

## Abstract of Paper

This paper focuses on the No Child Left Behind Act and how the test-based accountability and subgroup provisions actually provide incentives for segregated schools, encourages administrators to push out minority and poor students and punish schools that serve the most diverse populations. The paper offers suggestions for modifying the Act to ensure that our educational system truly does leave no child behind. These suggestions include changing the Act's accountability provisions to focus on overall growth and acknowledging the severe educational inequality that leads to minority and poor children underperforming on state assessment tests in the first place.

### I. Introduction

The No Child Left Behind Act (NCLBA) is the latest revision of the 1965 Elementary and Secondary Education Act (ESEA). The ESEA's most well-known component is Title I, which is the federal government's single largest educational aid program and is designed to assist disadvantaged students.<sup>1</sup> Its stated purpose is to ensure that all children have a fair, equal and significant opportunity to receive a high-quality education and reach proficiency on challenging state academic achievement standards and state academic assessments.<sup>2</sup> However, ever since President Bush passed the current revision in 2002, there have been serious concerns from educators, parents and academics about the implications on the policy for poor and minority children. The concerns are two-fold: first, "that test-based accountability has inconsistent benefits and several unintended consequences for minority students and second, that subgroup accountability rules may sanction a disproportionately large number of predominately Black and Latino schools."<sup>3</sup> The test-based accountability provisions help promote segregated schools, and

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<sup>1</sup> James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U.L. Rev. 932 (2004).

<sup>2</sup> 20 U.S.C. § 6301 (2003).

<sup>3</sup> Jimmy Kim & Gail L. Sunderman, *Large Mandates and Limited Resources: State Response to the No Child Left Behind Act and Implications for Accountability*, The Civil Rights Project at Harvard University (2004).

encourage and give incentives for schools to push out minority and poor students, while the subgroup accountability rules punish schools with the most diverse populations.

The NCLBA would better serve *all* students if instead of test-based accountability, the Act focused more on the school's overall rate of growth. Focusing on growth makes it less likely that statements about school quality would simply coincide with the racial and economic background of the school. The NCLBA would also benefit from providing realistic remedies for students in failing schools. Current studies in urban districts show that the NCLB transfer option was used by less than 3% of eligible students.<sup>4</sup> Although the NCLBA was created by people who had good intentions, the Act punishes poor and minority children as opposed to helping them and should be reformed to realistically allow achievement of its goals.

There are many complaints about the No Child Left Behind Act. This paper will only address a very narrow scope of those problems. I do not discuss many of the structural issues that others have brought up with the Act. The Act has been accused of being an unfunded mandate, over-emphasizing testing, and eradicating local control of schools. There is a fair amount of controversy over the funding of the Act, with many claiming it is under-funded and many (often representatives of the government) claiming that it may in fact be *over-funded*.<sup>5</sup> In fact, on April 20, 2005, the National Education Association and a number of school districts filed suit against the U.S. Department of Education on this very issue.<sup>6</sup> The case is still pending, but it follows that the issue of the Act being an unfunded mandate is far from being settled. While these issues are key in improving the No Child Left Behind Act, I have chosen to focus on how the Act affects students in low-income and minority schools and what can be done to help those students and schools.

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<sup>4</sup> Jimmy Kim & Gail L. Sunderman, *Does NCLB Provide Good Choices for Students in Low-Performing Schools?* The Civil Rights Project at Harvard University (2004).

<sup>5</sup> See Ralph G. Neas, *Funding a Movement: U.S. Department of Education Pours Millions into Groups Advocating School Vouchers and Education Privatization*, PEOPLE FOR THE AMERICAN WAY.ORG, Nov. 18, 2003, at [http://www.pfaw.org/pfaw/dfiles/file\\_259.pdf](http://www.pfaw.org/pfaw/dfiles/file_259.pdf); John Boehner, *Massachusetts Officials Say Critics Greatly Exaggerate NCLB Costs to States; Study Concludes Law May Even be Overfunded*, COMMITTEE ON EDUCATION AND THE WORKFORCE, Feb. 10, 2004, at <http://www.edworkforce.house.gov/press/press108/second/02feb/massnclbcost021004.htm>.

<sup>6</sup> See <http://www.nea.org/lawsuit/images/nclbcomplaint.pdf> (last visited May 8, 2005).

## II. Mechanics of the No Child Left Behind Act

The main provisions of the NCLBA focus of teaching, testing and accountability. As far as teaching goes, the Act calls for “highly qualified” teachers for all subjects and that teachers in Title I schools demonstrate that they are “highly qualified” by 2005-2006.<sup>7</sup> Teachers are presumed to be “highly qualified” if they majored in the subject that they teach. They can also show that they are “highly qualified” if they are fully certified and demonstrate competency in the subjects that they teach, by taking a state test.<sup>8</sup>

The testing and accountability provisions go together hand in hand. States must set “student achievement standards” and “challenging academic content standards” that define what the adequate education is for children in the state.<sup>9</sup> The Act requires annual testing in reading and math to be given between third and eighth grades and at least one more test in reading and math between tenth and twelfth grades.<sup>10</sup> Starting in 2007, students are also going to be tested in science at least three times between third and twelfth grades.<sup>11</sup> A sufficient percentage of all students must perform adequately on these state tests. Each year, the number of proficient students is supposed to rise like stair steps, until 2014, at which point all students are supposed to be proficient. This concept is known as adequate yearly progress (AYP) and is worth exploring further.

Crucial to AYP is the success of all identified subgroups within a school. Since 1994, the ESEA has required states and districts to report disaggregated test scores by race, ethnicity, gender, migrant status, disability, limited English proficiency, and socioeconomic status.<sup>12</sup> However, even though racially disaggregated data collection has been required since 1994, the

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<sup>7</sup> 20 U.S.C. § 1119(a)(3) (2003).

<sup>8</sup> Ryan, *supra* note 1.

<sup>9</sup> 20 U.S.C. § 1111(b)(1)(A) (2003).

<sup>10</sup> § 1111(b)(3).

<sup>11</sup> § 1111(b)(3)(C)(v)(II).

<sup>12</sup> 20 U.S.C. 6311(b)(3)(I) (2000).

requirements were not enforced in the face of noncompliance.<sup>13</sup> Schools do have a way to avoid being labeled as failures if a particular subgroup fails to make AYP. The Act includes a “safe harbor” provision that allows schools to avoid intervention if the failing subgroup reduced its failure rate by at least 10% and improved on at least one other academic measure.<sup>14</sup>

AYP can make or break a school’s level of “success” under the Act. Using test scores from 2001-2002, states had to create a starting point for AYP that was the higher of either: the percentage of students in the lowest-achieving subgroup or the threshold percentage of students performing proficiently in the lowest-performing quintile of schools statewide.<sup>15</sup> The state must then set a uniform bar for achievement for all schools and all subgroups within schools. Schools that fail to make AYP are labeled as needs improvement and after two consecutive years of failing to make AYP schools must develop a plan for improvement, accept technical assistance, and make public school choice available.<sup>16</sup> Schools that don’t make AYP for four consecutive years must choose between instituting new measures such as replacing the school’s staff or instituting a brand-new curriculum. Schools who fail to make AYP for five consecutive years must give up control of the school to the state government, which could then choose to take over the school itself, turn over the school to a private company or reopen the school as a charter school.<sup>17</sup> Since AYP and test-based accountability plays such a large role in a school’s fate, the consequences of this technique and its effects on poor and minority students should be examined.

### III. Consequences of Test-Based Accountability

The test-based accountability that is the touchstone of NCLB has devastating consequences for poor and minority students and the schools that they attend. The test-based accountability leads to what many call a “diversity penalty”: the schools that are the most racially and

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<sup>13</sup> Daniel J. Losen, *Challenging Racial Disparities: The Promise and Pitfalls of the No Child Left Behind Act’s Race-Conscious Accountability*, 47 How. L. J. 243 (2004).

<sup>14</sup> 20 U.S.C.6311(b)(2)(I)(i) (2003).

<sup>15</sup> § 1111(b)(2)(E).

<sup>16</sup> § 1116(b)(3), (4).

<sup>17</sup> § 1116(b)(7)-(8).

economically diverse will tend to be punished most harshly.<sup>18</sup> This occurs because, often, schools with diverse populations will have one or more subgroups who will not meet the AYP standards. This could very well lead to this school being labeled as a failing school, when in fact, great gains (from the previous year) may have been made within that subgroup and all other subgroups. Once schools begin noticing this trend (if they have not already), they will be reluctant to count the students that belong in these subgroups and may begin to try to push these students out. Subgroup test-based accountability also puts diverse and low-income schools at a higher risk of failing AYP than white and middle-class schools.<sup>19</sup> This is an unacceptable consequence of the Act. Additionally, the test-based accountability will lead to segregated schools staying segregated, and may make schools more segregated than they currently are. All these factors add up to one conclusion: that the NCLBA will turn out to have horrible consequences for poor and minority students and the schools that they attend.

Academics are not the only ones who are questioning the validity of test-based accountability and corresponding sanctions NCLB doles out. In a survey by the Harvard Civil Rights Project, teachers did not believe that identifying schools that have not made AYP would lead to those schools improving.<sup>20</sup> The Harvard Civil Rights Project study questioned teachers in two urban school districts, one in Fresno, California and the other in Richmond, Virginia.<sup>21</sup> These districts serve many low-income and minority children.<sup>22</sup> The teachers felt that the sanctions imposed by the Act would encourage teachers to transfer out of schools that are labeled as needs improvement.<sup>23</sup> Or it could encourage teachers not to teach at those schools to begin with.<sup>24</sup> Additionally, when teachers were asked about how long they planned to continue teaching at their current schools, teachers who were currently teaching at schools that were labeled needs improvement were more likely to be planning on leaving within five years than teachers in schools

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<sup>18</sup> Ryan, *supra* note 1

<sup>19</sup> Kim & Sunderman, *supra* note 3 at 27.

<sup>20</sup> Gail L. Sunderman, et al, *Listening to Teachers: Classroom Realities and No Child Left Behind*, The Civil Rights Project at Harvard University (2004).

<sup>21</sup> *Id.* at 3.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 30.

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

that had made adequate progress (differences of 10 to 15 percentage points).<sup>25</sup> Teachers were split on the idea of how sanctions would improve schools, but they were united in their belief that the transfer option would not improve schools.<sup>26</sup> The majority of teachers also believed that sanctions and the AYP requirements would cause them to ignore important aspects of the curriculum, and essentially “teach to the test”.<sup>27</sup> The teachers surveyed were hopeful about the supplemental educational services (out of school tutoring and the like) available to them.<sup>28</sup> Overall, the teachers’ feelings about the NCLBA mirror those of many who are concerned about the unintended effects the Act may have.

Schools trying to succeed under the Act face a startling reality when examining the correlations between the diversity of the school and the likelihood of making AYP. Schools with more diverse populations also have more student subgroups and, as school administrators have learned, the more subgroups a school or district has, the harder it becomes for that school or district to make AYP. This is because the likelihood of all subgroups passing the tests decreases with each additional subgroup a school has. Studies have confirmed that the more diverse a school is, the more likely that particular school is to fail to make AYP.<sup>29</sup> Thus, schools are punished for serving more integrated communities. Unfortunately, many schools are identified as failing, when they have a relatively high performance, simply because a small number of students in any one subgroup can not meet AYP standards.<sup>30</sup> It appears that the diversity of schools has almost as strong of a correlation with making AYP, as does the socioeconomic and racial background of the school alone. Within schools serving lower-income families, the percentage of schools meeting AYP drops dramatically when those schools have more subgroups. A study conducted by the Policy Analysis for California Education (PACE) group revealed that within schools that have less than 25% of their students qualifying as economically disadvantaged as the number of subgroups

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<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 31.

<sup>27</sup> *Id.* at 33.

<sup>28</sup> *Id.*

<sup>29</sup> Monty Neill, *Leaving Children Behind: How No Child Left Behind Will Fail Our Children*, 85 PHI DELTA KAPPAN 225, 226 (2003).

<sup>30</sup> David Nash, *Improving No Child Left Behind: Achieving Excellence and Equity in Partnership with the States*, 55 Rutgers L. Rev. 239 (2002).

rose the percentage of schools that met AYP dropped 30%.<sup>31</sup> For schools with more than 75% of their populations that are from economically disadvantaged backgrounds, as the number of subgroups rises, the percentage of schools that met AYP dropped 37%.<sup>32</sup> The bottom line is clear: there is no motivation for schools to strive to have diverse populations; in fact, it is to a school's advantage to have as few subgroups as possible.

The test-based accountability and subgroup rules provide an incentive for administrators and teachers to push out minority and low-income students. The Act has added to the incentive some states already face to get rid of the kids who don't score high on the state tests because now these schools are being publicly reprimanded, sanctioned and could eventually lose funds. Some schools and administrators will work to avoid enrolling students who typically score lower on the state tests (i.e. minority and low-income students). This pressure could lead schools to push low performing students to another school, provided one will accept them, or out of the system totally. This is much more likely to occur at the high school level because students are much more apt to drop out at that level. A study done in New York gives credence to the idea that test-based accountability does indeed provide an incentive to push out low performing students.<sup>33</sup> Since the Act states that schools will not be held accountable for test scores of students that are not in attendance for the "full year", some schools have begun sending (and encouraging the parents of such children to send) low achieving students to alternative schools in order to circumvent test-based accountability.<sup>34</sup> Some school officials have acknowledged that students are encouraged to quit regular high school and to attend "alternative" schools so that the school's test performance is boosted.<sup>35</sup> These "alternative" schools are often meant for students with behavior problems and are not likely to address to educational issues that the student might be facing. Obviously, the

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<sup>31</sup> John R. Novak & Bruce Fuller, *Penalizing Diverse Schools? Similar Test Scores, but Different Students, Bring Federal Sanctions*, PACE POLICY BRIEF, Dec. 2003, available at [http://www.pace.berkeley.edu/policy\\_brief\\_03-4\\_Pen.Div.pdf](http://www.pace.berkeley.edu/policy_brief_03-4_Pen.Div.pdf).

<sup>32</sup> *Id.*

<sup>33</sup> John Charles Boger, *Educations Perfect Storm: Racial Resegregation, High Stakes Testing and School Resource Inequities: The Case of North Carolina*, 81 N.C. L. Rev. 1375, 1434 (2003).

<sup>34</sup> Losen, *supra* note 13.

<sup>35</sup> Boger, *supra*, note 33.

issue of students being pushed out is a very real problem in schools that are concerned about low test scores and not making AYP.

This act of being “pushed out” can have devastating results on a student’s future. America’s prisons are filled with young people who left school and shortly after, ended up in prison. This cycle is called the school-to-prison pipeline and the pipeline is growing every day.<sup>36</sup> Sadly, about 70% of adult prison inmates are high school dropouts.<sup>37</sup> Additionally, pushing students to these alternative schools generally does nothing to help their educations. Most of these schools were designed for students with behavioral needs, not students who have been labeled as low achievers.<sup>38</sup> Daniel J. Losen noted that, “the only state that has had a race-based accountability system in place (Texas), also has a disproportionately high level of Latino and Black children who are sent to disciplinary alternative programs”.<sup>39</sup> Instead of helping students who need it the most, the Act inspires some administrators to simply ship them away so the problem can be avoided.

The NCLBA leads to incentives to keep segregated schools segregated. Already, today’s schools are approaching segregation levels that recall the days immediately post Brown. When examining large, urban districts the pervasiveness of segregation is apparent and staggering. Starting in the mid 1990s, nearly all of the students (93% of more) in big urban cities such as East St. Louis, Compton, Atlanta, Los Angeles, Oakland, and Washington D.C. were minority.<sup>40</sup> The Harvard Civil Rights Project recently released a study that showed that “because of the severe isolation of students in their own racial groups, particularly of white students, black and Latino students attend predominately minority schools in disproportionate numbers”.<sup>41</sup> School segregation is now largely due to residential segregation. However, whatever its source, the Act exasperates this problem by providing administrators of middle class schools a reason to exclude

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<sup>36</sup> Losen, *supra*, note 13 at 257.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 290.

<sup>39</sup> *Id.*

<sup>40</sup> Craig D. Jerald & Bridget K. Curran, *By the Numbers: The Urban Picture*, EDUC. WK., Jan. 8, 1995, at 56.

<sup>41</sup> Gary Orfield & Chungmei Lee, *Why Segregation Matters: Poverty and Educational Inequality*, The Civil Rights Project at Harvard University (2005).

minority and poor students.<sup>42</sup> Due to vast disparities in our educational system, schools that contain a minority or low-income subgroup are much more likely to fail to make AYP. Some researchers even suggest that virtually no schools that serve a large number of low-income children will make AYP.<sup>43</sup> Since it is a well-known fact that minority and low-income students fail to make AYP at higher rates than white and middle class students, administrators have an incentive to minimize the number of minority or poor students in their schools.

The Act only requires the disaggregation of test scores for a subgroup if that subgroup is sufficiently large enough to yield what they deem to be “statistically reliable information”.<sup>44</sup> However, since there is no single formula for determining this figure and states have the power to determine the minimize size of the subgroups, this figure may become the dividing line between schools that make AYP and schools that don’t.<sup>45</sup> Additionally, parents who may be seeking an integrated school will be deterred since the most diverse schools are more likely to be labeled as “failing” schools. Because NCLB provides no incentives for administrators to integrate schools, schools will not only remain segregated, they will continue to become more segregated as administrators try to keep the number of low performing (read: low-income and minority) students at bay.

The incentives to segregate will have a devastating effect on poor and minority students. Segregated schools are a serious detriment to both poor and minority students. However, it is not simply the act of sitting next to a middle-class white student that helps to provide a better educational experience. Studies have shown that students in racially segregated school districts are substantially more likely than others to be educated by uncertified or inexperienced teachers, when in fact these are exactly the students who need the best and most qualified teachers.<sup>46</sup> Additionally, several studies have shown that by attending a middle class school, minority and low-

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<sup>42</sup> Ryan, *supra* note 1 at 961.

<sup>43</sup> Neill, *supra* note 29 at 228.

<sup>44</sup> Ryan, *supra* note 1 at 962.

<sup>45</sup> *Id.*

<sup>46</sup> Losen, *supra* note 13.

income students are exposed to higher expectations and more educational and career options.<sup>47</sup> As the teachers who were interviewed by the Harvard Civil Rights Project attested to, high poverty schools tend to struggle with attracting and retaining good teachers.<sup>48</sup> A national study conducted over ten years ago found a correlation between the average socioeconomic status of the student body and academic credits offered: schools with the most low-income students had fewer course offerings.<sup>49</sup> There is no reason to think that segregated schools today will do any better. In fact, studies have proven the exact opposite.<sup>50</sup>

Urban students and minorities are not the only group of students getting left behind. Children who live in rural communities – where they often have high poverty rates and significant minority populations – are also facing devastating consequences because of the No Child Left Behind Act. The test-based accountability requirements affect rural schools because oftentimes the schools are simply too small to yield statistically significant data.<sup>51</sup> However, there is no exception that prevents schools with small data sets from using the information if the entire school is too small.<sup>52</sup> Unfortunately, this practice will be more likely to lead to school closings rather than school improvement. In small towns, when a newspaper reports that, for example, four out of 20 fourth graders scored below proficiency in reading, there is likely to be open speculation about who those children are.<sup>53</sup> Not only does this not help to ensure the quality of schools, it humiliates the children it is supposed to help.

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<sup>47</sup> Orfield & Lee, *supra* note 41, citing J.W. Schofield, *Review of Research on School Desegregation's Impact on Elementary and Secondary School Students* in HANDBOOK OF RESEARCH ON MULTICULTURAL EDUCATION (J.A. Banks & C.A.M. Banks eds., 1995); J. Anyon, *Ghetto Schooling: A Political Economy of Urban Educational Reform* (1994); M.P. Dawkins & J.H. Braddock, *The Continuing Significance of Desegregation: School Racial Composition and African American Inclusion in American Society*, 63 J. NEGRO EDUC. 394, 394-405 (1994); G. Natriello et al., *Schooling Disadvantaged Children: Racing Against Catastrophe* (1990).

<sup>48</sup> *Id.* at 16.

<sup>49</sup> *Id.*, citing D. Monk & E. Haller, *Predictors of High School Academic Course Offerings: The Role of School Size*, 30 AM. EDUC. RES. J. 3 (1993).

<sup>50</sup> *Id.*, citing M.P. Dawkins & J.H. Braddock, *The Continuing Significance of Desegregation: School Racial Composition and African American Inclusion in American Society*, 63 J. NEGRO EDUC. 394, 394-405 (1994).

<sup>51</sup> Rachel B. Tompkins, *Leaving Rural Children Behind*, EDUC. WK MAG., Mar. 26, 2003, available at <http://www.edweek.org/ew/articles/2003/03/26/28tompkins.h22.html>.

<sup>52</sup> *Id.*

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

Rural schools also face additional challenges because of their location. Small schools face obstacles implementing the sanctions that the Act demands when a school is in need of improvement.<sup>54</sup> Many are in remote areas and this brings about problems with attracting and retaining educators, providing supplemental services and offering school choice.<sup>55</sup> When there is only one high school within 100 miles, it is quite difficult to offer a school choice program. For districts with more than one school in the district, the school choice requirement will likely exacerbate current problems associated with transporting students long distances.<sup>56</sup> It is clear that the problems with the No Child Left Behind Act do not simply manifest in urban communities.

The No Child Left Behind Act is wrought with problems that affect all students and schools. However, some of these problems are going to disproportionately affect minority and low-income students (including students in rural communities). The Act will help promote segregated schools and within these schools it gives incentives to push out low performing students. These students are disproportionately low income and minority students. The claims about the NCLBA are pretty serious and beg the question, what has happened to school districts since the Act was passed? Have schools fallen prey to the negative incentives of the Act? To help in my quest to answer these questions, I looked at how California's public schools have changed since the Act was passed.

#### Case Study – California Public Schools

I have chosen to examine the effect that the NCLBA has had on California's public schools because California is the state with the most ethnically and socially diverse public schools. Under the AYP rules, California identified ten major subgroup categories that must be counted for AYP

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<sup>54</sup> Cynthia Reeves, *Implementing the No Child Left Behind Act: Implications for Rural Schools and Districts*, NORTH CENTRAL REGIONAL EDUCATIONAL LIBRARY (2003), at [http://www.ncrel.org/policy/pubs/html/implicate/NCLB\\_PolicyBrief.pdf](http://www.ncrel.org/policy/pubs/html/implicate/NCLB_PolicyBrief.pdf).

<sup>55</sup> Lorna Jimerson, *Special Challenges of the No Child Left Behind Act for Rural Schools and Districts*, at <http://www.ruraledu.org/docs/nclb/jimerson.pdf>.

<sup>56</sup> Reeves, *supra* note 54 at 5.

calculations: American Indian or Alaska Native; Asian; Black; Hispanic or Latino; Native Hawaiian or Other Pacific Islander; White; Students with Disabilities; Limited English Proficient; and Economically Disadvantaged.<sup>57</sup> The subgroup accountability provisions are most likely to affect schools enrolling disadvantaged minority students and schools with racially diverse enrollments.<sup>58</sup> Within these schools, the performance of Latino, White, Economically Disadvantaged and Limited English Proficient students will most likely determine whether a school makes AYP.<sup>59</sup> California is also an interesting state to examine because the Act has indeed had a definite impact on the public schools in the state.

After the No Child Left Behind Act was passed, numerous California schools were labeled as failing schools. Following the 2002-2003 school year, over 3,000 schools fell short of their annual measurable objectives for the second year in a row.<sup>60</sup> Due to this, children were free to request a transfer to another public school.<sup>61</sup> However, in California, as is true around the rest of the country, the transfer option is rarely used, so essentially these children are stuck in schools that are deemed “failing”.<sup>62</sup> This is ironic, since the purpose of the act is to leave no child behind – but that seems to be exactly what is happening in these California schools.

The diversity penalty is alive and well in California as well. The percentage of schools in California hitting their AYP growth target is strongly related to the number of student subgroups.<sup>63</sup> Schools serving lower income families and their children are also less likely to achieve their AYP growth targets. Interestingly enough, even within schools serving lower-income families, the percentage of schools meeting AYP drops dramatically when those schools have more subgroups.<sup>64</sup> However, in California, schools labeled as needing improvement were likely to fail to

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<sup>57</sup> CALIFORNIA’S CONSOLIDATED STATE PERFORMANCE REPORT: PART 1 (California Dept. of Education, January 2005), available at <http://www.cde.ca.gov/nclb/sr/rt/documents/usdecsprjanfinal.doc>.

<sup>58</sup> Kim & Sunderman, *supra* note 3.

<sup>59</sup> *Id.*

<sup>60</sup> Novak & Fuller, *supra* note 31.

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

<sup>62</sup> *Id.*

<sup>63</sup> Kim and Sunderman, *supra* note 3.

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

make AYP because of the performance of two subgroups – students with LEP and students with disabilities.<sup>65</sup> Schools identified as needing improvement are more likely than schools meeting AYP to be required to meet separate performance targets for disadvantaged groups.<sup>66</sup> Additionally, schools needing improvement were more likely to have a black and special education subgroup and less likely to have a white subgroup than schools that meet AYP.<sup>67</sup> Take Manzanita Elementary in Oakland, for example. The school is one where parents are active, teachers are inspiring and students are challenged. However, when the students met all but one of the necessary targets for achievement, the school was posted on the list of failing California schools. This is discouraging for a school that works hard to educate all of its students, and indeed had made gains since the prior year. It is an unfortunate thing that under the No Child Left Behind Act, those gains are not recognized.

The link between race, family income level and a school's rating is strong in many California districts. Two districts in California that combine to add up to only 8% of California's public schools contain almost 17% of all schools labeled as needing improvement.<sup>68</sup> This means that several districts that serve low income and minority students contain a disproportionately large percentage of the schools that are labeled as needing improvement. Because of this, these schools will disproportionately shoulder more of the weight by having to offer transfer options. This means that these schools will end up having to spend 20% of their fiscal resources as they send students to other schools. It appears that once again, minority and low income students will shoulder the burden of being left behind.

The statistics on student achievement in California are disheartening. During the 2002-2003 school year only 52.4% of all second grade students tested in math were labeled as proficient

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<sup>65</sup> Id.

<sup>66</sup> Id.

<sup>67</sup> Id.

<sup>68</sup> Kim and Sunderman, *supra*, note 4.

or advanced and only 36.3% were proficient in reading/language arts.<sup>69</sup> What is really disheartening is that this same group of students (third grade students) received worse scores in 2003-2004, with only 49% of third graders proficient in math and 31% proficient in reading/language arts.<sup>70</sup> During the 2003-2004 school year, only 23% of black fifth graders in California were proficient or advanced in math.<sup>71</sup> Only 25% of Latino fifth graders were proficient in math and only 17% of fifth grade students with disabilities were judged proficient. This is compared with 52% of all white fifth graders. The differences between white and minority children remain throughout middle score, growing larger some years. For example, while 52% of white sixth graders are proficient in math, only 18% of black students are.<sup>72</sup> By eighth grade, only 13% of black students are proficient in math, and only 20% are proficient in reading/language arts. In contrast, 42% of white eighth graders are proficient in math and 51% are proficient in reading/language arts. Clearly, there is a huge disparity and so far, the No Child Left Behind Act has not helped ease this disparity. It is clear that California, like many states across the nation, is finding it increasingly difficult to meet the demands of the No Child Left Behind Act.

#### IV. Suggested Solutions

So, what should be done to reshape the No Child Left Behind Act into a law that truly does benefit *all* students? There a few things that I believe would be a good start in reforming the law. The Act should focus on overall growth, create incentives for the transfer option, remove the temptation to push underperforming students out of schools, and somehow address the poverty that leads low income and minority students to fail to meet their target schools at greater rates. If these changes were made, the Act would come closer to its original goals.

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<sup>69</sup> CALIFORNIA'S CONSOLIDATED STATE PERFORMANCE REPORT: PART 1 (California Dept. of Education, January 2005), *available at* <http://www.cde.ca.gov/nclb/sr/rt/documents/cspr.pdf>.

<sup>70</sup> CALIFORNIA'S CONSOLIDATED STATE PERFORMANCE REPORT: PART 1 (California Dept. of Education, January 2005), *available at* <http://www.cde.ca.gov/nclb/sr/rt/documents/usdecsprjanfinal.doc>.

<sup>71</sup> *Id.*

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

The AYP requirements would be a more realistic target for schools if they focused on value added methods of assessment in student achievement rather than absolute growth. Value added assessment essentially focuses on achievement gains over time for the same individual or groups of individuals.<sup>73</sup> The idea is that by focusing on gains made or lost by the same group of students, educators get a true view of what the school has added to the student's academic performance.<sup>74</sup> This changes the way AYP currently is analyzed, because under the value added approach, schools can be recognized as effective even if most of their students are performing below average.<sup>75</sup> This is because the schools are judged by how much they've improved year to year, not whether they met an arbitrary benchmark. Value-added measures are calculated for each student within a given school, which allows policy makers to calculate school-specific measures based on the performance of students in *that particular school*.<sup>76</sup> This approach would take into account the differences between schools and not merely proscribe a one size fits all solution to problems with schools. This would be particularly advantageous for schools that have a high number of students that are typically labeled as "underperforming".

Additionally, the school choice provision should be revised. As it stands now, it is remarkably underused in urban districts.<sup>77</sup> Only a handful of states (Alabama, Kansas, New York, Oklahoma, and Oregon) reported more than 10% of eligible students taking advantage of the school choice option in 2003-2004.<sup>78</sup> There are a few explanations for the lack of school transfers. First, school districts are not required to receive students from failing schools and there are currently no incentives in place for them to do so.<sup>79</sup> The Act should be reformed so that school's have some incentive to accept students from failing schools. Perhaps the school's allocation for supplemental services could be increased so that schools would be encouraged and have motivation to accept

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<sup>73</sup> Ryan, *supra* note 1 at 981.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 982.

<sup>76</sup> Helen F. Ladd & Randall P. Walsh, *Implementing Value-Added Measures of School Effectiveness: Getting the Incentives Right*, 21 ECON. EDUC. REV. 1, 4 (2002).

<sup>77</sup> Lynn Olson, *NCLB Choice Option Going Untapped, but Tutoring Picking Up*, EDUC. WK MAG., Mar. 16, 2005, available at <http://www.edweek.org/ew/articles/2005/03/16/27nclb.h24.html>.

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

<sup>79</sup> Losen, *supra* note 13

students from failing schools. Secondly, students can only transfer within their district and the biggest disparities are currently between districts, not within districts.<sup>80</sup> This is a problem for small districts and districts where all the schools are labeled failing.

The school choice provision can also harm students who, because of transportation issues or other reasons, can not transfer to other schools.<sup>81</sup> This is because the failing schools are required by the Act to use twenty percent of their federal money to pay for transportation for students who opt to transfer to another school.<sup>82</sup> While this does help the ten percent of students who are actually utilizing school choice, for the students who are left behind, their schools are simply losing money. This seems counterintuitive to the goals of the Act. The “failing” schools probably need the most money in order to help rectify the problems within the school. By taking money away, it is simply giving the children who are left in that school a poorer school. Lastly, school choice doesn’t insure that the children who are transferring will be transferring into the best school, just one that is slightly better than where she is now.<sup>83</sup> A study by the Harvard Civil Rights Project, found that there was little difference in achievement levels between sending and receiving schools.<sup>84</sup> This is often the case because in many of these urban districts, good schooling options are simply not available since the schools that are eligible to receive transfers are serving overwhelmingly low-income populations.<sup>85</sup> As it currently stands, it is unlikely that the transfer option will provide meaningful choices for students in urban or rural districts that serve large numbers of low-income students.<sup>86</sup> This is because those districts have a disproportionate share of the schools required to offer transfers, which makes it harder for them to identify better performing schools to accept student transfers.<sup>87</sup> A better option would be inter-district transfers, since the disparities are more often between districts as opposed to within districts. The federal government should encourage

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<sup>80</sup> Anthony J. Christmas, *Educated Fools From Uneducated Schools: Whether the No Child Left Behind Act will be an Effective Remedy to the Inadequate Funding of Inner City Urban Schools and Ultimately Improve the Education of Low-Income Blacks*, 6 Rutgers Race & L. Rev. 177 (2004).

<sup>81</sup> Losen, *supra* note 13.

<sup>82</sup> 20 U.S.C. 6316(b)(9)-(10).

<sup>83</sup> Christmas, *supra* note 80.

<sup>84</sup> Kim and Sunderman, *supra* note 4 at 25.

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

<sup>86</sup> *Id.* at 26.

<sup>87</sup> *Id.*

inter-district transfers by offering additional resources to districts that receive students from low performing schools *and* to districts sending these students, so that students from the sending district do not suffer by losing resources.<sup>88</sup>

The temptation to push out low performing students must be eradicated. This “push out” syndrome has dangerous consequences for students. These consequences include pushing the student out of school and that students subsequently following a school-to-prison pipeline.<sup>89</sup> This temptation is there because having one subgroup that does not make AYP can possibly put a school on the “needs improvement” list. This policy should be changed. Although, it is important that schools be held accountable for the success of their students, currently this policy is simply too detrimental to low performing students.

The Act does include a “safe harbor” provision that states that if a subgroup of students fall short of AYP, the school can still make AYP if the percentage of students who score below the proficient level is decreased by 10% from the prior year and there is improvement for that particular subgroup on other indicators.<sup>90</sup> However, a 10% decrease in one year is quite a lofty goal and it is rare that a school is going to actually be able to qualify for the safe harbor provision.<sup>91</sup> The safe harbor provision would better address the temptation to push out students if it used a more reasonable number for the decrease such as three to four percent.

The No Child Left Behind Act has wonderful goals of ensuring that every child receives a quality education. However, it is impossible to truly implement this goal if the Act fails to address the problems that lead to low-income and minority children failing to succeed in our schools in the first place. It concentrates, instead, on making us aware of the problem, without really offering a long term solution. The playing field for minority and low-income children will never truly be leveled

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<sup>88</sup> *Id.* at 33.

<sup>89</sup> Losen, *supra* note 13 at 257.

<sup>90</sup> 20 U.S.C. 1111(b)(2)(E), (I)(i).

<sup>91</sup> Robert L. Linn, *Rethinking the No Child Left Behind Accountability System*, NATIONAL CENTER FOR RESEARCH ON EVALUATION, STANDARDS, AND STUDENT TESTING, July 28, 2004 at <http://www.ctredpol.org/pubs/Forum28July2004/BobLinnPaper.doc>.

if the underlying problems involving racial and socioeconomic discrimination are never acknowledged.<sup>92</sup> The Act does not acknowledge educational inequality. Currently, the wealthiest U.S. public schools spend more than ten times per pupil what the poorest schools spend.<sup>93</sup> This is a problem that sanctioning schools is never going to fix. Money certainly won't solve every probably with our schools, but it is an issue that should not be ignored. Testing alone won't solve these problems. As one researcher puts it, "the high stakes testing regimes that states are obligated to implement under the NCLBA represent an attempt to measure student achievement without addressing the underlying causes for deficiencies in minority student performance".<sup>94</sup> It is crucial that the differences between low-income schools and middle class schools be addressed.

The socioeconomic status of children attending a school affects numerous factors. Low-income students who attend middle-class schools perform higher on average, than middle-class children who attend high poverty schools (high poverty schools refers to schools where at least half of the students are eligible for free or reduced lunch).<sup>95</sup> This fact alone, begs some type of explanation. If the income level of the students can change performance so much, then why aren't policy makers focusing on eradicating poverty? This is a valid question and one that needs to be explored. The notion that outside pressure and accountability alone will fix low-income schools is flawed because research finds that what all students need is the good learning environment that is often found in middle class schools.<sup>96</sup> This learning environment is one that has an adequate financial base to provide small class sizes and modern equipment; it is more likely to spend money on the classroom rather than on bureaucracy and it has an orderly setting.<sup>97</sup> This learning environment also has a stable student population, qualified teachers, better curriculums and higher

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<sup>92</sup> Losen, *supra* note 13 at 266.

<sup>93</sup> DEBORAH MEIER ET AL., *MANY CHILDREN LEFT BEHIND: HOW THE NO CHILD LEFT BEHIND ACT IS DAMAGING OUR CHILDREN AND OUR SCHOOLS* (DEBORAH MEIER & GEORGE WOOD eds., 2004).

<sup>94</sup> Leland Ware, *Brown's Uncertain Legacy: High Stakes Testing and the Continuing Achievement Gap*, 35 U. Tol. L. Rev. 841 (2004).

<sup>95</sup> Richard D. Kahlenberg, *Can Separate Be Equal? The Overlooked Flaw at the Center of No Child Left Behind*, The Century Foundation, at [http://www.tcf.org/Publications/Education/kahlenberg\\_separaterc.pdf](http://www.tcf.org/Publications/Education/kahlenberg_separaterc.pdf) (last visited May 6, 2005).

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

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

expectations for its students (offering challenging courses such as Advanced Placement courses, etc) and has active parental involvement.<sup>98</sup> With the exception of an adequate financial base (and even this is debatable, as many claim that the Act is severely under-funded) and qualified teachers, the Act does nothing to specifically address these issues. In fact, it encourages schools to lower their standards and expectations for students in order to ensure that the school will make AYP.

## V. Conclusion

The No Child Left Behind Act was passed with the greatest intentions and the loftiest of goals. The Act was to ensure that every student would receive an excellent education and be proficient according to challenging state academic standards.<sup>99</sup> However, ever since the Act's passage in 2002, there has been debate about what type of impact on schools and students the Act truly has. The NCLBA's test-based accountability provisions help to promote segregated schools, encourage schools to push out low performing students (the majority who tend to be disproportionately minority or poor), and punish schools that serve diverse populations.

The Act promotes segregated schools by giving educators and parents a reason to keep schools as segregated as they currently are. It is well known that minority and students in high poverty schools typically are less likely to make AYP than white students and students who attend middle-class schools. Armed with this knowledge, parents and educators will be less likely to seek out diverse schools in which to send their children, or to work in. If the AYP requirements focused on value-added assessment as opposed to absolute growth, this would help to recognize schools that have actually raised student's scores even if they have not yet met a certain benchmark. This would help to remove the incentive to segregate schools, because no longer would schools that have high numbers of low performing students (typically minority and students from low income families) be seen as schools that will certainly not make AYP. These schools would be recognized for the improvements they have made year to year.

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<sup>98</sup> Id.

<sup>99</sup> 20 U.S.C. § 6301

The NCLBA also encourages administrators to push low performing students out of their schools. This is for the same reason that the Act promotes segregation. This push out problem is particularly dangerous to students because often times, if a student is pushed out of school, they will end up in prison. A potential solution to this problem is revising the safe harbor provision so that test-based accountability won't be so closely linked to the socioeconomic make-up of the school. If administrator's no longer have a reason to exclude minority and poor students from their schools, these students can actually reap the benefits of the Act, instead of being punished because of it.

Lastly, the Act has a so-called "diversity penalty" for schools that serve diverse populations. Studies have confirmed that the more diverse a school is, the more likely that particular school is to fail to make AYP.<sup>100</sup> Schools are punished for serving more integrated communities. As the number of subgroups within a school rises, the percentage of the students that make AYP falls.<sup>101</sup> The solution to this problem is complex and involves more than simply changing a line within the Act.

Unfortunately, the Act does not address the root of any of these problems. Our country has a problem called educational inequality and it must be addressed. If we never acknowledge that race and socioeconomic status do affect how the type of educational experience our children have, this problem will never be solved.<sup>102</sup> It is unrealistic for educators and parents to expect all children to be able to reach the same benchmark in the same time frame when some of those children are beginning so far behind. Poor and minority students have a long history of inadequate resources, unqualified teachers and watered down curricula.<sup>103</sup> These are all problems that need to be addressed before we can expect the No Child Left Behind Act to truly promote an adequate

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<sup>100</sup> Neill, *supra*, note 29.

<sup>101</sup> Novak & Fuller, *supra* note 31.

<sup>102</sup> Losen, *supra* note 13 at 266.

<sup>103</sup> *Id.* at 290.

education for every child. Until educators, policy makers and the federal government are ready to deal with these problems, the NCLBA will continue to leave *many* children behind.