

A Bad Road Paved with Good Intentions:  
The Impact of No Child Left Behind on Poor and Minority Students

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## **I. INTRODUCTION**

When Congress passed No Child Left Behind (NCLB)<sup>1</sup> in 2001, it pledged to improve educational outcomes for disadvantaged and low-performing students. It planned to fulfill that promise by requiring every student, regardless of race or income, to reach the same level of academic proficiency, as measured by standardized tests. It also instituted a rule that schools would be judged not only on test scores in the aggregate, but also by the performance of poor and minority students.<sup>2</sup> In short, the intention of NCLB was exactly as its name suggests. It was a promise by Congress that regardless of certain social disadvantages, all students would reach a level of academic success commensurate with their peers.

The timeline Congress set for that goal will expire at the end of this school year. That impending deadline also raises the question of whether NCLB has lived up to the guarantees it made in 2001. The short answer is no. Although the aim of the law was to adjust for social disadvantages facing poor and minority students, NCLB's one-dimensional, test-based approach has not produced the revolutionary reform lawmakers hoped. This paper considers NCLB's impact on the racial and income achievement gaps the law sought to narrow. It also explains how, in some ways, NCLB may have actually worked to harm the struggling students it sought to protect. Finally, this paper concludes with a recommendation for how lawmakers and educators can learn from NCLB's mistakes, and consider policies that may help achieve the goals Congress created in 2001.

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<sup>1</sup> See No Child Left Behind Act of 2001, Pub. L. 107-110, 115 Stat 1425 (2002) (codified at 20 U.S.C. § 6301 *et seq.*).

<sup>2</sup> 20 U.S.C. § 6311(b)(2)(c)(v) (2002).

## II. HOW NCLB PLANNED TO CHANGE EDUCATION

### **A. New Performance Requirements**

When President George W. Bush signed NCLB into law in 2002, the Act introduced several “firsts” to the federal regulation of public schools. The law marked the first time public schools were required to demonstrate 100 percent student proficiency in reading, math and science.<sup>3</sup> It was also the first time Congress set a deadline for academic achievement, demanding schools produce those results by the end of the 2013-2014 school year.<sup>4</sup> In addition, NCLB introduced a new measure for school performance known as “adequate yearly progress” (AYP).<sup>5</sup> This was to ensure students received the type of instruction that would allow them to perform “proficiently” on standardized tests.<sup>6</sup> Most significantly, AYP required for the first time that poor and minority student test scores be counted separately for determining school effectiveness—a reflection of Congress’ endeavor to eliminate the achievement gap between disadvantaged students and their more affluent, non-minority peers.<sup>7</sup>

Along with this list of firsts, NCLB also introduced several new sanctions for schools that failed to satisfy the Act’s high expectations. Failure to make AYP for one year under NCLB identifies a school as “in need of improvement,” while two years allows students to leave and

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<sup>3</sup> See Elizabeth Davidson and Randall Reback, et al., *Fifty Ways to Leave a Child Behind: Idiosyncrasies and Discrepancies in States’ Implementation of NCLB 1*, Institute for Education Sciences, Columbia University (2013).

<sup>4</sup> *Id.*

<sup>5</sup> See 20 U.S.C. § 6311(A)(2)(a) (2002); EDUCATION WEEK, *Adequate Yearly Progress*, (last updated July 18, 2011) available at <http://www.edweek.org/ew/issues/adequate-yearly-progress/>.

<sup>6</sup> *Id.*

<sup>7</sup> See 20 U.S.C. § 6311(b)(2)(c)(v) (2002); U.S. Dep’t. of Ed., *Continuing to Expose and Close Achievement Gaps 1* (2012) available at <http://www2.ed.gov/policy/elsec/guid/esea-flexibility/resources/close-achievement-gaps.pdf>.

enroll in another school in the same district.<sup>8</sup> A third year of failure requires that schools provide students with free after-school tutoring.<sup>9</sup> Beyond that point, the law turns its aim toward teachers and administrators. Four years of failure obligate a school to take “corrective action,” which includes replacing staff members or adopting a new curriculum.<sup>10</sup> Five years of not making AYP requires that a school be “restructured” and taken over by the state.<sup>11</sup> At that point, states have the discretion to turn the school over to a private charter organization or continue its operation with an entirely new staff.<sup>12</sup> In short, five years of failure under NCLB means every teacher and administrator will be fired and replaced.

Sanctions aside, it is critical to remember why these mandates and sanctions were put in place: to ensure all students receive an education that will provide them an opportunity to achieve personal success.<sup>13</sup> Philosophically, this goal reflects what John Rawls articulated as fair equality of opportunity.<sup>14</sup> This concept calls for adjustments to the social lottery of circumstance, not merely the same treatment of all children and families.<sup>15</sup> With that in mind, it is important to evaluate how well Congress’ approach has worked to promote fair equality of opportunity for poor and minority students over the past twelve years.

## **B. Twelve Years Later: Test Scores and the Impact of NCLB**

If the drafters of NCLB were graded on how well their plan has succeeded since 2002, the outcome would not be good. Lawmakers might receive an A for effort, but in terms of practical effect, NCLB has failed to achieve the measureable progress it promised. Rather than

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<sup>8</sup> 20 U.S.C. § 6316(a)(1) (2002).

<sup>9</sup> 20 U.S.C. § 6316(a)(1)(c) (2002).

<sup>10</sup> 20 U.S.C. § 6316(b)(7) (2002).

<sup>11</sup> 20 U.S.C. § 6316 (b)(8) (2002).

<sup>12</sup> 20 U.S.C. § 6316 (b)(8)(A)(i)-(iii) (2002).

<sup>13</sup> 20 U.S.C. § 6301 (2002).

<sup>14</sup> See John Rawls, *A Theory of Justice*, 4-5 (1971).

<sup>15</sup> *Id.*

markedly improving outcomes for at-risk students, evidence collected between 2002 and 2012 demonstrate that the Act has done two other things in that time. First, its emphasis on standardized testing has “severely damaged educational quality and equity, with its narrowing and limiting effects falling most severely on the poor.”<sup>16</sup> Second, the Act has failed to make any real progress in narrowing the racial or income achievement gaps over the past twelve years.<sup>17</sup> These outcomes ring true whether demonstrated anecdotally or numerically.

Based on standardized test results, it does not appear that students today are performing better than those tested before NCLB began. The National Assessment of Educational Progress (NAEP), a “nationally representative and continuing assessment of what America's students know and can do in various subject areas,” shows that academic achievement has stagnated since NCLB.<sup>18</sup> In fact, national test scores in math and reading were growing faster *before* NCLB.<sup>19</sup> Based on NAEP’s 500-point scale, the average national score in fourth grade math increased from 213 to 226 between 1990 and 2000.<sup>20</sup> Between 2003 and 2011, that same score increased by just six points.<sup>21</sup> Fourth grade reading scores on the NAEP have increased by only three points since NCLB began—and have remained stagnant since 2007.<sup>22</sup> For purposes of evaluating NCLB’s goal of helping poor and minority students, it is especially relevant that

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<sup>16</sup> See Lisa Guisbond and Monty Neill, et al., *NCLB’s Lost Decade for Educational Progress: What Can We Learn from this Policy Failure?* 1, NATIONAL CENTER FOR FAIR AND OPEN TESTING (2012).

<sup>17</sup> *Id.*

<sup>18</sup> See National Center for Education Statistics, *NAEP: A Common Yardstick* (last updated Feb. 10, 2014) available at <http://nces.ed.gov/nationsreportcard/about/>.

<sup>19</sup> See Guisbond, *supra* note 16, at 3

<sup>20</sup> *Id.*

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

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

NAEP scores “have stagnated or slowed for almost every demographic group in both subjects,” since the Act was introduced in 2002.<sup>23</sup>

Despite NCLB’s hope that disaggregating poor and minority student test scores into “subgroups” would force schools to provide better instruction, NAEP results suggest that effort has proved unsuccessful. A national study of NAEP scores for white, African-American and Hispanic students between 2003 and 2011 confirmed NCLB’s ineffectiveness in this regard. The study found “no evidence that states can meet the laudable goal of convergence of student-subgroup performance at a significantly higher level of academic proficiency than is currently observed.”<sup>24</sup> This conclusion, essentially that NCLB’s “subgroup” approach did not work to narrow the racial achievement gap, is confirmed by NAEP results among the states. With the exception of Wisconsin, no state narrowed the achievement gap between white and African-American students in eighth grade reading between 1998 and 2011.<sup>25</sup> Only two states, Alabama and California, narrowed the achievement gap between white and Hispanic students in eighth grade reading during that time.<sup>26</sup> Moreover, NAEP trends over the past four decades show just one period, in the early 1980’s, where the racial achievement gap narrowed significantly.<sup>27</sup> That small window of progress preceded not only NCLB, but also the use of high-stakes testing nationwide.<sup>28</sup>

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<sup>23</sup>

*Id.*

<sup>24</sup>

See Aaron Pallas, *The Nation’s Report Card and NCLB: Friends or Foes?*, National Education Policy Center (2011) available at <http://nepc.colorado.edu/blog/nation%E2%80%99s-report-card-and-nclb-friends-or-foes>.

<sup>25</sup>

*Id.*

<sup>26</sup>

*Id.*

<sup>27</sup>

See National Center for Education Statistics, *The Nation’s Report Card: Long-Term Trends* (2008) available at <https://nces.ed.gov/pubsearch/pubsinfo.asp?pubid=2009479>.

<sup>28</sup>

See Guisbond, *supra* note 16, at 4.

### C. NCLB and the Income Achievement Gap

Although much attention is paid to the racial achievement gap in standardized measures such as the NAEP, some scholars maintain that the income achievement gap is perhaps a more authentic way to frame existing disparities in academic achievement.

With respect to how well NCLB addressed disparities between rich and poor students, research by Professor Sean Reardon suggests that the law not only failed to narrow the income achievement gap, but that the gap has continued to widen over the past fifty years.<sup>29</sup> According to Reardon, “the rich-poor gap in test scores is about 40 percent larger now than it was 30 years ago.”<sup>30</sup> The income achievement gap for children born in 2001 is estimated to be nearly 75 percent larger than the gap between rich and poor children born in the 1940’s.<sup>31</sup> NCLB’s failed response to this growing disparity is significant, particularly because socioeconomic status has long been a better predictor of success in school than a child’s race.<sup>32</sup>

Together with NAEP scores, these statistics provides a sense of how well NCLB has worked to adjust for educational inequality over the past twelve years. Not only did NCLB fail to improve standardized test scores or narrow the achievement gap, but as the law made its way into schools, a second major effect began to emerge. NCLB also inadvertently harmed some of the poor and minority students it was designed to protect.

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<sup>29</sup> See Sean Reardon, *No Rich Child Left Behind*, N.Y. TIMES (Apr. 27, 2013) available at [http://opinionator.blogs.nytimes.com/2013/04/27/no-rich-child-left-behind/?\\_php=true&\\_type=blogs&\\_r=0](http://opinionator.blogs.nytimes.com/2013/04/27/no-rich-child-left-behind/?_php=true&_type=blogs&_r=0).

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

<sup>31</sup> See Sean Reardon, *The Widening Academic Achievement Gap Between the Rich and the Poor: New Evidence and Possible Explanations* in WITHER OPPORTUNITY: RISING INEQUALITY, SCHOOLS, AND CHILDREN’S LIFE CHANCES 101 (Greg J. Duncan and Richard J. Murnane eds.) (2011).

<sup>32</sup> *Id.* at 104.

## II. THE UNINTENDED CONSEQUENCES OF A WELL-INTENTIONED LAW

With its high expectations and zero-tolerance approach to school accountability, NCLB seems to be exactly the kind of reform that would ensure better outcomes for at-risk students. What lawmakers did not anticipate, however, is the way struggling schools would respond to the mandates contained in the nearly 1,000-page law.<sup>33</sup> Faced with increasing pressure to produce satisfactory test results, some schools took drastic measures to avoid NCLB's sanctions.

### **A. Narrowed Curriculums and Lower Standards**

As shown, national standardized test scores have not improved since NCLB's inception. But that does not mean that schools were not preparing students to take those tests. Despite the law's intention to increase accountability, one of NCLB's most pervasive effects after 2001 was to narrow school curriculums and limit instruction to the specific subjects that would be tested.

This so-called "teach to the test" phenomenon has been widely reported. More troubling, though, is evidence showing that this effect was most severe in schools with higher numbers of poor and minority students.<sup>34</sup> Two years after NCLB was introduced, 47 percent of principals at high-minority schools reported decreases in instructional time for social studies, civics and geography, compared to 29 percent of principals nationwide.<sup>35</sup> Thirty-six percent of principals at high minority schools also reported reduced instructional time in music and the arts, compared to 25 percent of principals overall.<sup>36</sup> As one education scholar observed, the threat of NCLB

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<sup>33</sup> See Linda Darling-Hammond, *From "Separate but Equal" to "No Child Left Behind": The Collision of New Standards and Old Inequalities* 3 (2004).

<sup>34</sup> See Claus von Zastrow and Helen Janc, *Academic Atrophy: The Condition of the Liberal Arts in America's Public Schools* 7, Council for Basic Education (2004).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

sanctions has led to “less useful and engaging education,” as well as “test-based instruction that ignores critical real world skills, especially for lower-income and lower-performing students.”<sup>37</sup>

This pressure to perform is also what led to cheating scandals, such as the one in Atlanta, Georgia, in 2009.<sup>38</sup> There, forty-four schools and 178 teachers and principals participated in erasing and changing student responses on state standardized tests to improve school performance scores.<sup>39</sup> While the systemic dishonesty in that case was widely reported, less egregious incidents of cheating have been confirmed in thirty-seven states and the District of Columbia in the past four years.<sup>40</sup> These reports came both from schools serving poor and minority populations and from schools that did not. In any case, the response demonstrates that application of a rigid, across-the-board standard to a diverse group of students is likely to result in such abuse.

Struggling schools were not alone in their attempts to satisfy NCLB’s expectations. The states also played a role. After 2002, fifteen states lowered their academic proficiency standards to help schools avoid federal sanctions.<sup>41</sup> By lowering expectations, those states made it easier for schools to satisfy NCLB with lower test scores. In states with higher standards, the Act had the effect of making more schools appear to be failing—even if their students performed better

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<sup>37</sup> See Darling-Hammond, *supra* note 33, at 18.

<sup>38</sup> See Kim Severson and Alan Blinder, *Test Scandal in Atlanta Brings More Guilty Pleas*, N.Y. TIMES (Jan. 6, 2014) available at [http://www.nytimes.com/2014/01/07/education/test-scandal-in-atlanta-brings-more-guilty-pleas.html?\\_r=0](http://www.nytimes.com/2014/01/07/education/test-scandal-in-atlanta-brings-more-guilty-pleas.html?_r=0).

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

<sup>40</sup> See National Center for Fair and Open Testing, *New Report Shows Widespread Test Score Corruption* (Mar. 27, 2013), available at <http://www.fairtest.org/2013-Cheating-Report-PressRelease>.

<sup>41</sup> See Sam Dillon, *Federal Researchers Find Lower Standards in Schools*, N.Y. TIMES (Oct. 29, 2009) available at [http://www.nytimes.com/2009/10/30/education/30educ.html?\\_r=0](http://www.nytimes.com/2009/10/30/education/30educ.html?_r=0).

than those considered “proficient” in other states.<sup>42</sup> In the state of Washington, for example, a student must score in the 73rd percentile or above to be considered “proficient” in tenth grade math.<sup>43</sup> In California, students need to score only in the 13th percentile to be deemed “proficient” in the same subject.<sup>44</sup> Not only are these results inconsistent, but they show that some states simply lowered their expectations, rather than work to produce better outcomes for at-risk students, after 2002.

Narrowed curriculums, cheating and lower expectations negatively affected students throughout the U.S., but unfortunately, NCLB’s negative impact does not end there. The Act also harmed poor and minority students in more serious ways—by driving some at-risk students out of school entirely after 2001.

## **B. Pushing Out Low-Performers**

First, the NCLB harmed the students it sought to protect by incentivizing schools to push out low-performers they suspected would not do well on standardized tests. In 2002, for example, the Houston Independent School District adopted a policy of holding back any student who did not pass every course in the ninth grade.<sup>45</sup> That policy received national criticism after a local principal revealed it was designed to keep low-performing students from taking Texas’ high-stakes test administered in the tenth grade.<sup>46</sup> One report estimated that over 20,000 Latino

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<sup>42</sup> See Darling-Hammond, *supra* note 33, at 16.

<sup>43</sup> See Bella Rosenberg, *The No Child Left Behind Act and The Many Meanings of Proficiency 3*, The American Federation of Teachers (2004) available at <https://www.aft.org/pdfs/teachers/whatsproficient0504.pdf>.

<sup>44</sup> *Id.*

<sup>45</sup> See Robert H. Kimball, *How Hispanics Are Pushed Out of Public Education*, Educational Equity, Politics & Policy in Texas, (Feb. 2005), available at <http://www.texasedequity.blogspot.com/2005/02/how-hispanics-are-pushed-out-of-public.html>.

<sup>46</sup> *Id.*

students were kept in the ninth grade for up to three years under that policy.<sup>47</sup> The effect of being held back several years in a row led many of those students to drop out altogether.<sup>48</sup> Although national scrutiny eventually led Houston to change its policy, evidence suggests that similar practices were in place elsewhere.

Another example came from Birmingham, Alabama. There, administrators admitted to withdrawing 522 students without their consent in the spring of 2000, after the state introduced heightened requirements for its high school exit exam.<sup>49</sup> Although that practice ended temporarily after it gained local media attention, the push-outs began again in 2002, once NCLB was in place.<sup>50</sup> In those cases, students were removed from class rosters and given pre-printed forms citing “lack of interest,” “academic failure” or “poor attendance” as the reason for withdrawal.<sup>51</sup> Even after reports of those school exclusions surfaced, none of the pushed out students were offered readmission.<sup>52</sup>

The fact that poor, minority, and disabled students were the primary targets in both Birmingham and Houston, suggests that NCLB’s focus on standardized test results did not improve outcomes for all at-risk students, as the law intended. This negative incentive is made worse by the fact that poor and minority students continue to drop out of school at disproportionately higher rates than their white, more affluent peers. A 2009 report on the nation’s dropout rate revealed that African-Americans were twice as likely to drop out of school

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<sup>47</sup>

*Id.*

<sup>48</sup>

*Id.*

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*See R. Murray Thomas, High-Stakes Testing: Coping with Collateral Damage 71 (2005).*

<sup>50</sup>

*Id.*

<sup>51</sup>

*Id.* at 26.

<sup>52</sup>

*Id.*

as white students, while Latino students were three times as likely to do so.<sup>53</sup> That study also showed that low-income students dropped out at rates five times higher than their more affluent peers.<sup>54</sup> The fact that these disparities have remained fairly consistent since 2002 is further evidence that NCLB has not been the game-changer lawmakers hoped.<sup>55</sup>

### **C. Counseling Out Students to GED Programs**

In addition to crafting policies that drove some low-performers to leave “voluntarily,” NCLB also encouraged some administrators to begin deliberately counseling students out of school.

In 2003, the *New York Times* reported that, to avoid state and federal sanctions, New York City Public Schools were encouraging low-performing students to enroll in GED programs.<sup>56</sup> There, students were effectively counseled out of school: they were told they did not have enough credits to graduate on time, that they had missed too many days, or that they were simply too old to earn a diploma.<sup>57</sup> Like the incidents in Alabama and Texas, schools that engaged in this practice most aggressively were ones that served predominantly poor and minority students.<sup>58</sup>

That report also revealed that citywide GED programs were “inundated with younger students,” after NCLB sanctions were introduced.<sup>59</sup> In fact, two years after NCLB was enacted, New York City saw a 48 percent increase in the number of school-aged students enrolled in GED

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<sup>53</sup> See Chris Chapman, et al., *Trends in High School Dropout and Completion Rates in the United States: 1972-2009* 6, National Center for Education Statistics (2011).

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> See Tamar Lewin and Jennifer Medina, *To Cut Failure Rates, Schools Shed Students*, N.Y. TIMES (July 31, 2003) available at <http://www.nytimes.com/2003/07/31/nyregion/to-cut-failure-rate-schools-shed-students.html>.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

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

programs—increasing from 25,000 participants in 2002, to more than 37,000 by 2004.<sup>60</sup> By 2008, the number of people taking GED tests nationwide was the highest since before NCLB was enacted, increasing from 600,000 test-takers in 2001 to 775,000 seven years later.<sup>61</sup> Although no conclusive link exists between those national statistics and NCLB, that does not reduce the negative impact of this exclusionary tactic.

Like the diminished prospects for students who drop out of school, evidence suggests that students who earn GEDs do not fare as well as those who earn a diploma. Not only do more than 40 percent of those who enroll in these programs fail to obtain a GED, only 5 percent go on to complete a bachelor's degree.<sup>62</sup> GED recipients also have lower incomes overall.<sup>63</sup> In 2009, “high school diploma holders earned approximately \$4,700 in mean monthly earnings compared with GED certificate holders, who earned \$3,100.”<sup>64</sup> One recent report suggested that GED recipients fare no better in the job market than those who dropped out entirely.<sup>65</sup> Although a redesigned GED exam was introduced in January 2014, the quality of GED preparation programs continues to vary dramatically across states.<sup>66</sup> Like the decision to drop out of school, pursuit of a GED could also be a proxy for other deficiencies.

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<sup>60</sup> See Shiri Klima, *The Children We Leave Behind: Effects of High-Stakes Testing on Dropout Rates*, 7 S. CAL. REV. L. & SOC. JUST. 18 (2007).

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

<sup>62</sup> See GED Testing Service, *2011 Annual Statistical Report on the GED Test* 83 (2012) available at <http://www.gedtestingservice.com/uploads/files/8df0860dd59e38aa74c8d44eae97cec.pdf>.

<sup>63</sup> *Id.*

<sup>64</sup> See Stephanie Ewert, *GED Recipients Have Lower Earnings, are Less Likely to Enter College*, U.S. Census Bureau (Feb. 27, 2012) available at <http://blogs.census.gov/2012/02/27/ged-recipients-have-lower-earnings-are-less-likely-to-enter-college/>.

<sup>65</sup> See Claudio Sanchez, *In Today's Economy, How Far Can A GED Take You?*, NATIONAL PUBLIC RADIO (Feb. 18, 2012) available at <http://www.npr.org/2012/02/18/147015513/in-todays-economy-how-far-can-a-ged-take-you?ft=1&f=1013>.

<sup>66</sup> See Carolyn Kaster, *GED Test Overhauled, and some states give failing grade*, ASSOCIATED PRESS (Jan. 1, 2014) available at [http://usnews.nbcnews.com/\\_news/2014/01/01/](http://usnews.nbcnews.com/_news/2014/01/01/)

#### D. Increased Use of Disciplinary Exclusions

The pressures of NCLB also increased “the perceived imperative to remove the ‘bad kids’ who prevent the ‘good kids,’ from learning.”<sup>67</sup> Once test scores took on a new meaning, some administrators took steps to push out “behavior problems” as well as low-performers. In Los Angeles, California, for example, some administrators began using discipline to purge schools of students likely to harm AYP after 2002.<sup>68</sup> There, school exclusions began with increased use of classroom removals and out-of-school suspensions, eventually leading to “opportunity transfers.”<sup>69</sup> At that point, students were relocated to alternative schools, where their standardized test scores would not be counted—with many seldom returning to their original school placements.<sup>70</sup>

National trends in exclusionary discipline provide further support that discipline-based push-outs have increased since NCLB took effect. Nearly 250,000 *more* students were suspended during the 2006-2007 school year, compared to just four years earlier—when the Act was signed into law.<sup>71</sup> That increase was also coupled with a 15 percent rise in the number of school expulsions that year.<sup>72</sup> By 2010, out-of-school suspensions reached a new high, at more than 3.7 million.<sup>73</sup>

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22134710-ged-test-overhauled-and-some-states-give-failing-grade?lite.

<sup>67</sup> See The Advancement Project, *Test, Punish and Push Out: How “Zero Tolerance” and High-Stakes Testing Funnel Youth Into the School-To-Prison Pipeline* 28 (2010) available at <http://www.advancementproject.org/resources/entry/test-punish-and-push-out-how-zero-tolerance-and-high-stakes-testing-funnel>.

<sup>68</sup> See Davin Rosborough, *Left Behind, and Then Pushed Out: Charting A Jurisprudential Framework to Remedy Illegal Student Exclusions*, 87 WASH. U.L. REV. 663, 678 (2010).

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> See The Advancement Project, *supra* note 67, at 5.

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

<sup>73</sup> See Tamar Lewin, *Black Students Face More Discipline, Data Suggests*, N.Y. TIMES, (Mar. 6, 2012) available at <http://www.nytimes.com/2012/03/06/education/black-students-face->

Increased use of school discipline is significant for evaluating NCLB's effectiveness, because it has disproportionately affected the same students the law sought to protect. Compared to their white peers, African-American students were three-and-a-half times more likely to be suspended or expelled in 2010, according to Department of Education (DOE) data collected from 72,000 schools nationwide.<sup>74</sup> Despite comprising just 18 percent of students overall, African-American students accounted for 35 percent of those suspended at least once and 46 percent of students suspended more than once during that year.<sup>75</sup> Like the push-outs in Texas, Alabama, and New York, the uptick in school discipline over the past decade is not attributable entirely to NCLB. Like other exclusionary efforts, however, these data seem to indicate that the law may have exacerbated an existing problem after 2002.

Taken together, the sum of this evidence suggests that NCLB's intention to make schools accountable may actually have pushed some students out of classrooms entirely. Although school exclusions through push-outs and discipline undoubtedly occurred prior to 2002, "No Child Left Behind exacerbated this problem by adding to the incentives . . . for getting rid of troublesome youth who don't score high enough," by introducing federal sanctions into the equation.<sup>76</sup>

### **III. WHY CONGRESS' PLAN FAILED**

The negative effects of NCLB raise the question of how a Congress with such good intentions could design a law that produced such bad results. To answer that question, it is

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more-harsh-discipline-data-shows.html (reporting on the 2010 data collected by the Office for Civil Rights at the DOE).

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

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

<sup>76</sup> See Maureen Carroll, *Educating Expelled Students After No Child Left Behind: Mending an Incentive Structure That Discourages Alternative Education and Reinstatement*, 55 UCLA L. REV. 1909, 1919 (2008).

important to consider the law’s design and why it inadvertently contributed to damaging outcomes for some poor and minority students.

### **A. Based on a Flawed Model**

First, it is essential to remember what Congress was trying to achieve with NCLB: ensuring that all students receive an education that equips them with the skills to succeed in life. To understand why lawmakers set out to achieve that goal in the way they did, it is important to consider the historical underpinnings of the Act.

The standardized testing component of NCLB, largely considered the linchpin of the Act, was modeled after an education reform effort that produced the “Texas miracle.” As Governor of Texas in the early 1990’s, George W. Bush implemented education reforms that required public schools to reach annual benchmarks on state standardized tests.<sup>77</sup> As the plan took shape, Houston emerged as a model for its success, reporting remarkable progress in closing the achievement gap and boasting a dropout rate of 1.5 percent.<sup>78</sup> When Bush became President in 2000, he promised to replicate that plan at the federal level. Two years later, NCLB was signed into law with the full expectation that it would produce Texas-style results nationwide.<sup>79</sup>

But in December 2003, a *New York Times* report revealed the “Texas miracle” was actually the product of widespread cheating and “rampant undercounting of school dropouts.”<sup>80</sup> At Sharpston High School in Houston, for example, 463 of 1,700 students left during the 2001-

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<sup>77</sup> See Klima, *supra* note 60, at 14

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

<sup>79</sup> See Klima, *supra* note 60, at 15.

<sup>80</sup> See Diana Jean Schemo and Ford Fessenden, *A Miracle Revisited: Measuring Success; Gains in Houston Schools: How Real Are They?*, N.Y. TIMES, (Dec. 3, 2003) available at <http://www.nytimes.com/2003/12/03/us/a-miracle-revisited-measuring-success-gains-in-houston-schools-how-real-are-they.html>.

2002 school year, but none was counted as a dropout.<sup>81</sup> Instead, these primarily Latino students were classified as pursuing GEDs or returning to their home countries.<sup>82</sup> The actual dropout rate in Houston was estimated to be between 33 and 50 percent during that time.<sup>83</sup> By the time the Texas myth gained national attention, NCLB had been in place for almost two years.

## **B. Repeating Past Mistakes**

The second problem with NCLB's plan was that it failed to adequately address graduation and dropout rates. Until 2012, states were permitted to set their own graduation rate goals under the law.<sup>84</sup> The effect of that decision meant NCLB "incentivized states to set fairly low graduation rate goals rather than be subject to penalties for failing to meet high goals," after 2002.<sup>85</sup> It also meant schools could drive students away—and classify them as dropouts or GED transfers—with essentially no impact on their annual performance, as measured by AYP. In fact, some states set graduation rates as low as 50 percent, and "only needed to achieve as little as 0.1 percent annual growth in graduation rates to avoid having to implement improvement strategies" under NCLB.<sup>86</sup>

After reports on student dropouts and push-outs began to emerge, lawmakers modified the graduation rate component of the law. Beginning in 2012, the DOE required high schools to

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<sup>81</sup> *Id.*

<sup>82</sup> *See* Klima, *supra* note 60, at 15.

<sup>83</sup> *See* George Wood, *A View from the Field: NCLB's Effects on Classrooms and Schools*, 36 (2004).

<sup>84</sup> *See* Kathleen Kingsbury, *No Dropouts Left Behind: New Rules on Grad Rates*, TIME MAGAZINE (Oct. 30, 2008) available at <http://content.time.com/time/nation/article/0,8599,1854758,00.html>.

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

<sup>86</sup> *See* Alliance for Excellent Education, *The Effect of ESEA Waiver Plans on High School Graduation Rate Accountability* 3 (2013) available at <http://all4ed.org/reports-factsheets/the-effect-of-esea-waiver-plans-on-high-school-graduation-rate-accountability/>.

adopt a “four-year adjusted cohort” model for measuring annual graduation rates.<sup>87</sup> That means that a student who is held-back, pursues a GED, “or leaves school for any other reason” must be counted toward a school’s graduation rate.<sup>88</sup> Those reforms also required schools to start treating graduation rates like standardized test scores—by disaggregating the percentage of poor and minority graduates beginning in 2012.<sup>89</sup>

While those changes seem to counteract many of the negative incentives created by NCLB, the problem is that states have now begun to seek waivers from the law’s heightened requirements. As of 2013, thirty-four states and the District of Columbia had been granted temporary waivers from the new graduation rate requirements.<sup>90</sup> A 2013 report on the impact of those waivers noted that, “[t]his leads to the major potential risk that schools will push out low-performing students in order to raise test scores.”<sup>91</sup> In fact, the irony behind the waivers is that they could work to revive major problems with the law that the 2012 reforms were meant to correct. Although graduation is essentially “the endgame of the K-12 experience,” only a handful of states now use policies consistent with the 2012 standards. That has led some scholars to suggest that the dropout, push-out, and student retention problems created by NCLB may still exist.<sup>92</sup>

#### **IV. NCLB MOVING FORWARD**

Despite NCLB’s shortcomings, federal education policy does have the potential to help ensure fair equality of opportunity for at-risk students. While education policy alone cannot

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<sup>87</sup> 34 C.F.R. § 200.19(b)(1)(i) (2008).

<sup>88</sup> 34 C.F.R. § 200.19(b)(1)(ii)(B)(2) (2008).

<sup>89</sup> 34 C.F.R. § 200.19(b)(1)(ii)(B)(3) (2008)

<sup>90</sup> See Christine Armario, *Study: NCLB Waviers Weaken Grad Rate Accountability*, ASSOCIATED PRESS, (Feb. 12, 2013) available at <http://bigstory.ap.org/article/study-nclb-waiver-weaken-grad-rate-accountability>.

<sup>91</sup> See Alliance for Excellent Education, *supra* note 86, at 6.

<sup>92</sup> *Id.*

solve the problems Congress sought to tackle in 2001, NCLB could still play an important role in achieving better outcomes for poor and minority students. Until we stop expecting teachers to fix the effects of social inequality, however, the reality is that schools will continue to exhibit the negative responses produced by NCLB. In the interim, we can start by changing federal education policy to focus on the learning process, rather than on the outcome of a standardized test.

### **A. Use a Value-Added Approach for School Performance**

The first way to improve NCLB is to change how student academic achievement is measured. Currently, NCLB relies on a standard that determines school quality through annual standardized tests. Although quantifying and measuring student achievement will remain critical for improving public education, a better approach is one that relies on a value-added model. This is an evaluation of achievement that measures student gains in a single school year, independent of a uniform starting point. A student who enters the seventh grade on a fourth grade reading level, for example, would be evaluated on the progress she makes during that particular school year—as opposed to being evaluated by a standardized test measuring the capabilities of an average seventh grader.

For schools serving at-risk students, this model is advantageous for several reasons. First, “[v]alue-added measures . . . isolate an individual teacher’s contribution to student learning from all the other factors that can influence academic achievement and progress.”<sup>93</sup> More specifically, a value-added approach minimizes the effect of external influences that make it difficult to determine the actual effectiveness of a school or teacher. Such factors include annual family income, the educational level of parents, and the influence of peer groups outside the

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<sup>93</sup> See The Glossary of Education Reform, *Value-Added Measures* (last visited Mar. 14, 2014) available at <http://edglossary.org/value-added-measures/>.

classroom.<sup>94</sup> While these factors should not be ignored as a matter of public policy, a value-added approach provides a more authentic assessment of what is going on in schools and classrooms.

As the law stands today, even a highly effective teacher could lose her job if she works in a high-needs school where standardized test scores fall below the line of “proficiency.” If that happens five years in a row, an entire school can be shut down under NCLB—even if teachers were making significant gains with a high-needs population. Although NCLB rightly expects teachers to make significant gains, it does so by requiring all students to reach the same finish line. This approach completely disregards the fact that low-income students typically begin at a starting line much farther back, and often face significant hurdles to learning along the way. Faced with this difficult path and the threat of NCLB sanctions, it is hardly surprising that some schools sought to entirely exclude low-performers from the race. While not a total solution to NCLB’s problems, placing all teachers on equal footing is an important starting point for ensuring that most qualified teachers are not deterred from accepting positions in high-needs schools, where they are needed most.<sup>95</sup>

In terms of protecting at-risk students, a value-added approach could also address one factor making school exclusions easier: students’ perceived lack of value in what is being taught. Rather than teaching to a test, a value-added model allows teachers to tailor their instruction to student needs, thereby increasing the educational benefit that students receive from school. By focusing on student progress—regardless of starting point—a value-added approach gives all students a chance to experience academic success. Not only does this help students feel

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<sup>94</sup>

*Id.*

<sup>95</sup> See Dale Ballou, *Controlling for Student Background in Value-Added Assessment of Teachers*, 29 J. ED. & BEHAVIORAL STATISTICS 42 (2004).

empowered by their individual gains, it could also help foster a student’s personal investment in his or her education. Using NCLB’s approach, however, “[w]e continue to confuse test scores with quality schooling, even though there is no evidence that high scores on these tests predict anything about a child’s success in life after school.”<sup>96</sup>

Rather than focus on rote memorization or skills likely to appear on a standardized test, a value-added approach could incentivize teachers to address fundamental gaps in understanding instead.<sup>97</sup> The current approach of NCLB makes this difficult, because it encourages teachers to focus on students with the greatest potential to perform well on state tests, rather than on those who are the farthest behind. A valued added approach is beneficial in this sense, because it “recognize[s] that some students start at a lower proficiency level . . . and rewards schools for helping them improve rather than punishing schools for taking them in.”<sup>98</sup>

In sum, a revised approach to measuring student performance and teacher effectiveness is an important way to ensure that at-risk students receive an authentic educational experience. Although it does not have the same political appeal as a one-size-fits-all annual test, a value-added model would more genuinely foster NCLB’s goal of using public education to adjust for social disadvantage.<sup>99</sup> For poor and minority students, it is also an important way to ensure they are not pushed out of classrooms because of public policies that expect schools to ignore and overcome significant social barriers to learning.

## **B. Confront the Social Realities of Public Education**

Changing the way students and teachers are assessed is necessary but not sufficient for improving NCLB. Realizing better outcomes for poor and minority students also requires a

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<sup>96</sup> *Id.*  
<sup>97</sup> *Id.* at 43.  
<sup>98</sup> Carroll, at 1950.  
<sup>99</sup> *Id.*

holistic assessment of the social determinants that impact education. As Professor Peter Edelman has noted, “[q]uality education is a core strategy in fighting poverty, but unless we fight poverty on all fronts, the schools will not succeed in helping all children have the chance to achieve their full potential.”<sup>100</sup> NCLB attempted to ensure greater educational equality through testing and school sanctions, while ignoring the vast social inequalities that affect academic performance. The modern reality is that schools serving low-income students are not just responsible for providing an education. They also have to “provide breakfasts and lunches, help families find housing and health care, and deal with constant mobility due to evictions,” in addition to the host of other issues that come with living in poverty.<sup>101</sup> The fact that NCLB bypassed each of these social determinants and opted instead for a one-size-fits-all approach, ignores the fundamental social change required to achieve fair equality of opportunity.

The first step towards a more holistic approach is to acknowledge the extent to which school populations affect academic achievement. Beginning in 1966, the Coleman Report established that “the social composition of [a school’s] student body is more highly related to student achievement, independent of the student’s own social background, than is any school factor.”<sup>102</sup> Growing income inequality in the U.S. has only exacerbated the challenges that come with this reality. Not only does concentrated poverty present schools with challenges related to health, safety and family mobility, it also leads to fewer resources, less qualified teachers and lower academic standards for students.<sup>103</sup>

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<sup>100</sup> See Peter Edelman, *So Rich, So Poor: Why It’s So Hard to End Poverty in America*, 141 (2013).

<sup>101</sup> See Linda Darling-Hammond, *The Flat World and Education: How American’s Commitment To Equity Will Determine Our Future* 37 (2010)

<sup>102</sup> *Id.* at 33 (quoting James Coleman et al., *The Coleman Report* 325, Johns Hopkins University (1966)).

<sup>103</sup> *Id.* at 38.

The connection between residential income segregation and public education has increased the number of schools dealing with concentrated poverty in recent years.<sup>104</sup> Because school enrollment is usually dictated by neighborhood, greater income segregation means wealthier families have access to resource-rich schools that poorer children simply do not.<sup>105</sup> And despite evidence that concentrated poverty tends to produce academic disparities *between* schools, rather than *within* them, NCLB continues to focus on the performance of “subgroups” as a way to protect poor and minority students.<sup>106</sup> While well intentioned, this approach ignores the way social determinants, such as income and housing, shape school populations, and ultimately affect academic achievement in the aggregate. The “subgroup” approach also reflects NCLB’s broader misunderstanding that, “the more any quantitative social indicator is used for social decision-making, the more subject it will be to corruption pressures and the more apt it will be to distort and corrupt the social processes it is intended to monitor.”<sup>107</sup> Rather than address systemic challenges related to the academic performance of poor and minority students, NCLB attempted to address the problem by singling out those students based on test scores alone. The school exclusions that resulted after 2001 confirm the problem with this approach.

Although there is weak support for the idea that more school funding can combat the effects of concentrated poverty, Professors Brian Jacob and Jens Ludwig posit two areas where increased resources could benefit schools serving predominantly low-income students.<sup>108</sup> The first is increased investment in early childhood education. School readiness programs, such as

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<sup>104</sup> *Id.* at 95.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 109.

<sup>107</sup> See Donald Campbell, *Assessing the Impact of Planned Social Change* 49, Dartmouth College (1976).

<sup>108</sup> See Brian A. Jacob and Jens Ludwig, *Improving Educational Outcomes for Poor Children*, in *CHANGING POVERTY, CHANGING POLICIES* 267 (Maria Cancian and Sheldon Danziger, eds.) (2009).

Head Start, for example, have proven to significantly impact cognitive skill development during formative years. As Jacob and Ludwig note, such programs also “improve the long-run life chances of poor children,” generating benefits significant enough to justify the cost.<sup>109</sup> The authors’ second recommendation is to reduce class sizes in early grades. According to Jacob and Ludwig, a 2002 study of nearly 12,000 students in Tennessee showed that those who had smaller class sizes in early grades not only exhibited higher standardized test scores, they were also more likely to take a college entrance exams, such as the ACT or SAT.<sup>110</sup> The authors note that the improved test scores alone were enough to justify the cost of hiring additional teachers. As with value-added assessments, however, better funding is only one component of a larger movement toward producing better outcomes for poor and minority students. There is also much that needs to be done outside of school. Reforms to testing and funding are necessary but not sufficient to genuinely improve student outcomes.

The same can be said for access to highly qualified teachers. Professor Sean Reardon’s evidence suggesting that poor and minority students are concentrated within certain schools and districts also holds true for unqualified teachers. “By every measure of qualification—certification, subject-matter background, pedagogical training . . . or experience—less qualified teachers are found in schools serving greater numbers of low-income and minority students.”<sup>111</sup> One national study by Professor Jeannie Oakes, for example, found that students in high-minority schools were less than 50 percent likely to be taught math or science by a teacher with a degree or license in those fields.<sup>112</sup> In fact, poor and minority students are often taught by those with no formal training in education at all. Under the current law, however, those students are

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<sup>109</sup> *Id.* at 271.

<sup>110</sup> *Id.* at 272.

<sup>111</sup> *See* Darling-Hammond, *supra* note 108 at 43.

<sup>112</sup> *Id.*

expected to perform at the same level as students in schools with the stability to retain veteran teachers and the support to properly train those new to the profession. While it cannot be understated that teachers alone are not enough to solve the problems Congress tried to tackle in 2001, strengthening NCLB’s standard for “highly qualified” teachers is one more way education policy could be used to achieve the fair equality of opportunity.

### **C. Improve Educational Odds Outside of School**

Academic assessments, school funding and teacher quality are undoubtedly important to improving outcomes for poor and minority students. But taken from the broader perspective of John Rawls’ concept of justice as fairness, the fact remains that social determinants such as health, income, and housing profoundly influence academic outcomes. To actually achieve the goals set forth by NCLB requires attending to those social determinants, in addition to what goes on in school. To do otherwise “is to deny reams of evidence of how poverty affects children’s ability to learn.”<sup>113</sup> In the most practical sense, “this means finding ways of helping parents become better teachers,” and developing programs to support working families, so they can invest in more time at home with their children.<sup>114</sup> The more we work to achieve fair equality of opportunity in this way, the less likely it is that schools will have to correct for society’s shortcomings—or risk being labeled as failures when its teachers and students cannot rise to the demands of laws like NCLB.

This is certainly no easy task, but the upside is that history proves that policy matters. When President Lyndon Johnson declared the War on Poverty and increased investments in poor and rural schools, educational outcomes improved. When desegregation took hold after *Brown v. Board of Education*, educational equality improved. When the Elementary and Secondary

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<sup>113</sup> See Guisbond, *supra* note 16, at 9.

<sup>114</sup> See Reardon, *supra* note 29.

Education Act of 1965 recognized that “where a child grows up should not determine where he or she ends up,” federal education policy began to embody what would come to be known as Rawls’ fair equality of opportunity principle.<sup>115</sup> In addition to these milestones, “efforts to level the playing field for children were supported by intensive investments in bringing and keeping talented individuals in teaching, improving teacher education, and investing in research and development,” along the way.<sup>116</sup>

This national effort to make equal opportunity in education a priority was followed by significant measurable results. “By the mid-1970’s, urban schools spent as much as suburban schools, and paid their teachers well; perennial teacher shortages had nearly ended; and gaps in educational attainment had closed substantially.”<sup>117</sup> For a brief period during that decade, African-Americans and Latino students were attending college at rates comparable to white students.<sup>118</sup> The most significant narrowing of the racial and income achievement gaps also occurred shortly after those efforts began, well before standardized testing ever entered the picture.<sup>119</sup>

Although much of this progress has been undone by growing economic inequality and reforms such as NCLB, which have focused on “outcomes rather than inputs” and high-stakes testing rather than authentic learning, that does not mean that change is impossible. This successful past lends support for the possibility that history could repeat itself, provided education policy is part of a larger commitment to ensuring fair equality of opportunity. In fact, “the rapid growth in the rich-poor educational gap provides a ray of hope,” according to

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<sup>115</sup> See Darling-Hammond, *supra* note 108 at 18.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 19

<sup>119</sup> *Id.*

Reardon. “If the relationship between family income and educational success can change this rapidly, then it is not an immutable, inevitable pattern. What changed once can change again.”<sup>120</sup> Although NCLB did not produce desirable results in effecting this change, perhaps the lesson to be learned from the law’s failure is that policy decisions matter more than we may realize.

## VI. CONCLUSION

When it was introduced in 2002, NCLB endeavored to help all students receive the education they deserve. But rather than confront the fact that poor and minority students bring a host of obstacles with them to school every day, the law tried to ignore that reality by turning public education into a test-driven numbers game, sacrificing some low-performers in the process. The truth, however, is that cultivating student achievement cannot be confined to the walls of a classroom or reduced to a standardized test. Schools are meant to help students develop critical thinking skills and to learn to work collaboratively. They are not meant to be Band-Aids for significant social and economic disparities. Until we take steps to address the myriad other inequalities affecting poor and minority students, the promise to leave no child behind will remain a slogan. Because a law that makes a big promise, but does not confront the reality that children today face the greatest economic inequality this country has ever seen, is not a solution.

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<sup>120</sup> See Reardon, *supra* note 29.

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