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## Political Currency and Hard Currency: The No Child Left Behind Act Turns Three, 40 J. Marshall L. Rev. 345 (2006)

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# POLITICAL CURRENCY AND HARD CURRENCY: THE NO CHILD LEFT BEHIND ACT TURNS THREE

BY: JOHN HEINTZ\*

## INTRODUCTION

This year is the third birthday of the No Child Left Behind Act (NCLBA).<sup>1</sup> It is an important birthday because the Act has a statutory lifespan of twelve years, and America's schools have an enormous task facing them between now and then.<sup>2</sup> The Act is the most ambitious attempt to improve education this country has ever undertaken.<sup>3</sup> It is the result of decades of educational philosophizing, social experimenting, and political wrangling.<sup>4</sup> The Act is the culmination of three previous epic events in the history of national education reform: 1965's Elementary and Secondary Education Act (ESEA),<sup>5</sup> 1983's publication of *A Nation at Risk* (NAR),<sup>6</sup> and 1994's Improving America's Schools Act

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\* John dedicates this article to the memory of a dear friend and teacher who knew from the trenches how to leave no child behind, Pat Flynn. John received his J.D. from The John Marshall Law School in 2007.

1. The No Child Left Behind Act of 2001, Pub. L. No. 107-10, 115 Stat. 1425 (2001) (codified as amended in scattered sections of 20 U.S.C.).

2. 20 U.S.C. § 6312(c)(1)(M) (2000 & Supp. 2002).

3. The No Child Left Behind Act, which totaled 1200 pages, was "surely the single most sweeping piece of education legislation ever enacted." *W. Va. Gets Advocate in Education Debate*, THE HERALD-DISPATCH, March 26, 2004, at 6A.

4. See Avi Salzman, *A Fight Over Ideas in Education Suit*, N.Y. TIMES, Aug. 28, 2005, § 14CN, at 5 (noting the tension between education philosophy, social pressures, and politics in Connecticut).

5. John Dayton & Anne Dupre, *School Funding Litigation: Who's Winning the War?*, 57 VAND. L. REV. 2351, 2353 (2004) (highlighting legislation in United States education history, including the Johnson Administration's War on Poverty and its ensuing Elementary and Secondary Education Act of 1965 which continues today to provide poor and disabled students with over two billion dollars annually through a formula based the number of disadvantaged children in a school (citing WALTER L. GARMS ET AL., SCHOOL FINANCE: THE ECONOMICS AND POLITICS OF PUBLIC EDUCATION 216 (1978))).

6. THE NAT'L COMM'N ON EXCELLENCE IN EDUC., A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM 5-23 (1983) [hereinafter A NATION AT RISK]. A NATION AT RISK was to education in the eighties what "The Kinsey Report," ALFRED C. KINSEY ET AL., SEXUAL BEHAVIOR IN THE HUMAN MALE 650 (1948), was to sex in the forties, a seemingly well-researched report that

(IASA).<sup>7</sup>

President Lyndon Johnson, as part of his Great Society initiative, enacted the first national education legislation which, to this day, provides Title I funding for disadvantaged and poor children.<sup>8</sup> Under President Reagan, *A Nation at Risk*, the seminal report on education in the 1980s, documented the nation's weak reading skills and called for action to resist the "rising tide of mediocrity" in education.<sup>9</sup> Less than a decade later, President Clinton's attempt at reform through the Improving America's Schools Act opened the door to No Child Left Behind's standards-based mandates by requiring that all schools employ "challenging content, proficiency standards, and assessment mechanisms."<sup>10</sup> All these developments marked significant shifts in federal focus: the buzz words in education policy went from "remediation" (ESEA) to "basics" (NAR) to "standards" (IASA).<sup>11</sup> These three disparate foci for education unified, however, under the growing umbrella of federally mandated educational policy. Moreover, none of these precursors are as far reaching as the NCLBA, which matches previous federal programs in dollars, but surpasses them in consequences for noncompliance.

Part I of this comment will discuss the recent history of the NCLBA and its three key components: teaching, testing, and accountability. Part II will explore the strengths and weaknesses of the various requirements under the Act: highly-qualified teachers, adequate yearly progress, and accountability. Part II will also discuss special education and the conflicts between the Act and special education law. Part III will then propose five changes to the law, including a broader definition of highly qualified teachers, rigorous national standards, local control of assessment, and a more aggressive role in national education policy.

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questioned, in dramatic terms, major assumptions about a fundamental American institution.

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

8. Chester E. Finn & Frederick M. Hess, *On Leaving No Child Behind; Education Law*, 157 THE PUBLIC INTEREST 35, 53 (2004) (referring to the ambitious NCLBA legislation as the "Great Society redux").

9. A NATION AT RISK, *supra* note 6, at 1.

10. Scott F. Johnson, *Reexamining Rowley: A New Focus in Special Education Law*, 2003 BYU EDUC. & L. J. 561, 574 (2003). Much of the emphasis of earlier actions for reform, like the Improving America's Schools, focused on reading. For a history and discussion of national educational reform and reading see David Davenport & Jeffrey M. Jones, *The Politics of Literacy*, POLICY REVIEW, April 2005, at 45.

11. See Michael Heise, *Litigated Learning and the Limits of Law*, 57 VAND. L. REV. 2417, 2450-53 (2004) (providing a history of the "evolving" education policy).

## II. TEACHING, TESTING AND ACOCUNTABILITY

### A. The No Child Left Behind Act

The No Child Left Behind Act, the largest spending program in the history of the United States, towers over its precursors: the Title I legislation of 1965, and the Improving America's Schools Act (IASA) of 1994. Where Title I sought remediation,<sup>12</sup> the NCLBA seeks proficiency.<sup>13</sup> Title I was the first to send federal education funds to schools and it demanded few assurances of accountability in return.<sup>14</sup> The NCLBA, in contrast, sends more money, ties the money to rigid rules, and imposes strict consequences for failure.<sup>15</sup>

After Title I, the IASA arrived and echoed the national move toward standards-based education policy,<sup>16</sup> but it never tied standards to accountability.<sup>17</sup> The NCLBA not only ties standards to performance goals, it creates a national deadline for universal proficiency in meeting those standards.<sup>18</sup> Indeed, the NCLBA requires extensive state plans by which each state will implement the Act,<sup>19</sup> and these plans contain three hallmarks of the NCLBA:

12. National Association for the Education of Young Children, *Fact Sheet on Title I — Helping Disadvantaged Children Meet High Standards*, <http://www.naeyc.org/policy/federal/title1.asp> (last visited Dec. 27, 2006) [hereinafter *Fact Sheet on Title I*].

13. 20 U.S.C. § 6311 (b)(1)(D)(ii)(II) (2000 & Supp. 2002).

14. See *Fact Sheet on Title I*, *supra* note 12 (listing services as professional development for teachers, hiring extra teachers and aides, improving curriculum and parent involvement, and offering tutoring).

15. See Nick Lewin, *The No Child Left Behind Act of 2001: The Triumph of School Choice over Racial Desegregation*, 12 GEO. J. ON POVERTY L. & POL'Y 95, 101 (2005) (reporting that the No Child Left Behind Act provides \$10.4 billion, or three percent of total education expenditures nationally, and that the ninety percent of public schools that receive funds would find it impossible to forego this money).

16. See Rachel F. Moran, *Education and the Constitution: Sorting and Reforming: High-Stakes Testing in the Public Schools*, 34 AKRON L. REV. 107 (2000) (describing the history of the standards movement and its relationship to high-stakes testing).

17. See Jennifer Mueller, *Facing the Unhappy Day: Three Aspects of the High Stakes Testing Movement*, 11 KAN. J.L. & PUB. POL'Y 201, 208 (2001) (tracing, among other things, the historical development of the testing movement, including the 1994 publication of the best-seller *THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE* by Richard J. Herrnstein and Charles Murray, and its concomitant effect on public beliefs that testing could act as a "proxy" for merit).

18. 20 U.S.C. § 6311(b)(2)(F) ("Each state shall establish a timeline for adequate yearly progress. The timeline shall ensure that not later than 12 years after the end of the 2001-2002 school year, all students in each group described [above] will meet or exceed the State's proficient level of academic achievement on the State assessments.").

19. 20 U.S.C. § 6311(a)(1).

highly-qualified teachers, adequate yearly progress, and accountability.<sup>20</sup>

### B. Highly-Qualified Teachers

Central to NCLBA's plan for improving schools are highly-qualified teachers.<sup>21</sup> Highly-qualified teachers are fully certified,<sup>22</sup> and have demonstrated competence to teach the academic subject for which they are licensed.<sup>23</sup> Under the NCLBA plan, new teachers to middle and secondary schools must have a Bachelor's degree,<sup>24</sup> pass a subject area test,<sup>25</sup> and have an undergraduate major,<sup>26</sup> graduate degree,<sup>27</sup> or alternative credential of competency<sup>28</sup> in their academic subject or subjects.<sup>29</sup> The backbone of the requirement for highly-qualified teachers, then, is

20. Although other mandates in the Act warrant detailed attention, including school report cards, choice, and supplemental services like tutoring, this comment will focus on the three components that have garnered the most attention. For a discussion of the mandates relating to school report cards and choice see Erin Kucerik, *The No Child Left Behind Act of 2001: Will it Live up to its Promise?*, 9 GEO. J. ON POVERTY L. & POL'Y 479, 483 (2002), discussing accountability and stating that "annual school 'report cards' will enable parents to compare their child's performance against that of students in similar schools and to transfer their child from a school that continually underperforms." For a discussion of the mandates related to supplemental services see Amy M. Reichbach, *The Power Behind the Promise: Enforcing No Child Left Behind to Improve Education*, 45 B. C. L. REV. 667, 697-703 (2004), arguing that private rights of action represent the best hope for enforcement of NCLBA supplemental services for poor and minority students.

21. James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U. L. REV. 932, 975-76 (2004) (arguing that high-quality teachers are essential to student success, and that the NCLBA, by requiring that teachers teach test preparation instead of material they prefer, deters quality teachers from entering the profession, especially in failing schools where test preparation dominates under the current regime).

22. 34 C.F.R. § 200.56(a)(1)(i)(2005).

23. 34 C.F.R. § 200.56(c)(2)(ii).

24. 34 C.F.R. § 200.56(b)(1).

25. 34 C.F.R. § 200.56(b)(3)(i).

26. 34 C.F.R. § 200.56(b)(3)(ii)(A).

27. 34 C.F.R. § 200.56(b)(3)(ii)(B).

28. In contrast with ambiguity elsewhere regarding professional standards, states are nearing consensus on one national method of determining competency. Thirty-seven states have formally adopted, and all other states have expressed an intent to adopt, the "High, Objective, Uniform State Standard of Evaluation (HOUSSE)" to demonstrate competency for current teachers. NCLB HIGHLY QUALIFIED TEACHER AND PARAPROFESSIONAL DATABASE, EDUC. COMM'N OF THE STATES, [http://www.ecs.org/html/educationissues/teachingquality/housse/housedb\\_intro.asp](http://www.ecs.org/html/educationissues/teachingquality/housse/housedb_intro.asp) (last visited Dec. 27, 2006). Part of the appeal of HOUSSE is its flexibility in allowing qualitative measures of competency. *Id.*

29. 34 C.F.R. § 200.56(b)(3)(ii)(C), (D). The other means include doing coursework in an academic area commensurate with an undergraduate major, or receiving "advanced credentialing." *Id.*

knowledge in core academic subjects.<sup>30</sup> Core subjects include mathematics, science, social studies, and English.<sup>31</sup> By the 2005-2006 school year, the NCLBA required all schools receiving Title I funds to have only highly-qualified teachers on staff.<sup>32</sup>

### C. Adequate Yearly Progress

#### 1. Testing

The driving force behind the NCLBA is adequate yearly progress for all students.<sup>33</sup> Adequate yearly progress is measured through state chosen,<sup>34</sup> standardized<sup>35</sup> exams.<sup>36</sup> States are allowed

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30. See *Fact Sheet on Title I*, *supra* note 12 (recalling that the focus on academic subjects over remedial teaching methodology and student support distinguishes the current Act from the original Title I).

31. Although the NCLBA defines core academic subjects as English, reading or language arts, mathematics, science, foreign languages, civics and government, economics, arts, history, and geography, the grouping of all areas except English, reading, mathematics, and science under the umbrella term "social studies" is common. 20 U.S.C. § 7801(11) (2003). *Cf.* Kristin Roberts, *Will Any of Nevada's Children Be Left Behind? A Discussion of the Federal No Child Left Behind Act and Nevada's Senate Bill No. 1*, 12 NEVADA LAWYER 8, 9 (2004) (defining the core subjects in Nevada as english, mathematics, and science).

32. 20 U.S.C. § 6311(b)(2)(A).

33. Ryan, *supra* note 21, at 939.

34. In secondary schools, for example, Illinois has chosen the college entrance exam, the ACT, as part of its hybrid exam. Diane Rado, *State Academic Watch List in Big Jump to 541 Schools*, CHI. TRIB., Dec. 17, 2004, at 4. Massachusetts created its own criterion-referenced exam, the Massachusetts Comprehensive Assessment System (MCAS), which is also used in Connecticut under a different acronym, CAP/CAPT. Amy Brenner-Fricke, *Education law misses the mark; No child left behind, but creativity is gone*, TELEGRAM & GAZETTE (Massachusetts), Aug. 28, 2005, at 1. California uses its own norm- and criterion-referenced exams, the Standardized Testing and Reporting (STAR). EdSource Online, *Frequently Asked Questions About the No Child Left Behind Act or NCLB*, [http://www.edsource.org/pub\\_faq\\_nclb.cfm](http://www.edsource.org/pub_faq_nclb.cfm) (last visited Dec. 27, 2006).

35. Of all the exams given in the nation to satisfy NCLBA purposes, seventy are criterion referenced, twenty-five are norm referenced, and eleven are hybrids offering sections with both. NAT'L CENTER FOR EDUC. STATISTICS, STANDARDS, ASSESSMENTS, AND ACCOUNTABILITY: NAMES AND TYPES OF STATEWIDE ASSESSMENTS ADMINISTERED, BY STATE: 2003-04, [http://nces.ed.gov/programs/statereform/saa\\_tab5.asp](http://nces.ed.gov/programs/statereform/saa_tab5.asp) (last visited Dec. 27, 2006). Although states give different exams for elementary, middle, and secondary students, only twenty-one give exclusively criterion-referenced tests: Colorado, Connecticut, Idaho, Indiana, Kansas, Maine, Massachusetts, Michigan, Minnesota, Nebraska, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oregon, Pennsylvania, South Carolina, Texas, Vermont, and Virginia. *Id.* Criterion-based tests, or assessments that focus on mastery of material over competition, hold all students to an identical level of knowledge, unlike norm-based tests that sort students based on comparative knowledge. Although criterion-referenced tests comport best with the NCLBA's stated purpose of "common expectations for student academic

to establish their own baseline grades, developed however they choose.<sup>37</sup> As well, states select or design their own tests.<sup>38</sup> Regardless, however, of where a state starts, all students in a school must be performing at the “proficient” level in mathematics and reading by 2014.<sup>39</sup>

Testing occurs three times between the third and twelfth grades.<sup>40</sup> Test data are collected for the total of all students in the school as well as for disaggregated groups.<sup>41</sup> The data is separated, per defined groups, into individual cells of information on a spreadsheet. Cells include economically disadvantaged students, students from major racial and ethnic groups,<sup>42</sup> students

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achievement,” Ryan, *supra* note 21, at 952, so long as states implement “high-quality” tests, norm-referenced tests may be used. 20 U.S.C. § 6311(b)(3)(A).

36. Using standardized tests as the primary, if not the sole, determiner of success or failure of a student or school has experienced resurgence in popularity in recent years. See Mueller, *supra* note 17 (discussing the problems with basing educational decisions on the results of one test). Nonetheless, the academic community has remained steadfastly opposed to standardized testing. See, e.g., ALLAN NAIRN, *THE REIGN OF ETS* (1980) (describing how test-maker ETS came to enjoy a virtual monopoly on aptitude testing and discussing the problems with those tests, and the consequences of their use); JAMES CROUSE & DALE TRUSHEIM, *THE CASE AGAINST THE SAT* (1988) (refuting the rationale given by ETS and the College Board for the SAT requirement); STEPHEN J. GOULD, *THE MISMEASURE OF MAN* (1995) (discussing how quantification of intelligence as a number is used to artificially rank classes of people); ALFIE COHEN, *THE CASE AGAINST STANDARDIZED TESTING: RAISING THE SCORES, RUINING THE SCHOOLS* (2000) (explaining how the pressure to raise standardized test scores affects other forms of learning); PETER SACKS, *STANDARDIZED MINDS: THE HIGH PRICE OF AMERICA’S TESTING CULTURE AND WHAT WE CAN DO TO CHANGE IT* (Perseus Publishing 2001) (1999) (offering alternatives to standard intelligence testing); DEBORAH MEINER & GEORGE WOOD, eds., *MANY CHILDREN LEFT BEHIND: HOW THE NO CHILD LEFT BEHIND ACT IS DAMAGING OUR CHILDREN AND OUR SCHOOLS* (2004) (discussing how the NCLBA does not achieve its goals, and offering alternative methods to reach those goals).

37. Ryan, *supra* note 21, at 982.

38. *Id.* at 941.

39. *Id.* at 940.

40. Specifically, until the 2007-2008 academic year, testing in mathematics and reading must occur at least once during grades three through five, grades six through nine, and grades ten through twelve. Beginning with the 2007-2008 academic year, science too must be tested along the same timeline. 20 U.S.C. § 6311(b)(3)(C)(v).

41. Schools do not have to count statistically insignificant groups, meaning that if there are not enough students in a particular group to warrant heightened attention, the group essentially does not exist at that school. 20 U.S.C. § 6311(b)(2)(C)(I-iv). Thus, a school may have spreadsheet cells for African American, Asian, White, low income, and disabled students, but not for Alaskan Native, Hispanic, multiracial, or Pacific Islander students. *Id.*

42. Subgroups include Asian, Alaskan Native, African American, Hispanic, multiracial/multiethnic, Native American, Pacific Islander, White, low income, limited english proficiency, and disabled. NAT’L CENTER FOR EDUC. STATISTICS, *STATE EDUCATION REFORMS, STANDARDS, ASSESSMENT, AND*

with disabilities, and students with limited English proficiency.<sup>43</sup> A school receives an overall score by placing each group's average, such as the average for African-American, Asian, Hispanic, White, Disabled, or low-income students into its own spreadsheet cell, and then averaging the scores.<sup>44</sup> Although graduation rates and at least one additional indicator for elementary schools must be included in reported data, these factors are not used to calculate adequate yearly progress.<sup>45</sup>

## 2. The special case of disabled students

One group's treatment under the NCLBA warrants highlighting.<sup>46</sup> The NCLBA requires the inclusion of disabled students in school calculations of adequate yearly progress.<sup>47</sup> Special education<sup>48</sup> encompasses a wide spectrum of students, including students with serious discipline problems, severely disabled students, such as those with Down's syndrome at one extreme, and students with mild impairments, such as those requiring extra time on tests in regular classes, near the other extreme.<sup>49</sup> For testing purposes, the NCLBA allows those students with the most severe disabilities not to take the same test as all other students; yet, all disabled students' scores do count. Indeed,

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ACCOUNTABILITY: REPORT CARDS PROVIDED BY THE STATE, STUDENT-PERFORMANCE DATA INCLUDED IN REPORT CARDS, GRADUATION OR DROPOUT RATES INCLUDED IN HIGH SCHOOL REPORT CARDS, AND THE PRESENCE OF STUDENT IDENTIFICATION SYSTEMS, BY STATE: 2005-2006 (2006), [http://nces.ed.gov/programs/statereform/saa\\_tab7.asp?referrer=tables](http://nces.ed.gov/programs/statereform/saa_tab7.asp?referrer=tables) (last visited Oct. 2, 2006).

43. 20 U.S.C. § 6311(b)(2)(C)(v)(II).

44. 20 U.S.C. § 6311(b)(2)(C)(v).

45. Although graduation rates and another factor must be included in school results, exemplary performance in those areas does little to mitigate any harm done from low test scores. 20 U.S.C. § 6311 (b)(2)(D). A high graduation rate may, at most, provide a mild boost to an already passing school. *Id.*

46. For a discussion of how tracking of students, which virtually always results in creating a bottom track of disabled students, and racial and ethnic minorities, intersects with the NCLBA's high standards see Kevin G. Welner, *Tracking in an Era of Standards: Low-Expectation Classes Meet High-Expectation Laws*, 28 HASTINGS CONST. L.Q. 699 (2001).

47. 20 U.S.C. § 6311(b)(2)(C)(v)(II)(cc).

48. See Alefia Mithaiwala, *Universal Preschool: A Solution to a Special Education Law Dilemma*, 2004 BYU EDUC. & L. J. 373, (2004) (providing a history of special education legislation in the context of advocating universal preschool).

49. See generally U.S. DEPT OF EDUC., PRESIDENT'S COMMISSION ON EXCELLENCE IN SPECIAL EDUCATION, A NEW ERA: REVITALIZING SPECIAL EDUCATION FOR CHILDREN AND THEIR FAMILIES (2002) (discussing the status of special education, and proposing reforms to improve special education classrooms), available at [http://www.ed.gov/initiatives/commissionsboards/whspecial\\_education/reports/index.html](http://www.ed.gov/initiatives/commissionsboards/whspecial_education/reports/index.html).



if a statistically significant number of disabled students attend one school, the NCLBA targets them for improvement.<sup>50</sup>

Schools offer special education services in either specialized or mainstream<sup>51</sup> classes, after performing a case study to determine the most appropriate environment for that student.<sup>52</sup> Students attending regular classes are typically those students with sufficiently mild impairments for whom accommodations can be made to keep them in the mainstream.<sup>53</sup> Other students, however, require special classes and special teachers. The NCLBA required, beginning with the 2004-2005 school year,<sup>54</sup> special education teachers be highly-qualified in both their core academic subjects and special education.<sup>55</sup>

#### D. Accountability

##### 1. Meeting performance goals

The NCLBA emphasizes high-quality teachers and adequate yearly progress through testing.<sup>56</sup> Every year, after testing at least ninety-five percent of its students, a school calculates averages for each of the following subgroups of students: Asian, Alaskan Native, Black, Hispanic, multiracial/multiethnic, Native American, Pacific Islander, White, low income, and disabled.<sup>57</sup> The

50. "Almost 30 years of research and experience has demonstrated that the education of children with disabilities can be made more effective by having high expectations for such children and ensuring their access to the general education curriculum in the regular classroom, to the maximum extent possible." 20 U.S.C. § 1400(c)(5)(A) (2000).

51. Although the legislation uses the term mainstream, the term of choice among educators is inclusion; however, the two terms are essentially synonymous. Telephone Interview with Margaret McGrath, Special Education teacher, Morton East High School (Oct. 5, 2005).

52. 20 U.S.C. § 1400(c)(5)(D).

53. Therese Craparo, *Remembering the "Individuals" of the Individuals with Disabilities Act*, 6 N.Y.U. J. LEGIS. & PUB. POL'Y 467, 469-71 (2003).

54. 20 U.S.C. § 6311(a)(1).

55. It is worth noting here that, although the Department of Education claims to be taking action to account for teachers trained in special education who teach core academic subjects in free-standing special education classes, no legislation has yet been proposed. DEPT OF EDUC., NEW NO CHILD LEFT BEHIND FLEXIBILITY: HIGHLY QUALIFIED TEACHERS (2004), <http://www.ed.gov/nclb/methods/teachers/hqtflexibility.html> (last visited Dec. 27, 2006).

56. 20 U.S.C. § 6301 (2000 & Supp. 2002).

57. NAT'L. CENTER FOR EDUC. STATISTICS, *supra* note 42. Recall also that a school does not have to have all of these subgroups. See discussion *supra* notes 41-42. The number of students a state deems "sufficient to yield statistically reliable information" varies according to state. 34 C.F.R. § 200.7(a)(2)(2005). Although some argue between 100-200 students is the statistical minimum, the number of students is often much lower. Access, *Reading School District v. Pennsylvania Department of Education*, Jan. 12,

lowest scoring group then becomes the focus.<sup>58</sup> If the least successful subgroup scores below the state benchmark for that year, the school fails to make adequate yearly progress.<sup>59</sup> The benchmark is the minimum number of students who must test “proficient” or better on the exam,<sup>60</sup> and each state created an initial benchmark during the 2001-2002 academic year.<sup>61</sup> This benchmark increases gradually until, by 2014, it reaches one-hundred percent, meaning that all the students in a school must display proficiency in reading, math, and science by 2014.<sup>62</sup> In Illinois, for example, the 2004 baseline for all schools in the state was forty percent.<sup>63</sup> Thus, if only thirty-nine percent of a particular school’s low-income students had scored “proficient” or better on the state exam, that school would have failed to make adequate yearly progress for 2004.

## 2. Sanctions for failing schools

When a school does not make adequate yearly progress, the NCLBA imposes progressively invasive sanctions.<sup>64</sup> The first

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2004, <http://www.schoolfunding.info/states/pa/1-12-04ReadingNCLBFull.php3> (last visited Sept. 10, 2006) (placing the number for Pennsylvania at forty).

58. 20 U.S.C. § 6311(b)(2)(E)(i) (2000 & Supp. 2002).

59. 20 U.S.C. § 6311(b)(2)(I)(i).

60. 20 U.S.C. § 6311(b)(2)(E).

61. *Id.*

62. 20 U.S.C. § 6311(b)(2)(H)(i). There is an exception, however: the “safe harbor provision” grants that, even if the lowest-performing group fails to increase to the required level, as long as that group has improved at least ten percent from the previous year, the school makes adequate yearly progress. § 6311(b)(2)(I)(i). This is the only positive assistance a school receives in calculating adequate yearly progress, and it provides little comfort to schools which must, nevertheless, ensure that all students are proficient in reading and mathematics by 2014. § 6311(b)(2)(F). On the other hand, two other provisions of the Act require that, even if a school’s test scores are successful, a school will not make adequate yearly progress unless it (1) has ninety-five percent of students in each subgroup actually take the test, and (2) meets attendance or graduation targets. *See supra* note 45 (discussing the effect of graduation rates on school assessments).

63. Illinois State Board of Education, *Factors Considered in Determining Adequate Yearly Progress*, [http://www.isbe.state.il.us/ayp/ayp\\_factors.htm](http://www.isbe.state.il.us/ayp/ayp_factors.htm) (last visited Dec. 27, 2006).

64. Ryan, *supra* note 21, at 942; *see also* NAT’L CENTER FOR EDUC. STATISTICS, STANDARDS, ASSESSMENTS, AND ACCOUNTABILITY: REWARDS AND SANCTIONS FOR DISTRICTS AND SCHOOLS, BY STATE: 2005-2006, [http://nces.ed.gov/programs/statereform/saa\\_tab3.asp?referrer=tables](http://nces.ed.gov/programs/statereform/saa_tab3.asp?referrer=tables) (last visited Dec. 27, 2006) (listing 37 states that, in the first four years under the NCLBA regime, have already had sanctions imposed: Alabama, Alaska, Arizona, Arkansas, California, Connecticut, Delaware, Florida, Georgia, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nevada, New Mexico, New York, North Carolina, Oklahoma, Oregon, Rhode Island, South Carolina, Tennessee, Texas, Vermont, Virginia, West Virginia, and Wyoming).

failing year is unsanctioned, allowing schools to prepare curricula, create a staff of highly-qualified teachers, and organize testing. After the second failing year, sanctions begin by requiring school improvement.<sup>65</sup> This includes creating a school improvement plan subject to approval by the Local Education Association,<sup>66</sup> a commitment of ten percent of Title I funds to be used exclusively for professional development,<sup>67</sup> and a formal letter offering school choice to parents of failing students in failing subgroups.<sup>68</sup>

The second year a school fails to make adequate yearly progress, it must notify parents of failing students and again offer supplemental educational services, like tutoring and school choice.<sup>69</sup> After the third failing year, the state may take corrective action including replacing staff,<sup>70</sup> instituting a new curriculum,<sup>71</sup> decreasing school management responsibility,<sup>72</sup> appointing an outside expert to advise the school,<sup>73</sup> extending the school year,<sup>74</sup> and restructuring the internal organization of the school.<sup>75</sup> In the

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65. 20 U.S.C. § 6311(b)(3)(4).

66. The definition of a Local School Agency (LEA) has caused some problems. The Department of Education, however, has argued on at least one occasion that the LEA may also be the state or the Department of Education itself. *Reading Sch. Dist. v. Dep't of Educ.*, 875 A.2d 1218, 1221 (Pa. Commw. Ct. 2005) (noting that the Department of Education "interprets LEA to mean the agency performing its role"). The courts, however, have held that the LEA is the school district. Thus, in *Reading Sch. Dist.*, the court held that the Department of Education cannot alter the plain meaning of "Local School Agency" in order to deny the right to appeal of a school that has failed to make adequate yearly progress.

67. U.S. Dep't of Educ., *Key Policy Letters Signed by the Education Secretary or Deputy Secretary*, <http://www.ed.gov/policy/elsec/guid/secletter/020724.html> (last visited Dec. 27, 2006).

68. School choice is a requirement of the NCLBA that merits a much more thorough discussion than this note can provide. It is worth noting, however, that choice is not a powerful mandate of the NCLBA. Failing students are offered the choice to go to another school in the same school district if other schools in that district (a) receive Title I funds, and (b) have made adequate yearly progress themselves. Students can transfer to an out-of-district school only if the districts have entered into an optional intergovernmental agreement. However, few, if any, of these situations exist for three reasons: first, most school districts already offer intra-district transfers; second, multi-school districts exist primarily in urban and suburban areas, so rural schools are unable to offer this option; third, few multi-school districts have one Title I school making adequate yearly progress and another Title I school failing. Telephone interview with Dr. Roger Stein, Assistant Superintendent, Illinois District 219 (Sept. 23, 2005).

69. 20 U.S.C. § 6316(b)(1)(E)(i) (2000 & Supp. 2002).

70. 20 U.S.C. § 6316(b)(7)(C)(iv)(I).

71. 20 U.S.C. § 6316(b)(7)(C)(iv)(II).

72. 20 U.S.C. § 6316(b)(7)(C)(iv)(III).

73. 20 U.S.C. § 6316(b)(7)(C)(iv)(IV).

74. 20 U.S.C. § 6316(b)(7)(C)(iv)(V).

75. 20 U.S.C. § 6316(b)(7)(C)(iv)(VI).

fourth year, a private management company may be hired,<sup>76</sup> the principal and staff may be replaced,<sup>77</sup> the state may take over the school,<sup>78</sup> or the school may be reopened as a charter school.<sup>79</sup> By the first day of school in the fifth year of failing, a restructuring plan must be fully in effect.<sup>80</sup>

These sanctions have already begun. After only three years, around 20,000, or one-fifth of the nation's schools were failing.<sup>81</sup> The NCLBA laudably exerts pressure on schools to direct resources towards those children most likely to fail; nevertheless, with strict mandates for teacher quality, little local control over testing, adequate yearly progress calculations that ignore school progress, and flexible accountability measures coupled with rigid sanctions, the number of failing schools will rise precipitously in the next four years.

### III. LAUDABLE GOALS, SYSTEMIC FAILINGS

The NCLBA requires prompt revision lest its laudable goals become consumed by its systemic failings. The Act mandates specific results while remaining vague about the means of achieving them.<sup>82</sup> Even as she manages the largest federal foray into a vehemently defended state concern, the U.S. Department of Education's Margaret Spellings points out without irony that responsibility for education rests primarily with the states.<sup>83</sup> To the extent that education is not among the powers enumerated in the Constitution, she is correct.<sup>84</sup> Nonetheless, the NCLBA's unprecedented injection into traditionally state-controlled territory is evidence that there are compelling political, social, and pedagogical reasons why the federal government must play a

76. 20 U.S.C. § 6316(b)(8)(B)(iii).

77. 20 U.S.C. § 6316(b)(8)(B)(ii).

78. 20 U.S.C. § 6316(b)(8)(B)(iv).

79. See Krista Kafer, *School Choice in 2003: An Old Concept Gains New Life*, 59 N.Y.U. ANN. SURV. AM. L. 439, 457 (2005) (arguing that the NCLBA has increased opportunities for charter schools). But see Cathryn Vaughn, *The School Choice Provision of the No Child Left Behind Act and Its Conflict with Desegregation Orders*, 13 B.U. PUB. INT. L.J. 79 (2005) (arguing that the school choice provision of the NCLBA promotes segregation).

80. 20 U.S.C. § 6316(b)(8)(B).

81. NAT'L CENTER FOR EDUC. STATISTICS, STANDARDS, ASSESSMENTS, AND ACCOUNTABILITY: STATE ASSIGNMENT OF SCHOOL RATINGS, NUMBER OF SCHOOLS NOT MAKING ADEQUATE YEARLY PROGRESS, AND NUMBER OF SCHOOLS IDENTIFIED AS LOW-PERFORMING, BY STATE: 2004–05, [http://nces.ed.gov/programs/statereform/saa\\_tab6.asp?tblName=6&tableID=6&ReformID=1](http://nces.ed.gov/programs/statereform/saa_tab6.asp?tblName=6&tableID=6&ReformID=1) (last visited Dec. 27, 2006) (reporting 19,644 schools failing nationally).

82. Ryan, *supra* note 21, at 944.

83. Margaret Spellings discusses the No Child Left Behind law and other issues facing the Department of Education, National Public Radio, April 7, 2005 ("[P]ublic education is a state and local responsibility.").

84. U.S. CONST. amend. X.

much greater role in education.<sup>85</sup> Redistributive justice, clearly a goal of the Act, and arguably a necessary governmental correction to ensure the validity of the meritocracy that is the American education system, cannot be overlooked as an important objective of education.<sup>86</sup> With improvements, federal education policy has the potential to provide long-term economic security for the traditionally very disadvantaged groups the Act intends to help.

This section will discuss the three most problematic areas of the NCLBA. The first concerns the centrality of the highly-qualified teacher to any plan for educational success. The Act's version of a highly-qualified teacher, however, forgets that content-area knowledge is only one half of the equation. The other half, having the skills to teach well, is best highlighted in a discussion of special education teachers. The second problematic area concerns the Act's calculation whether a school achieves adequate yearly progress through testing disaggregated groups of students. These calculations are problematic because of the uneasy relationship between testing and learning, especially in the case of disabled children. Finally, the Act's rigid accountability measures are grossly disproportionate to the meager attention the federal government pays to the processes states will use to achieve these goals.

### A. Highly-Qualified Teachers

#### 1. The perennial teacher shortage's effect on highly-qualified teachers

The most significant problem with the NCLBA's mandates regarding teacher quality is what the Act omits. There is a perennial teacher shortage in the United States, especially in poor, rural areas,<sup>87</sup> and the Act provides no specific aid for this endemic

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85. Heise, *supra* note 11, at 2419 (arguing that *Brown v. Board of Education*, 347 U.S. 483 (1954), in the past, school finance litigation in the present, and academic achievement litigation in the future mark out the definite, if unclear role of the courts in education).

86. See Maureen B. Cavanaugh, *Democracy, Equality and Taxes*, 54 ALA. L. REV. 415, 423-24 (2003) (explaining the importance of wealth redistribution as a necessary prerequisite for democracy); Transcript, *Who Gets In? The Quest for Diversity After Grutter*, 52 BUFFALO L. REV. 531, 557 (2004) (discussing the harm done by *Grutter v. Bollinger*, 539 U.S. 982 (2004), to the issue of distributive justice); Martha Albertson Fineman, *Cracking the Foundational Myths: Independence, Autonomy, and Self-Sufficiency*, 8 AM. U.J. GENDER SOC. POL'Y & L. 13, 28 (2000) (arguing that, absent fair distribution of goods, the American meritocracy is "distorted").

87. Tony Collins, *Teachers Who Leave Quizzed; City Concern as Increasing Numbers Walk Out*, BIRMINGHAM EVENING MAIL, Sept. 30, 2005, at 19.

shortfall.<sup>88</sup> Indeed, the reasons for the teacher shortage are hardly discussed any longer, although low salaries and poor working conditions are among the most frequently cited causes.<sup>89</sup> Permanent substitutes and programs like Teach For America,<sup>90</sup> Troops to Teachers, and Transition to Teaching<sup>91</sup> exist as minor, stopgap measures, but the fundamental problem remains: if demand for teachers outweighs supply, where is the incentive for increased quality? The first problem, then, with the NCLBA's attempts to ensure that every child has a highly qualified teacher is that the Act provides no assistance with this teacher shortage.

## 2. Teacher quality and content-area knowledge

The Act seeks to ensure that teachers are highly qualified by requiring degrees, tests, or other demonstrations of competency in core subject areas.<sup>92</sup> According to one researcher, the presumption that content-area knowledge trumps methodological effectiveness<sup>93</sup> wholly ignores why teachers who score lower on vocabulary tests tend to be worse teachers.<sup>94</sup> In other words, the Act presumes that worse teachers received poor substantive preparation. The Act, therefore, reinforces content-area preparation and diminishes the importance of teacher training in the hopes that this will lead to greater success in the classroom, for teacher and students.<sup>95</sup>

More specifically, the Act fails to ensure quality teachers for three reasons. First, pedagogy matters. Parents want knowledgeable teachers using effective methodology, and the Act ignores pedagogy.<sup>96</sup> Second, the reason many teachers score poorly

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88. 20 U.S.C. § 6311(b)(1)(E) (calling on school wide programs to find ways to recruit and retain teachers, especially in areas of greatest need).

89. Glenn Cook, *Byzantine boondoggle*, LAS VEGAS REVIEW-JOURNAL, Oct. 2, 2005, at 8D.

90. Greg Toppo, *Teach for America Turns 15*, U.S.A. TODAY, Oct. 6, 2005, at 7D.

91. U.S. DEPT OF EDUC., MEETING THE HIGHLY QUALIFIED TEACHERS CHALLENGE: THE SECRETARY'S ANNUAL REPORT ON TEACHER QUALITY, POLICY PAPER (2002), available at <http://www.ed.gov/about/reports/annual/teachprep/index.html> (last visited Dec. 27, 2006).

92. 34 C.F.R. § 200.56(b)(3) (2006).

93. See Marnie S. Shaul, *Additional Assistance and Research on Effective Strategies Would Help Small Rural Districts*, GAO REPORTS, Sept. 23, 2004, at 10 (presuming that learning improved subject matter expertise is identical to learning improved instructional techniques).

94. Then-Secretary of Education, Ron Paige, paraphrased a 1966 report, EQUALITY OF EDUCATIONAL OPPORTUNITY by James Coleman, by noting that, for African-American students, there was a correlation between their achievement and their teachers' scores on vocabulary tests. Meeting the highly qualified teachers challenge. U.S. DEPT OF EDUC., *supra* note 91, at 6.

95. See Marilyn Cochran-Smith, *No Child Left Behind: 3 Years and Counting*, 56 J. TEACHER EDUC. 99, 101 (2005) (arguing that the NCLBA "ignores pedagogy").

96. See Michael McKinney, *Certification Pressure Grows for Teachers*,

on vocabulary tests is because, especially in poorer schools where working conditions and salaries are inferior to more highly-coveted jobs in wealthier areas, the schools' standards for accepting new teachers are lower.<sup>97</sup> The Act does nothing redistributive to decrease this polarization of strength and weakness.<sup>98</sup> Finally just like other professions, teachers develop knowledge<sup>99</sup> and methodology over time. Insisting that teachers enter a classroom with more coursework does not guarantee quality teaching.<sup>100</sup>

### 3. Special education teachers

Special education teachers hold credentials in teaching special education as opposed to a traditional content-area.<sup>101</sup> In secondary school, where special education teachers may work with students who perform at levels far below their peers, the Act requires that, in addition to competency in special education, the teachers be competent in "grade appropriate academic subject matter knowledge."<sup>102</sup> As a practical matter, this means that all special education teachers must become certified in all the content areas they teach. Alternatively, schools must hire a second teacher, highly qualified in the content-area of the class, to work alongside each of the special education teachers.<sup>103</sup> The problems compound when one considers that most self-contained special education classes teach more than one content-area.<sup>104</sup> To comply with the Act, special education teachers must become certified in all content areas taught before the end of the 2005-2006 school year.<sup>105</sup> The burden on special education teachers and schools is enormous, yet the Department of Education has been reticent to

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PROVIDENCE JOURNAL-BULLETIN, Dec. 10, 2003, at C-1 (reporting that, although some parents insist on highly-qualified teachers, most just want to be sure their children's teachers are good teachers).

97. Ryan, *supra* note 21, at 977.

98. See Susan E. Ansell & Melissa McCabe, *Off Target*, EDUCATION WEEK, Jan. 9, 2003, at 56-57, (emphasizing that poor and minority areas get the worst teachers).

99. See MICHEL FOUCAULT, THE ARCHAEOLOGY OF KNOWLEDGE 32 (1969) (arguing, among other things, that language constructs reality, and pluralizing "knowledge" reinforces the notion that multiple knowledges exist, which destabilizes the language of traditional hierarchies of knowledge).

100. See Cochran-Smith, *supra* note 95, at 102-03 (stating that there needs to be an increase in resources in order for changes to be effective).

101. U.S. DEP'T OF LABOR, OCCUPATIONAL OUTLOOK HANDBOOK, TEACHERS-SPECIAL EDUCATION (2005), available at <http://www.bls.gov/oco/ocos070.htm#training>.

102. 20 U.S.C. § 7801(23)(C)(ii)(I) (2000 & Supp. 2002).

103. Telephone interview with Dr. Nanciann Gatta, Assistant Superintendent for Human Resources, Ill. Dist. 219 (Oct. 5, 2005).

104. *Id.*

105. 20 U.S.C. § 6311(b)(1)(c) (2000 & Supp. 2002).

create an exception for special education — some flexibility must eventually emerge.<sup>106</sup>

The reticence displayed by the Department of Education, however, is instructive for understanding the larger and emerging controversy between disabled students and the NCLBA. Special education teachers work with disabled children whose needs vary so wildly that the umbrella term — disabled — disguises the magnitude of their differences.<sup>107</sup> The Individualized Education Plans (IEPs) required for every special education student provide a window into the needs of the lowest-achieving students specifically targeted by the Act.<sup>108</sup> Accommodations and alternative assessments are the heart of the controversy.<sup>109</sup>

By conceding that special education students require special attention and special criteria to succeed on a standard test, the Department of Education implicitly admits that holding all students to the same level of performance does not work.<sup>110</sup> As more than a practical matter, then, special education is the irresistible force meeting the immovable object of the NCLBA's standardized exams. Ninety-five percent of all students must sit for these exams,<sup>111</sup> special education students included, and special education students require exam accommodations or even alternative assessments that might make the exams invalid.<sup>112</sup>

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106. See discussion *supra* note 55.

107. Jennifer R. Rowe, *High School Exit Exams Meet IDEA: An Examination of the History, Legal Ramifications, and Implications for Local School Administrators and Teachers*, 2004 BYU EDUC. & L.J. 75, 87 (cataloging the processes used to assess and provide services to disabled children).

108. The two central concepts of special education law are the concepts of the Least Restrictive Environment (LRE), and the Individualized Education Plan (IEP). *Id.* According to the Education for All Handicapped Children Act, disabled children are entitled to a free appropriate public education (FAPE) in the Least Restrictive Environment possible. Pub. L. 94-142, 89 Stat. 773 (1975) (codified as amended in scattered sections of 20 U.S.C.). After receiving non-discriminatory testing, the disabled student receives an Individualized Education Plan that provides for whatever accommodations the student needs. Rowe, *supra* note 107, at 82.

109. Rowe, *supra* note 107, at 132 (explaining that the Individuals with Disabilities Education Act requires all disabled students to be offered alternative assessments such as portfolio-based assessments, interviews and oral presentations, constructed instead of multiple-choice responses, hands-on experiences for scientific ideas, or projects that display knowledge and skill in a particular content area).

110. See *id.* at 128 (explaining that a “particular accommodation” can be too weak or too excessive, e.g., a test designed to measure handwriting skills would be invalidated if the student’s disability requires accommodation by allowing her to dictate her responses).

111. 20 U.S.C. § 6311(b)(2)(C)(v)(II) (2000 & Supp. 2002).

112. See Rowe, *supra* note 107, at 127 (“A student who is unable to learn because of his handicap is surely not an individual who is qualified [to take the state exam] in spite of his handicap.”).



## B. Adequate Yearly Progress

### 1. The problem with disaggregated grouping

Schools calculate whether they have achieved adequate yearly progress by disaggregating the test result data of their students into separate spreadsheet cells.<sup>113</sup> A subgroup comes into existence, for purposes of the NCLBA, as soon as a school passes a state-defined threshold defining how many students constitute a “significant” number.<sup>114</sup> In practice, one student is frequently represented in more than one cell.<sup>115</sup> A limited English-Hispanic student with a learning disability, for example, would be counted three times. Double or triple counting helps the Act achieve its goal of shining a spotlight — in this case three spotlights — on students in the most disadvantaged categories.<sup>116</sup> School leaders, however, argue that this is the point at which the NCLBA most determinedly sticks its head in the ground.<sup>117</sup> A school should not fail to make adequate yearly progress, school stakeholders argue, because of one student.<sup>118</sup>

### 2. Valid & Reliable Testing v. Accommodations & Modifications

The requirement for valid and reliable testing under the NCLBA often conflicts with the requirement of providing accommodations for a student's disability. Schools must comply with any accommodations required by a disabled student's IEP, including a requirement to give an alternative assessment.<sup>119</sup> Given that the Act allows no flexibility in its requirement that ninety-five percent of the school's students participate in testing, and that all students be tested with the same measuring instrument, the Act conflicts with the Individuals with Disabilities Act's requirement that every student's disability be accommodated.<sup>120</sup> The vaunted even-handedness of standardized testing therefore exists in tension with the personalized

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113. 20 U.S.C. § 6311(b)(2)(C)(v)(II) (2000 & Supp. 2002).

114. See discussion *supra* note 41 (noting that schools do not have to count a statistically insignificant group because if there are not enough students in a particular group to warrant heightened attention, the group essentially does not exist at that school).

115. Telephone interview with Dr. Roger Stein, *supra* note 68.

116. 20 U.S.C. § 6301 (2000 & Supp. 2002) (statement of purpose).

117. Telephone interview with Dr. Nanciann Gatta, *supra* note 103.

118. *Id.*

119. Rowe, *supra* note 107, at 132.

120. Individuals with Disabilities Education Act, Pub. L. No. 101-476, 104 Stat. 1103 (1990) (amending Education of All Handicapped Children Act, Pub. L. No. 94-142, 89 Stat. 773 (1975)). The IDEA was amended again in 1997. Pub. L. No. 105-17, 111 Stat. 37 (1997) (codified at 20 U.S.C. § 1400-87 (2000)).

accommodations required in a special-education student's individualized education plan.<sup>121</sup>

An analysis of accommodations under special education law can be instructive in understanding the broader challenges facing the Act specifically, and the testing movement generally. The Act's most praiseworthy goals in promoting standardized testing are universality and blind justice. These goals, however, conflict with the highly individual and nonstandard testing needs of disabled students.<sup>122</sup> Multiple-intelligence theory,<sup>123</sup> learning-styles theory,<sup>124</sup> and critical-thinking theory<sup>125</sup> suit disabled students'

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121. Jim Ysseldyke, et al., *What We Know and Need to Know about the Consequences of High-Stakes Testing for Students with Disabilities*, 71 EXCEPTIONAL CHILDREN 75, 83-85 (2004) (recognizing the tension between large-scale assessment and disabled students needs, while calling for more empirical research).

122. Rowe, *supra* note 107, at 132.

123. For an introduction to multiple intelligence theory, which argues for the existence of, and necessity to develop in students multiple intelligences including linguistic, logical/mathematical, spatial, bodily/kinesthetic, musical, interpersonal, and intrapersonal see for example HOWARD GARDNER, *MULTIPLE INTELLIGENCES: THE THEORY IN PRACTICE* (1993) (arguing that the intelligences include giftedness, prodigiousness, creativity, expertise, and genius); RAE ANN HIRSH, *EARLY CHILDHOOD CURRICULUM: INCORPORATING MULTIPLE INTELLIGENCES, DEVELOPMENTALLY APPROPRIATE PRACTICE, AND PLAY* (2004) (arguing that intelligences manifest themselves best when students are assessed by being asked to recall, interpret, summarize, associate, relate, apply, create, design, assess, and discriminate); BRIAN HAGGERTY, *NURTURING INTELLIGENCES: A GUIDE TO MULTIPLE INTELLIGENCES THEORY AND TEACHING* (1995) (providing alternatives to traditional academic assessments).

124. For an introduction to learning styles theory, which argues that education must take into account students' different ways of learning, see for example JOHN M. PETERS, *ADULT EDUCATION: EVOLUTION AND ACHIEVEMENTS IN A DEVELOPING FIELD OF STUDY* (1991) (students' perceptual modalities); JEFFREY BARSCH, *LEARNING STYLE INVENTORY* (1980) (students process information); MARLANE MILLER, *BRAINSTYLES: CHANGE YOUR LIFE WITHOUT CHANGING WHO YOU ARE* (1997) (students' personality patterns); DAVID H. JONASSEN, BARBARA L. GRABOWSKI, *HANDBOOK OF INDIVIDUAL DIFFERENCES, LEARNING AND INSTRUCTION* (1993) (students' learning differences).

125. For an introduction to critical thinking theory see for example DIANE F. HALPERN, *THOUGHT AND KNOWLEDGE: AN INTRODUCTION TO CRITICAL THINKING* (1989) (introducing alternative teaching and assessment to teachers); Mike Allen & Sandra Berkowitz, *A Meta-Analysis of the Impact of Forensics and Communication Education on Critical Thinking*, 48 COMMUNICATION EDUCATION 18 (1999) (arguing for speech and debate participation as a more effective measure of learning than testing); Haithe Anderson, *Disciplining Education and Educating the Disciplines*, 19 INQUIRY: CRITICAL THINKING ACROSS THE DISCIPLINES 4 (1999) (arguing broadly for reconsideration of traditional classroom assessments); Mary Lou Duffy, Joanna Jones, & Susan W. Thomas, *Using Portfolios to Foster Independent Thinking*, 35 INTERVENTION IN SCHOOL & CLINIC 34 (1999) (arguing that alternative assessments promote learning); Heini Hinkkanen, *Critical*

needs far better than the NCLBA's promotion of easily comparable numeric test scores.<sup>126</sup> Meanwhile, schools continue to see an increase in special education.<sup>127</sup> As more students have IEPs, the number of students who need accommodations on tests grows, while the reliability of the tests continues to wane.<sup>128</sup>

### C. Accountability

#### 1. Inevitable failure

In the first three years since enactment, the most sweeping challenges to the NCLBA have concerned issues of funding.<sup>129</sup> The Bush Administration touts the forty-percent increase in federal funding coupled to the Act.<sup>130</sup> Nonetheless, given current high standards in most states, most schools still fail.<sup>131</sup> Indeed, many commentators argue that this has been the plan of the Act from the start; it certainly is difficult to view the Act's ambitious goal of proficiency in reading, math, and science by 2014 as realistic and not as an impossible trap designed to embarrass and discredit

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*Thinking As the Objective of Anglo-American Educational Discourse*, 19 INQUIRY: CRITICAL THINKING ACROSS THE DISCIPLINES 7 (2000) (analyzing critical thinking in education); Ray E. McKerrow, *'Method of Composition': Whately's Earliest 'Rhetoric'*, 11 PHILOSOPHY AND RHETORIC 43 (1978) (applying critical thinking to the teaching of writing); John Miller, *Critical Thinking and Asynchronous Discussion*, 19 INQUIRY: CRITICAL THINKING ACROSS THE DISCIPLINES 18 (1999) (explaining the use of debate and discussion as learning and assessment tools); George W. Triantosky, *Rule Utilitarianism and the Slippery Slope*, 75 JOURNAL OF PHILOSOPHY 414 (1978) (applying critical thinking to teaching philosophy).

126. David Hargreaves, *Help Us Stop the Pedlars of Snake Oil*, THE TIMES EDUCATIONAL SUPP., Sept. 17, 2004, at 21 (arguing that, as education moves from a focus on teaching to a focus on learning, education must eschew the fads, and focus on successful "innovations," such as critical thinking and multiple intelligence theories, in order to help students become successful and independent learners).

127. Where special education used to be a foreign ground for "retarded" children, now even high achieving students in top-level tracks at the best schools often have an IEP. As more parents recognize that having an IEP ensures a kind of personalized attention it is difficult to obtain in the public schools, special education will continue to grow. See Rowe, *supra* note 107, at 75-76.

128. *Id.* at 134.

129. See Finn & Hess, *supra* note 8, at 43 (reporting that twenty-one states, by April 2004, had proposed bills or resolutions criticizing the NCLBA, or sought waivers from the Department of Education).

130. Kate O'Beirne, *Leaving Republicans Behind*, NATIONAL REVIEW, March 8, 2004, at 35 (claiming that after implementation of the No Child Left Behind Act federal spending on education has increased forty-eight percent).

131. See Cochran-Smith, *supra* note 95, at 100 (claiming that only five states will meet all of the No Child Left Behind Act's requirements).

public schools nationally.<sup>132</sup> States will pull emergency valves soon to stave off failure,<sup>133</sup> but the opportunity for public school critics to deride the lowering of standards in the face of challenging federal goals will further harm the perception that public schools can be saved.<sup>134</sup>

## 2. Rigid timetable

Education is the federal government's largest aid program,<sup>135</sup> and, since its creation in 1965, the federal government has never mandated test success for all schools by a specific date.<sup>136</sup> The simplicity of this change in federal policy is both alluring and obfuscatory.<sup>137</sup> The allure lies in the prospect of reading, math, and science proficiency for one-hundred percent of students by June 2014.<sup>138</sup> This unprecedented deadline, however, shows no

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132. *Id.* at 102-03. (highlighting criticism that the No Child Left Behind Act's seemingly insurmountable system of accountability may be designed to discredit the public schools in order to clear a path for increased privatization of schools through its voucher system).

133. Ryan, *supra* note 21, at 959 (arguing that states, in order to not have mass failures of schools, will do "whatever they can to make their schools look good," including lowering the scores required to meet the NCLBA's "proficient" standard).

134. Ryan notes that supporters of the NCLBA claim that states will not lower the standards of their state assessments in order to ensure most schools achieve adequate yearly progress because of the National Assessment of Educational Progress (NAEP). *Id.* at 959. The NAEP is the only standardized exam given in all fifty states, which creates the threat, say supporters of the NCLBA, that a state lowering standards on its state exam would be caught and embarrassed nationally. *Id.* If that is the case, the 2005 results from the NAEP will provide ample evidence for the NCLBA's supporters. Lynn Olson & Kathleen Kennedy Manzo, *Despite NCLB Law's Emphasis on Reading and Math, National Test Scores Show Little Change*, EDUCATION WEEK, Oct. 20, 2005, [http://www.edweek.org/ew/articles/2005/10/20/09naep\\_web.h25.html](http://www.edweek.org/ew/articles/2005/10/20/09naep_web.h25.html).

135. Michael Heise, *Litigated Learning and the Limits of the Law*, 57 VAND. L. REV. 2417, 2453 (2004).

136. See discussion *infra* notes 18-20 (discussing the creation of a national deadline for meeting proposed standards).

137. Melanie Natasha Henry, *No Child Left Behind? Educational Malpractice Litigation for the 21st Century*, 92 CALIF. L. REV. 1117, 1126 (2004) (arguing, among other things, that even though California has exerted great effort to meet the requirements of the NCLBA, it will likely fail to meet the Act's required timeline).

138. Even though the idea of 100% proficiency in math, science, and reading is enticing, the fact that a mere 19,644 schools, NAT'L CENTER FOR EDUC. STATISTICS, *supra* note 81, or around twenty percent of the nation's schools, are currently failing to make adequate yearly progress toward 100% proficiency should not give room for hope. Cochran-Smith, *supra* note 95, at 103. Many states, suspecting looming failure to make adequate yearly progress, have already started taking steps to delay, what they view as inevitable, sanctions. *Id.* at 101. One such method is the "balloon payment" approach, similar to a balloon mortgage. *Id.* Since a state can create its own baseline from which it must begin to calculate whether its schools are making

flexibility and, most agree, little prospect of success.<sup>139</sup> The hope of success disguises the reality that achieving that goal will require far more effort than the national consensus will currently allow.<sup>140</sup>

The problem is funding.<sup>141</sup> An absolute deadline necessitates absolute funding, and absolute funding — a rights-based approach to universal education — is off the American political radar screen.<sup>142</sup> Even with new funding coupled to the Act's

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adequate yearly progress, many states started with a low percentage. *Id.* at 102. This means that, although large numbers of schools in most states seem to be making progress toward the 2014 goal of having 100% of students performing at the proficient level on exams, in fact they are not. *Id.* The states have, rather, opted to start with small goals hoping for the promise of huge gains later. *Id.*

139. After the 2003-2004 school year, 19,644 schools nationwide did not make adequate yearly progress. NAT'L CENTER FOR EDUC. STATISTICS, *supra* note 81. Of those, 11,008 received identifiers as "low performing" and have started sanctions. *Id.* There were only four states with under 100 failing schools, Wyoming (30), North Dakota (45), Vermont (39), and Delaware (44). *Id.* Only three states had over 1000 failing schools, Alabama (1042), Florida (2349), and California (3213). *Id.* Five states were in the range between 500-1000, Pennsylvania (566), North Carolina (662), Ohio (662), Michigan (826), and New York (990), and the majority of states had between 100-500 schools failing. *Id.* Lastly, six states did not report numbers of failing schools, Illinois, Texas, Oklahoma, Rhode Island, Montana, and Nebraska. *Id.* The results for states with low performing schools, however, showed a different picture. *Id.* Fourteen states had one hundred or fewer low performing schools, Wyoming (15), North Dakota (21), Kansas (21), Vermont (28), West Virginia (37), Rhode Island (39), Montana (40), Delaware (43), Minnesota (48), Maine (50), Wisconsin (51), Iowa (66), and Mississippi (71). *Id.* Although Alabama went from the third state with the most failing schools, it moved to the thirtieth in the number of low performing schools, making it the state with the most drastic difference between the number of failing and low performing schools. *Id.* Nebraska was the only state to report neither total number of failing schools nor total number of low performing schools. *Id.*

140. See Cochran-Smith, *supra* note 95, at 103 (arguing that no one element of the educational system will fix "the nation's worst school's").

141. Jennifer Imazeki & Andrew Reschovsky, *Is No Child Left Behind an Un (or Under) Funded Federal Mandate? Evidence from Texas*, 57 NAT'L TAX J. 571, 580 (2004) (arguing that the No Child Left Behind Act is a "seriously underfunded mandate" that fails to pay for its own requirements, much less provide sufficient support for schools to make adequate yearly progress toward 100% proficiency in reading, math, and science by 2014).

142. See R. Craig Wood & Bruce D. Baker, *An Examination and analysis of the Equity and Adequacy Concepts of Constitutional Challenges to State Education Finance Distribution Formulas*, 27 U. ARK. LITTLE ROCK L. REV. 125, 131, (2004) (arguing that education financing never achieved the status of a fundamental right because courts focused on equal funding over adequate funding). But see Matthew A. Brunell, *What Lawrence Brought for "Show and Tell": The Non-Fundamental Liberty Interest in a Minimally Adequate Education*, 25 B.C. THIRD WORLD L.J. 343, 380 (arguing that, although *San Antonio v. Rodriguez*, 411 U.S. 1 (1973), held that there is no fundamental right to education in the Constitution, the Court in *Lawrence v. Texas*, 539 U.S. 558 (2003), by creating a "bold, new architecture" for future due process

requirements, the federal government remains only a modest player in education, contributing less than seven percent to elementary and secondary school budgets.<sup>143</sup> Still, the states, following the rhetorical lead of the federal government, have increased their commitments to education;<sup>144</sup> yet, the increases necessary to ensure that schools create systems in which one hundred percent of the lowest performing students achieve proficiency by 2014 outstrips any efforts currently under consideration.<sup>145</sup> It is at this point that the gross differential between the NCLBA's funding and its goals elicits a suspicion of duplicity in the minds of the Act's most vocal critics.<sup>146</sup>

#### IV. ALTERNATIVES

The NCLBA directs valuable political currency toward low-performing students. Unfortunately, the Act directs little hard currency toward the programs necessary to ensure their success. The wealth of research in special education provides a window into the future of education. The most respected literature argues strongly for alternative methodologies of teaching and assessment. The Act needs to acknowledge and respond to these lessons. This section will propose five changes to the Act.

##### *A. The NCLBA Should Reconsider What it Means to be a Highly-Qualified Teacher*

The NCLBA needs to expand its definition of a highly-qualified teacher to include teaching skills. Teaching skills represent at least one half of the qualities that make a teacher effective, and the Act should mandate that teacher training include not only content-area training but also skills training.<sup>147</sup> Although content-area course work is certainly an important part

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considerations, may have opened the door to a future, universal right to education).

143. Finn & Hess, *supra* note 8, at 36.

144. See, e.g., Nathan Glazer, *Separate and Unequal*, N.Y. TIMES, Sept. 25, 2005, § 7, at 12 (noting that per-student expenditures in New York City have risen by two-thirds since 1991).

145. Ryan, *supra* note 21, at 984, argues that the NCLBA is in essence "hoping for a miracle." Indeed, Ryan advocates that schools bet that the NCLBA will have been, by the 2014 deadline, just "another fad." *Id.* at 985. Even when Ryan is more optimistic about the NCLBA's chances of surviving another four congressional voting cycles, he emphasizes that the NCLBA's accountability measures, including sanctions, work against schools having the funding necessary to achieve, attract, train, and retain good teachers and create solid, well-planned educational programs. *Id.* at 984.

146. Cochran-Smith, *supra* note 95, at 102, (citing MANY CHILDREN LEFT BEHIND: HOW THE NO CHILD LEFT BEHIND ACT IS DAMAGING OUR CHILDREN AND OUR SCHOOLS (M. Meier & G. Wood eds., 2004)).

147. *Id.*

of teacher effectiveness, the ability to communicate that knowledge is equally essential. Teachers must be effective speakers, organized managers, careful listeners, and competent conversationalists.<sup>148</sup> Coupling content area requirements with alternative gauges of teacher skillfulness would eliminate one of the most myopic mandates of the Act.

*B. The NCLBA Should Provide Funding  
Commensurate to its Mandate*

*1. Targeting low-achieving students*

As long as criterion-based tests remain the norm, the responsibilities for federal involvement in education rise enormously. The NCLBA's testing focuses on low-performing students. In giving every low-achieving minority a vote, so to speak, on the success or failure of a school, the Act pushes schools to redistribute its efforts away from higher-achieving students and toward these lower-achieving groups. In targeting low achievers, the NCLBA insists that schools reach more deeply into cultural, social, racial, and economic causes for student failure.

*2. Adequate funding*

Low-achieving students need as much funding focused on them as high-achieving students.<sup>149</sup> Since the NCLBA demands situation-blind scoring, scoring that takes no account of the support students receive inside or outside of school, federal funding should do the same. Funding should be raised to provide, at a minimum, compensation that raises the floor to universally adequate levels.<sup>150</sup> Not only must the NCBLA fund school programs, it should also fund services at home to create affirmative redistributive effects.<sup>151</sup> But, given the current distaste for acting affirmatively to correct social wrongs, it is probable that neither the federal government, nor the American people are prepared for this kind of massive economic redistribution in the next few years.<sup>152</sup>

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148. *Id.*

149. Thomas J. Sugrue, *Separate and Unequal — Still; A Look at How America's Schools are Leaving Black and Hispanic Children Behind*, CHI. TRIB., Sept. 11, 2005, at C1.

150. See Imazeki & Reschovsky, *supra* note 141, at 592 (arguing that federal funding is not sufficient even to support the NCBLA's mandates, and thus that federal funds cannot equalize funding between less and more advantaged students).

151. *Id.* at 572.

152. See discussion *supra* note 86 (presenting the aversive nature of the federal government to correcting social wrongs).

### C. The NCLBA Should Mandate Alternative Assessments.

#### 1. National standards, local assessment

The NCLBA comes in conflict with the IDEA, and the conflict points out a key change necessary in the NCLBA.<sup>153</sup> The IDEA's Individualized Education Plans highlight specific needs for student learning.<sup>154</sup> This concomitantly requires specific testing needs.<sup>155</sup> The NCLBA needs to define rigorous, national standards instead of requiring standards, and then allowing the states to define them.<sup>156</sup> These standards, however, must be evaluated locally.<sup>157</sup> Local evaluation of national standards would satisfy the NCLBA's goal of uniform standards while allowing localities the flexibility to assess these standards in ways responsive to local concerns.<sup>158</sup>

#### 2. Standard v. Individualized

Contrary to popular belief, standardized tests and individual assessment do not contradict. Individual differences have room to blossom in standardized environments.<sup>159</sup> Supporters of criterion-based tests reject local control, arguing that local flexibility in assessment contradicts universality of standards.<sup>160</sup> This anti-localism argument must give way to the realpolitik of education policy today.<sup>161</sup> The American policy goal has never been testing; it

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153. See discussion *supra* Part II.C.2 (discussing the conflict between accommodating disabilities and taking standardized tests).

154. See discussion *supra* note 108 (discussing the two central ideas in special education law: the concepts of the Least Restrictive Environment, and the Individualized Education Plan).

155. See Rowe, *supra* note 107, at 82 (explaining the use of individualized plans in certain government programs).

156. See Ryan, *supra* note 21, at 944-45 (arguing that allowing the states to define the standards is driving a race to the bottom because no state wants to fail).

157. *Id.* at 974 (arguing that decreased local control discourages good teachers from wanting to enter the profession, or work at lower performing schools, thereby undermining the Act's goal of highly qualified teachers).

158. See Ysseldyke, et al., *supra* note 121, at 89-91 (reporting that, when individual students' needs are ignored students become frustrated, give up on college plans, or even drop out).

159. See *id.* at 91 (reporting that some states have moved to allowing multiple diplomas as a way of recognizing individual differences); see also discussion *supra* note 127 (discussing the importance of personal attention to all types of students with individual differences).

160. Carolyn Kleiner Butler, *Success in the City*, U.S. NEWS & WORLD REP., Oct. 3, 2005, at 54 (reporting that a standard, aligned curriculum, and standard assessment, coupled with changes in teaching, results in success).

161. See discussion *supra* Part III.B.2 (discussing how, as the number of students with special education, Individualized Education Plans grows, individualization of education programs is no longer an option).



has always been student achievement.<sup>162</sup> Student achievement is better assessed locally by schools.<sup>163</sup> Special education legislation recognizes this for disabled students, and making reasonable accommodations to individual needs is the trajectory of education in non-disabled settings as well.<sup>164</sup>

### 3. *Alternative assessments*

Educational assessments from highly respected sources, including the Scholastic Aptitude Test, Advanced Placement, and International Baccalaureate, include writing and, in some cases, speaking, and even multi-media presentations, in their scoring formulas.<sup>165</sup> The movement away from multiple-choice tests toward more complex, performance-based assessments necessarily carries with it a movement toward individualization as well. Writing, the classic performance assessment, by its nature resists the binaries of a multiple-choice test.<sup>166</sup> Written tests always allow room for ambiguity, creativity, and individualization.<sup>167</sup> The NCLBA should require alternative assessments, locally constructed and evaluated.

#### *D. The NCLBA Should Create Concrete, Skills-Based National Standards for Education*

The NCLBA should define national standards for education. Only by promoting specific, skills-based national standards can education avoid a race to the bottom.<sup>168</sup> The Reagan, Clinton, and both Bush administrations, national teachers' unions, the educational research community, and the public at large all agree on the need for rigorous national standards.<sup>169</sup> The nation needs decisive federal leadership to fulfill this mandate.<sup>170</sup> Coupling

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162. See Finn & Hess, *supra* note 8, at 36-37 (discussing the history of federal education reform and the related goals for student achievement).

163. See Ysseldyke, et al., *supra* note 121, at 89-91 (reporting how schools and teachers can respond better to student needs).

164. See discussion *supra* Part III.B.2 (discussing the ever-growing number of students with Individualized Education Plans).

165. CollegeBoard.com, *SAT Reasoning Test*, <http://www.collegeboard.com/student/testing/sat/about/SATI.html> (last visited Dec. 27, 2006); CollegeBoard.com, *About AP*, <http://www.collegeboard.com/student/testing/ap/about.html> (last visited Dec. 27, 2006); International Baccalaureate Organization, *What are the three programmes?*, <http://www.ibo.org/ibo/index.cfm?page=/ibo/programmes&language=EN#dp> (last visited Dec. 27, 2006).

166. See Rowe, *supra* note 107, at 130 (discussing how modifications can invalidate a test).

167. *Id.* at 132 (listing alternative tests, including writing, such as portfolio assessments, constructed responses, and multiple choice tests where students produce their own answers).

168. Ryan, *supra* note 21, at 945-46.

169. Finn & Hess, *supra* note 8, at 36-37.

170. *Id.*

rigorous standards with local control of assessment will provide a clear direction for education and provide opportunities for schools to determine the best means of assessing those standards.

*E. The NCLBA Should Make a Greater Commitment  
to Long Term Distributive Justice.*

*1. The social goals of education*

The long-term just distribution of economic resources remains the supreme goal of education.<sup>171</sup> Even as the United States has witnessed a widening chasm between the wealthy and the poor, it has long considered itself a classless society.<sup>172</sup> Americans desire economic justice even as they rail against burdens on the free market. This split between rhetoric and reality merges when Americans consider education. Even the harshest critic of education reform acknowledges the use-value of education itself. Indeed, there is agreement that, when fair access to adequate educational resources exists, fair access to economic resources exists as well.<sup>173</sup>

*2. Tepid federal education involvement*

It is an American peculiarity that education has been, for so long, off-limits to significant federal intervention.<sup>174</sup> Yet, if any program warrants hefty national involvement, it is a program aimed at ensuring the future vitality of the nation.<sup>175</sup> However, the NCLBA is a tepid venture into educational reform, and a seven percent investor has little voice.<sup>176</sup> The NCLBA needs to construct as strong a federal presence in education as federal mandates in other areas like interstate highways, interstate crime, and interstate commerce.<sup>177</sup> With high standards and financial commitment, distributive justice remains possible in the long term.

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171. Wood & Baker, *supra* note 142, at 130-31.

172. Pat M. Holt, *U.S. is Losing Sight of Need for Education*, DESERT NEWS (Salt Lake City), May 4, 2003, at AA03.

173. See Wood & Baker, *supra* note 144, at 125 (discussing the relevance of education financing to opportunity).

174. Margaret Spellings discusses the No Child Left Behind law and other issues facing the Department of Education, *supra* note 83.

175. Imazeki & Reschovsky, *supra* note 141, at 580.

176. Finn & Hess, *supra* note 8, at 36.

177. Although Title I funds represent the largest single federal expenditure, mandates in other areas are more specific. See, e.g., Joel P. Dennison, *New Tricks for an Old Dog: The Changing Role of the Comprehensive Plan Under Pennsylvania's "Growing Smarter" Land Use Reforms*, 105 DICK. L. REV. 385, 395 (2001) (emphasizing the specificity of national land use legislation aimed at abating urban sprawl).

## V. CONCLUSION

The NCLBA laudably aspires to universal success in education. The incentives codified by the Act, however, remain mired in the “Adam Smithian hunch” that threats of failure motivate success.<sup>178</sup> But the threat of failure only works as a motivational tool when the possibility of success exists. The NCLBA provides nowhere near enough funding to encourage schools to invest their own precious local resources in a venture so likely to fail.<sup>179</sup> To be effective, the NCLBA’s incentives must be high enough to make investment by schools worthwhile. In other words, schools must perceive that valuable returns from large and risky investments in their lowest achievers’ chances of success — at the expense of middle and high achievers — are a realistic possibility. Until the reward is great enough, no school will take the risk.<sup>180</sup>

Today, schools are not taking the risk. The estimated likelihood of failure so outweighs the hopes of success that numerous schools have already opted to receive no federal funds at all rather than attempt the impossible.<sup>181</sup> The nation needs strong leadership in crafting rigorous federal standards for education coupled with a proportionately greater participation of federal financial incentives for schools. Only then could national leaders begin to say that no child has been left behind.

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178. Finn & Hess, *supra* note 8, at 36.

179. Cochran-Smith, *supra* note 95, at 100.

180. Ryan, *supra* note 21, at 959.

181. Telephone Interview with Dr. Nanciann Gatta, *supra* note 103 (confirming that suburban Chicago, Illinois, high school district 211, stopped receiving all federal funds in 2005).