

**Many Children Left Behind:  
The Problems with the Promises of Accountability in Education**

by  
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On January 8, 2002, President George W. Bush signed into law the No Child Left Behind Act of 2001 (NCLBA). This law reauthorized and built upon the foundation of the Elementary and Secondary Education Act (ESEA), first enacted in 1965 and last reauthorized in 1994. Since its passage, NCLBA, with its expansion of federal involvement in a traditionally localized concern and its primary focus on improving the educational performance of America's disadvantaged students, has been a central focus of all of those involved with or concerned about the future of our nation and its students. The core of NCLBA is accountability, an idea at once so simple and so complex that implementation has been eager, yet confused, complicated and frustrating. As a result of this promising ambiguity, the law has its fair share of proponents and opponents, persons from both sides of the political spectrum and all points in between.

While the Act grants states twelve years to enable all students to reach a proficient level in academic achievement,<sup>1</sup> the Act itself is due for reauthorization in 2007.<sup>2</sup> No later than January 8, 2005, however, the Secretary of Education must transmit an interim report on the national assessment conducted by the Department of Education on the implementation and effectiveness of NCLBA.<sup>3</sup> Also, current Democratic frontrunner John F. Kerry has indicated that should he win the election later this year, changes to the law could occur much sooner. Even in a certain political climate, however, no law is without faults, and it is important to revisit critical laws such as NCLBA in order to determine whether the law is meeting its self-imposed goals, as well as to examine possible areas of improvement.

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<sup>1</sup> 20 U.S.C.A. § 6311(b)(2)(F) (2003).

<sup>2</sup> 20 U.S.C.A. § 6491 (a)(6) (2003).

<sup>3</sup> 20 U.S.C.A. § 6491 (a)(6)(A) (2003).

This paper begins with a brief history of accountability in education law, followed by a closer examination of accountability and its role in NCLBA. The paper then examines some key problems and concerns with the effectiveness and implementation of NCLBA. Congress designed NCLBA as an accountability system to ensure that all children have an opportunity to obtain a high quality education. Many of the ways NCLBA seeks to create equity in educational opportunities are through special emphasis on improving the educational achievement of disadvantaged children. Accordingly, the paper focuses specifically on the effect of NCLBA on disadvantaged children. The paper closes with some recommendations for policy makers as they try to create a law that truly will do what it promises: leave no child behind.

## **I. Overview: The State of the Law**

### **A. Brief History of Accountability in Education Law**

High-stakes testing, where either the organization responsible for those tested or those tested themselves face severe consequences for failure to perform at a minimal standard, is not new in American politics. Early 1900s immigrants seeking entrance into the United States took newly-developed standardized tests.<sup>4</sup> Their performance on these tests could mean their entrance into or rejection from the United States.<sup>5</sup> This is probably the clearest and most drastic form of a strict consequence tied to adequate performance. Later, in the 1950s, when our then-enemy the Soviet Union won the space race by launching Sputnik in 1957, many politicians and journalists began to doubt the superiority of American education.<sup>6</sup> At about the same time, the increased use of standardized national tests became a key issue for many American leaders.<sup>7</sup> The Scholastic Aptitude Test (SAT), developed in the 1950s as way for colleges and universities to

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<sup>4</sup> Audrey L. Amrein & David C. Berliner, *High-Stakes Testing, Uncertainty, and Student Learning*, 10 EDUCATION POLICY ANALYSIS ARCHIVES 1, 3 (2002), available at <http://epaa.asu.edu/epaa/v10n18>.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

evaluate the abilities and potential of applicants, began to attract more takers each year.<sup>8</sup> Many politicians and concerned citizens, looking for a way to evaluate the performance of our educational system, latched onto the SAT as a tool for determining the quality of public schools.<sup>9</sup> For a few years, the SAT scores improved, or at least held constant, and Americans likely felt reassured that their schools were doing just fine.

In the 1960s and 1970s, however, as SAT scores began to decline, Americans realized that not all was well with the public education system.<sup>10</sup> While some people attributed the decline in scores to the fact that more students (of all races and genders) were taking the exam, which could be seen as a sign of progress, other researchers found that the increase in takers could not account for a large part of the decrease in scores.<sup>11</sup> Finally, the federal government determined that because the SAT only tested college-bound juniors and seniors, it did not provide a complete picture of student and school performance. As a result, the federal government sponsored the development of a new standardized test, the National Assessment of Education Progress (NAEP).<sup>12</sup> Interestingly, the NAEP showed more losses than gains in student test performance. Thus, the very test designed to show that students were doing better than SAT results indicated actually hastened the move toward accountability in schools.<sup>13</sup>

The Reagan Administration's Secretary of Education, Terrel H. Bell, appointed a national commission to examine the quality of America's schools. In 1983, the National Commission on Education released *A Nation at Risk*, probably the most influential piece of educational

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<sup>8</sup> Martin R. West & Paul E. Peterson, *The Politics and Practice of Accountability*, in *NO CHILD LEFT BEHIND? THE POLITICS AND PRACTICE OF SCHOOL ACCOUNTABILITY* 1, 3 (Paul E. Peterson & Martin R. West, eds., 2003).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 3-4.

<sup>11</sup> DIANE RAVITCH, *NATIONAL STANDARDS IN AMERICAN EDUCATION: A CITIZEN'S GUIDE* 64-70 (Brookings Institution Press 1995).

<sup>12</sup> West & Peterson, *supra* note 8, at 4.

<sup>13</sup> *Id.* at 5.

propaganda of the past few decades.<sup>14</sup> *A Nation at Risk* begins by detailing the nature of the risk America faced: the eroding of our educational foundations and the loss of our competitive edge by an acceptance of mediocrity in our school systems, and goes on to discuss the commission's findings and recommendations.<sup>15</sup> Over time, the report has proved largely inaccurate,<sup>16</sup> but it fomented concern for our national public education system. It also helped push the nation further toward accountability politics because it moved educational issues higher on state political agendas. The report also marked a shift in political philosophy on improving the state of education for disadvantaged children. In the late 1960s and 70s, the idea was that more equitable funding for disadvantaged children would improve their academic achievement. *A Nation at Risk* shifted the focus to accountability as a way to increase the opportunities offered to disadvantaged students. It began by stating that all persons, regardless of race, class, or socioeconomic status are entitled to a fair opportunity for education, which served as a foundation for the current NCLBA. Following the release of this report, state legislatures in every state except Iowa gradually developed some form of educational standards, and every one of these states except Nebraska created policies to assess the effectiveness of those standards.<sup>17</sup>

Over a decade later, Congress in 1994 intruded into the largely localized educational standards and assessment movement. Congress imposed the first accountability mandate on the states through a reauthorization of the Elementary and Secondary Education Act. On its face, this mandate required local schools to show, through standardized tests, annual student progress

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<sup>14</sup> *A Nation at Risk* meets the textbook definition of propaganda in that it was material disseminated by the advocates of a doctrine or cause. It reads much like wartime propaganda issued to reflect very strongly the views of the government while encouraging citizens to join in the cause.

<sup>15</sup> NATIONAL COMM'N ON EDUC., U.S. DEPT. OF EDUC., *A NATION AT RISK* (1983).

<sup>16</sup> See DAVID BERLINER & BRUCE J. BIDDLE, *THE MANUFACTURED CRISIS: MYTHS, FRAUD, AND THE ATTACK ON AMERICAN PUBLIC SCHOOLS* (Longman Publishers 1997) (presenting a defense of the American public schools in part by attacking the shoddy scholarship of *A Nation at Risk*).

<sup>17</sup> *Special Report: Quality Counts 2001*, EDUCATION WEEK, Jan. 11, 2001, available at [www.edweek.org/sreports/qc01/](http://www.edweek.org/sreports/qc01/)

toward state-created standards of educational proficiency. The 1994 law, called the Improving America's Schools Act (IASA), tied federal funds to state creation of standards and the meeting of adequate yearly progress (AYP).<sup>18</sup> IASA was vague, however, and federal enforcement was weak. Many states developed inefficient or ineffective accountability plans, and while some states made progress, others did not.<sup>19</sup> Nevertheless, this law marked a watershed moment of bipartisan support for the idea of school accountability. The 1994 concept received new life and more detail in the No Child Left Behind Act of 2001. When President Bush signed NCLBA into law, he presented public schools with a goal similar to the past law: all students – regardless of race or socioeconomic status – must be held to the same academic expectations and must have their academic progress measured through the method of AYP. Where IASA was vague, NCLBA is detailed. It created an explicit accountability system for measuring and improving the performance of *each* student subgroup within a school, not just overall school performance.

### **B. Accountability in No Child Left Behind**

NCLBA began as a high-stakes accountability system offering the straightforward allure of standards-based reform. High-stakes accountability systems link incentives to demonstrated student performance in order to ensure that students are achieving a minimum level of proficiency and that educators are teaching effectively. High-stakes accountability systems include sanctions for students, teachers, or both. In this system, school improvement no longer depends primarily upon student or teacher motivation or desire to succeed. Instead, the threat of not getting a diploma or losing one's teaching position triggers the desire for school improvement. High-stakes accountability has everything to do with coercion and nothing to do with suggestion. There are real costs to this high-stakes accountability system, however. In

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<sup>18</sup> Andrew Rudalevige, *No Child Left Behind: Forging a Congressional Compromise*, in *NO CHILD LEFT BEHIND? THE POLITICS AND PRACTICE OF SCHOOL ACCOUNTABILITY* 23, 29 (Paul E. Peterson & Martin R. West eds., 2003).

<sup>19</sup> West & Peterson, *supra* note 8, at 7.

enacting NCLBA, the fear of these costs led legislators to make a series of compromises that left the concept of accountability throughout the bill, but stripped the power behind the accountability.

The intent of the ESEA has remained virtually the same since its inception and is now reflected in NCLBA. The first purpose of these laws, discussed above, is to ensure that all children have a fair, equal and significant opportunity to obtain a high-quality education, regardless of socioeconomic background or race.<sup>20</sup> The second purpose is to ensure that all children reach, at a minimum, proficiency on challenging state academic achievement standards and state academic assessments.<sup>21</sup> The goal is to close the achievement gap between poor and affluent children and between minorities and non-minorities. While the ends have remained the same, the means have changed greatly over the years. To achieve the goal of NCLBA, Congress seeks to hold schools local educational agencies (LEAs) and states accountable for improving the academic achievement of all students and to hold states and LEAs accountable for identifying and helping low-performing schools offer a high-quality education.<sup>22</sup> NCLBA requires all states receiving Title I funds to develop *challenging* academic curricula and student academic achievement standards.<sup>23</sup> The state and LEAs must then use these standards as benchmarks to measure their improvement and their AYP.<sup>24</sup> The law does not specify what qualifies as a challenging standard. In fact, it forbids the Secretary of Education from imposing any particular standard on states as a condition for approval of its consolidated plan.<sup>25</sup> NCLBA does set out requirements for what information the standards must contain. The academic content standards

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<sup>20</sup> 20 U.S.C.A. § 6301 (2003).

<sup>21</sup> *Id.*

<sup>22</sup> 20 U.S.C.A. § 6301(4) (2003).

<sup>23</sup> 20 U.S.C.A. § 6311(b)(1)(A) (2003) (emphasis added).

<sup>24</sup> *Id.*

<sup>25</sup> 20 U.S.C.A. § 6311(e)(1)(F) (2003).

must: (1) specify what all students are expected to know and be able to do; (2) contain coherent and rigorous content; and (3) encourage the teaching of advanced skills.<sup>26</sup> These academic standards must apply to all public schools and public school students, including those served with Title I funds, and must expect the same levels of achievement of all students.<sup>27</sup>

In addition, the state must develop or adopt academic assessments to determine whether these academic standards are being met.<sup>28</sup> By the 2005-2006 school year states must begin testing students in grades 3-8 annually in reading and mathematics, with science tests being added by 2007-2008.<sup>29</sup> The tests must be aligned with state academic standards.<sup>30</sup> Test results on state assessments must be reported in the aggregate but also broken down by categories such as race, ethnicity, economic status, and disability.<sup>31</sup> Simply reporting an overall average might hide subgroups of failing students. Also, at least 95 percent of students in each group and subgroup must be assessed.<sup>32</sup> As a way to expose states that might be setting too easily attainable standards, and also as a way of comparing state-to-state results, NCLBA requires all states receiving federal Title I funds to administer, at federal expense, the NAEP in reading and math to samples of fourth and eighth graders.<sup>33</sup>

Based on the state academic assessments, state plans must set out what constitutes AYP in meeting the goals of enabling all public school students to achieve proficient status and narrowing the achievement gaps between various groups.<sup>34</sup> Also, to ensure that the most disadvantaged students are not left behind, states must include separate measurable objectives for

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<sup>26</sup> 20 U.S.C.A. § 6311(b)(1)(D) (2003).

<sup>27</sup> 20 U.S.C.A. § 6311(b)(1)(B) and (b)(2)(A) (2003).

<sup>28</sup> 20 U.S.C.A. § 6311(b)(3) (2003).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> 20 U.S.C.A. § 6311(b)(3) (2003).

<sup>32</sup> 20 U.S.C.A. § 6311(b)(2)(I)(ii) (2003).

<sup>33</sup> 20 U.S.C.A. § 6311(c)(2) (2003).

<sup>34</sup> 20 U.S.C.A. § 6311(b)(2)(B) (2003).

“continuous and substantial improvement” in both reading and math for students who are minorities, poor, disabled, or of limited English proficiency.<sup>35</sup> In large part, NCLBA is designed to close achievement gaps. This provision of the law ensures that in order to demonstrate AYP, the state and LEAs must show that schools are meeting or exceeding the state annual standards for *all* students and for students within *each* definable subgroup.

In measuring AYP, the state must create an annual report card, and make that card available to the public in a language parents can understand.<sup>36</sup> The report card must detail the performance of each student subgroup on state assessments by state and school.<sup>37</sup> The annual report card must also identify whether the LEA as a whole is exceeding, meeting, or not meeting AYP (usually denoted as “Needs Improvement” or “NI”).<sup>38</sup> The LEA must also prepare and disseminate an annual report card that details the performance of each school overall and of each subgroup within the school, as well as whether or not the school has been identified for improvement.<sup>39</sup>

The failure to make AYP triggers corrective actions or sanctions on schools and districts.<sup>40</sup> Sanctions initially involve allowing students the option to transfer to a higher performing school in their district and providing students with school-funded supplemental services (offered by the school or a private provider).<sup>41</sup> They can subsequently involve broader consequences such as staff replacement or state takeovers of the school.<sup>42</sup> In return for this “stick,” the government provides a “carrot.” The law gives states some new flexibility in

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<sup>35</sup> 20 U.S.C.A. § 6311(b)(2)(C) (2003).

<sup>36</sup> 20 U.S.C.A. § 6311(h)(1)(B) & (2)(E) (2003).

<sup>37</sup> 20 U.S.C.A. § 6311(h)(1) (2003). *See also* North Carolina School Report Cards, *available at* <http://www.ncreportcards.org/src/>.

<sup>38</sup> 20 U.S.C.A. § 6311(h)(1) (2003).

<sup>39</sup> 20 U.S.C.A. § 6311(h)(2) (2003).

<sup>40</sup> 20 U.S.C.A. § 6316 (2003).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*



spending federal funds, which allows states to direct discretionary funds where they are most needed.<sup>43</sup> Also, authorized spending is increased and better targeted toward needy districts.<sup>44</sup> In describing NCLBA, the Bush Administration and the Department of Education have explicitly characterized it as an opportunity for states and school districts to have “unprecedented flexibility in how they use federal education funds in exchange for greater accountability for results.”<sup>45</sup>

NCLBA mixes high-stakes accountability with so-called soft accountability. High-stakes accountability links standardized assessments of student performance with severe sanctions. As discussed above, after two consecutive years of failure federal sanctions begin,<sup>46</sup> and after five years of failure, the federal government can take over and restructure the local school.<sup>47</sup> Soft accountability is less coercive. Under soft accountability, policies still require schools and states to achieve a minimal level of performance, but that performance is tied to sanctions enforced by the public, not the federal government. One example of soft accountability is NCLBA’s reliance on the free market accountability. Parents and students can ostensibly choose alternative schools when a school fails to perform adequately, but the government does not enforce the sanction. Thus, NCLBA accountability centers in two areas: the requirements that must be met in exchange for federal money and the creation of information so that parents can make accurate demands of, or make choices between, the public schools in their districts.

This paper assumes the benefits of NCLBA, including improving overall student performance and closing achievement gaps between minorities and non-minorities and the

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<sup>43</sup> 20 U.S.C.A. §§ 6302-6304 (2003).

<sup>44</sup> *Id.*

<sup>45</sup> U.S. DEP’T OF EDUC., *The No Child Left Behind Act: More Local Freedom*, available at <http://www.ed.gov/nclb/freedom/index.html?src=ov>.

<sup>46</sup> 20 U.S.C.A. § 6316(1)(E) (2003).

<sup>47</sup> 20 U.S.C.A. § 6316(8)(A) (2003).

affluent and the poor, are the goals for which our education system should be striving. If NCLBA has the right goals, the key question is: Are the means achieving the ends? Or are the means aggravating, hindering, and even destroying the ends? In short, how effective is NCLBA in improving the educational opportunities for and achievement of disadvantaged children?

## **II. Leaving Many Children Behind: NCLBA's Unintended Consequences**

NCLBA has many things right. The standards, testing, and accountability provisions of NCLBA provide sources for hope that our education system may one day achieve equality for those children most often left behind: the poor, rural, or minority students, and students who fall into more than one of these categories. Unfortunately, these sources of hope have also been the source of headaches for state and local education officials, parents, students, and teachers. In its three years of implementation, NCLBA has prompted much controversy. This paper offers no reprieve from that controversy. Most people want NCLBA to work because its goal is both desired and important in the continued success of our society, but NCLBA has worsened many problems it set out to fix. A few of these unintended negative consequences are detailed herein.

### **A. High Stakes Testing Issues: "AYP Absurdities"**

AYP is the way that NCLBA judges the academic progress of students and schools. All students, regardless of race or socioeconomic status, must be held to the same challenging academic standards and must achieve a minimum level of performance or improvement each year. The concept, while having the valid goal of providing a standardized means from which the federal government can judge whether students and schools are experiencing achievement gains and closing achievement gaps, has created many procedural problems. The National Education Association and this paper refer to these as "Adequate Yearly Progress Absurdities."<sup>48</sup>

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<sup>48</sup> NAT'L EDUC. ASS'N, *NCLB Absurdities*, available at <http://www.nea.org/esea/absurd.html>

## 1. Mixed Messages of Achievement

AYP is familiar to many educators. The IASA required states to establish academic standards, develop tests to assess student progress toward those standards, and create baseline standards for performance on those assessments. As a result, many states put into place state accountability plans or systems soon after the passage of the IASA. In 2000, thirty-three states had state accountability systems that used the results of state assessments as the primary measure for school and student performance.<sup>49</sup> Of those thirty-three states, nineteen used other non-cognitive factors to judge school performance such as attendance rates, dropout rates and graduation rates.<sup>50</sup> For example, Kentucky developed a “Long-term Accountability Model” that included both norm- and criterion-referenced assessments,<sup>51</sup> as well as a non-academic index with “four outcomes: attendance rate, retention rate, dropout rate (middle and high school), and rate of successful transition to adult life (high school only).<sup>52</sup> Further, because the focus of the 1994 IASA was on measuring the AYP in Title I schools and students, some states had dual state accountability systems in place. One measured the progress of Title I students and schools and another measured all public schools. In 2000, eleven of the thirty-three states with accountability systems had dual systems for evaluating their public schools.<sup>53</sup> Many states had highly developed or multiple state accountability systems tied to student and school performance under the old IASA law.

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<sup>49</sup> Margaret E. Goertz et al., *Assessment and Accountability Systems in the 50 States: 1999-2000*, CPRE RESEARCH REPORT SERIES, Mar. 2001, at 17, available at [http://www.cpre.org/Research/Research\\_Project\\_B-1.htm](http://www.cpre.org/Research/Research_Project_B-1.htm).

<sup>50</sup> *Id.* at 18.

<sup>51</sup> See Fair Test: The National Center for Fair and Open Testing, (“Norm-referenced tests compare a person’s score against the scores of a group of people who have already taken the same exam, called the ‘norming group.’ ... To compare students, it is often easiest to use a norm-referenced test because they were created to rank test-takers.... NRTs are a quick snapshot of some of the things most people expect students to learn.... Criterion-referenced tests are intended to measure how well a person has learned a specific body of knowledge and skills.... In education, CRTs usually are made to determine whether a student has learned the material taught in a specific grade or course.”), available at <http://www.fairtest.org/facts/>.

<sup>52</sup> Goertz, *supra* note 49, at 19.

<sup>53</sup> *Id.* at 30.

NCLBA changed the game: developing the standards and accountability systems is no longer satisfactory. Now, states must make real, measured progress toward those standards. Under NCLBA, the same system must be used for all public schools, so those eleven dual-system states have had to unify their accountability system into a single system for all public elementary and secondary schools. Further, while states must create academic standards and performance levels and must adopt assessments to test the progress of students, now schools must also test students on the NAEP at certain grade levels.

Twenty-one states have maintained their own accountability systems while still issuing annual report cards and complying with NCLBA.<sup>54</sup> As described above, several states with pre-existing accountability systems weighed test scores along with other non-cognitive items. Such different state and federal philosophies have led to some dramatically mixed messages. Students and schools in states from California to North Carolina and all points in between are often meeting state accountability standards, yet failing under federal accountability rules. To name a few concrete examples, Gove Elementary in Florida, John Glenn Middle School of International Studies in California, and a Marion County elementary school in Kentucky all met their state goals for improvement but failed the federal accountability rules. According to an *Education Week* article, in just about every state “a higher proportion of schools come up short under the federal rules than under the state rules.”<sup>55</sup>

Part of this mixed message of performance – failing at the federal level but passing at the state level – is actually due to a positive change in the federal law. Under NCLBA, unlike under some state accountability systems, a school is not judged solely on its ability to improve overall student performance. Under the new requirements each school must demonstrate that it is

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<sup>54</sup> David J. Hoff, *Accountability Conflicts Vex Schools*, EDUCATION WEEK, Mar. 24, 2004, at 2.

<sup>55</sup> *Id.* at 3.

helping students from all racial, ethnic, and socioeconomic backgrounds achieve or move toward achieving the academic standards.<sup>56</sup> By requiring performance results for all subgroups, NCLBA has broadened the accountability systems of most states, and made states focus on low-income and minority students. In the past, states or schools could report the scores of their highest achieving students, while ignoring their lower achievers, often racial minorities or students of low socioeconomic status. NCLBA forces schools and educators to focus on improving the achievement of *all* students, and as this may be a change from state systems, it is only logical that the two standards (federal and state) may produce different results. If this were the only reason for the disparity, however, one could expect that gradually the disparity would decrease and state and federal performance ratings begin to run parallel.

There is another reason for the disparity between the state and federal results. Disparity between state and federal accountability system performance will likely continue because of their differing emphasis on what makes a child or a school successful. State accountability systems, as noted, tend to use a mixture of non-cognitive and cognitive factors in order to determine school and student performance. State models valuing both factors tend to focus on education as more than a transfer of learning, but also as former Senator Paul Wellstone described it, as “a process of shaping the moral imagination, character, skills and intellect of our children...and of giving them the resources to prepare to fully participate in the life of the nation and of the world.”<sup>57</sup> Under NCLBA, the only factors to judge school performance are cognitive, and a very limited range of cognitive skills (currently math and reading only). Educators and state policy makers have created growth-model, in-depth methods for assessing school quality that seek to identify weak schools, improve teaching and student learning, and inform the public about

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<sup>56</sup> 20 U.S.C.A. § 6311 (2003).

<sup>57</sup> Senator Paul D. Wellstone, High Stakes Tests: A Harsh Agenda for America’s Children, Address Before Teachers College, Columbia University (Mar. 31, 2000), *available at* <http://www.senate.gov/~wellstone/columbia.htm>

school quality. These are all goals of NCLBA, but these assessments are now devalued due to the reality of school sanctions. In short, better alternatives exist for evaluating and improving schools and all student performance, but these are ignored under the test-score focused NCLBA.

The idea behind NCLBA is that all of our children receive a high-quality education. Unfortunately, in order to meet the increasingly tough federal test-performance standards, schools have an incentive to convert high-quality education into high-quality test preparation. This can mean that a successful school, one that is improving in other subjects, offering a wide range of interesting and valuable courses, providing tutoring skills, or helping their students to succeed in life, may not reach the federal bar of achievement in math or reading tests, may fail, and may face heavy federal sanctions. Under the pressure of federal sanctions, many of these successful schools will drop programs that work well in reaching the goal of education. In schools where children do not perform well on standardized tests, the state and local school officials will likely put pressure on these schools to eliminate or de-emphasize untested subjects – history, languages, or the arts – and to reduce the curriculum for tested subjects to the form or content of those exams. In addition to a narrowed curriculum, there is the tendency to also lower the skill level of the curriculum: Even exam proponents realize that high-order thinking skills are not tested on fill-in-the-bubble multiple-choice exams. Obviously, teaching to the test is not a bad idea, if that test is good or tests things that show learning. When that test only assesses low-order skill on a limited amount of subjects, however, teaching to the test harms education. Some research suggests that accountability systems focused primarily on student performance on standardized tests have prompted some teachers to include standardized test content and test-taking skills into their curriculum at the expense of other more educationally important

material.<sup>58</sup> And as states seek to meet the high, single-focused federal standard, their schools' performance on non-cognitive factors will likely decline, causing their schools to fail their own state standards. This reversal of results, passing federal standards and failing state standards, will increase the disparity between the measurements. Most importantly, narrowing and watering down of the curriculum stands to harm all of our children and diminish their opportunity to receive a high-quality education, including the very children NCLBA seeks to help most.

## 2. NCLBA Sets Diverse Schools Up for Failure

NCLBA requires that each state define AYP in such a way that includes separate measurable annual objectives for the improvement of the “achievement of economically disadvantaged students; students from major racial and ethnic groups; students with disabilities; and students with limited English proficiency.”<sup>59</sup> States and LEAs must also include both aggregate and disaggregated performance information for each subgroup in their annual report cards.<sup>60</sup> The disaggregated groups include race, ethnicity, gender, disability status, migrant status, English proficiency, and status as economically disadvantaged.<sup>61</sup> One major reason for this change in the law is the idea that focusing on the progress of individual subgroups helps to ensure that all students are treated equitably by the educational system. Score disaggregating makes it less likely that schools will help certain groups at the expense of others in order to make their federal goals and avoid sanctions. The goal is admirable, but NCLBA creates problems in its implementation. It may actually worsen the fate of the very students and schools it was intended to aid.

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<sup>58</sup> *Quality Counts, 2001: A Better Balance – Standards, Tests, and the Tools to Succeed*, EDUCATION WEEK, Jan. 2001, at 20; Robert L. Linn, *Assessments and Accountability*, 29 EDUCATIONAL RESEARCHER 4 (2000) (accessed online – information found at 6 of online version, available at <http://www.aera.net/pubs/er/arts/29-02/linn06.htm>).

<sup>59</sup> 20 U.S.C.A. § 6311(b)(2)(C) (2003).

<sup>60</sup> 20 U.S.C.A. § 6311(h) (2003).

<sup>61</sup> *Id.*

The University of California's Policy Analysis for California Education group conducted a study that detailed how "schools serving diverse students in California are less likely to achieve their growth targets and be subjected to stiff federal sanctions."<sup>62</sup> This study found that schools enrolling more subgroups typically serve those students who often score lower on standardized tests.<sup>63</sup> But, the study also found that even when students have similar or almost identical test scores, the more subgroups a school has makes the score more likely to fail under NCLBA growth targets.<sup>64</sup> To use two concrete examples, a school in California with less than 25% of its population from economically disadvantaged families that contains three subgroups has a 76% chance of meeting AYP.<sup>65</sup> A school with more than 75% of its students from economically disadvantaged families that has three subgroups has a 40% chance of meeting its AYP goals.<sup>66</sup> The percentage of schools hitting their AYP target correlates strongly with the number of student subgroups and "schools serving lower income families and their children, *on average*, are less likely to have achieved their AYP growth targets."<sup>67</sup> In Indiana, the story is essentially the same: Schools with large and diverse populations find it hardest to show progress while schools with a subgroup of special education students find it essentially impossible to meet AYP.<sup>68</sup> Black students showed a 94% failure rate, Hispanic students had a 68% failure rate, and students on free or reduced lunch showed a 56% failure rate.<sup>69</sup> In Georgia, two out of every three low-income students failed the math, English, and reading sections of their competency tests, while

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<sup>62</sup> John R. Novak & Bruce Fuller, *Penalizing Diverse Schools? Similar Test Scores, but Different Students, Bring Federal Sanctions*, PACE POLICY BRIEF, Dec. 2003, at 1.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 4.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> See William J. Mathis, *No Child Left Behind: Costs and Benefits*, 84 PHI DELTA KAPPAN 679, 684 (2003) (quoting Lowell C. Rose, *Hard Facts Regarding Adequate Yearly Progress (AYP) Under the No Child Left Behind Act*, special analysis for the Indiana Urban Superintendents Association, 2002).

<sup>69</sup> Mathis, *supra* note 68, at 684.



no students from high socioeconomic status counties failed any of the tests, and more than half exceeded the state standards.<sup>70</sup> Schools that serve students with disabilities are also penalized, even when trying to help their students achieve. Sheldon High School, in Eugene, Oregon, recently failed to meet AYP because its developmentally disabled students did not achieve their AYP goals.<sup>71</sup> The school has a program that teaches life skills to these students. Because it is successful, it attracts many students, most of whom do not perform well on traditional exams.<sup>72</sup> In short, the law penalizes schools that are trying to serve the population most left behind under the former education law. This result is beyond absurdity. It is a tragedy.

One theory for why the law may penalize diverse schools is purely procedural. Under NCLBA, each subgroup must meet or exceed the objectives set by the state in order to make AYP, and 95% of each subgroup must be tested (although the Department of Education recently relaxed this requirement somewhat).<sup>73</sup> Essentially, a school has a large grid of boxes that it must check off in every category for every subgroup. If a single subgroup within a school fails to meet AYP for that year or if less than 95% of a single subgroup takes the test, the school cannot check off that “box.” If a school fails to check off just one of its boxes, the school fails. Thus, a school with a diverse population, and therefore many subgroups, has many more opportunities to fail. The diverse school is seemingly penalized just for being diverse. For a law that is designed to even the playing field, this is an anomalous and disturbing result.

Another theory for the failure is that schools serving diverse students have special challenges that homogeneous schools simply do not face. Diverse schools have to perform in

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<sup>70</sup> James Salzer, *Georgia Drop-Out Rate Highest in Nation*, ATLANTA JOURNAL-CONSTITUTION, Apr. 29, 2001, at A1.

<sup>71</sup> Susan Palmer, *Education Act Unsettling to Educators*, THE REGISTER-GUARD (Eugene, Oregon), Aug. 30, 2003, at B1.

<sup>72</sup> *Id.*

<sup>73</sup> 20 U.S.C.A. § 6311(b)(2)(I) (2003).

more different ways to succeed than do more homogeneous schools. A school that has a learning disabled population, a Spanish-speaking population, and a low-income population may have multiple differently-tailored programs to meet the special learning needs of each group in order to have each group achieve proficiency. On the other hand, a largely white, largely moderate-to-high income school may only need to do one thing and do it well in order to have its children succeed. Schools may be labeled as “failing” only because they are in poor or diverse neighborhoods, because they are small and rural, or because they are trying to help serve the underserved. Ironically, they may fail because they try to ensure that no child is left behind.

### 3. High-Stakes Testing Might Actually Worsen Overall Academic Achievement

A recent study examined high-stakes testing and student learning. This study looked at eighteen states that had adopted severe consequences tied to performance on state standardized tests. The study examined four separate standardized tests, the SAT, ACT, NAEP, and the Advanced Placement tests.<sup>74</sup> The researchers chose these tests because they overlap the material tested on state standardized tests.<sup>75</sup> There is some concern that none of these tests actually tests transfer of learning or high-order thinking skills, which the researchers acknowledged.<sup>76</sup> The idea of the study was to determine whether, if scores were increasing on state tests, there was a corresponding increase in scores on other measures of the same types of skills.<sup>77</sup> The main question was whether there is “evidence of student learning, *beyond the training that prepared them for the tests they take*, in those states that depend on high-stakes tests to improve student achievement?”<sup>78</sup> The researchers found evidence indicating that states that have implemented high-stakes testing policies have fared worse on independent measures of academic achievement

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<sup>74</sup> Amrein & Berliner, *supra* note 4, at 2.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 2, 15.

<sup>77</sup> *Id.* at 2.

<sup>78</sup> *Id.* at 15.

than have states with low- or no-stakes testing programs.<sup>79</sup> The research from this study also indicated the phenomenon discussed above, that high-stakes testing policies have had a disproportionate negative impact on students from racial minority and low socioeconomic backgrounds.<sup>80</sup> Further, when this study examined results on the SAT and ACT for those states with high-stakes accountability, the study found “scant evidence of learning.”<sup>81</sup>

This study not only has implications for the debate about high-stakes accountability but also for the future of our nation’s children. In seventeen of the eighteen states, “student learning is indeterminate, remains at the same level it was before the policy was implemented, or actually goes down when high-stakes testing policies are instituted.”<sup>82</sup> The researchers admitted that part of this result could be due to the Heisenberg Uncertainty Principle, which says that the “more important any quantitative social indicator becomes in social decision-making, the more likely it will be to distort and corrupt the social process it is intended to monitor.”<sup>83</sup> This uncertainty principle affects the outcomes of all high-stakes tests. Nevertheless, the study shows that high-stakes tests used today do not “appear valid as indicators of genuine learning.”<sup>84</sup> The uncertainty of results and the “questionable validity of high-stakes tests as indicators of the domains they are intended to reflect,” suggest at the very least that further research needs to be done.<sup>85</sup> The study also suggests that high-stakes tests and high-stakes accountability systems are failing to

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<sup>79</sup> See *id.* at 11 (2002) (citing Monty Neill & Keith Gayler, *Do High-Stakes Graduation Tests Improve Learning Outcomes? Using State-level NAEP Data to Evaluate the Effects of Mandatory Graduation Tests*, in *RAISING STANDARDS OR RAISING BARRIERS? INEQUALITY AND HIGH-STAKES TESTING IN PUBLIC EDUCATION* 107 (Gary Orfield & Mindy L. Kornhaber, eds., 2001)); see also Peter Sacks, *STANDARDIZED MINDS: THE HIGH PRICE OF AMERICA’S TESTING CULTURE AND WHAT WE CAN DO TO CHANGE IT* (Perseus Books 1999).

<sup>80</sup> Amrein & Berliner, *supra* note 4, at 11.

<sup>81</sup> *Id.* at 30, 34.

<sup>82</sup> *Id.* at 2.

<sup>83</sup> *Id.* at 5 (citing George Madus & Marguerite Clarke, *The Adverse Impact of High Stakes Testing on Minority Students: Evidence from One Hundred Years of Test Data*, in *RAISING STANDARDS OF RAISING BARRIERS? INEQUALITY AND HIGH-STAKES TESTING IN PUBLIC EDUCATION* 85 (Gary Orfield & Mindy L. Kornhaber, eds., 2001).

<sup>84</sup> Amrein & Berliner, *supra* note 4, at 57.

<sup>85</sup> *Id.*

encourage the increased achievement of all students, particularly low-income and racial minority students. In fact, these policies have a negative impact on the achievement of the “left behind” students, which indicates that there is a major flaw in NCLBA. This flaw is more than just a simple mistake. It is a political mechanism for discrimination against many poor and minority children, one that must be examined and corrected immediately.

#### 4. Heavy Sanctions Create Incentives to Misrepresent Results

Standards-based reform and accountability is the key focus of both NCLBA and state reform plans. As discussed repeatedly throughout this paper, the accountability most used in NCLBA is high-stakes accountability, where performance and achievement is tied to strict consequences for failure. The approach found in NCLBA is a heavy emphasis on punishments and sanctions for failing schools, with few rewards for schools that do well. The sanctions begin after two years of failing, and quickly become severe. States, LEAs, and local schools now live in the deep shadow of consequences, punishments that can be triggered rather easily under NCLBA. Looking at this in the most positive light, the sanctions motivate school administrators to determine how to advance the educational achievement of their students and their schools. In fear of these sanctions, schools may improve their teaching methods, curriculum quality, and student attention. Looking at the sanctions more realistically, however, sanctions create incentives to make it appear that students are learning more than they are. Obviously, outright cheating on state tests is illegal, but there are other less obvious and legal ways to go about demonstrating gains. NCLBA certainly creates a strong motive to employ these methods.

One legal way to misrepresent educational gains is using teacher effort in a strategic manner. Part of this can be seen in teaching to the test and narrowing the curriculum. Teachers may also focus their efforts on certain types of students. Under NCLBA, a school makes AYP

when a certain percentage of students meet the proficient standard created by the state. The more students that a school can push over the proficiency mark, the better the school will perform. Gains in learning shown by students who are already above the bar add no value to the school's performance level, nor do gains by students who are so below the standard that they may never reach it. To many teachers, helping children on either end of the spectrum may not be worth the effort. In this way, the law encourages teachers to focus most (or all) attention on students just below the standard, students who have a chance of actually crossing over the threshold standard. Research on gains in scores on the Kentucky Instructional Results Information System, a Kentucky state assessment, suggests that educators in that state have achieved gains on the test by focusing on average or higher-achieving students who had not yet reached the proficiency level, often to the detriment of lower-achieving students.<sup>86</sup> Kentucky is probably not alone in this phenomenon. As lower-socioeconomic status and minority children tend to perform more poorly on standardized tests, focusing teacher efforts on the average or higher-achievers in each subgroup could adversely affect the lowest-performing children in the lowest-performing subgroups.

States can also attempt to misrepresent gains by manipulating who is tested. To some extent, this effort is blunted by the NCLBA requirement that 95% of each subgroup must be tested in order for that subgroup's score to be counted (unless that subgroup is so small as to produce statistically unreliable results).<sup>87</sup> However, there are ways to manipulate the testing pool while still complying with the attendance requirement. For example, the NAEP, the test NCLBA requires states to give in certain grade levels, is administered to randomly sampled students in the fourth and eighth grade. First, there is a random sample of school districts tested within each

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<sup>86</sup> Daniel Koretz & Sheila Barron, *The Validity of Gains in Scores on the Kentucky Instructional Results Information System (KIRIS)*, RAND (1998), available at <http://www.rand.org/publications/MR/MR1014/>.

<sup>87</sup> 20 U.S.C.A. § 6311(b)(2)(I) (2003).

state. Next, schools within the district are randomly sampled. Third, a random sample of students within each school is tested. Once the students are selected, the school administration removes from the sample all students with limited English proficiency or who have individualized education programs required by their special education status. Since administrators have final say over which students in the sample actually take the test, the sample becomes less “random.” It is likely that administrators will select the best students from the sample to take the NAEP.

Another way to manipulate the test pool is through school promotion and retention policies. Because students now face assessments in certain grade levels, schools may adopt strict promotion or retention policies to ensure that as they reach a “testing grade,” weaker students are quickly promoted through or held behind as needed. Third grade is the first testing year under NCLBA, so schools may be unwilling to promote weaker students into the third grade. This may not be a wholly bad policy, because retaining truly weak students may help them ultimately master skills that they may have missed by being “socially promoted.” Most research, however, shows that strict retention policies often encourage the likelihood that students will drop out from high school.<sup>88</sup> Again, since many low-performing students fall into at least one subgroup, such as a racial minority or a low socioeconomic group, the retention of these students could have a negative impact on their dropout rate. An increase in drop outs certainly would leave children behind and deprive them of an education.

### **B. Marketplace Accountability: Efficiency, Not Equity**

NCLBA contains more than just provisions for high-stakes accountability. It also features an element of marketplace accountability. A major component of NCLBA is public

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<sup>88</sup> C. Thomas Holmes, *Grade Level Retention Effects: A Meta-Analysis of Research Studies*, in *FLUNKING GRADES: RESEARCH AND POLICIES ON RETENTION* 16 (Lorrie A. Shepard and Mary Lee Smith eds., 1989).

dissemination of information about how schools are performing so that parents can make informed choices about their child's education. When each state, LEA, or local school reports in its annual report card the schools' and school subgroups' performance, parents will ostensibly be able to determine whether their child's school best fits their child's learning needs. In addition, the school must provide options to parents who feel that their child's school is not a good fit for the child. After two or more consecutive years of being identified for school improvement, a school must offer to all children the option of transferring to a higher performing public school in the district.<sup>89</sup> NCLBA requires that when funding or space is limited, the schools must give transfer priority to the lowest achieving children from low-income families.<sup>90</sup> In addition, the law requires that, subject to a spending limit, the school pay for transportation for all students who exercise their school-choice option under Title I.<sup>91</sup> In the event of a shortage of funds, priority must again be given to the lowest achieving children from low-income families.<sup>92</sup>

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These provisions constitute marketplace accountability, a form of soft accountability.

Market-driven education, also called consumer-driven or outcomes-driven, is based on the economic model of former University of Chicago economist Milton Friedman, and of education specialists such as Chester Finn and Diane Ravitch. This model equates schools with businesses or other economic institutions. Similar to the free market economy, schools must compete for "customers" who choose goods and services based on informed choices about relative values, wants, and needs. The school as economic institution makes sense in theory. The end aim of NCLBA is that accountability and standards will improve overall student performance and school quality. Soft market accountability is one means to achieving that goal. As parents

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<sup>89</sup> 20 U.S.C.A. § 6316(b)(1)(E) (2003).

<sup>90</sup> *Id.*

<sup>91</sup> 20 U.S.C.A. § 6316(b)(9) & (10) (2003).

<sup>92</sup> 20 U.S.C.A. § 6316(b)(10)(C) (2003).

exercise school choice, lower-performing schools may lose students to higher-performing schools, and risk losing federal and state funds. Theoretically, when this happens, the lower-performing schools will strive to improve themselves and their overall quality. As a result, children learn, schools improve, and there is a net overall gain in achievement and performance.

On the positive side, market-based accountability directs information and provides school choice to low-income or minority persons, persons often excluded from adequate information or adequate choices in the economic or education markets, an admirable and desirable goal. In order to improve the performance of all American students and schools, the inequities that existed in the educational market must be corrected. In operation, however, this accountability may be less than effective in meeting this goal.

First, not everyone agrees that schools can operate best as marketplaces or economic institutions. Schools do, like businesses, have employees, provide services to customers (students and parents), and compete to an extent for those customers. But the depiction of schools as economic units is an incomplete description of their role in society. Schools reflect the communities in which they are based and are a place where students learn those communal values as well as marketable social skills and abilities. A school's services, ones that may be as valuable to education as reading and writing, may be intangible items that cannot adequately be determined by reporting of test scores and subgroup performance results. If so, test scores may not provide parents adequate information to make informed, efficient marketplace choices. Distorted or incomplete information may actually worsen the fate of the very students the information was intended to aid.

Another reason that the marketplace accountability theory is inappropriate for schools is that schools face resource and operational constraints that businesses do not face. Marketplace



accountability assumes that the local school that provides the product (a quality education) is unencumbered by bureaucratic or financial constraints that would prevent the school from being able to respond efficiently to the market. When a business begins to lose its customers, there are many variables that a business owner is control of, and therefore may easily change. For example, a business owner could lower his prices, increase his advertisements, or make changes to the décor or services offered. Similarly, if a business goes bankrupt, citizens in the community have little reason to be concerned; it could be the economy or the owner's fault, but either way, there is likely a comparable substitute available. In contrast, a group of elected officials control the decisions and the spending of a school district or school, and there are many constraints on their decisions over which they simply have no control. In turn, the local school administration has even less control over some of the funding and programming issues their school faces. It is hard to use the market and respond to changes efficiently when the school may have control over only a few of the many inputs that determine success or failure. In addition, a community has reason to be concerned when a local school goes under, as there may be no comparable substitute available that can provide the range of community values and intangibles the community desires its school to offer. The school is simply not comparable to a business, and its success or failure should not be measured by economic standards.

Third, market-driven education also assumes that all customers – parents and students – have equal access to the information needed to make an informed choice. The idea of equality in education is lost when parents must make calculated, efficiency marketplace decisions without full information. NCLBA did try to remedy some of this inequality in information through the requirement of annual report cards. But it did not go far enough. Outcomes reported on the state and LEA report cards are only one piece of a puzzle that makes up complete information on

which school is best suited for one's child. Reporting test results may not always reflect the level of student attention, the types of values stressed in the school, or whether the school is the best place to send one's child. Test scores do not inform a parent about extracurricular activities, positive or negative racial interaction, tutoring programs, or class size, all of which may be important to whether a parent should move her child to an ostensibly better-performing school. Test scores measure those things that are easiest to measure – often low or mid-level thinking skills based on a narrow curriculum – and are extremely efficient at monitoring certain levels of learning. If we are merely seeking cold efficiency and economy in our schools, then reporting test scores and basing school choice on those scores is the way to achieve that goal. If we consider education about more than scores on standardized tests, the marketplace accountability method may be inadequate or incomplete to meet or achieve those sorts of goals.

Another deficiency in this model is its assumption that customers will choose to be involved and will choose to gather all of the information necessary to make an informed decision. Not every parent will be able or willing to spend time calling local schools and asking questions to find out about intangible items not addressed on the report card. Often parents may not bother to find out any information, may not want to be involved in the decision, may not be able to be involved in the decision, and even if they do get test score information, may be no more than consumers of these test scores. Or, more often, they may simply remain uninvolved in the marketplace altogether. Seemingly confirming this, a series of studies by the Harvard Civil Rights Project found that fewer than three percent of students eligible for Title I-funded transfers from “low-performing” schools took advantage of them in the eleven districts studied.<sup>93</sup>

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<sup>93</sup> Press Release, The Civil Rights Project at Harvard University, No Child Left Behind: A Federal-, State-, and District-Level Look at the First Year (Feb. 6, 2004), *available at* [http://www.civilrightsproject.harvard.edu/news/pressreleases.php/record\\_id=44/](http://www.civilrightsproject.harvard.edu/news/pressreleases.php/record_id=44/).

Also, the model assumes that free choice is really an option and that customers have no factors that could constrain their choice, such as limited finances, time, or transportation. Again, schools are required to provide transportation to the children who choose to exercise school choice, but for schools distant from the local area, this often means tokens for public transit or reimbursement vouchers for parents' gas costs. A person of limited means in a low-wage job may be unable to take time off work to transport her child to a possibly distant school. A parent may feel uncomfortable placing his young child alone on the public bus. The opportunity for school choice begins to look more like political rhetoric when applied to the real world. All of these factors stack the deck against marketplace accountability as an effective means for leveling the inequality found in our nation's education.

### **III. Suggestions for Regaining the Lost Children**

NCLBA has the right goal: improving the quality of education offered to all of America's students and specifically helping increase the achievement levels of minority students and students of low socioeconomic means. I agree that accountability is crucial in ensuring that schools reach this goal. States, schools, and students must be held to a standard. There must be consequences for failing to achieve that standard. However, NCLBA is imperfect in its implementation, and while it may never be perfect, changes can be made in order to improve the means by which NCLBA seeks to achieve its goals. My suggestions are also imperfect. I have no single cure for the ailments of NCLBA. The most important suggestion I can offer is that Congress and the Department of Education continue to diligently research NCLBA's effects thus far and evaluate NCLBA's successes and failures thoroughly. The Department of Education should continue to make administrative changes in the law, as they have frequently since 2001.

The rest of my suggestions do not fully address the problems I raised in the body of the paper, but they offer some idea of where the law can and should go from here.

First, the federal government must work to develop an accountability system that supports improved student learning, better schools, and more in-depth information to parents and communities. This will help address the problem of mixed messages of achievement, as well as fill in the information gaps in the annual report cards. Many states had good, highly developed accountability systems prior to NCLBA. In large part, those states have been required to abandon or modify their state systems in favor of the federal system. It makes no sense, and in fact does little to aid educational improvement, when schools are improving on a state growth model that considers both cognitive and non-cognitive factors, and yet fail on an arbitrary level of proficiency on one national standardized exam. It might be best to take some of the positive aspects of federal accountability, such as increased reporting standards and disaggregated scores, and apply them to growth-oriented state models. A school's performance over time would be a better reflection of its success or failure than a snapshot of performance based on the NAEP. Alternatively, Congress could maintain its use of the NAEP, but could also use factors such as quality of curriculum, availability of extra-academic supports, and graduation or dropout rates in the federal evaluation of states and LEAs. A new evaluation method could provide a much wider range of valuable information about the success of our schools.

To combat the problem of worsening of overall achievement, as well as to possibly reduce the ways in which teachers or administrators can misrepresent results, Congress may consider changing the assessment NCLBA uses. Large-scale national testing does not properly diagnose children's learning needs, nor does it assess whether students are learning higher-order skills that are generally needed to be successful beyond high school. There are several

alternative assessments that might better serve the government's goal of providing all students with a high-quality education. These tests might be used instead of, or in addition to, the NAEP. One example of a performance-based, classroom assessment is the Learning Record (LR).<sup>94</sup> LR is a standards-referenced assessment that studies a pattern of performance over time.<sup>95</sup> This assessment attempts to build on what students from "ethnically and linguistically diverse backgrounds demonstrate they know and can do," which is crucial in effectively testing students from all subgroups.<sup>96</sup> Further, the test encourages problem solving in multiple ways, which is one way to test higher-order thinking skills.<sup>97</sup> It also includes safeguards to ensure the reliability and validity of its results.<sup>98</sup> The Massachusetts Coalition for Authentic Reform in Education (CARE), a FairTest Assessment Reform Network affiliate, has developed "an assessment and accountability plan in which each school would use diverse data about academic outcomes and other attributes to evaluate itself."<sup>99</sup> The goal of CARE's assessment is to start a dialogue within a community to help encourage community members to get involved in the improvement of their local school. Obviously, a switch to a new assessment would not solve problems overnight, and could in fact create administrative-type problems during the conversion, but an assessment that looked at the big picture of education and transfer of learning would be a vast improvement over the current standardized exam. Further, an assessment that tested higher-order thinking skills would help minimize the curriculum narrowing phenomenon and may allow schools more freedom in offering additional courses or activities.

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<sup>94</sup> The assessment evaluates learning in writing, reading, and mathematics based on five dimensions of learning, available at <http://www.learningrecord.org>.

<sup>95</sup> Mary A. Barr, *The Learning Record Assessment System*, available at <http://www.learningrecord.org/lrassessment1.htm>

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> Monty Neill, *Leaving Children Behind: How No Child Left Behind Will Fail Our Children*, 85 PHI DELTA KAPPAN, 227 (citing COALITION FOR AUTHENTIC REFORM IN EDUCATION, *A Call for an Authentic State-Wide Assessment System*, available at <http://www.fairtest.org/care/accountability.html>).

Third, NCLBA should minimize the sanctions, or delay their onset, while at the same time creating real incentives at the school and state level that will enable teachers and principals to develop their own creative and thoughtful solutions to attack the achievement gap. This is my weakest suggestion, because I am unsure how it will work in practice. One of the major complaints about this law is that schools are not free to improve partly because of a lack of federal funds. Incentives might include financial rewards, but where there are limited resources, issues about distribution of wealth arise. For example, will the rich schools that already do well keep getting richer? Yet, right now, the heavy focus on avoiding sanctions and getting students to an arbitrary achievement standard has effectively paralyzed most educators from thinking of creative solutions for improving student learning. Interestingly, those who would compare schools to businesses seem to have forgotten that productivity increases when workers enjoy what they do, are rewarded well for a job well done, and are not punished disproportionately to their mistakes. Some of these worthy business lessons should be applied to the education arena. When the focus on testing, data collection, and punishments shifts to real learning, this can only mean a more successful educational environment for all parties involved.

In conclusion, NCLBA has many admirable goals. It attempts to use accountability as a way to make equality in education a reality for the most disadvantaged students. In practice, some of the methods of NCLBA have prevented the law from reaching its goals. The government must continue to research ways to improve the law and to provide high quality education to all students. The law can begin by embracing state growth-model accountability systems, changing or modifying the assessment tools, and increasing rewards while decreasing sanctions. Admittedly, my suggestions are mere palliatives for NCLBA's woes, but they should provide a good starting point for creating a law that truly leaves no child behind.