Chapter 14

Effectiveness and Accountability (Part 2): Alternatives to the Compliance Model

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Introduction

As we described in Chapter 3, effectiveness and accountability policy and practice in special education have traditionally been shaped by a "compliance model" that defines effectiveness largely in terms of following certain processes and ensures accountability through the documentation of procedural compliance. Although the Individuals with Disabilities Education Act amendments passed in 1997 (IDEA 1997) were billed as the start of a new regime of results-based accountability, we have seen that they did not replace the traditional compliance-based model. Instead, the 1997 amendments merely grafted performance measurement onto the pre-existing compliance approach. In addition, IDEA 97 allowed critical exceptions and exemptions, which have enabled a number of state and local education agencies to postpone if not entirely avoid the day in which documented changes in educational achievement drive effectiveness and accountability in special education. Moreover, both the accountability system designed by the Department of Education in the wake of IDEA 97 and its operation "in the trenches" preserved much of the process-focus and procedural-documentation components of the familiar compliance model described in Chapter 3.

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If the effectiveness standards and accountability mechanisms of IDEA 97 did not accomplish the "regime shift" that its backers claim, what alternatives might be available to promote outcome-based measures of achievement and real accountability for performance? In this chapter, we address that question in two stages:

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First, we examine promising alternatives to the compliance model that have arisen outside of special education, indeed outside of education altogether, as policymakers in other domains have prompted shifts from a compliance-based to a results-based approach. These developments in other fields may provide inspiration and lessons for special education policy.

Second, we develop a broad framework for the application of these approaches within special education. The framework we propose makes student learning results the central driving force of special education policy, not an overlay on a pre-existing compliance system. Though certain procedural requirements remain in force, they do so to make it possible for results-based accountability to fulfill its potential.

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Alternatives to the Compliance Model

Special education is not the only domain in which policymakers have sought to achieve a worthy goal by setting hard-and-fast procedural rules and then creating an enforcement apparatus to ensure that regulated parties meet their responsibilities. When environmental degradation began to concern us decades ago, Congress and state legislatures responded with an array of detailed prescriptions for how industry and citizens should reduce the amount of pollution and waste they produced, and empowered the Environmental Protection Agency and parallel state and local offices to enforce these rules.[1] Problems with safety and health in the workplace prompted the creation of a similar apparatus, embodied in the Occupational Safety and Health Administration and its state counterparts.[2] Within government, the prevalence of political patronage and other questionable practices in hiring and procurement led policymakers to create the civil service and detailed procurement regulations to ensure that government managers gave out jobs, promotions, and contracts according to merit-based criteria.[3]

These approaches have successfully eliminated some of the troubling behaviors that they targeted. The release of dangerous pollutants into the atmosphere has been greatly reduced. The incidence of certain workplace injuries has dropped dramatically. Handing out jobs and contracts to political cronies has become less common in government. As has happened in special education, however, observers of these other domains have become critical of their nearly exclusive reliance on the enforcement approach to achieving desired policy objectives. Here are some of the major criticisms, many of them summarized by Harvard public-management professor Malcolm Sparrow[4]:

- **The inflexibility of regulations impedes effective practice.** Because regulations are designed as "one-size-fits-all" interventions, they often block local actors from doing what's best in a given situation. They also may fail to adjust over time to changes in best practice or in the nature of the problem to be solved. And to the extent that regulations prescribe in detail how a problem should be handled, they do not provide incentives for regulated parties to work out better ways of achieving the same results.

- **The attention of regulators is distributed irrationally**. Because the enforcement approach directs regulators to enforce rules rather than solve problems, regulatory attention does not necessarily focus on the most pressing or highest-impact activities. Analyses of the regulation of risk have shown that regulatory action often focuses massive resources on activities with little payoff.[5] For example, if environmental regulations require officials to concentrate on reducing particular toxins, they may thereby ignore other threats to health that are more severe. Some policy scholars have argued that, in the extreme, the "capture" of a regulatory agency by its regulatory target leads the agency to partner with the people it is supposed to oversee and deliberately shine its regulatory light only in the places where mischief is not occurring.[6]

- **The sheer volume and complexity of regulation diminish its effectiveness.** As requirements increase, it becomes less likely that regulated parties can keep up with their obligations, even if they would like to comply. It also becomes less likely that regulators can effectively monitor compliance and apply sanctions.[7]

- **The costs of regulation outweigh the benefits.** According to one estimate, the cost of complying with federal regulations reaches nearly $700 billion per year.[8] Concerns about cost, of course, lead to constant calls by business organizations and scholars to reduce the regulatory burden on their industries.[9]

- **Regulation of process ignores results.** A focus on procedural rules induces regulated parties to focus on checking off procedural elements rather than ensuring that they are achieving the results the regulation intends to produce.

Regulators elicit compliance not just through detailed command-and-control regulation, but also by deploying a broad range of tools to achieve the intended results.

In response to these criticisms, policymakers and regulators have begun to experiment with a wider range of tools. Though they are diverse, one central concept ties them together—*a focus on results*. In each instance described below, policymakers or agency officials sought to replace a system that focused purely on regulatory compliance with one that *concentrates the efforts of regulated parties on achieving superior outcomes.* The following subsections describe some of these alternative approaches, provide examples of their use, and discuss their potential and limitations. Note that these approaches are not mutually exclusive; indeed, as the next section will argue, joining them into coherent policies is the principal challenge policymakers and regulators face in special education and elsewhere. The approaches are presented under three headings, which represent increasingly radical departures from the compliance model.

Smart Regulation

"Smart regulation" shares a great deal with the compliance model.[10] Basic norms of behavior remain in place, regulators can still check to see whether regulated parties are following them, and regulators can still impose sanctions when parties fail to comply. But regulators elicit compliance not just through detailed command-and-control regulation; instead, they deploy a

broader range of tools to achieve the intended results. This section discusses four such tools: forging voluntary agreements (with technical assistance); using information to spur good behavior; addressing underlying causes of noncompliance; and replacing procedural controls with after-the-fact checks.[11]

Voluntary agreements. Perhaps the best way to understand the idea of voluntary agreements is to look at examples of how they have worked in practice. One illustration is the Occupational Safety and Health Administration's Maine 200 program, launched in 1993. OSHA offered Maine's 200 employers holding the worst records of on-the-job injuries a choice: either develop a company-designed comprehensive health-and-safety program with employee involvement, or undergo a traditional OSHA inspection. Companies that opted for the voluntary plan would also receive extensive technical assistance from OSHA in identifying and remedying workplace hazards. The program immediately motivated a profound shift in responsibility for identifying and abating workplace hazards. Within its first year, companies themselves had cited nearly three times as many hazards (95,800) as OSHA had managed to identify in the eight previous years (36,780). In addition, worker compensation claims in Maine dropped by 35 percent during the first two program years.[12]

These examples of voluntary agreements share an important element: They focus on results.The regulators asked: What are we trying to accomplish, and are there better ways to reach those goals?

Though OSHA's Maine 200 program is one of the better-known examples of voluntary agreements (it won a Ford Foundation/Kennedy School of Government Innovations Award), it is by no means the only one. During the Clinton administration, the Environmental Protection Agency was the site of numerous similar initiatives. In Project XL, for example, regulators gained the authority to offer flexibility to companies in exchange for agreements to produce superior environmental results. This initiative responded to bizarre situations like one involving Amoco, which was required by EPA regulations to spend $31 million to recover a small amount of benzene when an alternate approach (which ran against regulations) would have allowed the company to recover five times as much benzene for only $6 million.[13] Numerous other federal, state, and local agencies have adopted similar approaches. These examples share an important element: They focus on results. Regulators stepped back from their standard operating procedures and asked: What are we trying to accomplish, and are there better ways to reach those goals? They then worked with the regulated parties to produce better outcomes, even if it meant scrapping some conventional compliance requirements.

Using information. A twist on voluntary agreements involves the use of information-based strategies to achieve compliance.[14] Under this approach, regulators require regulated parties to disclose certain facts about their operations to the media and the wider public. Because most companies do not want to be embarrassed publicly, disclosure may induce compliance where traditional enforcement mechanisms have failed. For example, the Toxics Release Inventory (TRI) requires more than 20,000 facilities to provide information to the Environmental Protection Agency about their release and transfer of toxic chemicals. The EPA then publishes the

information. Though analysts stress that it is difficult to attribute reductions solely to TRI, the numbers are impressive: Between 1988 (when the program began) and 1997, "total releases of toxic chemicals tracked by TRI declined 49 percent nationwide."[15] The Consumer Product Safety Commission traditionally has also used an information-based strategy in an attempt to shame the manufacturers of dangerous products as well as reward companies that go out of their way to produce safer toys and household goods.

Addressing root causes. In another form of smart regulation, agencies sometimes try to induce compliance by addressing the underlying causes of failure to adhere to rules. A good example is the Immigration and Naturalization Service's Operation Jobs, which sought to break a cycle of repeated enforcement of laws prohibiting the employment of undocumented immigrants in Dallas, Texas. Traditionally, the INS's unannounced visits to companies and subsequent arrests of illegal workers would produce a surge of job openings that all-too-often were immediately filled by a new group of illegal hires. As a result, traditional enforcement had no lasting effect. Under the new program, The INS helped to match these jobs with legal replacements by partnering with public and nonprofit organizations that worked with women transitioning off welfare, unemployed youth, documented immigrants, and other people seeking work. The effect was immediate. Within the first two weeks of the program, Operation Jobs produced 1,400 job placement referrals, and, by the end of the year, 2,500 employable adults and youth had gone to work.

Because smart regulation leaves in place some of the basic regulatory apparatus, it appears to retain a check against flagrant violations by regulated parties.

Moving to after-the-fact audits. Often a particular regulation is not objectionable in itself, but the detailed procedural requirements imposed to ensure that regulated parties comply with it are onerous and counterproductive. Consider procurement. Many of the basic concepts of government procurement policy are essentially sound. For example, government buyers should not use the government's checkbook to make personal purchases, or enter into contracts with companies solely because their owners have strong political or family connections to agency officials. Few people would say such restrictions should vanish entirely, but the way government agencies have gone about ensuring compliance with them has been, in the eyes of some observers, excessively procedural, requiring government buyers to go through numerous hoops and fill out reams of paperwork to make even the smallest purchases. Over the last decade, reformers have tried to do away with such procedural hurdles while maintaining essential safeguards. One wide-ranging reform allowed buyers to use credit cards to make purchases up to a certain amount, by-passing the usual submit-and-wait requisition process. In the Agriculture Department, according to one analysis, "costs per transaction have dropped from $77 per paper purchase order to $17 per electronic transaction, a decrease of almost 80 percent. The agency stands to save $29.5 million annually as a result of its award-winning program."[16] To prevent abuse, an automated monitoring system triggers alerts if users appear to be logging personal expenses with their cards or making multiple purchases from the same vendor within a day. And an *ex post* review of one out of every 100 transactions creates a strong deterrent against fraud at a much lower cost than *ex ante* reviews

of all transactions.

Post-audits, by definition, catch problems only after the proverbial cow has escaped from the barn. Fines and other *ex post* sanctions can punish offenders, and thereby possibly deter others from leaving the barn door open. Yet such punishments often cannot undo the damage that has occurred. When the consequences of noncompliance are truly dire, post-audits are an inappropriate accountability mechanism. One way to address this problem is by offering flexibility not across the board, but to those agents that have proven through past performance that they are good stewards of resources or policy.

Benefits and Drawbacks of Smart Regulation

These examples illustrate the central features of smart regulation. First, the *underlying norms or principles* often do not change. Second, the ultimate *threat of sanctions* still looms in the background for regulated parties. Indeed, it sometimes looms larger than before, as in the case of the threatened OSHA inspections in the Maine 200 program. Third, the approaches provide some flexibility to regulated parties about *how to comply.* They do not dictate in great detail the precise actions that parties must take, just the basic principles they must uphold. Fourth, the strategies often use decidedly *non-regulatory* tactics to induce performance, such as technical assistance, publicity, or efforts to address underlying causes of problems. Finally, and perhaps most importantly, smart regulation *focuses relentlessly on results.* The purpose of each change is to achieve a better outcome, whether that is reduced pollution, decreased hiring of illegal immigrants, or other policy goals.

When regulations appear ineffective, stifling, inflexible, or too costly to continue, the search is on for forms of accountability that can replace the focus on compliance.

Smart regulation is appealing for a number of reasons. Because it leaves in place some of the basic regulatory apparatus, it appears to retain a check against flagrant violations by regulated parties, assuming that the existing regulatory regime is appropriately designed and well targeted. If negotiations, technical assistance, or other approaches fail to produce results, the agency can still throw the book at an uncooperative organization. This ultimate threat of sanctions provides the motivation for regulated parties to come to the negotiating table or accept technical assistance in the first place. At the same time, though, the flexibility built into these approaches arguably leads to better outcomes, or equal outcomes at lower cost. In the case of Maine 200, though OSHA retained final say, negotiated plans were likely to be more sensible and better tailored to companies' circumstances than plans handed down by OSHA would have been. In the credit card procurement initiative, illicit contracting is still policed, but honest government buyers are spared the hassles of command-and-control procurement systems.

Smart regulation has drawbacks, too. Critics of regulation assail it for not going far enough, leaving in place a regulatory apparatus that needs to be dismantled altogether. Proponents of regulation attack it for allowing regulated parties to skirt important constraints, negotiating their way out of obligations. They also worry that these new approaches will lead to non-uniformity in the implementation of regulations, with some offenders getting a pass while others comply. Many

regulatory regimes were put in place precisely to ensure that everyone is treated alike, and proponents of that approach resist any changes that might lead to differential treatment.

The approach may also create an ambiguous situation for both regulated parties and regulators, leaving it unclear what kinds of behaviors and activities are permissible under the new regime. In the OSHA case, for example, what happens if a worker in a company with an OSHA-approved plan finds a specific safety violation? Can OSHA inspect the plant and levy any justified sanctions? If so, what has the company really gained by going through the negotiating process? If not, how can workers at the plant gain protection from unsafe conditions? Can regulators negotiate away elements of law, or are there some constraints that must remain in place? This kind of ambiguity apparently led to an internal slogan at EPA for Project XL: "If it ain't illegal, it ain't XL."[17] More seriously, it has often made it difficult for companies and regulators to come to final agreements. Despite the appeal of Project XL, only a small number of agreements have been negotiated under it.[18] As a result of these ambiguities, attempts to implement negotiated arrangements have frequently resulted in litigation.[19]

Because of these problems, some regulatory reformers have looked beyond smart regulation to more radical approaches in which existing rules and restrictions are actually scrapped and replaced with other means of producing desired results. The next two sections describe a pair of such approaches.

Incentives for Performance

Though some enthusiasts of deregulation call for an end to regulation altogether, most recognize that simply throwing rules on the trash heap will not suffice. As inane as many specific regulations may be, broad regulatory structures (such as environmental protection and workplace safety) often have valuable social purposes that policymakers and regulators remain eager to advance. Accordingly, when regulations appear ineffective, stifling, inflexible, or too costly to continue, the search is on for forms of accountability that can replace the focus on compliance. Chief among these is accountability for "results," "performance," or "outcomes." Accountability for results starts from the reasonable premise that results are what matter most. The aim of public policy, this reasoning goes, should be to produce the intended outcomes, not to prescribe the means of getting there. Policymakers (and their delegates in public agencies) should set goals for performance, and then create a system of incentives to induce relevant parties to achieve those goals, by whatever means make sense.

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Of course it is not necessary to look outside the domain of education to find examples of performance-based reform. Almost every state has instituted standards for student learning, required schools to administer tests to determine whether pupils are meeting those standards, and attached at least some consequences to how schools, school districts, and/or students perform on these tests. Even within special education, the 1997 IDEA amendments sought to

place more emphasis on the setting and achieving of learning goals by disabled students. However, in many of these educational settings (including special education, as discussed in Chapter 3), performance accountability has been primarily an *overlay* on the existing compliance-oriented system, rather than a replacement for it. Though standards-and-accountability reforms often carry with them a great deal of rhetoric about giving districts and schools more authority in exchange for their enhanced accountability, the vast majority of public schools have little control over their budgets, personnel, use of time, or even their instructional programs. Charter schools and some unique public schools are exceptions, but they represent a small fraction of all public schools. The 1997 IDEA amendments pressed for more performance accountability, but also left compliance in place as the essential core of special education policy.

An important subset of performance accountability seeks to encourage a particular kind of outcome: prevention of problems before they develop.

Success stories. Consequently, it is helpful to look outside of education for some examples of regulatory reform in which moves toward performance-based accountability were actually moves away from compliance-based approaches. Perhaps the best example was Great Britain's "Next Steps" initiative, launched in 1988. Over the course of several years, most of the country's government agencies negotiated performance agreements (known as "framework documents") with the ministers or departments overseeing them. These documents specified results the agency would achieve over a three-year period and the flexibility and autonomy it would achieve in return. They also set forth consequences that would attach to performance and nonperformance. The chief executive of each agency would be required to reapply for his or her job every three years, and the agency's performance over that time would play a central role in the decision about rehiring.

As the approach—which resembles American charter schools—spread across the government, success stories spread as well. Though many of these successes involved cost savings, the arguably more important outcome was improvements in the quality of services provided. The Vehicle Inspectorate—newly judged by measures such as waiting times and customer satisfaction—immediately opened its offices on Saturdays and Sundays, making it much easier for people with Monday-to-Friday jobs to have their cars inspected. The Employment Service began publishing comparative data about local offices. Offices responded by cutting waiting times, increasing the accuracy of unemployment-check payments, and reducing costs. Most significantly, the service as a whole increased job placements 40 percent with no new resources.[20]

An important subset of performance accountability approaches seeks to encourage a particular kind of outcome: *prevention of problems before they develop.* By providing incentives for public agencies or private actors to take preventive steps, overseers have managed to reduce the incidence of problems and the costs of dealing with them. Often, the mechanism used to encourage prevention is a set of fiscal incentives that, in effect, provide bonuses for agents that do a good job with prevention. For example, Scottsdale, Arizona (like many other municipalities), provides a lump-sum budget to an employee-owned company that operates its

fire department. The company may keep any surplus left after a year of firefighting. As a consequence, the incentives are strong for the company to focus on preventing fires altogether. The company works closely with developers of new homes and commercial establishments to help them construct fire-safe structures. The company also led the charge to pass a local ordinance requiring sprinkler systems in new buildings. The results: between 1986 and 1991, as the value of property in the city rose 86 percent, fire losses *dropped* by 15%.[21]

In another example, the state of Oregon provides $48,000 to counties for each bed in juvenile detention centers that is *not* used. Consequently, Deschutes County established a community-based alternative to state incarceration for non-violent juvenile offenders that focuses on early intervention, prevention, and creative reinvestment of public money. The results are telling: Between 1997 and 2000, Deschutes County saw its average incarceration rates drop from 23 to 5 youths (the lowest in the country), while earning $630,000 in unused-bed resources to support prevention efforts.[22]

Benefits and Challenges to Incentives for Performance

These examples demonstrate the basic principles of the performance-based approach. Overseers *set goals or standards* for regulated parties to meet. To the extent practicable, these goals and standards concern ultimate destinations (*outcomes*) rather than procedural steps along the way (*inputs*). Overseers establish *measures* that will allow everyone to assess the extent to which regulated parties are meeting goals and standards. They give regulated parties the flexibility to pursue these goals as they see fit, retaining only the most basic rules to guard against gross malfeasance. And they impose *consequences* based on how well the regulated parties achieve their objectives—often both positive consequences for success and negative consequences for failure.[23] In the case of Britain's Next Steps program, these features are recorded in framework documents that govern each agency's conduct. In cases of the prevention-based approaches, standards, measures, and consequences are more indirect. Scottsdale's fire department, for example, is not given an annual goal for fire losses. Instead, the built-in fiscal incentives encourage the fire department to establish its own ambitious standards and measure its results; the consequences come out in the bottom line.

Rather than prescribe a single way to achieve goals, the performance-based approach gives regulated parties incentives and flexibility to figure out new and better (or less expensive) ways of producing outcomes.

The performance-based approach boasts many appealing features. It focuses the attention of both regulators and regulated parties on what matters most: the outcomes of their actions, at least as they are defined by the goals and standards. Rather than prescribe a single way to achieve goals, it gives regulated parties incentives and flexibility to figure out new and better (or less expensive) ways of producing outcomes. This flexibility allows parties to adapt to local circumstances and invent "better mousetraps" over time. The goal, of course, is simply to "catch mice."

The performance-based approach faces challenges as well. For some opponents of regulation, it

still does not go far enough. Bureaucrats are still put in charge of setting standards and goals which may be unreasonable, inflexible, or ill-suited to local circumstances or changes over time in the regulated activities.[24] Even proponents note technical challenges in creating incentives for performance. First, it is often difficult to set goals and standards that strike the right balance between being ambitious and being attainable, especially when attempting to do so for an entire state or nation. Second, it is often challenging to find instruments that truly measure the outcomes that policymakers most want. Without credible measures, it is hard to generate support for the consequences that attach to inadequate performance.[25] Third, because performance-measurement systems tend to rely on aggregate measures (in order to be manageable and "objective"), they can ignore problematic situations within the broader system. For example, suppose a firm achieves exemplary workplace safety results on a company-wide basis but has one plant where safety is abysmal. Is there any protection for workers at that plant in a system with no rules for specific workplaces, just overall goals? In principle, it is possible to design a system of goals and measures that attends to the problem of the smallest units, but in practice doing so can magnify the difficulties of goal-setting and data-gathering. A fourth and related problem arises when policymakers care not just about ultimate outcomes, but also about how regulated parties pursue these goals. In such cases, an outcomes-based regime does not guarantee all the desired results. For example, regulation in air safety is very compliance-oriented, requiring airlines to employ particular equipment and follow specified procedures. A results-based alternative—allowing airlines to do as they please so long as they kept the number of air deaths per year below an acceptable number—would not be appropriate. Passengers want assurance that airlines are making an effort to ensure that *every airplane* is safe for *every flight*, and that *every pilot and crewmember* is well-trained.

Market-based reforms seek to hold regulated parties accountable via a market-like mechanism rather through a set of goals, measures, and consequences.

Customer Choice

Another technique that policymakers have utilized to move away from enforcement-based systems is the use of market mechanisms. Like performance management, market-based approaches eliminate many of the constraints that formerly governed the behavior of regulated parties. But instead of replacing them with goals, measures, and consequences imposed by public entities, market-based reforms seek to hold regulated parties accountable via a market-like mechanism. Markets, of course, are not a recent invention of regulatory theorists. The idea that market mechanisms can maximize *public* benefit through an "invisible hand" goes back to Adam Smith and, in less sophisticated forms, even further.

Market-based approaches come in different shapes depending upon the particular regulatory problem being addressed. This section discusses one important variant: customer choice.[26] The basic idea is to empower a set of customers to make decisions about the providers from which they will buy the service (or whether they will buy it at all). Often, the immediate customers are the ultimate beneficiaries of the service—such as families of school-aged children, recipients of public assistance seeking job training, or government employees who need to purchase supplies or equipment. Other times, the customer acts on behalf of the ultimate beneficiaries—such as a

city agency purchasing garbage-removal services or water. Instead of dictating in detail how providers will carry out the activity, overseers leave those decisions to providers on the theory that those who perform poorly will simply "go out of business."

A good example comes from America's experience with public housing. For many years, the primary way in which the government helped the poor afford shelter was by constructing public housing "projects" and subsidizing the rent of low-income residents (usually by charging them a percentage of their income). Because this housing was often the only realistic alternative for its residents, public housing did not really have "customers"; its residents were not likely to go elsewhere if they were unhappy with their dwellings. To maintain quality, therefore, overseers of public housing had to employ a compliance model, specifying in detail how units would be constructed and maintained. This approach, however, could not overcome the tendencies toward decline and chaos that infected these complexes. No handbook of regulations on safety or building upkeep could stem the tide of vandalism and neglect. The compliance model did not cause this decline, but it was woefully inadequate as a solution.

The main appeal of empowering customers lies in the fact that customers with a choice of providers are more apt to receive services that meet their needs and suit their preferences.

By contrast, the federal Section 8 program pursued a similar goal but used customer choice rather than compliance to achieve quality and satisfaction. Under Section 8, low-income families receive subsidies that they can put toward the housing of their choice. If unhappy with the housing they have selected, they can search for alternatives. Landlords have new incentives to provide quality housing that is affordable to Section 8 recipients because their ability to pay is enhanced by the subsidy. To be sure, Section 8 is not a perfect system. The supply of affordable housing is limited, and many landlords resist Section 8 tenants. Compared with traditional public housing, however, most would judge Section 8 a success, providing homes for millions of people in places they want to live outside the confines of public housing projects.

By way of further example, many government agencies across the world have been transformed into "enterprise" functions, living or dying based on their ability to convince other agencies to deliver their services. If the central supply depot cannot produce the right supplies in a timely and cost-effective manner, managers may shop at Office Depot or other vendors instead. If the human resources department cannot stir up good pools of candidates for job openings, managers can place their own classifieds or hire headhunting firms. If the sanitation department cannot deliver better service and/or lower costs than alternate providers, the city can contract with the private firms for this service.[27] In all these examples, providers face strong incentives to provide excellent service. They are not told what to do but are induced to figure out the "best" approaches by their need to attract and retain customers.

Benefits and Drawbacks of Customer Choice

The advantages and drawbacks of this approach have been voluminously discussed in general and more specifically in reference to K-12 education, where reforms that give families more

choice over the schools their children attend are both popular and controversial. The main appeal of empowering customers lies in the fact that customers with a choice of providers are more apt to receive services that meet their needs and suit their preferences. Moreover, providers that must attract customers in order to survive and prosper are likely to be better motivated to improve the quality of services. Finally, to the extent that providers are paid on a per-customer basis for their services, they also face strong incentives to reduce the costs of delivering those services. The drawbacks of customer choice as an accountability mechanism include (1) the potential disconnect between what individual customers want and "the public interest"; (2) the fact that customers in some markets may not possess sufficient information to make sensible choices; and (3) the related fact that the customers who are least informed or motivated to seek out quality services may be those in greatest need. Like performance management, choice-based approaches might result in aggregate improvements in service but leave significant sub-groups with the same or inferior levels of service.

One theme that runs through the various approaches discussed in this chapter is the importance of high-quality information about the regulated activity.

Tying it Together: Transparency and Problem-Based Thinking

In other regulatory domains, recent decades have witnessed much experimentation with alternatives to traditional command-and-control structures, adding many tools to regulators' toolboxes. But simply having the tools has not by itself revolutionized regulatory domains. Harvard professor Malcolm Sparrow has noted: "Regulators face no shortage of strategies, methods, programs, and ideas. Rather they face the lack of a structure for managing them all."[28] This section outlines two important ideas that contribute to such a structure, with examples of how these ideas have been put to work. We then explore how these ideas might apply to special education.

The Importance of Information and Transparency

One theme that runs through the various approaches discussed above is the importance of high-quality information about the regulated activity. The need for information is perhaps most obvious in the case of performance-management approaches, which rely centrally on measuring the progress of regulated parties toward pre-defined goals. But information is also critical in the other approaches. Under smart regulation, regulators need ways of knowing whether their creative approaches are indeed yielding better results. Regulators in a variety of fields have developed elaborate systems of random sampling to keep tabs on critical outcomes as new approaches go into effect.[29] And in some smart-regulation approaches, information plays an even more direct role as regulators seek to use publicity about compliance and/or outcomes to motivate regulated parties to comply. In customer-based market approaches, consumers need good information about services and performance in order to make intelligent choices among providers.

Too often, regulatory bodies lack the systems and expertise to acquire and use information in these ways. Many problems can contribute to this. First, good measures of newly important

behavior or outcomes may not exist at the outset. Regulators may be faced with the task of developing such indicators from scratch, which is time-consuming and may require technical expertise not present in the agency. Second, information-gathering systems currently in place may not meet new information needs. In agencies that have traditionally relied on command-and-control regulation, information flows have been developed that mesh with those approaches. Agencies keep track of whether forms have been filed, deadlines met, counts taken, inspections conducted, dollars spent within the appropriate line items, and so on. Shifting to systems that focus on other tasks or measurements involves changing long-standing routines, which takes time and sometimes training. Third, although the technology available to regulatory agencies for information collection and analysis has improved dramatically in recent years, many agencies still lag behind. Finally, in agencies that have not heretofore relied heavily on data analysis, staff may lack technical skills required to make the best use of incoming information.

One of the greatest barriers to change in regulatory practice is fear on the part of policymakers, regulators, and interest groups that it will be difficult to tell whether new strategies are working.

As severe as these problems may be, solving them is generally worth the investment. One of the greatest barriers to change in regulatory practice is fear on the part of policymakers, regulators, and interest groups that it will be difficult to tell whether new strategies are working. Consider the case of Maine 200, which provides incentives for companies to comply voluntarily with regulations. Suppose that, after a few years of this approach, the agency's traditional measures showed a significant trend—the number of enforcement actions against companies was down. But did workplace safety actually improve? Sparrow writes, "In the absence of such measures, the ambiguity persists: maybe compliance improved. Or maybe the department got distracted or captured. No one can tell which, so observers remain free to choose whichever explanation suits their purpose."[30] In the case of OSHA in Maine, the agency did develop alternative measures, tracking the number of workers' compensation claims filed by employees. Because these dropped dramatically, the agency had some confidence that its tactics were actually improving worker safety, not just letting companies off the hook. Without such indicators, however, it would have been difficult for the agency to muster political support to change its approach in this way.

Problem-Based Thinking

Another theme in the discussion of these new regulatory tools is that each seems well-suited for some situations but not others. Part of the criticism of the command-and-control approach is that it has been applied indiscriminately to a wide range of regulatory problems regardless of whether it was the most effective strategy for solving a problem. As appealing as these alternate approaches may be, it would be incorrect to assume that any of them can solve every problem faced by policymakers and regulators.

Instead, the most sophisticated thinking about regulatory strategy proposes a "problem-based approach" whereby policymakers or regulators identify concrete problems that need to be addressed if outcome goals are to be achieved.[31] For each, they assemble a set of tools that

seem likely to solve that particular problem. Rather than choose a specific tool (such as customer choice) in advance and go looking for ways to use it, the results-based approach suggests applying a great deal of energy to *defining problems and then selecting appropriate tools* to address them. Within any broad regulatory domain such as the environment or special education, there will be many different problems, each demanding its own tailored set of solutions. The aim of regulatory policy should be to create a system in which these problems are identified and then addressed using an array of tools.

Two implications of the problem-based approach are worth noting. First, it magnifies the informational needs sketched above. Understanding what the problems are, the contexts in which they arise, and the likely effectiveness of different tools requires large amounts of information. Assessing whether coordinated strategies are working also requires good measures of the incidence of the problem that is being addressed.

Second, an agency adopting the problem-based approach uses different tools in different situations. Though this point may seem obvious, it runs counter to traditional regulatory thinking, which tends to value consistency and uniformity. An agency taking a problem-based approach may end up applying different strategies to different problems under its purview, different regions of its jurisdiction, and different categories of regulated parties, even to specific regulated parties. Within the context of problem-solving, these variations are not capricious or arbitrary; instead, they are what Sparrow calls "rational inconsistencies," justified by the fact that they make it possible to solve problems that would go unsolved if the agency were required to apply a uniform approach across its entire domain.[32]

We believe three principles should guide any redesign of special education policy: (1) an obsession with results; (2) a big toolbox; and (3) residual rules that buttress the results obsession.

Implications for Special Education

Based on these experiences in other domains, this section sets forth principles for a reworked special education accountability system and then outlines how such a system might work.

Principles for Redesign

Here are three principles that we believe should guide any redesign of special education policy:

- **An obsession with results.** First and foremost, every element of the system should focus on student learning. This obsession must begin at the federal level, with the way Congress frames the federal mandate and the way Washington structures its funding and oversight of states. Through those mechanisms it must create the same obsession in state education agencies, so that they in turn structure their funding and oversight of school districts, charter schools, and other entities with student-learning results in mind. Prodded by those systems to focus intently on learning outcomes, districts must structure their relationships with schools and other providers to produce results. Ultimately, the people on the front lines, those who work directly with children, must share this obsession.

- **A big toolbox.** Within that results-driven framework, people involved at all levels should have access to a wide range of tools for achieving the desired outcomes. Taking a page from "problem-based thinking" in other regulatory domains, policymakers and officials at each level must give those at lower levels the authority to reach into a big toolbox and select the tools most likely to solve problems, including but not limited to the strategies discussed earlier in this chapter: customer choice; incentives for performance; and "smart regulation" approaches such as technical assistance, information, and addressing root causes of shortcomings. Many different problems get in the way of effectively educating disabled students, and they arise at different stages of the educational process. They have different underlying causes. They vary by place and disability. Rather than replacing the one-size-fits-all compliance model with another monolithic approach, a new system should provide the incentives and flexibility to enable problems to be solved.

- **Residual rules that buttress the results obsession.** To the extent that some compliance obligations remain in place, they should be limited to those that enable the results-obsessed system to function properly. As we discuss below, certain aspects of the compliance model probably need to stay. However, in contrast to the current approach, which makes compliance paramount, we propose limiting compliance obligations to a minimal list that supports the overall results-orientation of the system by ensuring that goals are set for student learning, results are measured, and a safety net remains in place for students who still are not learning despite the system's intense new incentives for performance.

Using New Tools Within Special Education

This section frames a new approach to special education policy, drawing on lessons from other regulatory fields. We aim merely to set out a conceptual framework here with the understanding that it would require a great deal of elaboration and detail beyond the scope of this chapter to implement such a framework.

> ***We propose limiting compliance obligations to a minimal list that supports the overall results-orientation of the system by ensuring that goals are set for student learning, results are measured, and a safety net remains in place.***

Intense incentives for performance. The main substitute for the old compliance model is a system of performance incentives to (1) maximize the degree to which students with identified special needs achieve (effective intervention); (2) maximize the chances that students with remediable special needs go "off the special education rolls" (effective remediation); and (3) minimize the incidence of preventable special needs in the first place (effective prevention). Like any good performance-management system, the approach we propose involves clear goals for performance, careful measurement of results, and the application of consequences based on those results. We do not address the difficult issue of how to measure results in this chapter and instead concentrate on the critical issues of goal-setting and consequences.

Goal-setting up and down the system. We propose a system of goal-setting that is *nested, negotiated,* and *diverse.* Just as the current compliance system is "nested" (with federal constraints binding states, whose constraints bind local education agencies (LEAs), whose constraints bind schools, teachers, and contractors), so too must a system of goal-setting have this nested quality. As a nation we must have goals for states, which must have goals for LEAs, which must have goals for schools and contractors, which in turn have goals for individual students. It's possible to imagine two extreme ways to arrive at such a nested system: a top-down approach, in which the federal government dictates goals for states, which dictate goals for LEAs, and so on; or a bottom-up approach, in which schools (or other providers) set goals for students, which are rolled up into LEA-wide goals, which are in turn rolled up into statewide goals, which are finally rolled up into national goals. Each has its drawbacks. A purely top-down system would lack responsiveness to local needs and would have difficulty taking into account divergent starting points. It would run counter to the "problem-based" approach advocated in this chapter which calls for tailored responses to different problems. At the same time, a strictly bottom-up system would tend to generate mediocre, easy-to-reach goals and would foster unacceptable inconsistencies in the learning achieved by disabled students between one school or district and others.[33]

Our proposal represents a middle path in which entities at each level negotiate performance agreements with the next level up, each spelling out the performance targets the entity is expected to reach.

Our proposal represents a middle path in which entities at each level *negotiate* performance agreements with the next level up. These agreements would spell out in yearly or multi-year fashion the performance targets the entity is expected to reach. Because the higher-level entity has the final say, it can bring a degree of uniformity and ambition to the lower-level party's goals sufficient to allow the higher-level entity to meet targets agreed to with *its* controlling authority. But because agreements would be forged independently, they would have the capacity to reflect the particular situation of the entity in question. An LEA or state with one set of daunting challenges and a particular starting point might have a different set of goals for the year than does a neighboring LEA or state. A school facility operating an all-day pullout program for students with certain acute needs would have completely different goals from a "regular" school whose student body includes a small number of learning-disabled children.

As implied by the previous paragraph, these negotiated agreements would contain diverse types of goals. For example, a high school's agreement might contain goals regarding outcomes as varied as exceptional students' mastery of state standards (and their progress over time toward such mastery), scores on standardized tests (and changes over time in individuals' scores), achievement of more student-specific learning goals measured in other ways, graduation rates, and post-school outcomes such as employment. If the school housed unique populations or had distinct historical problems, its agreement might address those issues with goals unlike those of other high schools in an LEA. An LEA's agreement with the state might contain similar measures, aggregated across all its high schools, plus analogous goals at the middle and elementary levels. Like the high school example, if the LEA faced singular challenges (such as especially low performance of special-needs children of a particular race), its agreement might contain goals

relevant to those issues.

At the bedrock of the goal-setting system are the goals set for individual students. In contrast to the current system, which mandates individual goals but does not make attainment its central focus, goals for individual students should become the guiding force for all activities within special education so that the attainment of goals by individual students would be the foundation for schools' achievement of *their* goals, which would in turn be the foundation for LEAs' attainment of *their* goals, and so on.

> ***Census-based (rather than need-based) funding can create strong financial incentives to prevent and remediate without the threat of losing funds.***

Consequences for performance. Though arguably the process of goal-setting and measuring would induce some improvements in performance, a full system of performance incentives needs consequences tied to progress toward goals. In particular, we must consider sanctions which might be applied to entities that fall short of their goals. Most obvious is withholding funds. Because special education is expensive and because most entities receive special education funds from the next level up the chain, this threat is likely to be potent. However, it is a blunt instrument that tends to involve all-or-nothing decisions, when in fact the performance picture for an LEA or state is likely to be mixed as it achieves goals in some areas but not others. Withholding funds also has perverse effects, penalizing students for the errors of educators (though these side effects can be mitigated by withholding administrative rather than program funds). Furthermore, high-stakes organizational punishments such as funding reductions for sub-par performance can create strong incentives to employ "creative" strategies for measuring and reporting results, a phenomenon that is often referred to as "gaming the numbers." Consequently, although withholding funds may be a viable *ultimate* sanction for agencies to wield, a fine-tuned system of performance incentives should offer more options. Here are some examples:

- **Limited census-based funding.** To encourage entities to achieve certain kinds of goals—notably those having to do with preventing specific learning disabilities from developing altogether or eliminating learning disabilities that can be remedied over time—census-based (rather than need-based) funding can create strong financial incentives to prevent and remediate without the threat of losing funds.[34] In a fiscal system that provides more resources as more students are identified with special needs, states, LEAs, and schools have no financial incentive to engage in preventive or remedial activities. If the system provides parts of special education funding on a "census" basis—a certain amount per pupil, counting *all* the entity's students—entities acquire incentives to prevent and remediate learning disabilities. To account for differences in the incidence of these preventable and remediable learning disabilities, some kind of modified census system that adjusts for school-to-school or district-to-district differences would likely make sense. But the basic notion of providing built-in, self-enforcing incentives for achieving desirable outcomes is sound. Note, however, that this strategy works best for a limited class of disabilities. Pure census-based funding would create incentives for LEAs to find ways to exclude children with expensive disabilities altogether. LEAs that happened to have high

proportions of children with expensive disabilities would face significant cost pressures. To avoid this, a fiscal system that blends census-based funding with funding linked to the actual presence of students with certain types of disabilities makes the most sense. Census funding works best for broader geographic entities, such as states and large districts, which are more likely to possess an average incidence of a given disability. It is less appropriate for smaller LEAs and particular schools, which might by chance enroll disproportionately large numbers of such children.

- **Rewards for exceptional performance.** Another fiscal approach is to provide bonuses for exemplary performance. Bonuses can function at all levels of the system—federal bonuses to states, state bonuses to LEAs, LEA bonuses to schools, and LEA or school bonuses for teachers or other providers.

- **Market testing.** In many cases, it may be possible to create performance incentives by putting providers of special education to a market test, requiring them to compete with other potential providers for the "business" of a school or LEA. "Providers" could be organizations that deliver special education services, or they could be individual teachers. Either way, the idea is to make continued contracts or employment contingent on performance. In essence, this approach pushes the notion of performance agreements another notch down the chain, closer to the actual instructional process. Market testing is more acceptable than simply withholding funds because it does not penalize students for the poor performance of providers, except as they suffer from disruptions caused by changes in providers. This practice is already in use for providers of highly specialized placements and services, such as private facilities that offer residential treatment and services.

Giving individual families the opportunity to choose providers—with funding following children to the new provider—creates a more targeted form of performance accountability.

- **Offer family choice.** In contrast to the bluntness of a threat to withhold funds from an LEA, school, or provider, giving individual families the opportunity to choose providers—with funding following children to the new provider—creates a more targeted form of performance accountability. This approach would work better in some situations than others. Choice is less promising, for example, where the supply of providers is thin; more promising where many providers are eager to compete for students. This latter variable is not, of course, fixed, and policymakers eager to use this approach to promote accountability would do well to consider ways of stimulating the supply of effective providers of needed services. Such supply stimulation would be more likely if the funding that followed the child increased with the severity of the disability in question. (As described in Chapter 13, Florida recently instituted a program whereby families of special-needs students who do not meet the goals of their individualized education programs (IEPs) may select other providers, taking their special education funding with them.)[35]

- **Remove flexibility.** Another potential sanction is a return to command-and-control-style oversight. An entity that fails to meet performance targets could be placed on probation in

which it must adhere to stricter procedural controls until its record improves. Note that such a removal of flexibility need not be an all-or-nothing move by an overseer; it could be applied to certain aspects of the process and not others (based on where the weaknesses lie), to certain kinds of disabilities, and so forth.

- **Using information-based approaches.** Finally, policymakers should not underestimate the power of transparency as a performance incentive. If schools, LEAs, states and federal officials know that the extent to which they are (or are not) achieving their goals with special-need students is going to be widely disseminated to parents, policymakers, the media, and the wider public, they are likely to focus more energy on achieving those goals.

Why does the framework retain some elements of compliance and omit others? Our problem-solving orientation recognizes that there are some problems that are more successfully addressed with compliance approaches than others.

With an array of possible accountability tools, an important question becomes how policymakers can blend them into a coherent system of consequences. What we propose here, once again, is a *nested* approach in which each level of the system takes two actions with regard to entities at the next level "down":

First, each level of the system sets consequences for the entities below it. Each level makes clear what consequences will result from different levels of performance, utilizing tools such as those noted above.

Second, each level empowers the entities below to use the full range of consequences in their own oversight of succeeding levels. The word "empowers" is key; in the envisioned system, Washington would neither require states to mete out any particular consequences for LEAs nor require LEAs to deal with their schools and providers in any particular fashion; nor would it forbid any such actions. Rather, federal policy would make clear that these entities may use the full range of consequences in their efforts to induce performance from those they oversee. By the same token, state policy would make clear that LEAs are free to use the full arsenal in their oversight of schools and providers.

It is worth noting that, although different tools are easier to use at different levels, there is no reason to restrict their use to one level or another. For example, market testing is most obvious as a strategy for an LEA or charter school. It becomes more difficult to devise a market-testing approach that a state could use in its oversight of LEAs, and more difficult still to devise a federal market test for states. But state agencies facing strong pressures from the federal government to produce results would have an incentive to investigate such an option. For certain specialized services, for example, it might be possible for a state to contract directly with another provider rather than route funding to a low-performing LEA. What is important is that states be empowered to pursue such options as they see fit and that they face strong incentives to pursue strategies that are likely to yield results.

Residual base of essential compliance obligations. In addition to the basic obligation to

educate all children, including those with disabilities, we suggest four fundamental processes that local education agencies (and states) should be responsible for carrying out. First, LEAs should continue to be required to identify potential special-needs children and assess those special needs. Second, for each child so identified and assessed, LEAs should be required to establish year-by-year goals for the student's learning—again reinforcing the fundamental results orientation of special education policy. Third, LEAs should be required to assess students' progress on these goals and report the results to parents, schools, the state, and the public. Finally, LEAs should be required to involve and inform parents and guardians throughout this process. States should monitor LEAs' compliance with these obligations and disseminate their own reports on compliance and progress toward meeting goals.

In cases where IEPs, "least restrictive environments," specially certified personnel, and highly choreographed committees produce the best outcomes for students, schools will likely use them even when not required to do so.

Readers will likely note that this list retains a significant degree of procedural compliance but omits several significant aspects of the current regime. Omissions include the requirement that each student have an IEP, specific requirements about the nature of IEPs (such as the mandate that students be placed in the "least restrictive environment"), limitations on the type of personnel that can work with special-needs children, and stipulations about the membership of committees that oversee the residual procedural requirements (beyond the required involvement of parents).

Why does the framework retain some elements of compliance and omit others? The answer lies in the problem-solving orientation laid out above; there are some problems that are more successfully addressed with compliance approaches than others. The problems singled out for continuing compliance regulation share two important characteristics:

First, addressing them is essential to the result-oriented approach of the proposed system. Without knowing which children have disabilities—and the nature of those disabilities—it is impossible to set goals and measure performance for their learning. As we discussed in Chapter 3, without having a clear set of goals for each student and measuring progress toward them, it is impossible to judge the progress of students, schools, LEAs, states, or the nation as a whole. Without widely reporting the results of those measurements, it is impossible for LEAs, states, the federal government, and families to exercise the strategies envisioned here. If families are not in the loop, the system loses (potentially) the most effective and self-managing accountability mechanism of all—the needs and priorities of the ultimate "client."

Second, they require a basic "safety net" to help ensure that no child falls through the cracks. One potential pitfall of an approach that relies heavily on performance measurement is that it tends to focus on aggregate results. Under such an approach, it is possible for a system (like an LEA) to meet all of its performance goals even as a subset of students fails to learn. To the extent that such failure is due to lack of effort by—or incompetence among—school officials, a safety net can be helpful. Part of that net can be built into a performance-based system through the use of customer choice which—unlike other possible consequences—focuses not on aggregate numbers but on the performance of individual students and the satisfaction of their families. The

compliance requirements outlined here enhance that safety net, helping to assure that individual students are not ignored by the system.

Omitted steps—such as the required IEP, rules prescribing the nature of education programs for disabled students, restrictions on personnel, and stipulations about committee makeup—all lack one or both of these characteristics. Although it is plausible that these omitted steps can contribute to good outcomes for special-needs children, there is no reason to think they are *essential*. Indeed, current experience makes clear that even with all these trappings, many disabled students receive a poor education. Well-structured performance incentives and family choice can produce better overall results than these procedural requirements. In cases where IEPs, "least restrictive environments," specially certified personnel, and highly choreographed committees produce the best outcomes for students, schools will likely use them even when not required to do so.

A perfect system of measurement is a chimera, but policymakers can move toward a results-based system even though measurement systems are imperfect.

Enabling "smart regulation." Within the limited scope of residual compliance obligations, states and LEAs would be free to use "smart regulation" to increase the level of compliance, reduce its burden, or, most importantly, enhance the results achieved. Because the essence of smart regulation is the use of creative strategies to induce desired behavior in particular situations, it is impossible to lay out in the abstract all forms that smart regulation might take in special education. But it is possible to offer some illustrations:

- **Addressing underlying causes.** A state finds that an LEA chronically fails to meet its compliance goals regarding identification and assessment of certain kinds of disabilities. State officials realize that this LEA is plagued by turnover of personnel needed to assess these conditions. Conversations with other districts that have similar compliance issues reveal that they face similar problems. The state responds by working with select LEAs to (1) create a training institute to boost the supply of needed experts, or (2) use Internet and satellite technology to give LEAs access to a statewide pool of specialists.

- **Negotiated solutions with technical assistance.** Much like OSHA's Maine 200 program, the state identifies the LEAs with the most severe compliance difficulties. It asks them to develop acceptable plans for boosting their compliance and outcomes or face a thorough inspection of their operations.

Though these two examples illustrate smart regulation, the idea is not to mandate such tactics from Washington but to encourage federal, state, and local officials to use such approaches as they pursue their goals within the broader context of the performance incentives they face. In order to meet their performance targets, agencies would utilize Professor Sparrow's problem-solving methodology on a regular basis—identifying problems, devising approaches using diverse tools, monitoring results, and moving onto the next problem.

Challenges

The framework outlined above is not without transition problems. Here are several:

Measurement. Most of the proposed strategies require significant specification and measurement of outcomes. Although special education has moved in this direction in recent years, problems still bedevil efforts to assess how students, schools, LEAs, states, and the nation as a whole are performing; and the IDEA's 1997 amendments did not adequately solve these problems. Because special-needs students are, by definition, more severely challenged than regular students in their quest for educational achievement, we particularly urge that any performance measurement system (1) either eschew special testing accommodations or use the same accommodations consistently for a given student, and (2) focus on gains in test scores rather than whether a given pupil reaches a fixed achievement level. A perfect system of measurement is a chimera, but policymakers can move toward a results-based system even though measurement systems are imperfect. In any case, a major investment of state, federal, and local resources in improved goal-setting and measurement systems is a must for the success of this proposal, and for most other worthwhile reforms of special education.

A perfect system of measurement is a chimera, but policymakers can move toward a results-based system even though measurement systems are imperfect.

Personnel. One challenge faced universally by regulatory agencies that have reinvented their oversight systems is the fact that today's personnel are not necessarily equipped for their new tasks.[36] Under the proposal outlined here, special education agencies would shift much of their resources to tasks like defining outcomes, devising measurement systems, negotiating performance agreements with entities under their jurisdictions, monitoring outcomes, and creating innovative problem-solving strategies that utilize tools beyond the enforcement of rules. Though special education agencies do some of these things now, as mentioned in Chapter 3, significant retooling, in the form of professional development and new hiring, would likely be needed.

The civil rights question. Current special education regulation rests upon a civil rights foundation. Students are entitled to due process and certain kinds of treatment, and they may pursue litigation if they believe their rights have been violated. This proposed set of reforms retains some aspects of due process, requiring that LEAs identify and assess children for special needs, set goals for their performance, monitor and report progress, and involve and inform families. But other aspects of current due process would vanish, to be replaced by strong performance incentives. Unfortunately, as in any system (including the current compliance-based one), some students could slip through the cracks in a performance-oriented system. An LEA, for example, could meet or exceed all of its goals for the year, even as some individual students within the system are poorly served. Could those youngsters sue the LEA for neglecting their specific needs, even as the LEA met its general performance goals? If so, would the threat of litigation induce the special education system to cling to today's compliance approach as a defense mechanism? In line with the new focus on results suggested above, could the civil rights of students with disabilities be redefined from a "right to be served" to a "right to be educated"? We pose these as questions to be addressed among the many challenges that any significant reform of an entrenched system invariably faces.

Conclusion

This outline of a new policy framework does not explore all the ramifications or supply all the details that would need to be worked through. What is most important is the set of underlying principles—the obsession with learning results; the provision of a wide range of tools to participants in the system; and the limited, residual base of compliance requirements. Where we have suggested details, we remain open to alternative approaches as long as they live up to these principles. In fact, we believe that "openness to alternatives" may be what is needed most in special education, where it is common for any criticism of the status quo to be taken as an attack on disabled children. Unless people involved in this policy area are willing to weigh proposals for change, it is difficult to imagine that progress will be made. We hope the ideas set forth here will generate that kind of open discussion.

The accountability system governing special education is beginning to evolve away from a "one-size-fits-all" compliance system; we think policymakers should accelerate this evolutionary process.

Though it centers on results, the system of accountability and effectiveness oversight that we advocate relies upon a mix of performance incentives, professional judgment, and limited rule-based compliance. As such, it is a hybrid of the three "pure" types of accountability systems of hierarchy, markets, and clans discussed in Chapter 3. Each of those regimes has strengths and weaknesses that make it a particularly good or bad fit for various aspects of special education. Today's system is itself a hybrid: it remains heavily influenced by the hierarchical compliance model, yet at times places its trust in "clan-like" organizations of professionals even as market-inspired "results-based" performance systems and requirements have begun to be incorporated into it. The accountability system governing special education is beginning to evolve away from a "one-size-fits-all" compliance system; we think policymakers should accelerate this evolutionary process.

One-size-fits-all systems are common in part because they are easy. Unified systems of rules and procedures are relatively easy to justify, design, document, and communicate to interested parties. They also feature less ambiguity than the alternative system we propose here. In the context of special education, our proposal would require that we rely heavily upon the informed judgments of professionals in the special education field. We expect that, with the sort of performance incentives we envision, the vast majority of those judgments will prove to be sound ones that redound to the benefit of children with special needs. Still, any accountability system that admits to ambiguity and relies upon professional judgment will produce the occasional mistake. If such mistakes become scandals, then the entire accountability system will be vulnerable to attack and modification. All regulatory systems, even those that fit the compliance model, are susceptible to mistakes and subsequent backlashes. However, it is more difficult to defend results-based systems with claims that personnel were "simply following the rules" or that the agency involved was in "full compliance" with existing standards. Thus, we might expect the alternative system for special education accountability and oversight that we present here to prove not only difficult to obtain, but also even more difficult to sustain. Still, we think the ineffectiveness of the current compliance model of oversight does a great disservice to many of our country's most vulnerable children. We think there is a better way.

[1] See, for example, Mark K. Landy, Mark J. Roberts, and Stephen R. Thomas, *The Environmental Protection Agency: Asking the Wrong Questions* (Oxford: Oxford University Press, 1990); National Academy of Public Administration, *Resolving the Paradox of Environmental Protection: An Agenda for Congress, EPA, and the States* (Washington, DC: National Academy of Public Administration, 1997); and National Academy of Public Administration, *Setting Priorities, Getting Results: A New Direction for the Environmental Protection Agency* (Washington, DC: National Academy of Public Administration, 1995).

[2] See Susannah Zak Figura, "The New OSHA," *Government Executive,* May 1997 (available at <<http://www.govexec.com/features/0597s4.htm>>); and Sidney A. Shapiro and Randy S. Rabinowitz, "Punishment Versus Cooperation in Regulatory Enforcement: A Case Study of OSHA," *Administrative Law Review* 49, no. 4 (1997).

[3] See Steven Kelman, *Procurement and Public Management: The Fear of Discretion and the Quality of Government Performance* (Washington, DC: American Enterprise Institute, 1990); and Jack H. Knott and Gary J. Miller, *Reforming Bureaucracy: The Politics of Institutional Choice* (Englewood Cliffs, NJ: Prentice-Hall, 1987).

[4] See Malcolm K. Sparrow, *The Regulatory Craft: Controlling Risks, Solving Problems, and Managing Compliance* (Washington, DC: The Brookings Institution, 2000), 22. Numerous critiques and discussions of regulatory problems exist, including Eugene Bardach and Robert A. Kagan, *Going by the Book: The Problem of Regulatory Unreasonableness* (Philadelphia: Temple University Press, 1982); Eugene Bardach and Robert A. Kagan, eds., *Social Regulation: Strategies for Reform* (San Francisco: Institute for Contemporary Studies, 1982); Robert W. Crandall, et al., *An Agenda for Federal Regulatory Reform* (Washington, D.C.: American Enterprise Institute, 1997); Robert W. Hahn and Robert E. Litan, *Improving Regulatory Accountability* (Washington, DC: American Enterprise Institute and Brookings Institution, 1997); and Phillip K. Howard, *The Death of Common Sense: How Law is Suffocating America* (New York: Random House, 1994).

[5] See, for example, Stephen G. Breyer, *Breaking the Vicious Cycle: Toward Effective Risk Regulation* (Cambridge, MA: Harvard University Press, 1993).

[6] See, for example, Marver Bernstein, *Regulating Business by Independent Commission* (Princeton: Princeton University Press, 1955).

[7] See Organization for Economic Cooperation and Development, *OECD Report on Regulatory Reform: Synthesis* (Paris: Organization for Economic Cooperation and Development, 1997); and Organization for Economic Cooperation and Development, *Recommendation of the Council of the OECD on Improving the Quality of Government Regulation* (London: OECD Public Management Service, 1995).

[8] Thomas Hopkins, *Regulatory Costs in Profile* (St. Louis: Washington University Center for the Study of American Business, 1996), 5.

[9] See Committee for Economic Development, *Modernizing Government Regulation: The Need for Action* (New York: Committee for Economic Development, 1998); Crandall et al., *An Agenda for Federal Regulatory Reform;* John D. Graham, "Legislative Approaches to Achieving More Protection Against Risk at Less Cost," *University of Chicago Legal Forum* 13 (1997): 13-58; Robert W. Hahn, "Achieving Real Regulatory Reform," *University of Chicago Legal Forum* 13 (1997): 143-158; and Hahn and Litan, *Improving Regulatory Accountability.*

[10] See Archon Fung, "Smart Regulation: How Government is Marshalling Firms and Citizens to Protect the Environment," *Taubman Center (Harvard University) Annual Report* (2000), 2-3.

[11] See Ian Ayres and John Braithwaite, "Designing Responsive Regulatory Institutions," *The Responsive Community* 2, no. 3 (1992); Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford: Oxford University Press, 1992); Mary Graham, "Putting Disclosure to the Test," *Taubman Center (Harvard University) Annual Report (*2000), 6-7; Neal Shover, Donald A. Clelland, and John Lynxwiler, *Enforcement or Negotiation: Constructing a Regulatory Bureaucracy* (Albany: State University of New York Press, 1986).

[12] See Sparrow, *The Regulatory Craft,* 86-87.

[13] Ibid., 22; see also Elizabeth Glass Geltman and Andrew E. Skroback, "Reinventing the EPA to Conform with

the New American Environmentality," *Columbia Journal of Environmental Law* 23, no. 1 (1998): 1-56.

[14] See Graham, "Putting Disclosure to the Test."

[15] Archon Fung, "Reinventing Environmental Regulation from the Grassroots Up: Explaining and Expanding the Success of the Toxics Release Inventory," *Environmental Management* 25, no. 2, (2000): 115-127.

[16] Allan V. Burman, "Federal Marketplace," *Government Executive,* April 1999 (available at <<http://govexec.com/procure/articles/0499mark.htm>>).

[17] Sparrow, *The Regulatory Craft*, 23.

[18] See ibid.

[19] See Cary Coglianese, "Assessing Consensus: The Promise and Performance of Negotiated Rulemaking," *Duke Law Journal* 46, no.6 (1997): 10.

[20] See David Osborne and Peter Plastrik, *Banishing Bureaucracy: The Five Strategies for Reinventing Government* (New York: Penguin Group, 1997), 23-30.

[21] See David Osborne and Ted Gaebler, *Reinventing Government* (Reading, MA: Addison-Wesley, 1992), 223-26.

[22] See Program on Innovations in American Government, *2000 Finalists*, available from <<http://www.innovations.harvard.edu/Finalists/2000/index.html>>.

[23] Refer to Figure 1 in Chapter 3 for the essential elements of a results-measurement accountability system.

[24] For example, in their work on improving the performance of government organizations, Osborne and Plastrik list performance management as the least desirable of several approaches to imposing "consequences" for performance, favoring instead (where practical) the more market-oriented approaches discussed in the next section. See Osborne and Plastrik, *Banishing Bureaucracy.*)

[25] For a probing discussion of these issues in the education setting, see Richard Rothstein, "Toward a Composite Index of School Performance," *Elementary School Journal* 5 (2000): 411-417.

[26] This section focuses only on customer choice because of its relevance to special education, in which there are readily definable "customers." Another significant variant is "tradable permits," of which the most prominent examples have emerged in the environmental field. Regulators have set overall targets for the amount of certain pollutants that they are willing to tolerate, issued permits to potential polluters allowing (in the aggregate) the targeted level of emission, and created marketplaces in which permit-holders can buy and sell the right to emit different amounts of pollutants. See Allen V. Kneese and Charles L. Schultze, *Pollution, Prices, and Public Policy* (Washington, DC: The Brookings Institution, 1975); Richard Kosobud and Jennifer Zimmerman, eds., *Market-Based Approaches to Environmental Policy* (New York: Van Nostrand Reinhold, 1997); and Thomas Schelling, *Incentives for Environmental Protection* (Cambridge, MA: MIT Press, 1983).

[27] For examples, see Michael Barzelay and Babak Armanjani, *Breaking through Bureaucracy: A New Vision for Managing in Government* (Berkeley: University of California Press, 1992); and Osborne and Plastrik, *Banishing Bureaucracy.*

[28] Sparrow, *The Regulatory Craft,* 43.

[29] See ibid., 255-278.

[30] Ibid., 113.

[31] See, for example, Herman Goldstein, *Problem-Oriented Policing* (New York: McGraw-Hill, 1990); and Sparrow, *The Regulatory Craft.*

[32] See Sparrow, *The Regulatory Craft*, 251-252.

[33] The argument for goals set at higher levels parallels arguments within regular education for having statewide rather than local standards for student learning.

[34] See Richard Rothstein, "Rethinking Special Education Without Losing Ground," *New York Times,* 5 July 2000, sec. B, p. 12. For more on preventable and remedial disabilities and their policy implications, see Chapters 2 and 12 in this volume.

[35] See Chapter 13 in this volume.

[36] See Sparrow, *The Regulatory Craft*, especially 155-170, 224-237, and 255-278.