

Dumbing Down America: How the High-Stakes Testing Requirements of the No Child Left Behind Act of 2001 Impair the Very Students that the Regulations Target to Help

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Introduction

Two years ago, teacher Victoria Proctor placed a model skeleton sporting a Michael Jordan jersey outside her classroom with signs that read, “Not much life here. . .but I passed the TAASS test NCLB” and “I’m a ‘Texas scholar’ Hey...isn’t that an oxy *moron*.”¹ The federal No Child Left Behind Act of 2001² (“NCLB Act”) amended the Elementary and Secondary Education Act of 1965³ (“ESEA”), which previously had been the single largest source of federal support that regulated spending affecting education from kindergarten through twelfth grade. The change to Title I funding constituted the most significant change resulting from the NCLB Act. On account of the NCLB Act, Title I now requires every state to establish levels of proficiency in reading and math as well as test every student between the third and eighth grades in order to receive federal funds.⁴

Signed into law by President George W. Bush on January 8, 2002, this critical legislation promised to reform our nation’s public schools by increasing accountability, allowing more freedom for states and communities, encouraging proven educational methods and providing more choices for parents.⁵ Calling accountability “an exercise in hope,”⁶ President Bush insisted that the NCLB Act would raise academic standards by making teachers aware of where and how their students need to improve. Scores would empower parents “to push for change,”⁷ and accountability would bring real results for schoolchildren.

The U.S. Department of Education (“DOE”) passed regulations pursuant to the NCLB Act to clarify how states and teachers should comply.⁸ Yet in recent years, educators across the nation have expressed growing opposition to the NCLB Act,⁹ leaving the DOE to dodge criticism by exhibiting results that prove the regulations’ worth.¹⁰ These results primarily come in the form of test scores that illustrate whether a school’s academic performance meets the minimum standards set forth by the NCLB Act regulations.¹¹ If all children at a particular school do not achieve satisfactory scores by the statutory deadline, then the government can penalize the school, restructure it or privatize it.¹²

Although Congress passed the NCLB Act with bipartisan support to close the education gaps between rich and poor students and white and minority students, members along both party lines now speculate as to whether the regulations will in fact widen the achievement gap as the statutory deadline approaches.¹³ These concerns make apparent the arbitrary and capricious nature of the DOE regulations.¹⁴ Rather than helping students to increase their proficiency in basic subject areas, test scores can rise at the expense of actual knowledge acquired. More significantly, the regulations mandate annual testing for all states, but they do not provide federal standards for testing practices.¹⁵ This lack of consistency in the testing regulations complicates results and can lead the DOE to conclude that a school has progressed academically when it actually remained the same or even worsened.¹⁶

This Comment will examine how the DOE regulations produce inverse effects from the NCLB Act's noble intentions by equating student achievement with test scores. Part I will examine some of the problems inherent in the regulations that the DOE developed to enforce Congress's determination to use standardized testing as an adequate means of assessing student academic progress. Part II will highlight the legislative history as a critical demonstration behind Congress's motivation to pass the NCLB Act and provide guidelines to develop the regulations. Part III will analyze how certain methods of testing can mislead the DOE about a school's actual progress. This section also recommends that the DOE implement clearer guidelines that specify appropriate testing practices and penalties for schools that dupe the agency with misleading results. This Comment concludes by recognizing that while standardized testing is probably not the most effective method for assessing academic progress, Congress implemented this method for its uniformity and applicability to the widest range of students. With clearer requirements for testing practices that enhance assessment methods and eliminate deceptive results, the DOE's regulations would more effectively fulfill the NCLB Act's intent to "improve the academic achievement of the disadvantaged."¹⁷

I. Background

A. Discouragement of Testing as an Appropriate Means to Measure Students' Progress Prior to the Regulations that Enforce the NCLB Act

Advocates for the NCLB Act preach the mantra often quoted by Education Secretary Margaret Spellings: “What gets measured gets done.”¹⁸ Statistically speaking, the NCLB Act has had an impact on academic progress in the U.S. by lessening the achievement gap between low-income, minority students and wealthier, Caucasian students.¹⁹ However, numbers can often be deceiving.²⁰ The testing required by the DOE regulations supposedly targets underperforming schools and encourages them to rise to par or risk serious sanctions.²¹ A closer look at the reported test results becomes vital to determine whether the regulations, in fact, produce outcomes consistent with Congressional goals.²²

Prior to the NCLB Act, the DOE did not direct states on how frequently they should administer standardized tests to students.²³ The NCLB Act gives much more power to the federal government to regulate what goes on in the classroom, prompting critics to argue that the NCLB Act attempts to nationalize public education.²⁴ Yet, even with the federal government’s increased power, school district administrators continue to address their pleas to state governments for more time to meet the NCLB Act’s academic standards.²⁵

Various factors can account for the low performance on standardized tests that translate to noncompliance with the NCLB regulations.²⁶ Studies show how anxiety, stress and particular circumstances on a given day, for example not eating breakfast, can affect how a student performs on an exam.²⁷ Testing can produce psychological effects that generate results that do not adequately reflect the knowledge retained.²⁸ Wealthier families can pay for tutors to ease some of the pressures that additional testing places on students, but many low-income students cannot or do not take advantage of free tutoring provided under federal law.²⁹ Another telling fact is that the testing industry came off its three most problem-plagued years, only to face increased pressure with President Bush's demand for annual testing with the NCLB Act.³⁰ Greater testing demands can instigate issues such as correct answers marked wrong with students' receiving lower scores that do not accurately reflect their performance on the exam.³¹

In addition, the United States has embraced a trend toward resegregation since the late 1980s, despite the nation's growing diversity.³² More American children these days attend school with a vast majority of students of the same skin color, and several public schools comprise students of only one race. Yet, in a review of ninety-three studies that examined the relationship between school diversity and minority student academic achievement, researchers found consistent improvement in the measure of test scores of students who attended more diverse schools.³³ A real danger exists where minority children who do not

perform well on these tests may be the ones most likely to drop out of school. Even some legislators who support the NCLB Act admit fear that increasing the focus on assessments can induce higher dropout rates as states strive to meet their academic performance goals.³⁴ A number of opponents perceive the regulations to provide incentives for schools to allow underperforming students to drop out of school, rather than expend resources attempting to educate them.³⁵

These days, even American television shows acknowledge the frustration over the testing regulations that compel states to comply with the NCLB Act. Consider, for example, recent episodes on the popular Home Box Office (HBO) television series, “The Wire.” The fourth season of the show centers its primary storyline on schoolchildren in inner-city Baltimore. Multiple episodes feature teachers struggling to raise test scores in a student population that sees no correlation, and thus no benefit, to their real lives whether or not they perform effectively on the statewide tests. Students and teachers alike on “The Wire” demonstrate little devotion to motivate themselves to raise the school’s AYP.³⁶ In practice, some minority students will immediately dismiss an examination because they feel they lack the ability to pass.³⁷ Others will not motivate themselves to work toward examination success because they do not perceive test credentials to result in jobs or college, primarily due to scarcity, competition or lack of relevance in their social setting.

The DOE regulations fail to acknowledge that females and minorities generally tend to turn out lower performances on standardized tests, even despite academic performance otherwise.³⁸ This consistent disparity drives speculation as to how well the testing regulations can legitimately gauge a particular student's acquired knowledge and produce accurate results.³⁹ The regulations ignore this disparity and ineffectively execute Congress's goals to target those students in need of serious academic assistance.

B. The Role that the DOE Regulations Play in Facing Opposition to the NCLB Act

Despite strong opposition across the country to the NCLB Act, individuals and states alike find it difficult to challenge the federal regulations effectively in court.⁴⁰ A Kansas schoolteacher brought suit against the federal government, calling the NCLB Act unfair and unconstitutional because it seeks to hold school personnel accountable if students at a particular school fail to achieve satisfactory test scores.⁴¹ In Texas, the education commissioner decided to ignore NCLB regulations on testing students with learning disabilities, placing the state in direct violation of these regulations.⁴² Last August, Connecticut became the first state to challenge the NCLB Act in court, arguing that the Act amounts to an unfunded mandate from the federal government.⁴³ Given that Congress is unlikely to repeal the NCLB Act anytime soon, these concerns should be addressed by the DOE to ensure that the regulations better meet the goals of Congress.⁴⁴

The lawsuits surrounding the NCLB Act illustrate how many feel that the regulations underlying the legislation actually harm the students that they intend to help. In general, schools with predominantly African American and Latino student populations, particularly in urban areas, lack sufficient resources, receive less money and employ less qualified teachers than their suburban counterparts with primarily Caucasian and wealthier students.⁴⁵ The NCLB Act seeks to rectify these discrepancies by forcing states to comply with specific regulations to ensure that every child in public school will achieve reading and math proficiency by the year 2014.⁴⁶

II. Legislative History: Why the DOE Regulations Implement Annual Testing Requirements to Enforce Congressional Intent to Assess a School's Adequate Yearly Progress

Although some members of Congress did express skepticism in utilizing testing as the primary means to assess students' and, thus, a school's progress, Congress ultimately authorized the DOE to carry out the intentions behind the NCLB Act by enforcing annual testing requirements through the agency's regulations.⁴⁷ Chosen for its uniformity and applicability to the widest range of students, standardized testing became the method by which the DOE evaluates whether a school has made adequate yearly progress ("AYP").⁴⁸

Inherent problems with the current system, however, make it virtually impossible for some schools ever to reach the standards set. The regulations

presently do not take into account differences in school profiles. This means that the regulations hold all schools to the same standards and do not consider where one particular school stands in correlation to another in terms of resources, composition of students and qualification of teachers.⁴⁹

Urban schools and schools comprised mostly of low-income and minority students face unique challenges that place them at a lower starting point than schools that have students who exhibit higher reading levels and advanced mathematics skills before any tests have been administered.⁵⁰ Schools in mostly white suburbs that offer substantive pre-Kindergarten programs better prepare children for school when compared to many inner-city programs that function as alternative child-care arrangements.⁵¹ A few years later in third grade, all these children find themselves taking the same tests. Children who received the benefits of substantive early education programs now have the upper hand when taking these tests, while those children who were denied those opportunities clearly do not. Nonetheless, the state requires all children to take, and be measured by, the same examinations. As author Jonathan Kozol insists, there exists “something deeply hypocritical about a society that holds an eight-year-old inner-city child ‘accountable’ for her performance on a high-stakes standardized exam but does not hold the high officials of our government accountable for robbing her of what they gave their own kids.”⁵² Students in low-performing schools also tend to spend large portions of classroom time on “kill and drill”

exercises in order to raise their own and their school's standardized test scores, as opposed to students in higher performing schools which tend to comprise white and middle class students.⁵³

The NCLB Act frequents these high-stakes tests and fosters these inequalities throughout a student's public education. Congress wanted the DOE to impose annual testing to pinpoint underperforming schools as intended by the NCLB Act, but the regulations fail to acknowledge that not all schools function with the same capacities.⁵⁴ The discrepancies parallel and produce a similar effect to a marathon that allows certain competitors a leading start, miles ahead of other participants before the race even begins. Yet, all racers must reach the same finish line in the same time constraints. Measuring vastly different schools by the same criteria makes fallacious results essentially inevitable.

III. Analysis

A. Current Federal Regulations Do Not Meet Congress's Goal for Improving Academic Progress Through Standardized Testing

The NCLB Act shifts accountability from the school level to the district level. This heightened focus on district accountability means that the DOE regulations must be examined for efficacy in testing methods to identify districts for sanctioning and its effect on the low-income and minority students.⁵⁵ District accountability has a disparate impact on districts with large low-income and minority populations.⁵⁶ Districts identified as needing improvement under the

NCLB Act enrolled more minority and low-income students than districts making adequate progress.⁵⁷ They also enrolled substantially higher percentages of English language learners (ELLs).⁵⁸

The AYP mechanism is used to identify districts for improvement and contributes to disparities in three major ways. Specifically, the regulations make it harder for large city districts to make adequate progress because they must meet more performance targets than more homogeneous districts and smaller districts.⁵⁹ The regulations also force lower performing districts to make larger gains to achieve AYP than higher performing districts and can have sanctions imposed even when they are improving student achievement.⁶⁰ Moreover, participation rate requirements can result in high performing districts being identified for improvement, and these districts are sanctioned the same way as low performing districts.⁶¹

Although the DOE regulations subject all students to the same testing requirements, they also allow states the freedom to develop and administer their own examinations.⁶² Rather than working to the benefit of disadvantaged students, this freedom institutes a lack of clarity in the regulations that gives states more difficulty to comply with the testing requirements.⁶³ Where the regulations do not lack clarity is in the provisions regarding penalties and sanctions for schools that do not meet AYP.⁶⁴ The regulations force compliance by threatening

sanctions and other penalties that actually encourage schools to adopt inappropriate methods of testing that feign academic progress.⁶⁵

There are concerns that some states have lowered standards and expectations in order to hide the low performance of their schools or to remove schools from lists of low performers.⁶⁶ Some states administer “easier” tests to deceive the DOE that their students have improved academically even though their performance has remained the same or worsened.⁶⁷ In other states, school principals alter scores so as to create the appearance of reaching the AYP and avoid the penalties for failure.⁶⁸ The present regulations can thus encourage teachers to lower their expectations of students by administering these easier tests or by altering exam scores. Low expectations, in turn, promote low performance.⁶⁹ With these methods, new knowledge is not acquired, and the students in most need of academic assistance suffer because they cannot experience the protections that the regulations should afford them.

Another serious concern lies in the NCLB Act’s use of the school-wide average of student proficiency, where schools can provide school-wide averages across grades rather than reports for all student subgroups in each grade.⁷⁰ Reliance on this measure may discourage use of “value-added” analytical methods, which measure the impact of a school on the progress of individual students over time.⁷¹ Some educators will feel this ugly pressure to raise test scores so much that they will exploit the freedom allowed by the testing

requirements in a desperate effort to save their schools from sanctions.⁷² In this sense, playing by the rules could mean breaking them, albeit with good intentions at heart. Rather than effectively target schools in need of academic improvement as Congress intended, the regulations' lack of clarity and threat of sanctions persuade schools to hide the very students that the NCLB Act intends to help.⁷³

B. Judicial Review

If a lawsuit alleged that the testing requirements of the regulations are “arbitrary and capricious” and against Congressional intent, the Court would apply the rule in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*.⁷⁴ Under *Chevron*, if Congress did not speak directly to a specific question then the court will examine whether the enforcing agency's construction of the statute is permissible.⁷⁵ As in *Chevron*, the Court here would also examine the legislation and its history; the Court would not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation.⁷⁶

One could argue that Congress purposely left the specifics of the NCLB Act's testing requirements up to the DOE.⁷⁷ If Congress explicitly left the gap for the DOE to fill, then Congress expressly delegated authority to the DOE to clarify that provision of the statute by regulation.⁷⁸ According to the *Chevron* doctrine, unless the agency's testing regulations prove arbitrary, capricious or noticeably contrary to the statute, they are given controlling weight.⁷⁹ This is a high standard of review that grants substantial deference to the DOE's testing

regulations.⁸⁰ Should the court find reasonable the DOE's interpretation of the testing requirements set forth in the NCLB Act, then the testing regulations would stand.⁸¹

C. Authority of the Department of Education: Acknowledgement and Recommendations

As the regulations currently stand, they do not effectively carry out Congress's intentions in passing the NCLB Act: to target students in need of serious academic assistance and to raise the standards of assessment for disadvantaged public school children.⁸² The DOE should reform the regulations to implement clearer testing requirements that better execute Congress's goals to find and improve schools in need of academic progress.⁸³ In so doing, the regulations can achieve the purpose of the NCLB Act instead of leaving behind the very children whom the Act endeavors to help.⁸⁴

At the very least, the DOE should articulate inappropriate methods of testing through specific guidelines in order to enhance uniform compliance with the regulations.⁸⁵ These guidelines could come in the form of a general statement of policy that would clarify the preferred methods of testing and reporting of scores.⁸⁶ A policy statement refining the testing requirements would still allow states to retain their flexibility;⁸⁷ states maintain their control over the testing through the regulations themselves, which carry greater binding effect than a general statement of policy. The clarification gained from a policy statement on

testing would improve the regulations and contribute to their value in performing the purpose of the NCLB Act.⁸⁸ Guiding states to a more proper means of testing and reporting scores, the DOE's clarification would motivate schools to become less inclined to mask their students' true progress through facades of easier exams and inflated scores.⁸⁹

The agency should also focus more on imposing sanctions through the regulations for schools that engage in inappropriate testing methods so as to eliminate testing that creates false results and deceives the DOE about a school's actual AYP.⁹⁰ By enticing teachers to tamper with students' exams and permitting principals to report falsified scores, the current regulations impose sanctions on and punish schools in the wrong places.⁹¹ To reprimand inappropriate methods of testing would eradicate the problem in its roots. By punishing schools only for their test *results*, the regulations pressure well-intentioned teachers and administrators to tamper with test scores to save their schools from sanctions that would further harm their students.⁹² If Congress's goal in passing the NCLB Act truly lies in advancing the education of the disadvantaged, then the DOE must modify the regulations to better correspond to congressional intentions.

Conclusion

One scholar disagreed so much with the NCLB Act that he described it as "a tool not to strengthen our schools but a ticking time bomb set to destroy them

as the punitive sanctions of the law kicked in.”⁹³ Yet, taking into account the debilitating state of the modern-day American public school system, perhaps the time had come for the U.S. government to take charge through the Department of Education. Those who support the NCLB Act would probably encourage the opposition to heed John Adams’ insistence that, “The education of a nation instead of being confined to a few schools and universities for the instruction of the few, must become the national care...for the formation of the many.”

Although standardized testing may not be the most effective method with which to assess the academic progress of students at a particular school,⁹⁴ Congress decided to implement this method because testing can operate uniformly and allows for the widest accessibility to students across the nation. For the NCLB Act to be more effective and consistent with Congressional goals, changes should be made to the federal regulations to include provisions that set out clearer requirements for testing. At the very least, the DOE should supplement the regulations with guidelines that articulate inappropriate methods of testing and impose sanctions for employing such methods. Additional guidelines in the form of a general statement of policy would discourage schools and states to produce deceptive results for the DOE that hinder the agency’s ability to report accurately on students’ academic progress throughout the nation.

To reform America’s education system to allow for all citizens to succeed academically requires more than the words of the adopted NCLB legislation.

Attaining academic progress all around requires continued partnerships between federal, state and local governments as well as between schools, communities and parents.⁹⁵ Yet, with clearer testing regulations, the DOE can more successfully pursue the NCLB Act's goal of targeting underperforming schools and, in so doing, take one step closer to enhancing the academic achievement of our nation's disadvantaged.

¹ See *Proctor v. Bd. of Educ., Sch. Dist. 65, Evanston, Ill., No. 04-C3889*, 2005 WL 1243400, at *1 (N.D. Ill. May 19, 2005) (considering whether the teacher's involuntary transfer of schools occurred as a result of her deliberate display of criticism in opposition to the No Child Left Behind Act [hereinafter the NCLB Act]); see also *Proctor v. Bd. of Educ., Sch. Dist. 65, Evanston, Ill.*, 392 F.Supp.2d 1026 (2005) (describing colleagues' response to what they perceived to be an inappropriate demonstration through which the teacher expressed her disapproval of the NCLB Act).

² Pub. L. No. 107-110, 115 Stat. 1425 (2002).

³ See generally Elementary and Secondary Education Act [hereinafter ESEA] 20 U.S.C. §§ 2701-3386 (2000). Prior to the NCLB Act, the most recent reauthorization of the ESEA occurred in 1994. See *Improving America's Schools Act (IASA)*, Pub. L. No. 103-382, 108 Stat. 3518 (1994); see also Bradley W. Joondeph, *Missouri v. Jenkins and the De Facto Abandonment of Court-Enforced Desegregation*, 71 WASH. L. REV. 597, 605 (1996) (asserting that because Title VI of the Civil Rights Act of 1964 forbid racial discrimination by entities receiving federal funds, the Department of Health, Education and Welfare ("HEW") could make the disbursement of billions of dollars in funds through the ESEA available to public school districts contingent upon their abandonment of segregation). See generally DAN A. LEWIS & KATHRYN NAKAGAWA, *RACE AND EDUCATIONAL REFORM IN THE AMERICAN METROPOLIS: A STUDY OF SCHOOL DECENTRALIZATION* 80-81 (1995).

⁴ See generally Title I Improving the Academic Achievement of the Disadvantaged, 34 C.F.R. § 200 (2005).

⁵ See Steve Meade, *The Growing State Resistance to NCLB*, *ADVOCATE*, Nov. 2005, at 16.

⁶ See generally H.R. REP. NO. 1, at 1 (2001) (CONF. REP.) (quoting President George W. Bush that, “Accountability is an exercise in hope. When we raise academic standards, children raise their academic sights. When children are regularly tested, teachers know where and how to improve. When scores are known to parents, parents are empowered to push for change. When accountability for our schools is real, the results for our children are real.”).

⁷ *Id.*

⁸ See generally Pub. L. No. 107-110, § 1001 (delegating authority to the DOE to establish appropriate regulations pursuant to the NCLB Act).

⁹ Pub. L. No. 107-110, 115 Stat. 1425 (2002).

¹⁰ See Chris Newmarker, *Education Chief Defends Federal ‘No Child’ Law*, THE PRESS OF ATLANTIC CITY, Feb. 23, 2006, at C4.

¹¹ See Jennifer Mueller, *Facing the Unhappy Day: Three Aspects of the High Stakes Testing Movement*, 11-WTR KAN. J.L. & PUB. POL’Y 201 (2002).

¹² See *Keggereis v. United States of America*, No. CIV.A.03-2232-KHV, 2003 WL 22327188, at *1 (D. Kan. Oct. 9, 2003) (sustaining defendant United States of America’s motion to dismiss on the grounds that plaintiff schoolteacher did not articulate how the NCLB Act presently violates his constitutional rights and finding that the alleged injury depends on (1)the performance of students at plaintiff’s school on standardized tests over the next eleven years and (2)the Department of Education’s future choice of any remedy to be imposed as a result of student test scores).

¹³ See *No Child Left Behind Act Rewards Progress, Corrects Failure: Hearing on H.R. 1 Before the House of Rep.*, 107th Cong. 1 (2001) (statement of Mr. Ballenger, Member, House of Rep.), available at <http://thomas.loc.gov/cgi-bin/query/D?r107:2:./temp/~r107iGPcUy::> (asserting that the achievement gap grows wider between disadvantaged students and the more affluent and insisting that “we cannot keep perpetuating a system that accepts such mediocrity, not at the expense of our least fortunate children”). But see *No Child Left Behind: The Need to Address the Dropout Crisis: Hearing Before the Comm. On Health, Education, Labor, and Pensions (HELP)*, 108th Cong. 1-3 (2002) (statement of Senator Bingaman) (considering Hispanic children to be especially at-risk to dropping out of school should they not perform well on these tests).

¹⁴ See *Chevron, U.S.A., Inc. v. Nat. Resources Def. Council*, 467 U.S. 837 (1984) (asserting that courts must review “questions of fact” arising in informal adjudication under the “arbitrary and capricious” standard adopted in this landmark administrative law case). But see generally *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971) (describing what some have called the first modern administrative law case, where the Supreme Court

explained arbitrary and capricious review in a wholly new way that further developed in later cases involving informal rulemaking).

¹⁵ See 34 C.F.R. § 200.3 (2005) (articulating the requirements for a state’s academic assessment system but allowing states to design their own testing practices).

¹⁶ See Richard Wenning, *No Child Left Behind: Testing, Reporting, and Accountability*, ERIC DIGEST, Aug. 2003, available at <http://www.ericdigests.org/2004-2/behind.html> (explaining that although the NCLB Act mandates annual testing for all states, it does not provide federal standards for testing practices).

¹⁷ See generally 34 C.F.R. § 200 (2005).

¹⁸ See *Defense of Tough School Standards*, N.J. RECORD, Feb. 23, 2006, at A04 (quoting Education Secretary Margaret Spellings).

¹⁹ See *No Child Left Behind Successes: Hearing on H.R. 4372 Before the House of Reps.*, 109th Cong. 1 (2005) (statement of Mr. Price, Member, House of Reps.), available at <http://thomas.loc.gov/cgi-bin/query/D?r109:2:./temp/~r109sa9Lfy::> (insisting that the achievement gap narrows and student test scores rise as a result of the NCLB Act). Mr. Price noted specifically the ten percent improvement in African American fifth-graders passing the state math test in Georgia as well as nearly a ten percent improvement in Hispanic third-grade students passing the state reading test as compared with the 2002 scores. See *id.*

²⁰ See Diana B. Henriques and Jacques Steinberg, *Right Answer, Wrong Score: Test Flaws Take Toll*, N.Y. TIMES, May 20, 2001, at A1 (describing how only thirteen states tested for reading and math in all six grades (third through eighth) prior to the NCLB Act).

²¹ See James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U. L. REV. 932, 934 (2004) (suggesting that the central problem remains the NCLB Act’s central feature, namely the requirement that schools be sanctioned if their students fail to demonstrate an absolute level of achievement on tests within a relatively short period of time: “By this process, a law intended to raise academic standards may lower them.”); see also *News from the Washington File: President Bush Celebrates African-American History Month*, STATE DEPT. DOCUMENTS, Feb. 22, 2006 (quoting President Bush that he will “refuse to accept a school system that doesn’t teach every child” and referring to the NCLB Act as challenging the “soft bigotry of low expectations”).

²² See generally *The No Child Left Behind Act*, *supra* note 1, at § 1001 (proposing that the NCLB Act aims to ensure that all children have access to high-quality education by reaching minimum proficiency on “challenging” academic achievement standards).

²³ See *Back to School and the No Child Left Behind Act: Hearing on S. 10111 and S. 10112* (hereinafter *Back to School*), 109th Cong. 1-3 (statement by Mr. Feingold, Member, Senate) (2005), available at <http://thomas.loc.gov/cgi-bin/query/D?r109:34:.temp/~r109sa9Lfy::> (acknowledging the federal government's long history of supporting local and state governments in their efforts to provide quality public education and opposing the NCLB legislation because it takes decisions regarding the frequency of testing out of local school districts' control). See generally *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (allowing states to retain much of their authority in the educational realm). It used to be more difficult for the courts or the federal government to regulate the activities of states' public schools, but many argue that the NCLB Act attempts to nationalize education and, in doing so, it affords much more power to the government than federal agencies like the DOE previously enjoyed in the dominion of education.

²⁴ See, e.g., ANNA KINSMAN, *POLITICS OF KNOWLEDGE: PUBLIC SCHOOLS IN THE NATION'S CAPITAL* 22 (2003) (accrediting Thomas Jefferson as the leader who first conceived the possibility of public education in this nation).

²⁵ See Chad Brooks, *Dist. 211 Pushes for Second Chance Law in State Testing*, DAILY HERALD (ARLINGTON HEIGHTS, IL), Feb. 17, 2006, at 5 (proposing for the Illinois State Board of Education to allow senior high school students a chance to meet the NCLB Act standards if they failed to do so as juniors).

²⁶ See generally Patricia F. First, *NCLB and Questions of Validity and Reliability*, 34 J.L. & EDUC. 69, 70 (2005) (expressing concern that with high-stakes testing comes the potential for corruption of indicators and the difficulties educators may face in clearly and accurately interpreting, using and communicating the results in meaningful ways). The author asserts that the complexity of validation is manifestly illustrated in the mandated sanctions that threaten schools after unsatisfactory test results under the NCLB Act's imposed regulations. See *id.* Author Alex Duran calls for additional factors to be considered for consensus on the appropriate uses of test scores in applied contexts. These factors include student demographics, measurement and sampling error, school size and other contextual factors such as poverty and nutrition. See *id.*

²⁷ See Alfie Kohn, *Standardized Testing and Its Victims* (Sept. 27, 2000), at <http://www.alfiekohn.org/teaching/edweek/staiv.htm> (explaining how testing pressures hold reduced educational quality in schools that serve low-income students because they place a greater emphasis on low-level drills aimed at teaching to tests).

²⁸ See Gary T. Henry & Craig S. Gordon, *Competition in the Sandbox: A Test of the Effects of Preschool Competition on Educational Outcomes*, 25 J. POL'Y

ANALYSIS & MGMT. 97 (2006) (finding that generally competition enhances third grade reading and mathematics marks but has no effect on retention).

²⁹ See Jennifer Radcliffe, *Few HISD Students Sign Up for Free Tutors/District Failed to Inform Parents of Extra TAKS Help, Critics Say*, HOUSTON CHRONICLE, Feb. 21, 2006, at B1 (pointing out that only three percent of low-income students at struggling Houston schools took advantage of free tutoring provided under federal law). The low number of low-income students that signed up for free tutoring made some advocates question whether the Houston Independent School District (HISD) adequately informed and encouraged families to seek the additional help before the Texas Assessment of Knowledge and Skills (TAKS) test took place. *Id.*; see also Ben Feller, *Poor Kids' Free Tutoring Being Blocked, Some Say*, FORT WORTH STAR-TELEGRAM, Feb. 17, 2006, at A5 (addressing problems that block significant numbers of poor children from receiving free tutoring). Pursuant to the NCLB Act, low-income parents should get a free tutor for any child who attends a school that receives federal poverty aid but has not made steady progress for three straight years. Parents may pick the tutor they desire, even a private one, from a state list. Advocates argue that the low numbers can be attributed not to lack of interest but instead to difficulties that parents and children face in participating in the free services: registration sessions are held in the middle of the workday when parents cannot attend; school administrators and school board members make little time and space inside schools available to tutors; schools and districts dissuade parents from accepting tutoring on grounds that it would eat up federal aid that schools need for other reasons. *See id.*

³⁰ See Henriques, *supra* note 20.

³¹ *Id.* (noting that in order to compensate President Bush's plan the testing industry's workload had to grow by more than fifty percent).

³² Gary Orfield, Johanna Wald & Christine Sanni, *School Segregation on the Rise Despite Growing Diversity Among School-Aged Children*, The Civil Rights Project of Harvard University, available at <http://www.gse.harvard.edu/news/features/orfield07172001.html> (July 17, 2001).

³³ See Comment, Jo Ann Grozuczak Goedert, *Jenkins v. Missouri: The Future of Interdistrict School Desegregation*, 76 GEO. L.J. 1867 (1988); see also Gary Orfield, *Trends in Percent of Black Students in Majority White Schools in the U.S. South and Reading Test Score Gap Trends Between Black and White Students*, THE CIVIL RIGHTS PROJECT OF HARVARD UNIVERSITY, available at <http://www.civilrightsproject.harvard.edu> (July 17, 2001).

³⁴ See *Democrat's Education Agenda: Hearing on H.R. 4491 Before the House of Rep.*, 109th Cong. 1 (2005), available at <http://thomas.loc.gov/cgi-bin/query/D?r109:35./temp/~r1094oiEjK::> (statement of Ms. Solis, Member, House of Rep.) (supporting the Democratic plan that calls for fully funding the

NCLB Act because her home State of California alone saw nearly half of Latino and African American high school students fail to graduate in the year 2002).

³⁵ See Reichbach, *infra* note 73.

³⁶ See Tracey, *infra* note 48.

³⁷ See generally RAISING STANDARDS OR RAISING BARRIERS? INEQUALITY AND HIGH-STAKES TESTING IN PUBLIC EDUCATION (GARY ORFIELD & MINDY L. KORNHABER eds., 2001).

³⁸ See generally THE BLACK-WHITE TEST SCORE GAP (CHRISTOPHER JENCKS & MEREDITH PHILLIPS eds., 1998) (asserting that African Americans currently score lower than European Americans on vocabulary, reading and mathematics tests as well as on tests that claim to measure scholastic aptitude and intelligence but attributing this gap to multiple factors such as test bias, heredity and home environment). See generally JOHN P. JACKSON, JR., SOCIAL SCIENTISTS FOR SOCIAL JUSTICE: MAKING THE CASE AGAINST SEGREGATION 125-55 (2001) (examining the damaging psychological effects that segregation in public schools has on minority students).

³⁹ See *Back to School*, *supra* note 23 (statement of Mr. Feingold) (drawing attention to the unprecedented “state revolt” against the federal law that saturates America’s classrooms with “top-down, one-size-fits-all” approach to testing and revealing that forty-seven states currently question, oppose or rebel against this sweeping education reform); see also *Ensuring That No Child Is Left Behind Requires More: Hearing on H.R. 1*, 107th Cong. (2001) (statement of Hon. Ciro D. Rodriguez, Member, House of Reps.), available at <http://thomas.loc.gov/cgi-bin/query/D?r107:6:./temp/~r107iGPcUy::> (expressing concern that tests provided only in English can result in inaccurate assessments of student performance for the Limited English Proficient (LEP) student population, especially in Texas).

⁴⁰ See *Keggereis*, 2003 WL 22327188, at *1 (dismissing the teacher’s complaint for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted).

⁴¹ *Id.*

⁴² See 34 C.F.R. § 200.6 (2005) (addressing the requirement that a state’s academic assessment system must provide for the participation of all students in the grades assessed, including students with disabilities).

⁴³ See *Conn. Lawsuit Challenges No Child Left Behind*, USA TODAY, Aug. 22, 2005 (asserting that federal funds will fall \$41.6 million short of paying for staffing, program development, standardized tests and other costs associated with implementing the law through 2008).

⁴⁴ Reauthorization of the NCLB Act will be addressed next year.

⁴⁵ See Jonathan Kozol, *Still Separate, Still Unequal: America’s Educational Apartheid*, HARPER’S MAGAZINE, Sept. 1, 2005, at 1864; see also Gary Orfield &

Erica Frankenberg, *Reviving Brown v. Board of Education: How Courts and Enforcement Agencies Can Produce More Integrated Schools*, in *BROWN AT 50: THE UNFINISHED LEGACY* 184, 184-209 (Deborah L. Rhode & Charles J. Ogletree, Jr. eds., 2004). *See generally* Imani Perry, *A Black Student's Reflection on Public and Private Schools*, in *LEGACIES OF BROWN: MULTIRACIAL EQUITY IN AMERICAN EDUCATION* 297, 301 (Dorinda J. Carter, Stella M. Flores, Richard J. Reddick eds., 2004) (reflecting that Black and Hispanic students have less chance of building strong relationships with any teachers because their appearance and behavior may be considered offensive to the middle-class White teachers who perceive these students as "less intelligent").

⁴⁶ *See* 34 C.F.R. § 200.2 (2005) (determining that, "Each State. . . must implement a system of high-quality, yearly student academic assessments that includes, at a minimum, academic assessments in mathematics, reading/language arts and, beginning in the 2007-08 school year, science"); *see also* Carol Guensburg, *Why Johnny (Still) Can't Read: As Reading Skills Falter, Educators Push to Improve Adolescent Literacy*, 2 *EDUTOPIA* 35 (2006) (insisting that although the majority of literacy investment has centered on young children, the quest for improved adolescent-literacy skills gains ground due to tougher state assessment standards established by the NCLB Act's regulations).

⁴⁷ *See generally* 34 C.F.R. § 200.1- § 200.3.

⁴⁸ *See* CHRISTOPHER A. TRACEY, GAIL L. SUNDERMAN & GARY ORFIELD, *Changing NCLB District Accountability Standards: Implications for Racial Equity*, THE CIVIL RIGHTS PROJECT OF HARVARD UNIVERSITY, available at http://www.civilrightsproject.harvard.edu/research/esea/nclb_district_account.php (June 2005). *See generally* RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* 773 (2004).

⁴⁹ *But see Introduction of H.R. 1—The No Child Left Behind Act of 2001: Hearing on H.R. 1*, 107th Cong. 1 (2001) (statement of Hon. John A. Boehner, Member, House of Reps.), available at <http://thomas.loc.gov/cgi-bin/query/D?r107:3:./temp/~r107iGPcUy>:: (acknowledging that nearly seventy percent of inner city and rural fourth-graders cannot read at a basic level and low-income students lag behind their wealthier counterparts by an average of twenty percentile points on national assessment tests). The Hon. John A. Boehner presented the NCLB Act as the resolution that will bridge the achievement gaps. *Id.*

⁵⁰ *See* Kozol, *supra* note 45, at 1864 (insisting that Americans who live far from major cities and who have no personal knowledge of the realities found in urban public schools remain ignorant about the disadvantages with which students attending schools in those locations deal). Kozol points out, for example, that the

present New York City spending level per pupil actually equals almost exactly what the affluent suburb of Manhasset, Long Island, spent per pupil eighteen years ago, in 1987, when that amount of money bought much more in services, salaries and teacher quality than it can possibly buy today. *See id.*

⁵¹ Jonathan Kozol, *Still Separate, Still Unequal: America's Educational Apartheid*, HARPER'S MAGAZINE, Sept. 1, 2005, at 1864.

⁵² *Id.*

⁵³ *See* Roslyn Arlin Mickelson, Comment, *Achieving Equality of Educational Opportunity in the Wake of Judicial Retreat from Race Sensitive Remedies: Lessons from North Carolina*, 52 AM. U. L. REV. 1502, 1503 (2002).

⁵⁴ *See, e.g., id.* (describing possible reasons that could account for different test scores between white and minority students); *see also* ALLAN NAIRN & ASSOCIATES, *THE REIGN OF ETS, THE CORPORATION THAT MAKES UP MINDS: THE RALPH NADER REPORT ON THE EDUCATIONAL TESTING SERVICE (ETS)*, 57 (1980) (revealing that the company's claims that standardized tests are not biased against minority students were repudiated as "untenable" in an internal memorandum by an ETS vice president in 1971).

⁵⁵ *See* Tracey, *supra* note 48.

⁵⁶ *See* Sen. Kennedy Puts Forth Plan to Jumpstart American Competitiveness, U.S. FEDERAL NEWS, Feb. 22, 2006 (alluding to the Senator's sentiment that the NCLB Act and the regulations attached to it constitute more of a slogan than an actual promise of a moral commitment to public school education in America).

⁵⁷ *See* Tracey, *supra* note 48.

⁵⁸ *Id.*

⁵⁹ *See* Tracey, *supra* note 48.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *See generally* 34 C.F.R. § 200.3.

⁶³ The State of Connecticut sued because of lack of clarity regarding funding of the additional testing that the regulations mandate. Connecticut typically tests its students every *other* year as opposed to annually, and the State Attorney General alleged that the mandate of additional testing without expressly providing for funding for such goes against the authority given to the federal government by the U.S. Constitution. *See generally* Ronald D. Wenkart, *The No Child Left Behind Act and Congress' Power to Regulate Under the Spending Clause*, 174 ED. LAW REP. 589, 590 (2003).

⁶⁴ *See generally* 34 C.F.R. § 200.

⁶⁵ *See* Jay Mathews, *A Study in Pride, Progress: Alexandria School Works Hard to Erase Academic Blot*, WASH. POST, Feb. 2, 2006, at A1 (relating how the students at Maury Elementary School passed the state reading test in 2004 at the

lowest rate in the entire city). The article compared the school's success the following year to "the crucible. . .because [schools like Maury] become models of what can or cannot be done." *Id.*

⁶⁶ See Press Release, Committee on Education and the Workforce, *Boehner Backs Secretary Paige's Strong Stand on State Education Standards* (Oct. 23, 2002), <http://edworkforce.house.gov/press/press107/paigeletter102302.htm> (voicing such concerns).

⁶⁷ See Wenning, *supra* note 16.

⁶⁸ See example in Houston; see also KATI HAYCOCK & DAVID HORNBECK, *Making Schools Work for Children in Poverty*, in NATIONAL ISSUES IN EDUCATION: ELEMENTARY AND SECONDARY EDUCATION ACT 77, 79 (JOHN F. JENNINGS ed., 1995) (stressing that low performance among poor children can often be attributable to low standards and expectations, which actually were encouraged by the then-current law).

⁶⁹ *Id.*

⁷⁰ See Wenning, *supra* note 16 (identifying this more serious concern of reporting school-wide averages).

⁷¹ *Id.*

⁷² See Popham, *infra* note 90.

⁷³ See Amy M. Reichbach, Comment, *The Power Behind the Promise: Enforcing No Child Left Behind to Improve Education*, 45 B.C. L. REV. 679 (2003) (suggesting that the regulations may actually provide incentives for schools to allow underperforming students to drop out of school).

⁷⁴ 467 U.S. at 837 (establishing that when an agency interprets a statute for which the agency holds responsibility for administering, courts should review that interpretation under the *Chevron* doctrine). *Chevron's* approach consists of two steps: 1. to determine whether the statutory language being interpreted is ambiguous, or whether the meaning of the provision is clear through the use of traditional tools of statutory construction and 2. to determine whether the agency's interpretation is reasonable or permissible, or if the interpretation falls outside the range of ambiguity in the provision). If the meaning of the provision is clear, the court ends its analysis and announces the clear meaning of the statute. If ambiguous, the agency's interpretation must be deemed reasonable by the court in order for the court to uphold the agency's interpretation.

⁷⁵ See *id.*, at 837-38 (explaining the theory behind the *Chevron* doctrine that the court also gives effect to legislative judgment in assuring that the law the agency makes falls within the scope of the delegated power, i.e. within the range of ambiguity in the statute).

⁷⁶ See *id.*, at 842-43 (insisting that the judiciary remains the final authority on issues of statutory construction and must reject administrative constructions that contradict clear congressional intent).

⁷⁷ See *Center for Law and Educ. v. United States Dep't of Educ.*, 209 F.Supp.2d 102, 103 (2002) (indicating that Section 1901 of the NCLB Act empowers the Secretary of Education to issue regulations under Title I of the Elementary and Secondary Act of 1965). This case specifically acknowledged that Section 1901(b), called "Negotiated Rulemaking Process," presents precise procedures for the Secretary to follow in developing and promulgating the regulations; see also *Bowen v. Michigan Acad. Of Fam. Physicians*, 476 U.S. 667, 670 (1986) (admitting that there exists a strong presumption that Congress intends judicial review of administrative action).

⁷⁸ See *Morton v. Ruiz*, 415 U.S. 199, 231 (suggesting that "the power of an administrative agency to administer a congressionally created. . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress").

⁷⁹ See generally *Chevron*, 467 U.S. at 844 (reminding that even if the legislative delegation to an agency on a specific question is implicit as opposed to explicit, a court may substitute its own construction of a statutory provision for a *reasonable* interpretation made by the administrator of an agency (emphasis added)).

⁸⁰ *Id.*, at 845 (accepting the well-settled principle of deference to administrative interpretations and recognizing the nature of the court's role in reviewing the regulations at issue).

⁸¹ *Id.*, at 865 (concerting that the responsibilities for assessing the wisdom of an agency's policy choices and resolving the struggle between competing public interest views do not fall within the judiciary's realm); see also *TVA v. Hill*, 437 U.S. 153, 195 (1978) (agreeing that, "Our Constitution vests such responsibilities in the political branches.").

⁸² But see First, *supra* note 26, at 70-71 (quoting author Duran who suggests that, "If approached and used properly, the NCLB Act can become the vehicle that transforms ordinary classrooms into extraordinary learning environments. . ."); see also Benjamin Michael Superfine, *At the Intersection of Law and Psychometrics: Explaining the Validity Clause of No Child Left Behind*, 33 J.L. & EDUC. 475, 490-91 (2004) (advocating that while a differential impact such as significantly lower test scores for blacks than whites may not necessarily invalidate a testing practice, at the very least it should indicate that a problem might be present).

⁸³ See S. REP. NO. 13323, at 9773 (2001) (CONF. REP.) (insisting on the need for the NCLB Act). The regulations set a standard to provide uniform information to all parents in an understandable format. Prior to the Act, thirteen states provided

no individual school profiles at all, and of the thirty-seven states that did produce school reports cards “their quality and accessibility for parents var[ied] widely.”

Id.

⁸⁴ *But see* Diane Rado, *State May Ease Test Norms: Board Targets Scores for 8th-Grade Math*, CHICAGO TRIBUNE, Feb. 23, 2006 (revealing how the State of Illinois made several significant changes last year to their testing system that made it easier for schools to meet the NCLB Act’s passing standards). The article cautioned that further revisions could be characterized as “gaming the system.” *See id.* This year, the State of Illinois will also consider adjusting how test scores of certain students, particularly low-income and minority children, get classified as factors in judging schools. If incorporated, the changes will provide local officials more leeway in excluding the scores of those children, while keeping the typically higher scores of affluent, white students.

⁸⁵ *See Statements on Introduced Bills and Joint Resolutions: Hearing on S. 9987 Before the Senate*, 109th Cong. 1 (2005), available at <http://thomas.loc.gov/cgi-bin/query/F?r109:4:./temp/~r109sa9Lfy:e3778>: (statement of Ms. Collins, Member, Senate) (proposing the No Child Left Behind Flexibility and Improvements Act that includes twenty-six recommendations for changes to the NCLB law and regulations governing its implementation). In some cases, though, the goals of the legislation may be accomplished more quickly through changes to guidance and regulations from the DOE.

⁸⁶ *But see generally* Nina A. Mendelson, *Chevron and Preemption*, 102 MICH. L. REV. 737, 771 (2004) (noting that general statements of policy are rules that do not have binding legal power).

⁸⁷ *See Under No Child Left Behind, States Submit Growth Model Proposals, Outside Peer Reviewers Selected*, U.S. FEDERAL NEWS, Feb. 22, 2006 (distinguishing the pilot program from the current requirements, where states participating in the pilot program can receive credit for student improvement over time by tracking *individual* student achievement from year to year (emphasis added)).

⁸⁸ *See Gov. Blagojevich’s ‘Less Red Tape’ Legislation to Ease Burden on Local Schools, Teachers Wins Senate Committee Approval*, U.S. STATE NEWS, Feb. 23, 2006 (quoting Governor Blagojevich of Illinois that, “We have to get rid of requirements that do nothing to help kids learn and only cause administrative headaches for school districts and teachers.”); *see also* Diana Jean Schemo, *20 States Ask for Flexibility in School Law*, N.Y. TIMES, Feb. 22, 2006, at A12 (reporting that the DOE agreed to review requests from twenty states for substantial changes in how they measure student progress under the NCLB Act). Secretary of DOE Margaret Spellings asked states to submit requests for ten state

pilot projects on tracking individual students, as opposed to entire grade levels, over time. *See id.*

⁸⁹ *See* Rado, *supra* note 84 (citing concerns across the nation that the NCLB Act has actually lost effectiveness because of a number of modifications that each state has made).

⁹⁰ *See* W. JAMES POPHAM, AMERICA'S "FAILING" SCHOOLS: HOW PARENTS AND TEACHERS CAN COPE WITH NO CHILD LEFT BEHIND 14 (2004) (suggesting that after considering the significant amounts of money that states and districts can collect from the NCLB Act, the majority of local educators will play by the rules that will provide their schools with federal money).

⁹¹ *See* Don Campbell, *Education, Chutzpah and the GOP*, USA TODAY, Feb. 23, 2006 at A13 (recalling the liberal Democratic mantra: "Don't judge us by our results, judge us by our good intentions").

⁹² *Id.* (relaying some of the problems inherent in a law that requires that students at under-performing schools have the opportunity to transfer to another school of their choice at the failing school's expense). With the NCLB Act, the "bad" schools lose the students needed for academic stability, while the "good" schools become overwhelmed with lower-achieving students. *See id.*

⁹³ Alfie Kohn, et. al, MANY CHILDREN LEFT BEHIND: HOW THE NO CHILD LEFT BEHIND ACT IS DAMAGING OUR CHILDREN AND OUR SCHOOLS ix (Beacon Press, 2004).

⁹⁴ *See generally* RICHARD ROTHSTEIN, THE WAY WE WERE? THE MYTHS AND REALITIES OF AMERICA'S STUDENT ACHIEVEMENT 51 (1998) (insinuating that national standardized testing, like the Scholastic Aptitude Test (SAT) for instance, is the "worst possible way" to evaluate American schools and students).

⁹⁵ S. REP. NO. 13323, at 2 (2001) (CONF. REP.).