

Why The No Child Left Behind Act Needs To Be Restructured To Accomplish Its Goals and How To Do It⁺

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INTRODUCTION

The No Child Left Behind Act (“NCLB” or the “Act”)¹ has created a once in a lifetime opportunity to improve American public education. NCLB has embraced vital goals for the new Information Age: academic proficiency for virtually all public school students and elimination of the severe racial/income “achievement gap.” The Act provides four pillars on which states and localities might build a bridge to reach the goals: higher standards; periodic testing to measure the extent to which the standards are being met; disaggregating test results by student subgroup; and reporting to the public.

The critical question is “how to build that bridge?” What do the states, districts and schools need to do to dramatically improve learning so as to bridge the vast chasm that separates millions of children, particularly poor, black and Hispanic students, from the goals of the NCLB?

It is here that NCLB is most seriously deficient. It does not advise the states and localities as to what specific, major structural changes they need to make to get there and then help them along the way. Instead, NCLB essentially mandates the states to raise students’ test scores to meet escalating Adequate Yearly Progress (“AYP”) targets - so that 100% of students are at “proficiency” by 2014 - or be subjected to increasingly harsh and embarrassing sanctions.

This remedial approach is not only largely ineffectual, but also harmful to many of the very teachers, administrators and students that it is intended to help, as well as wasteful of scarce financial and human resources, because it is based on false premises. These implicit premises include that: most schools know what changes to make to enable virtually all children to reach proficiency; the schools have the capacity to make those changes; and the Act’s sanctions will induce them to do so.

To the contrary, however, as this article will show, schools generally do not know how to substantially reach the goals and do not have the capacity to do what is necessary, nor will NCLB’s sanctions-based remedial scheme generate the needed improvements. By treating increasing test scores as the end in itself, the Act pressures schools to “drill and kill” students with test preparation, narrow the curriculum, and take other steps to artificially raise test scores. This needlessly and harmfully diverts schools’ attention away

⁺ As appears in the *University of the District of Columbia Law Review*, 9 UDC/DCSL L. REV. 1 (2007).

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¹ The No Child Left Behind Act of 2001, 20 U.S.C. § 6301 (2002).

from doing what needs to be done: making the difficult changes necessary to dramatically improve teaching and learning.

But, as President Bush recently wrote about NCLB, “It is not enough for us to hope that things will improve. We must . . . make the changes necessary to reach every child.”² Explaining what “changes [are] necessary” and why they are needed is what this article is about.

To galvanize the nation’s support to “make the changes necessary,” the federal government needs to lead the way by identifying what changes are essential and by requiring states to develop plans to carry them out. This would give our federal, state and local governments the unprecedented opportunity to work together to transform our Industrial Age two-track public school system into the uniformly high level one-track system needed to equip Americans for the new Information Age. Fundamentally, NCLB needs to be amended to “shift its emphasis” from applying sanctions “for failing to raise test scores to holding states and localities accountable for making the systemic changes that improve student achievement.”³ By contrast, retaining NCLB’s existing sanctions approach would needlessly engender ever-increasing numbers of “failing” schools and seriously risk undermining the country’s support for public education.

Part I will discuss the problems that NCLB intended to solve, its academic goals, assessments, and the current gaps in meeting the goals. Part II will discuss how the existing NCLB seeks to solve the problems, especially the nature and structure of its sanctions-based remedial approach. Part III will explain how key premises of this remedial approach are flawed and how the approach itself is often injurious and wholly inadequate to address the underlying causes of the problems. Part IV will explain how to amend NCLB to effectively address the underlying need: converting from a two-tier to a one-tier system.

I. NCLB’S GOALS, ASSESSMENTS AND GAPS IN ACHIEVEMENT

The No Child Left Behind Act of 2001 is the popular name given to Congress’s January 8, 2002, reauthorization of the Elementary and Secondary Education Act of 1965 (“ESEA”), as amended. Since NCLB’s source of leverage over states and localities is the funding it provides them under ESEA, most of its requirements apply only to states that receive Title I grants under ESEA, their local public education agencies and public elementary and secondary schools.⁴ In addition, certain Title I eligible children enrolled in private schools are entitled to educational services and other benefits.⁵

A. Goals and Assessments

NCLB’s dominant goals are “to ensure that all children . . . reach, at a minimum, proficiency on challenging State academic achievement standards and state academic

² George W. Bush, *The Essential Work of Democracy*, PHI DELTA KAPPAN, Oct. 2004, at 121.

³ *Joint Organizational Statement on No Child Left Behind Act*, Oct. 21, 2004 (now endorsed by one hundred national education, civil rights, disability, religious and civic organizations), available at <http://www.citizenseffectiveschools.org>.

⁴ See 20 U.S.C. § 6311(a)(b)(1)(c)(2)(A)(B), (3)(h)(1); 20 U.S.C. § 6312(a)(b)(c); 20 U.S.C. § 6311(h)(2); and 20 U.S.C. § 7801(26).

⁵ See 20 U.S.C. § 6320.

assessments,”⁶ and to “clos[e] the achievement gap between high – and low – performing children, especially the achievement gaps between minority and non-minority students, and between disadvantaged children and their more advantaged peers[.]”⁷ For convenience, these two goals are referred to here as “academic proficiency” and “achievement gap,” respectively. The “state academic assessments” must be “consistent with relevant nationally recognized professional and technical standards[.]”⁸ “measure the proficiency of students in, at a minimum, mathematics and reading or language arts,”⁹ and “involve multiple up-to-date measures of student academic achievement, including measures that assess higher-order thinking skills and understanding [.]”¹⁰ The “relevant, nationally recognized professional . . . standards” intended to be the yardstick for academic “proficiency” are those contained in the National Assessment of Educational Progress (“NAEP”), also known as “The Nation’s Report Card.”¹¹ NAEP “proficiency” in reading and math roughly corresponds to grade level knowledge and skills in those subjects.¹²

Thus, to be “proficient” in reading, a fourth grade student needs to show an “overall understanding of [a fourth grade] text” and be able to “mak[e] inferences” from the text while connecting it to his/her “own experiences.”¹³ An eighth grade student needs to be able to do the same for eighth grade level texts, draw connections to “other reading experiences,” and “be able to identify some of the devices authors use in composing text.”¹⁴ A twelfth grade student needs to be able to apply the same skills to twelfth grade texts and “be able to analyze the author’s use of literary devices.”¹⁵

To be “proficient” in mathematics, a fourth grade student needs to be able, *inter alia*, “to use whole numbers to estimate, compute, and determine whether results are reasonable[,] . . . have a conceptual understanding of fractions and decimals[,] [and] be able to solve real world problems”¹⁶ An eighth grade student needs “to have a thorough understanding of Basic level arithmetic operations” sufficient to solve practical

⁶ § 6301 (Supp. I 2001).

⁷ § 6301(3).

⁸ § 6311(b)(3)(C)(iii).

⁹ § 6311(b)(3)(C)(v)(I).

¹⁰ § 6311(b)(3)(C)(vi).

¹¹ See 20 U.S.C. § 6311(c)(2) and 20 U.S.C. 6312(b)(1)(F)(Supp. I 2001)(by implication).

¹² See Bush, *supra* note 2, at 114. “Proficient achievement level represents solid academic performance for each grade assessed. Students reaching this level have demonstrated competency over challenging subject matter, including subject-matter knowledge, application of such knowledge to real-world situations, and analytical skills appropriate to the subject matter.” P. DONAHUE, M. DAANE, & W. GRIGG, NAT’L CTR. FOR EDUC. STAT., U.S. DEP’T OF EDUC., THE NATION’S REPORT CARD: READING HIGHLIGHTS 2003 2 (2004), <http://nces.ed.gov/pubsearch/pubsinfo.asp?pubid=2004452>; J. BRASWELL, M. DAANE, & W. GRIGG, NAT’L CTR. FOR EDUC. STAT., DEP’T OF EDUC., THE NATION’S REPORT CARD: MATHEMATICS HIGHLIGHTS 2003 2 (2004), <http://nces.ed.gov/pubsearch/pubsinfo.asp?pubid=2004451>.

¹³ PATRICIA L. DONAHUE, KRISTIN E. VOELKL, JAY R. CAMPBELL, & JOHN MAZZEO, NAT’L CTR. FOR EDUC. STAT., U.S. DEP’T OF EDUC., NAEP 1998 READING REPORT CARD FOR THE NATION AND THE STATES: FINDINGS FROM THE NATIONAL ASSESSMENT OF EDUCATIONAL PROGRESS 19 (1999), <http://nces.ed.gov/nationsreportcard/pubs/main1998/1999500.asp>.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ J.S. BRASWELL, A.D. LUTKUS, W.S. GRIGG, S.L. SANTAPAU, B. TAY-LIM, & M. JOHNSON, NAT’L CTR. FOR EDUC. STAT, U.S. DEP’T OF EDUC., THE NATION’S REPORT CARD: MATHEMATICS 2000 10 (2006), <http://nces.ed.gov/pubsearch/pubsinfo.asp?pubid=2001517>.

problems, be able to “make inferences from data and graphs[,]” “accurately use the tools of technology” and perform calculations in “statistics and probability.”¹⁷ A twelfth grade student needs to understand “algebraic, statistical, and geometric and spatial reasoning” and “be able to perform algebraic operations involving polynomials.”¹⁸

NCLB’s adoption of “academic proficiency” for all students as America’s principal public education goal is vital to our nation’s interest. To understand, and successfully adjust to, the ever-increasing rate of change and complexity of the new Information Age, Americans will not only need to have traditional “basic skills,” but substantial analytical and problem-solving skills as well. Moreover, meeting society’s critical demands for a well-informed, participating electorate and a highly skilled, adaptable and innovative workforce is contingent on its members having the same intellectual “proficiency.”¹⁹

Indeed, if high school graduates were “proficient” at the twelfth grade level, they would not only have the skills to go to college or other post-secondary schooling without remediation, they would also have the academic skills to qualify for many middle class paying jobs without having to go to college.²⁰ The president of a Florida surveying company recently said, “I would add 15 people tomorrow if I could find them We need people with some knowledge of trigonometry and geometry. It’s really just arithmetic. We’re turning down work because we don’t have the people.”²¹ Today, a large percentage of high school graduates lack this “proficiency.” Consequently, many employers have begun demanding a college degree from applicants – not because the jobs require college-level skills, but as a proxy for high school level skills.²² As measured by the most reliable assessment, NAEP, the gap between NCLB’s goal of “academic proficiency” for all public school students and reality is huge.

¹⁷ *Id.* at 11.

¹⁸ *Id.* at 12.

¹⁹ See, e.g., Nell Henderson, *Surviving the Shift: Workers Had to Adapt as Global Trade, Technology Transform the Nation’s Workforce*, WASH. POST, Feb. 3, 2005, at E4:

[E]mployers say the new manufacturing jobs require workers with more skills than those who used to perform repetitive tasks on the old textile and power tool assembly lines. Those jobs are gone forever. . . . SFA [Inc., a Largo, Maryland defense contractor] for example, employs highly skilled carpenters, welders, plumbers and electricians in its Easton plant, including workers who can work in teams and shift easily between product lines, said Jon West, the plant’s human resource manager “A lot of the Black & Decker folks didn’t have those skills.”

Fundamentally, what all students must be taught is “how to learn. Being really good at ‘learning how to learn,’ as President Bill Brody of Johns Hopkins put it, ‘will be an enormous asset in an era of rapid change and innovation’” Thomas L. Friedman, *Tuning Into Jon Stewart, and Britney Schmidt*, N.Y. TIMES, May 6, 2005, at 27.

²⁰ The National Governors Association recently found: that “more than 4 in 10 public high school students who manage to graduate are unprepared for either college courses or anything beyond an entry-level job, . . . requiring billions of dollars in remedial training to endow them with the skills ‘they should have attained in high school,’” Greg Winter, *Governors Seek Rise in High School Standards*, N.Y. TIMES, Feb. 23, 2005, at A13.

²¹ Nell Henderson, *Skilled Labor in High Demand; Employers Lament Declining Ranks of Capable Workers*, WASH. POST, Aug. 25, 2004, at E1.

²² RICHARD J. MURNANE & FRANK LEVY, *TEACHING THE NEW BASIC SKILLS 8-9* (1996); see also Henderson, *supra* note 21, at E2.

B. *The Gaps in Achievement*

Approximately 70% of public school students are below “Proficient” in reading²³ and 70% below “proficient” in math,²⁴ as measured by NAEP. Disaggregating the data by race and ethnicity, the figures are even more striking. Whereas about 41% of white students are “proficient” in reading²⁵ and approximately 40% are “proficient” in math,²⁶ only about 12% of minority students (9% of blacks and 14% of Hispanics) are “proficient” in math²⁷ while approximately 15% of minorities (14% of blacks and 17% of Hispanics) are “proficient” in reading.²⁸ Overall, approximately 88% of black students and 84% of Hispanic students are below “proficiency.”

Even more seriously, approximately 48% of minority students are “Below Basic” in reading²⁹ and 49% in math,³⁰ i.e., they lack “partial mastery” of the necessary skills normative to their grade level.³¹ Thus, for example, minority fourth graders testing “Below Basic” cannot do simple arithmetic computations with whole numbers.³² Similarly, eighth graders cannot understand the literal meaning of eighth grade texts or interpret them.³³ Of poor children, approximately 49% (eight million)³⁴ are “Below Basic” at their grade level in reading,³⁵ with about 45% “Below Basic” in math.³⁶

In twelfth grade, the gap is even more pronounced: only approximately 3% of blacks and 4% of Hispanics are “proficient” in math.³⁷ In reading, the comparable figure shows approximately 16% of black students and 22% of Hispanics are “proficient.”³⁸ However, even these low math and reading “proficiency” percentages for twelfth graders are overstated because 27% of Hispanic students and 11% of black students drop out of

²³ READING HIGHLIGHTS 2003, *supra* note 12, at 7-8

²⁴ MATHEMATICS HIGHLIGHTS 2003, *supra* note 12, at 7-8.

²⁵ L. JERRY & A. LUTKUS, NAT’L CTR. EDUC. STAT., DEP’T OF EDUC., READING HIGHLIGHTS 2002 14 (2003) (all schools, grades four, eight and twelve), <http://nces.ed.gov/pubsearch/pubsinfo.asp?pubid=2003524>.

²⁶ MATHEMATICS HIGHLIGHTS 2003, *supra* note 12, at 14.

²⁷ *Id.*

²⁸ READING HIGHLIGHTS 2002, *supra* note 25, at 14.

²⁹ *Id.*

³⁰ MATHEMATICS HIGHLIGHTS 2003, *supra* note 12, at 14.

³¹ READING HIGHLIGHTS 2003, *supra* note 12, at 2.

³² MATHEMATICS 2000, *supra* note 16, at 10.

³³ NAEP 1998 READING REPORT CARD FOR THE NATION AND THE STATES: FINDINGS FROM THE NATIONAL ASSESSMENT OF EDUCATIONAL PROGRESS, *supra* note 13.

³⁴ Eligibility for free or reduced price school lunches is widely accepted as a proxy for poverty. In 2003, an average of 16.4 million children received such lunches, DEP’T OF AGRIC., FOOD & NUTRITION SVC., Table: National School Lunch Program: Participation and Lunches Served, <http://www.fns.usda.gov/pd/slsummar.htm>. Forty-nine percent of 16.4 million is 8.036 million.

³⁵ NAT’L CTR. EDUC. STAT., DEP’T OF EDUC., NAEP 2003 *Reading Assessment* <http://nces.ed.gov/nationsreportcard/reading/results2003/natachieve-lunch-gr4.asp> and <http://nces.ed.gov/nationsreportcard/reading/results2003/natachieve-lunch-gr8.asp>.

³⁶ MATHEMATICS HIGHLIGHTS 2003, *supra* note 12, at 15.

³⁷ MATHEMATICS 2000, *supra* note 16, at 64-65.

³⁸ READING HIGHLIGHTS 2002, *supra* note 25, at 14.

high school.³⁹ (Since most have dropped out before their twelfth grade year, except for the few who might re-enroll, they are necessarily excluded from the twelfth grade scores.⁴⁰)

High school dropouts typically have very poor academic achievement,⁴¹ indeed, their loss of hope caused by academic failure is a major reason that they drop out.⁴² If their predominantly low scores were added to those of the in-school students whose scores are already reported, the number of students “below proficiency” would increase substantially. Consequently, since the number of “proficient” students would remain about the same, they would constitute a smaller percentage of the total. Accordingly, even the figures showing that 3-4% of all twelfth grade Black and Hispanic students are “proficient” in math and 16-20% are “proficient” in reading, overstates the extent of “proficiency” among children of twelfth grade age.

Even if one focuses only on the “achievement gap” between poor and minority students and their non-poor, non-minority peers, the gap is quite large. While only about 13% of minority students (12% in math and 15% in reading) are “proficient” in math and reading, about 40% of white students are at that same level.⁴³ Additionally, while only about 14%-15% of poor children are “proficient” in math⁴⁴ and reading,⁴⁵ about 41% of non-poor students are at that level (41% in math⁴⁶ and in reading).⁴⁷ Even if this “achievement gap” were closed by raising the same proportion of poor and minority students to “proficiency” as their more advantaged peers, that would still leave about 60% of all students, including whites, below “proficiency.”

II. THE STRUCTURE OF THE NCLB

NCLB is a massive and complex law regulating scores of federal education grant programs. Rather than attempt to summarize the entire Act, I will describe here what I believe are the major provisions it relies on to induce states and localities to accomplish

³⁹ PHILIP KAUFMAN, MARTHA NAOMI ALT, & CHRISTOPHER D. CHAPMAN, NAT’L CTR. FOR EDUC. STAT., DEP’T OF EDUC., DROPOUT RATES IN THE UNITED STATES:2001, http://nces.ed.gov/pubs2005/dropout2001/sec_3.asp.

⁴⁰ Indeed, from 1993-1999, about 60% of all high school dropouts had dropped out by the end of tenth grade. THOMAS SNYDER & CHARLENE HOFFMAN, NAT’L CTR. FOR EDUC. STAT., DEP’T OF EDUC., DIGEST OF EDUCATION STATISTICS 2000 127, Table 107, <http://nces.ed.gov/pubsearch/pubsinfo.asp?pubid=2001034>.

⁴¹ It is disproportionately poor and minority students who drop out: low income children at 6 times the rate as high income, PHILIP KAUFMAN, MARTHA N. ALT, & CHRISTOPHER CHAPMAN, NAT’L CTR. FOR EDUC. STAT., DOE, *DROPOUT RATES IN THE UNITED STATES: 2001*(2001), http://nces.ed.gov/pubs2005/dropout2001/sec_2.asp, with Hispanics more than four times, and blacks one and a half times, the rate of whites. http://nces.ed.gov/pubs2005/dropout2001/sec_3.asp. These are the very groups of children who have the lowest achievement.

⁴² Rick Stiggins, *New Assessment Beliefs for a New School Mission*, PHI DELTA KAPPA, Sept. 2004, at 24.

⁴³ See *supra* notes 25-28 and associated text.

⁴⁴ MATHEMATICS HIGHLIGHTS 2003, see *supra* note 12, at 15.

⁴⁵ See READING HIGHLIGHTS 2003, *Reading Assessment*, *supra* note 12. Cf. <http://nces.ed.gov/nationsreportcard/reading/results2003/natachieve-lunch-gr4.asp>” with <http://nces.ed.gov/nationsreportcard/reading/results2003/natachieve-lunch-gr8.asp>.

⁴⁶ See MATHEMATICS HIGHLIGHTS 2003, *supra* note 12, at 15.

⁴⁷ See READING HIGHLIGHTS 2003, *Reading Assessment*, *supra* note 12, at 26.

its goals. These provisions were heavily modeled on the states' then decade-old "standards, assessments and accountability" movement. (In fact, NCLB may be thought of as the "federalization" of that movement.)

A. *Academic Standards*

NCLB begins by imposing certain requirements on each state participating in the federal Title I grant program, a program intended to improve education for poor children.⁴⁸ Each such state must: (a) adopt "challenging academic content standards" in math, reading, language arts and science for what students will be taught; (b) adopt "challenging student academic achievement standards" – i.e., "proficient" and "advanced" – to describe levels of mastery of the requisite content⁴⁹; and apply both "content and achievement" standards to all its public school children,⁵⁰ provided, that any state may revise any such "standard" at any time.⁵¹

B. *Assessments*

As of 2005-2006, every such state must conduct its own annual "assessments" in grades three through eight,⁵² and in at least one of the grades ten through twelve,⁵³ in "mathematics, and reading or language arts,"⁵⁴ and, beginning in 2007-2008, also in "science,"⁵⁵ to measure the extent to which the students in each state, school district and public school have met the state's "academic achievement standards."⁵⁶ The "assessments" shall provide for all students to participate,⁵⁷ and shall allow the "results to be disaggregated within each State, local educational agency"⁵⁸ and school by student subgroups, including race and ethnicity, poverty, disability and limited English proficiency.⁵⁹

C. *"Adequate Yearly Progress"*

By 2013-2014, twelve years after enactment, each state will be responsible for bringing its public school students to "proficiency" level on its "achievement standard" as measured by its "assessments."⁶⁰ To induce states to meet this ultimate "timeline," each

⁴⁸ 20 U.S.C. § 6311(a)(1).

⁴⁹ § 6311(a)(b)(1).

⁵⁰ § 6311(a)(b)(1)(A)-(D).

⁵¹ § 6311(b)(1)(F).

⁵² § 6311(b)(3)(A)(C)(vii).

⁵³ § 6311 (b)(3)(C)(v)(I)(cc).

⁵⁴ § 6311(b)(3)(C)(vii).

⁵⁵ § 6311(b)(3)(A)-(C)(v)(II).

⁵⁶ § 6311(b)(3)(A).

⁵⁷ § 6311(b)(3)(C)(ix)(I).

⁵⁸ "Local education agency" is the statutory phrase used to describe the local government entity that is legally responsible for controlling a locality's public schools. See definition at 20 U.S.C. § 7801(26) (Supp. I 2001). It is typically a local board of education ("school board") governing a local "school district," but is sometimes a mayor, county, or other governmental body.

⁵⁹ 20 U.S.C. § 6311(b)(3)(C)(xiii) (Supp. I 2001).

⁶⁰ § 6311(b)(2)(F).

must hold its own schools and districts “accountable” by adopting a system of “adequate yearly progress,”⁶¹ i.e., a scheme for continuous increases in the percentage of students who are “proficient.”

While each state is free to design its own AYP scheme, the scheme must provide, *inter alia*, that: (a) the minimum percentage of students required to be “proficient” at any time shall be the same for all schools and all student sub-groups statewide;⁶² (b) the minimum percentage of “proficient” students shall increase continuously at least every two to three years;⁶³ (c) the minimum percentage must reach 100% by 2013-2014;⁶⁴ (d) for any school to satisfy AYP in any year, at least the minimum percentage of students must be at “proficiency” in every sub-group separately, i.e., poor, racial/ethnic minorities, the disabled and students with limited English language;⁶⁵ and, (e) to satisfy AYP in any year, at least 95% of the students in each sub-group must have taken the assessment.⁶⁶

D. Sanctions

1. Schools in “need of improvement”/transfers

Although NCLB’s overall concepts of “standards,” “assessments,” and “accountability” through adoption of AYP “objectives” apply to all public schools, its elaborate sanctions-based system for enforcement applies only to schools receiving Title I funding.⁶⁷ If Title I funded schools fail to make “adequate yearly progress” for “2 consecutive years,” they are deemed to be in need of “school improvement.”⁶⁸ The districts responsible for them must offer all their students the option to transfer to other schools “not . . . identified for school improvement,” giving “priority to the lowest achieving children from low-income families.”⁶⁹

2. “Individual School Plans”

In addition, each school in need of “improvement” must prepare a 2-year individual school improvement plan that includes: “strategies based on scientifically based research that will strengthen the core academic subjects in the school and address the specific academic issues that caused the school to be identified for school

⁶¹ § 6311(b)(2)(A) (Supp. I 2001).

⁶² § 6311(b)(2)(G)(ii)(iii) (Supp. I 2001).

⁶³ § 6311(b)(2)(G)(v)(H) (Supp. I 2001).

⁶⁴ § 6311(b)(2)(G)(iv) (Supp. I 2001).

⁶⁵ 20 U.S.C. § 6311(b)(2)(I)(i) (Supp. I 2001). This does not apply where there are too few students in a category “to yield statistically reliable information,” 20 U.S.C. § 6311(b)(2)(C)(v) (Supp. I 2001), or where the percentage of students that failed to meet AYP in the sub-group decreased by at least 10% from the prior year and the sub-group improved in its graduation rate or other “academic indicator.” 20 U.S.C. §§ 6311(b)(2)(I)(i) with (b)(2)(C)(vi)(vii) (Supp. I 2001).

⁶⁶ 20 U.S.C. § 6311(b)(2)(I)(ii) (Supp. I 2001).

⁶⁷ 20 U.S.C. § 6311(b)(2)(A)(2) (Supp. I 2001), 20 U.S.C. § 6316(a)(1)(A)(B)(b)(1)(A) (Supp. I 2001). In NCLB, Congress found that Title I funded schools constituted “[f]ifty-eight percent of all schools . . . including many suburban schools with predominantly well-off students.” 20 U.S.C. § 6336(a)(3) (Supp. I 2001).

⁶⁸ § 6316(b)(1)(A) (Supp. I 2001).

⁶⁹ § 6316(b)(1)(E), (Supp. I 2001). Transfers are not required if “prohibited by State law.” *Id.*

improvement;” allocation of 10% of basic Title I funds to professional development; new goals for a minimum percentage of each sub-group to reach “proficiency;” division of district and state agency responsibilities for technical assistance; “strategies to promote effective parental involvement;” longer school year, summer, before and after school programs, and teacher mentoring.⁷⁰

3. Tutoring and Local “Corrective Action”

For schools that fail to make AYP three or more years in a row, districts must also offer tutoring to low income children,⁷¹ as an alternative to transfers.⁷² For schools that fail to make AYP for four consecutive years, the district must also “identify the school for corrective action and take at least one of the following corrective actions”: replace the responsible school staff; “institute . . . a new curriculum, including providing appropriate professional development for all relevant staff, that is based on scientifically based research and offers substantial promise of improving educational achievement for low-achieving students and enabling the school to make adequate yearly progress”; “[s]ignificantly decrease management authority at the school level”; “[a]ppoint an outside expert to advise the school on its school plan;” “[e]xtend the school year or school day;” or “[r]estructure the internal organization of the school.”⁷³

4. “Restructuring”

If a Title I school fails to make AYP for five consecutive years, no later than the beginning of the seventh year, the district must provide for an “alternative governance arrangement” by: converting it to a “public charter school;” replacing most or all of the staff; contracting its management to a “private management company, with a demonstrated record of effectiveness”; providing for takeover by the state department of education; or by “[a]ny other major restructuring of the school’s governance arrangement that makes fundamental reforms, such as significant changes in the school’s staffing and governance, to improve student achievement . . . and that has substantial promise of enabling the school to make adequate yearly progress[.]”⁷⁴

E. *State Departments of Education*

1. Technical Assistance

Ultimately, the state departments of education are responsible for assisting districts and schools in complying with the Act and ensuring that they do so. Each “State educational agency” must provide technical assistance and support to help districts carry

⁷⁰ § 6316(b)(3)(A) (Supp. I 2001).

⁷¹ § 6316(b)(5)(B)(7)(C)(iii)(e) (Supp. I 2001).

⁷² § 6316(b)(6)(F) (Supp. I 2001).

⁷³ § 6316(b)(7)(A)(B)(C) (Supp. I 2001).

⁷⁴ § 6316(b)(8).

out the scheme of sanctions for schools “in need of improvement,”⁷⁵ including “school support teams” of experts.⁷⁶

2. “Corrective Action”

Moreover, the State must take “at least one” “corrective action” against any district “that fails to make adequate yearly progress as defined by the State” for four consecutive years.⁷⁷ “Corrective actions” include reducing districts’ administrative funding, replacing their curriculum, replacing staff, putting the entire operation of the district into state receivership and abolishing the school board.⁷⁸

F. “Highly Qualified Teachers”

The NCLB Act’s two other major implementation strategies are requirements for “highly qualified teachers” and public reporting. Every state must have “a plan to ensure that all teachers of core academic subjects⁷⁹ are highly qualified by not later than the end of the 2005-2006 school year.”⁸⁰ To be “highly qualified,” a teacher in a regular public school must either have “obtained full State certification as a teacher,” through traditional or “alternative routes,” or have “passed the State teacher licensing examination,” as well as hold “a license to teach in such State” and “at least a bachelor’s degree.”⁸¹ Teachers in public charter schools need only “meet the requirements set forth in the State’s public charter school law[.]”⁸²

In addition, to be deemed “highly qualified,” existing elementary school teachers must have passed a state test or evaluation showing that they have subject matter knowledge and teaching skills in all the subjects they teach, or, for middle and secondary school teachers, have an undergraduate academic major or similar university coursework in the subject.⁸³ New elementary teachers must pass a test; new middle and secondary school teachers may either pass a test or satisfy the requirement with an undergraduate academic major or equivalent in any academic subject they teach.⁸⁴ All the “test” requirements may be met by “passing a State-required certification or licensing test.”⁸⁵

⁷⁵ 20 U.S.C. § 6311(c)(3) and 20 U.S.C. § 6316(b)(14)(A) (Supp. I 2001).

⁷⁶ § 6317(a) (Supp. I 2001).

⁷⁷ § 6316(c)(10)(B)(ii) (Supp. I 2001) with 20 U.S.C. § 6316(c)(3) (Supp. I 2001). Upon request by such a district, it must also provide technical assistance to help develop parental involvement and professional development programs. § 6316(c)(9).

⁷⁸ § 6316(c)(10)(C) (Supp. I 2001).

⁷⁹ “Core academic subjects” means English, reading or language arts, mathematics, science, foreign languages, civics and government, economics, arts, history, and geography.” 20 U.S.C. § 7801(11) (Supp. I 2001).

⁸⁰ 20 U.S.C. § 6319(a)(2) (Supp. I 2001).

⁸¹ § 7801(23)(A)(B)(i)(I)(C) (Supp. I 2001).

⁸² *Id.*

⁸³ § 7801(23)(C) (Supp. I 2001).

⁸⁴ § 7801(23)(B)(Supp. I 2001).

⁸⁵ § 7801(23)(B)(i)(II)(ii)(I)(C)(i).

G. Reporting

The Act's reporting requirements focus heavily on how its state "assessment," "adequate yearly progress" and "highly qualified teacher" strategies are working. Each state must annually submit to the public a "State report card" that includes, for example: data on how the statewide percentage of each student subgroup at "proficiency" on the "assessment" compares to the state's minimum AYP objective for that year; "the number and names of each school identified for school improvement" in each district";⁸⁶ and the "percentage of classes in the State not taught by highly qualified teachers[.]"⁸⁷

Every "local educational agency" must annually prepare and widely disseminate to the public and the media a local report card that contains the same information for the district and each of its schools that the state is required to include in its state report card for the state as a whole.⁸⁸ Most specifically, the district must report as follows: how its students' assessment scores compare to those statewide, how many schools are "in need of improvement", how long they have been "so identified," and how each such school's assessments compared to the district-wide and statewide scores.⁸⁹

III. WHY NCLB'S REMEDIAL APPROACH NEEDS TO BE RESTRUCTURED TO ACCOMPLISH THE ACT'S GOALS:

A. Premise One

1. A Sanctions-Based Strategy Induces Dramatic School Improvements

The NCLB principally relies on three strategies to induce districts and states to make the educational changes needed to vastly improve student learning. First, test scores of each school's students must be published and compared to each other, so schools with low test scores may be singled out. Second, any Title I school that fails to make AYP two years in a row must be labeled as "needing improvement." Third, failing schools must be subjected to an escalating sequence of improvement plans, tutoring, transfers and other sanctions, such as staff replacement, conversion to charter schools, and state takeovers, for seven or more years.⁹⁰ The Act continues to subject such schools to sanctions unless they meet AYP for two consecutive years.⁹¹

Implicit in the Act's sanctions-based remedial approach is the premise that it would induce grantees to make the necessary educational changes to avoid being

⁸⁶ Every state also must annually report such matters to the U.S. Secretary of Education. In addition, it must report to the Secretary "the reason why each school was so identified and the measures taken to address the achievement problems of such schools," as well as "the number of students and schools that participated" in the Act's transfers and tutoring options. 20 U.S.C. § 6311(h)(4) (Supp. I 2001). The Secretary must annually report to Congress "national and State-level data" on the same topics. 20 U.S.C. § 6311(h)(5).

⁸⁷ 20 U.S.C. § 6311(h)(1).

⁸⁸ § 6311(h)(2)(A)(B).

⁸⁹ § 6311(h)(2)(B)(i)(ii).

⁹⁰ The Act also requires states to certify by 2006 that each teacher of a core academic subject is "highly qualified," although it leaves vast discretion to each state to determine how demanding the tests -- or other evaluative requirements that teachers must pass to be deemed "highly qualified" -- will be.

⁹¹ 20 U.S.C. § 6316(b)(12) (Supp. I 2001).

subjected to embarrassment or sanctions. This premise was illustrated, for example, by the transfer requirement. Supporters thought that troubled schools would significantly improve themselves to avoid losing students and their corresponding per pupil funding to other schools.⁹²

2. The Reality

a. *Manipulations and Self-defeating Harms*

Generally, however, embarrassing schools by labeling them as failing and threatening them with additional sanctions has not induced them to significantly improve student learning. To the contrary, the primary responses to the threat of sanctions have not been major improvements in teaching and learning, but widespread manipulations of test standards, scores and schedules to produce artificial compliance with AYP and postpone sanctions as long as possible.⁹³ Moreover, many of the changes that NCLB has precipitated have themselves caused self-defeating harms.

i. Lowering academic standards. Instead of inducing the states to institute the necessary systemic changes, the Act has caused many of them to severely lower their achievement standards to avoid having to sanction so many schools for failing to make AYP. Michigan reduced the percentage of students needed to pass a test for a school to

⁹² “Some accountability advocates suggest that the threat of sanctions or the loss of students alone can be enough incentive for failing schools to improve their performance. In practice, however, such schools typically still require outside help to do it. For schools in the worst shape, which are often in chaos and have leaders who are weak and ineffective, stronger incentives to do the right thing won’t make much difference.” Marc S. Tucker & Thomas Toch, *The Secret to Making NCLB Work? More Bureaucrats*, PHI DELTA KAPPAN, Sept. 2004, at 31; Frederick M. Hess & Chester E. Finn, Jr., *Inflating the Life Rafts of NCLB: Making Public School Choice and Supplemental Services Work for Students in Troubled Schools*, PHI DELTA KAPPAN, Sept. 2004, at 36-38. Tutoring and transfers in particular have generally not produced school improvement.

⁹³ It is important to distinguish establishing high statewide standards, periodic testing, and accountability through public reporting of test results – the front end of NCLB – from relying on a sanctions-based remedy as the principal “improvement” method - at the back end. State standards, assessments and reporting, by themselves, can be a useful means of focusing the public’s attention on the need for improvements in student learning, especially among poor and minority students.

Their establishment may give some teachers a “rude awakening,” raise their expectations and encourage them to start collaborating to improve their teaching. See Dan Goldhaber & Jane Hannaway, *Accountability with a Kicker: Observations on the Florida A+ Plan*, PHI DELTA KAPPAN, Apr. 2004, at 601. It may help some superintendents and principals to hold themselves accountable for their academic mission. See COMMONWEALTH OF VIRGINIA JOINT LEGIS. COMM’N, REVIEW OF FACTORS AND PRACTICES ASSOCIATED WITH SCHOOL PERFORMANCE IN VIRGINIA, S. Doc. No. 8, IX-X (2004), jlarc.state.va.us/Reports/Rpt305.pdf. Even high-stakes testing itself may encourage some students who have already been relatively successful – who “believe the chances that they will succeed are high enough to justify taking the risk of trying” – to try harder. Stiggins, *supra* note 42, at 24. By contrast, high-stakes testing typically has a severely negative effect on “students whose academic record reveals a chronic history of failure”, intimidating and discouraging them from even trying. *Id.*

But a sanctions-based remedial approach - relying chiefly on increasing pressures on teachers and administrators - will not by itself, normally generate the systemic improvements needed. It will not cause widespread enhancement of teachers’ and administrators’ knowledge, skills and abilities, raise the level of the curriculum or increase the extent of family support. Public policy must address those changes directly.

satisfy AYP from 75% to 42%. Colorado deemed scores formerly “partially proficient” to be “proficient.” Texas reduced the minimum “passing” score for its new third grade reading test from 24 to 20 correct answers out of 36 questions. And twenty states have greatly reduced the portion of students needed to be brought to proficiency in the early years, offsetting that with supposed sharp increases later.⁹⁴

ii. Excluding weak students from tests and pushing them out of schools. At the local level, high stakes testing, including the NCLB, has induced multiple forms of manipulation to exclude low performing students from taking the tests. These students are forced to repeat a year of school so they will not be counted in the grade level at which key tests are administered.⁹⁵ Districts also push weak students to drop out of high school so their scores will not be counted.⁹⁶ And whole categories of students, such as special-education children, have been improperly excluded from the tests, so their scores will not count against AYP.⁹⁷

iii. Cheating on tests. In addition, NCLB has induced “a broad spate of cheating . . . by teachers and administrators. From Pittsburgh, Pennsylvania, and Milwaukee, Wisconsin, to Worcester, Massachusetts, and Spokane, Washington, hundreds of teachers, principals, and administrators have been accused of doing anything they can to boost their schools’ test scores. Transgressions include changing students’ answers on tests, handing out exams – and even answers – in advance, tutoring students with real tests [So] given the tremendous pressure No Child is putting on schools and teachers, test-rigging isn’t likely to stop soon.”⁹⁸

In short, the Act’s AYP/test-score-based enforcement system is an invitation to manipulation. It permits states to postpone major reforms and perpetuate the failing *status quo*, while minimizing their apparent non-compliance.⁹⁹

⁹⁴ CITIZENS FOR EFFECTIVE SCHOOLS, INC., OPEN LETTER TO PRESIDENT BUSH AND CONGRESS, TO ACCOMPLISH ‘NO CHILD LEFT BEHIND’ ACT GOAL OF ACADEMIC COMPETENCE FOR ALL STUDENTS, WE NEED TO MOVE BEYOND ‘ACCOUNTABILITY,’ (Oct. 15, 2003), <http://www.citizenseffectiveschools.org>; see Tucker & Toch, *supra* note 92, at 2 (“some states chose to . . . avoid the impact of the sanctions on large numbers of schools, lowered their standards – sometimes into the basement.”)

⁹⁵ Alfie Kohn, *Test Today, Privatize Tomorrow: Using Accountability to “Reform” Public Schools to Death*, PHI DELTA KAPPAN, Apr, 2004, at 575-576.

⁹⁶ Karen W. Arenson, *More Youths Opt for G.E.D., Skirting High-School Hurdle*, N.Y. TIMES, May 15, 2004, at A1, A12. Cf. Stiggins, *supra* note 42, at 23 (“[H]igh-stakes tests . . . are often accompanied by such negative outcomes as . . . increased dropout rates and reduced graduation rates.”).

⁹⁷ Brian Grow, *A Spate of Cheating – by Teachers: No Child Left Behind Links Test results to School Funding. Is That a Recipe for Deceit?* BUS. WK., July 5, 2004, at 95; Diana Jean Schemo, *Effort by Bush on Education Hits Obstacles*, N.Y. TIMES, Aug. 18, 2004, at A16.

⁹⁸ Brian Grow, *supra* note 97, at 94-95.

⁹⁹ Instead of leading states and localities to make major improvements in the classrooms and at home, the Act has pressured them to make whatever changes are needed to be in technical compliance. Thus, state and local changes have been heavily directed to implement annual testing programs in grades three to eight, aligning their assessments and curricula with their standards, and with each other, and reporting test results to the public.

The nature of their disputes with the federal government exemplifies where NCLB is causing states and localities to put their efforts. Concerns have centered on lack of sufficient funding for the mandated testing programs, excessively rigid AYP requirements, inconsistencies between federal and state criteria for which schools need “improvement” and similar technical matters. See e.g., Lynn Olson, *States*

b. Dumbed-down Curriculum, Lower-Level Thinking Skills and Student Boredom

Moreover, the changes that the NCLB high-stakes testing regime have usually induced in the classroom have not promoted, but undermined, the Act's goal of raising virtually all students to academic proficiency. Today, "40 percent to 60 percent of all students are chronically disengaged from schools."¹⁰⁰ Traditional schools serving predominantly low-income students are "marked by drill and boredom."¹⁰¹ Yet, fundamentally, if we are to approach NCLB's goal, it is only the students themselves who can do the learning. For that to happen, schools must get the students engaged in the learning process. Multi-disciplinary research "confirms that students learn best when they are actively involved in understanding and helping solve meaningful problems. This is true across all ability levels and grades."¹⁰²

To accomplish NCLB's goal of developing all students' intellectual skills to a proficient level would require having students memorize certain facts necessary for understanding and learn certain basic skills of decoding letters and how to carry out certain rote arithmetic computation processes. But proficiency demands more. Students must also be taught challenging subject matter in interesting ways that draw on their knowledge and experience¹⁰³ and effectively teach them analytical, problem-solving and other higher-order thinking skills.¹⁰⁴

To the contrary, what NCLB has widely generated is "teaching to the test," i.e., teaching a scripted,¹⁰⁵ narrowed and dumbed-down curriculum¹⁰⁶ concentrated on memorization of facts and the lower-level thinking skills needed to pass the standardized tests.¹⁰⁷ Nor has NCLB encouraged more highly educated, knowledgeable and creative

Revive Efforts to Coax NCLB Changes: Some Legislators Seek Waivers Under Law, EDUC. WK., Feb. 2, 2005, at 1, 29.

Instead of inducing the states and localities to deal with the critical issues – dramatically improving human resources in education – NCLB pressures them to focus on measuring and reporting test scores and punishing perceived failure. That, too, has precipitated the same kinds of superficial changes in mechanics. Notwithstanding more than a decade of states' standards-based reform, many Title I schools continue to fail millions of poor and minority children because they do not, and cannot, address the underlying systemic problems, and the standards movement has failed to equip them to do so. *See generally* <http://www.achieve.org>.

¹⁰⁰ Milbrey McLaughlin & Martin Blank, *Creating a Culture of Attachment: A Community-as-Text Approach to Learning*, EDUC. WK., Nov. 10, 2004, at 34.

¹⁰¹ John Merrow, *Meeting Superman*, PHI DELTA KAPPAN, Feb. 2004, at 460.

¹⁰² *Id.*

¹⁰³ *See id.*

¹⁰⁴ Nick Rabkin & Robin Redmond, *The Art of Education Success*, WASH. POST, Jan. 8, 2005, at A19.

¹⁰⁵ Bobby Ann Starnes, *Textbooks, School Reform And the Silver Lining*, PHI DELTA KAPPAN, Oct. 2004, at 171; Alfie Kohn, *supra* note 95, at 575.

¹⁰⁶ Tucker & Toch, *supra* note 92, at 29. Most "NCLB-endorsed programs rely on scripts, direct teaching, lectures, and paper-and-pencil work. Sit-and-listen and sit-and-memorize are the most commonly used teaching strategies. Content is taught in rigid sequence. . . . Rich language experiences are minimal, if even possible. The short answer is what counts. Thinking, imagination, and creativity are very low priorities, if they are priorities at all." Bobby Ann Starnes, *Same Story, Different Century*, PHI DELTA KAPPAN, (Dec. 2003) at 331.

¹⁰⁷ Larry Myatt & Peggy Kemp, *Taking Stock: A Decade of Education Reform in Massachusetts*, PHI DELTA KAPPAN, Oct. 2004, at 141-142; David Sadker & Karen Zittleman, *Test Anxiety: Are Students*

individuals to come into, or remain in, public school teaching. Instead, its elevation of test score drills over deeper student understanding is driving competent, creative teachers out of the public schools.¹⁰⁸

c. Standards-based Reform: Little Improvement in Student Learning

i. Nationally. Moreover, the “standards” based reform movement (of which NCLB is a part) has spent more than a decade of intensive efforts nationwide relying on the high-stakes testing approach as the vehicle for dramatically improving student achievement. Nevertheless, compared to the need, the results have been very limited. From 1992–2003, the nationwide percentage of public school students deemed “proficient” in reading – the most central academic skill – has barely increased. It has gone from about 27% to 30%.¹⁰⁹ In the same time period, the percentage in math has gone from about 18% to 29%.¹¹⁰

ii. “Leading States”: Texas, North Carolina, Kentucky. Even the states touted as the greatest successes of the “standards” movement have made only limited progress in math and very little in reading, even regressing in one instance. In Texas -- the flagship for NCLB -- between 1992-2003 the percentage of public school students at “Proficiency” level in math only increased from about 16% to 29%,¹¹¹ and from about 24% to 27% in reading.¹¹² (In Texas, after growing slightly from 1992 to 1998, the portion of students “proficient” in reading actually fell between the years 1998 and 2003.¹¹³) Two states recently cited as leading examples of success that used an approach similar to NCLB are North Carolina and Kentucky.¹¹⁴ In this same eleven-year period, in North Carolina the percent “proficient” went from about 12% to 37% in math,¹¹⁵ and from about 25% to 31% in reading.¹¹⁶ Kentucky increased from about 13% to 23% “proficient” in math,¹¹⁷ and from about 23% to 33% “proficient” in reading.¹¹⁸ Thus, even among the most “successful” states, the “standards” movement has brought only about one-tenth of the student body from below “proficiency” to “proficiency” (e.g., in Kentucky, from 13% to 23% and 23% to 33%).

In short, over more than ten years of intensive efforts, the “standards, assessment and accountability” reform method has only raised about an additional 3% of the students to “proficiency” in reading and 10% in math nationwide. More than 85% of poor students

Failing Tests or Are Tests Failing Students? PHI DELTA KAPPAN, June 2004, at 741-42; cf. Laura Hamilton & Brian Stecher, *Responding Effectively to Test-Based Accountability*, PHI DELTA KAPPAN, Apr. 2004, at 582 (similar consequences of past high-stakes testing).

¹⁰⁸ Sadker & Zittleman, *supra* note 107, at 743.

¹⁰⁹ READING HIGHLIGHTS 2003, *supra* note 12, at 9-10.

¹¹⁰ MATH HIGHLIGHTS 2003, *supra* note 12, at 9-10.

¹¹¹ MATH HIGHLIGHTS 2003, *supra* note 12, at 9.

¹¹² READING HIGHLIGHTS 2003, *supra* note 12, at 9-10.

¹¹³ *Id.* at 9-10.

¹¹⁴ Tucker & Toch, *supra* note 92, at 31, 33.

¹¹⁵ MATH HIGHLIGHTS 2003, *supra* note 12, at 9-10.

¹¹⁶ READING HIGHLIGHTS 2003, 9-10.

¹¹⁷ See MATH HIGHLIGHTS 2003, *supra* note 12, at 135.

¹¹⁸ See READING HIGHLIGHTS 2003, *supra* note 12, at 136.

and 85% of minority students are still below “proficiency,”¹¹⁹ as are about 70% of all public school students.¹²⁰

iii. At the same rate, it would take 85 to 280 years to attain NCLB’s goals. Even if NCLB could sustain the same improvement rates of 3% and 10% per decade in the future, it would take about 280 more years to raise the remaining 85% of poor and minority students to “proficiency” in reading and eighty-five more years to do so in math. Moreover, it seems unlikely that the high-stakes testing, sanctions-based reform approach could sustain even those rates of improvement over the long term because it has not produced fundamental, widespread improvements in the level and quality of teaching in the classroom or support from home and the community. Contrary to NCLB’s premise, this approach generally has *not* and does *not* induce states and localities to make the critical structural changes needed to greatly improve learning for the majority of students.

B. Premise Two

1. Each Failing School’s Deficiencies Are Predominantly Unique to It and Within Its Capacity to Fix through Individual School Plans

The Act’s remedial approach concentrates on identifying those individual schools “in need of improvement” and then developing individual school improvement plans, “corrective action” and “restructuring” to rectify the particular problems causing low achievement at each such school. Implicit in this approach are the premises that the dominant reasons for any failing Title I school’s low student achievement are peculiar to that school, that each such school currently has the capacity, with or without district assistance, to overcome its deficiencies, and that it would, therefore, be most efficient and effective to rectify the defects separately at each school.

If, by contrast, the dominant factors responsible for any given Title I school’s failure were problems for which it was not peculiarly responsible – problems that it shared in common with virtually all other failing Title I schools nationwide – it would be highly duplicative and inefficient to try to remedy them with a separate plan for each school. Similarly, insofar as certain major causes of a school’s failure were policies and structural problems at the state or national level, beyond a locality’s control, it would make no sense to rely on individual school plans to remedy them.

Yet, that is exactly the case here. For the large universe of Title I schools whose students are disproportionately below grade level, the principal problems responsible for their failure are generally not due to special circumstances at each school. Rather, their problems are due to underlying policies and practices typically applicable to schools serving high concentrations of poor and minority children nationwide. Moreover, while there are critical roles that school boards must play to turn these schools around, certain core problems are beyond most boards’ authority to correct.

¹¹⁹ See *supra* notes 43-45 and accompanying text.

¹²⁰ See *supra* notes 23-24 and accompanying text.

2. The Reality

a. *History of America's Two-Track System and Disproportionate Assignment of Poor and Minority Students to Non-academic Tracks*

To understand the nature and scope of these problems, it is necessary to look at how they arose historically. The basic structure of American public education today stems from a 1918 national commission report. It recommended reorganizing high schools to provide essentially two different curricular tracks: the first, a rigorous academic track for the minority of students predicted to be going on to college; the second, an academically much less challenging general and vocational track for the majority of students who were perceived as having low ability and not needing an academic education to meet society's workforce needs.¹²¹

Over the next seven decades, this two-track curriculum was widely adopted in high schools. Extended into middle and elementary schools,¹²² it became the core of America's Industrial Age public school system.¹²³ Poor, black and Hispanic children were "disproportionately assigned" to the "nonacademic tracks,"¹²⁴ with their "lower expectations" for academic achievement.¹²⁵ Indeed, "[t]racking is a primary means by which schools allocate access to knowledge and restrict access to 'programs, teachers, resources, curricular goals, and instructional activities . . . in ways that disadvantage low-income students.'"¹²⁶

Since the early 1990s, the original tracking system in which each track contained a "preset program of courses" has largely changed into one in which students choose to "enroll in classes subject by subject."¹²⁷ However, courses continue to be provided at the levels of the different "tracks" and "[m]ost middle and high schools still sort students into classes at different levels based on judgments of students' 'ability.'"¹²⁸ Moreover, low income and minority students are still "tracked disproportionately into the lowest classes in racially mixed schools and . . . are likely to attend racially isolated schools where lower-level classes predominate."¹²⁹

¹²¹ See generally DIANNE RAVITCH, NATIONAL STANDARDS IN AMERICAN EDUCATION: A CITIZEN'S GUIDE 41-43 (1995).

¹²² See *id.* at 93-94.

¹²³ See *id.* at 91-93, 97. As of 1992, 43% of high school seniors were in the academic track, 45% in the general track, and 12% in the vocational track. INST. OF EDUC. STAT., NAT'L CTR. FOR EDUC. STAT., DEP'T OF EDUC., DIGEST OF EDUCATION STATISTICS 1996, Table 132, at 131, <http://nces.ed.gov/programs/digest/d96/>.

¹²⁴ RAVITCH, *supra* note 121, at 93; see *id.* at 42-43.

¹²⁵ *Id.* at 94.

¹²⁶ *Id.* at 93-94, quoting JEANNIE OAKES, MULTIPLYING INEQUALITIES: THE EFFECTS OF RACE, SOCIAL CLASS, AND TRACKING ON OPPORTUNITIES TO LEARN MATHEMATICS AND SCIENCE 102 (1990). As Diane Ravitch observes, "This invidious differentiation legitimates providing different educational opportunities and lower expectations to certain groups of students; it actually *widens* the gap between advantaged and disadvantaged students." (Emphasis in original.) RAVITCH, *supra* note 121, at 94.

¹²⁷ JEANNIE OAKES, KEEPING TRACK: HOW SCHOOLS STRUCTURE INEQUALITY x (2d ed. 2005).

¹²⁸ *Id.* at xi.

¹²⁹ *Id.* Severe differences in the academic treatment of poor and affluent public school students is not limited to tracking between students in the same school, but has also widely come to characterize differences between schools. Public schools serving low income areas typically offer a much poorer quality of education to their students than schools serving predominantly affluent children. Arthur E. Wise,

b. Adverse Consequences of Two-tier System

i. Teachers and administrators. The adoption of the two-tier curriculum has had profound consequences for teachers, administrators, parents and students. While teachers of the academic track required strong subject matter knowledge and pedagogical skills to be able to engage their students at a high academic level, much less academic capability was required of teachers of general and vocational classes. Principals and superintendents, far from being expected to raise all children to academic competence, were simply expected to manage the day-to-day operation of a functioning two-track system.

ii. Students. Since relatively little academic attainment was expected from students in general and vocational classes, they have usually been taught a below-grade-level curriculum. Consequently, they are not intellectually challenged in class, not expected to apply themselves vigorously to academic study, and not assigned much homework. Little was provided academically to these disproportionately poor and minority students, and little was expected of them academically. Not surprisingly, they generally met society's low expectations. Without the challenge of a demanding curriculum and teachers who intellectually engaged their interests, these students typically were not motivated to apply themselves academically, did not study hard, and performed (as designed by the system) well below grade level.

iii. Parents. A small proportion of parents remarkably have overcome the societal weight of low expectations; they have motivated and assisted poor and minority children to excel academically.¹³⁰ Most, however, accepted the schools' implicit messages that their children had limited academic ability and there was little that parents could or should be doing to help their children learn at a high academic level.

c. Additional Adverse Factors

This two-tier structure, and its adverse effects on poor and minority students' academic achievement, continues to this very moment. In addition, its effects are aggravated by several factors, including: the opening-up of more remunerative occupations for women,¹³¹ so that not as many very bright and well educated women still become teachers; many parents lack the literacy and/or parenting skills needed to help children learn;¹³² a myriad of social problems, including drug addiction, alcoholism, crime, child abuse, substandard housing, poor vision and other harmful conditions

Teaching Teams: A 21st Century Paradigm for Organizing America's Schools, EDUC. WK., Sept. 29, 2004, at 32.

¹³⁰ FREEMAN A. HRABOWSKI et al., OVERCOMING THE ODDS: RAISING ACADEMICALLY SUCCESSFUL AFRICAN AMERICAN WOMEN (2002).

¹³¹ The percentage of professional degrees earned by women in law, medicine, business and other fields has increased from about 10% in 1970 to about 40%-70% today. W. Michael Cox & Richard Alm, *Scientists Are Made, Not Born*, N.Y. TIMES, Feb. 28, 2005, at A25.

¹³² See RICHARD ROTHSTEIN, CLASS AND SCHOOLS: USING SOCIAL, ECONOMIC AND EDUCATIONAL REFORMS TO CLOSE THE BLACK WHITE ACHIEVEMENT GAP 19-31 (2004).

weighing on many children's lives;¹³³ racially discriminatory attitudes and behaviors by certain school staff; and, inequitable school financing.¹³⁴

d. NCLB Implies Need to Convert to a One-Tier System

NCLB has laudably superimposed on this two-tier system a radically different and higher expectation. Now, virtually all public school students are to be taught an academically rigorous curriculum and are to become "academically proficient." In effect, *NCLB aspires to transform what for decades has operated as a two-tier system into a one-tier system.*

e. Conversion to One-tier System Requires Greatly Increasing the Knowledge and Skills of Many Teachers, Administrators and Parents

Experienced educators know what needs to be changed. Many teachers do not have the subject matter knowledge and pedagogical skills to effectively teach a diverse student body a rigorous curriculum, one that teaches not just mechanical reading and computational skills, but analysis, problem-solving and effective oral and written communication.¹³⁵ Many principals and superintendents do not know how to lead fundamental changes in attitude and conduct among their teachers, parents, students and community members.¹³⁶ Many parents lack the literacy and parenting skills to assist their children. And many children lack the motivation to apply themselves seriously to academic learning.

Whereas before, a great percentage of teachers did not have to have extensive subject matter knowledge and pedagogical skills, now it is necessary for all teachers to acquire them. Whereas before, principals and superintendents needed only to be managers, now they need to become leaders – leading their communities in profound changes in expectations, attitudes and behaviors inside the classroom and at home. Whereas before, little academic effort was expected of many students, now they all need to apply themselves seriously to schoolwork. Whereas before, parents might have accepted that there was nothing they needed to do to assist their children's learning, now they need to actively help.

¹³³ See *id.* at 37-47.

¹³⁴ See Greg Winter, *At Frontier of School Reform, Progress Is Constant, but Slow*, N. Y. TIMES, Dec. 6, 2004, at A1, A22 (describing Kentucky's experience spearheading movement seeking adequate funding for schools statewide).

¹³⁵ "Despite the . . . national commitment to learning that the federal No Child Left Behind Act appears to embody, teachers have not been provided with the necessary training and support to carry out these mandates. . . . Unprepared teachers produce unprepared students." Vartan Gregorian, *No More Silver Bullets*, EDUC. WK., Nov. 10, 2004, at 36. "Most schools and teachers cannot produce the kind of learning demanded by the new reforms – not because they do not want to, but because they do not have know how, and the systems in which they work do not support them in doing so." NAT'L COMM'N ON TEACHING AND AMERICA'S FUTURE, *WHAT MATTERS MOST: TEACHING FOR AMERICA'S FUTURE* 5 (1996).

¹³⁶ There is "a very limited supply of [superintendents and principals] who have the competence required to turn around low-performing schools As those executives' salaries have spiraled upwards [in the wealthiest districts], they have been lured away from working-class and urban schools." Tucker & Toch, *supra* note 92, at 31.

Thus, the fundamental problem that underlies Title I schools' failure to meet the new Information Age "proficiency" standards is the absence of the key human resources.

¹³⁷ The absence of this staff and parental capacity is assuredly not a problem unique to individual Title I schools. It is a widespread problem resulting from common policies and social conditions nationwide. Rectifying it will require major improvements in teacher and administrator preparation, teacher and administrator staff development and enhancing parental literacy and parenting skills around the country.

“The NCLB’s accountability model assumes that there exists local capacity (financial, material, and human resources) for improvement and that this capacity merely needs to be harnessed to yield better outcomes.”¹³⁸ But today, the stakeholders are still locked into the two-track system – they lack the capacity to do what they would need to be able to do to raise the level of the entire system to the level of what had historically been its elite, academic track. Given the commonality of all the underlying human resources problems, and the need for a coordinated attack at the state and federal levels, it would be highly wasteful and inefficient to try to address these endemic problems through ad hoc remedies at individual schools. To develop these human resources nationwide, the federal government needs to lead the way so that state and local governments can focus coherently on actually carrying out the hard work of change in their own jurisdictions.¹³⁹

C. Premise Three

1. The Mechanistic Sanctions of “School Plans,” “Corrective Action” and “Restructuring” Will Cure Schools’ Problems

Aside from the premises that a strategy based on threatening sanctions will induce major improvement and that improvements are best made *ad hoc* in each school, rather than systemically and nationwide, NCLB’s sanctions-based approach contains another implied premise. If troubled schools fail to make the necessary improvements on their own, the particular sanctions specified by the Act will rectify the schools’ underlying problems and dramatically improve their students’ learning.

Essentially, the Act mandates that any school needing “improvement” is to rectify its deficiencies by engaging in a “strategic planning” process¹⁴⁰ – from consulting with stakeholders, identifying defects and remedial strategies, prescribing measurable objectives and timelines, and ultimately, implementing plans.¹⁴¹ Thus, schools “identified

¹³⁷ Providing adequate education to all children also requires physical resources, financial resources and effective use of time. These matters are addressed in Part IV.B.2.b., IV.B.9, and IV.B.2.b., *infra*, respectively.

¹³⁸ Laura Hamilton & Brian Stecher, *Responding Effectively to Test-Based Accountability*, PHI DELTA KAPPAN, Apr. 2004, at 579.

¹³⁹ See Part IV.B, *infra*. While there is much that schools and districts have the legal authority to do to improve staff development and parental support, preparation of teachers and administrators in schools of education is largely beyond their power. Authority for making those improvements rests with the governments and boards of trustees that control the state and private teachers’ colleges, respectively.

¹⁴⁰ See Mike Schmoker, *Tipping Point: From Feckless Reform to Substantive Instructional Improvement*, PHI DELTA KAPPAN, Feb. 2004, at 426.

¹⁴¹ See 20 U.S.C. § 6316(b)(3).

for school improvement” must prepare, and, after approval by the local educational agency, implement, two-year “school plans” that “address the specific academic issues that caused the school to be identified for school improvement.”¹⁴² Subsequent “corrective action” must “substantially and directly respond[] to . . . any underlying staffing, curriculum, or other problems in the school[.]”¹⁴³ And, “restructuring” is to reframe “the school’s governance arrangement [so as] to improve student academic achievement [and] enabl[e] the school to make adequate yearly progress.”¹⁴⁴

At least initially, this remedial scheme may seem sensible because of its apparently pragmatic approach. “Start by figuring out which parts of the school are broken, e.g. curriculum, teachers, staff development or length of the school day. Then, prepare a long-term plan to repair the defective parts. If, after replacing the defective parts, the school is still broken, replace the people who control it.” That is, NCLB treats a failing school as if it were a broken machine composed of discrete parts that can be made to work by developing a strategic plan to fix whichever discrete pieces are broken, leaving the rest of the machine untouched. Unfortunately, this remedial approach does not comport with the real nature of failing schools and why they typically fail, nor with extensive experience in what it takes to turn them around.

2. The Reality

a. “School Plans” and “Corrective Action”

i. Successful school transformation requires organic, not mechanistic, reform.
Schools are not machines. They are human organizations. When a Title I school seriously fails to educate high percentages of its students, typically it is not defects in a few discrete aspects of its operations that cause the failure, but rather an interwoven set of low expectations, poor skills and ineffective practices shared by many of the participants – all working together against high achievement. To dramatically improve learning at such a school, it is necessary to lead broad and integrated changes in those expectations, skills and practices.

Successful transformation of a failing school (like other failing human organizations) is an organic process. Typically in such schools: the principal and many teachers have low expectations for student achievement; the teachers are disproportionately inexperienced; many lack both strong subject matter knowledge in the courses they are teaching and strong pedagogical skills to be able to engage students’ interests and teach higher-level thinking skills; the curriculum actually taught is below grade level; many parents provide little support or intellectual stimulation for their children’s learning; and many children themselves lack motivation to become academically successful.

To turn around such a school requires skilled leadership and intense commitment, usually from the principal. Teachers must be led to believe that all students can succeed academically, regardless of race or poverty, and to become committed to that goal. They need to be engaged in peer collaboration and be given individualized mentoring so that

¹⁴² § 6316(b)(3)(A)(i).

¹⁴³ § 6316(b)(7)(A).

¹⁴⁴ § 6316(b)(8)(B)(v).

they can become effective teachers. Parents need to be led to actively support their children's learning by reading to them and encouraging them to read independently, to do their homework, and in various other ways. Where that is not possible, the school needs to arrange alternative adult role models and support. And children need to be given challenging coursework that engages their interests, as well as recognition for their genuine academic accomplishments.¹⁴⁵

ii. Strategic planning-based school reform is generally ineffective. The rigidity of strategic planning makes it an inherently ill-suited technique for generating the interwoven, multiplicitous and continuously evolving changes in stakeholders' expectations, knowledge and behaviors needed to turn around failing schools. Moreover, it has proven to be ineffective. After review of the literature and extensive personal experience, Schmoker concludes in a prominent article that historically, strategic planning-based school reforms have typically been ineffective in raising either "instructional quality [or] levels of achievement."¹⁴⁶ The three chief reasons for this failure are that: strategic planning usually involves far too many "goals, initiatives and projects" to implement or even monitor effectively; the remedies selected are not closely connected to improving teaching; and the plan is finalized, by planners, before school starts rather than being continuously revised by teachers collaboratively during the school year in response to the immediate problems they are encountering in their classrooms.¹⁴⁷

NCLB's compartmentalized, mechanistic "school plan"/"corrective action" remedial scheme disregards the nature, depth and interconnectedness of the usual problems at failing schools. It is poorly designed to remedy the underlying problems in a coherent and effective way and should not be relied on as the vehicle for trying to transform failing schools.¹⁴⁸

¹⁴⁵ COMMONWEALTH OF VIRGINIA JOINT LEGIS. AUDIT & REV. COMM'N REP., *supra* note 93, at 67-74; MURNANE & LEVY, *supra* note 22, at 83-108 (Zavala Elementary School, Austin, Texas); *see* SAMUEL CASEY CARTER, NO EXCUSES: LESSONS FROM 21 HIGH-PERFORMING HIGH-POVERTY SCHOOLS 7-11 (2000); U.S. DEP'T OF EDUC., WHAT WORKS: RESEARCH ABOUT TEACHING AND LEARNING 7,9,11,15,19,32, 34-35, 37-38, 41-42, 50, 52 (1986); Kathy Christie, *Virginia's Excellent Adventure*, PHI DELTA KAPPAN, Apr. 2004, at 566-567; David S. Broder, *A Model for High Schools*, WASH. POST, Feb. 24, 2005, at A21 (noting that even for high school dropouts, "the challenge of a tough curriculum, backed by skillful teaching in small classes and plenty of personal counseling, can be a path to success"); John Merrow, *Meeting Superman*, PHI DELTA KAPPAN, Feb. 2004, at 455-460 (especially regarding key "role of principal in providing teachers whatever support and help they request, establishing school's commitment to achievement by every child, building academic content into all courses, including music and gym, and making school fun for elementary school children, not just drills"); DALE HAIR, BETTY KRAFT & AMY ALLEN, NATIONAL STAFF DEVELOPMENT COUNCIL PROJECT ADVANCE MINI-GRANT: LOUISIANA STAFF DEVELOPMENT COUNCIL'S END OF GRANT REPORT, JUNE 30, 2001 6-8, <http://www.nsd.org/library/publications/index.cfm>; <http://www.bestpracticescenter.org/publ/index.html> (highlighting critical importance of principal and faculty agreement on student learning as school's top priority and belief they could, and would, overcome all obstacles, instructional leadership, peer collaboration and other factors in twelve "high poverty high performing" schools in Louisiana); *cf.* Anna Mulrine, *Closing the Gap*, U.S. NEWS & WORLD REP., Mar. 29, 2004, at 87-88 (noting similar conditions operative in new schools effective for low income children).

¹⁴⁶ Mike Schmoker, *Tipping Point: From Feckless Reform to Substantive Improvement*, PHI DELTA KAPPAN, Feb. 2003, at 427.

¹⁴⁷ *Id.* at 427.

¹⁴⁸ The transfer and tutoring remedies fall into a different category. Requiring districts to offer parents transfer and tutoring options was designed both to provide a limited number of "students in failing

b. “Restructuring”: “Alternative Governance”

i. If training is unsuccessful, principals and teachers need to be replaced promptly, not many years later. Nor would the Act’s restructuring/alternative governance approach be effective as a final sanction. Insofar as “restructuring” contemplates replacing the principal of a failing school,¹⁴⁹ this needs to happen much earlier in the reform process than seven years after the school’s failure begins to be recognized. Because the principal needs to be the leading agent in transforming an individual school, it is essential that the district superintendent closely evaluate the principals of every troubled school early in the reform process. If, as is widely the case, the principals do not have the training needed to successfully lead school transformation, they need to be promptly trained. If, after training, they are not capable of leading the process, they need to be replaced at that time, before any major reform effort is begun; otherwise, the entire reform process will be stymied.

Similarly, one of a principal’s most important responsibilities is evaluating the performance of his or her teachers. (This needs to be done on an ongoing basis, especially in schools seeking transformation.) If teachers are not performing well, they need to be mentored and trained. If, after appropriate assistance, they are still not performing effectively, the principal, supported as needed by the superintendent, needs to remove them.¹⁵⁰ If many teachers need to be removed, this needs to be done early, so that the key players are in place to improve instruction during the reform process, not at the end, after the children have been needlessly subjected to years of inferior instruction. And, while preserving employees’ procedural due process rights, removing ineffective teachers and principals should be made easier than it often is now.

ii. Charter schools and private management are no answer. Insofar as “restructuring” contemplates converting a school to a public “charter school” or private management,¹⁵¹ the strategy holds no promise of improvement. Extensive studies of charter schools have found them to be “less likely to meet [state] performance standards

schools access to other places and service providers whereby they could learn reading and math and meet NCLB standards and . . . give failing schools an incentive to improve by threatening to reduce enrollments and budgets.” Hess & Finn, *supra* note 92, at 38. For reasons explained by Hess & Finn, *id.*, at 35-39, as currently structured, these provisions provide “few viable options for children [and] are unlikely to cause schools to alter their practices in the achievement-enhancing ways that the law’s framers envisioned.” *Id.* at 37.

More fundamentally, neither of these sanctions is designed directly to address a school’s underlying problems. Transferring some students away from a failing school to another school does nothing to solve the instructional problems at the school they leave except in those instances in which overcrowding is itself part of the problem. Nor does having the school’s teachers or outside vendors provide tutoring to individual students outside of class do anything to rectify the underlying problems of the entire school’s normal operations during class hours.

¹⁴⁹ 20 U.S.C. § 6316(b)(8)(B)(ii), (v) (Supp. I 2001).

¹⁵⁰ Removal of ineffective teachers is one of the hallmarks of principals in successful schools. See COMMONWEALTH OF VIRGINIA JOINT LEGIS. AUDIT & REV. COMM’N REP., *supra* note 93, at 63-64.

¹⁵¹ See 20 U.S.C. § 6316(b)(8)(A)(i)-(iii) (Supp. I 2001).

than traditional public schools[.]”¹⁵² Furthermore, charter schools run by commercial management companies, such as Edison Schools, have been found to be no more effective than other charter schools managed by nonprofit organizations.¹⁵³

iii. State takeovers: few and limited sources. As to state takeovers, the record has been mixed. For example, in New Jersey:

Beginning with the Jersey City schools in 1989, and following with takeovers in Paterson and Newark, Garden State leaders found it was far easier to clean up district-level finances and management practices than it was to make a dent in student achievement, observers say. New Jersey’s experience was not an anomaly.¹⁵⁴

Takeovers by some other states, particularly North Carolina and Kentucky, have been able to turn around a small number of failing schools, at least to the extent that improvement is measured by their own state assessments.¹⁵⁵ But even these states severely lack the capacity to turn around the large number of schools “in need of improvement” under NCLB.¹⁵⁶

D. *Premise Four*

1. States Have Technical Capacity to Effectively Assist Schools and District Transformations and, Where Assistance Is Unsuccessful, to Lead by Themselves

The Act is forceful in demanding that: Title I schools and districts must achieve “adequate yearly progress”; all states’ departments of education must provide them with technical assistance and support to enable them to do so; and, where that is unsuccessful,

¹⁵² Sam Dillon & Diana Jean Schemo, *Charter Schools Fall Short In Public Schools Match-up*, N.Y. TIMES, Nov. 23, 2004, at A19; Diana Jean Schemo, *A Second Report Shows Charter School Students Not Performing as Well as Other Students*, N.Y. TIMES, Dec. 16, 2004, at A32 (As a Columbia University education professor has concluded, while there is substantial variation in the quality of individual charter schools, “clearly we have enough evidence to suggest that the free-market ideals that fueled this [charter school] reform movement are at best misguided and at worst harmful to the most disadvantaged students.”); Amy Stuart Wells, *Charter Schools: Lessons in Limits*, WASH. POST, Dec. 29, 2004, at A19.

¹⁵³ Diana Jean Schemo, *supra* note 152, at A32.

¹⁵⁴ Jessica L. Sandham, *Despite Takeover Laws, States Moving Cautiously on Interventions*, EDUC. WK., Apr. 14, 1999, at 21. *See, e.g.*, Catherine Gewertz, *State-Run Pa. District Battles Host of Woes*, EDUC. WK., Mar. 2, 2005, at 3, 14 (designating takeover in Chester, Pa. a failure); Karla Scoon Reid, *California Returns Compton District To Local Control*, EDUC. WK., Sept. 19, 2001, at 3 (designating takeover in Compton, Cal. a success). *See generally A History of Intervention*, EDUC. WK., Jan. 9, 2002, at 14 (brief history of state interventions from 1989-1999).

¹⁵⁵ Tucker & Toch, *supra* note 92, at 31. Typically, the criteria for “passing” state assessments are set much lower than “proficiency” on the NAEP. For example, while in 2001-2002, more than 75% of Virginia’s students “passed” Virginia’s Standards of Learning test, *see* COMMONWEALTH OF VIRGINIA JOINT LEGIS. AUDIT, *supra* note 93, at 37, only about 37% of Virginia’s students were “proficient” on the NAEP in reading in 2002, and about 34% “proficient” in math, as of 2003. INST. OF EDUC. SCI., NAT’L CTR. FOR EDUC. STAT., DEP’T OF EDUC., NATIONS REPORT CARD: STATE PROFILES: VIRGINIA at 2, at <http://nces.ed.gov/nationsreportcard/states> (last updated April 12, 2004).

¹⁵⁶ Tucker & Toch, *supra* note 92, at 30-31.

the states must take “corrective action” themselves to bring such schools and districts into compliance with AYP.

The implicit premise is twofold. First, the states have sufficient qualified staff and other resources to provide all their failing Title I schools and districts whatever technical assistance and support they would need to bring all their students to “proficiency.” Second, insofar as indirect technical assistance and support were not successful, the states, by themselves, have the capacity to take direct “corrective action” to bring their failing schools and districts into compliance. These premises are invalid.

2. The Reality

Although in recent years, because of the state “standards” movement and the ESEA amendments of 1994, responsibility for the public schools has been gradually shifting from the local to the state level, it is only because of NCLB that the states are now required “to move quickly to crack down on schools that didn’t measure up Overnight, state regulators were to become reformers But while the expectations and responsibilities of state education bureaucracies have suddenly and utterly changed, their actual structure has not.”¹⁵⁷

To turn failing schools around through technical assistance and support is “labor intensive – and not inexpensive.”¹⁵⁸ It requires providing trained educators, experienced in successful school improvement initiatives, to be on-site for extended periods.¹⁵⁹ There is a severe dearth of such educator-reformers nationwide.

Even states that already have some capacity to do this, currently have available only enough qualified staff and funding to assist a relative handful of schools. For example, whereas North Carolina is now equipped to help turn around about twelve schools statewide, under NCLB, it will need to turn around about 500 schools.¹⁶⁰ And North Carolina is one of the best-prepared states.¹⁶¹

As Tucker and Toch observe, “It is almost impossible to exaggerate just how unprepared these departments [of education] are for the task [of turning around failing schools. The] states are a long way from having the capacity to carry out [NCLB’s] mandates.”¹⁶²

IV. HOW TO RESTRUCTURE THE ACT TO ACCOMPLISH ITS GOALS

A. *The Bottom Line*

1. NCLB’s Contributions

NCLB has made some changes that have the potential to profoundly improve American public education. It has dramatically committed the nation to the goal of

¹⁵⁷ *Id.* at 30.

¹⁵⁸ *Id.* at 31.

¹⁵⁹ *See id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² Tucker & Toch, *supra* note 92, at 32.

academic proficiency for all students. It has greatly heightened the public's awareness that millions of our students, disproportionately those who are poor, black and Hispanic, are not receiving the level of academic skills that they will need to be fully productive and self-supporting citizens in the 21st century. It has galvanized schools and districts across the country to pay more attention to meeting this need and induced many to allocate resources toward this end. And it has begun to hold the states accountable for ensuring that their districts and schools meet this need and schools adequately educate all students.¹⁶³

2. NCLB's Deficiencies

At the same time, NCLB has severe deficiencies. It does not recognize that the reasons so many schools and districts are failing have much more to do with the intentional creation of a two-tier education system than with any defects peculiar to individual schools, and that remedies, therefore, need to be systemic, not chiefly individualized for each school. It does not recognize that a remedial approach that puts overwhelming emphasis on producing "high" test scores and sanctioning failure to generate such scores will induce widespread manipulation of state/local testing criteria and concentration on "drill and kill" techniques to raise test scores, rather than providing the higher-level thinking skills and understanding that NAEP "proficiency" demands.

NCLB does not recognize that the problems of failing Title I schools usually infect the expectations, attitudes and practices of all the stakeholders: the principals, teachers, parents and students. Nor does it recognize that remedying such failure requires intense and skillful on-site leadership and organic, not mechanical, intervention, maintained over an extended time period in the multiplicity of interconnected school activities to get the participants to buy into a new culture and turn a school around. Its artificially compartmentalized and superficial planning process is ineffectual because it does not recognize that the state departments of education, on which it heavily relies to provide essential support teams and other technical assistance, are incapable of doing so. Severe understaffing, under-funding, and the dearth of qualified reformers nationwide make it impossible for the state education departments to provide the assistance that they are mandated to provide to the thousands of schools that need it.

While NCLB has many valuable concepts, much of it needs to be redirected to accomplish its goals. The article will approach how to restructure the Act by focusing on major concepts: which should be retained, revised or repealed and why.

B. What Should Stay and What Should Go: The Specifics of Restructuring

1. Goals, Standards, Assessments, Disaggregated Data and Reporting Assessment Results

¹⁶³ See generally *id.* at 29-30.

a. *The Increasingly Strong National Interest in Education*

Although public education has traditionally been a state and local function,¹⁶⁴ the nation as a whole also has a strong economic, political and defense interest in producing well educated citizens.¹⁶⁵ With the shift from the relatively simple and stable Industrial Age to the increasingly complex and fast-changing Information Age, education has become increasingly more important to enable people to understand and adapt to change. Accordingly, in recent years, the national interest in effective education has significantly increased. “For decades, state and local governments . . . have allowed thousands of low-quality schools to provide substandard education to millions of students, especially poor and minority students.”¹⁶⁶ At this stage, it is not only appropriate, but essential that the federal government assert a greater national interest in education and begin to hold states that accept federal education funding accountable for providing effective public education.

In the interests of both federalism and effectiveness, however, the government needs to do this in a way that emphasizes helping the states and localities, not punishing them. While NCLB’s initial concepts – goals, standards, assessments, assessment reporting and disaggregated data – need some adjustments, they are generally moving in the right direction.

b. *Holding States Accountable for High Standards of “Academic Proficiency”*

Although it is useful to require that the states adopt “standards” for “academic content” and “academic achievement,”¹⁶⁷ and that those standards be “challenging,”¹⁶⁸ the Act currently allows the states complete discretion to define what is “challenging.” As a result, the “standards” that the states have adopted vary widely; and some states have adopted very low standards.¹⁶⁹ The national interest is in ensuring that “virtually” all students nationwide are educated, at least to a meaningful level of academic competency at each grade level, including the development of analytical, problem solving and other higher-level thinking skills. The law should be amended to ensure that each state’s standards for “proficiency” at least roughly correspond to NAEP “proficiency.”¹⁷⁰

Requiring regular state assessments in elementary, middle and high school¹⁷¹ can be a valuable means of monitoring the extent to which students’ learning is improving. As with the “standards” noted above, the government should ensure that the state assessments are measuring not just low-level thinking and memorization of facts, but increasingly higher level thinking skills as the students advance through school.

¹⁶⁴ *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

¹⁶⁵ See Gershon M. Ratner, *A New Legal Duty for Urban Public Schools: Effective Education in Basic Skills*, 63 *Tex. L. Rev.* 777, 781-785 (1985).

¹⁶⁶ Tucker & Toch, *supra* note 92, at 29.

¹⁶⁷ 20 U.S.C. § 6311(b)(1) (Supp. I 2001).

¹⁶⁸ See 20 U.S.C. § 6311(b)(1)(F) (Supp. I 2001).

¹⁶⁹ Tucker & Toch, *supra* note 92, at 32.

¹⁷⁰ NCLB’s current provision that “no State shall be required to have academic content or student academic achievement standards approved or certified by the Federal government, in order to receive assistance under this Act,” 20 USC § 7907(c), should be amended accordingly.

¹⁷¹ See 20 U.S.C. § 6311(b)(3).

c. Disaggregating Assessment Results

Insisting on disaggregating assessment results by race, ethnicity, poverty, disability, and limited English proficiency¹⁷² is essential to monitor the extent to which any schooling changes actually improve learning by the historically most under-served and low-performing groups of students. This requirement should be retained as is.

d. Publicly Reporting Disaggregated Assessment Results

Similarly, mandating that states and localities report to the public, and that the states report to the Secretary of Education, disaggregated assessment results¹⁷³ is vital. It ensures that important information is provided to the public on whether or not school improvement efforts are advancing and helps to enable the public to hold the schools, districts and states accountable. These provisions should also be preserved, except for those requiring reporting of the names and numbers of schools “identified for school improvement” which, as described below, would no longer be applicable.

2. Deficiencies of AYP, Reporting AYP and Sanctions Against Schools and Districts

a. Concept of AYP Itself Lacks Foundation and Is Patently “Unscientific”

The key to NCLB’s remedial scheme is that all Title I schools must make “adequate yearly progress” toward raising “100%” of their students to “proficiency” by 2014 or face sanctions. But, even though NCLB demands that failing schools must adopt “strategies based on scientifically based research,”¹⁷⁴ the Act’s central remedial concept – AYP – is itself patently “unscientific.” That is, it has never been shown to be achievable in practice.

To the contrary, notwithstanding 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. (The highest – Massachusetts, Minnesota, New Hampshire, and Connecticut – have only brought about 40% of their students to “proficiency” in reading and 40% in math. Moreover, major portions of those students were already “proficient” before the “standards” movement ever started.¹⁷⁵)

¹⁷² See 20 U.S.C. § 6311(b)(3)(C)(xiii).

¹⁷³ 20 U.S.C. § 6311(h)(1)(A)(B)(C)(i)(iii)(iv), 115 Stat. 1457-1458 (states reporting to public); 20 U.S.C. § 6311(h)(2)(A)(B)(i)(II)(ii)(II)[first clause](E), 115 Stat. 1459-1460 (districts reporting to public); 20 U.S.C. § 6311(h)(4)(A)(B)(C)(D), 115 Stat. 1460 (states reporting to Secretary).

¹⁷⁴ 20 U.S.C. § 6316(b)(3)(A)(i) (Supp. I 2001).

¹⁷⁵ READING HIGHLIGHTS 2003, *supra* note 12, at 10; MATH HIGHLIGHTS 2003, *supra* note 12, at 10. A substantial portion of students in these states and nationwide were already at “proficiency” before the “standards” movement started, so that movement would not be entitled to “credit” for the entire 40%. In fact, by 1992, 31%-38% of 4th graders in Massachusetts, Minnesota, New Hampshire and Connecticut were *already* “proficient” in reading, READING HIGHLIGHTS 2003, *supra* note 12, at 9, and by 1990, 20%-23% of eighth graders in Minnesota, New Hampshire and Connecticut were *already* “proficient” in math. MATH

Whatever numbers states plug in as their “measurable objectives” – to go from their current “proficiency” rate of approximately 30% to 100% in twelve years – they are not based on any proven track record.¹⁷⁶ To the contrary, these annual “progress” percentages – the noncompliance with which is the entire basis for NCLB’s sanctions – are themselves arbitrary and unfounded.¹⁷⁷ Thus, the entire AYP edifice is built on a foundation of sand.

b. A Sanction-based Remedy Relies on False Premises and Is Ineffectual

Moreover, the means chosen to enforce compliance – sanctions – is not only punitive and harmful, but also largely ineffectual. As *The New York Times* noted, NCLB “aimed for nothing less than ending the achievement gap between whites and minorities by threatening public schools with dire punishments unless they improved the academic performance of all students.”¹⁷⁸

NCLB’s punishment scheme presumes that failing schools and districts largely know what to do to dramatically improve learning for their children and have the capacity to do it – all they are missing is the motivation. But that is belied by experience. Although we have had decades of presumably well-intentioned “school reform” efforts, they have been characterized by: one group of superficial, unrelated and piecemeal programmatic and organizational reforms after another; continuous replacements of superintendents; and concentration on narrowing the curriculum and test-taking techniques, rather than raising the level of teaching and learning. And the myriad reforms have produced little improvement in academic proficiency. As University of Southern California professor of education policy Priscilla Wohlstetter has written: “Part of the problem [with improving public education] is that public schools lack the knowledge and expertise they need to build capacity to improve themselves.”¹⁷⁹

HIGHLIGHTS 2003, *supra*, note 12, at 10. Thus, during the standards movement period, even in the most accomplished states, virtually no progress has been made in lifting the percentage of children to “proficiency” in reading and little has been made in math.

¹⁷⁶ As education professor Robert Linn, Co-director, National Center for Research on Evaluation, Standards, and Student Testing, states: “[NCLB] requires an unrealistically rapid rate of improvement. This becomes apparent when the required changes are compared with a variety of different types of evidence, including historical data on change in student performance on state testing programs or on the NAEP.” Robert Linn, *Do We Need to Repair the Monument? Debating the Future of No Child Left Behind*, EDUC. NEXT, Spring 2005 at 14, www.educationnext.org.

“At the very least, there needs to be existence of proof. That is, there should be evidence that the [AYP] goal does not exceed what has previously been achieved by the students in the highest-performing schools.” *Id.* at 12.

¹⁷⁷ Indeed, Professor Linn believes, “[t]he most serious [problem with NCLB] is that the expectations for student achievement have been set unrealistically high, and as a consequence, almost all schools will fall short of the AYP targets within the next few years unless major changes are made in the definition of AYP.” Linn, *supra* note 176, at 12.

¹⁷⁸ Diana Jean Schemo, *Effort by Bush on Education Hits Obstacles*, N.Y. TIMES, Aug. 18, 2004, at A16.

¹⁷⁹ Priscilla Wohlstetter & Joanna Smith, *Partnering to Improve Education: Lessons From Charter Schools*, EDUC. WK., Sep. 29, 2004, at 30. See Dan Goldhaber & Jane Hannaway, *Accountability with a Kicker: Observations on the Florida A+ Accountability Plan*, PHI DELTA KAPPAN, Apr. 2004, at 599.

c. *AYP/Sanctions Scheme Will Lead to Almost All Schools Failing*

As discussed in Part III, A, 2, above, rather than generating a wave of major improvements in teaching and learning in Title I schools across the country, the AYP/sanctions scheme has led to widespread manipulation of testing criteria, the use of artificial techniques for raising test scores so as to come into paper compliance with AYP, and other educational harms. Even with the manipulations and narrow test-score-raising focus, 10,992 schools nationwide have still been identified as “in need of improvement” as of February 25, 2005.¹⁸⁰ “Nancy Grasmick, Maryland’s schools superintendent, has warned that as more grades are tested in coming years and higher proportions of students must pass, the ranks of floundering schools will balloon in Maryland and around the country. By 2014, when the law aims to have all students reach proficiency, nearly all schools in all states will fail under the law, researchers predict.”¹⁸¹ If NCLB’s AYP/sanctions scheme is allowed to remain in place, the spiral of ever-increasing numbers of “failing” schools caused by relentless federal pressure and punishment for failing to reach arbitrary objectives could permanently undermine the public’s support for public education.

d. *Replace Punishment with Systemic Changes to Improve Student Achievement*

i. Hold states and districts accountable for implementing key structural improvement, not AYP. What is needed is to restructure the Act’s accountability approach from sanctioning states and localities for non-compliance with AYP to inducing them to make the necessary improvements to the educational system. In its *Joint Organizational Statement*, an unprecedented group of national education, civil rights, disability, religious and civic organizations have recently endorsed this change in direction. The group includes the: National School Boards Association, National Council of Churches, National Education Association, National Urban League, NAACP, League of United Latin American Citizens, Council for Exceptional Children, and Children’s Defense Fund, and now totals one hundred national organizations.¹⁸² The group has declared: “Overall, the law’s emphasis needs to shift from applying sanctions for failing to raise test scores to holding states and localities accountable for making the systemic changes that improve student achievement.”¹⁸³

NCLB’s existing mandate for the imposition of sanctions for failing to achieve AYP,¹⁸⁴ including required provision of transfers and tutoring, needs to be replaced. While public reporting of disaggregated student achievement data would still be required, and reasonable annual measurable objectives could be set, “accountability” would no

¹⁸⁰ Group E-mail Notification from Joel Packer, Manager, ESEA Policy, National Education Association (Mar. 1, 2005) (on file with author).

¹⁸¹ Diana Jean Schemo, *supra* note 178, at A16.

¹⁸² Citizens for Effective Schools, Inc., of which the author is founder and Executive Director, is one of the national organizations signing the *Joint Organizational Statement*. The author was one of the *Statement*’s principal drafters.

¹⁸³ JOINT ORGANIZATIONAL STATEMENT ON “NO CHILD LEFT BEHIND (NCLB) ACT,” Oct. 21, 2004 (including list of signing organizations), <http://www.citizenseffectiveschools.org/jointstatement.htm>; <http://www.fairtest.org>.

¹⁸⁴ 20 U.S.C. § 6311(b)(2) (Supp. I 2001).

longer consist of sanctioning schools and districts for failing to meet AYP. Instead, the federal government would identify the essential structural changes that states and localities need to make to convert from a two-tier to a one-tier educational system. It would then: have the states prepare and submit plans for carrying out those changes; substantially fund the state and local costs of conversion; and hold states and localities accountable for making the changes.¹⁸⁵ This would put the emphasis of school reform directly where it needs to be: on helping schools improve.

ii. Refocus how stakeholders spend their time. In October 2003, a nationwide group of more than 100 distinguished educators and other citizens wrote an *Open Letter to President Bush and Congress* which advocated amending NCLB to accomplish its goal. As the *Open Letter* stated:

[E]xperienced educators know and research confirms what does need to be done and how to do it. Create three conditions for virtually all students: challenging curriculum, effective teaching and family (or mentor) support for high student achievement. **These changes can be carried out largely by changing how teachers, administrators, teacher educators, parents and students spend their time.**¹⁸⁶ Time must be refocused on improving teachers' instructional knowledge and skills, administrators' capacity to lead school and community transformations, families' capacity to provide motivation and assistance for high level student learning, and students' concentration on academic learning at school and at home. Federal policy's emphasis now needs to move beyond pressuring states and schools to improve student achievement to having them implement the specific changes essential to accomplish it.¹⁸⁷

iii. Focus federal role on strengthening preparation and training. As a threshold matter, while the federal role in education policy and funding has expanded significantly over the last fifty years to reflect the increasingly great national interest in effectively educating all children, it is still limited. Given the strong state and local interest in maintaining day-to-day control over public schooling, it is essential that the federal role be carefully directed to where it can make the most important contribution toward accomplishing NCLB's goals.

¹⁸⁵ See Part IV, B.3, 7-9, *infra*.

¹⁸⁶ The Virginia legislature's JOINT LEGIS. AUDIT AND REV. COMM'N REP., *supra* note 145, supports a similar conclusion. It found that "challenged schools" that were unusually successful in educating poor and minority children in Virginia typically implemented the same nine practices. All of these practices involved how the principal and teachers used their time. For principals, the practices included "ensur[ing] that academic achievement [was] the school's highest priority" and assisting ineffective teachers to improve, and where unsuccessful, removing them. For teachers, the practices included "motiv[at]ing students . . . by setting high expectations . . . and by constantly reinforcing their achievement," working collaboratively to "plan lessons, perform assessments . . . and analyze test results," and differentiating instruction to meet "the diverse needs of their individual students." *Id.* at 61-65.

¹⁸⁷ OPEN LETTER, *supra* note 94 (including list of signers and affiliations)(emphasis in original). Kathy Christie emphasizes that the same practices that the Virginia Legislative Commission Report found enable low-performing schools and districts to improve "ha[ve] both local and universal applicability." *Virginia's Excellent Adventure*, *supra* note 145, at 567.

Accordingly, this article recommends that NCLB's remedial approach be reframed to lead the states and localities to make the structural changes in teacher and administrator preparation and training, coupled with family support, that are necessary to dramatically improve teaching and learning, especially for poor and minority children. These are the most critical changes required to enable American education to convert from a two-tier to a one-tier system. I believe that, in President Bush's words, these are "the changes necessary to reach every child."¹⁸⁸

At the same time, providing high level education requires not only effectively developing and using human resources, but also having adequate physical resources, including classrooms, books and materials. Having the requisite human and physical resources both depend on having sufficient financial resources to pay for them. Given that federal funding will inevitably cover only a portion of total K-12 education expenditures, top priority should go toward funding the needs that will have the greatest and most direct impact in accomplishing NCLB's academic goals: building the necessary human capacity.

3. A More Reasonable Target Percentage for Compliance

Instead of having the duty to comply with NCLB's remedial provisions be contingent on the presence of Title I schools "in need of improvement" under AYP, it should depend on whether fewer than 85% of students in Title I schools are performing "proficiently" in reading and math. Any Title I school with fewer than 85% of its students at "proficiency" would be subject to the restructuring requirements, as would any district and state in which such schools are located.

Use of the "85% of students at proficiency" criterion for this purpose was proposed by the group of more than 100 respected educators and other citizens who signed the October 2003 *Open Letter to President Bush and Congress*.¹⁸⁹ The proposals elaborated here are largely based on the Letter's recommendations.¹⁹⁰ Eight-five percent was selected as the dividing line, at least in part, because that was thought to be a reasonable estimate of the minimum percent of all public school children who could be educated to "proficiency" in high quality public schools. Settling on this percentage recognized that a small portion of students would be so severely cognitively disabled that they could not be educated to that level regardless of the quality of schooling. The 85% figure is designed to be conservative.

¹⁸⁸ See *supra* note 2 and accompanying text.

¹⁸⁹ See OPEN LETTER, *supra* note 94. The author was the principal drafter of the Letter.

¹⁹⁰ The Letter resulted from a May 8, 2003, "Action Conference to Reframe the National School Reform Debate and Significantly Improve Public Schooling" at Princeton University. The Conference was attended by experienced elementary, secondary and university educators and administrators, and other concerned citizens from around the country. It was co-sponsored by Princeton Project 55, The Princeton University Program in Teacher Preparation and Citizens for Effective Schools, Inc. (CES) and was principally designed by CES.

4. Curriculum Level

a. *Importance of Teaching Virtually All Students a “Challenging Curriculum”*

NCLB rightly recognizes that a key ingredient to accomplishing its goal of academic competence for virtually all students is that they would all be taught a challenging curriculum. It rightly specifies that the states’ academic content standards shall contain “rigorous content”¹⁹¹ and that its annual tests “shall. . . assess higher-order thinking skills and understanding.”¹⁹² (Indeed, sharply raising the intellectual rigor of the curriculum traditionally taught in the general and vocational tracks to the level of the academic track is the single most defining characteristic of converting from a two-tier to a one-tier system.)

b. *Largely Abolish Below Grade-level Curriculum in “General” and “Vocational” Courses*

As a practical matter, to approach NCLB’s goal of academic proficiency for virtually all students, the curriculum in all classes (except for the severely disabled) must be at least at grade level.¹⁹³ This means that the traditional, two-tier high school system in which the curriculum for classes in the “academic/college” track (often referred to as “honors” courses) is at grade level, but the curriculum in “general” and “vocational” track courses is usually well-below grade level, must be largely abolished.¹⁹⁴ Instead, after an initial transition period,¹⁹⁵ the curriculum in virtually all academic classes¹⁹⁶ in American

¹⁹¹ 20 U.S.C. § 6311(b)(1)(D)(i)(II) (Supp. I 2001).

¹⁹² § 6311(b)(3)(C)(vi) (Supp. I 2001).

¹⁹³ Advanced Placement, International Baccalaureate, and any other classes already above grade level would be unaffected by the necessary reforms, since it is only the below grade level classes that obstruct attaining NCLB’s goals.

¹⁹⁴ A small portion of classes would still need to provide a below grade-level curriculum for those children who have such severe disabilities, including mental retardation, that it would be impossible to bring their academic skills to grade level at every grade, regardless of the quality of schooling and family support offered.

¹⁹⁵ As *The New York Times* has noted: “The traditional American high school, as conceived a century ago, was never meant to produce well-educated workers in the numbers required by today’s economy. [To remake the system, t]he curriculum must become far more rigorous across the board.” Editorial, N.Y. TIMES, Feb. 23, 2005, at A30. To facilitate the transition to a uniformly high level curriculum, “[t]he schools must offer broad-based remedial instruction to help the eye-popping 70% of students who arrive at high school reading too poorly to absorb the complex subject matter they will be required to cover.” *Id.*

¹⁹⁶ Since the key objective is to enable virtually all students to become academically competent, it is not at all inconsistent for schools to continue to provide vocational education, as well as courses in music, art, physical education and other non-“core academic subjects.” Indeed, provision of such courses is invaluable to enrich and broaden the lives of all students, and combat boredom. Moreover, for those students for whom these are the only subjects about which they really care, it may be the only way for schools to effectively engage them. See Kenneth Gray, *Is High School Career and Technical Education Obsolete?* PHI DELTA KAPPAN, Oct. 2004, at 134; Anne C. Lewis, *Reforming Secondary Education*, PHI DELTA KAPPAN, Sept. 2004, at 3-4.

The critical point is that, whatever other courses students may take, they must all take a sufficient number of academic courses that are at least at grade level, so that they learn the subject matter and high level thinking and communications skills they need to become academically proficient. See Editorial, N.Y.

high schools should be brought at least to the level of the regular classes in the college preparatory tier.¹⁹⁷ Moreover, corresponding changes must be made to replace below grade-level curriculum in elementary and middle/junior high schools nationwide.¹⁹⁸

c. Hold States and Districts Accountable for Providing “Challenging Curriculum” to Virtually All Students

NCLB, however, falls short in three measures necessary to ensure that the schools convert the curriculum in virtually all classes to (at least) grade level. First, it fails to require districts to evaluate whether the level of curriculum actually being taught in the classrooms is at the appropriate grade level.¹⁹⁹ (There may often be a significant gap between written standards and what happens in the classroom.) Second, it fails to require the states to verify the accuracy of such district determinations. Third, it prevents the federal government from being able to hold the states accountable for having academic standards that are “challenging,” by explicitly exempting the states from having “to submit such standards to the Secretary.”²⁰⁰ Exempted from federal review, most schools continue to provide many students, especially the disadvantaged, with “lower-track classes.”²⁰¹

Abolishing AYP and sanctions would eliminate certain serious incentives for schools to dumb down their standards and curriculum to artificially raise test scores. But

TIMES, Feb. 23, 2005, at A30 (“vocational programs [need to] offer a sound academic grounding along with preparation for the new economy’s high-skill jobs”). The New York Regents program seems to provide an effective model. See James A. Kadamus, *Vocational Education*, N.Y. TIMES, Feb. 28, 2005, at A24 (letter to the editor by the Deputy Commissioner, New York State Education Department, describing its program which “integrate[s] sound academics with technical coursework.”).

¹⁹⁷ This recognition of the need to raise the curriculum at least to “honors” level in all high schools nationwide was recently endorsed by then Federal Reserve Chairman Alan Greenspan, as well as by Achieve, Inc., an organization of governors and business executives, the Thomas B. Fordham Foundation and the Education Trust. Anne C. Lewis, *High Schools and Reform*, PHI DELTA KAPPAN, Apr. 2004, at 563. The National Governors Association has also recently called on its member governors to raise the level of state high school curricula to provide students the skills they need for work and college today. Greg Winter, *Governors Seek Rise in High School Standards*, N.Y. TIMES, Feb. 23, 2005, at A13. Such “honors” courses are below the level of high school Advanced Placement and International Baccalaureate courses, all of which are college-level.

¹⁹⁸ Since about 1998, a diverse Long Island school district “began replacing its [middle school and high school] tracked classes with heterogeneously grouped classes in which the curriculum formerly reserved for the district’s high-track students was taught.” Carol Corbett Burris & Kevin G. Welner, *Closing the Achievement Gap by Detracking*, PHI DELTA KAPPAN, Apr. 2005, at 595. As a result: the percentage of African American and Hispanic students who passed the “algebra-based Regents exam before entering high school” increased from 23% to 75%; the percentage of such students passing the comparable science Regents exam “increased from 48% to 77%,” and the percentage of these students graduating from high school with a Regents diploma shot up from 32% to 82%. *Id.* at 596-597. Moreover, detracking had no negative effect on white and Asian students; in fact, their total passing percentages also increased significantly on all three measures, even though they started from a much higher passing rate. *Id.*

¹⁹⁹ “Lower-class children cannot produce typical middle-class achievement unless they learn basic and more advanced skills simultaneously, with each reinforcing the other. This is, in fact, how middle-class children who come to school ready to learn acquire both basic and advanced skills.” Richard Rothstein, *A Wider Lens On the Black-White Achievement Gap*, PHI DELTA KAPPAN, Oct. 2004, at 108.

²⁰⁰ 20 U.S.C. § 6311(b)(1)(A) (Supp. I 2001).

²⁰¹ JEANNIE OAKES, *supra* note 127, at xi.

they would still have the pressures of being required to publicly report test scores by NCLB and their own state accountability systems pulling them in the same direction, as well as the history and structure of decades of low-level curriculum for poor, minority and many other students. To overcome this heavy pressure, NCLB needs to have the states verify that the curriculum actually being taught in the classrooms is actually “challenging” and report on that to the federal government.

5. Teachers, Principals and Superintendents

NCLB rightly acknowledges that it is important to have a “highly qualified teacher” in core academic subjects in every public school classroom,²⁰² and that to be “highly qualified,” teachers would need to have both subject matter knowledge and pedagogical skills in the courses they are teaching.²⁰³ It requires schools “in need of improvement” to use at least 10% of their Title I funds to provide teachers and principals “professional development,” selecting from a laundry list of federally authorized activities²⁰⁴ and it requires that minimum percentages of Title I funds be spent to enable all teachers to become “highly qualified” by 2005-2006.²⁰⁵

What NCLB does not do is focus the schools on adopting the few critical structural changes known to improve instruction or identify the strategies necessary to equip existing principals and superintendents to lead school transformations. Nor does it identify the structural reforms needed in university preparation programs, so that future K-12 teachers and administrators will routinely be capable of teaching competently at grade level and leading school conversions, respectively, when they complete their university studies.

a. *Develop Existing Staff*

i. Replace reliance on teacher “workshops” with peer collaboration. NCLB already refers to a few of the key concepts that should become the core for greatly improving staff knowledge and skills. Schools need to terminate their traditional reliance on “workshops” as the dominant form²⁰⁶ of “staff development.” These are typically irrelevant to individual teachers’ instructional needs and do not improve classroom teaching.²⁰⁷ The Act moves in this direction by saying that the “professional

²⁰² 20 U.S.C. § 6319(a)(2) (Supp. I 2001).

²⁰³ 20 U.S.C. § 7801(23)(B)(i)(II)(C)(ii)(I) (Supp. I 2001). However, teaching skills do not seem to be required of “new” “middle or secondary school teachers.” See 20 U.S.C. § 7801(23)(B)(ii) (Supp. I 2001). Since such skills are essential at all grades K-12, that should be rectified.

²⁰⁴ 20 U.S.C. § 6316(b)(3)(A)(iii) (Supp. I 2001); 20 U.S.C. § 7801(34)(A) (Supp. I 2001).

²⁰⁵ § 6319(l) (Supp. I 2001).

²⁰⁶ “Highly structured and scripted training may occasionally be required to support unprepared and novice teachers [who cannot reasonably be expected] to collaborate in a sophisticated way and to exercise solid professional judgment.” Dennis Sparks, *The Looming Danger Of a Two-Tiered Professional Development System*, PHI DELTA KAPPAN, Dec. 2004, at 305-306. Such “neophytes . . . require mentoring, in-classroom coaching, and intensive professional development, some of it in a highly structured form.” *Id.* at 305.

²⁰⁷ OPEN LETTER, *supra* note 94, at 2; see Frank Levy & Richard J. Murnane, *A Role for Technology in Professional Development? Lessons from IBM*, PHI DELTA KAPPAN, June 2004, at 728;

development” it mandates for failing schools may not include “1-day or short-term workshops or conferences.”²⁰⁸

Now, it needs to go the next step and require that such workshops be replaced by intensive peer collaboration as the centerpiece of staff development. Joint lesson planning and evaluation with fellow teachers enables teachers to learn from each other’s strengths and overcome the often debilitating traditional culture of teacher isolation.²⁰⁹ There is “[a]n astonishing level of agreement [among] esteemed educators and researchers . . . that ‘the most promising strategy for sustained substantive school improvement is building the capacity of school personnel to function as a professional learning community’”²¹⁰ – i.e., peer collaboration. As Schmoker explains, “The most productive thinking is continuous and simultaneous with action – that is, with teaching – as practitioners collaboratively implement, assess, and adjust instruction as it happens . . . Actual practice must adjust and respond to ground-level complexities [such as] what do we do when our (presumably terrific) lesson or strategy doesn’t work with most students?”²¹¹ Even though “[t]housands of schools and even entire districts can attest to the power of [collaborative] structures for promoting . . . cumulatively dramatic and enduring improvements in teaching and learning . . . such collaboration . . . remains exceedingly, dismayingly rare.”²¹² This needs to be changed.

ii. Provide intensive mentoring for teachers. Second, schools need to provide intensive teacher mentoring by accomplished teachers and principals to all non-effective teachers, regardless of their experience levels, to meet each teacher’s specific pedagogical needs.²¹³ Such mentoring “shows great promise for changing professional practice and the . . . culture of isolation in which teachers have worked for decades.”²¹⁴ Evidence shows that the professional development it provides can carry “over into classroom practice because the coach helps teachers implement what they have

VIVIAN TROEN & KATHERINE C. BOLES, WHO’S TEACHING YOUR CHILDREN? WHY THE TEACHER CRISIS IS WORSE THAN YOU THINK AND WHAT CAN BE DONE ABOUT IT 52-57 (2003).

²⁰⁸ 20 U.S.C. § 7801(34)(A)(v)(ii) (Supp. I 2001).

²⁰⁹ See OPEN LETTER, *supra* note 94, at 2; U.S. DEP’T OF EDUC., WHAT WORKS: RESEARCH ABOUT TEACHING AND LEARNING 51 (1986).

²¹⁰ Mike Schmoker, *Tipping Point: From Feckless Reform to Substantive Instructional Improvement*, PHI DELTA KAPPAN, Feb. 2004, at 424, quoting Stanford University Professor Milbrey McLaughlin, in RICHARD DUFOUR & ROBERT EAKER, PROFESSIONAL LEARNING COMMUNITIES AT WORK xi (1998).

²¹¹ *Id.* at 427.

²¹² *Id.* at 431. Such collaboration was identified as essential to academic success by all twelve “high poverty, high performing schools” recently studied in Louisiana. DALE HAIR ET AL, *supra* note 145, at 9-10.

²¹³ See Sidney Trubowitz, *The Why, How and What of Mentoring*, PHI DELTA KAPPAN, Sept. 2004, at 59-62. RICHARD F. ELMORE, NAT’L COMM’N ON TEACHING & AMERICA’S FUTURE, INVESTING IN TEACHER LEARNING: STAFF DEVELOPMENT AND INSTRUCTIONAL IMPROVEMENT IN COMMUNITY SCHOOL DISTRICT #2, NEW YORK CITY 2-3 (1997), <http://www.nctaf.org/resources/archives/index.htm>; JOINT LEGIS. AUDIT & REV. COMM’N REP., *supra* note 145, at 73.

²¹⁴ BARBARA NEUFELD & DANA ROPER, THE ASPEN INST. PROG. ON EDUC. AND THE ANNENBERG INST. FOR SCH. REFORM, COACHING, A STRATEGY FOR DEVELOPING INSTRUCTIONAL CAPACITY: PROMISES & PRACTICALITIES 28 (2003), <http://www.annenberginstitute.org/images/Coaching.pdf>.

learned[.]”²¹⁵ Creating successful mentoring (or “coaching”) programs has been determined to depend on developing several conditions. These include that the district “provide clear, explicit and continuing support for the coaching program,” “provide principals with professional development that enables them to create a school culture in which coaching [for teachers] is both routine and safe,” fairly select knowledgeable and credible coaches, and “not divert their time to other school needs.”²¹⁶ To generate sufficient numbers of capable mentors, districts should create career ladders for accomplished teachers to become master teachers/mentors.²¹⁷ NCLB already has a useful definition of “teacher mentoring.”²¹⁸ It should be operationalized so that all Title I funded schools with fewer than 85% of their students at “proficiency” would have to provide such mentoring.²¹⁹

iii. Provide mentoring and peer collaboration for principals and superintendents. As much as many teachers need major help to teach effectively at grade level, many principals and superintendents raised on a two-track system, are likewise in over their heads.²²⁰ The districts need to provide for intensive mentoring and peer collaboration to meet the particular needs of their individual principals and superintendents to learn how to successfully lead transformations of their own schools and districts.²²¹

²¹⁵ *Id.* at 26-27. At the same time, Neufeld and Roper say that, even where teachers are anxious to improve their teaching, “the truth is that it will take several years for [them] to master what are fundamentally new and different instructional strategies It is important for district leaders . . . not to . . . put impossible expectations and demands on teachers and principals.” *Id.* at 22-23.

²¹⁶ NEUFELD & ROPER, *supra* note 215, at 16-17.

²¹⁷ See OPEN LETTER, *supra* note 94, at 2. Where South Carolina provided a three-year program of teacher mentors (“specialists”) in many of its low-performing schools, 89% of the principals and 74% of the teachers concluded that it “contributed greatly to the effectiveness of instruction at this school.” SOUTH CAROLINA EDUCATION OVERSIGHT COMMITTEE, THE TEACHER SPECIALIST ON SITE PROGRAM: YEAR THREE SUMMATIVE REVIEW 16 (2005), http://www.state.sc.us/eoc/PDF/Teacher_Specialist_On_Site_Program_3rd_Year_Review.pdf. But the state was unable to recruit a sufficient number of mentors to meet its need. *Id.* at 1, 35.

²¹⁸ 20 U.S.C. § 7801(42) (Supp. I 2001).

²¹⁹ In addition, as NCLB alludes to, “poor and minority children” are typically subjected to a much higher percentage of “inexperienced, unqualified [and] out-of-field teachers [than other children.]” 20 U.S.C. § 6311(b)(8)(c) (Supp. I 2001). To rectify this severe inequity and attract some of the most experienced and highly competent staff to schools whose students have the greatest needs, the states should be required to provide higher salary/differential pay to teachers and administrators in hard-to-staff schools. OPEN LETTER, *supra* note 94, at 4; see Jay Mathews, *A Move to Invest More in Effective Teaching*, WASH. POST, Feb. 10, 2004, at A10 (describing endorsement by The Teaching Commission, headed by former IBM chairman Louis V. Gerstner, Jr., of the need for such differential pay).

²²⁰ Indeed, in the experience of Neufeld and Roper, “most principals do not have [the] knowledge and skill . . . they need . . . to support their teachers’ learning.” NEUFELD & ROPER, *supra* note 215, at 4, n.7; See Jason Spencer, *HISD Hopefuls Don’t All Have Stellar Records*, HOUSTON CHRON., Nov. 6, 2004, at A1, A14; cf. Michael Dobbs, *Corporate Model Proves an Imperfect Fit for School System*, WASH. POST, Dec. 5, 2004, at A3, A10.

²²¹ See NEUFELD & ROPER, *supra* note 215, at 4-7, 24 (how “coaches” can help principals to become good instructional leaders); Jeff Archer, *Superintendents Gain Advice, New Insights From Network*, EDUC. WK., Mar. 23, 2005, at 6 (noting need for peer collaboration and mentoring of superintendents, so they can learn how to make “teaching and learning . . . their primary concern”).

b. Develop New Staff

i. Importance of greatly improving teacher preparation. As important as it is to use methods that actually work to increase the knowledge and skills of current educators, it is at least equally essential to pay attention to the preparation of new teachers. While more than two million teachers are projected to retire or otherwise leave the field in the next ten years,²²² new educators will take their places and serve our children for decades to come. Yet, as Vartan Gregorian, president of the Carnegie Corporation of New York, has recently warned:

We can no longer close our eyes to the problem of America's schools of education and the pitiful job most of them do in preparing our teachers. We are all fooling ourselves if we think that the past twenty years of standards-based education reform will ever result in our nation's children being provided with the quality of education they need without a dramatic parallel reform effort in the training of teachers.²²³

ii. Reduce "theory" and "methods" courses and integrate them with at least 30 week closely supervised, clinical placement for prospective teachers. Fortunately, in teacher preparation, as in staff development, educators know what works. Research by the National Commission on Teaching and America's Future has identified exceptional teacher colleges whose students routinely are prepared to effectively teach a challenging curriculum to diverse learners by the time they graduate. Moreover, all these schools of education have in common the fact that they provide intensive, academically integrated clinical programs of at least 30 weeks.²²⁴ (This contrasts with the eight to ten week clinical programs that education schools have traditionally provided.)²²⁵

The much greater emphasis on supervised teaching experience in the schools gives prospective teachers the opportunity to immediately apply the abstract "theory" and "methods" that they are studying. It allows them to see what works and what does not. Prospective teachers are able to get immediate guidance from experienced teachers, and develop and refine their own pedagogical skills. Schools with rigorous clinical programs also have much higher teacher retention. For example, after five years, DePaul University's Urban Teacher Corps has 77% retention and the University of Connecticut 88%, versus the nationwide average of only 54%.²²⁶ Vastly increased retention would

²²² See NAT'L COMM'N ON TEACHING AND AMERICA'S FUTURE, *No Dream Denied: A Pledge to America's Children*, 27 (2003).

²²³ Vartan Gregorian, *supra* note 135, at 48, available at <http://www.edweek.org/ew/articles/>.

²²⁴ See LINDA DARLING-HAMMOND, THE NAT'L COMM'N ON TEACHING AND AMERICA'S FUTURE, *DOING WHAT MATTERS MOST: INVESTING IN QUALITY TEACHING* 30 (1997), http://www.nctaf.org/resources/research_and_reports/nctaf_research_reports/index.htm. In April 2004, U.S. Senators Reed, Kennedy and Bingaman introduced a bill, "Preparing, Recruiting and Retaining Education Professionals Act of 2004," S. 2335, 108th Cong.(2004) to amend the Higher Education Act of 1965, that begins to address this issue. It would specify "year-long" clinical placements as a permissible use of "STATE GRANTS" under Section 202(d)(1) and "PARTNERSHIP GRANTS" under Section 203(d)(1).

²²⁵ DARLING-HAMMOND, *supra* note 224, at 31.

²²⁶ OPEN LETTER, *supra* note 94, at 3.

greatly reduce the nation's cost of continuously recruiting and preparing huge numbers of new teachers, and better retention would improve the quality of the teaching force.²²⁷

Accordingly, the Higher Education Act should be amended to provide that schools of education receiving federal dollars through direct grants, loans or student assistance, adopt practices that will equip their graduates to become effective teachers. Specifically, they need to: (1) replace short clinical training programs with at least thirty weeks of closely supervised observation/assistance of regular teachers and student teaching; (2) integrate education theory and methods into helping the candidates solve the actual problems they encounter in their practice teaching; and (3) include intensive experience in how to effectively teach higher-order analytical, problem-solving and communications skills, as well as children with disabilities and/or children with limited English proficiency, so all new teachers know how to engage the interests of diverse students.²²⁸

In addition, for two reasons, schools of education need to significantly reduce the time they spend on "methods" and "theory" courses. First, the material is much better learned and more useful to teaching candidates when integrated closely into their practical teaching experience in clinical programs. Second, the key "methods" of effective teaching are the same in all subjects: clear presentation of material; teacher modeling; students' using, organizing, understanding and communicating information; and teacher resolution of student confusion.²²⁹ Therefore, these subjects do not require many courses.

Instead of spending so much time on theory and methods courses, teacher education programs should increase significantly the time spent preparing candidates for the actual conditions they will face in today's urban (and other) schools.²³⁰ This should include how to apply the generic teaching methods described above to different subjects, especially math, science and reading/language arts. And it should include how to teach both "closed" learning tasks, with "a single well-defined outcome," such as grammatical rules, and "open" tasks with a wide range of acceptable outcomes," such as how to write a poem.²³¹ These teacher preparation courses need to be closely integrated with the clinical program.

iii. Require college major in academic field for teachers. In addition, all new teachers of any core academic subject should be required to have a college major or

²²⁷ OPEN LETTER, *supra* note 94, at 3. *See generally* NAT'L COMM'N ON TEACHING AND AMERICA'S FUTURE, NO DREAM DENIED: A PLEDGE TO AMERICA'S CHILDREN 8-9, 32-35(2003) (importance of increasing rate of teacher retention), www.nctaf.org.

²²⁸ OPEN LETTER, *supra* note 94, at 3. *See also* Gregorian, *supra* note 135, at 36. This structural change is consonant with Gregorian's position that education must be "view[ed] . . . as an academically taught clinical practice . . . one which includes close cooperation between colleges of education and participating schools; master teachers as clinical faculty in colleges of education; and two-year residencies for beginning teachers."

²²⁹ OPEN LETTER, *supra* note 94, at 3; *cf.* Paul Black et al., *Working Inside the Black Box: Assessment for Learning in the Classroom*, PHI DELTA KAPPAN, Sept. 2004, at 16. Teachers' "generic skills [are] plan[ning] their questions, allow[ing] appropriate wait time, . . . g[iving] feedback that was designed to cause thinking [and] ensur[ing] that students were given enough time during lessons to evaluate their own work and that of others.").

²³⁰ OPEN LETTER, *supra* note 94, at 3.

²³¹ *See* Black, *supra* note 229, at 17-18.

equivalent in an academic field, even if they have an education major.²³² This will help to assure that future teachers will have both the academic subject matter knowledge they need to become effective teachers and have developed the same kinds of analytical, problem-solving and communications skills that we expect them to teach to all their students.²³³

iv. Prepare principals and superintendents in how to lead school/district transformations. The Higher Education Act also needs to be amended as to principals and superintendents. Schools of education and any other providers of administrator preparation that receive federal education funds should replace post-graduate programs that emphasize how to manage schools as though they were stable “businesses” with programs that teach administrators and administrator candidates how to lead the transformation of their communities’ expectations and students’ achievement. These should be intensive case-study and experiential programs working with accomplished principals and superintendents.²³⁴

6. Family Support

a. Importance of Parental Support to Students’ Learning

“Go to any inner-city neighborhood,” Barack Obama said in his keynote address to the Democratic National Convention, ‘and folks will tell you that government alone

²³² OPEN LETTER, *supra* note 94, at 4.

²³³ See Gregorian, *supra* note 135, at 48 (“It is nonsense to talk about raising standards for students when their own teachers often do not meet the same standards. It’s not surprising that mediocre teachers produce mediocre students.”).

²³⁴ OPEN LETTER, *supra* note 94, at 3. The existing “highly qualified teacher” requirements, 20 U.S.C. § 6319(a) (Supp. I 2001) and 20 U.S.C. § 7801(23) (Supp. I 2001), are so loose that they could be satisfied by anyone holding a bachelor’s degree in any subject and passing any test deemed by a state to be “rigorous.” Thus, a teacher could be deemed “highly qualified” merely by having a bachelor’s degree in “education,” a traditionally non-intellectually rigorous major that has attracted many of the least academically qualified college students, and passing the widely used PRAXIS II test, which is at an 8th grade level.

This is not a high enough standard to give any assurance to the public that teachers genuinely have the subject matter knowledge, pedagogical skills, and intellectual capability to effectively teach students at the “proficient” level. Instead, state “highly qualified teacher” certification standards, tests and evaluations should be based on the Interstate New Teacher Assessment and Support Consortium Model Standards for Beginning Teacher Licensing, Assessment and Development, or similar standards, to ensure that all teachers of reading/language arts, math and other core academic subjects have extensive content knowledge and pedagogical skills in the courses they teach. Open Letter, *supra* note 94, at 4. The states should also be required to establish administrator certification standards and assessment devices, drawn from the applicable Interstate School Leaders Licensure Consortium Standards, or similar standards, to ensure that all principals and superintendents have the knowledge and skills to effectively lead their communities’ transformation to meet the Act’s goals. *Id.*

However, the first need is to vastly improve staff development and preparation, so as to create a large enough pool of competent and knowledgeable teachers and administrators to meet the states’ hiring needs at a meaningful level of certification. It is important for the states to concentrate on making those changes before creating higher certification standards, so that the candidates would actually be able to meet them, rather than having the standards be a hopeless and meaningless abstraction. Accordingly, new certification standards should not be required until 5 years after NCLB is restructured.

can't teach kids to learn. They know that parents have to parent, that children can't achieve unless we raise their expectations and eradicate the slander that says a black youth with a book is acting white.”²³⁵

Fundamentally, school children's learning depends on their having *motivation* to learn. Parents are the single-most important source of that motivation. Yet, many poor and minority families lack the parenting skills and adult literacy to provide the necessary motivation and stimulation for their children's academic learning.

NCLB soundly recognizes that it is important to encourage Title I parents to actively support their children's learning. For example, it encourages parents to “[m]onitor homework completion, and television watching,” support “positive use of extracurricular time,” and attend “parent-teacher conferences....”²³⁶ And it supports districts’ “promoting family literacy and parenting skills,”²³⁷ including providing “literacy training.”²³⁸

b. Provide Extensive Programs in Adult Literacy and Parenting Skills, and Adult Mentors Where Parents Are Unavailable

But the NCLB approach has a serious shortcoming. It fails to require the provision of programs to develop family literacy and parenting skills for the families whose children most need such support to be able to reach the Act's goals.

Currently, millions of parents lack the knowledge, skills and/or understanding needed to motivate and stimulate their children's learning at a high level. For many children, there are no parents or other caring adults in their lives who can give them the encouragement, motivation and disciplined structure they need to study and learn at a high academic level, including regularly doing their homework. Accordingly, NCLB should be amended to greatly expand programs like the federal Even Start Family Literacy Program,²³⁹ and other public/private programs that offer intensive parenting

²³⁵ Henry Louis Gates, Jr., *Breaking the Silence*, N.Y. TIMES, Aug. 1, 2004, at 11.

²³⁶ 20 U.S.C. § 6318(d)(1)(2)(A) (Supp. I 2001).

²³⁷ § 6318(a)(3)(A).

²³⁸ § 6318(e)(2)(7).

²³⁹ The Administration's effort to entirely eliminate the \$225 million appropriation for this program, Jonathan Weisman, *White House, Congress to Battle Again Over Domestic Programs*, WASH. POST, Feb. 6, 2005, at A7, is absolutely the wrong direction for federal policy to take. It is inconsistent with the critical need to strengthen family support for high level learning among poor and minority families and NCLB's recognition of that need. Extensive research and experience have shown that it is possible to operate effective programs. See ANNE T. HENDERSON & NANCY BERLA, eds., CENTER FOR LAW AND EDUC., NEW GENERATION OF EVIDENCE: THE FAMILY IS CRITICAL TO STUDENT ACHIEVEMENT 6 (1994) (“Across the [many parental involvement] programs studied, student achievement increased directly with the duration and intensity of parent involvement.” Effective current parent involvement programs include Toyota Families in Schools, see HEATHER HILL, NAT'L CTR. FOR FAMILY LITERACY, RESEARCH BRIEF UPDATE, TEACHER REPORT ON STUDENT PERFORMANCE, 2000-2003 (2003), <http://www.familit.org>, and the Teachers Involve Parents in Schoolwork program (TIPS), F.L. Van Voorhis, F. L. Van Voorhis, *Interactive Homework in Middle School: Effects on Family Involvement and Science Achievement: Teachers Involve Parents in Schoolwork (TIPS)*, 96 J. EDUC. RES. 323 (2003).

Insofar as the existing Even Start Program may be ineffectual, Congress needs to hold hearings to find out why, and then amend the authorizing law appropriately. Killing the program outright would be flying in the face of what we know about student learning and undermining the very goals that NCLB seeks to achieve.

skills and adult literacy training, so that such programs would be available to all families whose children's learning is comparable to "Below Basic" on the NAEP.²⁴⁰ Where parents are unavailable to receive such training or are otherwise unable to provide the needed motivation and support, either trained adult mentors should be offered to closely guide and assist such students,²⁴¹ or such students should be provided a longer school day in which school staff can provide such structure and support, including the undisturbed opportunity to complete homework, after the normal school day.²⁴²

7. State Technical Assistance and Corrective Action

While, under the remedial approach proposed here, the schools, districts and schools of education would be responsible for carrying out the required structural improvements rather than implementing the AYP/sanctions scheme, the states would continue to be responsible for ensuring that the applicable federal requirements are satisfied. In that regard, much of the existing law should be retained, substituting the "less than 85% proficiency criterion" for "in need of improvement" under AYP as the trigger for state involvement.

As currently, the states' first responsibility would be to provide technical assistance,²⁴³ including "school support teams."²⁴⁴ If, after providing such assistance, a state learns that the existing personnel at a school or district are not capable of making, or leading, the kinds and extent of changes that are required to turn the school or district around, as a last resort, it would then need to provide such leadership directly. The state would assign one or more trained educators, experienced in turning around failing schools, to work in the locality for an extended period to lead the organic process of school transformation.²⁴⁵

²⁴⁰ OPEN LETTER, *supra* note 94, at 4. Federal law also needs to provide that, for federal aid recipients, part of university preparation and school staff development will be intensive experiential training of teachers and administrators in how to reach out and effectively engage families to support their children's high academic achievement. OPEN LETTER, *supra* note 94, at 3.

²⁴¹ This might be done effectively by greatly expanding the work of Big Brothers Big Sisters ("BBBS"), "the oldest and largest youth mentoring organization in the United States," <http://www.bbbsa.org/site/pp.asp?c=iuJ3JgO2F&b=14603>, at 1, and similar organizations. Instead of having each mentor spend only "one hour a week to several hours a month," as BBBS does now, *id.*, the time should be expanded to multiple hours every week, so mentors could provide ongoing structure, motivation and support to such children. When it is recognized that we have "2.5 million children in this country who have an incarcerated parent," *id.* at 3, let alone millions of other severely disadvantaged children whose academic achievement is "Below Basic," and BBBS serves a total of only about 200,000 youth nationwide, *id.*, the need is vast.

²⁴² This practice is already used successfully by KIPP middle schools which serve predominantly poor students around the country. See Lynn Rosellini, *Closing the Gap: Getting Young Lives In Line*, U.S. NEWS & WORLD REP., Mar. 22/Mar. 29, 2004, at 87-88.

²⁴³ See 20 U.S.C. § 6316(b)(14)(c)(9) (Supp. I 2001).

²⁴⁴ 20 U.S.C. § 6317(a) (Supp. I 2001). Because the states' role in helping failing schools and districts turn around is so pivotal, see Part III, D, *supra*, state departments' of education capacity to provide this help will have to be vastly increased.

²⁴⁵ See Part III, C, 2, *supra*.

8. Reporting

Under the proposed remedial scheme, reporting would be a critical element of accountability. While that includes reporting of test scores, more important would be reporting of the status of reform implementation. To hold schools, districts and schools of education accountable for implementing the required structural improvements, and states accountable for ensuring that they do so, all would have to report regularly to the public and the government on the status of their implementation.²⁴⁶ This would need to include what steps they have taken to carry out each of the required structural changes, what obstacles they have run into, how they have attempted to overcome the obstacles, and the current results.

9. Federal Funding

“By the nature of many of the needed structural changes, much of their cost can be paid with existing resources by changing how districts, schools, teacher colleges, parents and students spend their time.”²⁴⁷ However, major additional funding would undoubtedly be needed for the country to convert from a two-tier to a one-tier educational system.²⁴⁸ This would include, for example, costs for intensive mentoring of teachers and administrators, differential salaries in high-need schools, and expanding the reform capacity of state departments of education.

Because the country as a whole has a profound national interest in seeing that these structural improvements are made, and the federal government would be taking the initiative to make them happen, it should fund 75% of their cost. At the same time, because the states and localities have such a major responsibility for providing public education, they should pay the remaining 25%.²⁴⁹

CONCLUSION

NCLB has given the nation an unprecedented opportunity to convert its two-tier education system that was designed for the Industrial Age into the high-level, one-tier system it requires for the new Information Age. NCLB implies that this conversion is necessary by enshrining the goal that virtually all students need to become academically proficient, regardless of race, ethnicity or income, and that there must be high standards for all.

However, the Act’s central remedial approach for accomplishing the proficiency goal – sanctioning schools when test scores fail to meet AYP – is based on false premises. NCLB incorrectly assumes that an overall sanctions approach will pressure

²⁴⁶ See JOINT ORGANIZATIONAL STATEMENT, *supra* note 3, at ¶ 3.

²⁴⁷ OPEN LETTER, *supra* note 94, at 4. For example, time spent on ineffectual workshops can instead be spent on peer collaboration and much time spent in “methods” and “theory” courses can instead be spent in closely supervised clinical placements.

²⁴⁸ *Cf.* Tucker & Toch, *supra* note 92, at 33 (“Making NCLB work will almost certainly require far more money than the Bush Administration – or even many Democrats – have imagined.”).

²⁴⁹ If NCLB’s provision that currently precludes the federal government from “mandat[ing] a State or any subdivision thereof to spend any funds or incur any costs not paid for under this Act” would be construed as preventing such a matching requirement, it should be amended accordingly. See 20 USC § 7907(a).

schools into making whatever changes are necessary to effectively educate all children by 2014. It incorrectly assumes that schools and districts already know what to do to accomplish this goal and have the capacity to do so. It incorrectly assumes that, if they are unable or unwilling to continuously and dramatically increase the percentage of students at proficiency, compelling them to implement individual school strategic plans, “corrective actions” and “restructuring” will rectify the underlying causes of their failure. And it incorrectly assumes that if districts cannot turn failing schools around, the state departments of education have the capacity to assist them to do so, or, if necessary, to do it themselves.

The whole AYP/sanctions scheme leads to excessive concentration on raising test scores as an end in itself and manipulating the results to avoid or minimize sanctions, instead of directing efforts to replacing our outdated two-tier education system. To accomplish the Act’s goal, federal law needs to replace this punitive approach to accountability with a positive and constructive one: guiding states and localities toward the key structural changes necessary to actually improve learning and then holding localities and states accountable for implementing them.

Specifically, these structural changes include:

1. Requiring that the curriculum taught be at least at grade level in all classes, except for severely, cognitively disabled students incapable of learning at that level regardless of the quality of teaching;
2. Replacing “workshops” as the dominant form of staff development with peer collaboration and mentoring;
3. Providing higher salary/differential pay to teachers and administrators in hard-to-staff schools;
4. Increasing the teacher preparation time spent on supervised clinical placements to at least thirty weeks, decreasing the time spent on traditional “methods” and “theory” courses, and emphasizing student teachers’ application of research to real-life problems facing them in their urban, and other, classrooms;
5. Replacing post-graduate programs for principals and superintendents that emphasize how to manage stable “businesses”, with intensive experiential programs in how to lead transformations of community expectations and student achievement;
6. Greatly expanding programs to provide parenting skills and adult literacy to families of very low-achieving students, and, where infeasible, providing for adult mentors as role models;

7. Reframing the states' role from enforcing the AYP/sanctions scheme to assisting localities make the structural changes needed to improve teaching and learning;
8. Recasting the emphasis of public reporting from test scores to what steps localities and states are taking to implement the structural changes; and
9. Funding 75% of the cost of carrying out the recommended changes.

The requirement to carry out the designated policy changes would apply to any Title I funded school with fewer than 85% of its students proficient in reading and math, and to any district and state in which such schools were located. As under the current NCLB, each state would retain discretion as to how to implement the federal requirements through designing its own state plan.

The federal power embodied in NCLB needs to be redirected to make the structural improvements required to convert to a high-level one-tier public education system for all. If this is done, NCLB can overcome decades of unequal education of poor and minority students and turn education into the new civil right of the 21st century.

If, however, NCLB is allowed to remain on its current path of punishing schools for violating arbitrary AYP objectives, it will not generate the fundamental changes necessary to improve learning. Absent fundamental improvements in what happens in the classroom and at home, predictably either the number of failing schools will continue to escalate or standards will be self-defeatingly lowered to avoid the appearance of failure. Following that road runs the risk of destroying public support for the public schools. Let us choose wisely.