The Ed Trust proposes that parents of children in Title I schools, those that have a disadvantaged population and are the main recipients of federal funds, be vested with a private right of action “to enforce their rights under the law.” The rights that the Trust names are of two kinds. One is for access to data on funding patterns, teacher distributions, and high school graduation rates. The other is for participation in school-level decisions about allocation of supplemental educational services funds, for example, whether to use them for tutoring or expanded in-school instruction.

If the Ed Trust proposal imprudently invites lawsuits from aggrieved parents on a few specific topics, it appears quite restrained when compared to the superhighway to the courtroom concocted by the No Child Left Behind Commission, which offers an unlimited array of statutory language to an unlimited universe of potential litigants. Sponsored by the Aspen Institute, a think tank with global aspirations, the 15-member commission was co-chaired by two former governors, Tommy G. Thompson of Wisconsin and Roy E. Barnes of Georgia, and included the law dean at the University of California at Berkeley, Christopher Edley, who is a leading advocate of private rights of action in education.

In contrast to the Education Trust’s willingness to call a spade a spade and specify its use, the commission proposal is a Pandora’s box wrapped in a euphemism and tied with red tape. Rather than a private right of action, it speaks of “enhanced enforcement options” for parents and “other concerned parties.” Plaintiffs could sue “to enforce the law,” namely NCLB, which is a statute of immense scope and complexity, laden with problematic and sharply contested features, not likely to become simpler in revision.

However, the aggrieved parties would not get to court immediately. There are a lot of bureaucratic stops on the Aspen superhighway. The commission proposal would require states to define procedures by which complainants would bring grievances against local districts or the state itself to a state agency. If the state rejected a complaint, the complaining party could appeal to the U.S. Department of Education (ED), which would be empowered to select the “complaints worthy of response or needing clarifying rulings.” The ED could order a state to respond, but if the department elected not to hear an appeal, the complainant could file suit in state court, an odd approach for a federal law to take, given that in our federal system the United States does not define the jurisdiction of state courts.

Edley has complained, according to the San Francisco Chronicle (February 14, 2007), that parents and the public cannot get in the courthouse door to argue that officials are failing to live up to the obligations of education statutes: “If the state fails to enforce environmental regulations against a polluter, members of the public can not only go to the ballot box, they can also go to court. That’s true in countless areas, and it ought to be true in education.”

But the fact is that for decades litigants have been marching through the courthouse door to influence what happens in schools. They did so to achieve racial desegregation. They do so today for countless purposes, typically to claim a right to free and edgy speech on T-shirts or banners under the First Amendment, to assert rights to education of the handicapped under the federal Individuals with Disabilities Education Act, and to ask for more school spending under state constitutional provisions that are said to guarantee an equitable or an adequate education.

Attaching private rights of action to NCLB would not open the courthouse door for the first time, but would open it much wider.

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