

## SHOOTING FOR THE MOON: THE INNOCENCE OF THE NO CHILD LEFT BEHIND ACT'S ONE HUNDRED PERCENT PROFICIENCY GOAL AND ITS CONSEQUENCES

“Shoot for the moon. Even if you miss, you will land among the stars.”  
—Motivational speaker and successful businessman, Les Brown<sup>1</sup>

### INTRODUCTION

On January 10, 2008, Margaret Spellings, Secretary of Education, declared that the Education Department is “committed to our promise of grade-level or better for every child by 2014 because it’s the right thing to do. Not just for our kids, but for our country’s long-term economic security.”<sup>2</sup> Undoubtedly, this statement reflected her continued belief that the administration and the legislature should stay true to No Child Left Behind’s<sup>3</sup> ultimate goal of having one hundred percent of America’s students at or above grade level in reading, math, and science by the year 2014 because, she believes, it is working.<sup>4</sup>

President George W. Bush has frequently stated that the No Child Left Behind Act (“NCLB” or “the Act”) is necessary to combat the “soft bigotry of low expectations.”<sup>5</sup> Yet in recent years, few topics have been scrutinized by

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1. See Selfgrowth.com, The Online Self Improvement Encyclopedia, *Les Brown*, [http://www.selfgrowth.com/experts/les\\_brown.html](http://www.selfgrowth.com/experts/les_brown.html). This popular “self-help” quote is generally attributed to Les Brown. See, e.g., SHARRON OROVAN-JOHNSTON, TAKE THE WHEELS OFF YOUR BUS: ATTACK ANXIETY WITH HUMOUR 61 (2006); KIM CADOTTE, POSITIVE WAY TO START YOUR DAY 7 (2007).

2. Press Release, U.S. Dep’t of Educ., U.S. Secretary of Education Margaret Spellings Discusses No Child Left Behind, Priorities for 2008 During Remarks at National Press Club in Washington DC (Jan. 10, 2008), available at <http://www.ed.gov/news/pressreleases/2008/01/01102008.html>.

3. “No Child Left Behind” refers generally to amendments made to the Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10 (codified as amended at 20 U.S.C. §§ 6301–7941 (2006)).

4. See *Newshour: School Districts Find Loophole in No Child Left Behind Law* (PBS television broadcast Aug. 14, 2007), [hereinafter *Newshour*] (transcript available at [http://www.pbs.org/newshour/bb/education/july-dec07/nclb\\_08-14.html](http://www.pbs.org/newshour/bb/education/july-dec07/nclb_08-14.html)) (statement by Margaret Spellings) (“I choose to believe that the people in states are working hard to improve education for their kids. Have we made progress? Have we raised the level of intensity, and the level of rigor, and the level of anxiety for grownups to respond to kids? You bet we have.”).

5. Although this phrase has been used often by President Bush in support of NCLB, it had been invoked by him even before he became president. In a speech at the Latin Business

educational scholars more than NCLB. The Act's faults have been pointed out by educational policy scholars, sociologists, equal rights activists, economists, and legal scholars, among others.<sup>6</sup> NCLB has received harsh criticism since its inception,<sup>7</sup> and despite pressure to reauthorize NCLB, Congress did not act on the issue in 2007.<sup>8</sup>

The driving force behind NCLB is its ultimate goal of one hundred percent proficiency by 2014. Generally, this "goal" derives from the "Timeline" section of the Act, which states that "Each State shall establish a timeline for adequate yearly progress. The timeline shall ensure that not later than 12 years after the end of the 2001–2002 school year, all students in each group . . . will meet or exceed the State's proficient level of academic achievement on the State assessments . . . ."<sup>9</sup> Progress is determined and sanctions are applied to individual schools based on progress toward this "shoot for the moon" goal of one hundred percent proficiency for all American school children.<sup>10</sup>

Yet lurking behind the seeming innocence of this goal are the detrimental consequences that result from states trying in vain to attain it. Despite Les Brown's insistence, in reality falling short of the moon won't land you safely on a star. It will leave you floating in outer space, or send you crashing to the ground. Similarly, the incentives that NCLB brings, and the practices that

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Association Luncheon in Los Angeles, CA, then-Governor Bush stated, "Some say it is unfair to hold disadvantaged children to rigorous standards. I say it is discrimination to require anything less—the soft bigotry of low expectations. Some say that schools can't be expected to teach, because there are too many broken families, too many immigrants, too much diversity. I say that pigment and poverty need not determine performance. That myth is disproved by good schools every day. Excuse-making must end before learning can begin." Gov. George W. Bush, Education: No Child Left Behind (Sept. 2, 1999), in REPUBLICAN NATIONAL COMMITTEE & BUSH FOR PRESIDENT, INC., RENEWING AMERICA'S PURPOSE: POLICY ADDRESSES OF GEORGE W. BUSH, JULY 1999–JULY 2000, at 17 (2000); Kevin G. Welner & Don Q. Weitzman, *The Soft Bigotry of Low Expenditures*, 38 EQUITY & EXCELLENCE IN EDUC. 242, 242 (2005), available at <http://eps1.asu.edu/epru/articles/EPRU-0508-134-OW1.pdf>.

6. For general overview of criticism for NCLB, see generally Philip T.K. Daniel, *No Child Left Behind: The Balm of Gilead has Arrived in American Education*, 206 ED. LAW. REP. 791, 797–813 (2006) (outlining several of the major sources of critique of NCLB from states, school districts, and scholars).

7. See generally Linda Darling-Hammond, *Evaluating, 'No Child Left Behind,'* NATION, May 21, 2007, at 11–18 (listing the various ways that states, schools, teachers, and parents have protested and criticized NCLB).

8. Sheryl G. Stolberg & Diana J. Schemo, *Bush Prodding Congress to Reauthorize His Education Law*, N.Y. TIMES, Oct. 10, 2007, available at <http://www.nytimes.com/2007/10/10/washington/10bush.html?ref=education>.

9. 20 U.S.C. § 6311(b)(2)(F) (2006).

10. As used in this paper, the term "one hundred percent proficiency" refers to the proficiency of the general population of students in a school, as well as each sub-group defined under the Act. See *id.* § 6311(b)(2). Recent pilot programs by the Department of Education, however, could make this term less inclusive for some states. See *infra* note 41.

states and educators have undertaken in the name of this seemingly innocent, though ambitious, goal will not result in a sparkly new future for historically low-achieving children; it will lead to disastrous results.

While countless scholars and commentaries have sought to analyze the detrimental effects that NCLB has on American education, this Comment focuses on the one hundred percent proficiency goal itself. By analyzing educational research, scholarly articles, and recent litigation, this Comment contends that not only is this goal irrational and unsupported; it has led states, school districts, individual schools, and teachers to commence in inevitable, yet wholly counter-productive practices that work against the noble intentions of NCLB.<sup>11</sup> Moreover, it is the author's own suggestion that the goal itself, championed by President Bush as necessary to combat the "soft bigotry of low expectations," might actually *create* low expectations—expectations of minimum proficiency.

In order to lay a framework for the analysis, Part I of this Comment gives a brief overview of how the one hundred percent goal functions in the NCLB Act. This includes a brief description of how NCLB works, a short recitation of federal education policy that has led to the current goal, and an analysis of what one hundred percent proficiency means in the context of the Act. This paper does not seek to explain the specific mechanisms of the law in detail, but rather merely to provide a background for the reader.

Part II of this Comment attempts to tackle the logic and rationale of the goal by examining the possible "innocent" explanations that proponents of NCLB have used to defend this "shoot for the moon strategy." As a response to these explanations, Part II also explores data which reveals the sheer implausibility of the goal itself.

Part III presents three main categories of problems that have arisen as reactions to NCLB and links these problems to the one hundred percent proficiency goal. These problems include states lowering standards to adhere to NCLB requirements, states abandoning proven and successful educational practices in order to meet the ever increasing requirements of NCLB, and the phenomenon of historically failing schools falling further behind as a result of NCLB's unreachable goals.

Part IV analyzes a sample of proposals to amend NCLB that deal with the 2014 goal and concludes that none of the proposed changes are strong enough to deter the negative incentives; the goal simply does not work in any real sense.

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11. See *Newshour*, *supra* note 4 (statement of Chester Finn, former Assistant Secretary of Education under President Reagan) ("There's not an educator in the country that thinks that it's real or can happen, not one. Unfortunately, it breeds cynicism among educators. They say, 'Well, why shouldn't we take advantage of every angle we can take advantage of so we don't look bad in the process of not achieving that goal?'").

Finally, Part V concludes this Comment by presenting the author's view that beyond the demonstrated statistics from the preceding sections, NCLB's proficiency goal enables a new type of "soft bigotry of low expectations." Specifically, shifting focus from *Brown v. Board of Education*'s promise of "opportunity" to NCLB's target of "results" creates a climate in which historically low-performing schools are motivated to provide only enough resources and energy for students to reach minimum proficiency.

## I. AN OVERVIEW OF NCLB AND ITS STATED GOAL

### A. *The Basics of the No Child Left Behind Act*

The No Child Left Behind Act is by no means the first piece of federal legislation aimed at improving the nation's education system.<sup>12</sup> Nonetheless, its passage symbolized a consensus among lawmakers that the federal government should take a new approach in addressing the nation's educational problems.<sup>13</sup> Accordingly, the Act seeks 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."<sup>14</sup> It is the direct and mandatory focus on achievement, particularly as measured through standardized testing, that made NCLB such a dramatic shift in the federal approach to education.<sup>15</sup>

The basic premise of NCLB is simple.<sup>16</sup> All American public school children must be proficient in reading and mathematics by the year 2014.<sup>17</sup> In order to receive federal Title I funding,<sup>18</sup> a state must submit a plan that:

12. For a brief description of how NCLB evolved from previous federal education acts, see JOSEPH P. VITERITTI, CHOOSING EQUALITY: SCHOOL CHOICE, THE CONSTITUTION, AND CIVIL SOCIETY 1-3 (1999).

13. Kimberly J. Robinson, *The Case for a Collaborative Enforcement Model for a Federal Right to Education*, 40 U. C. DAVIS L. REV. 1653, 1658 (2007).

14. 20 U.S.C. § 6301 (2006).

15. See GAIL L. SUNDERMAN, JAMES S. KIM & GARY ORFIELD, NCLB MEETS SCHOOL REALITIES: LESSONS FROM THE FIELD, xxv (2005) ("In many ways, [NCLB] is the most startling departure in federal educational policy in U.S. history.").

16. For a recent and well-articulated judicial summary of how NCLB works, see *Sch. Dist. of Pontiac v. Sec'y of the U.S. Dep't of Educ.*, 512 F.3d 252, 254-58 (6th Cir. 2008), *reh'g en banc granted, opinion vacated*, No. 05-2708, 2008 U.S. App. LEXIS 12121 (6th Cir. May 1, 2008).

17. See 20 U.S.C. § 6311(b)(2)(F)&(G) (2006).

18. The term "Title I funding" refers to Title I of the Elementary and Secondary Education Act of 1965, 20 U.S.C. § 6301, which seeks "to provide the full educational opportunity for every child regardless of economic background." *Agostini v. Felton*, 521 U.S. 203, 209 (1997) (citations omitted). Functionally, "Title I channels federal funds, through the States, to 'local educational agencies.'" *Id.* (citations omitted).

(a) sets challenging academic standards;<sup>19</sup> (b) tests children annually to determine if the standards are being met;<sup>20</sup> and (c) develops “a single, statewide State accountability system.”<sup>21</sup> For the accountability requirement, a state must use a determination of “Adequate Yearly Progress” (AYP),<sup>22</sup> with the term “adequate” meaning that the school’s progress is on target to meet the Act’s ultimate goal of one hundred percent proficiency by 2014.<sup>23</sup> Generally it is the states, not the federal Education Department, that make this determination.<sup>24</sup>

The Act also sets out a system for “school improvement,” which targets those schools that fail to make AYP.<sup>25</sup> Using self-determined academic standards and assessments, states must apply different labels to schools, which must also be made known to the public.<sup>26</sup> Any school that fails to make AYP for two consecutive years is labeled as “identif[ied] for school improvement.”<sup>27</sup> This means that “the local educational agency shall, not later than the first day of the school year following such identification, provide all students enrolled in the school with the option to transfer to another public school served by the local educational agency . . . .”<sup>28</sup> This is commonly referred to as the “school choice” provision. Such a school must also develop and submit a plan that details how it intends to improve its student performance.<sup>29</sup>

If the school fails to make AYP in the next year, it must offer “supplemental education services” (SES), such as after-school programs run by private companies, to its students.<sup>30</sup> Schools that continue to fail to make AYP two years after being identified for improvement are then labeled for “corrective action.”<sup>31</sup> Under this label, in addition to offering school choice and SES, a school must take at least one of the following corrective actions:

19. 20 U.S.C. § 6311(b)(1) (2006).

20. *Id.* § 6311(b)(3).

21. *Id.* § 6311(b)(2)(A).

22. *Id.* § 6311(b)(2)(B).

23. *Id.* § 6311(b)(2)(F). At the Act’s inception, each state was charged with establishing a starting point for the number of students who must meet or exceed the State’s proficient level. *Id.* § 6311(b)(2)(E). Thereafter, the state must set annual measurable objectives for core subjects and subgroups, the attainment of which marks sufficient progress toward proficiency. *Id.* § 6311(b)(2)(G).

24. *See* 20 U.S.C. § 6311(b)(2)(G) (2006).

25. *Id.* § 6316(b)(1)(A).

26. *Id.* § 6316(a).

27. *Id.* § 6316(b)(1)(A).

28. *Id.* § 6316(b)(1)(E)(i). As it is used in the Act, the term “local educational agency” (also referred to as an “LEA”) generally refers to a school district.

29. 20 U.S.C. § 6316(b)(3)(A) (2006).

30. *Id.* § 6316(b)(5)(B).

31. *Id.* § 6316(b)(7).

- 1) replace the school staff,
- 2) implement a new curriculum,
- 3) decrease the school-level management authority,
- 4) appoint an outside expert,
- 5) extend the school day or year, or
- 6) restructure the internal organization of the school.<sup>32</sup>

Finally, for schools that still fail to meet AYP, the final label to be applied is “[r]estructuring,” in which a school must take one or more of the following more drastic “alternative governance” arrangements:

- 1) reopen the school as a charter school,
- 2) replace the staff,
- 3) contract out the school to a private company,
- 4) institute a state takeover of the school, or
- 5) “[a]ny other major restructuring of the school’s governance arrangement that makes fundamental reforms . . . .”<sup>33</sup>

*B. The One Hundred Percent Proficiency Goal and Historically Disadvantaged Sub-groups*

For a school to make AYP, it is not as simple as having a certain percentage of the total students pass proficiency exams. In order to combat the “soft bigotry of low expectations,” NCLB “shines a spotlight on social inequities in school performance that sometimes have been obscured in the past.”<sup>34</sup> This is accomplished by requiring schools to “report test results separately for students in different demographic subgroups . . . .”<sup>35</sup> These subgroups, which directly address NCLB’s stated purpose of meeting the educational needs of historically “low-achieving children,”<sup>36</sup> include “economically disadvantaged students[,] students from major racial and ethnic groups[,] students with disabilities[,] and students with limited English proficiency.”<sup>37</sup> Accordingly, NCLB’s goal of one hundred percent proficiency in math, reading, and science by the year 2014 refers to the performance of not only the general student population of a school,<sup>38</sup> but the performance of these

32. *Id.* § 6316(b)(7)(C)(iv)(I)–(VI).

33. *Id.* § 6316(b)(8).

34. Adam Gamoran, *Introduction: Can Standards-Based Reform Help Reduce the Poverty Gap in Education?*, in *STANDARDS-BASED REFORM AND THE POVERTY GAP: LESSONS FOR NO CHILD LEFT BEHIND* 4 (Adam Gamoran ed., 2007).

35. *Id.*

36. 20 U.S.C. § 6301(2) (2006).

37. *Id.* § 6311(b)(2)(C)(v)(II)(aa)–(dd).

38. *Id.* § 6311(b)(2)(C)(v)(I).

individual sub-groups as well.<sup>39</sup> Each sub-group must meet the AYP requirement for a school to escape a failing label.

For example, if a school needs 65% of its students to be at or above grade level in math to make AYP for the 2007–2008 school year, not only must the school have 65% percent of its *total* students pass that year's state math assessment, but 65% of the school's "economically disadvantaged students" and "students with disabilities," and any other qualifying sub-group in the school must pass as well.<sup>40</sup> If just one sub-group has less than 65% of its members pass, the school is labeled failing.<sup>41</sup> The Act also requires that at least ninety-five percent of students in each sub-group take the test.<sup>42</sup>

*C. How Did the Goal Come to Be?: A Brief Look at Federal Education's Precursors to NCLB's One Hundred Percent Proficiency Goal*

Ideas of accountability, even the concept of AYP, appeared in federal education legislation well before NCLB. A relevant starting point is President George H.W. Bush's 1990 State of the Union address, which laid out six national goals for education.<sup>43</sup> Goals 2000, passed under President Clinton, required states to develop standards and conduct achievement assessments related to these goals.<sup>44</sup> This focus on accountability "shifted responsibility for compliance to schools and individual principals and teachers rather than either state or district levels."<sup>45</sup>

39. *Id.* § 6311(b)(2)(C)(v)(II)(aa)–(dd).

40. *Id.* § 6311(b)(2)(I)(i) ("Each year, for a school to make adequately yearly progress . . . each [sub-group] . . . must meet or exceed the objectives set by the State.").

41. 20 U.S.C. § 6311(b)(2)(I)(i) (2006); *but see id.* § 6311(b)(2)(C)(v)(II) (stating that performance data for these individual sub-groups "shall not be required in a case in which the number of students in a category is insufficient to yield statistically reliable information or the results would reveal personally identifiable information about an individual student"). It should also be noted that in July, 2008, Secretary of Education Spellings approved six states' proposals to modify the "all-or-nothing" approach. Under the proposals, states will be allowed to vary the intensity of NCLB's sanctions "to match the academic reasons that lead to a school's identification." *See* Dept. of Ed., *Secretary Spellings Approves 6 States Differentiated Accountability Proposals* (2008), <http://www.ed.gov/nclb/accountability/differentiated/factsheet03.pdf> (last visited May 17, 2009). The six states approved for the "differentiated accountability pilot program" are Florida, Georgia, Illinois, Indiana, Maryland, and Ohio. *Id.*

42. 20 U.S.C. § 6311(b)(2)(I)(ii) (2006). Note that the same section gives a waiver of this testing requirement as well, "in a case in which the number of students in a category is insufficient to yield statistically reliable information or the results would reveal personally identifiable information about an individual student." *Id.*

43. E. JANE IRONS & SANDRA HARRIS, *THE CHALLENGES OF NO CHILD LEFT BEHIND: UNDERSTANDING THE ISSUES OF EXCELLENCE, ACCOUNTABILITY, AND CHOICE* 6 (2007).

44. *Id.*

45. *Id.* For an argument that such a shift in focus to precinct level behavior is unworkable, see Frederick M. Hess & Chester E. Finn, Jr., *Crash Course: NCLB Is Driven by Education Politics*, EDUC. NEXT, Fall 2007, at 40, 45 ("Even the Great Society's most daring and important

When Congress passed the Improving America's Schools Act (IASA) in 1994 to amend the Elementary and Secondary Education Act (ESEA), "improving accountability" meant that states and local education agencies were to submit to the Secretary of Education a plan of "challenging" standards and assessments.<sup>46</sup> Although at that time, accountability meant that states and school districts had to make "adequate yearly progress" (as in NCLB), the measures that could qualify as AYP were decided by the Secretary.<sup>47</sup> Nonetheless, by the time NCLB was enacted "only 19 states had fully approved standards and assessment systems mandated six years earlier under the 1994 law."<sup>48</sup>

Under NCLB, this changed. AYP under NCLB is derived from a timeline, scaled from the Act's goal that all children, and each sub-group defined under the law, reach one hundred percent proficiency by 2014.<sup>49</sup> This focus on absolute results is NCLB's cornerstone, and a small but very significant departure from previous federal legislation.

## II. THE PURPOSE AND LOGIC OF THE GOAL

### A. *Congress Aims High: The Innocence of the One Hundred Percent Proficiency Goal*

Perhaps the fact that so many states did not comply with previous federal mandates for accountability structures could suggest that a more solid timeline was needed in 2001. But exactly why Congress would actually agree to a timeline based on one hundred percent proficiency of all students has baffled some scholars. It is doubtful that the language was anything but deliberate, although even President Bush has conceded that he did not read the Act before signing it.<sup>50</sup>

Of course aiming high is not a new concept, especially for politicians.<sup>51</sup> Perhaps a generally accepted rationale for such a goal is that of journalist Jay

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victories avoided the sweeping hubris of NCLB. Neither the Civil Rights Act of 1964 nor the Voting Rights Act of 1965, both remembered now as towering triumphs, ever sought to change precinct-level behaviors.").

46. Improving America's Schools Act, Pub. L. No. 103-382, Tit. I, Sec. 1111, 1112 (codified as amended in scattered sections of 20 U.S.C.), available at <http://www.ed.gov/legislation/ESEA/toc.html>.

47. *Id.* at Sec. 1111(b)(2)(B)(i).

48. SUNDERMAN, KIM, & ORFIELD, *supra* note 15, at 5 (citing Erik W. Robelen, *States, Ed. Dept. Reach Accords on 1994 ESEA*, EDUC. WEEK, April 17, 2002, available at <http://www.edweek.org/ew/articles/2002/04/17/31esea.h21.html>).

49. 20 U.S.C. § 6311 (b)(2)(F) (2006).

50. See SUNDERMAN, KIM, & ORFIELD, *supra* note 15, at xxvi.

51. See, e.g., 33 U.S.C. § 1251(a)(1) (2006) (proclaiming, as part of the Clean Water Act, that "it is the national goal that the discharge of pollutants into the navigable waters be eliminated



Mathews, who wrote, “The 100 percent goal was simply a target . . . designed to motivate schools to stretch themselves to do better, such as scientists trying to cure cancer or gardeners hoping to grow the perfect tomato.”<sup>52</sup> The logic thus seems innocent enough—politicians must set the highest goal for educators, and as they strive to reach it, whether or not they are successful, the aggregate effect will be improvement for all schools.<sup>53</sup>

Yet “aiming high” is not the only explanation. Even though the vast majority of scholars involved with educational research and policy would agree that the goal is implausible, it is wishful thinking to assume that all of the legislators had the same perception when they enacted NCLB. The Congressional Record reflects several stories of Congressmen pronouncing how their own state’s accountability systems have brought about educational miracles.<sup>54</sup> The supportive and “inspiring” illustration of Representative Ric Keller (R-FL), an original co-sponsor of President Bush’s NCLB Act, serves as a worthwhile example:

[W]e have already implemented these same principles, measuring performance and demanding accountability, in the great State of Florida. What happened as

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by 1985”); Al Gore, *We Can Solve It Campaign: A Generational Challenge to Repower America* (July 17, 2008) (transcript and video available at [http://www.wecansolveit.org/pages/al\\_gore\\_a\\_generational\\_challenge\\_to\\_repower\\_america/](http://www.wecansolveit.org/pages/al_gore_a_generational_challenge_to_repower_america/)) (challenging America “to commit to producing 100 percent of our electricity from renewable energy and truly clean carbon-free sources within 10 years”).

52. Kevin G. Welner, *Can Irrational Become Unconstitutional? NCLB’s 100% Presuppositions*, 38 *EQUITY & EXCELLENCE IN EDUC.* 171, 176 (2005) (quoting Jay Mathews, *No Child Left Behind Act: Facts and Fiction*, WASH. POST, Nov. 11, 2003, at A08). Welner also criticizes those who would defend such a seemingly unattainable goal by recalling President Kennedy’s seemingly outrageous goal of landing on the moon, stating that the difference is that “Kennedy could point to experts describing the plausibility of the goal. President Bush is not in a position to do this.” *Id.* at 176.

53. One must acknowledge how insulting this type of logic can be to educators in the classroom. Judging something as intimate and personal as childhood education in the aggregate is not only dangerous; it is probably needless. For teachers who are already working in under-resourced, over-crowded schools, a mandate that all children should be on grade level (a goal which virtually every teacher must already possess) is disrespectful and isolating. Politicians have simply mandated the idealism of every teacher, not acknowledging that as teachers who have dedicated their lives to teaching children in their own community, they are already working daily to figure out how to make it a reality. At best, this “what’s the harm” attitude is unnecessary. At worst it breeds hopelessness, a feeling that no one really understands what it means to teach. For a similarly spirited article, see Mimi B. Chenfield, *Handcuff Me, Too!*, 87 *PHI DELTA KAPPAN* 745 (2006) (describing the discontented atmosphere that accountability in schools can bring, as told through the eyes of a kindergarten student).

54. See 147 CONG. REC. H1179, 4728–4729 (daily ed. Mar. 27, 2001) (statement of Rep. Keller); 147 CONG. REC. H2311 (daily ed. May 17, 2001) (statement of Rep. Boehner); 147 CONG. REC. S1725–S1727 (daily ed. Mar. 01, 2001) (statement of Sen. Ensign) (implying that an end to “social promotion” would allow a struggling student to finally catch up to his peers).

a result? We went from having 78 F-rated schools based on low test scores to only 4 F schools in the course of only a year.

Let me give you two examples. First, in my district of Orlando, Florida, there is a school called Orlo Vista Elementary School. At this school, 92 percent of the children are from low-income families and they are entitled to receive the free hot lunch program. Eighty-six percent of the students are minorities. This school was rated as an F school by the State of Florida based on abysmally low test scores.

However, after measuring the students' performance, pumping Federal title I dollars into the school, along with local school board money and State dollars, we were able to make sure that we cured the problem and that all children were able to read, write and perform math appropriately. As a result, the school went from having 30 percent of the children pass a standardized test in 1 year to over 79 percent of the students being able to pass that same test a year later. It is no longer an F school.<sup>55</sup>

This statement seems to illustrate a belief by proponents of NCLB, such as Rep. Keller, that an accountability system could mimic this type of result for every American public school. Yet in retrospect, it seems doubtful that Congress would believe that by simply measuring performance and increasing funding, half of the students in America's failing schools would magically jump from failing to proficient in just one year. Notwithstanding such a leap of logic, illustrations such as Rep. Keller's demonstrate that the congressional intent behind NCLB's one hundred percent proficiency goal was not entirely about "aiming high." There was a faint belief, or at least a claim, that it could really happen.

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55. 147 CONG. REC. H1179, 4728 (daily ed. Mar. 27, 2001) (statement of Rep. Keller). Rep. Keller goes on to tell what could be considered an absurdly miraculous story about taking then Secretary of Education Rod Paige to visit this same elementary school to observe the progress. "I took him into a reading lab, and while there he observed a little 6 year-old African-American boy reading. This is a child who, 1 month earlier, was having problems with reading and was set apart. . . . As he leaned over the shoulder . . . he was blown away and so impressed. This child was flying through that book, reading as well as most adults that I know." *Id.* Although this may be an interesting comment on Rep. Keller's adult acquaintances, it also demonstrates the type of persuasive tactics that at least some of NCLB's proponents used on the Congressional floor. Namely, failing schools will turn around in one year, and illiterate children will learn to read in one month.

*B. An Unsupported Proposition: The Implausibility of the Goal*

Whether innocent or not, there is no evidence that such a goal is even possible.<sup>56</sup> As one critic writes, “[N]otwithstanding more than ten years of state school reform efforts founded on the same basic ‘standards, assessments and accountability’ principles as NCLB, not a single state has achieved 100% ‘proficiency’ on NAEP, or anything close. Indeed, no state has even brought 50% of its students to that level.”<sup>57</sup> In fact, one hundred percent proficiency is most likely impossible.<sup>58</sup> In 2003, results from the Programme for International Student Assessment<sup>59</sup> revealed that no country—not “even the highest performing countries of Finland, Korea, and Canada—had all of its students pass the *lowest* standard in either math or reading.”<sup>60</sup>

The “innocence” of the goal may in reality be arrogance. In fact, Congress actually may have contradicted itself in writing the NCLB Act. Pointing to NCLB’s provision requiring that newly adopted educational programs and practices be supported by “scientifically based research” that “has been accepted by a peer-reviewed journal or approved by a panel of independent

56. See Welner, *supra* note 52, at 172 (“NCLB’s demand that all students become proficient was immediately identified as an extreme departure from actual experience . . .”). Of course, there is also an argument to be made that having one hundred percent of students on grade level is statistically impossible, since the term “grade-level” is generally figured by percentile ratings. Following such an analysis, there will always be students in high and low percentiles, unless all children score exactly the same. Therefore, unless a national bottom-line was employed (which NCLB clearly does not establish), there will always be students in the lowest quartile. However, making such an argument assumes a terrifying amount of ignorance on the part of the drafters of NCLB. Accordingly, this comment proceeds assuming that states are actually able to determine grade level according to a fixed standard, independent of bell curve or percentile analysis. For comments on the subject, see generally Gerald W. Bracey, *The Perfect Law*, DISSENT, Fall 2004, at 62–63, available at <http://dissentmagazine.org/article/?article=318>. Professor Bracey discusses the problems with defining “proficient,” both under the NAEP and by individual states. *Id.* Bracey also implies that the law’s inevitable failure was planned to further Bush’s agenda of promoting private school vouchers. *Id.*

57. Gary Ratner, *Why the No Child Left Behind Act Needs to Be Restructured to Accomplish Its Goals*, 9 UDC L. REV. 1, 32 (2007).

58. Eric Haas, et al., *One Hundred Percent Proficiency: A Mission Impossible*, 38 EQUITY & EXCELLENCE IN EDUC. 180, 181 (2005); see also Mark Goldberg, *Test Mess 2: Are We Doing Better a Year Later*, 86 PHI DELTA KAPPAN 389 (2005) (stating that no “city, state or country—other than mythical Lake Wobegon—has ever produced an entire population of students who are above average”); but see Cynthia Beaudette, *Muscatine School Wins National Honor*, QUAD-CITY TIMES, Sept. 24, 2005, available at <http://www.qctimes.com/articles/2005/09/25/news/local/doc43361383d1cc6203044475.txt> (reporting on an Iowa elementary school that achieved a 100% proficiency rating on the 2003–2004 math test).

59. For information on the Programme for International Student Assessment, an internationally standardized assessment administered to fifteen year-olds, see Organization for Economic Co-operation and Development, Programme for International Student Assessment, available at <http://www.pisa.oecd.org> (last visited May 17, 2009).

60. Haas et al., *supra* note 58, at 181.

experts through a comparably rigorous, objective and scientific review,”<sup>61</sup> Professor Kevin Welner argues that the law imposes a double-standard.<sup>62</sup>

[I]f we held Congress to the same standard as Congress has chosen for school districts, then it could not have adopted NCLB. In fact, peer-reviewed scholarship, supported by multiple studies, flatly contradicts the NCLB 100% presuppositions. Although the statute does not, in fact, require the law itself to be supported by such scientifically based research, the inconsistency does show a staggering level of political arrogance.<sup>63</sup>

Moreover, to establish a system of sanctions based on improvement toward one-hundred percent student proficiency, one must assume that the sanctioned schools are responsible for, and have the ability to improve, student achievement.<sup>64</sup> As an illustration, consider the middle school that serves students in grades six through eight.<sup>65</sup> If a student fails to score at a proficient level on the 6th grade mathematics exam, the school would be held accountable for such a failure, even though most of the 6th grade student’s education occurred at a different elementary school.<sup>66</sup> And apart from pointing a finger at which *school* is to blame, several critics point out that it is doubtful “schools alone can eliminate achievement gaps in the face of powerful social inequalities in the wider society.”<sup>67</sup>

The plausibility of one hundred percent proficiency simply is not supported by data or experience. Even the most idealistic educational organizations do not declare as one of their goals that all children will be proficient in all skills. Teach For America,<sup>68</sup> for example, seeks to end educational inequality by sending recent college graduates to some of the nation’s lowest performing schools to teach for two years. That organization operates under the motto that “One day all children in this nation will have the *opportunity* to obtain an excellent education.”<sup>69</sup> Whether innocently or ignorantly, by making a goal based on absolute results Congress has leaped over this opportunity factor, shooting for an absurdly ambitious goal in choosing the current one hundred percent proficiency goal, the failure of which is easily, and perhaps conveniently, calculable.

61. Welner, *supra* note 52, at 174 (quoting NCLB, 20 U.S.C. § 7801(37)(B)(vi)).

62. *Id.*

63. *Id.*

64. *Id.* at 173.

65. *See id.* at 173–74 (using George W. Bush’s childhood education as a hypothetical to illustrate the same point).

66. Welner, *supra* note 52, at 173–74.

67. Gamoran, *supra* note 34, at 6. The issue of social inequities and their influence on education is a complex and hotly debated topic, one not dealt with in this Comment.

68. For information on Teach For America, the national teaching corps for recent college graduates, see Teach For America, <http://www.teachforamerica.org>.

69. WENDY KOPP, ONE DAY, ALL CHILDREN . . . 185 (2001).

## III. ANALYZING NCLB PROBLEMS IN RELATION TO THE 2014 GOAL

## A. “Perverse Incentives” and NCLB

By its very nature, NCLB’s structure inevitably seeks to label virtually all schools as failing. By 2014 (supposing that the Act as it is now written actually survives that long)<sup>70</sup> presumably any school with less than 100% efficiency will be labeled as failing.<sup>71</sup> Following such a course, most of the nation’s public schools will eventually face some form of the sanctions described above, or at least a “failing” label.<sup>72</sup> Scholars, as well as state policies themselves, have shown that such a dire fate for states has led to the adoption of practices that work contrary to the noble intentions of the Act.<sup>73</sup>

Professor James E. Ryan’s 2004 article *The Perverse Incentives of No Child Left Behind Act*<sup>74</sup> predicted that the NCLB Act, then in its initial years, would create “perverse incentives” that “work against the Act’s goals.”<sup>75</sup> Specifically, Professor Ryan stated that NCLB “creates incentives for states to lower academic standards” and “will make it even more difficult for disadvantaged students to catch up to their more affluent peers.”<sup>76</sup> Although Professor Ryan does not stand alone as a critic of NCLB, reviewing his predictions nearly four years later, as well as additional evidence that states have abandoned some of their proven academic best practices as a result of

70. See James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U. L. REV. 932, 985–86 (2004) (“The odds are quite good that the NCLBA is another fad. By 2014, Congress, the President, state officials, and the world will have changed. Schools and students may still be subject to standards and testing, but it is unlikely that public schools will be operating under the existing framework of the NCLBA.”).

71. 20 U.S.C. § 6311(b)(2)(F) (2006) (“[N]ot later than 12 years after the end of the 2001–2002 school year, all students in each group . . . will meet or exceed the State’s proficient level of academic achievement on the State assessments . . . .”); but see Evan Stephenson, *Evading the No Child Left Behind Act: State Strategies and Federal Complicity*, 2006 B.Y.U. EDUC. & L.J. 157, 159 (2006) (arguing that “[s]tates can escape the 100 percent proficiency goal by calculating their proficiency statistics using confidence intervals [margins of error]”). As Stephenson points out: “Hypothetically, if a state’s proficiency goal is 100 percent and its margin of error is eight percent, the state’s schools may be considered compliant if they reach only ninety-two percent proficiency.” Stephenson, *supra* note 71, at 159.

72. See Stephenson, *supra* note 71, at 177 (“One study predicts that by 2014, ninety-nine percent of California public schools will have failed to make AYP. . . . [Another study] estimates that more than 90% of Connecticut elementary and middle schools won’t meet federal education standards in 10 years.”).

73. See Ryan, *supra* note 70, at 932–34.

74. *Id.*; see also John H. White, Editorial, *Wise Modifications Put No Child Left Behind Law on the Right Track*, CHI. SUN TIMES, July 3, 2008, available at <http://www.isbe.net/news/2008/newsclips/080704.htm#wi> (“No one seriously questions the goals of the federal No Child Left Behind law.”).

75. Ryan, *supra* note 70, at 934.

76. *Id.*

NCLB, demonstrates that his predictions were well-founded. However, Professor Ryan does not go so far as to criticize the end goal of NCLB.<sup>77</sup>

He should. It is the struggle to make progress toward that goal, whether innocently or perversely, that will continue to cause negative consequences for American public education. The root of these problems is the goal itself. The following three sub-sections describe how.

*B. In Order to Progress Toward the Goal, States Must Lower Their Standards*

Since the inception of NCLB, scholars have predicted that many states would lower standards to avoid labeling their schools as failing.<sup>78</sup> As more and more schools continue to fail to make AYP, it has become evident that this practice has become reality.<sup>79</sup> After all, NCLB clearly allows the *states* to define what they feel are “challenging academic content standards.”<sup>80</sup> Nonetheless, as the 2014 goal approaches, the percentage of students that must pass state proficiency tests increases with each year, as does the incentive for states to make it easier for them to do so. The resulting phenomenon has been called NCLB’s educational “race to the bottom.”<sup>81</sup> Essentially, states have nothing to gain by imposing high standards—the law motivates states to find the lowest acceptable standard for AYP determinations.<sup>82</sup> A recent report by the Department of Education, which measured student performance on state assessments against the National Assessment of Educational Progress (NAEP), revealed that academic standards vary drastically between states.<sup>83</sup>

For example, an eighth grader in Missouri would need the equivalent of a 311 on the national math test to be judged proficient. That is actually more rigorous than the national test. In Tennessee, however, a student can meet the

77. *Id.* at 944.

78. *See id.* at 947–48.

79. *See id.* at 948; *see also* SUNDERMAN, KIM & ORFIELD, *supra* note 15, at 7 (describing a “sharply worded letter to the chief state school officers” sent by the Bush Administration after states began to redefine what it means to be proficient in reading and mathematics, which accused states of trying to “game the system for short-term benefits” and “hide the low performance of their schools” (internal citations omitted)).

80. 20 U.S.C. § 6311(b)(1)(A) (2006).

81. Paul E. Peterson & Frederick M. Hess, *Keeping an Eye on State Standards: A Race to the Bottom*, EDUC. NEXT, Summer 2006, at 28, 28.

82. *Id.*

83. NATIONAL CENTER FOR EDUCATION STATISTICS (INSTITUTE OF EDUCATION SCIENCES, U.S. DEPARTMENT OF EDUCATION), MAPPING 2005 STATE PROFICIENCY STANDARDS ONTO THE NAEP SCALES 16 (June 2007), *available at*: <http://nces.ed.gov/nationsreportcard/pdf/studies/2007482.pdf>.

state's proficiency standard with a 230, a score well below even the basic level on the national exam.<sup>84</sup>

Time has shown that state standards have changed, but the method that states employ to lower standards varies. First off, there are accusations that states, for political or other reasons, simply make the tests easier.<sup>85</sup> In some cases, critics charge that states are simply writing simpler tests, with more accessible language and relatable passages,<sup>86</sup> or creating easier formats and carefully selecting those tested skills that will yield higher results.<sup>87</sup> A 2004 study by The American Diploma Project, which sought to analyze how high the expectations were on six states' required graduation exams, found that none of the tests were overly demanding.<sup>88</sup> The study found that the math questions on these exams were similar to material that students in other countries cover in 7th or 8th grade, and reading comprehension skills that "ACT considers more appropriate for the test it gives to 8th and 9th graders[.]"<sup>89</sup>

Additionally, apart from simply lowering standards, states have implemented (and the federal government has approved) plans that simply "backload" the largest AYP gains to later years of NCLB's twelve-year timeline.<sup>90</sup> While this does not literally lower the education standards, it does lower progress goals.<sup>91</sup> These schedules, which are similar to a balloon payment at the end of a mortgage payment schedule, ask small gains of schools

84. Tamar Lewin, *States Found to Vary Widely on Education*, N.Y. TIMES, June 8, 2007, at A21 (citing NATIONAL CENTER FOR EDUCATION STATISTICS, *supra* note 83).

85. Michael Winerip, *One Secret to Better Test Scores: Make State Reading Tests Easier*, N.Y. TIMES, Oct. 5, 2005, <http://www.nytimes.com/2005/10/05/education/05education.html> (comparing the reading passages of the 2004 New York State Fourth Grade English Language Assessment with the "easier passages" of the 2005 assessment).

86. *Id.*

87. See Kevin Drum, *Soaring Test Scores*, WASHINGTON MONTHLY, June 6, 2007, [http://www.washingtonmonthly.com/archives/individual/2007\\_06/011441.php](http://www.washingtonmonthly.com/archives/individual/2007_06/011441.php) (citing Center on Education Policy, *Answering the Question that Matters Most: Has Student Achievement Increased Since No Child Left Behind*, June 2007, <http://www.cep-dc.org/index.cfm?fuseaction=document.showDocumentByID&nodeID=1&DocumentID=200>.) In attempting to explain why states had experienced significant gains on their own state tests, but not on a standardized national test, the Center on Education Policy study states that "for Texas 4th graders, the difference in scores between NAEP and state exam was largely explained by differences in the set of math skills (multiplication, division, fractions, decimals, etc.) covered by the two tests, and the format in which test items were presented (word problems, calculations without words, inclusion of a picture, etc.)." *Id.*

88. THE AMERICAN DIPLOMA PROJECT, DO GRADUATION TESTS MEASURE UP? A CLOSER LOOK AT STATE HIGH SCHOOL EXIT EXAMS 27 (2004), available at <http://www.njhighschoolsummit.org/ResourceRoom/secure/download.asp?dir=General&file=Graduation%20Tests.pdf>.

89. *Id.*

90. Stephenson, *supra* note 71, at 158.

91. Welner, *supra* note 52, at 172.

in the beginning years of NCLB, but demand large gains in the last years just before 2014, allowing schools to continue to make AYP, at least in the short term.<sup>92</sup> As the South Dakota Department of Legislative Audit stated in a 2004 report, explaining why the state chose to “back load” their annual measurable objectives (AMO),

Since the NCLB Act itself is set to expire in 2008, SD has effectively delayed the impact of NCLB’s 100% proficiency goal until after the Act would have to be reauthorized. . . . SD is not the only state to have done this and we are not saying there is anything wrong with what SD has done. Rather we just point out that there are many things to occur legislatively and politically before SD will have to make the largest, and arguably the hardest to achieve, gains in student proficiency.<sup>93</sup>

Although a temporary fix, this practice is attractive because it allows states to avoid giving schools failing labels and imposing sanctions.

But surely this attractiveness wears off when one considers the arbitrary sanctions that will arise when, in 2012 (or whenever the large gains are set by states), schools that had found ways to make persistent and predictable progress suddenly find themselves facing truly insurmountable AYP requirements. As an illustration, consider the following hypothetical. Imagine a school in a “backloading” state that innovatively uses its funds to develop alternative curriculum, including specially targeting students with learning disabilities and English language learners, and using discretionary funds to attract qualified and energetic staff. Assume that these changes lead to a three percent gain in student proficiency for all students and each sub-group during the early years of the Act, satisfying AYP requirements. Despite this progress, when faced with the very large gains in the later years, if the school fails (which it most likely will),<sup>94</sup> the money used to make progress will be shifted to conform with NCLB’s sanctions requirements, or eventually into restructuring the school altogether. Thus, a plan intended to forestall sanctions can instead make them even more arbitrary and disheartening than they would have been if they were applied earlier in the timeline.

The lesson learned is that one cannot forestall the impossible. Asking states to reach a goal that has no plausible evidence of being reached is dangerous. Attach such a mandate to as sensitive a subject as educating children, and states see little choice but to lower the bar or modify definitions

92. Stephenson, *supra* note 71, at 158; *see also* Welner, *supra* note 52, at 172.

93. STATE OF S.D. DEP’T OF LEGIS. AUDIT, A REPORT ON THE NO CHILD LEFT BEHIND ACT (NCLB) TO THE 2004 INTERIM DEPARTMENT OF EDUCATION AGENCY REVIEW COMMITTEE 12 (Sept. 22, 2004), *available at* <http://www.state.sd.us/legislativeaudit/NCLB/1Cover.pdf>.

94. *See* Welner, *supra* note 52, at 172 (referring to the “daunting proficiency increases” for 2009–2010 in Ohio’s plan, and referring to back-loading schemes as “waiting out the train wreck” plans).



of progress in order to make AYP and escape a public perception of failure. But these practices are not simply sneaky subterfuge, intended to deceive or cheat the system. They are the natural consequence of the goal. Accordingly, when assessing schools' progress toward NCLB's goal, one should consider the changing standards that a given state is using, as well as the motivations behind defining "proficient."

C. *NCLB's Timeline and Its Mandates Cause States to Abandon Their Best Educational Practices*

Even if a state chooses not to lower standards, the effect of NCLB's accountability requirements on the quality of their education system can be just as detrimental. The ticking clock toward 2014's goal does not stop, and increasing pressures to make AYP at the school level can change the focus of the daily curriculum, causing teachers to "teach to the test," or neglect enrichment subjects or specialized language instructions in order to prepare students for the ever-increasing requirements for AYP.<sup>95</sup> In a study conducted by The Civil Rights Project at Harvard University, about 75% of teachers surveyed from sanctioned schools agreed that the AYP requirements of NCLB caused teachers to "de-emphasize or neglect untested topics."<sup>96</sup> As one teacher from that study observed, "NCLB has become so much the instructional focus that . . . needed enrichment experiences are not planned or eliminated because they are not tested."<sup>97</sup>

There are also claims that schools that fail to make AYP are forced to cut non-tested Arts and Humanities classes.<sup>98</sup> In these schools, which are most often comprised of low-income students, budgets for art, music, and athletics programs are sacrificed in order to focus more resources on the subjects that NCLB tests.<sup>99</sup>

Apart from best teaching practices, even the ways to measure the one hundred percent proficiency goal are disputed. States must often abandon their preferred assessment methods in order to comply with NCLB's numerous testing and reporting requirements. In *Connecticut v. Spellings*, a state essentially made a claim that in order to comply with NCLB's annual testing

95. See Lisa Kelly, *Yearning for Lake Wobegon: The Quest for the Best Test at the Expense of the Best Education*, 7 S. CAL. INTERDISC. L.J. 41, 67–71 (1998) (discussing how over-emphasis on testing and accountability may cause schools and teachers to sacrifice developmentally appropriate curriculum to teach to the test).

96. SUNDERMAN, KIM & ORFIELD, *supra* note 15, at 91.

97. *Id.* at 91–92.

98. See generally Ryan S. Vincent, Comment, *No Child Left Behind, Only the Arts and Humanities: Emerging Inequalities in Education Fifty Years After Brown*, 44 WASHBURN L.J. 127, 142–49 (2004). The student author recounts how some schools, in order to make AYP, have elected to cut programs such as music, art, and athletics. *Id.* at 142, 144, 146–48.

99. *Id.* at 144–48.

requirements, it would have to either spend more than the Act provided, or abandon its own testing and accountability program, which the state claimed had proven to be very effective.<sup>100</sup> According to Connecticut, its efforts to achieve accountability and assessment, which existed well before NCLB, had been highly successful, made its students rank among the highest achieving in the nation, and substantially narrowed the achievement gap for minority and economically disadvantaged students.<sup>101</sup> Notably, Connecticut had “designed its testing regime and school curriculum around assessments that involve a substantial written component.”<sup>102</sup> However, because of the cost associated with administering and grading such tests, the state only administered the tests to grades 4, 6, 8, and 10.<sup>103</sup> It gave only formative tests to grades 3, 5, and 7, which did not satisfy the requirements of the Act.<sup>104</sup> Although the state’s primary objection to adhering to NCLB’s testing requirements was fiscal, it also expressed concerns about the efficacy of implementing annual “summative” (multiple choice) tests.<sup>105</sup>

The state thus challenged the Secretary of Education’s denial of a waiver from the requirement that non-formative testing occur in every grade and asserted that such an interpretation violated the “unfunded mandate” provision of the Act.<sup>106</sup> The Secretary’s response, as summarized by the court, was that “the State wants to employ testing methods that exceed what is required by the Act and then blame the federal Government for failing to pay for more than the Act itself requires.”<sup>107</sup> The court never reached the merits of the claim,<sup>108</sup> however, and dismissed the case for lack of jurisdiction over the administrative

100. 453 F. Supp. 2d 459, 475–77 (D. Conn. 2006).

101. *Id.* at 475.

102. *Id.*

103. *Id.* at 476

104. *Id.*

105. *Connecticut*, 453 F. Supp. 2d at 476 & n.6 (“Formative testing is solidly grounded in scientifically based research, whereas there is no conclusive research that the summative testing required by the Secretary has any positive effect on student academic achievement.”).

106. *Id.* at 474. “Nothing in this chapter shall be construed to authorize an officer or employee of the federal Government to mandate, direct, or control a State, local educational agency, or school’s curriculum, program of instruction, or allocation of State or local resources, or mandate a State or any subdivision thereof *to spend any funds or incur any costs not paid for under this chapter.*” *Id.* (quoting 20 U.S.C. § 7907a (2000) (emphasis added)).

107. *Id.* at 481.

108. *Id.* at 503. Although the complaint was dismissed in part, Connecticut’s concerns about annual testing have been recognized by congressional reformers. *See* The Improving Student Testing Act, S. 2053, 110th Cong. § 5(f) (2007), introduced by Sen. Feingold (D-WI), which would allow states to administer tests just once in elementary school, once in middle school, and once in high school.

decision, which it claimed it did not have under the General Education Provision Act (GEPA).<sup>109</sup>

Additionally, teachers of students with limited English proficiency (LEP) claim that NCLB's stringent testing requirements force them to abandon their own formative assessments, and instead watch their students struggle on largely irrelevant assessments. The American Federation of Teachers states that

[W]ithout native language or linguistically modified assessments, states now find themselves in a Catch-22 situation: If a student can't read an assessment because of a language barrier, then the assessment is not a valid measure of the student's academic proficiency. But students must still take these state assessments, even though they serve no valid educational purpose, because NCLB requires a 95 percent testing participation rate for each and every student subgroup.<sup>110</sup>

The result is that student sub-groups (LEP students as well as special education students) who by definition must be below grade level in order to be a member of that sub-group, can cause a school that would otherwise make AYP to fail.<sup>111</sup> This phenomenon has been of special concern to schools and legislators.<sup>112</sup>

#### *D. The Goal Causes Historically Failing Schools to Continue to Lag Behind*

"Aiming high" is assumedly intended to lead failing schools toward success. Yet another problem evidenced is that the changes and sanctions

109. *Connecticut*, 453 F. Supp. 2d at 482, 503; see General Provisions Concerning Education – Judicial Review, 20 U.S.C. § 1234g (2006). The statute provides that after the Secretary makes a "final agency action," it may only be appealed to the appropriate United States Court of Appeals. 20 U.S.C. § 1234g(a)–(b). Subsequent lawsuits by Connecticut have been equally unsuccessful, even where the district court found jurisdiction over the controversy. See *Connecticut v. Spellings*, 549 F. Supp. 2d 161, 174 (D. Conn. 2008) ("The Secretary did not act arbitrarily, capriciously, or contrary to law in concluding that the State's proposed plan amendments were contrary to the dictates of the Act.").

110. American Federation of Teachers, *AFT on English Language Learners and 'Adequate Yearly Progress' Calculations* (2004); see also KATE MENKEN, ENGLISH LEARNERS LEFT BEHIND 97, 118 (2008) ("ELLs [English Language Learners] are particularly vulnerable to high-stakes decisions based on test results . . . . Due to the importance of these exams for ELLs and those who educate them, educators . . . are under strong pressure to 'teach to the test,' and closely align the education of English language learners to the exams by focusing instruction on test content and skills or, more explicitly, by devoting class time to teaching test items and test-taking strategies.").

111. See GARY L. SUNDERMAN, HOLDING NCLB ACCOUNTABLE 165 (2007).

112. See The School Accountability Improvements Act, S. 1236, 110th Cong. § 5(2) (2007). This bill, introduced by Sen. Murkowski (R-AK), would allow a school that missed AYP solely because of performance by the LEP or students with disabilities sub-group to avoid NCLB sanctions by implementing improvement plans that target just those sub-groups. See *id.*

invoked by NCLB actually cause schools that are historically on the low end of the achievement gap to continue to fail. First of all, because of the sub-group reporting criteria of NCLB,<sup>113</sup> the most diverse schools (those with large numbers of black, Hispanic, economically-disadvantaged, or other historically low-performing students) are “more likely to be labeled as not making [AYP] simply because their larger number of population subgroups means that they have more targets to hit.”<sup>114</sup>

Secondly, the march toward one hundred percent proficiency means that each year, schools have a more difficult AYP standard to meet. For failing schools, or those schools close to failing, NCLB creates an obvious response—we must raise test scores, and we must do it now. Short-term responses include offering (and paying for) school choice and supplemental education services.<sup>115</sup> When those measures fail to meet the ever increasing AYP goal, NCLB requires even more drastic changes such as new curriculums, new staff, or complete school restructuring.<sup>116</sup>

However, many critics claim that this practice actually works against creating a sustainable infrastructure of quality education within a school.<sup>117</sup> For example, in a fascinating thesis, a group of professors from the University of Connecticut applied microeconomic theory to show that not only is the one hundred percent proficiency goal impossible; it “will impede, if not actually prevent, the attainment of a high-quality education for all students.”<sup>118</sup> Basically, the group contends, the immediate measures that schools will take to make AYP may work in the short term, but these measures will lead to costs of “unsustainable levels,” causing school programs to “degrade for lack of resources.”<sup>119</sup> As Professor Andy Hargreaves and Dean Fink argue,

The emphasis on change has obliterated the importance of continuity.

In urban schools, teachers see their principals come and go as though they were passing through revolving doors. They learn quickly how to resist or ignore the leader’s efforts. The result is that school improvement becomes like a set of bobbing corks, with schools rising under one set of leaders, only to sink under the next.<sup>120</sup>

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113. *See supra* Part I.B.

114. Gamoran, *supra* note 34, at 4–5.

115. *See supra* Part I.A.

116. *See supra* notes 25–33 and accompanying text.

117. *See* Andy Hargreaves & Dean Fink, *Sustaining Leadership*, 84 PHI DELTA KAPPAN 693 (2003).

118. Haas et al., *supra* note 58, at 180.

119. *Id.* at 183.

120. Hargreaves & Fink, *supra* note 117, at 699. The authors also note that “by 2005, 70% of the senior managers in public service in the U.S. will be eligible for retirement. This mass exodus

Failing labels can also lead to a lack of teacher permanence. For example, the pressures of probation on teachers led to high attrition rates and a “lack of commitment in conjunction with already difficult working conditions” in some of the perpetually failing schools in Maryland and Kentucky, as chronicled by the work of educational professor Heinrich Mintrop.<sup>121</sup> In one Maryland elementary school, which had been labeled as failing for over three years, 78% of teachers had between one and five years of experience, with the average among them being just 1.6 years.<sup>122</sup> Because of this phenomenon, this school, like many other failing schools, had to continually train new teachers on the state standards and assessments and “was prevented from developing a stable cadre of well-trained professionals capable of providing the type of instruction needed for its students to meet the state’s rigorous achievement standards.”<sup>123</sup> As Professor Hargreaves and Dean Fink note, “[I]mprovements in test results in the short run are being bought at the expense of the ability to recruit and retain teachers over the long term, since teaching driven by short-term results is not the kind of teaching that teachers want to do.”<sup>124</sup>

A study conducted by UCLA Professor Meredith Phillips and Jennifer Flashman, which analyzed teacher attitudes toward accountability policies, at least in part confirmed this suspicion.<sup>125</sup> The results suggested that “increased testing may cause teachers in the most disadvantaged schools to feel as though they have less autonomy over their teaching methods than do their peers in other schools, providing yet another reason for good teachers to prefer to teach in better-off schools.”<sup>126</sup>

In addition to the school’s staff and infrastructure, student mobility, encouraged through the school choice sanction, may create a barrier (or loophole) for schools to escape accurate assessment of student proficiency.<sup>127</sup> Students who do not attend school for a full academic year because they change schools are not necessarily counted in the testing school’s AYP

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will cause ‘unique challenges for numerous agencies in maintaining leadership continuity, institutional memory, and workforce experience.’” *Id.* (citation omitted).

121. HEINRICH MINTROP, *SCHOOLS ON PROBATION: HOW ACCOUNTABILITY WORKS (AND DOESN’T WORK)* 62 (2004).

122. *Id.* at 90.

123. *Id.* at 90–91.

124. Hargreaves & Fink, *supra* note 117, at 694 (citation omitted).

125. See generally Meredith Phillips & Jennifer Flashman, *How Did the Statewide Assessment and Accountability Policies of the 1990s Affect Instructional Quality in Low-Income Elementary Schools?*, in *STANDARDS-BASED REFORM AND THE POVERTY GAP: LESSONS FOR NO CHILD LEFT BEHIND* 45 (Adam Gamoran ed., 2007).

126. *Id.* at 70–71 (citation omitted).

127. Paul Weckstein, *Accountability and Student Mobility Under Title I of the No Child Left Behind Act*, 72 J. NEGRO EDUC. 117, 117 (2003).

determination.<sup>128</sup> Thus, failing schools could be motivated to encourage their lowest performing students to transfer, and schools receiving such transfers would have less incentive to provide adequate services for these students if the transfer occurred after the start of the academic year.<sup>129</sup>

Even assuming schools would not resort to these types of tactics to avoid NCLB sanctions, critics of school choice have nonetheless made dire predictions about the long term effect that school choice will have on schools in low-income neighborhoods. One critic writes that “[choice] will . . . drain these schools of a precious human resource, the highest motivated and achieving students with the most involved parents. The concentration and proportion of the most at-risk children will be increased in the poorest schools, which will have even fewer resources to work with.”<sup>130</sup>

Furthermore, it should not be forgotten that testing and imposing sanctions is expensive for states. Although federal funding for education has increased since NCLB, federal dollars still make up a small percentage of a state’s overall education budget (according to the Education Department, federal dollars make up about 17% of the states’ total education budget).<sup>131</sup> Additional testing requirements, transfers, and supplemental services “draw resources away from struggling schools.”<sup>132</sup> So the students who *don’t* transfer are left in a resource-drained school.<sup>133</sup>

It appears that the issue of disparate funding might actually be getting some attention from the legal community. In what is probably the first victory for NCLB plaintiffs, albeit small and perhaps short-lived, the Sixth Circuit recently revived a lawsuit by three states which charged that NCLB required states to comply with mandates that were not being paid for under the Act.<sup>134</sup> Under the “Spending Clause,”<sup>135</sup> “Congress has broad power to set the terms

128. *Id.* at 120; *see* 20 U.S.C. § 6311(b)(3)(C)(xi) (2006) (“[S]tudents who have attended more than 1 school in the local educational agency in any academic year shall be used only in determining the progress of the local educational agency.”).

129. Weckstein, *supra* note 127, at 120–21.

130. Douglas A. Archbald, *School Choice, Magnet Schools, and the Liberation Model: An Empirical Study*, 77 SOCIOLOGY OF EDUCATION 283, 287 (2004) (quoting JUDITH PEARSON, MYTHS OF EDUCATIONAL CHOICE 105 (1993)).

131. *See* U.S. DEP’T OF EDUC., 10 FACTS ABOUT K–12 EDUCATION FUNDING 2 (2005), available at <http://www.ed.gov/about/overview/fed/10facts/index.html> (“In the 2004–05 school year, 83 cents out of every dollar spent on education [was] estimated to come from state and local levels.”).

132. Gamoran, *supra* note 34, at 5.

133. *Id.*

134. *Sch. Dist. of Pontiac v. Sec’y of the U.S. Dep’t of Educ.*, 512 F.3d 252, 257 (6th Cir. 2008), *reh’g en banc granted, opinion vacated*, No. 05-2708, 2008 U.S. App. LEXIS 12121 (6th Cir. May 1, 2008).

135. U.S. CONST. art. I, § 8, cl. 1.

on which it disburses federal money to the States.”<sup>136</sup> However, when the funds are conditional, such conditions “must be set out ‘unambiguously.’”<sup>137</sup> The plaintiffs in *Pontiac v. Spellings* charged, and the Sixth Circuit agreed in a 2-1 decision, that the “unfunded mandate provision”<sup>138</sup> of the Act could be read to mean that a “[s]tate need not comply with requirements that are ‘not paid for under the Act.’”<sup>139</sup> Therefore, according to the plaintiffs, because Congress did not provide states and school districts enough money to comply with the Act, they could not be punished for non-compliance.<sup>140</sup> Nonetheless, the Sixth Circuit has since granted a rehearing *en banc*, so an ultimate resolution of the “unfunded mandate” issue is likely years away.

For low-performing schools, NCLB’s one hundred percent proficiency goal is incredibly, and perhaps deliberately, difficult to meet. With its absolute goal, schools that start out as the lowest performing will be the first to be sanctioned, whether they show progress or not. But these sanctions draw resources away by requiring education funds be used to pay for testing and sanctions requirements. They also cause an evaporation of the few quality teachers and students left in failing schools. In this way, the absolute goal of one hundred percent proficiency leads to perpetually failing schools.

#### IV. PROPOSED CHANGES TO THE GOAL

In fairness, it should be noted at the outset that the biggest critique of NCLB, at least by congressional opponents, was fiscal. Part of the problem could be, as many have claimed, that the White House has not requested, and Congress has not appropriated, nearly the amount of funding originally authorized under the Act.<sup>141</sup> Thus, one could claim that a surge of money could lead to greater progress toward the 2014 goal. Former Senator Hillary Clinton (D-NY), among others, took this stance during her time in the Senate.<sup>142</sup> However, according to many advocates of NCLB, the funding is not

136. *Id.* at 261 (quoting *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006)).

137. *Pontiac*, 512 F.3d at 261 (quoting *Arlington*, 548 U.S. at 296).

138. 20 U.S.C. § 7907(a) (2006), which reads, “Nothing in this chapter shall be construed to authorize an officer or employee of the Federal Government to mandate, direct, or control a State, local educational agency, or school’s curriculum, program of instruction, or allocation of State or local resources, or mandate a State or any subdivision thereof to spend any funds or incur any costs not paid for under this chapter.”

139. *Pontiac*, 512 F.3d at 272.

140. *Id.* at 254.

141. Welner & Weitzman, *supra* note 5, at 242–43.

142. See Online Education Database, *Comparison: Presidential Candidates on Major Education Issues* (Aug. 21, 2007), <http://oedb.org/library/features/comparison-presidential-candidates-on-major-education-issues> (stating that “President Bush’s budget for 2007 provides \$12 billion less than was promised by the No Child Left Behind Act . . .”).

the real issue. Education undersecretary Eugene Hickok has proclaimed that “the color of change is not always green.”<sup>143</sup> Nonetheless, although the funding of NCLB is a continuing issue which should or should not be downplayed, it is doubtful that these appropriation concerns will be resolved before the Act is reauthorized.

But turning to the one hundred percent proficiency goal, in the congressional debate to reauthorize NCLB, there has been some discussion of the 2014 goal. One strategy is to re-target the deadline date of the one hundred percent proficiency timeline. Rep. Betty McCollum (D-MN) introduced a bill that would simply move the deadline back four years to 2018.<sup>144</sup> Perhaps more creatively, “The No Child Left Behind Flexibility and Improvement Act,” introduced by Sen. Susan Collins (R-ME), would allow the Secretary of Education, at her discretion, to extend the timeline for states and schools to reach one hundred percent proficiency.<sup>145</sup> Under Sen. Collins’s proposal, the Secretary would review the timeline every three years and could modify it if she felt it was “in the interest of improving student achievement.”<sup>146</sup>

Other proposals seek to keep the goal in tact, but change the way AYP is measured to allow states and schools more flexibility in how they show progress toward proficiency. The current law actually does allow states to use other indicators besides standardized assessments.<sup>147</sup> However, states can only use such indicators “to identify *additional* schools for school improvement or in need of corrective action or restructuring,” not to *help* schools make AYP or show how a school is succeeding.<sup>148</sup> Plans such as “The No Child Left Behind Reform Act,” introduced by Sen. Chris Dodd (D-CT), would change this.<sup>149</sup> Sen. Dodd’s plan would strike the section of the Act that restricts a state’s use of additional indicators as only being used to identify additional failing schools.<sup>150</sup> The bill would also allow states to use “measures of individual or

143. Welner & Weitzman, *supra* note 5, at 246 (citing Diana J. Schemo, *Critics Say Money for Schools Falls Short of Promises*, N.Y. TIMES, Feb. 5, 2003, at A16).

144. Student Achievement and Successful Schools Act of 2007, H.R. 1169, 110th Cong. § 4(a)(1)(B) (2007). For the timeline goal, Sen. McCollum’s bill would replace the words “12 years” (which resulted in 2014), with the words “16 years” (resulting in the year 2018). *Id.*

145. No Child Left Behind Flexibility and Improvements Act, S. 562, 110th Cong. § 2(2) (2007). The bill would amend the timeline section of NCLB, 20 U.S.C. § 6311(b)(2)(F), to state that “Every 3 years, the Secretary . . . shall review the requirements of the timeline . . . and may issue guidance or regulations modifying such requirements if the Secretary determines, at the Secretary’s discretion and after a review of the progress of the States towards making adequate yearly progress for the 2013–2014 school year, that modifications to the timeline are in the interests of improving student achievement and are in keeping with the purpose of this title.” *Id.*

146. *Id.*

147. 20 U.S.C. § 6311(b)(2)(C)(vii) (2006).

148. *Id.* § 6311(b)(2)(D)(ii) (emphasis added).

149. The No Child Left Behind Reform Act, S. 1194, 110th Cong. (2007).

150. *Id.* § 2(a)(2)(A).



cohort growth over time based on the academic assessments implemented” in accordance with NCLB.<sup>151</sup> Although the language in the bill is a bit ambiguous, it would seem schools could make AYP by demonstrating success in other ways besides standardized tests including, according to Sen. Dodd, “dropout rates, the number of students who participate in advanced placement courses, and individual student improvement over time.”<sup>152</sup>

However, none of the proposed plans seems poised to solve the problems mentioned above. The first set of solutions, which seek to tweak the timeline for the one hundred percent proficiency goal, offer too weak an answer to correct the perverse incentives. Although Professor Ryan and the South Dakota legislature,<sup>153</sup> among many, predicted that the deadline would move, there is no logic which follows that giving a few more years to attain perfection will make perfection any more realistic. Sen. Collins’s proposal, which would give the Secretary discretion to extend the timeline, is similarly inadequate. Moreover, since NCLB’s inception, the Secretary has been anything but willing to grant such waivers.<sup>154</sup>

Senator Dodd’s plan, which would allow alternative methods of determining AYP, seems more appealing but suffers from the same fatal flaw as the current NCLB goal. It speaks in absolute results. One can see how statistics such as dropout rates, or the number of students enrolled in state-defined “advanced placement classes,” or even individual student performance, can be manipulated in order to adhere to an implausible and absolute goal of one hundred percent. So long as the goal is an unattainable absolute, the perverse incentives will likely exist.

#### V. ANALYSIS: ABANDONING OPPORTUNITY FOR 100% “TREADING WATER”

In their 2006 article debating the advantages of educational adequacy vs. educational equality, Professors William Koski and Rob Reich rationalized, “If the state settles for adequacy in the orientation of educational policy, it effectively cements the educational advantages of the well off; it confers on them the state’s imprimatur in using public schools to entrench advantages that they are already securing at home, in private.”<sup>155</sup> This point is well taken. NCLB leans toward a policy of adequacy by functionally asking states to get as many kids as possible to minimum proficiency. While the grand intention of

151. *Id.* § 2(a)(1)(B).

152. Statement of Sen. Dodd on the No Child Left Behind Reform Act (Apr. 6, 2005), available at <http://dodd.senate.gov/index.php?q=node/3344> (last visited May 17, 2009).

153. See *supra* Part III.A–B.

154. See generally *Connecticut v. Spellings*, 453 F. Supp. 2d 459 (D. Conn. 2006) (discussed *supra* Part II.C).

155. William S. Koski & Rob Reich, *When “Adequate” Isn’t: The Retreat From Equity in Educational Law and Policy and Why It Matters*, 56 EMORY L.J. 545, 613–14 (2006).

NCLB might not be to cement the advantages of the well-off, it might be the result of having a goal of one hundred percent proficiency.

As stated above, NCLB has led to problems of lowered state standards, the abandonment of educational best practices, the draining of valuable resources from states, and, especially, failing schools.<sup>156</sup> Granted, NCLB funding has not been near what was initially promised. But financing problems aside, even outspoken critics have been hampered in their effectiveness because, as Professor Ryan stated, “it is difficult to criticize the overarching goal of the Act, which is to ensure that all students are academically proficient in the not-so-distant future.”<sup>157</sup>

Yet the results of the NCLB timeline summarized above clearly demonstrate that it is indeed time to criticize. Even if properly funded, the mechanisms of NCLB appear to work in direct opposition to Bush’s stated mission of combating the “soft bigotry of low expectations.” To realize this, one must recall why the federal government got involved in education in the first place. The message of *Brown v. Board of Education*, one that has been cited by many dear to the cause of improving American education, is that “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.”<sup>158</sup> In his 2008 State of the Union address, George W. Bush seemed to make a similar appeal to providing this opportunity, lecturing, “[W]e must trust students to learn if given the chance.”<sup>159</sup>

Of course the irony in Bush’s statement is thick. In its goal, NCLB does not measure opportunity and does not seek to *give* poor students a “chance.” NCLB mandates a result. True, NCLB goes to great lengths to measure what *students* can do. But the measurement, the accountability, and the sanctions stop so long as the kid is adequate. What NCLB has done, regardless of how it has been funded, is force states to move away from *Brown*’s promise of opportunity and change their educational focus from “opportunity” to “result.” That is why the goal does not work. This is especially true for the disadvantaged members of the targeted sub-groups. For those students, and all others for that matter, states will be said to have provided enough of an education if the students pass a test of basic skills. Once that level is reached, the requirement is met. Why educate any further? A goal of one hundred percent proficiency does not ask how high, only how many.

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156. See *supra* Part III.B–C.

157. Ryan, *supra* note 70, at 944.

158. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (emphasis added).

159. 154 CONG. REC. S391 (daily ed. Jan. 28, 2008) (State of the Union Address by President Bush).

Most troubling is the evidence (presented above) of schools lowering their standards in order to comply.<sup>160</sup> If the schools that have struggled to make AYP were to actually take the goal seriously—or even worse, actually achieve it—the end result could be an even worse case of soft bigotry.<sup>161</sup> For students in failing schools, what is left is a school system that functions like a one-day swimming lesson, where the instruction stops after the child learns to tread water. In other words, if you can't teach one hundred percent of students in low-performing schools to swim, then just redefine what the word "swim" means. Call this "soft bigotry" or "low expectations" or any other politically motivating term, but this is the inescapable result of mandating that everyone be at the same destination in 2014. The only solution is for this "destination," at least as it is defined for low-income and minority students, to be more easily attainable. This is not done by giving kids more opportunity, but by changing how states categorize the result. It will not be the affluent, but the historically failing schools, the very same broken and tattered institutions that NCLB supposedly targets, which will sacrifice educational opportunity for tested result.

#### CONCLUSION

Whether innocently or ignorantly, NCLB functions pursuant to an implausible goal of one hundred percent proficiency for all students, in all core subjects, by 2014. This goal is almost indisputably unattainable. Yet it is accepted as an innocent ambition, or at least too noble a proposition to question. However, linking absolute results to this unattainable ambition has caused states to lower standards and abandon their own educational best practices, and there is evidence that it causes low-performing schools to perpetually fail. Put it together, and the Act ensures that states are motivated to teach less and call it proficient. The reality is this: NCLB claims to encourage rigorous standards, yet accepts increasingly easier ones. NCLB claims to strive toward providing opportunity, but tries to measure it with one-day test results that have been watered down or tailored to limited criteria.

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160. *See supra* Part III.B.

161. For a critique of how Bush's statement regarding the "soft bigotry of low-expectations" has been used by proponents of NCLB to dismiss opponents' claims that NCLB does not address the external problems in low-income communities where schools are located, *see* James Forman, Jr., *From Martin Luther King to Bill Cosby: Race and Class in the Twenty-First Century*, 50 VILL. L. REV. 213, 219–22 (2005). Professor Forman states, sarcastically, "The problem is not, for example, that urban schools need substantially greater funding than they currently get. It is not that, though children from poor neighborhoods often have wonderful gifts, many also need extra academic and other supports far beyond the small supplements that Title I currently provides. To make this argument, we are told, is to indulge in the 'soft bigotry of low expectations.'" *Id.* (citations omitted).

NCLB sacrifices quality and opportunity for the sake of avoiding sanctions and striving toward a goal, the foundations of which are political rhetoric.

In order to succeed, the one hundred percent proficiency goal must be either abolished or dramatically altered. Schools' success must be determined by the quality of opportunity they offer students in order to continue the spirit of *Brown*. Test results may be one indicator of this, but they cannot be absolute. Concededly, measuring the type of opportunity a school provides is somewhat abstract and does not shine the same spotlight on failing schools as do test results. Even assuming test results are the best indicator of student performance, it should not be forgotten who is making and who is grading these tests. And who is defining what "result" is proficient. No matter where the bar is set, the education system and the nation are both left behind if it becomes acceptable for schools to teach all of their children to tread water, but in doing so, to sacrifice teaching them how to swim.

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