How to Mend a Broken Act: Recapturing Those Left Behind by No Child Left Behind

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I. INTRODUCTION

Once heralded as a “landmark” in education legislation,1 legislation that would finally “improve education for those children traditionally left behind in American schools,”2 the No Child Left Behind Act3 (hereinafter “NCLB Act” or the “Act”) has instead become an obstacle in the path to high-quality public education. The Act, which was designed to foster a public education system where all children could obtain academic success, has fallen far short of its lofty expectations and objectives. The Act has not only failed to close the achievement gap between minorities and non-

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2 Linda Darling-Hammond, From “Separate But Equal” to “No Child Left Behind”: The Collision of New Standards and Old Inequalities, in MANY CHILDREN LEFT BEHIND: HOW THE NO CHILD LEFT BEHIND ACT IS DAMAGING OUR CHILDREN AND OUR SCHOOLS 3, 3 (Deborah Meier & George Wood eds., 2004) [hereinafter MANY CHILDREN LEFT BEHIND].

minorities and between those living in poverty and their more affluent counterparts; the Act has also had, and continues to have, detrimental consequences for its intended beneficiaries.¹ The failure of the Act is traceable to two main factors. The first is that the sponsors of the Act promised specific results that no law can ever deliver. The second is that it exposed the futility of placing much reliance on this law and public education to address problems caused by the ills of inequality in our society.

Our public education system is plagued with numerous problems that translate into obstacles for a generation of children desperately in need of the high-quality education required to succeed in this Information Technology-driven era. This article discusses one of the more recent, yet prominent, complications of public education—the No Child Left Behind Act. This Act, which purportedly was designed to allow all students, irrespective of race or situation of poverty, a meaningful opportunity for a high-quality education, has instead fueled a national epidemic of dropouts.² Furthermore, in-depth learning is being sacrificed and replaced with “drill and kill”³ standardized-test based curricula.

This article is divided into four parts. Part I provides a background of the problems the law was intended to address and gives a historical perspective of unequal educational opportunities and how minorities and low-income individuals are disproportionately affected by various social and societal factors that prevent them from receiving a high-quality education. It will also examine past efforts to address the problem. The objective of Part I is to provide context of the problems that led to the passage of the NCLB Act.

Part II discusses specific provisions of the Act that are most problematic. Specifically, it focuses on the provisions that (1) establish the requirement that students attain universal proficiency; (2) create a timeline expiring in the 2013-14 academic year for such universal proficiency; (3) require the use of standardized tests to assess students’ academic proficiency; and (4) on an escalating scale, penalize schools that are unable to meet the Act’s “adequate yearly progress” requirements.

Part III provides an evaluation and assessment of the provisions discussed in Part II. This section provides a score card of the Act after seven years of its existence. I argue here that, despite its laudable goals, the NCLB Act was predicated on a questionable premise and as such has failed to solve the problems it was enacted to address. Available evidence convincingly demonstrates that the so-called “achievement gap” has not improved in any meaningful manner. Moreover, at the

¹ Darling-Hammond, supra note 2, at 3-6.
² Id. at 20-21.
³ The term “drill ‘n kill” is used by many to denote the practice of drilling students on a particular skill until they “get it right.” However, this type of “dull and repetitive skills instruction … does not enable [students] to grasp underlying concepts. Drilling isn’t teaching.” ALFIE Kohn, THE SCHOOLS OUR CHILDREN DESERVE: MOVING BEYOND TRADITIONAL CLASSROOMS AND “TOUGHER STANDARDS” 55 (1999) (internal quotation marks and citation omitted).
present pace of “adequate yearly progress” benchmarks, particularly in schools with multiple target subgroups, schools most assuredly cannot and will not achieve universal proficiency by 2014.7

Part IV offers reform proposals for addressing the problems. I argue that a revised Act’s focus should center on developing an educational system designed with the goal of teaching and learning—which are necessary to higher-order learning—instead of the standardized test-driven “drill and kill” approach to education. Specifically, I opine that the idea of universal proficiency be replaced with a more realistic educational goal and that the unattainable deadline for such universal proficiency be eliminated. Necessary elements of the changes advanced include modified assessment and accountability tools as well as a redirected focus on learning instead of testing. Likewise, a revised Act should involve establishing realistic, uniform assessments to track academic progress and replace harsh disincentives and penalties with meaningful support and necessary resources for students and for schools in “need of improvement.” Such adjustments are essential to address the underlying social factors that created the problems that the NCLB Act was passed to remedy. Any meaningful reform must recognize the inadequacies of the existing law. It must also appreciate the impact of socio-economic factors on the quest for education, especially within minority and low-income families. An understanding of these issues will enable policymakers to confect a legal framework that will better address the problems and achieve the eminently laudable goal of providing equal educational opportunities for all.

II. ORIGINS OF THE NCLB ACT

Beginning with the Elementary and Secondary Education Act (the “ESEA”), the federal government assumed a more involved posture in our nation’s public education system.8 Prior to the ESEA, the Federal government, led by the strictures of the U.S. Constitution, specifically the Tenth Amendment,9 viewed education to be within the

7. Monty Neill et al., Nat’l Ctr. for Fair & Open Testing, Failing Our Children: How “No Child Left Behind” Undermines Quality and Equity in Education; An Accountability Model that Supports School Improvement 3-4 (May 2004), available at http://www.fairtest.org/node/1778; Robert L. Linn et al., Minimum Group Size for Measuring Adequate Yearly Progress, The CRESST LINE (Nat’l Ctr. for Research on Evaluation, Standards, and Student Testing), Fall 2002, at 6 (discussing some researchers’ opinion that if “progress were based on the experience of NAEP over the years, it would take 110 years to reach 100% proficiency across the country”).
9. U.S. Const. amend. X (reserving to the states those powers not specifically delegated to the United States by the Constitution).
exclusive province of state and local government.\textsuperscript{10} Title I of ESEA “was developed as an integral part of [President] Lyndon Johnson’s War on Poverty.”\textsuperscript{11} Specifically, Title I provided for assistance grants to schools with a “high concentration of children from low-income families” and required “that funds be used to meet the special educational needs of educationally deprived children residing in low-income areas.”\textsuperscript{12} Billions of dollars in federal funds were spent in schools with Title I programs; yet, in 1981, when the National Commission on Excellence in Education (the “Commission”) was created, little progress had been made toward closing the great divide in educational opportunity for the disadvantaged, particularly minorities, when compared to more privileged individuals.\textsuperscript{13}

In 1983, the Commission issued a report, \textit{A Nation at Risk}, outlining the insufficiency of the educational experience of many of our publically educated children, and recommending specific and drastic changes necessary to improve America’s schools.\textsuperscript{14} In its research and data gathered to prepare the report, the Commission determined that “23 million American adults [we]re functionally illiterate” and that there was an overall decline in student achievement levels.\textsuperscript{15}

\begin{itemize}
  \item International comparisons of student achievement, completed a decade ago, reveal that on 19 academic tests American students were never first or second and, in comparison with other industrialized nations, were last seven times.
  \item Some 23 million American adults are functionally illiterate by the simplest tests of everyday reading, writing, and comprehension.
  \item About 13 percent of all 17-year-olds in the United States can be considered functionally illiterate. Functional illiteracy among minority youth may run as high as 40 percent.
  \item Average achievement of high school students on most standardized tests is now lower than 26 years ago when Sputnik was launched.
  \item Over half the population of gifted students do not match their tested ability with comparable achievement in school.
\end{itemize}

\begin{footnotesize}
\item 11. \textit{MARK G. YUDOF \textit{ET AL., EDUCATIONAL POLICY AND THE LAW, CASES AND MATERIALS} 677 (2d ed. 1982)}.
\item 12. \textit{ROBERT SILVERSTEIN, EDUC. COMM’N OF THE STATES, A POLICY MAKER’S GUIDE TO \textit{TITLE I OF THE ELEMENTARY AND SECONDARY EDUCATION ACT AND ITS RELATIONSHIP TO STATE AND LOCAL SPECIAL PROGRAMS} 38 (1979)}.
\item 14. \textit{Id.}
\item 15. \textit{NAT’L COMM’N ON EXCELLENCE IN EDUC., A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM 8 (1983) [hereinafter COMMISSION ON EXCELLENCE], available at http://www.ed.gov/pubs/NatAtRisk/recomm.html}. According to the Commission, testimony before this body documented the following:
\end{footnotesize}
Based on its findings, the Commission recommended changes in “four important aspects of the educational process: (1) content; (2) expectations; (3) time; and (4) teaching.”\textsuperscript{16} The recommendations’ primary edict resolved that students should, at a minimum, complete a basic curriculum to obtain a high school diploma and that schools should “adopt more rigorous and measurable standards, and higher expectations, for academic performance and student conduct . . . .”\textsuperscript{17}

The report spawned a new education era of achievement testing and so-called standards-based education reform\textsuperscript{18} and ultimately led to the enactment of the Improving America’s Schools Act of 1994 (IASA), which extended for five years the authorizations of appropriations for the programs under the ESEA.\textsuperscript{19} IASA strongly encouraged states to address the educational needs of all children, not just the “disadvantaged and children at risk of school failure.”\textsuperscript{20} Furthermore, IASA required

- The College Board's Scholastic Aptitude Tests (SAT) demonstrate a virtually unbroken decline from 1963 to 1980. Average verbal scores fell over 50 points and average mathematics scores dropped nearly 40 points.
- College Board achievement tests also reveal consistent declines in recent years in such subjects as physics and English.
- Both the number and proportion of students demonstrating superior achievement on the SATs (i.e., those with scores of 650 or higher) have also dramatically declined.
- Many 17-year-olds do not possess the "higher order" intellectual skills we should expect of them. Nearly 40 percent cannot draw inferences from written material; only one-fifth can write a persuasive essay; and only one-third can solve a mathematics problem requiring several steps.
- There was a steady decline in science achievement scores of U.S. 17-year-olds as measured by national assessments of science in 1969, 1973, and 1977.
- Between 1975 and 1980, remedial mathematics courses in public 4-year colleges increased by 72 percent and now constitute one-quarter of all mathematics courses taught in those institutions.
- Average tested achievement of students graduating from college is also lower.
- Business and military leaders complain that they are required to spend millions of dollars on costly remedial education and training programs in such basic skills as reading, writing, spelling, and computation. The Department of the Navy, for example, reported to the Commission that one-quarter of its recent recruits cannot read at the ninth grade level, the minimum needed simply to understand written safety instructions. Without remedial work they cannot even begin, much less complete, the sophisticated training essential in much of the modern military.

\textit{Id.} at 8-9.

16. \textit{Jorgensen & Hoffmann, supra} note 13, at 3.


18. \textit{Jorgensen & Hoffmann, supra} note 13, at 3-4.


schools to develop performance standards and accountability systems to identify those schools that were not providing students a high-quality education. The NCLB Act was to many the next logical step in the standards-based assessment and accountability era of education. Unfortunately, the Act has overstepped.

III. OVERVIEW OF THE NCLB ACT

In 2001, at the urging of President George W. Bush, Congress passed the NCLB Act, and on January 8, 2002, President Bush signed the Act into law. The Act requires each State to implement statewide accountability systems for all public schools and their students, to define education standards, and to establish a system of assessments for measuring whether students have met those standards. More specifically, those states that receive funds under Title I of the ESEA are required to develop a state education plan consistent with the academic standards, assessments, and accountability provisions of the NCLB Act.

Congress articulated the purpose of the NCLB Act as follows: “to ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education and reach, at a minimum, proficiency on challenging State academic achievement standards and state academic assessments.” The purpose focuses on closing the achievement gap between the lowest and highest achieving groups of students, especially the gap between minority and nonminority students and between disadvantaged and the more advantaged, using state and school accountability and flexibility, together with parent choice and participation, so that no child is left behind. Under the Act, a school’s continued failure to make “adequate yearly progress” (AYP) toward meeting established student proficiency goals gives rise to assistance and intervention, with parents of students in failing schools allowed to transfer their children to better schools. If, after technical assistance and local

26. § 6301.
27. Id
28. § 6316(b).
restructuring, the schools experience continued failure to meet AYP goals, then corrective action may be implemented, resulting in state takeovers of local schools.\textsuperscript{29}

The Act presents twelve tools to be employed as the means of accomplishing its objectives.\textsuperscript{30} These tools encompass the implementation of statewide “academic assessments” and “accountability systems” so that all stakeholders may measure “student academic achievement” with particular attention given to the needs of “low-achieving children in our Nation’s highest-poverty schools, limited English proficient children, migratory children, children with disabilities, Indian children, neglected or delinquent children, and young children in need of reading assistance.”\textsuperscript{31} The measurements of accountability are for the purpose of “holding schools, local educational agencies, and States” responsible for improving the academic achievement of all students and reforming those low-performing schools that do not provide high-quality education and “[c]losing the achievement gap between high and low-performing children, especially . . . between minority and non-minority students,” and between the disadvantaged and the privileged.\textsuperscript{32} And finally, the Act promises a coordination of efforts of agencies providing services to “youth, children, and families” and empowerment of parents with educational leverage by way of “substantial and meaningful opportunities to participate in the education of their children.”\textsuperscript{33}

\begin{enumerate}
\item\textsuperscript{29} § 6316(c)(10).
\item\textsuperscript{30} § 6301.
\item\textsuperscript{31} § 6301(1)-(2).
\item\textsuperscript{32} § 6301(3)-(4).
\item\textsuperscript{33} § 6301(11)-(12). Specifically, § 6301 provides the following statement of purpose:
\begin{enumerate}
\item ensuring that high-quality academic assessments, accountability systems, teacher preparation and training, curriculum, and instructional materials are aligned with challenging State academic standards so that students, teachers, parents, and administrators can measure progress against common expectations for student academic achievement;
\item meeting the educational needs of low-achieving children in our Nation’s highest-poverty schools, limited English proficient children, migratory children, children with disabilities, Indian children, neglected or delinquent children, and young children in need of reading assistance;
\item Closing the achievement gap between high and low-performing children, especially the achievement gaps between minority and nonminority students, and between disadvantaged children and their more advantaged peers;
\item holding schools, local educational agencies, and States accountable for improving the academic achievement of all students, and identifying and turning around low-performing schools that have failed to provide a high-quality education to their students, while providing alternatives to students in such schools to enable the students to receive a high-quality education;
\item distributing and targeting resources sufficiently to make a difference to local educational agencies and schools where needs are greatest;
\end{enumerate}
\end{enumerate}
Under the NCLB Act, each state is allowed to develop and implement its own statewide accountability system. While the Act specifies that a state’s system must include standards that are academically challenging, each state sets its own standards and defines its own measurements of achievement levels. The NCLB Act’s main objective is that all students within a state “meet or exceed the State’s proficient level of academic achievement on the State assessments” by 2014. While this objective on its surface appears laudable, there are certain inherent flaws in its premise that all but guarantee that the goal will not be realized. First, “[t]he term ‘proficiency’ is borrowed from the National Assessment of Education Progress (NAEP) tests,” which have been criticized as employing flawed methods and yielding results that differ significantly from other data. In addition, states vary widely in their proficiency standards, “both among states and within states from grade level to grade level,” which yields inconsistent information and calls into question whether these assessments are accurate reflections of the academic levels of children in each state and from state to state.

(6) improving and strengthening accountability, teaching, and learning by using State assessment systems designed to ensure that students are meeting challenging State academic achievement and content standards and increasing achievement overall, but especially for the disadvantaged;
(7) providing greater decisionmaking authority and flexibility to schools and teachers in exchange for greater responsibility for student performance;
(8) providing children an enriched and accelerated educational program, including the use of schoolwide programs or additional services that increase the amount and quality of instructional time;
(9) promoting schoolwide reform and ensuring the access of children to effective, scientifically based instructional strategies and challenging academic content;
(10) significantly elevating the quality of instruction by providing staff in participating schools with substantial opportunities for professional development;
(11) coordinating services under all parts of this title with each other, with other educational services, and, to the extent feasible, with other agencies providing services to youth, children, and families; and
(12) affording parents substantial and meaningful opportunities to participate in the education of their children.

*Id.* § 6301.
34. *Id.* § 6311(b)(2)(A).
35. *Id.* § 6311(b).
36. *Id.* § 6311(b)(2)(F). “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 in subparagraph (C)(v) will meet or exceed the State’s proficient level of academic achievement on the State assessments under paragraph (3).” *Id.*
37. *Id.* at 11-12.
38. *Id.* at 11-12.
39. *Id.* at 13.
While the underlying premise of the NCLB Act—“ensur[ing] that all children have a fair, equal, and significant opportunity to obtain a high-quality education and reach, at a minimum, proficiency on challenging State academic achievement standards and state academic assessments”\textsuperscript{40}—is admirable, various components and provisions of the Act will all but ensure that the designated benchmarks and ultimate goals will not be attained. Specifically, NCLB establishes very loosely defined criteria for schools to define “challenging academic standards”\textsuperscript{41} supposedly aimed at closing the “achievement gap,” resulting in far too much emphasis placed on students’ performance on standardized tests in math, reading or language arts, and, recently, science,\textsuperscript{42} and not enough attention given to overall teaching and learning.\textsuperscript{43} This misplaced focus on students’ test performance has done very little toward the Act’s objective of closing the achievement gap, but instead has fostered an academic climate wrought with narrowing curricula\textsuperscript{44} and lower achievement standards, an escalating dropout rate and declining graduation rate,\textsuperscript{45} and little to no progress in closing the achievement gap.\textsuperscript{46}

This Act was passed in a well-intentioned, albeit misguided, effort to curtail educational inequality. However, the NCLB Act, with all its focus on high-stakes tests as indicators of academic success, exacerbates the problem by unduly causing administrators, principals, teachers and most importantly students to stress practicing skills and drills of abstract, often irrelevant—particularly from the students’ vantage point—facts likely to be tested, replacing in depth learning with rote memorization. All other relevant internal and external factors notwithstanding, if our children are to have a true opportunity for a high quality education with learning its central objective, the NCLB Act must be revamped to abolish the arbitrarily defined notions of proficiency, the inaccurate assessments of such proficiency, the scarlet labels associated with failure to adequately progress to such proficiency, and the ill-conceived idea that threats, sanctions, and public shaming will somehow cause schools to accomplish the impossible.

\textsuperscript{41} § 6311(b)(1)(D).
\textsuperscript{42} § 6311(b)(1)(C).
\textsuperscript{44} See generally CTR. ON EDUC. POLICY, CHOICES, CHANGES, AND CHALLENGES: CURRICULUM AND INSTRUCTION IN THE NCLB ERA (2007) (discussing curriculum changes in the wake of the NLCB Act).
\textsuperscript{46} Knaus, supra note 43, at 112-13.
As a component of the Act’s plan to propel schools to 100% proficiency, schools must hire teachers who are “highly-qualified.” NCLB defines a “highly qualified” teacher in terms of his or her academic credentials and certifications. Yet, the NCLB Act fails to include in this definition the relevance of other factors necessary for a teacher that is effective. While a “good” teacher should be qualified for the job, credentials and certifications do not guarantee that the teacher will be committed, experienced and responsive. These factors are equally important to effectiveness as are one’s academic credentials.

Moreover, an essential qualification for educators in today’s diverse society is that they are able to make their lessons culturally relevant and responsive to the unique learning styles of each individual student. For teachers to connect with their students—which is crucial in engaging students—teachers should learn about and try to understand their students’ cultural backgrounds and experiences. Furthermore, effective teachers will adopt teaching methods that are responsive to the various communication and learning styles of their students.

Although not specifically stated in so many words, the NCLB Act establishes a framework for a public education system mired in standardized tests disguised as “measurements” and “assessments” that are counterproductive to a true educational objective. The NCLB Act requires states that receive funds under the Act to develop state plans demonstrating “that the State has adopted challenging academic content standards and challenging student academic achievement standards that will be used by the State, its local educational agencies, and its schools . . . .” The academic standards required under the Act must be the same standards applied to all schools and children, and these standards must specifically include “mathematics, reading or language arts, and (beginning in the 2005-2006 school year) science.” As part and parcel of the states’ plans, the states are required to establish accountability systems in order to determine how students perform under the states’ standards with a goal of student performance at 100% proficiency “not later than 12 years after the end of the

48. § 7801(23).
49. See Knaus, supra note 43, at 112.
50. See id. at 111-12.
52. Pewewardy, supra note 51, at 41.
53. Fritzberg, supra note 51, at 171.
55. § 6311(b)(1)(C).
2001-2002 school year.\textsuperscript{56} The accountability systems are required to establish “annual measurable objectives,” which states must assess to measure the achievement or proficiency of all children.\textsuperscript{57} These assessments must be measured at least once during grades 3 through 5, grades 6 through 9, and grades 10 through 12.\textsuperscript{58} All children are to be tested to determine each school’s “adequate yearly progress” toward academic proficiency; in addition, children in certain subgroups—economically disadvantaged students; students from major racial and ethnic groups; students with disabilities; and students with limited English proficiency—are disaggregated from the rest of the students, such that students in each subgroup must also make “adequate yearly progress.”\textsuperscript{59} In the event that students’ test scores on these various assessments are such that a school does not make “adequate yearly progress,” various sanctions are imposed in an attempt to “shame” schools into improving test scores.

These sanctions are in fact disincentives and penalties for schools failing to meet “adequate yearly progress”\textsuperscript{60} undermining the purported objectives of the Act.\textsuperscript{61} These disincentives include a sliding scale of increasingly harsh punishments when a school fails to improve with little to no guidance and assistance toward the desired improvement.\textsuperscript{62} Specifically, schools have an “adequate yearly progress” goal to meet each year as they proceed toward an ultimate goal of 100% academic proficiency.\textsuperscript{63} A school not meeting its AYP is labeled as a school in need of improvement.\textsuperscript{64} This label requires the school to develop an individual two-year school improvement plan.\textsuperscript{65} If the following academic year the school continues to fail to attain AYP, the school is then required to take corrective action, which requires remediation in addition to that required upon first identification for improvement.\textsuperscript{66} If, again, the school does not meet AYP, then the school must restructure, which includes all the changes required under both the “need improvement” and “corrective action” clouds plus new “alternative” school governance.\textsuperscript{67}

\begin{itemize}
  \item \textsuperscript{56} § 6311(b)(1)(D), (b)(2)(F).
  \item \textsuperscript{57} § 6311(b)(2)-(3).
  \item \textsuperscript{58} Id.
  \item \textsuperscript{59} § 6311(b)(2)(C).
  \item \textsuperscript{60} § 6311(b)(2)(B)-(C).
  \item \textsuperscript{62} Id.
  \item \textsuperscript{64} § 6316(b)(1)(A).
  \item \textsuperscript{65} § 6311(b)(3)(A).
  \item \textsuperscript{66} § 6316(b)(7).
  \item \textsuperscript{67} § 6316(b)(8).
\end{itemize}
While these labels and penalties were implemented as purported motivators for schools to comply with NCLB’s directives, the Act is lacking in key components, which are essential to the remediation and restructuring these schools need—guidance, support, and resources.68

Finally, the Act establishes a relatively short and unrealistic time period—“not later than 12 years after the end of the 2001-2002 school year”—during which all students must meet or exceed academic proficiency.69 This timeline, together with its ultimate goal, has never been shown through any scientific data or statistical information as possible or even at all realistic.70

IV. EVALUATION OF THE ACT’S EFFECTIVENESS OR LACK THEREOF

Years after the Act’s passage, available evidence demonstrates convincingly that the NCLB Act is not accomplishing its stated goals. Millions of children in our nation’s public education system are still not receiving the fair, equal, and significant opportunity for a high-quality education.71 Many children attending public schools, particularly minorities (more specifically blacks and Hispanics) and the poor, are in fact being “left behind.” The 2007 Statistical Analysis Report Drop Out Rates in the United States: 2005, published by the United States Department of Education,72 notes


70. See NEILL ET AL., supra note 7, at 13 (noting that NCLB’s demand for steady yearly progress is “completely unrealistic”); Gershon M. (Gary) Ratner, Why the No Child Left Behind Act Needs to be Restructured to Accomplish its Goals and How to Do It, 9 D.C. L. REV. 1, 18 (2007) (contending that it will take 85 to 280 years to achieve NCLB’s goals at current rates of progress).


72. The National Center for Education Statistics (NCES) is the primary federal entity for collecting, analyzing, and reporting data related to education in the United States and other nations. It fulfills a congressional mandate to collect, collate, analyze, and report full and complete statistics on the condition of education in the United States; conduct and publish reports and specialized analyses of the meaning and significance of such statistics; assist state and local education agencies in improving their statistical systems; and review and report on education activities in foreign countries. NAT’L CTR. FOR EDUC. STATISTICS, DROP OUT RATES IN THE UNITED STATES: 2005, at intr. n. (2007),
that as of October 2005, the status dropout rates of Black students between the ages of sixteen and twenty-four was 10.4% and for Hispanics 22.4%. Yet, their white counterparts had a high school dropout rate of 6.0%. This same report revealed that the high school completion rate for Blacks between the ages of eighteen and twenty-four was 85.9%, and for Hispanics 70.2%. The completion rate for Whites was 92.3%. These numbers, however, are misleading and mask an even bleaker truth about our children’s education or lack thereof.

The “Dropout Rates” report should be treated with caution because it inadequately and inaccurately misidentifies the true crisis in our public education system. First, its core premise is faulty. Specifically, the “completion rates” referenced in the National Center for Education Statistics (NCES) report is not a true representation of actual high school graduation, on time or otherwise. Instead, the “completion rate” includes individuals who received high school equivalency credentials, such as GED recipients. Other studies that track so-called “graduation rates” instead of completion rates present a more accurate picture; however, these numbers also do not give a true picture of the problem.

The information used to determine “graduation rates” is incomplete or imprecise in individual student correlation. The “graduation rate” is tracked with a beginning threshold of students that are enrolled in the ninth grade, instead of by the number of students entering ninth grade. Thus, proper consideration is not given for those available at http://nces.ed.gov/pubs2007/2007059.pdf [hereinafter 2005 DROPOUT RATES].

73. Id. at 6.
74. Id.
75. Id. at 8.
76. Id.
77. Swanson, supra note 71.
78. See, e.g., Joydeep Roy & Lawrence Mishel, Using Administrative Data to Estimate Graduation Rates: Challenges, Proposed Solutions and their Pitfalls, 16 EDUC. POL’Y ANALYSIS ARCHIVES 1, 3 (June 4, 2008), available at http://epaa.asu.edu/epaa/v16n11/. Roy and Mishel posit that the data yields inaccurate results and present distorted picture, particularly as it relates to minorities because the various studies use Common Core Data (CCD) to compute graduation rates. Id. at 2-3. However, CCD does not measure high school graduation rates of entering ninth graders, but instead looks at ninth grade enrollment. Id. at 3. In other words, the diploma counts in the CCD include all diplomas, including students that graduate in five or six years. Id. Furthermore, not only do CCD computations fail to consider ninth and even tenth grade retention, other relevant considerations, such as migration of students from state to state between eighth and ninth grade, and the transfer of students from private to public schools between eighth and ninth grades. Id. at 3-4 & n.2.
students that may be repeating a grade or for students that may have migrated from district to district or state to state, as is often the case with low-income families.80

Other studies that examined the graduation rates in some of the larger “big-city” school districts have concluded that in these schools, “[s]tudents . . . have a less than 50-50 chance of graduating from high school with their peers, and a few cities graduate far fewer than half each spring.”81 Studies revealed that on-time graduation rates were lower than 50% in fourteen urban school districts, including Baltimore (38.5%), Detroit (21.7%), New York (38.9%), Milwaukee, Cleveland, Los Angeles, Miami, Dallas, Denver, and Houston.82 Other the estimates of other privately-funded studies indicate that only about 52% of Blacks, 47% of Native Americans, and about 56% of Hispanics graduate from high school on time with a standard high school diploma.83

As reflected in these numbers, a serious problem with our public education system persists that the Act is failing to adequately address. The system as it stands is not solving the problems because it is fundamentally flawed in focus and implementation.84 Specifically, many students, particularly those in the targeted subgroups, are dropping out of school at an alarming rate in large part to escape the harsh penalties associated with their performance on the high-stakes tests mandated by the NCLB Act. NCLB mandates “adequate yearly progress”85 toward an ultimate goal of 100% student academic “proficiency” by 2014, but provides no real guidance as to how to attain these objectives and severely penalizes schools that fall short of expectations.86 Moreover, the federal government does not provide adequate funding for the additional costs associated with implementing required policies and procedures necessary for compliance with NCLB.87 Additionally, NCLB places its primary focus on the schools and the outcomes they produce with little or no attention to other factors contributing to the so-called achievement gap.88 Ignoring other factors—i.e., language and cultural barriers, poorly developed social skills,
inadequate home, school and community support systems, etc.—contributes to why these students are being left behind.\(^\text{89}\)

And the students pay the price. For example, students are retained at the same grade level until they are able to pass the “high stakes” assessment tests. This retention does nothing towards closing the achievement gap,\(^\text{90}\) particularly, when the requisite changes necessary to meet the needs of the “low-achieving children in our Nation’s highest-poverty schools, limited English proficient children, migratory children, children with disabilities, Indian children, neglected or delinquent children, and young children in need of reading assistance”\(^\text{91}\) are not implemented and properly funded. Instead of closing the gap, the failure of these students to pass the assessments labels them and stigmatizes them, by amplifying failure. Ultimately, these are the students that give up and end up unemployed, unemployable, and incarcerated.\(^\text{92}\)

Consider the impact being “left behind” is having on our nation’s youth. Dropouts have an estimated life span that is nine years shorter than people who graduate.\(^\text{93}\) Typically, high school dropouts earn considerably less than those that graduate. For example, in 2005, the average income of persons between the ages of eighteen and sixty-five who had not completed high school was about $20,100 a year, whereas high school graduates of the same demographic earned about $29,700 a year on average.\(^\text{94}\) Moreover, a high school dropout is more likely than his or her graduating counterpart to be reliant on public assistance as an adult.\(^\text{95}\)

Dropping out of high school also seems to greatly increase one’s chances of incarceration. Empirical evidence exists to show the relationship between high school dropout rates and incarceration. Using data from 1997 and 1998, the United States Department of Justice estimated that “30 percent of federal inmates, 40 percent of state prison inmates and 50 percent persons on death row are high school dropouts.”\(^\text{96}\) Other researchers estimate a much higher percentage of individuals in


\(90\). Knaus, supra note 43, at 113-14.


\(94\). 2005 Dropout Rates, supra note 72, at 1.


\(96\). 2005 Dropout Rates, supra note 72, at 1 n.2.
Poverty and crime have a direct relationship to the chasm between the haves and the have-nots in educational opportunity and access. Although stated more than 50 years ago in Brown v. Board of Education, the message is still true today that

[E]ducation is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.  

Yet, today access and opportunity “to all on equal terms” still is not a reality. While we know that early childhood education and academic preparation and performance are key contributors to future success, not enough is being done to remedy the problem of the achievement gap between whites and minorities and between the poor and the affluent. Too much focus is placed on the lack of achievement when the target should be the eradication of the reasons for the lack of achievement. In other words, the spotlight has heretofore highlighted the symptoms without adequately addressing the root of the problem. Until other relevant factors are considered and addressed, true equality of opportunity cannot be attained. These factors include influences in the community, parental involvement or the lack thereof, home life, and cultural and educational barriers. The best models for success focus on serving the “whole child” rather than expecting schools to shoulder society’s responsibilities.

97. Thomas & Date, supra note 93.
100. Knaus, supra note 43, at 108.
101. Id. at 109.
102. The term “whole child” is borrowed from the Association for Supervision and Curriculum Development (ASCD). For more details about the “whole child” model, see ASS’N FOR SUPERVISION AND CURRICULUM DEV., COMM’N ON THE WHOLE CHILD, THE LEARNING COMPACT REDEFINED: A CALL TO ACTION (2007), available at www.ascd.org/learningcompact.
In addition to the adverse effects on individuals who are directly impacted by the inadequacies of the NCLB Act, the defects in our education system impose significant costs on society as a whole. The following “cost” estimates is just a snapshot of some of the fallout:

- Over a lifetime, an 18-year-old who does not complete high school earns about $260,000 less than an individual with a high school diploma, and contributes about $60,000 less in federal and state income taxes. The combined income and tax losses aggregated over one cohort of 18-year-olds who do not complete high school is about $192 billion, or 1.6 percent of the gross domestic product. (Cecilia Elena Rouse, economist, Princeton University)

- Individuals with a high school diploma live longer, have better indicators of general health, and are less likely to use publicly financed health-insurance programs than high school dropouts. If the 600,000 18-year-olds who failed to graduate in 2004 had advanced one grade, it would save about $2.3 billion in publicly financed medical care, aggregated over a lifetime. (Peter Muennig, Mailman School of Public Health, Columbia University)

- Adults who lack a high school diploma are at greater risk of being on public assistance. If all those receiving assistance who are high school dropouts instead had a high school diploma, the result would be a total cost savings for federal welfare spending, food stamps, and public housing of $7.9 billion to $10.8 billion a year. (Jane Waldfogel et al., Columbia University School of Social Work)

- In the 2004 election, college graduates were nearly three times as likely to vote as Americans without a high school diploma. (Jane Junn, Eagleton Institute of Politics, Rutgers University)

- High school dropouts are far more likely to commit crimes and be incarcerated than those with more education. A 1 percent increase in the high school completion rate of men ages 20 to 60 would save the United States as much as $1.4 billion a year in reduced costs from crime incurred by victims and society at large. (Enrico Moretti, economist, University of California, Berkeley)

V. PROPOSED SOLUTIONS TO THE NCLB PROBLEM

School systems across the country have articulated the need for changes to the NCLB Act. The Act’s mandate that struggling schools and their students be sanctioned for failing to meet an arbitrary benchmark misdirects the focus away from the systemic changes that states and localities need to make in improving student achievement. Sanctioning schools and students needs to be replaced with guidance and funding for the broad-scale restructuring that is required. Retaining the present sanctions merely increases the number of failing schools and seriously undermines public support for public education. Revisions to the NCLB Act should include: (1) the elimination of the notion of proficiency which should instead be replaced with emphasis on teaching and student learning; (2) an evaluation and assessment process that involves an examination of the student’s entire academic experience instead of total reliance on a student’s performance on one standardized test; (3) a system of funding for schools based in research and development of innovative ideas and higher order learning as opposed to penalties and disincentives because schools fail to attain unrealistic and arbitrary goals; and (4) the elimination of a timetable to evaluate whether a school is progressing adequately from year to year and in its stead the establishment of methodology to gauge whether a school is serving its intended purpose—providing our children with a high-quality education.

A. Replace the Aberration of Universal Proficiency with an Emphasis on Teaching and Student Learning

The very idea of 100% proficiency needs to be revisited. This is an unattainable goal that should be replaced with a more realistic objective. Congress should instead allow the true experts—educators themselves—in education to establish expectations and guidelines so that schools are about the business of teaching and students are learning—learning to be critical and analytical thinkers; learning to be problem-solvers; and learning through trial and error that it is acceptable to fail because there is a lesson in the failure necessary for future success.

Regardless of a child’s race, ethnicity or socio-economic status, in order to learn and succeed in school he or she must be actively engaged—cognitively, behaviorally, and emotionally. While students may naturally be expected to self-motivate to some degree, schools and teachers should work to improve students’ desire to learn. When teachers make students aware that they have the mental capability to succeed

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104. HUMRRO, supra note 68, at 16-22.
105. Ratner, supra note 70, at 2 & n.3.
106. See Kohn, supra note 6, at 55-59.
and academic success is expected of them, students have an additional motivator. Teachers can also help students be more engaged by ensuring they understand the personal rewards and short- and long-term benefits of education. Discussing with students how their short- and long-term life and career goals correlate to their academic success is important in attaining those goals and motivating students to want to learn. Inviting “guest speakers” and mentors from the local churches and community, with whom the students can identify, to tell their success stories adds credibility to statements by educators. Such speakers allow students to begin visualizing a quality education as an attainable and rewarding goal to which realistic and tangible benefits are linked.

It should be noted that students have no trouble verbalizing where their interests lie. Therefore schools’ curricula should begin to restructure, incorporating those concerns, interests, and activities that the students find most attractive and relevant. Personalizing the instruction in this manner will help give students a sense of belonging by showing an interest in their lives and providing a supportive caring learning environment.

NCLB has caused schools to place far more focus and emphasis on reading and math at the expense of other subjects, which are not required components of the high-stakes tests. National studies by independent researchers have shown that at least 44% of our nation’s public school districts have allotted more time for English and math and have cut back on the time given to other subject areas like social studies, science, music, and art. These cuts have typically amounted to a decrease of at least seventy-five minutes per week in the affected subject areas. In this technology-centered Information age, language arts and math are not enough to expect our children to succeed. Such limited curricular-focus stifles, rather than

108. Id. at 33-37.
109. Id. at 39-40.
110. Id.
111. Id. at 2, 8-9. One extreme example is former NBA star, Kevin Johnson, who in 1989 started the St. HOPE Academy in Sacramento, California, where he grew up as an inner city youth against whom odds of success were stacked. See details of this success story at St. Hope History and Timeline, http://www.sthope.com/history-1.html (last visited Mar. 30, 2010). Not all success stories need be professional athletes. Ideal examples include individuals who grew up in the community and, despite challenges and adversity, have since become productive members of society.
112. ENGAGING SCHOOLS, supra note 107, at 2-3.
114. CTR. ON EDUC. POLICY, INSTRUCTIONAL TIME IN ELEMENTARY SCHOOLS: A CLOSER LOOK AT CHANGES FOR SPECIFIC SUBJECTS 6 (2008).
115. Id.
supports learning, and fails to challenge students.\textsuperscript{117} As result, students are receiving a diploma that in many cases fosters a false belief of their ability to succeed in the Information Technology Age.\textsuperscript{118}

It is unacceptable that many students are completing high school in our public education system only to learn that they have been ill-prepared for higher education.\textsuperscript{119} Too often children attending schools in low-income neighborhoods have curricula that are inferior in subject matter content and coverage to that of schools in more affluent areas.\textsuperscript{120} Of community college freshmen, 42\% enroll in at least one remedial course; of university freshmen, 20\% enroll in at least one remedial course.\textsuperscript{121} In other words, more than one third of all freshmen start higher education ill-equipped to withstand the rigors required for matriculation.\textsuperscript{122} The costs associated with remediating these students are high.\textsuperscript{123} In addition to the student costs associated with remediation are the costs paid by their families, the colleges, and, most of all, the taxpayer.\textsuperscript{124} However, the highest cost is the large number of these students that drop out of college.\textsuperscript{125}


\begin{itemize}
  \item \textsuperscript{117} See \textsc{Alliance for Excellent Education}, \textit{supra} note 71, at 1, 4.
  \item \textsuperscript{118} See \textit{id.} at 1.
  \item \textsuperscript{119} \textit{See id.} at 1-2.
  \item \textsuperscript{120} Two examples of disparity were highlighted on the Oprah Winfrey Show in April 2006. Two Illinois area schools were featured: Harper High School, attended by 1,500 students from one of Chicago’s low-income inner-city neighborhoods, and Neuqua Valley High School, located in affluent Naperville about thirty-five miles from Harper High. The difference between the schools is like night and day. Harper High is neglected and dilapidated, with deplorable overall conditions and a graduation rate of only 40\%. Neuqua Valley High, on the other hand, is a “$62 million state-of-the-art facility” with a graduation rate of 99\%. During a “trading schools” experiment, where students from one school switched places with students from the other school, the students were shocked by the glaring differences in technology and computer access, school and extra-curricular facilities, course offerings and curricula, just to name a few. \textit{The Oprah Winfrey Show: Failing Grade} (Harpo Productions Inc. broadcast Apr. 11, 2006).
  \item \textsuperscript{121} \textsc{Alliance for Excellent Education}, \textit{supra} note 71, at 1.
  \item \textsuperscript{122} \textit{Id.} at 1-2.
  \item \textsuperscript{123} \textit{Id.} at 2-4.
  \item \textsuperscript{124} \textit{Id.}
\end{itemize}

A number of components comprise the high price that colleges, students and their families, and taxpayers pay to get students ‘up to speed’ for postsecondary education. Colleges must pay faculty to teach the remedial courses; provide the classroom space, and supply a variety of support services, including counseling, administrative support, parking, facilities maintenance, etc. Often, because of tradeoffs required by limited space and resources, schools must reduce the numbers of non-remedial courses offered to students, courses which would provide greater benefits to the community and its economy.

Though tuition, students and their families directly pay only about one-fifth of the overall cost of remediation. That relatively small portion totals approximately $283
In order for students to have true academic success, schools need to re-evaluate how much classroom time is being devoted solely to language arts and math and try to find ways to incorporate and integrate these skills into other courses that should be taught, such as science and social studies to ensure that students are receiving a more well-rounded education. More schools might consider lengthening the school day, a method not widely used, instead of sacrificing learning in one subject for another. Music, art, and physical education are natural and essential components of a truly well-rounded rigorous curriculum. Limiting or narrowing the curriculum does nothing to benefit the student that ultimately must compete in a global marketplace.

Integral to providing a rigorous curriculum are other classroom dynamics that play essential roles in providing schools that are optimal learning environments. Teacher preparation, experience, and attendance, class size, availability and quality of technology in the classroom are some of these factors. Teacher education and training make a difference in their students’ academic performance. Moreover,
employing teachers that are experienced and dedicated goes a long way toward teacher effectiveness. Schools should use incentives, such as retention bonuses, to attract and keep these kinds of educators, particularly in high-poverty and high-minority schools, which more often than not are the schools with high rates of low academic achievement.

Legislation has been proposed in Congress this session that would amend the NCLB to increase the courses of study that must be included in the assessments to determine proficiency. Specifically, proposed legislation would amend the Act to include United States history proficiency assessments, beginning in academic year 2012-2013. Moreover, proposed legislation calls for an increase in the number of physical education hours per week for students in elementary and secondary schools. However, these proposed changes, while a small step in the right direction of broadening the curriculum, are grossly inadequate in addressing the problems associated with the narrow curricula of many of our public schools. A more complete and appropriate remedy necessarily must include a shift in focus away from the “drill and kill” standardized test driven educational experience and be replaced with an emphasis on providing our children with a quality education that has at its center higher-order learning.

B. Evaluate and Assess Learning Not Ability to take Standardized Test

In addition to purging the very idea of proficiency from NCLB, the present system of assessments utilized in measuring said proficiency needs to be overhauled.

While the numbers clearly show that assignment of out-of-field teachers is a pervasive and widespread problem, affecting even the nation’s more affluent schools, the equity implications of this study are staggering. Classes in high-poverty schools are more likely to be assigned to an out of field teacher than classes in low-poverty schools. While the gap is not as large between high and low-minority schools, minority students clearly are less likely to get their fair share of qualified teachers as well. Classes in majority non-white schools are over 40% more likely to be assigned to an out-of-field teacher than those in mostly-white schools.


132. BARTON, supra note 130, at 12-13.

133. See id. at 12.


137. See generally George Wood, A View From the Field: NCLB’s Effects on Classrooms and Schools, in MANY CHILDREN LEFT BEHIND, supra note 2, at 33.
The legislative scheme of the NCLB Act, which places total reliance on standardized test scores to determine academic proficiency, sets our public education system up for imminent failure. As many researchers have observed, such an assessment scheme, which ties advancement and rewards to students’ performance on a standardized test, has led to an epidemic of “teaching to the test, elimination of subjects [from schools’ curricula] that are not tested, narrowing of subjects that are taught to what is on the test, and corruption of instruction.” Furthermore, children, who would otherwise have a chance at a meaningful educational experience, are stigmatized as failures and retained in one grade until many of them give up and drop out. Even if students are not directly penalized, they receive an indirect negative impact when lower-performing schools are labeled and sanctioned pursuant to the Act.

This practice of gauging a school’s success based on results from one test score has its impact the decline in school quality instead of improvement. Due to the high emphasis and significance placed on high-stakes tests, schools’ curricula have narrowed to focus on test preparation. More school resources are being devoted to test preparation materials in the place of enriched resources students need. Activities, projects, and other alternative learning tools that were once used to engage students, such as field trips and in-depth discussion of current events have been replaced with “kill and drill” practices related to a student’s ability to respond on cue, which have nothing to do with learning and long-term success. Subjects that are not tested are being eliminated from schools. Specifically, in many schools “art, music, shop and other ‘elective programs’—often the very programs that keep kids connected with and in school”—have been abolished.

I understand that evaluation and assessment of both student and school performance are relevant and necessary; however, the method, focus, and impact need to be redirected. Yes, it is sound educational policy to assess the academic achievement levels of each student. But, the results of these assessments should be138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147
present practice of holding a child back who has demonstrated in all other respects, absent the high-stakes test, that he or she is at grade level is absurd. This observation is particularly true in light of all the other variables that may impact a particular child’s performance on one test on any given day. Furthermore, a student performing well on a standardized test is not necessarily synonymous with how well a student is learning; instead it may be the result of “teaching to the test” which is prevalent in today’s “reformed” era of accountability.

Another major problem with an educational system driven by standardized test results is a misguided and misplaced focus on how well a student performs on an examination instead of on what, if anything, the student has learned. Such emphasis “(1) undermines students’ interest in learning, (2) makes failure seem overwhelming, (3) leads students to avoid challenging themselves, (4) reduces the quality of learning, and (5) invites students to think about how smart they are instead of how hard they tried.”

The arguments advanced by proponents of high-stakes standardized tests simply do not ring true. Specifically, proponents have argued that these tests were implemented to “eliminate the unequal system of tracking that permit[s] some students to slide through and graduate from high school without a rigorous education.” They also assert that high-stakes tests “are more objective and rigorous than portfolios and other forms of teacher-developed assessment.”

Contrary to these arguments, educational inequality has increased as more and more students—particularly minorities and disadvantaged students—are dropping out of school (as previously discussed in detail this article); moreover, these tests have led to watered-down curricula with emphasis on breadth rather than depth.

An educational assessment system that evaluates quality learning—in depth and breadth—must replace the present assessment structure that merely evaluates the quantity of information. The present high-stakes, test-based accountability system needs to be replaced by an accountability structure that has at its central objective student learning and provides the requisite flexibility for such learning. So, what assessment process should replace the present practice of standardized tests administered by outside agencies? We need to build a system that trusts the teachers’ ability and knowledge allowing them to evaluate their own students academic progress. The teachers, after all, are the individuals who observe and interact with

148. Hursh, supra note 144, at 84.
149. Kohn, supra note 6, at 28.
150. Hursh, supra note 144, at 72 (describing rationales advanced by proponents of high-stakes testing).
151. Id.
152. Kohn, supra note 6, at 59-61.
153. Id. at 115-58.
154. Id. at 199.
the students throughout the academic process and can best determine whether learning is occurring.

Of course, this return to teacher-developed assessments must necessarily involve a reorganization of the educational model employed in many of our standardized tests-driven classrooms today. Instead of drilling students with abstract facts and requiring them to retain this information through rote memorization and to regurgitate it on command by filling in bubbles or responding in five-sentence paragraphs to writing prompts—otherwise known as “drill and kill test-prep curriculum”\textsuperscript{155}—teachers should implement more progressive approaches for higher-order learning: “The goal is to create a learning experience that arouses and sustains children’s curiosity, enriching their capacities and responding to their questions in ways that are deeply engaging.”\textsuperscript{156}

C. Eliminate Ineffective Penalties and Sanctions

For schools failing to meet AYP benchmarks established by the Act, harsh sanctions are imposed. Specifically, these schools are labeled, successively, as “[in need of] school improvement,” for “corrective action,” and for “restructuring.”\textsuperscript{157} The NCLB Act, on its face, appears to give parents of children attending these “failing” schools better alternatives for “substantial and meaningful opportunities to participate in [their children’s] education”\textsuperscript{158} by offering tutoring and support services as well as transfer options. In fact, many parents have learned that these so-called options amount to unfulfilled promises.\textsuperscript{159} Often obstacles, such as distance of other schools from home, unavailability of space at higher-performing schools, choice of schools not much better than school students already attend, and feeling unwelcome at the new schools, lead parents to the conclusion that they really do not have real options.\textsuperscript{160} Simply put, the penalty provisions, which purportedly were believed would motivate schools to “shape up” or risk being “shut down,” are not working. And, as explained in previous subsections, will not work because of the flawed premises and unrealistic provisions of the NCLB Act itself.\textsuperscript{161} Amending the Act, to redirect focus from test performance to teaching and learning, however, should necessarily include changes that remove harsh penalties, replacing them with equitable funding and resources for all schools as well as true incentives that reward

\textsuperscript{155}. \textit{E.g.}, \textit{Hursli}, supra note 144, at 131.

\textsuperscript{156}. \textit{Kohn}, supra note 6, at 130.

\textsuperscript{157}. See generally \textit{20 U.S.C. § 6311 (2006)}.

\textsuperscript{158}. \textit{§ 6301(12)}.

\textsuperscript{159}. \textit{Neil et al.}, supra note 7, at 83-84.

\textsuperscript{160}. \textit{Id.} at 86-93.

\textsuperscript{161}. \textit{See supra} Part IV.
an educational culture of quality in-depth learning over quantity of abstract surface information.\textsuperscript{162}

And, equitable funding does not necessarily translate into a need for equal funding. As researchers have observed, if the achievement gap is to be closed for those children identified by NCLB Act lagging behind their more affluent counterparts, dollars are needed to address, not only the problems plaguing our inner city schools but also, the myriad other problems with which these children must cope.\textsuperscript{163} Fundamental problems, such as substandard living conditions, inadequate nutrition, and irregular health care, persist and cannot be resolved by schools and teachers.\textsuperscript{164} Yet, these problems directly impact these children’s education.\textsuperscript{165} “Simply teaching children will have little effect if they return to bad neighborhoods, single-parent homes, foster care, inadequate health care and a general lack of support.”\textsuperscript{166} Any true attempt at equity must necessarily involve interventions in both schools and in the homes and communities where these children live.\textsuperscript{167}

Ironically, in this country, the children that are most in need of a quality education—the impoverished and minorities—are those children that are most often shortchanged.\textsuperscript{168} “Across the country, $907 less is spent per student in the highest-poverty districts than in the most affluent districts,” and “$614 less is spent on students in the districts educating the most students of color as compared to the districts educating the fewest students of color.”\textsuperscript{169}

The children that attend schools with unequal and inadequate resources cannot be said to have equal educational opportunity and access.\textsuperscript{170} One of the major reasons these children attend schools with inadequate resources is tied to the manner in which revenue is generated at the local level to support the public education system. Much of a school district’s funding is tied to revenue from property taxes assessed in the community.\textsuperscript{171} Generally, schools in high-poverty districts are unable

\textsuperscript{162} See generally KOHN, supra note 6.
\textsuperscript{163} See supra note 87 and accompanying text.
\textsuperscript{164} NEILL ET AL., supra note 7, at 124.
\textsuperscript{165} Id.
\textsuperscript{166} Id. (quoting W.J. Mathis, No Child Left Behind: Costs and Benefits, 84 PHIL DELTA KAPPAN 679 (2003)).
\textsuperscript{167} Id.
\textsuperscript{169} Id. at 2.
\textsuperscript{170} Id.
to raise enough money from property taxes to adequately support the local school system. Consequently, schools—and children—in the high-poverty districts suffer.

While the federal government issues directives to the states, requiring the states to educate our nation’s youth, federal government participation in the provision of essential financial support is marginal at best. For example, 2005 data from the National Center for Education Statistics shows that the federal government contributed about 9% to funding for local school systems compared to nearly 47% from state governments and 44% from local governments. Yes, schools should be accountable to their constituents; however, the federal government should also more actively share in the responsibility. Instead of continuously penalizing schools that do not improve, in large part because they do not know or understand the kinds of changes necessary to achieve such improvement, more federal dollars should be spent on research and development of plans and programs that have proven effective or that show strong promise. Furthermore, federal financial support is needed to increase incentive pay for those high-quality teachers that are willing to teach in high-poverty and/or high-minority schools. Federal dollars also need to be directed toward increasing the number of high-quality schools, instead of states being left to shoulder the vast majority of the responsibility.

D. Eliminate Unrealistic Timetable

While utopian in its articulated purpose, the NCLB Act falls desperately short of its goal. Schools are not only missing the AYP milestones, the prospect of them attaining 100% proficiency by 2014 is abysmal. Not only is the NCLB Act not closing the achievement gap, it is creating a generation of children that are “left behind” and completely “left out.” Even if 100% proficiency were ever attainable, which it is not, at what price would it be attained in the present NCLB accountability system? The price is paid by the millions of children repeatedly retained because of low performance on standardized tests and ultimately pushed out of school.
Instead of penalizing struggling schools with disincentives, such as scarlet labels, school takeovers and closures, federal funding, particularly in schools that need improvement, should be increased so that effective administration by the schools in attempts at compliance with the NCLB Act is not undermined by the added responsibilities associated with school systems’ accountability requirements. Instead of holding states, districts, and schools accountable for failing to meet arbitrary AYP benchmarks toward an unattainable goal—100% proficiency by 2014—the NCLB Act should require schools to implement systemic changes needed to effectively educate all children. Moreover, states, districts, and schools should be provided with the resources necessary to effectuate such change. Specifically, support in the areas of professional development for educators as well as research and development for school reform are key components.

Guidance coupled with collaborative establishment of realistic educational objectives should be implemented as components of a system that fosters learning that will be assessed using genuine measurements of accountability. Moreover, academic assessments and measurements should not just be about student performance but should encompass all aspects of the educational environment. “Accountability requires the use of multiple forms of qualitative and quantitative evidence from both academic and nonacademic areas . . . .” Proper assessment of a child’s academic progress and success necessarily must include nonacademic influences, such as support at home, diet, health, among other things. For a child to truly improve and advance all relevant components must be considered and addressed. Finally, both in-school as well as out-of-school factors—such as race, culture and socioeconomic status—that directly impact how well students do in school should be considered as part of these assessments and evaluations.

VI. CONCLUSION

Unfortunately, the NCLB Act has not been true to its objectives of providing all children with a “fair, equal, and significant opportunity to obtain a high-quality education.”

180. See Jennings & Rentner, supra note 87; Mathis, supra note 89.
182. Monty Neill, Leaving No Child Behind: Overhauling NCLB, in Many Children Left Behind, supra note 2, at 101, 104-05.
183. Id. at 107.
184. Id.
185. Id.
186. See supra notes 71-89 and accompanying text.
education.” Instead, more and more schools persist in a futile effort toward “adequate yearly progress” benchmarks that do nothing to improve the quality of public education and that, with harsh penalties and punishments, push millions of children, who desperately need an educational opportunity, out of school and into bleak and austere futures. Moreover, the unfortunate “drill and kill” trend associated with the standardized test-based curricula exacerbates the problems and all but guarantees that 100% proficiency will not be attained within the established timeframe.

While the NCLB Act has helped to shine a bright light on the many inequities in our public education system, it has done precious little in the way of eradicating the discrepancies. Instead, it has made the educational experience about “teaching to the test” in a competition for finite resources at our children’s expense. However, an implementation of the recommended changes will redirect the focus away from standardized curricula toward “teaching and assessment that supports higher-order thinking and performance … and create ‘two-way accountability’—accountability to parents and children for the quality of education they receive . . . .”

The pitfalls associated with the NCLB Act are fairly obvious and have elicited responses, reactions and comments from individuals representing every aspect of impacted stakeholders—parents, children, educators and politicians. There exists a strong constituency to unite in the call for reform to address the inadequacies of the manifestly defective NCLB Act. Hopefully, the new federal administration, aided by Democratic majorities in both houses of Congress, will include in its crusade for change transformative revisions that will address the perennial problems that disproportionately prevent minorities and the disadvantaged from obtaining a high-quality education.

However, Congress and the President must have an impetus to act. The various constituencies of individual Congress members must demand revised legislation

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188. Darling-Hammond, supra note 2, at 32.
190. During his campaign for the presidency, now President Barack Obama placed great emphasis on the need to address the significant flaws of the Act by overhauling the Act to transfer the focus from punishment to improvement coupled with providing the required resources. In addition to revamping the NCLB Act, Obama’s plan for “providing a high-quality education” to our nation’s children is quite comprehensive and strives for improvement in all relevant components of the child’s instruction, socialization, and educational environment. See OBAMA FOR AMERICA, BARACK OBAMA AND JOE BIDEN’S PLAN FOR LIFETIME SUCCESS THROUGH EDUCATION, http://www.barackobama.com/pdf/issues/PreK-12EducationFactSheet.pdf (last visited Mar. 30, 2010).
whether proposed by the executive branch itself or by members of Congress. Irrespective of political party affiliation, individuals seeking to effect change must direct legislators toward a bipartisan effort at removing from NCLB arbitrary and unattainable objectives—such as 100% proficiency by 2014—and replacing them with goals and guidelines for actually educating our nation’s children.

In a nation, such as the United States, which has undertaken as its responsibility the opportunity of equal educational access, we the citizens of this country must hold her true to this promise. However, our schools do not need ill-funded federal mandates that usurp the control of local educators and educational experts. Instead, “schools need adequate funding and support, and assistance in righting the balance when egregious disparities exist between one place and another”191 in order to provide truly equal educational access and opportunity. The entire community of stakeholders must unite in purpose and effort to guarantee the opportunity for academic success to all children.192 As long as some children must succeed in spite of their circumstances while others succeed because of theirs, it cannot be said that our nation’s system of public education is “available to all on equal terms.”193

191. Alfie Kohn, NCLB and the Effort to Privatize Public Education, in MANY CHILDREN LEFT BEHIND, supra note 2, at 79, 97.
192. COMM’N ON THE WHOLE CHILD, supra note 102, at 8.