing of their children.

VALDÉS, *supra* note 51, at 166.

⁵⁵ VALDÉS, *supra* note 51, at 162.

⁵⁶ *See id.* at 155-60 (detailing the families' inexperience with the American school system).

⁵⁷ *Id.*

for bad behavior. Valdés observed that this practice significantly opposed the interests of the parents in Las Fuentes because:

Mothers who had strict rules about when their children were to come home and who viewed hanging out with neighborhood children as potentially dangerous considered teachers who interfered with these procedures to be inconsiderate, capricious, and overstepping their boundaries. They were, in fact, providing built-in excuses for lateness that children might use in inappropriate ways.⁵⁸

In this case, mothers viewed the teachers' actions as interfering with their job as a parent to provide a good *educación*, or moral upbringing, for their child.⁵⁹ These distinctions between the parent and teacher perspective help us to understand why a parent's refusal to request after school tutoring for their child in the SES context may not signify a lack of interest in their education, but rather a capitulation to more important goals: keeping their child safe from harm and raising a morally sound child. Irrespective of the parent's motivation, the end result is that the child will not be able to benefit from the afterschool offering of tutoring.

Additionally, a parent's race may also impact the school staff's perception of that parent's involvement and interest in the education and schooling of her child.⁶⁰ Researcher Cheryl Fields-Smith concludes that school staff frequently perceive low-income, ethnic-minority parents as either less involved or lacking interest in their child's education.⁶¹ Fields-Smith presents evidence that some teachers express surprise when a low-income, African-American parent actively seeks to communicate with the teacher about her child's progress in school.⁶² African-American parents' accounts of their interactions with school personnel demonstrate that they are many times aware of these perceptions.⁶³

In one study, the teachers' perceptions of African-American parents' desire to be involved in their children's education was sharply at odds with the parents' actual desire to be involved. The misperception documented in this study stemmed from the different manner in which the parents and the teachers viewed their respective roles. The parents interviewed in the study wanted to be involved in their children's education but believed they should first be asked by the teacher to become involved. The teachers, on the other hand, took the parents' lack of involvement as a sign that the parents were lazy and disinterested.⁶⁴

Research on African-American parental involvement demonstrates a difference between parents' and teachers' views on what it means to be involved

⁵⁸ *Id.* at 165-66.

⁵⁹ *See supra* note 54.

⁶⁰ Fields-Smith, *supra* note 41, at 167.

⁶¹ *Id.*

⁶² *Id.* at 169.

⁶³ One African-American parent of a seventh-grader stated, "You know a lot [of] teachers and even society think that every [B]lack child in the classroom comes from the ghetto and that their parents are either on drugs or in jail." Archer-Banks & Behar-Horenstein, *supra* note 48, at 150 (alteration in original).

⁶⁴ *Id.* at 170.

as a parent.⁶⁵ One study demonstrates that low-income, African-American parents' definition of parental involvement includes home-based activities as well as school-based activities.⁶⁶ For instance, some parents define parental involvement broadly as being "supportive of their children's interests and efforts."⁶⁷ Other parents believe they should only visit the school if their child is failing a subject or if they are called in by school personnel.⁶⁸ Others define their role in their children's education as including the assistance they provide at home with their child's homework or in obtaining a tutor for their child.⁶⁹ On the other hand, the teachers interviewed in this study defined parental involvement almost exclusively through school-based activities.⁷⁰

Complicating matters further is the difficulty in ensuring that interactions between parents and school personnel will be positive when they do take place. A study done by researcher Robert Colbert showed that African-American parents with limited levels of education may feel "powerless in their interactions with their children's school."⁷¹ In addition, teachers may doubt the ability of low-income parents to contribute to their children's education and actually devalue the social capital held by low-income parents of color.⁷² Negative encounters between parents and school personnel may simply reaffirm the tendency of working-class parents to refrain from establishing positive working relationships with their child's teacher. This, in turn, makes it more difficult for the parent to find out information about school activities and events and to keep track of her child's progress in school.⁷³

Notably, not all working-class or low-income households are identical, and "family status variables," such as income, education, ethnicity, and marital status, are not the only factors to impact a parent's decision to become involved in her child's education.⁷⁴ Other factors that appear to play a very important role in parental involvement decisions are "process variables." They include "the value parents put on education, their wishes to be involved or their involvement in [their] children's school progress, their interest in having their children succeed in school, or their aspirations for their children's achievement."⁷⁵ Across similar status groupings, a parent's actions or beliefs may either further or hinder a child's progress in school.⁷⁶ As such, depending on the process variables present in a family, students may occupy a relatively priv-

⁶⁵ Parents often included both home-based and school-based activities in their definition of parental involvement while teachers expressed a belief that parental involvement was almost exclusively comprised of school-based activities. Fields-Smith, *supra* note 41, at 169.

⁶⁶ *Id.*

⁶⁷ Archer-Banks & Behar-Horenstein, *supra* note 48, at 147.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ Fields-Smith, *supra* note 41, at 171.

⁷² *Id.* at 170.

⁷³ *Id.* at 169.

⁷⁴ Kathleen V. Hoover-Dempsey & Howard M. Sandler, *Why Do Parents Become Involved in Their Children's Education?*, 67 REV. EDUC. RES. 3, 7 (1997).

⁷⁵ *Id.* at 8.

⁷⁶ See *id.* at 7-8; Fields-Smith, *supra* note 41, at 179 ("Gorman (1998) found that working-class parents with positive learning experiences in childhood were more likely to value education than working-class parents with negative experiences.").

ileged position when compared to peers in the same socioeconomic status group. For example, working-class parents who had positive educational experiences as children are more likely to value education as adults.⁷⁷ Accordingly, their children are more likely to make better progress in school.

Studies show that the presence of certain family status and process variables can make it less likely that a parent will request a voluntary overtime work opportunity, such as tutoring offered under SES, for her child. For example, in their recent study, researchers Brian Jacob and Lars Lefgren examined the characteristics of families who requested specific teachers for their elementary school children.⁷⁸ Although all families could make a request, Jacob and Lefgren found that families whose higher incomes rendered them ineligible for the federal lunch program were about twice as likely to make a request as those who were eligible.⁷⁹ They also learned that:

[P]arents of low-income students [were] about 6 percentage points less likely to make a request than parents of high-income students (9 percent vs. 15 percent). Additionally, parents from high-income neighborhoods [were] about 4 percentage points more likely to make a request than parents from low-income neighborhoods (17 percent vs. 13 percent). . . . Hispanic parents [in this district were also] significantly less likely to request a particular teacher for their child than [] other families⁸⁰

This recent research is consistent with earlier findings. When Vernon Pohlmann examined secondary school choices for white boys and girls in St. Louis in 1953, he found that a child's socioeconomic status influenced the type of secondary school attended more than ability, for children of both sexes.⁸¹ Moreover, these findings mirror those in other countries.⁸² One additional

⁷⁷ Fields-Smith, *supra* note 41, at 179.

⁷⁸ Brian A. Jacob & Lars Lefgren, *In Low-Income Schools, Parents Want Teachers Who Teach: In Affluent Schools, Other Things Matter*, EDUC. NEXT, Summer 2007, at 59, 59.

⁷⁹ *Id.* at 62-63.

⁸⁰ *Id.* at 61 (emphasis omitted).

⁸¹ Vernon C. Pohlmann, *Relationship Between Ability, Socio-Economic Status and Choice of Secondary School*, 29 J. EDUC. SOC. 392, 393, 396 (1955).

⁸² Evidence collected from Britain, France, and the Netherlands supports the premise that educational interventions and/or systems based upon parental choice exacerbate the educational gaps already in existence between the privileged and the underprivileged. John S. Ambler, *Who Benefits from Educational Choice? Some Evidence from Europe*, 13 J. POL'Y ANALYSIS & MGMT. 454, 454 (1994). In France, where scholarships and subsidies have been provided to students and parents who transfer from public to private schools, the research shows that children of low-income parents are under-represented in private schools. *Id.* at 458. Evidence collected also showed that giving parents choices within the public sector also exacerbated stratification by class. "Of the 10 percent of parents who requested a school other than the one in their district, the occupational group most highly represented was secondary and higher education teachers . . . ; the least represented group was manual workers" *Id.* at 462. In Great Britain, parents were provided with a means-tested, sliding scale grant to use if they made the choice to enroll their child in an independent school. *Id.* at 465. Although this initiative was intended to assist students from poorer families, the research shows that the families actually helped by the grant were not the "culturally disadvantaged students" initially envisioned by proponents. *Id.* Although these students were also from poor families, the research shows that most of their parents had "received an education that was either private or selective." *Id.* at 465-66. Less than ten percent of the parents who exercised this option were from the manual working class. *Id.* at 465. In addition, in most of these families, there was a "relatively well educated mother . . . who gives her child strong encouragement to succeed academically and who actively seeks

example can be found in Scotland's experience with its 1981 Education Act.⁸³ Under this Act, parents acquired the statutory right to request schools for their children that were located outside of their designated attendance areas.⁸⁴ The evidence that has been collected demonstrates that the parents most likely to exercise this newly acquired choice were those parents who had both higher levels of education and higher social class status.⁸⁵

Thus, the types of process variables present in a family strongly influence the likelihood a parent will request a service such as SES for their child. For example, in Jacob and Lefgren's study where parents were allowed to request a particular teacher for their child, the researchers, after accounting for difference in socioeconomic status, found that parents of higher-achieving students were more likely to make a request.⁸⁶ The study's findings mirror those of a 1987 study, which found that parents of high-achieving students emphasized the value of getting good grades whereas the parents of low-achieving children were more likely to stress the importance of good behavior.⁸⁷ Consequently, the above findings all cast doubt on educational policies, such as SES, that claim to help low-income and low-achieving students by delivering educational services only to those children whose parents are able and willing to request said services. The evidence described above shows that the parents most likely to take advantage of educational choices such as SES are those parents comparatively advantaged in relation to other low-income parents, as well as those parents whose children are relatively high achieving. As such, SES's voluntary overtime work model is misguided, and the provision of tutoring to students who need it should not depend upon the parents' willingness to request such a service.

Trusting a child with this choice also is misguided. Unlike adults working overtime, school-age children do not generally have the promise of immediate monetary gain and may not understand the long-range incentives to participate. For example, Ann Chafin, Assistant State Superintendent for Student, Family, and School Support for the Maryland State Department of Education, lamented that children in grades four through seven do not view SES as a good opportunity.⁸⁸ Chafin further stated that she and her staff try very hard to encourage

out educational opportunities." *Id.* at 466. In the Netherlands, where most schools are subsidized private schools, critics argue that parental choice works better for those parents who are well-educated, for they not only have more information, but are able to better operate within the system. *Id.* at 468.

⁸³ See generally J. DOUGLAS WILLMS, *PARENTAL CHOICE AND EDUCATION POLICY* (1997), available at <http://www.ces.ed.ac.uk/PDF%20Files/Brief012.pdf> (reviewing several studies that examined the effects of the 1981 Education Act on secondary schooling in Scotland).

⁸⁴ *Id.* at 2.

⁸⁵ *Id.*

⁸⁶ Jacob & Lefgren, *supra* note 78, at 61.

⁸⁷ Fields-Smith, *supra* note 41, at 171.

⁸⁸ *Supplemental Educational Services Under the No Child Left Behind Act: How to Improve Quality and Access: Hearing Before the Subcomm. on Early Childhood, Elementary & Secondary Educ. of the H. Comm. on Educ. & Labor, 110th Cong. 73* (2007) [hereinafter *Quality and Access*] (statement of Ann Chafin, Ass't State Superintendent for Student, Family & Sch. Support, Md. State Dep't of Educ.). Chafin stated that "one of the biggest barriers to SES participation is the fact that these children at ages, you know, 4th, 5th, 6th and 7th grade don't see this as something that is really good." *Id.*

the children to take advantage of the opportunity to receive SES,⁸⁹ but it can sometimes be easier said than done. As Cornelia Ashby, Director of Education, Workforce, and Income Security Issues at the Government Accountability Office, stated, “Supplemental educational services conflict with other activities students might be involved in. They themselves perhaps prefer sports or prefer some type of other activity. Many students sign up for SES but don’t continue through the school year”⁹⁰ Even the providers of SES recognize that it can take more than encouragement from school staff to enroll children in their programs and admit that many times it takes providing children with financial incentives such as free computers and gift certificates.⁹¹ Of course, the additional problems of student mobility and absenteeism in many urban districts make it even more difficult for districts and providers of SES to be able to count on student participation in afterschool programs.⁹²

Additionally, the SES overtime work model faces other challenges besides those relating to parents and children. In fact, whether a child ultimately chooses to participate in SES also is affected by the diligence with which the school staff and administrators manage and implement their various responsibilities under SES. For example, politicians have praised Assistant Superintendent Chafin for the very high rates of student participation in SES in Maryland.⁹³ To increase the number of students enrolled in SES, she took steps such as simplifying letters sent home to parents by deleting a sentence that began with, “Pursuant to the reauthorization of ESEA” and replacing it with, “Good news, your son or daughter might be eligible for extra tutoring”⁹⁴

Unfortunately, not all districts have taken a proactive approach, and the Government Accountability Office (“GAO”) reports that, in 2004 and 2005, students in roughly twenty percent of the districts offering SES failed to receive services at all.⁹⁵ SES providers also have noted additional problems such as confusing parental notification letters that were unaccompanied by further out-

⁸⁹ Chafin stated that she encourages the children to “go and snatch all the education you can out of every opportunity.” *Id.* at 74.

⁹⁰ *Id.* at 59 (statement of Cornelia M. Ashby, Dir. of Educ., Workforce & Income Sec. Issues, Gov’t Accountability Office).

⁹¹ See, e.g., Wendy Beetlestone & Owen F. Lipsett, Commentary, *No Child Left Behind’s Accountability and Access Provisions: An Inherent Tension Within Supplemental Educational Services Programs*, 216 EDUC. LAW REP. 807, 824 (2007) (quoting John Hewitt, founder of the private, for-profit provider of SES, Louisiana Learning Circle, who said, “If you think kids are going to sign on for this because it’s a great program offered by the federal government, get real You have to sell them on it.” (omission in original)). In other states, incentives provided to children for enrollment in SES have included free computers and gift certificates to Toys “R” Us. *Id.*

⁹² SUNDERMAN & KIM, *supra* note 9, at 23.

⁹³ *Quality and Access*, *supra* note 88, at 60 (statement of Rep. Sestak, Member, Subcomm. on Early Childhood, Elementary & Secondary Educ.) (commenting on Chafin’s success). Sixty-eight percent of Maryland students participate in SES. *Id.* at 31 (statement of Ann Chafin, Ass’t State Superintendent for Student, Family, and Sch. Support, Md. State Dep’t of Educ.). The national rates are consistently below twenty percent. *Id.*

⁹⁴ *Id.* at 31 (statement of Ann Chafin, Ass’t State Superintendent for Student, Family, and Sch. Support, Md. State Dep’t of Educ.).

⁹⁵ GAO, NO CHILD LEFT BEHIND ACT: EDUCATION ACTIONS MAY HELP IMPROVE IMPLEMENTATION AND EVALUATION OF SUPPLEMENTAL EDUCATIONAL SERVICES 7 (2007) [herein-

reach and assistance.⁹⁶ In addition, because parents often did not receive timely notice, parents' ability to seek SES for their child often was delayed or foreclosed entirely.⁹⁷ By the time a parent becomes aware of the SES option, the offering may no longer be available if the number of requests has exceeded available funding.⁹⁸ The GAO reports that fifty-eight percent of school districts failed to inform parents that their children were eligible to receive SES before the beginning of the 2005-2006 school year.⁹⁹ As a result, the Department of Education issued non-regulatory guidance on the notice requirements of SES in the waning days of the Bush Administration.¹⁰⁰ This guidance provided new information on how school districts *should* provide notice of SES to parents, including information on how to notify parents directly through means other than mailing letters home.¹⁰¹ School districts were also encouraged to notify parents through multiple means, in order to maximize their chances of reaching parents.¹⁰²

In Maryland, where great strides have been taken to expand student enrollment in SES, access problems persist in rural areas.¹⁰³ Assistant Superintendent Chafin noted that, in these districts, far fewer vendors were available to serve as approved SES providers.¹⁰⁴ Moreover, law professor and former General Counsel of the U.S. Department of Education Judith A. Winston confirms the wide-scale application of this problem. She writes that few SES providers are "available in rural communities and the ability of children to stay late or be transported to such services after school or on weekends is extremely limited."¹⁰⁵ In fact, the GAO found that, in some of the rural districts it surveyed, none of the students received SES services due to a lack of providers in the area.¹⁰⁶ Elizabeth Schott, an elementary school principal from the rural district

after EDUCATION ACTIONS], in *Quality and Access*, *supra* note 88 (statement of Cornelia M. Ashby, Dir. of Educ., Workforce & Income Sec. Issues, GAO).

⁹⁶ *Id.* at 10.

⁹⁷ *See id.* at 9.

⁹⁸ The seemingly low utilization rates may "reflect close to maximum usage since a study reporting an overall 20% utilization rate also noted that 'with their current budgets, [school districts] can serve about 20% of all eligible students.'" Beetstone & Lipsett, *supra* note 91, at 812-13; *see also* SUNDERMAN & KIM, *supra* note 9, at 25 (recognizing the possibility that requests may exceed funding). *But see* GAIL L. SUNDERMAN, THE CIVIL RIGHTS PROJECT/PROYECTO DERECHOS CIVILES, UCLA, POLICY BRIEF—SUPPLEMENTAL EDUCATIONAL SERVICES UNDER NCLB: CHARTING IMPLEMENTATION 1 (2007), available at http://www.civilrightsproject.ucla.edu/research/esea/SES_Policy_Brief ("[D]ata shows that demand for supplemental educational services has either declined or leveled off after five years [of implementation].").

⁹⁹ EDUCATION ACTIONS, *supra* note 95, at 9.

¹⁰⁰ *See* DEP'T OF EDUC., SUPPLEMENTAL EDUCATIONAL SERVICES: NON-REGULATORY GUIDANCE 27-33 (2009), available at <http://www.ed.gov/policy/elsec/guid/suppsvcsguid.pdf> (*discussing parent notification requirements*).

¹⁰¹ *See id.* at 30.

¹⁰² *See id.*

¹⁰³ *See Quality and Access*, *supra* note 88, at 33 (statement of Ann Chafin, Ass't State Superintendent for Student, Family & Sch. Support, Md. State Dep't of Educ.).

¹⁰⁴ *Id.* at 31-32.

¹⁰⁵ Judith A. Winston, *Rural Schools in America: Will No Child Be Left Behind? The Elusive Quest for Equal Educational Opportunities*, 82 NEB. L. REV. 190, 207 (2003).

¹⁰⁶ EDUCATION ACTIONS, *supra* note 95, at 10.

of Petaluma, California, testified to Congress in 2007 that, in her school community, many children's only option was the SES provider who was within walking distance of the school.¹⁰⁷ This was attributed, in part, to the fact that many of the students' families had one car at most.¹⁰⁸ Principal Schott remarked that she was disappointed with the services provided, but they were "the only game in town."¹⁰⁹

Furthermore, certain student populations may find it even more challenging to access SES. For example, the GAO estimates that one third of school districts do not have enough providers to service students with limited English proficiency, and one quarter of the districts do not have enough providers to meet the needs of students with disabilities.¹¹⁰ Disparities also exist in the availability of SES providers across districts. In 2004-2005, SES recipients were found disproportionately in a small number of large districts.¹¹¹ As a result of these hurdles, the number of students who are ultimately able to access SES tutoring is appallingly low. The SES participation rate increased from a low rate of twelve percent to nineteen percent of eligible students between school years 2003-2004 and 2004-2005¹¹² and then declined again to fourteen percent in 2006-2007.¹¹³ In light of these challenges, it is hard to understand why NCLB's drafters selected the voluntary overtime work model as the vehicle to provide low-income students with academic tutoring.

Notably, during a 2007 congressional hearing on SES, Hawaiian Representative Mazie K. Hirono expressed concern about the poor fit between an individual child's need for services and the provision of such services.¹¹⁴ Specifically, she questioned whether it was necessary to go through all the testing required under NCLB, and the subsequent identification of those schools in need of improvement, simply to provide tutoring to individual students who are struggling.¹¹⁵ Representative Hirono argued that a number of well-established and accepted factors indicate poor academic performance, including English Language Learner status, socioeconomic status, and disabled status.¹¹⁶ Thus,

¹⁰⁷ *Improving the No Child Left Behind Act's Accountability System: Field Hearing Before the Subcomm. on Early Childhood, Elementary and Secondary Educ. of the H. Comm. on Educ. & Labor*, 110th Cong. 15 (2007), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_house_hearings&docid=f:34604.pdf (statement of Elizabeth Schott, Principal, McDowell Elementary Sch.).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ EDUCATION ACTIONS, *supra* note 95, at 10.

¹¹¹ *Id.* at 7.

¹¹² *Id.* at 2.

¹¹³ STEPHANIE STULLICH ET AL., DEP'T OF EDUC., TITLE I IMPLEMENTATION—UPDATE ON RECENT EVALUATION FINDINGS 34 (2009), available at <http://www.ed.gov/rschstat/eval/disadv/titlei-implementation/titlei-implementation.doc>. The increase from 2002-03 to 2004-05 can be "attributed in part to the increase in the number of schools required to offer SES, which increased from an estimated 4,509 in 2002-03 to 6,584 in 2005-06 [But a] closer look at the *percentage* of eligible students requesting services shows a decline in demand for services, even though the absolute number of students who received services increased." SUNDERMAN, *supra* note 98, at 11, 13 (emphasis in original).

¹¹⁴ *Quality and Access*, *supra* note 88, at 68 (statement of Rep. Hirono, Member, H. Comm. on Educ. & Labor).

¹¹⁵ *Id.*

¹¹⁶ *Id.*

we should identify struggling students by those factors and provide low-achieving students with quality SES as a first step. Representative Hirono's suggestions are supported by research indicating that parents of high-achieving students are most likely to seek out additional services.¹¹⁷ Irrespective of these findings, SES placed the burden of requesting SES on the parents of low-achieving students who are the least likely to make such a request.

Arguably, the self-selection process imbedded in the overtime work model is precisely what attracts many to such a strategy. For example, writing in support of SES, Harvard Professor Paul E. Peterson states that "[f]ortunately, voluntary attendance greatly reduces the problem disruptive students pose for inner-city teachers during the regular school day, when attendance is compulsory."¹¹⁸ In sum, Peterson's comment illustrates why the voluntary overtime work model appeals to some instructors of SES: they don't encounter the same challenges faced by teachers during the regular school day.

Yet the concept of voluntary overtime work for students undermines the premise of our system of public schooling: education is a "mandatory right."¹¹⁹ As the Pennsylvania Board of State Charities stated, the state is most interested in securing an education for "precisely those children whose parents or guardians are unable or indisposed to provide them with an education."¹²⁰ However, the voluntary overtime mechanism promotes the opposite result and only benefits children whose parents are engaged enough to request the services.

Even those children whose parents are engaged enough to request SES services receive far less than what is promised under NCLB. The statute describes the benefit of SES as additional academic instruction "specifically designed to increase the academic achievement of eligible children on the academic assessments required . . . and attain proficiency in meeting the State's academic achievement standards."¹²¹

Unfortunately, it is unclear whether those low-income students who succeed in availing themselves of SES in fact experience an increase in their academic achievement. First, the research documenting the effectiveness of SES is quite limited.¹²² Not only have few studies been conducted, but these studies have been small in scope, either internal evaluations conducted by the SES providers themselves,¹²³ or evaluations conducted by or for local school dis-

¹¹⁷ Jacob & Lefgren, *supra* note 78, at 61.

¹¹⁸ Peterson, *supra* note 7, at 45.

¹¹⁹ Joel Feinberg, *Voluntary Euthanasia and the Inalienable Right to Life*, 7 PHIL. & PUB. AFF. 93, 120 (1978); see also JOEL FEINBERG, *The Child's Right to an Open Future*, in FREEDOM AND FULFILLMENT: PHILOSOPHICAL ESSAYS 81-88 (1992) (asserting that children are entitled to the "right to an open future," which includes the right to education).

¹²⁰ YUDOF ET AL., *supra* note 38, at 13.

¹²¹ 20 U.S.C. § 6316(e)(12)(C)(i)-(ii) (2006).

¹²² Gail L. Sunderman reviewed the few, largely district-level studies that have emerged regarding the effectiveness of SES in raising student achievement. She examined and discussed study results from Tennessee, New Mexico, and Georgia and concluded that "the results, while mixed, are not encouraging." SUNDERMAN, *supra* note 98, at 5.

¹²³ Patricia Burch et al., *Supplemental Educational Services and NCLB: Policy Assumptions, Market Practices, Emerging Issues*, 29 EDUC. EVALUATION & POL'Y ANALYSIS 115, 116 (2007).

tricts.¹²⁴ Many of these small studies do not make a strong case for the continuation of SES.¹²⁵ For example, one study compared those students who received SES against those students who were eligible but did not participate in SES and found “small but significant” improvements in reading achievement.¹²⁶ Of course, the problem here is that this study assumes that those students who were eligible but did not participate in SES are the same as those students who took advantage of such services. Interestingly enough, the study conducted by the Los Angeles Unified School District compared only those students who attended the program with those who actually applied to receive SES but did not attend.¹²⁷ In this study, no significant differences in test scores were found between the two groups of students.¹²⁸ The problem is that attempts to reach conclusions about program effectiveness by comparing students who self-select into an educational offering versus those who do not is a bit like comparing apples and oranges.

The U.S. Department of Education has been forthcoming about this fact. Its study found that in five of seven districts, participation in SES for one year had a positive and significant impact on both math and reading.¹²⁹ However, the Department was quick to point out that “students who choose may be different from students who do not choose, and these differences may affect the results.”¹³⁰ In other words, there is a self-selection bias for which studies must account when reviewing the results of any voluntary program, even after controlling for factors such as socioeconomic background as well as race and ethnicity.¹³¹

Finally, in the Chicago Public Schools study, which found SES resulted in improvements, the students who made the greatest improvements were those with the lowest achievement scores at the outset.¹³² This information provides support for the position that SES should be mandatory. It is only in this manner that tutoring will be delivered to those students who need it the most. Under the current self-selection model, those are precisely the students most likely to go without the services.

Those students who actually enroll in an afterschool tutoring program face the possibility the program may be terminated at any time, irrespective of the student’s need for the service.¹³³ NCLB mandates the termination of SES without regard for students’ needs for ongoing tutoring as soon as the school achieves adequate yearly progress (“AYP”) for two consecutive school

¹²⁴ SUNDERMAN, *supra* note 98, at 4-5.

¹²⁵ *Id.* at 5.

¹²⁶ *Id.* at 6.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.* at 5; STULLICH ET AL., *supra* note 113, at xix.

¹³⁰ STULLICH ET AL., *supra* note 113, at xix.

¹³¹ *Id.*

¹³² SUNDERMAN, *supra* note 98, at 6 (“The Chicago Public Schools Study found that participation in the SES program resulted in a small but significant improvement in reading achievement but a negligible improvement in student math achievement” (citation omitted)).

¹³³ 20 U.S.C. § 6316(b)(12) (2006).

years.¹³⁴ As such, it becomes difficult to believe that SES was intended to provide a benefit to the individual student.

Parental reactions best capture the disingenuous nature of SES. Andrea Debardeleben testified before the House Education and Labor Committee in 2007:

My son however is a unique case. He has a very tough time at school. I cannot tell you how hard he tries. There are certain courses which just give him trouble, and he needs some extra help in these subjects. The resources to help my son used to exist in his school. No Child Left Behind mandated that since the school didn't make AYP, Supplemental Education Services must be provided to help those kids who needed more attention. Obviously the SES services helped the school improve. Yet in achieving AYP, the school no longer offers these important services, services that my son needs to be successful. . . . I would ask the Committee to move beyond how the overall school is doing and pay more attention to the individual student.¹³⁵

Similarly, *Education Week* published the following letter by a frustrated parent of a struggling student that illustrates the same problem:

My son is considered to be a low-income student because I'm a single mom. But the schools he has attended are all high-achieving, so he does not qualify for any extra tutoring. He is in the 3rd grade now and has struggled every year since kindergarten. He still is reading at a 1st-grade level. He needs the extra help.

As a concerned parent, I cannot sit back and hope that he will catch up. My son struggles, gets frustrated, calls himself a "dummy," and wants to give up. He's only 8 years old. The anger he displays when he's frustrated is scary.

. . . To bring him up to the level he needs to be and at which he will feel comfortable learning, I have had to take out a student loan for more than \$10,000 to pay for tutoring.¹³⁶

Many parents share Representative Hirono's puzzled reaction to Congress's decision to link SES delivery to the entire school's performance on NCLB-mandated assessments rather than simply provide SES to all struggling students.¹³⁷ Indeed, Andrea Debardeleben succinctly pointed out perhaps the most nefarious aspect of NCLB when she stated that "[o]bviously the SES services helped the school improve. Yet in achieving AYP, the school no longer offers these important services."¹³⁸

Pulling a beneficial academic offering from students who clearly need it suggests that SES's goal is not to help individual students most in need of

¹³⁴ See *id.* ("If any school identified for school improvement, corrective action, or restructuring makes adequate yearly progress for two consecutive school years, the local educational agency shall no longer subject the school to the requirements of school improvement, corrective action, or restructuring or identify the school for improvement for the succeeding school year.").

¹³⁵ *Local Perspectives on the No Child Left Behind Act: Hearing Before the Subcomm. on Early Childhood, Elementary and Secondary Educ. of the H. Comm. on Educ. and Labor, 110th Cong. 22 (2007)* [hereinafter *Local Perspectives*] (statement of Andrea Debardeleben, Parent).

¹³⁶ EDWARD E. GORDON ET AL., *THE TUTORING REVOLUTION: APPLYING RESEARCH FOR BEST PRACTICES, POLICY IMPLICATIONS, AND STUDENT ACHIEVEMENT* 33 (2007) (citation omitted).

¹³⁷ *Quality and Access*, *supra* note 88, at 68 (statement of Rep. Hirono, Member, H. Comm. on Educ. & Labor).

¹³⁸ *Local Perspectives*, *supra* note 135, at 21 (statement of Andrea Debardeleben, Parent).

assistance but to increase school-level achievement to a rate that is acceptable under NCLB. This troubling conclusion can also be gleaned from the fact that the initial decision to provide services is tied to familial income instead of a student's individual performance.¹³⁹ A student's individual performance only becomes a relevant consideration if SES is oversubscribed.¹⁴⁰ In the event that there are insufficient funds to provide SES to each student whose parent has made a request, the local school district is required to give priority to those students who are the lowest achievers. Otherwise, neither the individual student's level of academic ability nor actual need for supplemental tutoring factor into the decision-making process regarding which students should receive SES.¹⁴¹ It is inaccurate to assume that all low-income children are similarly situated with respect to their need for supplemental tutoring. As was illustrated earlier, there is great variation among parents and their children within the same socioeconomic class, and no single educational profile can be attributed to a child simply because certain socioeconomic indicators are present.¹⁴²

The requirements of SES reveal that its primary goal is not to help the individual child but rather to spur the school's achievement. A school meets or fails its AYP target based on the performance of its students on a standardized assessment.¹⁴³ The AYP target has to be met not only by the school overall, but also by each identified subgroup under NCLB, including the subgroup comprised of "economically disadvantaged" students.¹⁴⁴ The poor performance of one subgroup can prevent the entire school from reaching its AYP target. Therefore, even if only the low-income students who are initially eligible to request SES improve their subgroup's collective performance on the assessment, their improved scores may in turn help the entire school make AYP.¹⁴⁵ The great irony is that if these low-income students do ultimately succeed in helping their schools meet the AYP target, their overtime work is rewarded with the cessation of what was promoted as an academic benefit for the individual low-income child.¹⁴⁶ Thus, there is a limit to the touted "equal opportunity

¹³⁹ NCLB provides that any school failing to make AYP under section 20 U.S.C. § 6316(b)(5)(B) shall "arrange for the provision of supplemental educational services to eligible children in the school . . ." 20 U.S.C. § 6316(e)(1) (2006). The Act defines "eligible children" as those children "from a low-income family, as determined by the local educational agency . . ." *Id.* § 6316(e)(12)(A).

¹⁴⁰ In accordance with the provisions of NCLB, "If the amount of funds . . . available to provide [SES] is insufficient to provide supplemental educational services to each child whose parents request the services, the local educational agency shall give priority to providing the services to the lowest-achieving children." 20 U.S.C. § 6316(b)(10)(C) (2006).

¹⁴¹ *See supra* note 139.

¹⁴² Hoover-Dempsey & Sandler, *supra* note 74, at 7.

¹⁴³ *See* 20 U.S.C. § 6311(b)(2)(B), (b)(3)(A).

¹⁴⁴ NCLB is designed to "ensur[e] that all local educational agencies, public elementary schools, and public secondary schools make adequate yearly progress." *Id.* § 6311(b)(2)(A). AYP is defined as the achievement of the following subgroups: students who are economically disadvantaged; students from major racial and ethnic groups; students with disabilities; and, students with limited English proficiency. *Id.* § 6311(b)(2)(C)(v)(II)(aa)-(dd).

¹⁴⁵ *See id.* § 6311(b)(2)(C)(v)(II)(aa).

¹⁴⁶ *See id.* § 6316(b)(12) ("If any school identified for school improvement, corrective action, or restructuring makes adequate yearly progress for two consecutive school years, the local educational agency shall no longer subject the school to the requirements of school

model” of providing poor kids with the educational resources that rich kids have always enjoyed.¹⁴⁷ SES does not provide poor kids with equal opportunities but rather with voluntary overtime work that benefits their schools and districts. In reviewing a critique of the current educational system, Walter Parker observed that “[t]o get a favorable *return* on the *capital* that is *invested* in them, students must consume and work in ways that contribute to the economic competitiveness of the firms that employ them.”¹⁴⁸ Consequently, we currently face a “predominance of educational policies that literally devalue young people, or more precisely, see their value only in terms of a return on investment.”¹⁴⁹ SES is such an educational policy.

SES’s ultimate reward is not a better education, an equal opportunity, or any advantage for the individual child. Instead, it is the child’s school that reaps the reward in the form of a financial benefit. A local school district is initially required to make SES available if one of the district’s schools fails to make AYP for three consecutive years.¹⁵⁰ NCLB’s funding provisions for SES also require these same school districts to set aside twenty percent of their Title I, Part A, allocation to pay for supplemental educational services, as well as transportation costs under the school transfer option.¹⁵¹ However, NCLB does provide the local school district with a way to retain discretion over its Title I funds. If any school that initially failed to make AYP for three consecutive years subsequently makes AYP for at least two consecutive years, it is no longer required to make SES available.¹⁵² As such, the district may find itself in the position, depending upon how many schools in its district were initially subject to the SES requirement, to either expend less than the twenty percent set aside for SES or perhaps to expend no Title I funds whatsoever on providing SES to students in its district.¹⁵³ As a result, if low-income children, as a subgroup, sufficiently improve their collective performance on the annual assessment to help their school make AYP for two consecutive years, they will no longer have access to SES and will not be able to deliver Title I funds to the private SES providers under the provision’s portability feature.¹⁵⁴ The ultimate

improvement, corrective action, or restructuring or identify the school for improvement for the succeeding school year.”).

¹⁴⁷ MICHAEL ENGEL, *THE STRUGGLE FOR CONTROL OF PUBLIC EDUCATION: MARKET IDEOLOGY VS. DEMOCRATIC VALUES* 77-78 (2000).

¹⁴⁸ Walter C. Parker, Book Review, 576 *ANNALS AM. ACAD. POL. & SOC. SCI.* 146, 147 (2001) (reviewing ENGEL, *supra* note 147).

¹⁴⁹ ENGEL, *supra* note 147, at 41.

¹⁵⁰ See 20 U.S.C. § 6316(b)(5) (describing the requirement imposed on a local school district to make SES available “[i]n the case of any school served under this part that fails to make adequate yearly progress . . . by the end of the first full school year after identification under paragraph (1)”). “[I]dentification under paragraph (1)” occurs when a local school district identifies “for school improvement any elementary school or secondary school . . . that fails, for 2 consecutive years, to make adequate yearly progress.” *Id.* § 6316(b)(1)(A).

¹⁵¹ The specific amount to be set aside for supplemental educational services is discussed under 20 U.S.C. § 6316(b)(10)(A).

¹⁵² See *id.* § 6316(b)(12).

¹⁵³ See *id.* § 6316(b)(10), (12).

¹⁵⁴ Any school failing to make AYP under § 6316(b)(5)(B) of NCLB shall “arrange for the provision of supplemental educational services to eligible children in the school from a provider with a demonstrated record of effectiveness.” *Id.* § 6316(e)(1). The Act defines such a

reward, therefore, is to maintain Title I funding and discretion over that funding with the local school district. The ultimate sanction, as far as the school district is concerned, is to channel the student, and most importantly the Title I funding, elsewhere.

Next, we must address how and why policymakers decided that the over-time work model of SES was the best way to deliver much-needed tutoring and academic enrichment to the low-income child. The legislative process reveals that ideology, rather than research, drove the debate and discussion on SES. In fact, at the time of NCLB's enactment, there was no research to support the effectiveness of SES in raising student achievement.¹⁵⁵ The following section discusses the role that SES played in the larger policy debate about education.

II: SES SELLS: THE COMPELLING NARRATIVE OF SES

The freedom offered by NCLB made the SES narrative a compelling one. Theoretically, families can choose among a variety of afterschool tutoring providers, without any of the usual financial constraints. Indeed, the story of SES as an escape hatch or "safety valve" for the low-income student trapped in a persistently failing school was told and retold to scores of representatives and senators at the reauthorization of the ESEA.¹⁵⁶ On April 23, 2002, Eugene W. Hickok, then Under Secretary of Education, testified before the Senate Health, Education, Labor and Pensions Committee regarding the reauthorization of the ESEA.¹⁵⁷ He touted NCLB as a "watershed event" because it embodied the key principles and themes that President George W. Bush had emphasized when he took office.¹⁵⁸ Second only to its renewed emphasis on accountability for results, Hickok believed that the increased choices for parents and students represented one of the major themes and messages of NCLB.¹⁵⁹

Under the school choice provision, elementary and secondary students may transfer to another public school within the same district if their original school fails to make AYP for two consecutive years.¹⁶⁰ Although the Clinton Administration's 1994 Improving America's Schools Act ("IASA")¹⁶¹ allowed school districts to use Title I dollars to fund intra-district choice programs, they were not required to do so until NCLB was enacted in January 2002.¹⁶² Even though NCLB increased students' intra-district choice, it is difficult to argue that the choice was meaningful given that students may only transfer within

"provider" as "a non-profit entity, a for-profit entity, or a local educational agency." *Id.* § 6316(e)(12)(B). The definition of portability is provided *infra* notes 191, 247.

¹⁵⁵ SUNDERMAN, *supra* note 98, at 5.

¹⁵⁶ See *What's Next for School Choice*, *supra* note 40, at 2 (statement of Rep. Boehner, Member, H. Comm. on Educ. & Workforce).

¹⁵⁷ *Implementation of the No Child Left Behind Act: Hearing Before the S. Comm. on Health, Educ., Labor, & Pensions*, 107th Cong. 8-12 (2002) (statement of Eugene W. Hickok, Under Sec'y, U.S. Dep't of Educ.).

¹⁵⁸ *Id.* at 9.

¹⁵⁹ *Id.*

¹⁶⁰ 20 U.S.C. § 6316(b)(1)(E)(i) (2006).

¹⁶¹ Improving America's Schools Act of 1994, Pub. L. No. 103-382, 108 Stat. 3518 (codified in scattered sections of 20 U.S.C.).

¹⁶² GAIL L. SUNDERMAN ET AL., NCLB MEETS SCHOOL REALITIES: LESSONS FROM THE FIELD 39 (2005).

their own district.¹⁶³ In addition, students may not transfer to any other school identified as one in need of improvement, even if there are other reasons for rendering it a better choice for that individual student, such as specific Advanced Placement courses or a vocational program.¹⁶⁴ State law may also thwart a student's attempt to transfer to a charter school in her school district.¹⁶⁵ Given these significant constraints, the effectiveness of NCLB's school transfer options is questionable.¹⁶⁶

NCLB also mandates that school districts require all Title I recipients who perform below the AYP target for three consecutive years to provide SES services for low-income students. For proponents of choice, and proponents of vouchers in particular, SES was NCLB's most significant triumph.¹⁶⁷ Proponents touted this achievement as monumental, not because it required Title I schools to provide tutoring,¹⁶⁸ but solely because of SES's structure.¹⁶⁹ Title I had always featured tutoring, whether on a one-to-one or small group basis,¹⁷⁰ yet SES differed from prior iterations of the ESEA in which tutoring had been provided by school personnel during the school day.

Thus, NCLB embodied a significant shift in the method through which students received tutoring. Specifically, the Act requires that school districts provide eligible students with SES in addition to instruction provided during the school day.¹⁷¹ Therefore, school districts may only provide SES services after school, on weekends, or during the summer—in other words, during out-of-school time.¹⁷² Most importantly, NCLB prohibits individual schools identified for school improvement from implementing their own tutoring programs

¹⁶³ 20 U.S.C. § 6316(b)(i); *see also* Peterson, *supra* note 7, at 43 (pointing out that the transfer “option is being exercised by no more than 1 percent of eligible families”).

¹⁶⁴ *See* 20 U.S.C. § 6316(b)(1)(E)(i).

¹⁶⁵ *See id.*

¹⁶⁶ *See* Goodwin Liu, *Real Options for School Choice*, N.Y. TIMES, Dec. 4, 2002, at A31, available at <http://www.nytimes.com/2002/12/04/opinion/real-options-for-school-choice.html?sec=&spn=pagewanted=all>.

¹⁶⁷ “Supplemental educational services represents a major tenant of [NCLB], that is, that competition will produce better educational opportunities for disadvantaged students than the public schools provide and that accountability for individual student achievement will improve the performance of low performing schools.” SUNDERMAN & KIM, *supra* note 9, at 5.

¹⁶⁸ *See* George Farkas & Rachel E. Durham, *The Role of Tutoring in Standards-Based Reform*, in STANDARDS-BASED REFORM AND THE POVERTY GAP: LESSONS FOR NO CHILD LEFT BEHIND 203, 204 & n.3 (Adam Gamoran ed., 2007) (“Title I schools are those that enroll a high percentage of students from low-income households.”).

¹⁶⁹ Peterson, *supra* note 7, at 46. In discussing the new suppliers entering an intensely competitive market through SES, Peterson remarks that “the afterschool initiative could turn out to be the most important NCLB reform after all.” *Id.*

¹⁷⁰ Farkas & Durham, *supra* note 168, at 204.

¹⁷¹ 20 U.S.C. § 6316(e)(12)(C)(i) (2006).

¹⁷² Farkas & Durham, *supra* note 168, at 205. “Out-of-school time” refers to non-school hours and has become a commonly used term in research and policy circles. *See, e.g.*, National Institute on Out-of-School Time at the Wellesley Centers for Women, <http://www.niost.org/> (last visited Feb. 28, 2010); Northwest Regional Educational Laboratory, Afterschool/Out of School Time Resources, <http://educationnorthwest.org/resource/537> (last visited Feb. 28, 2010); Harvard Family Research Project, Out-of-School Time Program Research & Evaluation Database, <http://www.hfrp.org/out-of-school-time/ost-database-bibliography/database> (last visited Feb. 28, 2010).

to provide students with SES.¹⁷³ Instead, the school district must allocate twenty percent of its Title I funds towards both purchasing tutoring services from the “market” newly formed under NCLB,¹⁷⁴ as well as transporting students who choose the school transfer option.¹⁷⁵

Some observers regard this provision as the “furthest advance of privatization efforts within public schooling.”¹⁷⁶ On the other hand, educators, particularly teachers’ unions, disliked the mandate that schools spend such a large portion of Title I funds to purchase a supplemental service.¹⁷⁷ However, proponents successfully countered such criticism by focusing on the potential benefit to low-income children in under-performing schools. Essentially, proponents argued that the SES approach was necessary to reverse the previous direction of Title I legislation that aimed to provide funding for school-wide programs coordinated with the regular curriculum.¹⁷⁸ Specifically, the 1988 Hawkins-Stafford Amendments to ESEA¹⁷⁹ and the 1994 IASA “gave local school districts and schools greater flexibility to decide where and how to use the federal Title I resources.”¹⁸⁰ In addition to providing flexibility, this earlier legislation encouraged schools to adopt school-wide programs¹⁸¹ and provided local school staff with increased flexibility in addressing the needs of their students.¹⁸²

However, this flexibility was precisely what SES proponents argued should be stripped from local school staff.¹⁸³ In fact, they portrayed schools as failures in the effort to raise the performance level of low-income children, despite augmenting the regular school day with their allotment of Title I funds.¹⁸⁴ A number of studies support the premise that Title I’s original design simply did not address the needs of disadvantaged students or improve their learning.¹⁸⁵ Thus, the 2002 ESEA amendments responded to the perceived

¹⁷³ See 20 U.S.C. § 6316(e)(1).

¹⁷⁴ Beetlestone & Lipsett, *supra* note 91, at 812 (“By guaranteeing funding to private providers to tutor children, the law created a market ‘overnight’ in the words of the head of one company ‘founded in response’ to the SES mandate.”).

¹⁷⁵ See 20 U.S.C. § 6316(b)(10)(A)(i), (iii).

¹⁷⁶ Farkas & Durham, *supra* note 168, at 205.

¹⁷⁷ Peterson, *supra* note 7, at 47-48.

¹⁷⁸ SUNDERMAN ET AL., *supra* note 162, at 58.

¹⁷⁹ Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988, Pub. L. No. 100-297, 102 Stat. 130 (codified as amended in scattered sections of 20 U.S.C.).

¹⁸⁰ SUNDERMAN ET AL., *supra* note 162, at 58.

¹⁸¹ *Id.*

¹⁸² *Id.* at 59.

¹⁸³ “Underlying supplemental services is the assumption that academic instruction provided outside the regular school day by public and private organizations will be able to do what schools could not—raise the achievement of students in consistently poorly performing schools.” SUNDERMAN & KIM, *supra* note 9, at 6.

¹⁸⁴ Emily Suski, *Actually, We Are Leaving Children Behind: How Changes to Title I Under the No Child Left Behind Act Have Helped Relieve Public Schools of the Responsibility for Taking Care of Disadvantaged Students’ Needs*, 14 GEO. J. ON POVERTY L. & POL’Y 255, 271 (2007).

¹⁸⁵ *Id.* at 258. A study published in 1997, *Prospects: The Congressionally Mandated Study of Educational Growth and Opportunity*, revealed that the use of Title I funds had not been successful in closing the achievement gap between disadvantaged students and their more

incompetence and inability of public schools to utilize Title I funds to benefit those students most at risk.¹⁸⁶ Exploring ways school staff could use the funds more effectively and examining whether these more effective approaches would require additional funding was placed on the backburner. Instead, these studies' findings ushered in new ideas and proposals and provided strong support for proponents of market theories and school choice.¹⁸⁷ Ideology rather than research drove the shift in policy. Thus, SES was merely a tool utilized to further an ideological agenda. Professor Peterson summarized by writing, "[F]or those who think that choice and competition are the key to school reform, the afterschool intervention is the most promising vehicle currently available."¹⁸⁸

NCLB used children to test these assumptions. Clint Bolick, best known for his work defending state-based school choice programs, described the portability of public funds in the educational setting.¹⁸⁹ In 2000, he supported a plan that would "put an equal amount of money on the back of every school-child[.]"¹⁹⁰ Here, Bolick depicted schoolchildren as little workers upon whose backs federal money would be loaded and carried. The words Bolick chose are significant, not only because they foreshadowed what later occurred when SES was enacted, but because of the analogy he drew between the child's simultaneous roles as student and laborer. With the advent of SES, the portability¹⁹¹ of federal Title I funds was featured in federal education legislation for the first time.¹⁹² SES asks individual low-income students to assist in an ideologically motivated experiment because it places the burden of working to improve the school's performance under NCLB on their shoulders alone.

Ultimately, SES funding was secured without any research in place to support its effectiveness.¹⁹³ Sandra Feldman asked Congress why it was not implementing "things that we know work, on the basis of solid research evidence, for the education of poor children."¹⁹⁴ Specifically, she asked why all poor children were not being provided with an extended school day and an

advantaged counterparts. *Id.* at 271. The *Prospects* study, in addition to other studies conducted, highlighted the fact that the schools had utilized Title I funds in relatively traditional ways, such as to support remedial instruction and pull-out services for a small portion of the school day and to hire staff, many of which were instructional aides without college degrees. *Id.*

¹⁸⁶ *Id.* at 258.

¹⁸⁷ *Id.* at 271-72.

¹⁸⁸ Peterson, *supra* note 7, at 48; see Suski, *supra* note 184, at 272.

¹⁸⁹ Goldwater Inst., Profile of Clint Bolick, <http://www.goldwaterinstitute.org/expert/104> (last visited Feb. 28, 2010).

¹⁹⁰ Lamar Alexander et al., *Is a Grand Bargain Between Left and Right Possible?*, 572 ANNALS AM. ACAD. POL. & SOC. SCI. 115, 119 (2000).

¹⁹¹ Portability describes "[t]he idea that [federal] dollars should follow the child in the form of a per-pupil allocation." SUNDERMAN & KIM, *supra* note 9, at 8; see also *infra* note 247.

¹⁹² See Suski, *supra* note 184, at 273; see also Andrew Rudalevige, *No Child Left Behind: Forging a Congressional Compromise*, in *NO CHILD LEFT BEHIND?: THE POLITICS AND PRACTICE OF SCHOOL ACCOUNTABILITY* 23, 27 (Paul E. Peterson & Martin R. West eds., 2003).

¹⁹³ "[A]s of 2005-06, no state had conducted an evaluation on the effects of SES providers on student achievement . . ." SUNDERMAN, *supra* note 98, at 3 (citation omitted).

¹⁹⁴ Alexander et al., *supra* note 190, at 126.

extended school year, in order to deliver services such as tutoring, enrichment, or extra support.¹⁹⁵ The focus, according to Feldman, was not on the actual needs of poor children but on “abstract rhetoric about choice [and] competition[.]”¹⁹⁶

Policymakers were so open to this new direction because, by this point, the prevailing sentiment in Washington was that public schools had failed and it was time to give others a chance to get the job right.¹⁹⁷ Representative John Boehner, a Republican from Ohio, observed, “[W]e can’t turn our backs on children trapped in endlessly underachieving schools, either. When schools do not teach and do not change, even after repeated efforts to turn them around, there must be a safety valve for the students.”¹⁹⁸ This one statement captured both the appeal and the promise of SES. After all, with desires for school improvement remaining little more than a vague hope for the future and precious years of schooling rapidly passing by, what were children to do? Indeed, SES appeared to offer poor children a tangible advantage that their wealthier counterparts had always enjoyed: a choice to vote with their feet and seek better services elsewhere. Nina S. Rees, Deputy Under Secretary for Innovation and Improvement at the U.S. Department of Education, acknowledged as much in her testimony to Congress: “But the process of turning around a troubled school can take time, and during the school improvement process, parents of children attending a school identified for improvement must have options for ensuring that those children receive high-quality educational services.”¹⁹⁹

In fact, numerous witnesses provided a great deal of testimony on the failing state of our school system to Congress. For example, Dr. Roderick R. Paige, then Secretary of Education, testified before Congress in 2001 and delivered the message that “no child should be trapped in a persistently failing school.”²⁰⁰ Additionally, Under Secretary of Education, Eugene Hickok, echoed those remarks just a couple years later.²⁰¹ In 2002, House Majority Leader Dick Armey stated to the House Education and the Workforce Commit-

¹⁹⁵ *Id.* at 127.

¹⁹⁶ *Id.* at 128.

¹⁹⁷ See Peterson, *supra* note 7, at 46 (addressing privately run afterschool programs).

¹⁹⁸ *What's Next for School Choice*, *supra* note 40, at 2 (statement of Rep. Boehner, Member, H. Comm. on Educ. & Workforce).

¹⁹⁹ *No Child Left Behind's Education Choice Provisions: Are States and School Districts Giving Parents the Information They Need?: Field Hearing Before the Subcomm. on Educ. Reform of the H. Comm. on Educ. & the Workforce*, 108th Cong. 7-8 (2003) (statement of Nina S. Rees, Deputy Under Sec'y for Innovation & Improvement, U.S. Dep't of Educ.), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_house_hearings&docid=f:90143.pdf. Rees, previously an education analyst for the Heritage Foundation, had also worked with the Republican Party to emphasize many traditional Republican education positions such as choice, competition, accountability, local control, home schooling, and values. See PATRICK J. MCGUINN, *NO CHILD LEFT BEHIND AND THE TRANSFORMATION OF FEDERAL EDUCATION POLICY, 1965-2005*, at 155-56 (2006).

²⁰⁰ *Departments of Labor, Health and Human Services, Education, and Related Agencies Appropriations for Fiscal Year 2002: Hearing Before the H. Subcomm. of the H. Comm. on Appropriations*, 107th Cong. 11 (2001) (statement of Dr. Roderick R. Paige, Sec'y of Educ.).

²⁰¹ *Departments of Labor, Health and Human Services, Education, and Related Agencies Appropriations for 2004: Hearing Before the H. Subcomm. of the H. Comm. on Appropriations*, 108th Cong. 116 (2003) (statement of Eugene W. Hickok, Under Sec'y of Educ.).

tee that “[a]lthough so much of a child’s future is determined by grades K-12, no federal program exists to provide these students with the option of choosing a better alternative.”²⁰² Clint Bolick testified before the House Committee on Education and the Workforce that “[p]ublic school options are inadequate.”²⁰³

The disparaging testimony about the public school system was presented in tandem with evidence that parents embraced choice. For example, Dick Arme y’s congressional testimony included a Phi Delta Kappa poll showing that fifty-two percent of public school parents supported initiatives to allow them to choose the schools their children attend.²⁰⁴ Moreover, he added that the Joint Center for Political and Economic Studies in Washington found that seventy-four percent of African-American parents favored school choice.²⁰⁵ Proponents of SES focused on the dilemma of low-income parents who desired choice but had no meaningful options. Representative Arme y pointed out to Congress that educational choice was already widely exercised by both senators and representatives.²⁰⁶ He questioned the grounds on which such a right could then be denied to scores of public school parents clamoring for the same.²⁰⁷ He stated:

Take the word of 131 of our colleagues here in the House and 41 of our colleagues in the Senate who have school-age children at home. They choose to use their own money to exercise school choice and send at least one of their children to a private school instead of their local public school.²⁰⁸

However, despite the rhetoric, none of the proposed solutions would enable a low-income child to enjoy a private school education entirely at public expense. NCLB’s limited intra-district school transfer option had also done nothing to “alter the basic geography of educational inequality.”²⁰⁹ As designed, the choice provided by NCLB was limited, at best, and irrelevant, at worst. While SES provided a tangible offering during out-of-school time, it certainly was not the same as a Congresswoman’s ability to pay for her child to receive an exclusive private school education. Irrespective of these facts, the

(“When schools do not improve, *No Child Left Behind* protects students and their parents by requiring new choices to ensure that no child is trapped in a low-performing school.”).

²⁰² *What’s Next for School Choice*, *supra* note 40, at 52 (statement of Rep. Arme y, Majority Leader, U.S. H. of Reps.).

²⁰³ “*Empowering Success: Flexibility and School Choice*”: *Hearing Before the H. Subcomm. on Educ. Reform of the H. Comm. on Educ. & the Workforce*, 107th Cong. 66 (2001) (statement of Clint Bolick, V.P. & Litig. Dir., Inst. for Justice).

²⁰⁴ *What’s Next for School Choice*, *supra* note 40, at 53 (statement of Richard K. Arme y, Majority Leader, U.S. H. of Reps.).

²⁰⁵ A poll commissioned last year by Phi Delta Kappa, a professional teacher’s association opposed to school choice, found that 52 percent of public school parents supported initiatives to allow them to choose the schools their children attend. The Joint Center for Political and Economic Studies in Washington found that 57 percent of African-Americans favored school choice. Among African-Americans with children, that number soars to 74 percent.

Id.

²⁰⁶ *Id.* at 55.

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ Liu, *supra* note 166, at A31.

disingenuous rhetoric continued throughout ESEA's reauthorization and persists in today's debate.²¹⁰

Putting the merits of the arguments aside, our elected officials ultimately supported SES because it appeals to broad-based constituencies. Professor Goodwin Liu points out that "[t]he politics of choice do not fall neatly into a liberal versus conservative dichotomy. For instance, although many religious and free-market conservatives support choice, so do many liberal members of the Democratic Party, namely minority parents in central cities who want better school options."²¹¹ Parents in several communities, including Birmingham, Los Angeles, and Newark, showed strong evidence of parental support for SES when they took legal action against school officials who failed to notify them about this choice under NCLB.²¹²

SES also has received the support of prominent civil rights organizations, including the Leadership Conference on Civil Rights.²¹³ The civil rights dimension emerged when proponents touted SES as a mechanism to level the playing field between low-income children and their more affluent counterparts.²¹⁴ Indeed, an "odd combination of forces [] came together on NCLB"²¹⁵ when the NAACP filed a motion to intervene in a lawsuit in support

²¹⁰ See Peterson, *supra* note 7, at 46. According to a recent article in *Education Next*, federal officials have argued that "if the school district can't educate students during the regular school day, it's time to let others have a chance after the bell rings." *Id.* During the March 9, 2006 hearing held on FY 2007 appropriations for the education department, U.S. Representative Anne M. Northup (R-KY) made the following comments:

I know a lot of people here have talked about the after-school programs that have been run through the Department of Education, but I'm sorry; they're run by the same people that are running the failing schools that these kids are in. And they were not really achieving anything in those after-school programs.

U.S. Representative Ralph Regula (R-OH) Holds a Hearing on Fiscal Year 2007 Appropriations for the Department of Education: Hearing Before the H. Subcomm. on Appropriations and H. Comm. on Labor, HHS, Education and Related Agencies, 109th Cong. (2006) (statement of U.S. Rep. Anne M. Northup (R-KY), Vice Chairman).

²¹¹ Liu, *supra* note 166, at A31.

²¹² *Quality and Access*, *supra* note 88, at 53 (statement of Dianne M. Piché, Exec. Dir., Citizens' Comm'n on Civil Rights). In her statement, Piché provided background information on one grandparent's decision to enlist the assistance of an attorney in order to obtain SES for her grandchild:

At [the school's] failure to respond to Ms. Green's SES Request Form, Ms. Green verbally inquired about SES for her grandchild. [The school] failed to respond to her additional request. As a result, her grandchild continued to attend a Failing School while being denied the educational benefits he would have derived from receiving SES. Ms. Green was only able to obtain SES for her grandchild through the intervention of legal counsel.

Id. (alteration in original) (citation omitted). For information about the case filed by parents and guardians in New Jersey, see *Newark Parents Ass'n v. Newark Public Schs.*, 547 F.3d 199 (2008).

²¹³ *Quality and Access*, *supra* note 88, at 51.

²¹⁴ *Id.*

²¹⁵ MCGUINN, *supra* note 199, at 169 (interviewing Patty Sullivan, education analyst for the Council of Chief State School Officers).

of the federal government's position against the State of Connecticut's attempt to avoid many of its obligations under NCLB through litigation.²¹⁶

Ultimately, SES turned out to be the perfect vehicle for the choice movement to sell its message to the American people.²¹⁷ Simplistic in its appeal, but historically beyond the financial means of most families, access to tutoring was sold as a common-sense solution to a very complex problem. Tutoring reemerged at the beginning of the twenty-first century as a prominent education phenomenon.²¹⁸ Unfortunately, low-income students and their families have historically faced financial hurdles in accessing this tutoring market because private tutoring is the most commonly available form of tutoring across the United States.²¹⁹ In stark contrast, the practice has become commonplace among families with the financial means to hire a tutor.²²⁰ In 2007, a Maryland Assistant Superintendent told a congressional subcommittee it should support SES because "[e]very educator [she knows] whose own child is struggling first turns to a tutor."²²¹ This belief in the value of tutoring extends well beyond the education community. A *Newsweek* poll in 2000 "found that 42 percent of Americans believe there is a 'great need' for children to receive private, outside tutoring."²²² By 2002, when NCLB was enacted, "tutoring ha[d] grown to a \$5 billion to \$8 billion professional service industry."²²³ Within the last few years, it is estimated that the total private and public investment in tutoring has grown to between \$8 and \$12 billion.²²⁴ The advent of SES has provided this growing industry with even greater momentum by channeling federal funds to providers of tutoring services.²²⁵

SES may be here to stay. Not only have leaders from diverse political constituencies voiced their support for its continuation, but some are seeking to expand SES so that it can serve greater numbers of children.²²⁶ One example is provided by Stephanie Jones, Executive Director of the National Urban League. Jones testified to the House Committee on Education and Labor and stated her organization's recommendation that "SES eligibility requirements be changed to offer immediate academic support to all students not proficient, rather than have them wait 3 years before they can receive desperately needed academic

²¹⁶ See *Connecticut v. Spellings*, 453 F. Supp. 2d 459, 466 (D. Conn. 2006) (noting that numerous groups, including the NAACP through its motion to intervene, "request[ed] to participate in the proceedings").

²¹⁷ See Peterson, *supra* note 7, at 48.

²¹⁸ GORDON ET AL., *supra* note 136, at 27.

²¹⁹ *Id.* at 28.

²²⁰ See Peterson, *supra* note 7, at 44-45.

²²¹ *Quality and Access*, *supra* note 88, at 31 (statement of Ann Chafin, Ass't State Superintendent for Student, Family & Sch. Support, Md. State Dep't of Educ.).

²²² GORDON ET AL., *supra* note 136, at 27 (citation omitted).

²²³ *Id.* (citation omitted).

²²⁴ *Id.*

²²⁵ See *id.* at 28.

²²⁶ Eugene W. Hickok, the former Deputy Secretary of Education under President George W. Bush, currently lobbies on behalf of SES providers. Beetlestone & Lipsett, *supra* note 91, at 815. See *infra* note 237 and accompanying text for evidence of a liberal endorsement of the expansion of SES.

support.”²²⁷ Moreover, proponents of choice and competition in education share this sentiment.²²⁸

Professor Peterson predicted that “if school districts are unable to stop program growth, and if Title I funding continues its steady growth . . . , the afterschool program could expand to more than ten times its 2004 size.”²²⁹ In fact, President Obama’s Recovery Act appropriated an additional \$10 billion for Title I.²³⁰ However, the appropriation for Title I grants to school districts under the fiscal year 2010 budget is \$1.5 billion less than the regular 2009 level.²³¹ The U.S. Department of Education has acknowledged that the \$1.5 billion will be redirected to other programs and initiatives believed to “effectively improve low-performing schools.”²³² As such, it may become evident in the near future that, despite overall increases to federal education funding under President Obama, a small part of the current Administration’s plan is to defund SES. But it is too early to tell whether SES will slowly lose its funding stream.

It also is worth noting that Secretary of Education Arne Duncan has close ties to afterschool tutoring; he took a year off from studying sociology at Harvard to tutor Chicago children.²³³ Moreover, Mr. Duncan’s mother founded and ran an afterschool Chicago tutoring program for forty-eight years,²³⁴ in which Secretary Duncan spent much of his childhood.²³⁵ It is not surprising, then, that the Secretary of Education has embraced afterschool and summer learning programs as a key ingredient of reform.²³⁶ Perhaps most hopeful is the fact that Secretary Duncan’s position on tutoring may come close

²²⁷ *Reauthorization of the Elementary and Secondary Education Act of 1965: Hearing Before the H. Comm. on Educ. & Labor*, 110th Cong. 113 (2007) (statement of Stephanie J. Jones, Exec. Dir., Nat’l Urban League).

²²⁸ See Peterson, *supra* note 7, at 47-48.

²²⁹ *Id.* at 44.

²³⁰ U.S. Dep’t of Educ., AMERICAN RECOVERY AND REINVESTMENT ACT OF 2009: TITLE I, PART A FUNDS FOR GRANTS TO LOCAL EDUCATION AGENCIES (Apr. 1, 2009), <http://www.ed.gov/policy/gen/leg/recovery/factsheet/title-i.html>.

²³¹ U.S. DEP’T OF EDUC., FISCAL YEAR 2010 BUDGET SUMMARY AND BACKGROUND INFORMATION 6 (2009), available at <http://www.ed.gov/about/overview/budget/budget10/summary/10summary.pdf> (last visited Feb. 28, 2010).

²³² *Id.*

²³³ *Times Topics: Arne Duncan*, NYTIMES.COM, http://topics.nytimes.com/top/reference/timestopics/people/d/arne_duncan/index.html (last visited Feb. 28, 2010).

²³⁴ *Id.* However, Mr. Duncan also gained publicity in 2005 when, as Chief Executive of the Chicago schools, he continued the city’s tutoring program even after Department of Education officials demanded that it be shut down. Then Secretary of Education Margaret Spellings responded with the announcement that she would “allow the Chicago Public Schools to run federally financed tutoring programs for students at low-performing schools, despite Chicago’s failure to meet academic goals.” Sam Dillon, *Education Law Is Loosened for Failing Chicago Schools*, N.Y. TIMES, Sept. 2, 2005, at A12. It is not clear whether Mr. Duncan, as Secretary of Education, will choose to make similar arrangements available to other districts on academic probation under the statute.

²³⁵ “I grew up in my mother’s after-school program in Chicago, so I know firsthand the importance of after-school and summer programs.” *Departments of Labor, Health and Human Services, Education, and Related Agencies Appropriations for 2010: Hearings Before the H. Subcomm. on Appropriations*, 111th Cong. 466 (2009) (statement of Arne Duncan, Sec’y, Dep’t of Educ.).

²³⁶ *Id.*

to embracing the compulsory, rather than the voluntary, overtime model.²³⁷ Of course, whether or not such efforts ultimately succeed in helping struggling students catch up with their peers depends upon whether school districts make the extended school day, week, and year envisioned by Secretary Duncan voluntary or compulsory.²³⁸ For now, no requirement has been enacted to make federal education funding absolutely contingent upon a state's or district's provision of a compulsory, extended school day.²³⁹ Instead of continuing to invest disproportionate time, energy, and resources into what is, at best, supplemental help, it is high time to focus resources on the compulsory components of public education.

If the ramifications of SES escaped attention at NCLB's inception, it is understandable because they affected only a small number of students.²⁴⁰ After all, this intervention did not deal with the particulars of the regular school day, which affects all students within a public school system. Rather, it focused on an option reserved for a small segment of students and designed to take place exclusively during out-of-school time. In hindsight, this initially overlooked provision has grown to become one of NCLB's costliest components.²⁴¹

SES also stands out as one of the Act's most problematic policy choices because it only provides a "safety valve" for a select few students. SES is problematic, not because it advances an approach to school reform often associated with the political right, but because it advances the troubling premise that the public school system is a broken entity that can only be fixed by entrepreneurial students, their families, and administrators of small programs

²³⁷ Secretary Duncan gave a speech at the National Science Teachers Association Conference in which he stated:

One of the first areas where we can foster innovation is the amount of time our students spend learning. Other top-performing countries do not take two months off in the summer. They do not dismiss students at two in the afternoon. Instead, they spend 30 or 40 more days per year in school and offer safe, constructive activities that keep kids learning. We must expand quality after-school programs and rethink the school day to incorporate more time—whether that's by extending hours or offering more summer school.

Press Release, U.S. Dep't of Educ., Secretary Arne Duncan Speaks at the National Science Teachers Association Conference (Mar. 20 2009), available at <http://www.ed.gov/news/speeches/2009/03/03202009.html>.

²³⁸ "U.S. Secretary of Education Arne Duncan is pushing for [a longer school year]. 'I think our school day is too short. I think our school week is too short. I think our school year is too short,' Duncan said." Sally Holland, *Despite Push, Year-Round Schools Get Mixed Grades*, CNN.com, Sept. 10, 2009, <http://www.cnn.com/2009/US/09/04/us.year.round.schools/>.

²³⁹ Under the Race to the Top Fund, referred to in the American Recovery and Reinvestment Act as the State Incentive Grant Fund, \$4.3 billion has been allocated for incentives and rewards for states in the process of implementing certain education reforms. Race to the Top Fund, 74 Fed. Reg. 37,804, 37,804 (proposed July 29, 2009), available at <http://www.ed.gov/legislation/FedRegister/proprule/2009-3/072909d.pdf>. One of the proposed priorities to be considered by the U.S. Department of Education in considering applications from states relates to "[s]chool-[l]evel [c]onditions for [r]eform and [i]nnovation." *Id.* at 37,806. Included as one of the "flexibilities and autonomies conducive to reform and innovation" is the implementation of "new structures and formats for the school day or year that expand learning time." *Id.*

²⁴⁰ See SUNDERMAN ET AL., *supra* note 162, at 64.

²⁴¹ Burch et al., *supra* note 123, at 120 (noting that the funds available for SES increased from \$1.75 billion in FY 2001 to approximately \$2.55 billion in FY 2005).

who possess the energy, motivation, and skills that public schools lack as a whole.²⁴² This dangerous idea—that voluntary overtime is the only viable solution to the problem of “failing” schools—has been embraced by both the left and the right.

III: THE LEFT’S EMBRACE OF OVERTIME WORK

SES’s design does not derive from a purely conservative approach to education reform. Although SES relies on a partnership between the public and private spheres, the truth is that, at various times in our Nation’s history, both liberals and conservatives have concluded that “existing public institutions [are] incapable of making the changes needed to create effective learning environments.”²⁴³ In addition, SES’s voluntary overtime mechanism, which performs a gatekeeping function by reducing the number of students able to benefit from tutoring, is a staple feature of many of the most prominent educational interventions spearheaded by the political left throughout the last fifty years.²⁴⁴ Finally, the fact that both political constituencies view voluntary overtime as a viable solution suggests that the federal response to education can best be described, in the words of Ann Bastian, as one that is intent on “building more lifeboats, not better ships.”²⁴⁵

First, with respect to SES’s public/private partnership, it is certainly true that conservatives have most frequently advocated looking to entities outside of the public school system to improve education when defending a market-based approach to education reform.²⁴⁶ And, as was noted earlier, the SES provision, with its portability feature, represented a tremendous victory for proponents of vouchers.²⁴⁷ Additionally, critics have argued that SES and the portability of

²⁴² Alexander et al., *supra* note 190, at 126 (“We have to make a system in which schools that work for poor kids are not just the achievement of extraordinary people doing extraordinary things but are instead an ordinary event.”).

²⁴³ James Forman, Jr., *Do Charter Schools Threaten Public Education? Emerging Evidence from Fifteen Years of a Quasi-Market for Schooling*, 2007 U. ILL. L. REV. 839, 850 (2007).

²⁴⁴ Voluntary overtime programs for students operated in 69% of Title I schools during the 1999-2000 school year “and in 30% of Title I schools, these extended day programs were funded by Title I.” DAVID P. SMOLE, SUPPLEMENTAL EDUCATIONAL SERVICES FOR CHILDREN FROM LOW-INCOME FAMILIES UNDER ESEA TITLE I-A, CRS REPORT FOR CONGRESS 2 (2004).

²⁴⁵ Ann Bastian, *Is Public School “Choice” a Viable Alternative?*, in *RETHINKING SCHOOLS: AN AGENDA FOR CHANGE* 205, 206 (David Levine et al. eds., 1995).

²⁴⁶ John Chubb and Terry Moe gained prominence in the 1990s by making this argument in support of school choice. Forman, Jr., *supra* note 243, at 850. *But see* IVAN ILLICH, *DESCHOOLING SOCIETY* 4 (New York, Harper & Rowe 1971); PAUL GOODMAN, *COMPULSORY MIS-EDUCATION AND THE COMMUNITY OF SCHOLARS* 12 (Vintage Books 1964) (1962). The works of Ivan Illich and Paul Goodman reveal that such a view is not the exclusive province of political conservatives.

²⁴⁷ Supplemental educational services emerged as a policy derivative from the idea of ‘portability,’ a concept developed in a series of papers published in 1999 by the Fordham Foundation (Kanstoroom & Finn, 1999). In one of the papers, Ravitch (1999) argued that Title I funding had created an ‘unwieldy bureaucracy’ and that ‘the most direct way to reform Title I—and cut its bureaucracy down to size—would be to convert it to a portable entitlement, available to its intended recipients for educational services’ (p.143). The idea that dollars should follow the

Title I funds stems from market theories and assessment and accountability theories.²⁴⁸ Market theory envisions parents as consumers while assessment and accountability theories hold that schools and teachers will be motivated to change or improve their techniques if faced with consequences for failure to produce academic achievement.²⁴⁹ Consequently, the immediate result of Title I fund portability has been an influx of private entities into the educational fray.²⁵⁰ In fact, in the 2004-2005 school year alone, about half of state-certified SES providers nationwide were private, for-profit companies.²⁵¹ Similar to vouchers and charter schools, it is possible to put a purely conservative spin on the nature of the SES provision. Robert Lowe writes on the topic and argues that “[c]urrent efforts to promote an educational marketplace through choice trace directly to the work of conservative economist Milton Friedman.”²⁵²

However, ending a critique of SES here would be incomplete and do a disservice to the larger and more substantive question: How we can move forward with a school reform agenda that prioritizes our Nation’s lowest-performing schools and *all* of the children currently entrusted to their care? If we simply confine our analysis of SES and the voluntary overtime approach to a conservative ideology, we will miss the fact that the approach is pervasive

child in the form of a per-pupil allocation was taken up by Senator Judd Gregg (R-NH) in his proposal to re-authorize the Elementary and Secondary Education Act (ESEA) and Title I in 1999-2000. In this proposal, the ability to purchase educational services from an instructional service provider was part of a larger portability proposal. While the portability proposal was defeated, the No Child Left Behind Act of 2001 (NCLB) retained the idea of supplemental educational services as one of the school improvement alternatives available to students in low performing schools. The idea was not based on previous experience or research but represented a political compromise between supporters and opponents of vouchers.

SUNDERMAN & KIM, *supra* note 9, at 8; *see also* Suski, *supra* note 184, at 273; Rudalevige, *supra* note 192, at 37.

²⁴⁸ Since the 1980s, political support both in the United States and abroad has grown for the idea that government contracts with the private sector are the key to improved public sector performance (Apple, 2001; Ball, 1993; Savas, 1987). Supplemental educational services are part of this trend. Political arguments for outsourcing are based on the idea that market strategies of choice and competition are a necessary and sufficient condition for improving the quality of services while reducing costs.

Burch et al., *supra* note 123, at 117; *see* Suski, *supra* note 184, at 273; SUNDERMAN & KIM, *supra* note 9, at 6.

While previously in other federal education programs, private non-profit and for-profit providers delivered services under contract, tutorial assistance subgrants marked the first direct opportunity for parents to select a private entity to provide educational services to their children. Some believed that this might be a first step toward publicly funded school vouchers.

SMOLE, *supra* note 244, at 2.

²⁴⁹ Suski, *supra* note 184, at 273.

²⁵⁰ “Nationwide, the number of approved providers [of SES] increased from 997 in late April 2003 to 1,890 in early May, 2004, an increase of 90%. . . . Between 2001 and 2004, the first 3 years of NCLB’s implementation, the tutoring services industry enjoyed the highest growth rates in the combined pre-K and K-12 education industry.” Burch et al., *supra* note 123, at 120.

²⁵¹ “Next most common were private nonprofits, constituting about 18 percent of certified providers.” Farkas & Durham, *supra* note 168, at 205. “Familiar names such as Sylvan, Edison Schools, The Princeton Review, and PLATO Learning are represented.” *Id.* at 204.

²⁵² Robert Lowe, *The Perils of School Vouchers*, in *RETHINKING SCHOOLS: AN AGENDA FOR CHANGE*, *supra* note 245, at 191, 191.

throughout school reform initiatives generally. We should be concerned with the problem that so many educational interventions are offered exclusively through an overtime work approach, thereby ensuring their availability for only a select group of students. There are two issues we must address to move beyond the critique of SES as a uniquely conservative invention: that only the right favors public/private partnerships and that voluntary overtime work for students is only present in educational programs favored by political conservatives. Both assertions are incorrect.

The first misguided characterization present in critiques of SES is that only the right favors privatization while the left operates purely in the public sphere. Professor Gary Peller writes that “[t]he association of advocates of the public arena with *progressive* social reform and advocates of the private realm with *conservative* social ideology is clearly over[.]”²⁵³ Instead, we should note at the outset that “the move to the private may not necessarily be always, in all contexts, a conservative political move.”²⁵⁴ Although SES looks to outside providers, many of which are for-profit private entities, to deliver academic tutoring to students languishing in public schools,²⁵⁵ the claim that this approach somehow perverts the public mission of our educational system is of “dubious validity.”²⁵⁶ Frederick Hess argues that the question we should be asking ourselves is “[g]iven our shared objectives, what will help educate our children—as individuals and as citizens—most effectively?”²⁵⁷

And, if we succeed in helping individual students raise their academic achievement by bringing in outside entities, as envisioned by SES’s framers, we arguably have fulfilled a public purpose by enabling children to learn.²⁵⁸ Professor James Forman adds that “government increasingly relies on nongovernment actors, including private firms, to achieve public ends.”²⁵⁹ Professor Martha Minow also points out that the line between public and private has become blurred in many instances. Specifically, she points to the fact that many private non-profit organizations rely on government funding to perform important work in the field of education, health, and social welfare.²⁶⁰

²⁵³ Gary Peller, *Public Imperialism and Private Resistance: Progressive Possibilities of the New Private Law*, 73 DENV. U. L. REV. 1001, 1002 (1996).

²⁵⁴ Nancy Ehrenreich, *The Progressive Potential in Privatization*, 73 DENV. U. L. REV. 1235, 1237 (1996).

²⁵⁵ See *supra* note 26 (defining “provider” under NCLB); *supra* note 154 (explaining the consequences under NCLB for schools that fail to make AYP).

²⁵⁶ “In 1969, the Office of Economic Opportunity (‘OEO’), which was created to execute President Lyndon Johnson’s War on Poverty, launched a voucher experiment” in Alum Rock, California. Carol Ascher, “. . . And It Still Is News”: *The Educational Inequalities That Have Brought Us Vouchers*, 1998 ANN. SURV. AM. L. 205, 207. Ultimately, only eighteen percent of parents chose to utilize their vouchers to take their children out of the neighborhood schools, and the voucher experiment concluded in 1976. *Id.* at 208.

²⁵⁷ FREDERICK M. HESS, PROGRESSIVE POL’Y INST., MAKING SENSE OF THE “PUBLIC” IN PUBLIC EDUCATION 5 (2002).

²⁵⁸ *Id.* at 4.

²⁵⁹ Forman, Jr., *supra* note 243, at 839.

²⁶⁰ Martha Minow, *Partners, Not Rivals?: Redrawing the Lines Between Public and Private, Non-Profit and Profit, and Secular and Religious*, 80 B.U. L. REV. 1061, 1074 (2000). *But see id.* at 1082 (“[B]lurring the public/private line can jeopardize any sense of public obligation to provide social services, aid to the poor, health care, and even schooling.”).

Such efforts may be characterized as public because they aim to “benefit the broader community. . .”²⁶¹ Not exactly a recent phenomenon, the left’s embrace of these partnerships can be traced back at the very least and perhaps most notably to the Great Society programs enacted under President Lyndon B. Johnson.²⁶²

There exist many concrete examples of the left’s embrace of the private sphere in the field of education. One example can be found in the free schools, arising in the late 1960s and lasting through the mid-1970s.²⁶³ In the 1960s, reformers wishing to challenge the educational establishment status quo developed the free schools as an alternative to the public system for students.²⁶⁴ The free schools were the brainchild of progressive educators and activists such as John Holt who believed that public education could only be reformed *outside* the system.²⁶⁵ The prevailing sentiment among the founders of free schools was that the public school system was “unwilling or unable to meet the needs of poor and working-class black children.”²⁶⁶ Professor Forman writes that those behind free schools “believed the new small schools had to be outside the public system because the system was damaging children and too often unwilling to reform.”²⁶⁷

It is fascinating to observe the marked similarities that exist between the arguments advanced in support of free schools and SES. Just as progressive educators of the 1960s criticized the system’s inability to meet the needs of poor and working class black children,²⁶⁸ SES supporters utilized similar arguments. Specifically, SES supporters said that low-income students trapped in underperforming schools needed an escape hatch or “safety valve” to obtain the educational services lacking in public schools.²⁶⁹ One Chicago administrator stated: “When push comes to shove, we’re talking about children in desperate need of help. Should we just cross our fingers and wait? These children need these services. They need these services yesterday.”²⁷⁰

Another concrete example can be found in the private origin of the federal education program, GEAR UP. GEAR UP is designed to increase the number of low-income students who go on to pursue and succeed in postsecondary

²⁶¹ HESS, *supra* note 257, at 4.

²⁶² Professor Peter Edelman emphasizes that Great Society programs recognized that “poverty will not be significantly reduced unless responsibility for action is undertaken by a wide array of entities and actors, including but not limited to government.” Peter B. Edelman, *Toward a Comprehensive Antipoverty Strategy: Getting Beyond the Silver Bullet*, 81 GEO. L.J. 1697, 1726 (1993); see Forman, Jr., *supra* note 243, at 848.

²⁶³ James Forman, Jr., *The Secret History of School Choice: How Progressives Got There First*, 93 GEO. L.J. 1287, 1300 (2005).

²⁶⁴ *Id.*

²⁶⁵ *Id.* at 1302; ENGEL, *supra* note 147, at 36.

²⁶⁶ Forman, Jr., *supra* note 263, at 1290.

²⁶⁷ *Id.* at 1302.

²⁶⁸ *Id.* at 1290.

²⁶⁹ Peterson, *supra* note 7, at 43; see also *What’s Next for School Choice*, *supra* note 40, at 52 (statement of Rep. Boehner, Member, H. Comm. on Educ. & Workforce) (“[W]e can’t turn our backs on children trapped in endlessly underachieving schools, either. When schools do not teach and do not change, even after repeated efforts to turn them around, there must be a ‘safety valve’ for the students.”).

²⁷⁰ Peterson, *supra* note 7, at 46.

education.²⁷¹ Six-year grants are provided to states and partnerships to provide services to an entire cohort of students at high-poverty middle and high schools.²⁷² The idea is to begin the program no later than the seventh grade and to follow that cohort through high school.²⁷³

GEAR UP actually began as the private initiative of businessman Eugene Lang.²⁷⁴ In 1981, Lang promised college tuition to every sixth grader from P.S. 121 in East Harlem who graduated from high school.²⁷⁵ Lang had attended P.S. 121 fifty years earlier.²⁷⁶ Lang worked closely with this group of students and developed partnerships with community-based organizations to help provide them with additional support.²⁷⁷

Subsequently, Lang founded the national “I Have A Dream” Foundation to replicate the model in other communities.²⁷⁸ With the support of President Bill Clinton in 1993, the program was expanded to inner-city public housing developments.²⁷⁹ The following year, “I Have A Dream” partnered with AmeriCorps, the federally funded program designed to engage youth in service projects in high-need areas across the country.²⁸⁰ Finally, in 1998, President Clinton’s High Hopes for College program, designed to encourage colleges and universities to replicate Lang’s initiative, was enacted and renamed as GEAR UP.²⁸¹ Accordingly, the free schools and GEAR UP serve to demonstrate that the public/private partnership of SES is not a purely conservative approach.

Second, SES should not be described as purely a conservative initiative because the left has also supported educational initiatives that rely on voluntary overtime work by students. Indeed, the left shares culpability with the right in selecting the voluntary overtime work approach to deliver meaningful educational services to a small segment of students. A quick tour through a few educational reform initiatives advocated by Democrats, liberals, and progressives demonstrates this fact. The following programs all share the two main limitations of SES: they are voluntary and they require students to work beyond the regular, compulsory school day.

The first example is the short-lived Mississippi Freedom Schools of the 1960s. Established in Mississippi by political progressives in 1964, the Freedom Schools sought to accomplish what the existing public school system apparently could not: “[to] raise academic achievement for black children. . . .”²⁸² To achieve their goals, the civil rights workers and local volun-

²⁷¹ U.S. DEP’T EDUC., GUIDE TO U.S. DEPARTMENT OF EDUCATION PROGRAMS 83 (2008), available at <http://www2.ed.gov/programs/gtep/gtep2008.pdf>.

²⁷² *Id.*

²⁷³ *Id.*

²⁷⁴ “I Have a Dream” Foundation, About Us, <http://www.ihaveadreamfoundation.org/html/history.htm> (last visited Feb. 28, 2010).

²⁷⁵ *Id.*

²⁷⁶ *Id.*

²⁷⁷ *Id.*

²⁷⁸ *Id.*

²⁷⁹ *Id.*

²⁸⁰ *Id.*

²⁸¹ *Id.*

²⁸² Forman, Jr., *supra* note 263, at 1296.

teers utilized the voluntary overtime work model.²⁸³ Throughout the summer of 1964, over 2000 students elected to attend one of the forty-one alternative freedom schools created in Mississippi.²⁸⁴ Students who chose to participate dedicated their summer to learning lessons in history, civics, and politics.²⁸⁵ While working to provide individualized benefits, the founders of the freedom schools also hoped “to dramatize the inadequacy of the existing public schools.”²⁸⁶ However, despite the educational benefits freedom schools provided individual student participants, the impact on the public school system was negligible; most freedom schools permanently closed their doors after only one summer.²⁸⁷

The second example is provided by the Children’s Defense Fund (“CDF”), a non-profit child advocacy organization,²⁸⁸ led by Marian Wright Edelman, an advocate for the disadvantaged and a former civil rights attorney.²⁸⁹ Marian Wright Edelman’s writings evince a politically liberal philosophy and worldview.²⁹⁰ The CDF Freedom Schools, named after the Mississippi Freedom Schools,²⁹¹ have been in operation since 1995 and currently serve nearly 9000 children in 61 cities and 24 states in addition to Washington, D.C.²⁹²

²⁸³ *Id.*

²⁸⁴ *Id.* at 1299. It is important to point out that the concept behind the freedom schools did not originate in Mississippi; it can be traced to popular education movements and particularly the work of Myles Hort.

²⁸⁵ *Id.* at 1296.

²⁸⁶ *Id.*

²⁸⁷ *Id.* at 1299.

²⁸⁸ Children’s Defense Fund, Who Is CDF?, <http://www.childrensdefense.org/who-is-cdf/> (last visited Feb. 28, 2010).

²⁸⁹ Children’s Defense Fund, CDF Leadership and Staff: Marian Wright Edelman, <http://www.childrensdefense.org/who-is-cdf/cdf-leadership-staff/marian-wright-edelman/#bio> (last visited Feb. 28, 2010).

²⁹⁰ Isn’t it time to end the lottery of geography on child survival and provide every child a national safety net of decency? Isn’t it time to end child poverty in America, which costs our country hundreds of billions in lost productivity every year? Sadly, our nation’s poor children don’t have a team of bank presidents or investment house CEOs to plead for an economic bailout for their families in the corridors of power in Washington. That’s why I strongly encourage all of us to urge and support the incoming Obama Administration to work with Congress to ensure that there are provisions in economic stimulus legislation, the budget and other legislative initiatives that resuscitate our very sick economy and aid our nation’s most vulnerable children and families. Giving the poor buying power will certainly stimulate the economy and help families hold themselves together. Can we achieve these changes? Yes we can! During the mid-1960s and early 70s, the federal government effectively instituted programs that reduced poverty. The number of poor children hit its lowest in 1973 at about 9.6 million. What we had over the last eight years of the Bush Administration was a leadership ideology of taking from the poor to enrich the wealthy while lacking a strong advocacy and citizen voice to change these unjust budget priorities.

Marian Wright Edelman, *Now Is the Time to Bail Our Poor Children and Families Out of Poverty*, HUFFINGTON POST, Jan. 26, 2009, http://www.huffingtonpost.com/marian-wright-edelman/now-is-the-time-to-bail-o_b_160915.html.

²⁹¹ Children’s Defense Fund, CDF Freedom Schools History, <http://www.childrensdefense.org/helping-americas-children/cdf-freedom-schools-program/about/hsitory.html> (last visited Feb. 28, 2010).

²⁹² Children’s Defense Fund, About the CDF Freedom Schools Program, <http://www.childrensdefense.org/helping-americas-children/cdf-freedom-schools-program/about/> (last visited Feb. 28, 2010).

They provide summer and after school enrichment to children and families. Like SES, the CDF Freedom Schools are voluntary. In fact, these afterschool and summer opportunities require even more from a parent and child than does SES.

The CDF Freedom Schools require parents or caregivers to not only enroll their children in these programs but to “demonstrate their commitment to the program . . . by becoming actively involved in the daily CDF Freedom Schools program activities.”²⁹³ As such, only those children with caregivers willing to participate are able to take advantage of the program’s offerings. Because the CDF Freedom Schools operate only after school and during the summer, they can also be characterized as a voluntary overtime program.

Authorized under ESEA, and later amended by NCLB,²⁹⁴ the 21st Century Community Learning Centers provide a second example of the left’s embrace of the voluntary overtime work model. Indeed, afterschool programs were greatly expanded as the result of the 21st Century Community Learning Centers.²⁹⁵ These centers are largely designed to provide students in low-performing schools with tutoring and academic enrichment opportunities.²⁹⁶ Operating only when the regular school day is not in session, they comprise an “overtime” offering as that term has been utilized throughout this Article.²⁹⁷ In addition, participation in the 21st Century Community Learning Centers is voluntary, as the law only requires the centers to offer tutoring and academic enrichment services.²⁹⁸ There is no requirement regarding the number of students that must be served by these centers,²⁹⁹ and there are few requirements regarding the types of students these centers are intended to assist. The only requirement imposed upon states is that they award grants to centers that will primarily serve students attending schools with high concentrations of poverty.³⁰⁰ Beyond that, it is up to the individual child and family to decide whether to participate.

The preceding discussion makes it clear that voluntary overtime offerings, although in most cases beneficial to those students who participate, are unable to aid most children in need of academic assistance. The research shows that many of the students from low-income backgrounds that are able to successfully navigate their way through the public school system do so with the help of one of these voluntary overtime offerings. Jane Van Galen, writes that “[w]e simply do not see students making it through the complicated social structures of school on their own merit alone.”³⁰¹ She adds that “[a]s we meet these young people who are poised to circumvent the limits of their lives and their

²⁹³ *Id.*

²⁹⁴ OFFICE OF ELEMENTARY & SECONDARY EDUC., U.S. DEP’T OF EDUC., 21ST CENTURY COMMUNITY LEARNING CENTERS: NON-REGULATORY GUIDANCE 5 (2003), available at <http://www.ed.gov/programs/21stcccl/guidance2003.pdf>.

²⁹⁵ *Id.*

²⁹⁶ *Id.*; 20 U.S.C. § 7171 (2006).

²⁹⁷ OFFICE OF ELEMENTARY & SECONDARY EDUC., *supra* note 294, at 8.

²⁹⁸ *Id.*

²⁹⁹ *See id.* (providing no requirements for the number of students that must be served).

³⁰⁰ *Id.* at 6, 12.

³⁰¹ Jane A. Van Galen, *Introduction* to LATE TO CLASS: SOCIAL CLASS AND SCHOOLING IN THE NEW ECONOMY, *supra* note 41, at 7.

schooling, we most often do so in places other than the traditional classroom.”³⁰² But, if the regular and compulsory classroom is not where children can acquire the skills and knowledge necessary to “circumvent the limits of their lives,” then only the select few who participate in voluntary overtime opportunities will have access to what the classroom lacks. Although this may work for the few, what of the others, those “who cannot [get] out?”³⁰³ While I do not advocate terminating the programs discussed in this section, it is clear that the impetus should be upon policymakers to seek to provide *all* students with the services currently made available only to a few through these voluntary overtime work offerings.

IV: COMPELLING SUCCESS

In order to provide educational services such as tutoring and academic counseling to all students who need them, the most important step that could be taken would be to make those services compulsory rather than voluntary. The regular public school day is already compulsory in all fifty states. Additional offerings such as tutoring and academic counseling should be made available to students on a compulsory basis as well. The two primary challenges to this proposal are insufficient resources and insufficient time. A federally funded and mandated extended school day and year provides the best hope for turning current voluntary programs into compulsory programs, thereby providing all students with these resources.

First, any realistic strategy to address the needs of *all* children must flow from the states’ unanimous decision to compel children’s attendance in school.³⁰⁴ By 1918, all states required children to receive an education.³⁰⁵ Although “the child is not the mere creature of the State,”³⁰⁶ the Supreme Court recognizes the authority of the state to make education compulsory.³⁰⁷ In other words, education in this country, at least at the state level, is regarded as a “mandatory right.”³⁰⁸ With very few exceptions, children are not allowed to opt out of an education.³⁰⁹ And the United States is not the only country that has decided to compel children’s attendance in school. As early as 1959, the United Nations proclaimed that “[t]he child is entitled to receive education, which shall be free and compulsory”³¹⁰ Under this model, *our* model, of

³⁰² *Id.*

³⁰³ SANDRA CISNEROS, *THE HOUSE ON MANGO STREET* 110 (Vintage Books 1991) (1984) (“Friends and neighbors will say, What happened to that Esperanza? Where did she go with all those books and paper? Why did she march so far away? They will not know I have gone away to come back. For the ones I left behind. For the ones who cannot out.”).

³⁰⁴ Compulsory Education, www.ncsl.org/programs/educ/CompulsoryEd.htm (last visited Feb. 28, 2010).

³⁰⁵ *Id.*

³⁰⁶ *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 535 (1925).

³⁰⁷ *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923).

³⁰⁸ See *supra* note 121 and accompanying text.

³⁰⁹ *Wisconsin v. Yoder*, 406 U.S. 205, 235-36 (1972).

³¹⁰ Declaration of the Rights of the Child, G.A. Res. 1386 (XIV), ¶ 14, U.N. Doc. A/4354 (Nov. 20, 1959).

compulsory education, it is wrong to retain certain benefits exclusively for those students who are able to opt in as both a moral matter and a policy matter.

Each of the services identified in the previous sections—tutoring, after school enrichment programs, summer school, guidance about the college application process, and information about high school course selection—does indeed have the potential to benefit a student’s academic attainment. Accordingly, each of those services found to be beneficial, in addition to being offered on a voluntary overtime basis to the select few who apply or enroll in such programs, should be included in the regular school day. It is illogical to require individual students to first ask for a service if educators and policymakers already accept that it is a necessary component of an effective education. This is especially true when we consider that these voluntary overtime offerings will benefit only “self-selected groups of children and families[.]”³¹¹ Consequently, we must shift our attention away from voluntary overtime work to what takes place during the regular school day—the compulsory component of public education that affects all students. Our challenge is “to make a system in which schools that work for poor kids are not just the achievement of extraordinary people doing extraordinary things but are instead an ordinary event.”³¹²

It is also important to note that a compulsory system does not mean a system devoid of flexibility. Currently, we are able to provide flexibility to students within the paradigm of compulsory education. The following excerpt from a Rhode Island statute provides a model:

Every child enrolled in school who completes or has completed sixteen (16) years of life and who has not yet attained eighteen (18) years of age shall regularly attend school during all the days and hours that the public schools are in session in the city or town in which the child resides unless the person having control of the child withdraws the child from enrollment in accordance with § 16-67.1-3.³¹³

Rhode Island’s statute wisely places the burden on the parent to terminate, rather than initiate, services. Thus, the child will remain in school until the age of eighteen, *unless* she secures a parent’s authorization to drop out. The same could be done with respect to supplemental offerings. All students should be expected to attend these offerings as part and parcel of the regular school day, but a parent’s authorization would enable them to opt out of the supplemental components. However, the burden is shifted so that the parent must opt out rather than in.³¹⁴ Consequently, the social, cultural, and economic barriers and obstacles, which negatively impact the ability of many low-income parents to request overtime work offerings for their children, would now work in favor of, rather than against, the individual child. If the parent took no action, the child would be compelled to attend the formerly supplemental offering. In essence, this policy would shift the baseline in a way that benefits the children of those parents who, for a variety of reasons, are unable to be actively involved in their children’s schooling.

³¹¹ HESS, *supra* note 257, at 4.

³¹² Alexander et al., *supra* note 190, at 126 (quoting Sandra Feldman, President of the American Federation of Teachers).

³¹³ R.I. GEN. LAWS § 16-19-1 (2008).

³¹⁴ See 20 U.S.C. § 6316(b)(6)(F) (2006).

Second, the idea of providing services such as SES to students on a compulsory basis forces us to confront the issue of inadequate resources. This problem can be more easily ignored when we are dealing with voluntary offerings because the number of students who self-select into such offerings is small by comparison. It is one thing to argue that a safety valve or a lifeboat should be provided for *individual* students, but it is quite another to support the funding necessary to provide *all* students with such services. For example, when Senator Paul Wellstone, a Democrat from Minnesota, proposed to defer the new annual testing requirements under NCLB unless Title I funding was tripled, the proposition failed to garner sufficient support among his colleagues and the annual testing requirements were enacted without the additional funding.³¹⁵

Voluntary overtime educational programs historically have been underfunded and periodically threatened with a complete loss of funding. For example, in 2002, President Bush sought to cut funding for the 21st Century Community Learning Centers by forty percent.³¹⁶ In 2006, President Bush attempted to entirely eliminate GEAR UP.³¹⁷ In November of 2007, President Bush vetoed a spending measure for health and education programs that included a \$100 million increase for afterschool programs.³¹⁸ Thus far, President Obama has not proposed any cuts to these programs, and the fiscal year 2010 budget reveals that funding for the 21st Century Community Learning Centers and GEAR UP will remain at 2009 levels.³¹⁹ On the issue of resources overall, the Obama Administration has taken steps in the right direction by channeling an additional \$10 billion for Title I of ESEA under the Recovery Act.³²⁰

Related to the issue of funding, voluntary offerings can help to obscure resource shortfalls in high-poverty schools. For example, teachers in low-poverty schools tend to have better credentials and math backgrounds than teachers in high-poverty schools.³²¹ Accordingly, the solution with the greatest potential to aid *all* students attending a high-poverty school would be to hire teachers

³¹⁵ Rudalevige, *supra* note 192, at 38.

³¹⁶ Debra Viadero, *High-Quality After-School Programs Tied to Test-Score Gains*, EDUC. WEEK, Nov. 28, 2007, at 2, available at <http://www.wingsforkids.org/eNews/pdf/1107-EdWeek-Article.pdf>.

³¹⁷ Jeffrey Selingo, *Bush Budget Takes Aim at Student Aid and Research*, CHRON. HIGHER EDUC., Feb. 18, 2005, at A1. "The goal of Talent Search is to increase the number of youths from disadvantaged backgrounds who complete high school and enroll in postsecondary education institutions of their choice." Talent Search Program, <http://www2.ed.gov/programs/triotalent/index.html> (last visited Feb. 28, 2010). "GEAR UP provides six-year grants to states and partnerships to provide services [designed to increase college attendance and success and raise the expectations of low-income students] at high-poverty middle and high schools." Gaining Early Awareness And Readiness For Undergraduate Programs (Gear Up), <http://www2.ed.gov/programs/gearup/index.html> (last visited Feb. 28, 2010).

³¹⁸ Viadero, *supra* note 316, at 3.

³¹⁹ FY 2010 ED Budget Summary, <http://www.ed.gov/about/overview/budget/budget10/summary/edlite-section1.html> (last visited Feb. 28, 2010). The three programs are referred to implicitly by the umbrella term, "Federal TRIO Programs."

³²⁰ U.S. DEP'T OF EDUC., *supra* note 231.

³²¹ Adam Gamoran, *Can Standards-Based Reform Help Reduce the Poverty Gap in Education*, INTRODUCTION TO STANDARDS-BASED REFORM AND THE POVERTY GAP: LESSONS FROM NO CHILD LEFT BEHIND, *supra* note 168, at 9.

with better credentials and math backgrounds. Instead, a voluntary offering such as SES outsources teaching through a voluntary afterschool program. The goal should be to acquire highly qualified teachers in sufficient numbers, so we do not continue to see the disparities that currently exist even within schools. Indeed, the research shows that disadvantaged students, whether in low-poverty or in high-poverty schools, had less access to qualified teachers.³²² Again, this type of strategy would be capable of helping all students within a school, rather than the select few who can benefit from a voluntary overtime offering.

Currently, the Obama Administration is moving in the right direction with respect to this issue as well.³²³ In fact, President Obama's education plan includes new Teacher Service Scholarships to cover undergraduate or graduate education costs, "including high-quality alternative programs for mid-career recruits in exchange for teaching for at least four years in a high-need field or location."³²⁴ The plan also includes "Teacher Residency Programs that will supply 30,000 exceptionally well-prepared recruits to high-need schools."³²⁵ Additionally, the plan seeks to increase teacher pay for "accomplished educators who serve as mentors to new teachers," "teachers who work in underserved places like rural areas and inner cities," and teachers who "consistently excel in the classroom."³²⁶

Funding for teachers in the past has simply not been a priority.³²⁷ Summer schools that employ certified teachers have been cut while programs such as SES, which do not require "highly qualified" instructors, are funded.³²⁸ Sandra Feldman, President of the American Federation of Teachers, focused on this issue when she testified before Congress shortly after NCLB was enacted. Specifically, she criticized the fact that no one was paying attention to whether or not children were receiving educational services from qualified personnel.³²⁹

Though voluntary overtime work is not the root of the problem, it can and does serve as a distraction and may delay efforts to address the shortcomings of the regular school day.³³⁰ Part of the reason for this delay is that voluntary overtime meets the needs of those families most likely to voice their dissent to school policies and practices. In this manner, as the free schools before them, voluntary overtime programs risk "[allowing] the majority of schools to function more smoothly without dissent."³³¹

³²² *Id.*

³²³ White House Education Agenda (Jan. 2009), http://www.thetrc.org/trc/download/White_House_Education_Agenda.pdf.

³²⁴ *Id.*

³²⁵ *Id.*

³²⁶ *Id.*

³²⁷ MICHAEL A. REBELL & JOSEPH J. WARDENSKI, CAMPAIGN FOR FISCAL EQUITY, INC., OF COURSE MONEY MATTERS: WHY THE ARGUMENTS TO THE CONTRARY NEVER ADDED UP 14 (2004), <http://www.cfequity.org/MoneyMattersFeb2004.pdf>; *Teacher Quality*, EDUC. WK., Sept. 21, 2004, available at www.edweek.org/rc/issues/teacher-quality/?print=1.

³²⁸ *Avoiding the Summer Slide: The Importance of Summer School to Student Achievement: Hearing Before the S. Comm. on Health, Educ., Labor & Pensions*, 107th Cong. 11 (2002) (statement of Sandra Feldman, President, Am. Fed'n of Teachers).

³²⁹ *Id.*

³³⁰ See generally *id.* at 5-12.

³³¹ RON MILLER, FREE SCHOOLS, FREE PEOPLE: EDUCATION AND DEMOCRACY AFTER THE 1960s, at 136 (2002).

The most inclusive and equitable approach that the Obama Administration could take is expanding and reconfiguring the regular school day to encompass offerings, such as tutoring, currently available only through overtime work. This brings us to the challenge posed by insufficient time in the school day and school year. If we are able to build into compulsory education the range of afterschool and summer opportunities currently offered only on a voluntary basis, how will we fit them into the regular school day? President Obama has shed some light on this problem.³³² The Obama Administration has already recommended such an extended day approach in the middle school years as a way to attack the dropout crisis³³³ and is providing a financial incentive for states to implement extended learning time as an approach to turn around low-performing schools.³³⁴ Extended learning time presents an opportunity to supplement the regular school day with the types of opportunities currently offered only to students in afterschool programs. Extending the regular school day would remove the overtime component by successfully integrating those services into the regular school day.

In addition, President Obama's fiscal year 2010 budget also addresses this issue. It focuses on "scaling up educational practices that show results."³³⁵ Indeed, the President emphasizes that resources and strong supports, not just sanctions, are necessary to turn around high-need, low-performing schools.³³⁶ Most importantly, the new Administration advances a new strategy to help individual states "diagnose and address the root causes of schools' low performance."³³⁷ This language comports with the recommendations advocated by many in the school reform community for some time.

Under the Recovery Act, 2009 saw a \$10 billion increase in Title I funds allocated to local school districts.³³⁸ The Obama Administration intends for these funds to enable school districts to "implement innovative strategies . . . that improve education for at-risk students and close the achievement gaps."³³⁹ Moreover, the Secretary of Education has outlined suggestions for utilizing the additional funds to help individual states avoid investing in projects that will be unsustainable after the funding expires.³⁴⁰ One suggestion is to establish or

³³² We expect students to learn more today than ever before, and many experts agree that additional learning time, particularly for struggling students, is important to gaining knowledge and skills for the 21st century. The typical school day is a throwback to America's agricultural era and is not on par with that of other developed countries around the world. Longer school days or longer school years can help provide additional learning time for students to close the achievement gap. For working parents who have to juggle childcare and work responsibilities, access to high-quality after-school programs will help their children learn and strengthen a broad range of skills.

BARACK OBAMA, *THE OBAMA EDUCATION PLAN: AN EDUCATION WEEK GUIDE* 120 (2009).

³³³ White House Education Agenda, *supra* note 323.

³³⁴ Race to the Top Fund, 74 Fed. Reg. 37,804, 37,804, 37,810 (proposed July 29, 2009), available at <http://www.ed.gov/legislation/FedRegister/proprule/2009-3/072909d.pdf>.

³³⁵ U.S. DEP'T OF EDUC., *A NEW ERA OF RESPONSIBILITY* 60, http://www.whitehouse.gov/omb/assets/fy2010_new_era/Department_of_Education.pdf (last visited Feb. 28, 2010).

³³⁶ *Id.*

³³⁷ *Id.*

³³⁸ U.S. DEP'T OF EDUC., *supra* note 231.

³³⁹ *Id.*

³⁴⁰ *Id.*

expand “extended learning opportunities for Title I-eligible students.”³⁴¹ The examples mentioned by the Secretary include before and after school activities as well as summer programs and an extended school year.³⁴² These funds provide advocates at state and local levels an opportunity to educate policymakers about the potential pitfalls of allocating resources for voluntary rather than compulsory offerings. Furthermore, the extended school year, if compulsory, is one option that could potentially serve the entire student body, as opposed to voluntary overtime offerings, which only benefit a small and select group of students.

The central message is that we must push the much-needed services, currently available only through overtime work, back into the regular school day. Sunderman and Darling-Hammond, who both write extensively on education and school reform issues, argue that one approach might be to borrow from the special education model to “bring special education teachers into the core classroom and provide supports to help students with disabilities complete the same challenging work that other students are assigned.”³⁴³ In fact, Darling-Hammond specifically suggests “afterschool and Saturday homework support and tutoring for all students who need additional help.”³⁴⁴ Moreover, Darling-Hammond highlights that the schools currently succeeding in raising the achievement levels of their students provide precisely such “supports for struggling students.”³⁴⁵

At this time, the necessary momentum to push such an initiative as support for extended learning opportunities is very high.³⁴⁶ All that remains is to persuade policymakers that mandatory, as opposed to voluntary, programs will benefit a greater number of students. A study conducted in July of 2008 by the Center for American Progress documents the fact that more than three hundred initiatives to extend learning time had been launched between 1991 and 2007 in high-poverty and high-minority schools in thirty states.³⁴⁷ The Education Commission of the States, based in Denver, reports that there were more than

³⁴¹ *Id.*

³⁴² *Id.*

³⁴³ Linda Darling-Hammond, *No Child Left Behind and High School Reform*, 76 HARV. EDUC. REV. 642, 645 (2006).

³⁴⁴ *Id.*

³⁴⁵ *Id.* at 644-45.

³⁴⁶ The following quotes capture the strong support for extended learning opportunities: “‘This issue is hot right now,’ said Bela P. Shah, a senior program associate for after-school initiatives at the National League of Cities’ Institute for Youth, Education, and Families.” OBAMA, *supra* note 332, at 122; “‘There’s a real understanding that we have to do more, and that everyone has to take responsibility for it.’” *Id.*; “‘Everywhere I go, people are taking about this now,’ said An-Me Chung, a program officer for the Charles Stewart Mott Foundation, which has financed school-community partnerships and after-school programs since the 1930s. . . . ‘They realize we’ve got to think about time and learning in more than just a piecemeal way.’” *Id.* at 122-23; “Ron Fairchild, the executive director of the [National Center for Summer Learning at Johns Hopkins University in Baltimore] believes that the rush of activity on the local, state, and national levels shows that the importance of out-of-school time to children’s learning is finally getting the recognition it deserves. ‘We’re starting to see a real tipping point on this issue.’” *Id.* at 125.

³⁴⁷ *Id.* at 123.

fifty efforts since 2000.³⁴⁸ One example is the initiative taken by Massachusetts in 2007 to lengthen the school day by thirty percent in ten elementary and middle schools in the cities of Boston, Cambridge, Fall River, Malden, and Worcester.³⁴⁹ California, Illinois, New Jersey, and Tennessee have all enacted legislation establishing statewide programs offering extended learning opportunities.³⁵⁰

It is important to point out that the constituency for extended learning time is broad. Of course, there are those whose concerns can be traced back to the report *A Nation at Risk*, which urged schools to extend the school day in order to enhance the United States' competitiveness with other nations.³⁵¹ In addition, many educators worry that low-income children face an increased achievement gap due to the learning loss that occurs during the summer months.³⁵² There are also those who worry primarily about the dangers associated with unsupervised youth during after school hours and the summer months.³⁵³ And parents have also been quick to embrace extended learning time when offered by charter schools.³⁵⁴ This broad-based support for extended learning time can also help make an extended school day a viable option for policymakers.

Of course, advocates should support only those programs that are proven effective. SES, as discussed earlier in this article, has yet to effectively raise the achievement of students.³⁵⁵ However, other initiatives have been touted as successful in raising the academic achievement of students. For example, an eight-state study of high-quality afterschool 21st Century Community Learning Centers found that “[d]isadvantaged students who regularly attend top-notch afterschool programs end up, after two years, academically far ahead of peers who spend more out-of-school time in unsupervised activities.”³⁵⁶ This study was designed to correct perceived shortcomings in an earlier, controversial study conducted by MPR that involved programs of varying quality.³⁵⁷ The programs in the new study were selected for their successful track record.³⁵⁸

³⁴⁸ *Id.*

³⁴⁹ James Vaznis, *Kennedy to Promote Extended School Days*, BOSTON GLOBE, Jan. 8, 2007, at B1.

³⁵⁰ Nat'l Conference of State Legislatures, *Before- and After-School Programs*, <http://www.ncsl.org/Default.aspx?TabId=12844> (last visited Feb. 28, 2010).

³⁵¹ OBAMA, *supra* note 332, at 122.

³⁵² *Id.* at 125 (“Johns Hopkins sociologist Karl Alexander traces two-thirds of the achievement gap between students of less-advantaged and more-affluent backgrounds to summer learning loss by poorer children.”).

³⁵³ Geoffrey Canada writes the following about his experience growing up in Harlem: “The summer is the worst time for the children I know. More of them are outside. Too hot and too boring to be inside. There are few jobs for the teenagers. Life is lived and lost on the streets.” GEOFFREY CANADA, *FIST, STICK, KNIFE, GUN: A PERSONAL HISTORY OF VIOLENCE IN AMERICA* x (1995).

³⁵⁴ “Many charter schools, particularly KIPP Schools, require students to spend nearly 60% more time in school—often from 8am -5:30, sometimes on Saturday and for more weeks—than traditional schools.” Extended Day and Year Initiatives, <http://www.ncsl.org/Default.aspx?TabId=12848> (last visited Feb. 28, 2010).

³⁵⁵ SUNDERMAN, *supra* note 98, at 1.

³⁵⁶ Viadero, *supra* note 316, at 1.

³⁵⁷ *Id.*

³⁵⁸ *Id.*

Other evaluations and teacher reports have also revealed positive academic and behavioral results for students who regularly attend 21st Century Community Learning Centers.³⁵⁹ Annual performance report data from the Centers' grantees across the country demonstrate that regular attendees improve both their reading and math grades (43% and 49% improvement, respectively).³⁶⁰ Moreover, elementary school students attending LA's BEST afterschool program, funded in part by 21st Century Community Learning Centers, "improved their regular school day attendance and reported higher aspirations regarding finishing school and going to college."³⁶¹ This report also found that "LA's BEST participants are twenty percent less likely to drop out of school and thirty percent less likely to participate in criminal activities compared to matched nonparticipants."³⁶² Likewise, a report from the University of Florida on the state's 21st Century Community Learning Centers found that the program improved "students' academic performance, school attendance, disciplinary actions, and social behaviors."³⁶³

Furthermore, seventy-three studies, published by the Chicago-based Collaborative for Academic, Social, and Emotional Learning in 2007,³⁶⁴ analyzed afterschool programs geared to developing youths' personal and social skills and found that such programs could be linked to a wide range of improvement in students, such as better grades and test scores, increases in self-esteem and self-confidence, and decreases in problem behaviors.³⁶⁵ The Rose Institute at Claremont McKenna College found that every dollar invested in afterschool programs brings a return of between eight and thirteen dollars, decreasing costs related to everything from grade retention to future incarceration.³⁶⁶ Many studies and reports tout the importance of specialized academic supports for low-income students.³⁶⁷

The bottom line is that our system of public education is compulsory. Beneficial academic, guidance, remedial, and enrichment services, as described above, must exist within the regular school day in order for *all* students to benefit from them. Even at its best, SES's voluntary overtime work model can only deliver benefits to a small and select group of students. SES and other

³⁵⁹ AFTERSCHOOL ALLIANCE, 21ST CENTURY COMMUNITY LEARNING CENTERS: PROVIDING AFTERSCHOOL SUPPORTS TO COMMUNITIES NATIONWIDE 2 (2008), http://www.afterschoolalliance.org/Fact%20Sheet_21st%20Century%20Community%20Learning%20Centers%2008.pdf.

³⁶⁰ *Id.*

³⁶¹ *Id.*

³⁶² *Id.*

³⁶³ *Id.*

³⁶⁴ JOSEPH A. DURLAK & ROGER P. WEISSBERG, COLLABORATIVE FOR ACADEMIC, SOC., AND EMOTIONAL LEARNING, THE IMPACT OF AFTER-SCHOOL PROGRAMS THAT PROMOTE PERSONAL AND SOCIAL SKILLS 7 (2007), available at <http://www.casel.org/downloads/ASP-Full.pdf>.

³⁶⁵ *Id.*

³⁶⁶ WILLIAM O. BROWN ET AL., THE COSTS AND BENEFITS OF AFTER SCHOOL PROGRAMS: THE ESTIMATED EFFECTS OF THE AFTER SCHOOL EDUCATION AND SAFETY PROGRAM ACT OF 2002 Executive Summary (2002), available at http://www.claremontmckenna.edu/rose/publications/pdf/after_school.pdf.

³⁶⁷ See generally LATE TO CLASS: SOCIAL CLASS AND SCHOOLING IN THE NEW ECONOMY, *supra* note 41.

voluntary overtime work offerings will never be able to deliver the much needed intervention to the majority of students in high-poverty and under-performing schools. These limitations must be publicly acknowledged. The majority of low-income students need policymakers to focus on the regular school day and to incorporate those services now viewed only as a safety valve for the small percentage of students who are able to work overtime.

CONCLUSION

The goal of this Article is to help transform the current perception of SES. Instead of viewing it as a choice program, this Article seeks to identify SES's limited impact as a program of voluntary overtime work. The metaphor of voluntary overtime work aptly conveys the limitations of such offerings as SES, the 21st Century Community Learning Centers, and the CDF Freedom Schools. Hopefully, it paves the way for a renewed focus on the compulsory regular school day as the principal means of delivering academic services. It may be romantic to wish that all children and their families will one day overcome the various obstacles in their lives and avail themselves of voluntary overtime work offerings, but, as Mordecai Pinkney Horton cautioned at the beginning of this Article, our wagon wheels must be firmly planted on the ground. In this vein, I hope this Article helps to "make despair unconvincing and hope practical."³⁶⁸ The practical and hope-filled approach is to build into the regular school day the beneficial offerings currently only available to a few students through voluntary overtime work. The unconvincing approach is that which despairs about the regular school day to such an extent that it places much-needed benefits outside of compulsory education, knowing full well that these benefits will remain illusory and out of reach for the students most in need of help.

³⁶⁸ Henry Giroux, *Teachers as Transformatory Intellectuals*, 2 *EDUCATE!* 46, 49 (2002).