



Two Thoughts: New York's FERA Explains How Reformers Should Use Torts to Expand School Choice

By: RiShawn Biddle - February 18, 2013

It's time to help kids in New York State escape dropout factories such as Buffalo's Bennett High School.

NYFERA Shows the Way on Using Torts to Expand School Choice: Two years ago, Dropout Nation argued for school choice activists and other reformers to use the approach of filing torts similar to those undertaken with some success by adequacy and equity advocates. Back then, your editor explained how reformers could take advantage of constitutional requirements in 15 states to provide "adequate" educational opportunities, as well as provisions charging other states to provide free public education, to push for public charter schools, vouchers, inter-district choice, and voucher-like tax credit programs that can help families escape the worst American public education offers. [Former Heartland Institute scholar Bruno Behrend further elaborated on this in a Conversation podcast.] While teacher quality and Parent Power advocates have taken such advice to heart, and school choice advocates have still not embraced this approach.

But now, one reform outfit, New York's Foundation for Educational Reform and Accountability, have made their own call for using the courts to expand choice within the Empire State. The case FERA makes, contained in a 39 page report released last month, offers a useful blueprint for reformers in the state and throughout the nation.

Basing its analysis in part on the successful school funding lawsuit against the state led by the now-defunct Campaign for Fiscal Equity (which led to a 31 percent increase in funding for New York City, and as well as similar hikes for districts in other parts of New York State with almost no benefit in the form of improved student achievement), you FERA argues that the opportunity is ripe for a school choice lawsuit. Besides the Empire State's own constitutional requirement to provide "common schools" and the state high court's ruling in the Campaign for Fiscal Equity v. New York that this means a "sound basic education" fit for kids, there is the fact that the state already identifies failing and mediocre schools through the accountability system initiated as a result of the No Child Left Behind Act (which, as FERA notes, is considered one of the best in the country at least when it comes to identifying failing schools). Considering the overwhelming evidence that failing schools and districts are rarely ever overhauled with any success (including federal data showing that a mere four percent of failure mills are improved after three years), the state simply has no excuse for not doing all it can to help kids, especially those from poor and minority backgrounds often stuck attending the worst-performing schools, avoid them altogether.

The Empire State could just require districts to allow kids from anywhere to enroll in their schools, essentially encouraging inter-district choice. This would work particularly well in Westchester County outside New York City, where there are already a wide array of high-performing and laggard districts. In the case of the Big Apple, the state could even force Mayor Michael Bloomberg to end zoned schooling and allow open enrollment all over the city. The state can even go further and allow for unlimited number of charter schools to open throughout the state. But the choice efforts can go further. Although New York State does have one of those religiously-bigoted Blaine Amendments restricting the state from funding parochial schools, court rulings have given the state wiggle room as to what it means to aid private and parochial schools; a voucher program serving kids in the worst-performing districts, for example, could be allowed. Add in the U.S. Supreme Court's decision in *Zelman*, which allows states to fund vouchers so long as it doesn't determine what kind of religious school can be attended, and school choice activists could mount a successful choice tort.

From where FERA sits, two of the state's worst-performing districts — Rochester and Buffalo — would be the ideal battlegrounds for launching school choice torts. For one, their longstanding records of systemic academic failure and dysfunction makes them ripe for rallying support for such a suit; this is especially true given that the state Court of Appeals has already blessed the requirement set out by Campaign for Fiscal Equity that the state must give attention to those districts that enroll especially disadvantaged populations. That almost none of the schools in both districts are of high-quality — and thus, nearly all kids are stuck with the prospects of educational and economic despair — also factors into FERA's thinking. Add in the fact that both count on New York State for respectively, 69 percent and 77 percent of their funding — and have also seen annual funding increases of 4 percent and 5 percent between 2007-2008 and 2010-2011 — also makes clear that more state funding into their respective district bureaucracies has not equaled better results.

FERA's case isn't necessarily complete. For one, as Dropout Nation has noted ad nauseam, the state will need to actually take over full funding of those districts — and in fact, the entire state — in order to make choice a reality. So long as districts can continue to reap a portion of their dollars from local property taxes, they can argue that expanding choice would hurt local taxpayers who pay a large share of the bills (while also restricting choice within the district, and failing to overhaul their operations). Certainly a school choice program that only provides kids with vouchers to attend private and parochial schools within their respective cities could be done. But what if a higher-quality or better-fitting option lies in, say, Orchard Park instead of within Buffalo, or for Rochester students, may be a Catholic school in Brockport? A more comprehensive school finance overhaul would be needed to transform education in New York State from one based on district bureaucracies to one in which the state funds the highest-quality options for kids, regardless of what the school provider is. All that said, FERA offers a convincing argument for using the courts to advance choice that reformers should embrace.

Whether choice activists and other reformers will do so? They will have no choice. Certainly, there is plenty of reluctance among choice advocates to use the courts. One reason lies in the fact that many choice activists, in particular, are politically conservative, and thus tend to disdain such actions as supporting judicial activism; this, along with the general view that vouchers allow for the government to dip its hands too far into private schools, explains why some choice activists (most-notably the Cato Institute) have preferred voucher-like tax credit programs over vouchers. Another reason: Because choice activists have been fairly successful persuading governors and state legislatures in states such as Louisiana and Georgia (as well as having been successful on the federal level, with the Obama administration championing charters through

Race to the Top and House Republicans defending D.C.'s school voucher program). Add in the reluctance of centrist Democrat reformers to embrace vouchers (which they oppose because of their preference for separation of church and state, even as they support charters, which are often sponsored by churches and sometimes even run by organizations affiliated with religious orders), and one can see why the tort approach has not yet been supported.

Yet the fact remains that choice remains illusory throughout much of the nation. This is especially true in the Empire State, where the reluctance of centrist Democrats to embrace vouchers and opposition from American Federation of Teachers' affiliates have conspired to place limits on expanding choice beyond charters. Even inter-district and intra-district choice, which FERA championed last year in a report released just as children were dealing with the devastation of Hurricane Sandy (which damaged and destroyed a number of schools) hasn't gained much traction. For school choice activists, and the families whose children are stuck in the worst American public education has to offer in New York State and elsewhere, the courts are likely the only tool available for forcing the expansion of school opportunities that shouldn't be denied to any child. And FERA's road map is one that should be considered.

Benjamin Carson and the Importance of Speaking Truth to Power: Your editor doesn't write much about political discussions that aren't related to education. So I haven't had much to say about the move by famed surgeon Benjamin Carson to chastise President Barack Obama for his policymaking on healthcare and other issues at the National Prayer Breakfast held earlier this month. Certainly Carson has attracted plenty of cheers and jeers from all sides of the political line. Some such as conservative icon Cal Thomas and Rich Lowry of National Review are criticizing him for explicitly mentioning political issues during what has traditionally been a nonpolitical event (as well as having "diluted the power" of his own personal story). Supporters of the Obama administration such as radio commentator Bob Beckel are also complaining that Carson was disrespectful for offering his views at a time in which President Obama shouldn't be disturbed by a counterpoint.

Meanwhile others will have a little less admiration for Dr. Carson largely because he's no longer just the doctor who emerged from a single-parent household to become one of the nation's foremost surgeons and philanthropists. They are more-likely to dismiss the work he and his wife have done to stem illiteracy among black children and help them build self-pride (as well as be proud of their heritage). I have no less admiration for him now than before. But then, I'm not exactly one who looks down at folks who speak truth to power. In fact, I would say more people should follow Carson's example.

Certainly one can argue that Carson could have chosen a more political venue for his message. But as history has shown me a long time ago, there is never a convenient time to ever stand for what you truly believe. Every moment taken to express a view on issues of great social and political importance is a moment that involves someone being inconvenienced. This is especially true for political leaders, who are among our most-comfortable and least-afflicted. For presidents and governors, especially those who are defending policies and practices that are damaging to people in our nation, it is always inappropriate to call them out for faulty thinking and bad decision-making.

Which is why all times are perfectly appropriate to speak truth to power. After all, as American citizens, we are endowed by our Creator to the right to articulate our positions at any time before any political leader. Because politicians, especially those who are the first black anything, aren't kings or deities. They are men and women just like the rest of us with flaws just the same and the same requirement to live up to God's commandments as everyone else. This isn't to say that

one should be engage in incivility or behave unethically while expressing their views. But a principled argument against the policies and practices of political leaders, even by the one of the nation's foremost surgeons (and a black man) to the face of the nation's first black federal chief executive, is acceptable, appropriate, and, in fact, demanded. Especially from those of us who have gained influence and a platform for speaking courageously. What is the point of having influence if you do nothing good or courageous with it?

Imagine how much sooner Jim Crow segregation would have ended if, say, a black politician publicly called out Franklin Delano Roosevelt for aiding and abetting his fellow Democrats in southern states. Consider what would have happened if a civil rights leader called out John F. Kennedy to his face for his public (and behind the scenes) vacillations on desegregation. And think what President Obama would have done if a school reformer publicly rebuked him at the Democratic National Convention for launching an effort to eviscerate the No Child Left Behind Act's accountability provisions which has led to Plessy v. Ferguson-like proficiency targets that essentially damn black, Latino, and poor children with low expectations.

Perhaps if more of us, especially those of us with high public standing, engaged in courageous acts of speaking truth to power and influence as Dr. Carson has done, the world would be better for it.