

USING THE COURTS TO INFLUENCE THE IMPLEMENTATION OF NO CHILD LEFT BEHIND

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INTRODUCTION

The federal No Child Left Behind Act of 2001 (NCLB), the most recent reauthorization of the Elementary and Secondary Education Act (ESEA), is perhaps the most sweeping education law currently being implemented.¹ Responding to the perceived ineffectiveness of the United States education system,² NCLB aims to increase the academic achievement of students across the country and ensure that all students have the opportunity to receive a high quality education.³ In order to

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¹ Title I of the ESEA, which contains most of the NCLB provisions discussed in this Article, is found at 20 U.S.C.S. §§ 6301-6578 (LEXIS through 2006 legislation).

² In 1983, the publication of *A Nation at Risk* by a federally appointed panel focused national attention on deficiencies in the country's education system. The report stated that "the educational foundations of our society are presently being eroded by a rising tide of mediocrity that threatens our very future as a Nation and a people." NAT'L COMM'N ON EXCELLENCE IN EDUC., U.S. DEP'T OF EDUC., *A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM* 5 (1983), available at <http://www.ed.gov/pubs/NatAtRisk/risk.html>. Reports of student performance in the decades since *A Nation at Risk* was published continue to raise concerns about the performance of the U.S. education system. For example, in the recent *Trends in International Mathematics and Science Study*, the performance of U.S. fourth and eighth grade students in mathematics and science lagged behind the performance of their peers from several countries such as Japan and Chinese Taipei. See PATRICK GONZALES ET. AL., NAT'L CTR. FOR EDUC. STATISTICS, HIGHLIGHTS FROM THE TRENDS IN INTERNATIONAL MATHEMATICS AND SCIENCE STUDY (TIMSS) 2003, 4-5, 14-15 (2004), <http://nces.ed.gov/pubs2005/2005005.pdf>. And according to a recent estimate, over 25% of U.S. students in twelfth grade failed to graduate from public high schools in 1998. See JAY P. GREENE, THE MANHATTAN INST. FOR POLICY RESEARCH, HIGH SCHOOL GRADUATION RATES IN THE U.S. (2005), http://www.manhattan-institute.org/pdf/cr_baeo.pdf.

³ See 20 U.S.C.S. § 6301 (stating that NCLB's purpose is "to ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education and reach at a minimum, proficiency on challenging State academic achievement standards and state academic assessments").

achieve these goals, NCLB requires states to develop standards⁴ and assessments,⁵ and hold schools and districts accountable for their performance on the assessments.⁶ If schools and districts fail to meet their performance goals, a variety of administrative sanctions are prescribed.⁷ While the statutory provisions regarding standards and assessments are not entirely new at the federal level, the accountability mandates included in NCLB are unprecedented; never before has the federal government specified in such detail the steps that states, districts, and schools must take to increase student performance if schools fail to perform adequately.⁸

Accordingly, NCLB has been at the center of often heated disagreements regarding its efficacy and desirability. On the one hand, many have praised NCLB as the remedy to some of the problems that plague the United States education system⁹—through a heavy emphasis on academic performance and consequences tied to performance, NCLB can provide schools with the needed incentives to improve.¹⁰ On the other hand, many have attacked NCLB as overly intrusive and demanding. Critics have complained that NCLB has instituted an array

⁴ See 20 U.S.C.S. § 6311(b)(1)(C) (stating that states must adopt “academic standards for all public elementary school and secondary school children . . . in subjects determined by the State, but including at least mathematics, reading or language arts, and . . . science”); 20 U.S.C. § 6311(b)(1)(D)(i)(I) (stating that standards must “specify what children are expected to know and be able to do” in the appropriate subject area).

⁵ See 20 U.S.C.S. § 6311(b)(3)(A) (stating that each state must implement “a set of high-quality, yearly student academic assessments that include, at a minimum, academic assessments in mathematics, reading or language arts, and science”).

⁶ As discussed further *infra* notes 52-53 and accompanying text, states must determine whether schools have made “adequate yearly progress” (AYP) in student performance. See 20 U.S.C.S. § 6311(b)(2)(B).

⁷ For example, schools that fail to make AYP for two consecutive years are to participate in a public school choice program where the schools’ local education agency must “provide all students enrolled in the school with the option to transfer to another public school served by the local educational agency.” 20 U.S.C.S. § 6316(b)(1)(E)(i). The administrative sanctions will be described in more detail *infra* notes 54-62 and accompanying text.

⁸ As discussed further *infra* notes 35-38 and accompanying text, the Improving America’s Schools Act of 1994 (IASA) also required states to develop standards and assessments as a condition of receiving federal Title I funds. The IASA, however, did not include statutorily mandated administrative sanctions as consequences for insufficient performance. See Pub. L. No. 103-382, 108 Stat. 3518 (1994) (codified as amended at 20 U.S.C. § 6301 (2000) *et seq.*).

⁹ For example, the academic performance and graduation rates of U.S. students are arguably too low. See *supra* note 2.

¹⁰ For example, Rep. John Boehner, Chairman of the Committee on Education and the Workforce, U.S. House of Representatives, stated: “For a generation, we have pumped billions of dollars into a system that lacked accountability, never insisting on results. . . . I believe that kind of thinking is no longer acceptable, and it is why No Child Left Behind has the potential to be a pivotal moment in American education. . . . Accountability is the centerpiece of President Bush’s plan to improve public schools and close this achievement gap that has existed between disadvantaged students and their peers” *Implementation of the No Child Left Behind Act: Hearing on H.R. 1 Before the H. Committee on Education and the Workforce*, 107th Cong. 2-3 (2002).

of requirements with which states have little capacity to comply.¹¹ These complaints have particularly focused on the difficulties that states have had implementing the testing and accountability provisions of NCLB,¹² and that schools have had meeting their performance goals.¹³ Critics have also complained that the institution of NCLB has resulted in undesirable consequences in the classroom, such as “teaching to the test.”¹⁴ And some have argued that NCLB represents an unjustifiable federal usurpation of the power to control education, which has traditionally resided at state and local levels.¹⁵ As a result of such concerns, NCLB has begun to face a variety of legal challenges across the country.

This Article explores NCLB, the implementation problems it has experienced, and its legal ramifications. In particular, this Article focuses on the major problems NCLB has faced in the implementation of its testing and accountability provisions and the way that courts have been used to address these problems. Thus far, it appears that many of the major problems plaguing the implementation of NCLB stem from the failure to provide states, districts, and schools with the needed capacities, such as financial resources, to comply with NCLB mandates.¹⁶ Without having these types of capacities provided for,

¹¹ See, e.g., 147 CONG. REC. H2401 (2001) (statement of Rep. Patsy Mink) (“[NCLB] makes some resources available to failing schools, but not enough. . . . While this [bill] builds on President Clinton’s effort over the last 2 years to provide additional funds for low-performing schools, it does not go nearly far enough to provide the kind of intensive, high-quality support failing schools still need.”).

¹² As discussed *infra* notes 63-94 and accompanying text, states have experienced several problems administering NCLB-mandated testing systems and implementing accountability measures such as public school choice.

¹³ During the 2003-2004 school year, 26,896 schools failed to make AYP under NCLB. During the 2004-2005 school year, 21,350 schools failed to make AYP under NCLB. Despite the decrease in the number of schools failing to make AYP during the 2004-2005 school year, the National Education Association predicts that by the year 2014, between seventy-five and ninety-nine percent of all schools will be found failing to meet AYP. NATIONAL EDUCATION ASSOCIATION, NCLB TESTING RESULTS OFFER ‘COMPLEX, MUDDLED’ PICTURE: EMERGING TRENDS UNDER THE LAW’S ANNUAL RATING SYSTEM (2005), <http://www.nea.org/esea/ayptrends0305.html>.

¹⁴ See, e.g., Lorrie A. Shepard, *The Hazards of High-Stakes Testing*, ISSUES IN SCI. AND TECH., Winter 2002/2003, at 53, 53 (“Critics of testing often argue that the test scores can sometimes provide an inaccurate measure of student progress and that the growing importance of the tests has led teachers to distort the curriculum by ‘teaching to the test.’”); see also Ken Schroeder, *High-Stakes Horrors*, THE EDUC. DIG., May 2003, at 54.

¹⁵ See, e.g., Joetta L. Sack, *Utah Passes Bill to Trump ‘No Child’ Law*, EDUC. WK., Apr. 27, 2005, at 22. (Utah Representative Margaret Dayton commenting on NCLB that “[a] lot of legislators took this personally as a threat to the state of Utah by the strong arm of the federal government”) and that “education is the ‘last bastion of state sovereignty.’”); David Nather, *Despite Senate’s Plan to Cut a Deal, ESEA Bill Bogs Down in Details*, 59 CQ WKLY. 917, 917 (2001) (“[C]onservative Republicans . . . are unhappy with Bush’s testing proposal. They worry that the [NCLB] program . . . would be exactly the kind of prescriptive federal program Republicans have rejected in the past.”).

¹⁶ There are various types of capacities that state-level entities need to effectively comply

states and state-level entities have only a limited ability to implement NCLB testing and accountability provisions effectively. Moreover, as NCLB has been the object of somewhat bitter politics,¹⁷ a series of implementation problems stems from the lack of will that various entities have to implement NCLB provisions. That is, certain entities (such as state, district, or school officials) do not wish to implement NCLB fully, and implementation problems consequently arise.¹⁸ In this Article, I focus on the problem of capacities rather than the problem of politics—both types of implementation problems are certainly important (and likely related, to some extent), but the implementation problems related to institutional capacities are more easily traced to their statutory sources and are therefore more susceptible to legal analysis. Indeed, it is precisely the implementation problems related to these capacities that have begun to constitute the focus of the legal claims brought against NCLB.

In the lawsuits that have been brought to influence NCLB, the courts have not constituted an effective venue for addressing implementation problems or for enforcing salient NCLB provisions. An array of procedural hurdles and hurdles stemming from NCLB's statutory language has prevented courts from having the power to address these problems effectively. Moreover, even in the absence of these hurdles, it appears that courts still would not be in a position to address effectively many NCLB implementation problems. Plaintiffs' claims regarding these problems are naturally shaped by the statutory language of NCLB. In cases where NCLB does not include detailed language regarding the capacities that various entities need to implement NCLB, the law may simply fail to support claims that target the primary roots of the implementation problems.

The ineffective use of the courts thus far to address NCLB implementation problems accordingly raises the question of whether there is any useful role for the courts to play in regard to NCLB. Recently, education law scholars have begun to focus in an increasingly systematic fashion on the effectiveness of court-driven efforts to affect education policy.¹⁹ Certainly, scholars have demonstrated that court-

with NCLB requirements. See *infra* notes 71-102 for more detail on these capacities.

¹⁷ See *infra* notes 103-111 and accompanying text.

¹⁸ See, e.g., James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U. L. REV. 932, 946 (2004) (“[S]tate and local officials are not pleased by the prospect that half or more of their schools will be considered failing by the media and the public. Indeed, such a result is politically unacceptable. The only real question is what states will do to avoid it.”); Benjamin Michael Superfine, *The Politics of Accountability: The Rise and Fall of Goals 2000*, AM. J. OF EDUC., Nov. 2005, at 10, 30 (“[A]s the federal intent to enforce [NCLB] became increasingly clear, many states began to criticize NCLB and resist its full implementation.”).

¹⁹ See Jay P. Heubert, *Six Law-Driven School Reforms: Developments, Lessons, and Prospects*, in LAW AND SCHOOL REFORM 1, 3 (Jay P. Heubert ed., 1999) (describing the book *Law and School Reform* as “perhaps the first work to take stock systematically of a key set of

driven reform in education has had its share of limitations.²⁰ However, as a recent work examining the effectiveness of various court-driven reform efforts in education suggests, “setbacks notwithstanding, law-based reform efforts have evolved in promising directions and still hold great potential for improving the educational opportunities of disadvantaged children.”²¹ At the very least, courts became major players in the formation and implementation of education policy over the second half of the twentieth century, and they appear likely to retain this role.²² Building off the hope that the courts can constitute an effective venue for addressing educational problems, this Article examines a second group of cases that was not directly aimed at affecting NCLB’s implementation problems but that appears able to provide courts with an effective basis to do so nonetheless. These cases were particularly directed at reforming states’ systems of school finance. Recently, school finance litigation and issues related to standards and accountability have begun to collide. In this Article, I suggest that this collision may be able to provide courts with a new approach that enables them to address NCLB implementation problems more effectively.

In order to explore the issues grouped around the implementation of NCLB and how courts have been and can be used to address these implementation problems, this Article is divided into four primary parts. Part I situates NCLB in its historical context, describes the major provisions of the statute, and examines the major implementation problems that NCLB has experienced. This Part pays particular attention to the testing and accountability requirements contained in NCLB and the problems implementing accountability requirements. Part II examines the cases that have been brought to affect key aspects of NCLB’s implementation. In particular, this Part focuses on the problems plaintiffs have targeted, the subsequent legal hurdles that plaintiffs have faced, and the ways in which these cases highlight problems stemming from the statutory language and structure of NCLB. Part III outlines the recent collision between school finance reform litigation and issues regarding standards and accountability. Moreover,

law-based school reform efforts”).

²⁰ See, e.g., Gary Orfield, *Conservative Activists and the Rush Toward Resegregation*, in *LAW AND SCHOOL REFORM*, *supra* note 19, at 39, 40-41 (“The way educators and lawyers are now working together has often led to decisions that read very selectively from the law and to plans that create highly segregated and unequal schools.”); Molly S. McUsic, *The Law’s Role in the Distribution of Education: The Promises and Pitfalls of School Finance Litigation*, in *LAW AND SCHOOL REFORM*, *supra* note 19, at 88, 90 (stating, in regard to school finance litigation, that “despite litigation in nearly every state over the past two decades, interdistrict disparities in the United States have not diminished”).

²¹ Heubert, *supra* note 19, at 3.

²² See FREDERICK M. WIRT & MICHAEL W. KIRST, *THE POLITICS OF EDUCATION: SCHOOLS IN CONFLICT* 253-76 (1982).

this Part discusses this basic shape of a new approach to addressing salient NCLB implementation problems that could stem from this collision. Finally, Part IV offers concluding thoughts about the implications of the cases examined in Part II and the new approach suggested in Part III. In particular, this Part suggests that, while the courts have the potential to constitute a more effective venue to address NCLB implementation problems, reformers who wish to affect NCLB's implementation may have other (perhaps even more) effective strategies available to them as well. Moreover, this Part emphasizes that reformers should also look to other governmental branches if they wish to impact the design and implementation of federal standards- and accountability-based reform.

Before continuing, it is important to emphasize that I do not take a stand in this Article on the overall wisdom or desirability of NCLB. As the politics of federal education reform are rather divisive and it appears extremely difficult for state-level actors to implement standards- and accountability-based reforms effectively, I remain unsure of whether these reforms can in fact be well-designed and implemented. At the same time, I am also convinced that federally driven standards- and accountability-based reforms may be a viable solution to many of the problems facing our education system. I see a wealth of potential in reform efforts grouped around standards and accountability, and I find the core theory of standards-based reform particularly attractive.²³ Therefore, in this Article, I primarily focus on the implementation problems and use of the courts in the case of NCLB. As to deeper issues regarding the desirability of mandates regarding standards and accountability at the federal level, I remain thoroughly agnostic.

I. NO CHILD LEFT BEHIND

A. *History*

Although the federal government is now deeply involved in education policy with the passage of laws such as NCLB, the power to set and implement education policy was traditionally reserved to the

²³ To be sure, the underlying theory of standards-based reform has been construed in several different ways. See Maris A. Vinovskis, *An Analysis of the Concept and Uses of Systemic Educational Reform*, 33 AM. EDUC. RES. J. 53 (1996). However, most formulations of standards-based reform have several common elements. Under an early and influential formulation, standards-based reform includes curriculum frameworks, alignment of state policies around the curriculum frameworks, and educational governance structures to enable schools to help their students learn the skills and knowledge embodied in the frameworks. See Jennifer A. O'Day & Marshall S. Smith, *Systemic Reform and Educational Opportunity*, in DESIGNING COHERENT EDUCATION POLICY 250, 251 (Susan H. Fuhrman ed., 1993).

states for much of U.S. history. Pursuant to interpretations of the Constitution during the first century and a half after ratification, education was largely a state and local priority.²⁴ But after World War II, the federal role rapidly expanded. In 1958, Congress passed the National Defense Education Act, which directed federal funds to localities in order to advance education in areas such as science, mathematics, and foreign languages.²⁵ Federal courts became increasingly involved with education as they ruled in an array of civil rights cases.²⁶ With the Civil Rights Act of 1964, Congress articulated educational rights that apply to all students.²⁷ In 1965, Congress passed the Elementary and Secondary Education Act (ESEA) and aimed federal funds at disadvantaged students as part of President Johnson's war on poverty.²⁸ And with the passage of the Education for All Handicapped Children Act in 1975, Congress required states that receive federal funds to develop and implement policies that assure students with disabilities a free appropriate public education.²⁹ However, even with this expanding federal focus on education, the federal government did not delve too deeply into the inner workings of schools.³⁰ But with the 1983 publication of *A Nation at Risk*, a report

²⁴ See Michael W. Kirst, *Who's in Charge? Federal, State, and Local Control*, in *LEARNING FROM THE PAST* 25, 29 (Diane Ravitch & Maris A. Vinovskis eds., 1995). However, the federal government did have a small role in education during this time. For example, in the late eighteenth century, Congress reserved millions of acres for public education. See Land Ordinance of 1785, available at <http://www.statelib.lib.in.us/www/ihb/resources/docldord.html>; Northwest Ordinance of 1787, available at <http://www.historicaldocuments.com/NorthwestOrdinance.htm>.

²⁵ Pub. L. No. 85-864, 72 Stat. 1580 (1958).

²⁶ See, e.g., *Brown v. Board of Educ.*, 347 U.S. 483 (1954); *Cooper v. Aaron*, 358 U.S. 1 (1958); *Green v. County Sch. Bd.*, 391 U.S. 430 (1968); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971).

²⁷ See Pub. L. No. 88-352 §§ 401-410, 78 Stat. 241, 246-49 (1964) (codified as amended in 42 U.S.C. § 2000c (2000) *et seq.*).

²⁸ See Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27 (1965). The ESEA is perhaps the most sweeping piece of education reform legislation in U.S. history. As it was originally passed, the ESEA included five different Titles, each of which funneled federal funds into state educational programs. Title I, the central portion of the ESEA, authorized the appropriation of \$1 billion in categorical grants for the compensatory education of economically disadvantaged students. Other Titles provided millions of dollars for instructional materials, educational improvement centers, research and development centers, and efforts to increase coordination within state departments of education.

²⁹ See Pub. L. No. 94-142, 89 Stat. 773 (1975). The Education for all Handicapped Children Act requires states to develop and implement policies that assure a "free appropriate public education" to all children with disabilities in order for states to receive federal funds. 89 Stat. at 775. In 1997, the act was renamed the Individuals with Disabilities Education Act, Pub. L. No. 105-17, 111 Stat. 37 (1997).

³⁰ See John F. Jennings, *Title I: Its Legislative History and Its Promise*, in *COMPENSATORY EDUCATION AT THE CROSSROADS* 1, 14 (Geoffrey D. Borman, Samuel C. Stringfield & Robert E. Slavin eds., 2001). To be sure, some interpreted federal actions in education policy during the 1960s and 1970s as intrusive upon the states. See, e.g., PETER B. DOW, *SCHOOLHOUSE POLITICS: LESSONS FROM THE SPUTNIK ERA* 229-31 (1991) (indicating that the National Science

by a federally appointed panel that highlighted problems in the American education system, the foundation was laid for a shift in the federal role.³¹

With a burgeoning focus on substantive levels of academic achievement, the standards movement swept throughout the country. States such as California began to enact standards-based reforms,³² and in 1989, the National Council of Teachers of Mathematics (NCTM) published a set of model standards articulating what students should know and be able to do in mathematics.³³ In 1994, during President William Clinton's time in office, federal legislation addressed standards-based reform for the first time. Congress passed the Goals 2000: Educate America Act³⁴ (Goals 2000) and the Improving America's Schools Act³⁵ (IASA), two related federal statutes aimed at providing states with the capacities and incentives to engage in standards-based reforms. Goals 2000 was passed before the IASA and designed to be a standards-based framework for other educational policies;³⁶ Goals 2000 primarily provided grants to states to help them develop their own standards and assessment systems.³⁷ As a reauthorization of the ESEA, the IASA was passed in 1994 as a complement to Goals 2000. The IASA conditioned the receipt of its funds upon the development of standards, assessments, and accountability systems in each state.³⁸ Where Goals 2000 was to provide the federal direction for standards-based education reform, the IASA was to provide the incentives. Unfortunately, several problems

Foundation's MACOS project and regional language laboratories generated some criticism from concerned legislators and citizens).

³¹ See A NATION AT RISK, *supra* note 2. After the publication of *A Nation at Risk*, researchers released several reports that similarly decried the state of the American education system. See, e.g., TASK FORCE ON EDUC. FOR ECON. GROWTH, EDUC. COMM'N OF THE STATES, ACTION FOR EXCELLENCE (1983).

³² See Diane Ravitch, *The Search for Order and the Rejection of Conformity: Standards in American Education*, in LEARNING FROM THE PAST, *supra* note 24, at 167, 180-82.

³³ NAT'L COUNCIL OF TEACHERS OF MATHEMATICS, CURRICULUM AND EVALUATION STANDARDS FOR SCHOOL MATHEMATICS (1989). The standards developed by the National Council of Teachers of Mathematics constitute the first set of content standards agreed upon by prominent members of a disciplinary field and have constituted a model for standards created by many states. See Ravitch, *supra* note 32.

³⁴ Pub. L. No. 103-227, 108 Stat. 128 (1994).

³⁵ Pub. L. No. 103-382, 108 Stat. 3518 (1994).

³⁶ Some legislators did attempt to reauthorize Title I before Goals 2000 had been passed. On January 5, 1993, Representative Dale Kildee introduced a bill that would reauthorize the ESEA. Elementary and Secondary Education Amendments of 1993, H.R. 6, 103rd Cong. (1st Sess. 1993). However, almost all congressional consideration of Title I occurred after Goals 2000's passage.

³⁷ See Pub. L. No. 103-227, § 308, 108 Stat. 125, 168 (1994) (authorizing grants to states to build systems of standards and assessments).

³⁸ See Pub. L. No. 103-382, § 1111(b), 108 Stat. at 3523-27 (requiring states to submit plans to the U.S. Department of Education (ED) demonstrating that they had developed or adopted a set of high-quality standards and assessments).

marred the implementation of both laws,³⁹ and Goals 2000 in particular lost much of its force by the end of 1996 and was never reauthorized.⁴⁰ Consequently, by the time President Clinton left office in 2000, the potential of the federal government to increase student achievement by leveraging standards- and accountability-based reforms around the country was far from clear.⁴¹

B. *The Requirements of No Child Left Behind*

On January 8, 2002, President George W. Bush signed into law NCLB. While the underlying logic of NCLB is grounded in earlier statutes, such as Goals 2000 and the IASA, NCLB entails more stringent demands on states than its predecessors regarding testing and accountability. The most important changes Congress made to the ESEA with the passage of NCLB are in Title I. Historically, Title I has constituted the most important section of the ESEA and has funneled billions of federal dollars to the states for the education of disadvantaged students.⁴² According to its statutory text, NCLB is designed to strengthen “accountability, teaching, and learning by using State assessment systems designed to ensure that students are meeting challenging State academic achievement and content standards and increasing achievement overall.”⁴³ In order to achieve this goal, NCLB specifies in great detail the specific means that must be used. NCLB

³⁹ See, e.g., U.S. DEP’T OF EDUC., HIGH STANDARDS FOR ALL STUDENTS: A REPORT FROM THE NATIONAL ASSESSMENT OF TITLE I ON PROGRESS AND CHALLENGES SINCE THE 1994 REAUTHORIZATION 20 (2001) (indicating that only twenty-eight states complied with the IASA’s timeline for the institution of performance standards); JANE HANNAWAY WITH KRISTI KIMBALL, REPORTS ON REFORM FROM THE FIELD: DISTRICT AND STATE SURVEY RESULTS (1997) (suggesting that state-level policies, and not federal-level policies, accounted for much of the school district progress in effecting standards-based reform).

⁴⁰ In 1996, Congress amended Goals 2000. Pub. L. No. 104-134, 110 Stat. 1321, an appropriations bill that set the permanent 1996 budget, eliminated several significant Goals 2000 provisions. Pub. L. No. 104-134 particularly eliminated the requirement that states submit plans to ED and thereby eliminated the primary means that ED could use to hold states accountable for their use of Goals 2000 funds.

⁴¹ HIGH STANDARDS FOR ALL STUDENTS, *supra* note 39, at 13-17 (indicating that the performance of nine-year-olds in high-poverty schools rose slightly on the National Assessment of Educational Progress in reading and mathematics from 1992 to 1999, but also indicating that the achievement gap between high- and low-poverty schools was widening). This report refused to attribute much causal influence to President Clinton’s Title I policies on student achievement because, at the time, Title I funding only constituted three percent of total public school funding, and Title I funds were heavily intermingled with state and local resources. *Id.* At 9, 13.

⁴² From 1965 to 2003, the federal government spent over \$321 billion on K-12 education. Press Release from Rep. John Boehner, Chairman of the Committee on Education and the Workforce, House Education Committee Chairman Boehner Challenges AFT Attack on President Bush’s Education Budget (Feb. 5, 2003), <http://edworkforce.house.gov/press/press108/02feb/BoehnerresponseAFT020503.htm>.

⁴³ 20 U.S.C.S. § 6301(6) (LEXIS through 2006 legislation).

requires states to have submitted plans specifying how they will comply with the requirements of NCLB.⁴⁴ Moreover, NCLB requires states to adopt their own “challenging academic standards” in reading, mathematics, and science.⁴⁵ These standards must “specify what children are expected to know and be able to do” in the appropriate subject areas.⁴⁶ Furthermore, these standards must describe at least three levels of achievement—basic, proficient, and advanced.⁴⁷

In addition, NCLB requires each state to adopt a system of assessments to monitor the progress of student achievement in relation to state standards.⁴⁸ These assessments must be aligned with a state’s standards and must measure proficiency in mathematics, reading, and science. Through the 2004-2005 school year, reading and mathematics tests must be administered at least once annually in three different grades.⁴⁹ Beginning in the 2005-2006 school year, these tests must be administered at least once annually to students in grades three through eight.⁵⁰ States must begin to administer science tests in the 2007-2008 school year.⁵¹ Having developed academic standards and constructed an assessment to measure student achievement in relation to these standards, states also must ensure that schools receiving Title I funds make “adequate yearly progress” (AYP).⁵² In order to comply with this requirement, states must define for themselves what constitutes an acceptable annual increase of student proficiency on state assessments in schools. This annual increase must include separate objectives for economically disadvantaged students, students from major racial and ethnic groups, students with disabilities, and students with limited English proficiency.⁵³ Under the AYP provisions of NCLB, states must ensure that each of these student subgroups reaches proficiency by 2014.

If a school fails to make AYP on state assessments, the school becomes subject to a variety of accountability measures. The sanctions that flow from failure to make AYP are markedly more demanding than

⁴⁴ See 20 U.S.C.S. § 6311(a)(1).

⁴⁵ See 20 U.S.C.S. § 6311(b)(1). Reading and mathematics standards must have been adopted by the beginning of the 2002-2003 school year, and science standards must have been adopted by the beginning of the 2005-2006 school year.

⁴⁶ See 20 U.S.C.S. § 6311(b)(1)(D)(i)(I).

⁴⁷ See 20 U.S.C.S. §§ 6311(b)(1)(D)(ii)(II)-(III).

⁴⁸ See 20 U.S.C.S. § 6311(b)(3).

⁴⁹ See 20 U.S.C.S. § 6311(b)(3)(C)(v)(I). The grades to which tests must be administered must include one grade between grades 3 through 5, one grade between grades 6 through 9, and one grade between grades 10 through 12.

⁵⁰ See 20 U.S.C.S. § 6311(b)(3)(C)(vii).

⁵¹ See 20 U.S.C.S. § 6311(b)(3)(C)(v)(II). The grades to which tests must be administered must include one grade between grades 3 through 5, one grade between grades 6 through 9, and one grade between grades 10 through 12.

⁵² See 20 U.S.C.S. § 6311(b)(2).

⁵³ See 20 U.S.C.S. § 6311(b)(2)(C)(v).

any type of accountability sanctions that have previously been prescribed by a federal law.⁵⁴ A school that fails to make AYP for two consecutive years is to be identified for school improvement.⁵⁵ When a school district contains a school labeled for school improvement, the local educational agency must provide all students enrolled in the school with the option to transfer to another public school within the district.⁵⁶ A school identified for school improvement must also develop and implement a plan to strengthen the school's core academic subjects and to address the reasons why the school is identified for school improvement.⁵⁷ If a school fails to make AYP after its first year of identification for school improvement, "supplemental educational services" must be made available to all of its students.⁵⁸ The school's local educational agency must arrange for provision of these services to eligible children from a provider with a demonstrated record of effectiveness that is selected by parents and approved by the proper state educational agency.⁵⁹

If a school fails to make AYP after its second year of identification for school improvement status, that school is identified for corrective action.⁶⁰ Once a school is identified for corrective action, the appropriate local educational agency must implement at least one out of several demanding actions, such as replacing the school's staff.⁶¹ If a school fails to make AYP after its first year of identification for corrective action, the local educational agency must implement one out of another set of even more demanding actions, including turning the operation of the school over to the state.⁶²

⁵⁴ See *supra* note 8 and accompanying text.

⁵⁵ See 20 U.S.C.S. § 6316(b).

⁵⁶ See 20 U.S.C.S. § 6316(b)(1)(E).

⁵⁷ See 20 U.S.C.S. § 6316(b)(3).

⁵⁸ 20 U.S.C.S. § 6316(b)(5)(B).

⁵⁹ 20 U.S.C.S. § 6316(e)(1).

⁶⁰ 20 U.S.C.S. § 6316(b)(7).

⁶¹ NCLB states that a local educational agency with a school in its first year of corrective action must implement one of the following six options in the school:

(I) Replace the school staff who are relevant to the failure to make adequate yearly progress.

(II) Institute and fully implement a new curriculum, including providing appropriate professional development for all relevant staff, that is based on scientifically based research and offers substantial promise of improving educational achievement for low-achieving students and enabling the school to make adequate yearly progress.

(III) Significantly decrease management authority at the school level.

(IV) Appoint an outside expert to advise the school on its progress toward making adequate yearly progress

(V) Extend the school year or school day for the school.

(VI) Restructure the internal organizational structure of the school.

20 U.S.C.S. § 6316(b)(7)(C)(iv).

⁶² NCLB states that a local educational agency with a school in its second year of corrective action must implement one of the following five options in the school:

(i) Reopening the school as a public charter school.

In addition to these requirements governing standards, testing, and accountability, NCLB requires states to ensure that there is a “highly qualified teacher” (HQT) in every public school classroom by the end of the 2005-06 school year.⁶³ While the definition of what constitutes “highly qualified” varies for different types of teachers, NCLB generally requires teachers to have received a bachelor’s degree, be fully certified, and to have demonstrated their knowledge and skills.⁶⁴

In order to accomplish all these goals, Congress has provided for large increases in education funding. Upon NCLB’s passage, the discretionary budget of the U.S. Department of Education (ED) was increased to \$48.9 billion.⁶⁵ This figure represented an increase of 15.9 percent—the largest in the history of ED. NCLB funds were also authorized at higher levels than ever before in ESEA history. For its first year of implementation, NCLB was authorized at \$26.4 billion by Congress.⁶⁶ In its second year, it was authorized at \$29.2 billion, and in its third year, it was authorized at \$32 billion.⁶⁷ Notably, these authorization levels were the outcome of much congressional debate regarding the funding that states need to implement effectively the new requirements of NCLB.⁶⁸ Indeed, the final text of NCLB contains the

(ii) Replacing all or most of the school staff (which may include the principal) who are relevant to the failure to make adequate yearly progress.

(iii) Entering into a contract with an entity, such as a private management company, with a demonstrated record of effectiveness, to operate the public school.

(iv) Turning the operation of the school over to the State

(v) Any other major restructuring of the school’s governance arrangement that makes fundamental reforms

20 U.S.C.S. § 6316(b)(8)(B).

⁶³ See 20 U.S.C.S. § 6319(a)(2).

⁶⁴ See 20 U.S.C.S. § 7801(23) (stating that “highly qualified” generally refers to teachers who have a bachelor’s degree, have obtained full State certification or passed the State licensing examination, and hold a license to teach in the state). Former U.S. Secretary of Education Paige described a seemingly flexible method for current teachers to be considered highly qualified:

Under the law, current teachers have the option—instead of taking a test or going back to school—to demonstrate subject-matter competency through a process called HOUSSSE—high objective uniform state standard of evaluation. The HOUSSSE may include a teacher’s years of experience, high-quality professional development success as measured by a teacher’s students’ test scores, continuing education and other objective evaluations.

Press Release from U.S. Secretary of Education Rod Paige, *New, Flexible Policies Help Teachers Become Highly Qualified* (Mar. 15, 2004), <http://www.ed.gov/news/pressreleases/2004/03/03152004.html>.

⁶⁵ Joetta L. Sack, *Federal Spending Burst Nudges Up Uncle Sam’s Share*, EDUC. WK., Feb. 13, 2002, <http://www.edweek.gov>.

⁶⁶ See *id.*

⁶⁷ See *id.*

⁶⁸ See, e.g., Eric W. Robelen, *Key House Democrat Offers \$110 Billion Education Plan*, EDUC. WK., Feb. 7, 2001, at 22, available at <http://www.edweek.org> (indicating that soon after Bush released his initial outline of NCLB, Reps. George Miller and Dale Kildee argued that states would not be able to meet NCLB requirements without drastically increased funding); David Nather, *Parties Push Together for Many Key Proposals of Bush’s Education Plan*, 59 CQ WKLY.

“Unfunded Mandates Provision,” which prohibits federal officers or employees from mandating states and localities to spend funds for costs not paid for by NCLB.⁶⁹ This provision has become particularly important in the debates that surround NCLB and cases launched to influence the implementation of NCLB.⁷⁰

C. *The Implementation of No Child Left Behind*

Since NCLB was passed, it has faced an array of implementation problems. States, districts, and schools have had difficulty implementing NCLB mandates regarding testing and accountability, in part due to a lack of sufficient fiscal and technical capacities. These entities have had problems complying with NCLB’s HQT mandates, and states’ methods for determining whether schools make AYP have been repeatedly attacked by critics. This section details the major implementation problems NCLB has experienced and the primary causes of these problems.

The lack of adequate funding for NCLB testing and accountability mandates appears to constitute a major NCLB implementation problem. As states began to implement NCLB, they were experiencing one of the worst fiscal crises since World War II.⁷¹ Nevertheless, congressional appropriations have fallen markedly short of NCLB authorization levels.⁷² Partly as a result of insufficient appropriations, states appear to lack the fiscal capacity to implement effectively central NCLB provisions, including those governing testing and assessments. The General Accounting Office has estimated that it will cost \$1.9 billion between 2002 and 2008 for all states to implement the simplest types of

783, 783 (2001) (indicating that President Bush disagreed with the proposals of congressional Democrats and proposed only a \$1.6 billion increase in ESEA spending).

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

⁷⁰ See *infra* notes 165-171 and accompanying text.

⁷¹ In 2003, states faced a combined budget gap of \$17.5 billion, and 31 states faced deficits. Press Release from the National Council of State Legislatures, *Fiscal Storm Shows Signs of Subsiding* (Nov. 21, 2003), <http://www.ncsl.org/programs/press/2003/pr031121.htm>; Robert C. Johnston, *Governors: State Finances Worst Since World War II*, EDUC. WK., Dec. 4, 2002.

⁷² Although NCLB was authorized at \$26.4 billion for FY 2002, the Bush administration proposed a \$19.1 billion appropriation for NCLB, and Congress actually appropriated \$22.2 billion. Although NCLB was authorized at \$29.2 billion for FY 2003, the Bush administration proposed a \$22.1 billion appropriation, and Congress actually appropriated \$23.8 billion. Similarly, although NCLB was authorized at \$32 billion for FY 2004, the Bush administration proposed a \$22.6 billion appropriation, and Congress actually appropriated \$24.5 billion. See NATIONAL EDUCATION ASSOCIATION, *supra* note 13.

testing programs, and more sophisticated testing systems could cost up to \$5.3 billion.⁷³ Consequently, only 28 out of 48 states included in one implementation report have indicated that NCLB funds have been sufficient for developing state assessments.⁷⁴

States similarly appear to lack the fiscal capacity necessary to implement fully the consequences for failure to make AYP. The implementation of the school choice and supplemental services provisions has already proven costly,⁷⁵ and as NCLB continues to be implemented, the cost of implementing other NCLB provisions will mount as well.⁷⁶ Moreover, some reports indicate that states lack the funds necessary to bring their students up to the proficient level as required by NCLB.⁷⁷ In one national survey of 2000 public school administrators, 89 percent of superintendents and 88 percent of principals called NCLB an “unfunded mandate.”⁷⁸ As a result of such concerns, NCLB funding levels have been repeatedly attacked by a variety of individuals and organizations.⁷⁹

In addition to these funding issues, states face other problems implementing NCLB-mandated consequences for school failure to make

⁷³ See U.S. GEN. ACCOUNTING OFFICE, TITLE I: CHARACTERISTICS OF TESTS WILL INFLUENCE EXPENSES; INFORMATION SHARING MAY HELP STATES REALIZE EFFICIENCIES 3-4 (2003).

⁷⁴ See CTR. ON EDUC. POLICY, FROM THE CAPITAL TO THE CLASSROOM: YEAR 2 OF THE NO CHILD LEFT BEHIND ACT 66-67 (2004).

⁷⁵ See, e.g., CONN. STATE DEP'T OF EDUC., COST OF IMPLEMENTING THE FEDERAL NO CHILD LEFT BEHIND ACT IN CONNECTICUT 11 (2005) (indicating that developing and administering the NCLB accountability system cost \$380,000 through June 2003 but will drastically rise through 2008).

⁷⁶ See William J. Mathis, *The Cost of Implementing the Federal No Child Left Behind Act: Different Assumptions, Different Answers*, PEABODY J. OF EDUC., Iss. 2, at 90, 103 (2005) (“[S]tates will have to spend more than what they receive in new federal monies to implement the [NCLB] act. A reasonable estimate based on the studies to date suggests increases in total new administrative or new marginal costs of between 2% and 2.5% with total new federal revenues at less than 1%.”).

⁷⁷ See, e.g., William J. Mathis, *No Child Left Behind: Costs and Benefits*, 84 PHI DELTA KAPPAN 679 (2003) (indicating that state education expenditures may have to rise by more than 24 percent to fulfill the goal of all students reaching proficiency).

⁷⁸ See Press Release from Public Agenda, *America's Principals and Superintendents—Railing Against a Torrent of Local, State and Federal Mandates* (Nov. 19, 2003), http://www.publicagenda.org/press/press_release_detail.cfm?report_title=Rolling%20Up%20The%20Sleeves.

⁷⁹ See, e.g., Press Release from Representative George Miller, *Kennedy and Miller Call on Bush to Back Education Spending Increase to Ensure Success of Historic School Reform* (Mar. 18, 2002) (“The President’s budget leaves six million needy children behind and provides severely inadequate funding to put a qualified teacher in every class room and to reduce class size.”); Bess Keller, *NEA Seeks Allies to Bring Lawsuit on ESEA Funding*, EDUC. WK., Aug. 6, 2003, at 1, 22 <http://www.edweek.org> (stating that the President of the NEA, Reg Weaver, has called NCLB “the granddaddy of all underfunded federal mandates.”); National Education Association et al., *Joint Organizational Statement on ‘No Child Left Behind’ Act* (Oct. 21, 2004), <http://www.nea.org/presscenter/nclbjointstatement.html> (a joint statement of several education and civil rights groups calling for the federal government to raise authorized levels of NCLB).

AYP. States have not come close to offering public school choice to all students who are required to receive the option.⁸⁰ An array of factors not directly related to funding conspire to lower the capacities of schools and districts to implement the choice provisions, including an insufficient number of receiving schools,⁸¹ insufficient amount of space,⁸² countervailing state policies,⁸³ and overly tight timeframes.⁸⁴ Indeed, due to their inability to offer public school choice, many districts have instead offered supplemental services.⁸⁵ Nevertheless, states are facing similar problems implementing the supplemental services provisions of NCLB. Student access to supplemental services providers is not consistent across the states,⁸⁶ and the amount⁸⁷ and quality⁸⁸ of services provided to students can vary dramatically.

The HQT provisions of NCLB have also proven difficult for states to implement effectively. Just before states began to implement NCLB, only a little over half of U.S. secondary teachers could be considered highly qualified.⁸⁹ Efforts to raise the number of highly qualified teachers have faced many problems. There are severe teacher shortages

⁸⁰ See CTR. ON EDUC. POLICY, *supra* note 74, at 90 (indicating that in 2003-2004, only 51 percent of schools that are supposed to offer public school choice are actually offering public school choice).

⁸¹ In the 2002-2003 school year, districts with more than five schools in school improvement generally had two schools available to receive transfer students. This issue is more problematic in rural districts. Thirty-seven out of forty-eight states included in an implementation report indicated that many rural districts were experiencing public school choice implementation problems from various issues, such as having only one school or building per grade. See *id.* at 93.

⁸² See *id.* at 95 (twenty-six percent of school districts surveyed in 2002-2003 felt that lack of physical space was a serious challenge); U.S. GOV'T. ACCOUNTABILITY OFFICE, NO CHILD LEFT BEHIND ACT: EDUCATION NEEDS TO PROVIDE ADDITIONAL TECHNICAL ASSISTANCE AND CONDUCT IMPLEMENTATION STUDIES FOR SCHOOL CHOICE PROVISION 34 (2004) (half of the districts examined failed to grant as many transfers as requested because of constraints on building capacities).

⁸³ See CTR. ON EDUC. POLICY, *supra* note 74, at 95 (twenty-eight percent of districts surveyed in 2002-2003 indicated that class size limits were a serious challenge to carrying out the NCLB choice mandates).

⁸⁴ See U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 82, at 19 (seven of eight districts surveyed did not receive final student performance results in time to meet the transfer requirement for the following school year).

⁸⁵ See CTR. ON EDUC. POLICY, *supra* note 74, at 94 (fourteen out of thirty-two states surveyed offered supplemental services instead of choice during the 2002-2003 school year, and twenty-one out of thirty-five states surveyed offered supplemental services instead of choice during the 2003-2004 school year).

⁸⁶ See *id.* at 111 (eight out of the forty-six states surveyed indicated that approved services providers were providing the same frequency, duration, and range of services to all areas of the states, while twenty-six states indicated that services providers were not).

⁸⁷ See *id.* at 111-12 (providers charge different hourly rates for tutoring and the number of hours of tutoring that a student can receive for a fixed amount of funds can therefore vary drastically).

⁸⁸ See *id.* at 114 (forty-one percent of the states surveyed indicated that they do not have systems in place to monitor the quality of services providers).

⁸⁹ See U.S. DEP'T OF EDUC., MEETING THE HIGHLY QUALIFIED TEACHERS CHALLENGE: THE SECRETARY'S SECOND ANNUAL REPORT ON TEACHER QUALITY 7 (2003).

in high need subjects.⁹⁰ In addition, states' professional development programs are insufficient to raise teacher quality,⁹¹ and there are too few programs to support new teachers.⁹² Consequently, many states have developed low standards for defining what constitutes a highly qualified teacher.⁹³ And although it is very difficult to determine with precision the current number of teachers who conform to state-level teacher quality requirements,⁹⁴ it appears that state efforts to comply with the HQT provisions are currently weak.⁹⁵

Perhaps most importantly, many implementation problems regarding states' standards and assessment systems have also begun to surface. The quality of content standards developed by states is often low and varies drastically across states.⁹⁶ Similar issues have surfaced in states' systems for determining whether schools make AYP. As states have some power to set their own definitions of AYP, states use a variety of methods to determine whether schools make AYP. Different states set first year AYP goals at very different points.⁹⁷ Moreover, states use different methods to determine whether schools make AYP from year to year—as one implementation report indicates, three states

⁹⁰ See U.S. GEN. ACCOUNTING OFFICE, NO CHILD LEFT BEHIND ACT: MORE INFORMATION WOULD HELP STATES DETERMINE WHICH TEACHERS ARE HIGHLY QUALIFIED 3, 17 (2003) (twenty-three out of thirty-seven states surveyed have teacher shortages in high need subject areas such as mathematics, science, and special education).

⁹¹ See *id.* (fourteen of thirty-seven states surveyed indicated that professional development programs are insufficient to raise teacher quality).

⁹² See *id.* (thirteen of thirty-seven states surveyed indicated that there are too few programs to support new teachers).

⁹³ See CHRISTOPHER O. TRACY & KATE WALSH, NECESSARY AND INSUFFICIENT: RESISTING A FULL MEASURE OF TEACHER QUALITY 3 (2004) (giving state teacher standards an average grade of "D+").

⁹⁴ See U.S. GEN. ACCOUNTING OFFICE, *supra* note 90, at 3 (indicating that ED did not provide sufficiently clear guidance to enable states to evaluate the subject area knowledge of their current teachers, and that seven out of the eight states visited by the General Accounting Office reported that they did not have the data systems needed to determine if a highly qualified teacher taught each core subject).

⁹⁵ See, e.g., KATE WALSH & EMMA SNYDER, NAT'L COUNCIL ON TEACHER QUALITY, SEARCHING THE ATTIC: HOW STATES ARE RESPONDING TO THE NATION'S GOAL OF PLACING A HIGHLY QUALIFIED TEACHER IN EVERY CLASSROOM 1 (2004) ("In the short term, the prospects are dim for making genuine strides in improving teacher quality.").

⁹⁶ See, e.g., G. GAGE KINGSBURY ET AL., NORTHWEST EVALUATION ASS'N, THE STATE OF STATE STANDARDS: RESEARCH INVESTIGATING PROFICIENCY LEVELS IN FOURTEEN STATES 11, 19 (2004) (stating that the 36th percentile on the eighth grade Montana state mathematics test is approximately equivalent to the 89th percentile on the eighth grade Wyoming state mathematics test); BELLA ROSENBERG, AM. FED'N OF TEACHERS, AFL-CIO, WHAT'S PROFICIENT?: THE NO CHILD LEFT BEHIND ACT AND THE MANY MEANINGS OF PROFICIENCY 9 (2004) ("[T]he states have very different ideas about what it means to be proficient. Indeed, one of the ways parents can boost their chances of having proficient children is to move to another state!").

⁹⁷ See U.S. GOV'T ACCOUNTABILITY OFFICE, NO CHILD LEFT BEHIND ACT: IMPROVEMENTS NEEDED IN EDUCATION'S PROCESS FOR TRACKING STATES' IMPLEMENTATION OF KEY PROVISIONS 12-13 (2004) (indicating that California set its first year reading proficiency goal at 14 percent, while Colorado set its first year reading goal at 78 percent).

that were surveyed created a system in which schools would make AYP by making generally equal annual increases in student progress, but fourteen states staggered improvement over two or three year intervals rather than one year increments, and eighteen states used a combination method.⁹⁸ As a result of varying standards and methods of determining AYP, scholars have questioned the validity of AYP determinations under NCLB.⁹⁹

Other factors underlying AYP decisions have also raised concerns. One factor that has proven particularly detrimental to the statistical justifiability of AYP decisions stems from decisions about the minimum number of students necessary to constitute an assessable subgroup for AYP purposes. Researchers have suggested that many states have set the number of students sufficient to constitute an assessable subgroup as too low and consequently risk over-identification of the number of schools that fail to make AYP.¹⁰⁰ Moreover, it appears that many states lack the funds they need to ensure that they engage in sufficiently valid testing practices—the cost of test development and administration already exceeds NCLB funding in several states,¹⁰¹ and as mentioned above, if states expand the question types they use to increase the validity of their testing practices, the costs of such testing practices alone may reach \$5.3 billion between 2002 and 2008.¹⁰²

Due at least in part to the difficulties that states and schools have had implementing NCLB provisions and making AYP, NCLB has been the object of several political attacks. Governors have sent letters to ED criticizing the application of the new federal requirements to their states and asking for more flexibility.¹⁰³ As of April 2005, bills or resolutions

⁹⁸ See *id.* at 17-18.

⁹⁹ See, e.g., Robert L. Linn, *Conflicting Demands of No Child Left Behind and State Systems: Mixed Messages about School Performance*, 13(3) Educ. Pol'y Analysis Archives, June 28, 2005, at 1, <http://epaa.asu.edu/epaa/v13n33/v13n33.pdf> (indicating that failure to make AYP in a given year is unjustifiable because the identification depends to a substantial degree on the state in which the school is located and not exclusively on the effectiveness of the school). Factors other than methods for determining AYP, such as the reliability of student data and overly tight timelines for determining student progress, are also affecting states' abilities to implement well-functioning testing systems and call into question the justifiability of states' AYP decisions. See U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 97, at 24.

¹⁰⁰ See, e.g., Caroline M. Hoxby, *Inadequate Yearly Progress: Unlocking the Secrets of NCLB*, EDUC. NEXT, Summer 2005, at 46, 50 ("Currently, the crude manner in which the progress of [NCLB] subgroups is measured has stirred controversy, because the number of such students varies from one school to the next—and is often too small to permit a confident forecast."); Robert L. Linn, Eva L. Baker & Damian W. Betebenner, *Accountability Systems: Implications of Requirements of the No Child Left Behind Act of 2001*, EDUCATIONAL RESEARCHER, Aug/Sept. 2002, at 3, 11 (indicating that small subgroup size increases the volatility of school-building results and thus decreases system validity).

¹⁰¹ See CTR. ON EDUC. POLICY, *supra* note 74, at 66.

¹⁰² See U.S. GEN. ACCOUNTING OFFICE, *supra* note 73, at 3-4.

¹⁰³ See, e.g., Letter from N.J. Governor James E. McGreevey to U.S. Sec'y of Educ. Roderick R. Paige (Oct. 10, 2003), available at <http://www.state.nj.us/cgi->

to opt out of or limit federal funding under NCLB were introduced in at least 21 states.¹⁰⁴ In one of the most prominent responses thus far to NCLB, Utah passed a law giving its current state accountability requirements precedence over NCLB accountability requirements.¹⁰⁵ At the federal level, at least thirty bills calling for the changes in NCLB have been proposed in Congress.¹⁰⁶ In response to this political pressure, ED has loosened some key NCLB requirements¹⁰⁷ and regulations.¹⁰⁸ But despite such pressure, it appears that ED has displayed more willingness to enforce Title I provisions than it had in the past.¹⁰⁹ ED has withheld federal funds from states for failure to

bin/governor/njnewsline/view_article_archives.pl?id=1445; Letter from Mont. Governor Judy Martz & N.M. Governor Bill Richardson to U.S. Sec'y of Educ. Roderick R. Paige (Oct. 6, 2003), available at <http://www.meafmft.org/esea5a.htm>.

¹⁰⁴ As of April 2005, New Mexico, Virginia, and Utah had passed a resolution through both houses of their state legislature. Arizona, Arkansas, Connecticut, Florida, Hawaii, Idaho, Iowa, Maine, Maryland, Minnesota, Nebraska, New Jersey, Oregon, Vermont, and Washington had bills that were being debated in legislative committees. Colorado, Connecticut, Idaho, North Dakota, Minnesota, New Mexico, Utah, and Virginia had passed legislation through one or more legislative bodies. See National Education Association, *State Legislative Watch List: 21 States Seek Changes to 'No Child Left Behind'*, Apr. 2005, <http://www.nea.org/lawsuit/stateres.html>.

¹⁰⁵ See UTAH CODE ANN. § 53A-1-903 (2006).

¹⁰⁶ See National Education Association, *Urge Congress to Support Bills to Improve NCLB*, 2005, <http://www.nea.org/lac/esea/05nclb.html>.

¹⁰⁷ See, e.g., WILLIAM J. ERPENBACH, ELLEN FORTE-FAST & ABIGAIL POTTS, COUNCIL OF CHIEF STATE SCHOOL OFFICERS, STATEWIDE EDUCATIONAL ACCOUNTABILITY UNDER NCLB 18 (2003) (indicating that although NCLB prohibits states from operating their own accountability system in addition to the NCLB mandated accountability system, ED has consistently allowed states to continue operating dual accountability systems); Press Release from U.S. Department of Education, Secretary Paige Issues New Policy for Calculating Participation Rates Under No Child Left Behind (Mar. 29, 2004), <http://www.ed.gov/news/pressreleases/2004/03/03292004.html> (indicating that, although NCLB requires schools to test at least 95 percent of students overall and in each subgroup in order to make AYP, ED has allowed states to average the participation of students in a subgroup over a two or three year period to meet the 95 percent participation requirement).

¹⁰⁸ Under the original set of regulations released under NCLB, schools were required to apply the same grade-level content and achievement standards to all students, including those who take alternate assessments. See Title I—Improving the Academic Achievement of the Disadvantaged, Final Regulations, 67 Fed. Reg. 71,710 (Dec. 2, 2002). However, under modified regulations promulgated by ED about one year after the original regulations were released, states and districts can use alternate assessments aligned to non-grade level standards to test students with disabilities who cannot take grade level tests even with accommodations. See Title I—Improving the Academic Achievement of the Disadvantaged, 68 Fed. Reg. 68,698 (Dec. 9, 2003) (to be codified at 34 C.F.R. pt. 200). A few months after releasing these modified rules, ED further relaxed the original regulations by granting states more flexibility in handling LEP students. Under the more flexible implementation of NCLB, schools are no longer required to give LEP students their state's regular reading test if these students have been enrolled in a U.S. school for less than a year or to count students who have become proficient in English within the past two years as LEP students for the purpose of making AYP calculations. Mary Ann Zehr, *Paige Softens Rules on English-Language Learners*, EDUC. WK., Feb. 25, 2004, at 25, available at <http://www.edweek.org>.

¹⁰⁹ Since its inception, researchers have highlighted the lax enforcement of Title I and related legal requirements. See, e.g., WASHINGTON RESEARCH PROJECT OF THE SOUTHERN CENTER FOR STUDIES IN PUBLIC POLICY AND THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.,

comply with NCLB,¹¹⁰ and state officials have voiced a belief that NCLB is being strongly enforced.¹¹¹ It is precisely in the midst of ED's willingness to enforce certain NCLB provisions, political pressures, and implementation problems that lawsuits aimed at NCLB have been launched.

II. LAWSUITS AIMED AT NO CHILD LEFT BEHIND

In the short time since NCLB was enacted, it has come under legal attack from a variety of plaintiffs. Entities such as private individuals, non-profit organizations, teachers' unions, and school districts have brought suit to influence NCLB's implementation. In these cases, plaintiffs focused on an array of NCLB implementation problems and employed several different legal strategies. Thus far, these strategies have generally proven ineffective at enabling courts to remedy targeted implementation problems. Part II.A discusses the major types of problems plaintiffs have attempted to address through the courts, and Part II.B examines the major legal hurdles NCLB plaintiffs have faced. Part II.C analyzes how, even in the absence of these hurdles, courts still would not be well positioned to address effectively some of NCLB's major implementation problems due to the way in which NCLB was drafted.

A. *The Major Problems Targeted by NCLB Plaintiffs*

1. Testing Practices and AYP Determinations

The ways in which governmental entities implemented statutory requirements governing NCLB testing practices and AYP

TITLE I OF ESEA: IS IT HELPING POOR CHILDREN? 57 (1969) (indicating that Title I funds were used to equip superintendents' offices with paneling, install wall-to-wall carpeting in schools, and buy color televisions); Superfine, *supra* note 18 (focusing on the reluctance of ED to enforce certain provisions of Goals 2000, the IASA, and NCLB).

¹¹⁰ See, e.g., Eric Robelen, *Department Levies \$738,000 Title I Penalty on GA*, EDUC. WK., May 28, 2003, available at <http://www.edweek.org> (indicating that ED withheld nearly \$800,000 from Georgia for noncompliance with the NCLB requirement to align state tests with content standards); David J. Hoff, *Education Department Fines Texas for NCLB Violation*, EDUC. WK., May 4, 2005, at 27, available at <http://www.edweek.org> (indicating that ED withheld \$444,000 from Texas for failure to meet the NCLB deadline of informing parents of their rights to transfer out of schools that have failed to make AYP).

¹¹¹ See CTR. ON EDUC. POLICY, FROM THE CAPITAL TO THE CLASSROOM: YEAR 3 OF THE NO CHILD LEFT BEHIND ACT 55 (2005) (twenty-five out of fifty states surveyed believed that ED is very strictly enforcing the AYP provisions of NCLB, and an additional sixteen states believe that the AYP provisions are being strictly enforced).

determinations constituted a major problem targeted by NCLB plaintiffs. In two related cases entitled *Center for Law and Education v. United States Department of Education (CLE I and CLE II)*, non-profit organizations and parents sued ED to change regulations that ED had proposed and adopted regarding NCLB testing practices.¹¹² The plaintiffs particularly claimed that these regulations did not ensure that students would be assessed accurately by NCLB assessments.¹¹³ One regulation allowed states to use nationally-normed assessments rather than criterion-referenced assessments,¹¹⁴ and another regulation did not make clear that states must use multiple measures to assess student performance.¹¹⁵ Indeed, these regulations do not appear to be written in accordance with the recommendations included in standards published by the psychometric community¹¹⁶ and thus actually appear to put students at an increased risk of being inaccurately assessed.¹¹⁷ Although the plaintiffs did not explicitly claim that the risk of inaccurate assessment also jeopardizes the justifiability of AYP decisions, the plaintiffs' claims surely raise AYP issues as well. Without accurate determinations of student performance, it would be difficult to argue that AYP determinations made on the basis of such performance are justifiable.

¹¹² *Ctr. for Law and Educ. v. U.S. Dep't of Educ. (CLE I)*, 209 F. Supp. 2d 102 (D.D.C. 2002); *Ctr. for Law and Educ. v. U.S. Dep't of Educ. (CLE II)*, 315 F. Supp. 2d 15 (D.D.C. 2004).

¹¹³ *See* Complaint at 5, *Ctr. for Law and Educ. v. U.S. Dep't of Educ.*, 209 F. Supp. 2d 102 (D.D.C. 2002) (No. 1:02-cv-02414-JDB) ("Such a test [allowed by the regulations] does *not* show whether a student has mastered a particular subject . . .") (emphasis in original).

¹¹⁴ *See* 34 C.F.R. § 200.3(a)(2) (2006) (permitting a State to include in its assessment system "either or both—(i) Criterion-referenced assessments; and (ii) Assessments that yield national norms."). Generally, norm-referenced tests measure a student's performance against other students' performance, while criterion-referenced tests measure a student's performance against mastery of identifiable skills or knowledge.

¹¹⁵ *See* 34 C.F.R. § 200.2(b)(7) (2006) (mandating that state assessments "[i]nclude multiple up-to-date measures of student academic achievement, including measures that assess higher-order thinking skills and understanding of challenging content."). While the plaintiffs wanted to make clear that the phrase "multiple measures" refers to multiple ways of assessing the same proficiencies, ED did not make the clarification on the grounds that multiple measures could "mean either measures that differed in format or in the type of knowledge they tested." *CLE II*, 315 F. Supp. 2d at 21.

¹¹⁶ *See, e.g.*, AM. EDUC. RESEARCH ASS'N, AM. PSYCHOLOGICAL ASS'N & NAT'L COUNCIL ON MEASUREMENT IN EDUC., STANDARDS FOR EDUCATIONAL AND PSYCHOLOGICAL TESTING 14 (1999) ("Relationships among different methods of measuring the construct can be especially helpful in sharpening and elaborating score meaning and interpretation.") [hereinafter AERA]. *See also id.* at 43 (differentiating criterion-referenced tests from norm-referenced tests and stating that "[t]ests designed to facilitate one type of interpretation function less effectively for other types of interpretations."). As NCLB mandates the measurement of student performance against set specifications of identifiable skills or knowledge for AYP purposes, criterion-referenced tests would more effectively support valid interpretations of student performance under the psychometric standards.

¹¹⁷ Of course, the statement that the federal regulations put students at a risk of being inaccurately assessed assumes that some states choose to comply only with the minimum requirements of the regulations.

In *Reading School District v. Pennsylvania Department of Education (Reading I)*,¹¹⁸ a plaintiff also attacked the actual assessments administered to students but explicitly focused on the relationship between accurate determinations of student performance on such assessments and the justifiability of AYP decisions. In this case, the Reading school district (Reading) sued the Pennsylvania Department of Education (PDE) to rescind PDE's decision to identify thirteen of Reading's schools for failure to make AYP.¹¹⁹ While Reading made three distinct arguments to convince the court to rescind the AYP identifications, only one of these arguments particularly targeted the actual assessments administered to students.¹²⁰ Under this argument, Reading claimed that, despite its high proportion of students with limited English proficiency (LEP),¹²¹ PDE did not provide any native language tests to Reading for the assessment of these students.¹²² Consequently, Reading claimed that its students were inaccurately assessed and that AYP decisions made on the basis of student performance on NCLB tests were unjustifiable.¹²³ Indeed, the decision in this case not to administer native language tests to LEP students also does not appear to comport with the recommendations included in psychometric standards.¹²⁴ Thus, the decision not to administer native language tests appears to have put Reading's LEP students at a risk of being inaccurately assessed as well.

Another one of Reading's claims also targeted the justifiability of AYP decisions but instead focused the statistical methodology underlying AYP determinations. As discussed in Part I.B, NCLB requires states not only to assess entire schools but also different types

¹¹⁸ *Reading Sch. Dist. v. Pennsylvania Dep't of Educ. (Reading I)*, 855 A.2d 166 (Pa. Commw. Ct. 2004).

¹¹⁹ *Id.* In order to make AYP, schools in Pennsylvania must have had 35 percent of all their students proficient in mathematics and 45 percent of all their students proficient in reading during the 2002-2004 school years in both the aggregate and disaggregated categories. For more information on Pennsylvania's system of AYP, see U.S. DEP'T OF EDUC., PENNSYLVANIA CONSOLIDATED STATE APPLICATION ACCOUNTABILITY WORKBOOK (rev. 2005), available at http://www.pde.state.pa.us/nclb/lib/nclb/Accountability_Workbook_revised_2005.pdf.

¹²⁰ The other two problems targeted in *Reading I* are discussed *infra* notes 125-133, 160-164, and accompanying text.

¹²¹ During the 2003-04 school year, 14.9% of Reading students were LEP students. See Transcript of Appeal of Reading School District, Reading Sch. Dist. Ex. 2 (Oct. 15, 2003) (administrative appeal which led to *Reading I*) [hereinafter Reading Transcript].

¹²² See *Reading I*, 855 A.2d at 172.

¹²³ See *id.*

¹²⁴ See AERA, *supra* note 116, at 91 ("For all test takers, any test that employs language is, in part, a measure of their language skills. This is of particular concern for test takers whose first language is not the language of the test. . . . In such instances, test results may not reflect accurately the qualities and competencies intended to be measured."); see also Brief for Education Law Center - PA et al. as Amici Curiae at 18, *Reading Sch. Dist. v. Pennsylvania Dep't of Educ.*, 855 A.2d 166 (Pa. Commw. Ct. 2004) (No. 2695 CD 2003) ("Testing a child in a language that he or she cannot understand raises serious 'validity' questions . . .").

of subgroups, such as LEP students within schools, to determine if schools make AYP.¹²⁵ Under NCLB, subgroups must be of a certain minimum size in order to trigger AYP requirements. Reading claimed that PDE had failed to use sound statistical methodology to determine the minimum number of students, which Reading referred to as the “N” number,¹²⁶ that could constitute an assessable subgroup for NCLB purposes.¹²⁷ Evidence in the case indicated that the “N” number was set after a series of computer runs and bargaining with ED.¹²⁸ According to an employee of PDE, PDE had originally proposed seventy-five as the “N” number because of its statistical significance; as the employee indicated, a higher “N” number would yield more valid and reliable results.¹²⁹ ED, however, did not accept seventy-five as the “N” number. Instead, ED entered into negotiations with PDE, and these negotiations resulted in the choice of forty as the “N” number.¹³⁰ As argued in the plaintiff’s complaint¹³¹ and indicated in published studies,¹³² using a lower “N” number may create a substantial risk of identifying groups as failing to make AYP on the basis of chance rather than on real performance.¹³³ The validity of determinations made on the basis of chance would certainly be questionable as well.

Finally, a state’s AYP appeal policy has constituted an object of concern for NCLB plaintiffs. In another case brought by Reading against PDE (*Reading III*), Reading argued that PDE allowed an illegally small range of appeals of AYP determinations.¹³⁴ PDE’s

¹²⁵ See *supra* note 53 and accompanying text.

¹²⁶ Many statisticians would consider the term “N number” to be redundant. To statisticians, “N” generally refers to a number. However, because the court in *Reading I*, 855 A.2d at 172, used the term “‘N’ number,” this Article uses the term as well.

¹²⁷ *Id.*

¹²⁸ See Reading Transcript, *supra* note 121, at 128 (testimony of Dr. Leonard Lock of the Pennsylvania Department of Education, indicating that he was involved in making several computer runs and analyses to determine the “number that would be most valid and yield the results that would help correctly identify the schools that are in need of further supports,” and indicating that he had looked at a number of statistical studies to help determine the N number).

¹²⁹ See *id.* at 103-06 (testimony of John Weiss of the Pennsylvania Department of Education).

¹³⁰ See *id.*

¹³¹ See *Reading I*, 855 A.2d, Brief for Plaintiff at 32 (stating, “numerous studies have demonstrated that even at a group size of 100 or 200, there is substantial risk of identifying groups that are not making adequate yearly progress on the basis of chance rather than real under performance”).

¹³² See *supra* note 99 and accompanying text.

¹³³ In a separate case, Reading essentially repeated the claims regarding native language tests and the “N” number while adding more detail to another claim detailing the financial and technical assistance received by Reading. See *Reading Sch. Dist. v. Dep’t of Educ.*, No. 572 M.D. 2004 (Pa. Commw. Ct., Feb. 8, 2005) [hereinafter *Reading II*]. This case is not discussed in detail because the implementation problems highlighted by this case are essentially the same as the problems discussed in regard to *Reading I* in *supra* notes 125-133 and *infra* notes 160-164, and accompanying text.

¹³⁴ See *Reading Sch. Dist. v. Dep’t of Educ. (Reading III)*, 875 A.2d 1218 (Pa. Commw. Ct. 2005).

appeal policy prohibited all appeals of AYP determinations unless these determinations related to statistical error, growth in academic performance, or unforeseen circumstances beyond a district's control that prevented the district from making AYP.¹³⁵ According to Reading, such a policy violated Reading's due process rights.¹³⁶ So, in addition to focusing on the characteristics of NCLB testing practices themselves, plaintiffs also focused on their legal rights that relate to such practices. As indicated by the claims of the *Reading* and *CLE* plaintiffs, the justifiability of determinations made in regard to student performance and AYP determinations thus far has constituted a major implementation problem for reformers who have attempted to influence NCLB's implementation through legal means.

2. Consequences for Failure to Make AYP

The failure of schools and districts to effectively implement NCLB consequences for failure to make AYP constituted another major problem targeted by NCLB plaintiffs. In *Association of Community Organizations for Reform Now v. New York City Department of Education (ACORN)*, a community organization and parents brought suit to enforce the school choice and supplemental services provisions of NCLB.¹³⁷ In this case, both the New York City and Albany school districts were labeled for school improvement but had allegedly failed to provide students with the required school choice and supplemental services options.¹³⁸ The plaintiffs particularly alleged that the school districts had failed to provide the requisite information to parents regarding their rights to transfer and obtain supplemental services.¹³⁹ According to a poll cited by the plaintiffs' complaint, seventy-five percent of parents with children in schools labeled for improvement in New York City were unaware of their school's status.¹⁴⁰ And while parents of children in schools labeled for improvement may have received some communications (such as letters and press releases) regarding their school's status, these communications failed to explain

¹³⁵ See *id.* at 1219-20.

¹³⁶ See *id.* at 1220 ("The question we are asked to determine is whether the Department's limits on the grounds upon which it will allow school districts to appeal its determinations of failure to reach AYP violates the due process guarantees of the Fourteenth Amendment of the U.S. Constitution and . . . the Pennsylvania Constitution.").

¹³⁷ *Ass'n of Cmty. Orgs. for Reform Now v. New York City Dep't of Educ. (ACORN)*, 269 F. Supp. 2d 338 (S.D.N.Y. 2003).

¹³⁸ See *id.* at 342.

¹³⁹ See *id.*

¹⁴⁰ See Press Release from Foundation for Education Reform & Accountability, Survey of NYC Parents: Strong Support for Increased Parental Options as Klein Gets Ready to Overhaul School System 2 (Dec. 19, 2002).

what the school improvement label means, provide a full description of the available choice options, and provide a full description of the available supplemental services options.¹⁴¹ Most importantly, the plaintiffs alleged that the school districts had illegally rejected thousands of transfer and supplemental services requests.¹⁴²

The implementation of NCLB public school choice provisions constituted a target for another NCLB plaintiff as well. In *Bradley v. Pinellas County School Board*, a county containing schools that were about to be identified for school improvement asked a federal court for guidance about whether it should implement a controlled school choice plan ordered in a desegregation case or the public school choice requirements of NCLB; because the controlled school choice plan and NCLB choice requirements contained different mandates, both types of choice could not be implemented simultaneously.¹⁴³ So, in this case, a plaintiff highlighted a problematic conflict between NCLB statutory requirements and judicial orders issued under the U.S. Equal Protection Clause.¹⁴⁴

Another plaintiff also targeted the implementation of NCLB supplemental services provisions. In *Fresh Start Academy v. Toledo Board of Education (Fresh Start)*, a supplemental services provider did not obtain a contract from a district to provide supplemental services.¹⁴⁵ The supplemental services provider claimed that the district blocked the provider's access to NCLB funds by engaging in preferential treatment of other providers.¹⁴⁶ Thus, the provider asked for an accounting of funds received by the local board of education and an order allowing the provider to bid and obtain a contract from the district.¹⁴⁷

Another plaintiff challenged the implementation of NCLB consequences on a much more general level. In *Kegerreis v. United*

¹⁴¹ Complaint, *Ass'n of Cmty. Orgs. for Reform Now v. New York City Dep't of Educ.*, 269 F. Supp. 2d 338 (S.D.N.Y. 2003) (No. 03 Civ. 1080) [hereinafter ACORN Complaint].

¹⁴² A letter sent to parents in New York City by the New York City Department of Education indicated that not all transfer requests would be accommodated due to factors such as class size reduction mandates. *Id.* at 11. Similarly, when Albany parents attempted to exercise their transfer option or obtain supplemental services, the Albany Department of Education indicated that a list of receiving schools and supplemental services providers did not exist. *Id.* at 19.

¹⁴³ See Elizabeth H. DeBray, *NCLB Accountability Collides With Court-Ordered Desegregation: The Case of Pinellas County, Florida*, PEABODY J. OF EDUC., Iss. 2, at 170 (2005). A conflict between a desegregation order and NCLB public school choice provisions arose in at least one other case in Richmond County, Georgia. See Elizabeth DeBray, "The Equitable Powers of the Judge": *The Conflict Between No Child Left Behind and Court-Ordered Desegregation in Richmond County, Georgia*, 37 EQUITY AND EXCELLENCE IN EDUC. 264 (2004).

¹⁴⁴ *Bradley v. Pinellas County Sch. Bd.*, No. 8:64-CV-98-T-23TGW (2004) (order denying motion for relief from court order) (The case was originally decided at 431 F.2d 1377 (5th Cir. 1970)).

¹⁴⁵ *Fresh Start Acad. v. Toledo Bd. of Educ.*, 363 F. Supp. 2d 910 (N.D. Ohio 2005).

¹⁴⁶ See *id.* at 912.

¹⁴⁷ See *id.* at 912-13.

States of America (Kegerreis), a special education teacher filed a *pro se* claim that NCLB is unfair and unconstitutional because it holds school personnel accountable if a school's students fail to perform adequately.¹⁴⁸ The teacher particularly argued that the AYP standards detailed in NCLB cannot be met and that NCLB consequences would injure him and other teachers.¹⁴⁹

Finally, in *Board of Education of Ottawa Township v. U.S. Department of Education (Ottawa)*, local school boards, special education students, and the students' parents sued ED to halt the implementation of NCLB consequences in regard to special education students.¹⁵⁰ The plaintiffs argued that any remediation activities that districts must provide to special education students as a consequence of failing to make AYP would violate the Individuals with Disabilities Education Act (IDEA).¹⁵¹ The IDEA requires districts to develop an "individualized education program" (IEP) for each student identified with a disability.¹⁵² Accordingly, the plaintiffs claimed that the institution of any blanket remediation measures flowing from failure to make AYP would preclude the implementation of unique plans tailored to individual students with disabilities.¹⁵³

3. Highly Qualified Teachers

In addition to implementation problems related to NCLB testing practices and the administrative consequences attached to such practices, plaintiffs have targeted problems related to the implementation of NCLB's HQT mandate. In *Californians for Justice Education Fund v. California State Board of Education (CJE)*,¹⁵⁴ community organizations brought a lawsuit against the California State Board of Education in response to the definition of an HQT that the Board adopted pursuant to NCLB.¹⁵⁵ The definition of an HQT adopted by California included teachers certified on an emergency or provisional

¹⁴⁸ *Kegerreis v. United States*, No. 03-2232-KHV, 2003 U.S. Dist. LEXIS 18012 (D. Kan. Oct. 9, 2003).

¹⁴⁹ *See id.* at *7.

¹⁵⁰ *Bd. of Educ. of Ottawa Twp. High Sch. Dist. 140 v. U.S. Dep't of Educ. (Ottawa)*, No. 1:05-CV-00655 (N.D. Ill. 2005).

¹⁵¹ *See* Complaint at 4-5, *Bd. of Educ. of Ottawa Twp. High Sch. Dist. 140 v. U.S. Dep't of Educ.*, No. 1:05-CV-00655 (N.D. Ill. filed Feb. 3, 2005).

¹⁵² *See* 20 U.S.C.S. § 1414(d) (LEXIS through 2006 legislation).

¹⁵³ *See* Complaint at 10, *Ottawa*, No. 1:05-CV-00655.

¹⁵⁴ *See Californians for Justice Educ. Fund v. California State Bd. of Educ. (CJE)*, No. A102851, 2003 Cal. App. Unpub. LEXIS 11713 (Ct. App. Cal. Dec. 17, 2003).

¹⁵⁵ For a discussion of what NCLB requires in regard to highly qualified teachers, see *supra* note 64 and accompanying text.

basis and therefore clearly did not comply with NCLB requirements.¹⁵⁶ In response to the adoption of this definition, the California Board of Education was highly criticized by both politicians¹⁵⁷ and scholars.¹⁵⁸ However, before the suit was brought, the defendants had already begun the process of adopting a new definition of an HQT that complied with NCLB.¹⁵⁹

4. Financial and Technical Assistance to Implement NCLB

The assistance provided to states, districts, and schools to implement NCLB has perhaps constituted the most high-profile focus of plaintiffs' claims. In addition to Reading's other two claims regarding native language tests and the "N" number in *Reading I*,¹⁶⁰ Reading also claimed that PDE did not provide sufficient assistance to ensure that schools in Reading could comply with NCLB.¹⁶¹ Reading particularly claimed that PDE did not provide Reading with sufficient funds to pay for school improvement measures that flow from failure to make AYP¹⁶² and that PDE had not provided the technical assistance required

¹⁵⁶ Despite the definition's clear noncompliance with NCLB, the California Board of Education included this definition in California's first application to ED for the receipt of NCLB funds. See *CJE*, 2003 Cal. App. Unpub. LEXIS, at *5.

¹⁵⁷ See, e.g., Letter from Representative George Miller to Reed Hastings (Aug. 5, 2002), <http://edworkforce.house.gov/democrats/rel8502.html> ("I am writing to express my extreme disappointment with the California State Board of Education's recent action to deliberately misrepresent the alarmingly high number of under-qualified teachers in the State of California.").

¹⁵⁸ See Linda Darling-Hammond, *Lesson One: Training Counts*, L.A. TIMES, Sept. 1, 2002, available at <http://ed.stanford.edu/suse/news-bureau/displayRecord.php?tablename=notify1&id=35> ("But rather than formulate a plan to get qualified teachers into all the state's classrooms, the State Board of Education instead tried to define away the problem . . .").

¹⁵⁹ See *CJE*, 2003 Cal. App. Unpub. LEXIS, at *10.

¹⁶⁰ See *supra* notes 118-133 and accompanying text.

¹⁶¹ As mentioned *supra* note 133, Reading essentially repeated the claims regarding native language tests and the "N" number while adding more detail to another claim detailing the financial and technical assistance received by Reading in another case. See *Reading II*, No. 572 M.D. 2004. In this case, Reading particularly indicated that it needed \$26 million to implement NCLB sanctions during the 2003-2004 school year, but that it received only slightly more than \$8 million for this purpose. This case is not discussed in detail because the implementation problems highlighted by this case are essentially the same as the problems discussed *supra* notes 118-133 and *infra* notes 162-162 and accompanying text. As for *Reading II*, it originally appeared at http://www.courts.state.pa.us/OpPosting/CWealth/unpublished/572MD04_2-8-05.pdf, and was described at http://www.nsba.org/site/doc_cosa.asp?TRACKID=&VID=50&CID=1047&DID=35417.

¹⁶² See *Reading Sch. Dist. v. Pennsylvania Dep't of Educ. (Reading I)*, 855 A.2d 166, 171 (Pa. Commw. Ct. 2004). In the year before *Reading I* was brought, Reading had received over \$6 million in Title I funds and had begun to implement some of the school improvement requirements. By the beginning of the trial, Reading had already begun to offer school choice, extended the school day, and extended the school year.

by NCLB.¹⁶³ At the time of the trial, PDE had only provided Reading with five one-day workshops and had posted information on its website to help schools in school improvement.¹⁶⁴

In *School District of the City of Pontiac v. Spellings (Pontiac)*, the National Education Association (NEA),¹⁶⁵ an array of state education associations, and school districts focused on the financial capacities provided by ED to states to implement NCLB.¹⁶⁶ The NEA primarily argued that, under the statutory language of the Unfunded Mandates Provision of NCLB, ED had not provided sufficient funds to states to enable districts and schools to make AYP and institute applicable administrative sanctions.¹⁶⁷ To support this claim, the NEA provided in its complaint a detailed overview of alleged gaps between NCLB authorization levels and appropriation levels.¹⁶⁸ Moreover, the NEA cited a variety of studies that detailed the costs states must bear to comply with NCLB mandates regarding curriculum and testing,¹⁶⁹ and with NCLB mandates regarding the institution of accountability measures.¹⁷⁰ From this information, the NEA concluded that states and school districts have been and will be required to spend substantial amounts of non-NCLB funds in order to comply with NCLB mandates, and that a large number of schools will unjustifiably fail to make AYP.¹⁷¹

While all the allegations made by NCLB plaintiffs are certainly serious, the ones made by the *Reading* and *Pontiac* plaintiffs are perhaps the most serious. The lack of financial and technical capacities to implement effectively NCLB provisions arguably underlies many, if not most, of the implementation problems NCLB has experienced. If courts were to address such problems, the effects of judicial decisions could impact almost all of the implementation problems discussed in Part I.C. It is perhaps for this reason that the critics of NCLB have thus far focused on the lack of capacities that states possess to implement NCLB and that some plaintiffs have highlighted implementation issues related to such capacities.

¹⁶³ See *Reading I*, 855 A.2d at 170.

¹⁶⁴ Reading Transcript, *supra* note 121, at 94 (testimony of Sally Chamberlain, Pennsylvania Department of Education).

¹⁶⁵ The National Education Association is the country's largest teachers' union with over 2.8 million members nationwide. See National Education Association, <http://www.nea.org>.

¹⁶⁶ Sch. Dist. of the City of Pontiac v. Spellings (*Pontiac*), No. 05-CV-71535, 2005 U.S. Dist. LEXIS 29253 (E.D. Mich. Nov. 23, 2005).

¹⁶⁷ See *id.* at *3-5. For a discussion of the Unfunded Mandates Provision, see *supra* note 69 and accompanying text.

¹⁶⁸ See Complaint at 17-22, Sch. Dist. of the City of Pontiac v. Spellings, No. 05-CV-71535, 2005 U.S. Dist. LEXIS 29253 (E.D. Mich. Nov. 23, 2005) [hereinafter *Pontiac Complaint*].

¹⁶⁹ See *id.* at 23-29.

¹⁷⁰ See *id.* at 43-48. For more on costs related to NCLB, see *supra* notes 71-79 and accompanying text.

¹⁷¹ *Pontiac Complaint*, *supra* note 168, at 56.

B. *Major Hurdles Faced by NCLB Plaintiffs*

In the course of targeting the NCLB implementation problems discussed in Part II.A, plaintiffs have employed several different legal strategies. These legal strategies have generally proven ineffective. This section discusses the major arguments that plaintiffs have employed and hurdles that plaintiffs have faced. Accordingly, this section details how and why the courts thus far have not constituted an effective venue to address NCLB implementation problems.

1. Section 1983

In almost all of the cases brought to affect NCLB's implementation, plaintiffs claimed that NCLB was not being implemented in accordance with its statutory requirements. Thus, many of these plaintiffs attempted to use the courts to enforce NCLB's statutory language against a governmental entity. Private plaintiffs, however, cannot bring a successful claim against a governmental entity by simply proving that an entity has failed to comply with the requirements of a federal statute. Private plaintiffs also need to establish a cause of action that allows them to bring such a claim. Generally, private plaintiffs can find a cause of action to enforce the provisions of a federal statute from three primary sources: an express private cause of action,¹⁷² an implied private cause of action,¹⁷³ and a "Section 1983" action.¹⁷⁴ Because NCLB does not appear to include an express private cause of action, and the requirements regarding an implied private cause of action have largely collapsed with those regarding Section 1983 actions, bringing a Section 1983 action appears

¹⁷² Where a statute contains an express private cause of action, it explicitly provides that private citizens or entities can sue the government to enforce other provisions of the statute.

¹⁷³ Where a statute contains an implied private cause of action, its language and structure implies that private citizens or entities can sue the government to enforce other provisions of the statute. See *Cort v. Ash*, 422 U.S. 66, 78-79 (1975) (specifying a four part test to determine whether an implied private cause of action is available).

¹⁷⁴ As it was originally enacted, Section 1983 constituted the first section of the Ku Klux Klan Act of 1871. 5 EDUCATION LAW § 12.03[2](a) (Mathew Bender & Co. 2004). This law was passed by Congress in the aftermath of the Civil War and permits United States citizens to bring lawsuits against governmental action that deprives them of their "rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983 (2000). For over a century after its passage, the Supreme Court only allowed plaintiffs to sue under Section 1983 for violations of constitutional rights. See Bradford C. Mank, *Suing Under § 1983: The Future After Gonzaga University v. Doe*, 39 HOUS. L. REV. 1417, 1428 (2003). However, in 1980 the Supreme Court began to allow plaintiffs to sue under Section 1983 for the enforcement of a federal statute. See *Maine v. Thiboutot*, 448 U.S. 1 (1980).

at first glance to be a logical move for plaintiffs wishing to enforce NCLB requirements.¹⁷⁵

Although the Supreme Court has historically articulated the requirements governing Section 1983 actions in a seemingly haphazard fashion, recent Supreme Court jurisprudence has yielded a somewhat clear test focusing on congressional intent to determine whether plaintiffs can use Section 1983 to enforce the provisions of a federal law. In *Blessing v. Freestone* (*Blessing*), the Supreme Court stated that plaintiffs have a right to sue under Section 1983 to enforce the provisions of a federal statute where (1) plaintiffs are the intended beneficiaries of the legislation, (2) the right must not be “so ‘vague and amorphous’ that its enforcement would strain judicial competence,” and (3) the statutory language clearly binds the states with an obligation to comply.¹⁷⁶ In *Gonzaga University v. Doe* (*Gonzaga*), the Supreme Court cemented the *Blessing* approach by focusing on whether a federal statute includes “‘rights-creating’ language” instead of an emphasis on “‘institutional policy and practice.’”¹⁷⁷ This test has made it very difficult for private plaintiffs to use Section 1983 to enforce the provisions of a federal statute and has faced much criticism.¹⁷⁸

ACORN well demonstrates the problems that recent Section 1983 jurisprudence has created for reformers who wish to use the courts to address NCLB implementation problems. The plaintiffs in *ACORN* brought suit under Section 1983 against the New York City and Albany school districts to enforce NCLB provisions regarding school choice and supplemental services—the plaintiffs claimed that the districts’ failure to notify parents and provide transfer and supplemental services options violated the express requirements of NCLB.¹⁷⁹ Applying the Supreme Court jurisprudence governing Section 1983 for the first time since the Supreme Court decided *Gonzaga*, the *ACORN* court found that NCLB does not manifest the requisite congressional intent to allow a Section 1983 action.¹⁸⁰

¹⁷⁵ See Melanie Natasha Henry, Comment, *No Child Left Behind? Educational Malpractice Litigation for the 21st Century*, 92 CAL. L. REV. 1117, 1155-56 (“Yet, this merger [between Section 1983 and an implied cause of action] comes at a high price . . . collapsing the two forms of litigation in this manner weakens both, as it fails to acknowledge them, particularly § 1983 as independent and separate avenues to enforce non-express statutory private rights of action.”).

¹⁷⁶ *Blessing v. Freestone*, 520 U.S. 329, 340-41 (1997).

¹⁷⁷ *Gonzaga Univ. v. Doe*, 536 U.S. 273, 287-88 (2002).

¹⁷⁸ See, e.g., *Gonzaga Univ.*, 536 U.S. at 302 (Stevens, J. dissenting) (stating that “the Court has eroded—if not eviscerated—the long-established principle of presumptive enforceability of rights under § 1983.”). Legal scholars have also criticized the lead opinion in *Gonzaga*. See, e.g., Henry, *supra* note 175, at 1154 (stating that the new requirements for Section 1983 constitute a “nearly insurmountable bar for plaintiffs in § 1983 educational litigation to overcome”); Marsha S. Berzon, *Rights and Remedies*, 64 LA. L. REV. 519, 540 (criticizing *Gonzaga* for “weaken[ing] the analytic distinction between rights and remedies” inherent in federal statutes).

¹⁷⁹ See *supra* note 141-142 and accompanying text.

¹⁸⁰ See *Ass’n of Cmty. Orgs. for Reform Now v. New York City Dep’t of Educ. (ACORN)*,

First, the *ACORN* court examined the sections of NCLB providing for the creation of state plans, the development and implementation of systems of standards and assessments, and the requirements for schools to make AYP, and concluded that these provisions do not contain the requisite rights-creating language.¹⁸¹ The court next examined the parental notification, choice, and supplemental services provisions in considerable detail—the court quoted six provisions governing school transfer, five provisions governing supplemental services, and one provision governing parental notification¹⁸²—and the court concluded that NCLB’s provisions have only an aggregate focus and are not concerned with the needs of individuals.¹⁸³ After examining the provisions pertaining directly to the *ACORN* case, the court analyzed the “Penalties” section of NCLB and focused heavily on the enforcement mechanisms—the court here concluded that NCLB vests sole authority to enforce violations of NCLB in the Secretary of Education and does not contemplate enforcement by private plaintiffs.¹⁸⁴ Accordingly, the court dismissed *ACORN* and declined to enforce the school choice and supplemental services provisions of NCLB.¹⁸⁵ The *ACORN* court was not alone in its application of Section 1983 jurisprudence to NCLB. In *Fresh Start*, another district court engaged in a similar analysis in regard to a private plaintiff’s right to sue under Section 1983 to enforce NCLB provisions.¹⁸⁶ In this case, the court refused to find that a private plaintiff could sustain a Section 1983 action for similar reasons.¹⁸⁷

As *ACORN* and *Fresh Start* illustrate, the inability of plaintiffs to bring a Section 1983 action to enforce NCLB is quite important. In the absence of an express private cause of action, Section 1983 constitutes one of the primary tools that plaintiffs can employ to enforce the provisions of a federal statute in the courts. But even in cases such as *ACORN* where it clearly appears that a governmental entity has failed to

269 F. Supp. 2d 338, 347 (“[T]he NCLBA does not reflect the clear and unambiguous intent of Congress to create individually enforceable rights.”).

¹⁸¹ See *id.* at 344.

¹⁸² See *id.* at 344-46.

¹⁸³ See *id.* at 347 (stating that NCLB “is focused on the regulation of states and local educational agencies, and focuses on improving the condition of children collectively, and therefore lacks the individual focus suggestive of Congressional intent to create personal rights.”).

¹⁸⁴ See *id.* (“[T]he enforcement scheme of the statute indicates a Congressional intent to centralize enforcement and thereby to avoid the possibility of individual lawsuits and multiple interpretations of provisions of the Act.”).

¹⁸⁵ See *id.*

¹⁸⁶ See *Fresh Start Acad. v. Toledo Bd. of Educ.*, 363 F. Supp. 2d 910, 914-17 (N.D. Ohio 2005).

¹⁸⁷ See *id.* at 915-16 (citing *ACORN* and stating, “[f]or the same reasons, this Court holds that providers of SES, like *Fresh Start*, may not bring an action under § 1983 or under an implied private right of action to enforce any provisions of the NCLBA, as the Act does not evince an unambiguous congressional intent to create rights enforceable by such individuals.”).

comply with NCLB requirements, using Section 1983 does not constitute a viable option for plaintiffs who wish to address such problems. If the courts are to constitute an effective venue for addressing NCLB implementation problems, it appears that plaintiffs must employ another legal strategy.

2. Appealing Administrative Decisions

Although the unavailability of Section 1983 actions has made it more difficult for plaintiffs to influence NCLB's implementation, plaintiffs still have other strategies available to them. In particular, plaintiffs can appeal the determinations of administrative agencies that have ruled in regard to NCLB. As both federal and state education departments implement and make decisions regarding NCLB, plaintiffs have already questioned decisions made by both types of education departments. However, even where plaintiffs have employed this strategy, the courts have still failed to constitute an effective venue to address NCLB's implementation problems.

In order to appeal successfully the decision of an administrative agency, plaintiffs must fulfill certain procedural requirements. Generally, plaintiffs must exhaust all administrative remedies available to them before going to a court to appeal the decision of an administrative agency.¹⁸⁸ Before *Pontiac* was decided, legal commentators highlighted this requirement as perhaps the most difficult for the *Pontiac* plaintiffs to meet.¹⁸⁹ In this case, the plaintiffs filed suit in federal court to enforce the Unfunded Mandates Provision without ever bringing their claim before ED.¹⁹⁰ Thus, no administrative agency had made a ruling in *Pontiac*. Moreover, the *Pontiac* plaintiffs cited no other legal grounds to indicate why they should be allowed to enforce a provision of a federal statute.¹⁹¹ Ultimately, the court dismissed *Pontiac*

¹⁸⁸ To be sure, courts sometimes allow claims to proceed even if all administrative remedies have not been exhausted. See *Leedom v. Kyne*, 358 U.S. 180 (1958) (holding that parties can challenge agency actions without exhausting all administrative remedies where an agency has committed a facially clear breach of its statutory authority).

¹⁸⁹ See Memorandum from Senator Angela Monson & Speaker Martin Stephens to State Legislative Presiding Officers, Chairs of Education Committees & Legislative Education Staff (July 7, 2003), available at <http://www.nsba.org/site/docs/31500/31484.pdf>; John R. Munich & Rocco E. Testani, *NEA Sues Over NCLB*, EDUC. NEXT, Fall 2005, at 10 (“[T]he plaintiffs in this lawsuit would have to show a real dispute between the school district and the DOE. To prevent federal courts from premature intervention, plaintiffs are normally required to show that all administrative remedies have been pursued before a lawsuit was filed. In this case, there is no allegation that the DOE has refused a district request for a waiver of NCLB requirements. Without such a showing, the court may well refuse even to consider the case.”).

¹⁹⁰ See *Pontiac* Complaint, *supra* note 168.

¹⁹¹ See *id.*

on grounds other than the plaintiffs' inability to enforce a federal statutory provision without bringing a Section 1983 action or appealing an administrative decision.¹⁹² But given the reaction of legal commentators to the arguments of the *Pontiac* plaintiffs, it appears that the *Pontiac* court may have decided wrongly. Thus, similarly situated plaintiffs may face problems in the future if they attempt to enforce NCLB provisions without exhausting all administrative remedies or arguing that they possess any other cause of action.

Even where plaintiffs have exhausted all their administrative remedies, it still has proven difficult for such plaintiffs to overturn an agency decision in court. As mentioned in Part II.A, the Reading school district sued PDE in *Reading I* to overturn PDE's decision to identify thirteen of Reading's schools for failure to make AYP.¹⁹³ Unlike the plaintiffs in *Pontiac*, Reading first brought its claims before an administrative agency—Reading first appealed PDE's decision to PDE and did not bring its claim before the proper state-level court until it exhausted all administrative appeals within PDE.¹⁹⁴ However, even after exhausting all administrative remedies, Reading still faced difficulties stemming from the administrative appeal process. In particular, Reading faced a standard of review that was already somewhat deferential to PDE's original AYP determinations.

In accordance with statutory requirements and state precedent, the *Reading I* court reviewed PDE's determinations to see if they were supported by "substantial evidence."¹⁹⁵ So long as an agency can prove that its determinations are supported by such evidence, a reviewing court using this standard should defer to the decisions of the agency. As the substantial evidence standard is inherently deferential to administrative agencies, it is somewhat difficult for a court to find that such an agency has improperly implemented NCLB—in comparison to

¹⁹² See *infra* notes 215-220 and accompanying text.

¹⁹³ See *supra* note 119 and accompanying text.

¹⁹⁴ See *Reading Sch. Dist. v. Pennsylvania Dep't of Educ. (Reading I)*, 855 A.2d 166, 168 (Pa. Commw. Ct. 2004) ("Reading School District (District) appeals from the decision of the Secretary of Education (Secretary) affirming the Pennsylvania Department of Education's (Department) decision to identify thirteen schools as failing to achieve adequate yearly progress . . .").

¹⁹⁵ Pennsylvania state code provides that state courts reviewing the decisions of administrative agencies are limited to determining whether constitutional rights have been violated, errors of law have been committed, or whether the decision is not supported by substantial evidence. 2 PA. CONS. STAT. § 704 (2004). In an attempt to clarify this standard of review, the Pennsylvania Supreme Court has defined what is meant by "substantial evidence." See *Sell v. Workers' Compensation Appeal Bd.*, 771 A.2d 1246, 1250-51 (Pa. 2001) ("Substantial evidence has been defined as such relevant evidence that a reasonable mind might accept as adequate to support a conclusion. . . . the court must simply determine whether, upon consideration of the evidence as a whole, [the administrative agency's] findings have the requisite measure of support in the record." (quoting *Republic Steel Corp. v. Workmen's Compensation Appeal Bd.*, 421 A.2d 1060, 1062 (Pa. 1980))).

the deference that would be employed in the case of a successful Section 1983 action, the deference employed in the case of an administrative appeal favors governmental entities to a greater extent. Thus, appeals of administrative decisions inherently make it difficult for a court to find that administrative agencies have acted improperly when implementing NCLB. Indeed, in part due to the use of the substantial evidence standard, the *Reading I* court did not find for Reading in regard to any of its claims.¹⁹⁶

3. Statutory Language

In combination with the deferential standard of review employed by courts hearing administrative appeals, the language of NCLB constitutes another important hurdle that can prevent courts from effectively addressing NCLB implementation problems. The precise language of NCLB was particularly important in *Reading I*. In this case, relevant NCLB provisions gave the court little leverage to find that NCLB was being implemented improperly. First, the court examined PDE's determination that PDE had complied with the NCLB provisions regarding the financial and technical assistance that states must provide to schools and districts. Under NCLB, states are to establish a system of "intensive and sustained support and improvement" for Title I schools and districts,¹⁹⁷ create "school support teams" to devise additional approaches to provide assistance,¹⁹⁸ and designate and use "distinguished teachers" to help improve student achievement.¹⁹⁹ Moreover, under both NCLB and its regulations, states must provide districts identified for school improvement with technical assistance if requested.²⁰⁰ As mentioned above, PDE had only provided

¹⁹⁶ See *Reading I*, 855 A.2d at 173 ("here the Secretary has exercised her discretion regarding a matter within her purview of special expertise, and it is not this Court's place to disturb that finding since there is supporting evidence on the record to support that finding and no abuse of discretion can be found.").

¹⁹⁷ See 20 U.S.C.S. § 6317(a)(1) (LEXIS through 2006 legislation) ("In general [e]ach state shall establish a statewide system of intensive and sustained support and improvement for local educational agencies and schools receiving funds under this part, in order to increase the opportunity for all students served by those agencies and schools to meet the State's academic content standards and student academic achievement standards.").

¹⁹⁸ See 20 U.S.C.S. § 6317(a)(4)(A) (stating that schools must engage in "at a minimum, the following approaches: (i) Establishing school support teams . . . for assignment to, and working in, schools in the State . . . (ii) Providing such support as the State educational agency determines necessary and available in order to ensure the effectiveness of such teams. (iii) Designating and using distinguished teachers and principals who are chosen from schools served under this part that have been especially successful in improving academic achievement. (iv) Devising additional approaches to providing the assistance . . .").

¹⁹⁹ See 20 U.S.C.S. § 6317(a)(4)(A)(iii).

²⁰⁰ See 20 U.S.C.S. § 6316(c)(9) (stating that such technical assistance shall help a district to

Reading with five one-day workshops and had posted information on its website to help schools in school improvement.²⁰¹

Nevertheless, the court ruled that such assistance was sufficient to satisfy NCLB requirements. The court found that PDE was still in the process of implementing its program of technical assistance required under the statute²⁰² and that the technical assistance required by the statute and regulations had no effect on the analysis of whether the AYP determinations were justifiable—as the court stated, much of the technical assistance required by NCLB and its regulations is a *consequence* of failure to make AYP, not a condition precedent.²⁰³ In other words, because NCLB does not condition the justifiability of AYP decisions upon the actual receipt of technical assistance, the court refused to find that the decision to identify a school for school improvement was unjustifiable on technical assistance grounds. Moreover, the court found that Reading cited no NCLB language requiring states to pay for school improvement measures.²⁰⁴ Indeed, NCLB contains no such language.²⁰⁵ Because of the precise way in which NCLB's assistance provisions were drafted, the *Reading I* court simply had little grounds to address any of Reading's problems stemming from the lack of financial and technical assistance.

The precise language of NCLB also constituted a major factor in preventing the *Reading* court from addressing PDE's failure to provide native language tests. NCLB requires states to provide native language tests "to the extent practicable."²⁰⁶ According to the testimony of a PDE employee, the costs of providing native language tests were very high—such tests would cost more than \$15 per student, and each native

"(i) develop and implement the local educational agency's plan; and (ii) work with schools needing improvement."); see also 34 C.F.R. § 200.52(b)(1) (2006) ("An SEA that identifies an LEA for improvement . . . must, if requested, provide or arrange for the provision of technical or other assistance to the LEA."). Under NCLB, "LEA" refers to a local educational agency.

²⁰¹ See *supra* note 164 and accompanying text.

²⁰² *Reading Sch. Dist. v. Pennsylvania Dep't of Educ. (Reading I)*, 855 A.2d 166, 171 (Pa. Commw. Ct. 2004) ("Additionally, NCLB does not require that the technical assistance be provided all at once. . . . The record establishes that the Department intends to continue to provide the District with technical assistance as more funding becomes available with the passage of the Governor's education budget.").

²⁰³ See *id.* ("Technical assistance is a consequence of the identification, not a condition precedent to the identification, and the Department's obligation to provide technical assistance does not commence until after schools are identified as in need of improvement.").

²⁰⁴ See *id.* at 171-72 ("Finally, the District does not cite any statutory language that requires or directs the Department to pay for the District's improvement measures.").

²⁰⁵ NCLB does state that states must award Title I funds to districts with the lowest achieving schools that demonstrate the "greatest need for such funds" and have "the strongest commitment to ensuring that such funds are used to provide adequate resources to enable the lowest-achieving schools to meet the goals under school and local agency improvement, corrective action, and restructuring plans . . ." 20 U.S.C.S. § 6303(g)(6).

²⁰⁶ 20 U.S.C.S. § 6311(b)(3)(C)(ix)(III).

language test would have to be developed from scratch to be valid.²⁰⁷ Due to the time required to develop test items, field test the items, and analyze the results of the field testing, it would take at least two to three years to develop a valid native language test.²⁰⁸ After examining the time and money needed to administer native language tests, the court let stand PDE's determination that such tests were not practicable.²⁰⁹ As *Reading I* highlights, the "practicable" standard contained in the native language testing provision is very deferential to a state and makes it very difficult for a court to regulate the behavior of a state in regard to native language tests. Even where the failure to provide such tests may result in inaccurate determinations about what students know and can do, the deferential language of NCLB provides courts with little basis to address this problem.

The language of NCLB and its regulations similarly constituted a major factor in preventing the *Reading I* court from addressing the low "N" number set by PDE. Under NCLB, states may not evaluate a subgroup separately if "the number of students in a category is insufficient to yield statistically reliable information."²¹⁰ NCLB regulations contain similar requirements.²¹¹ As discussed in Part II.A, the "N" number chosen by PDE was the product of bargaining with ED and may have been low enough to lead to statistically unjustifiable AYP determinations.²¹² Nevertheless, the court found that the "N" number was sufficient to yield statistically reliable information—citing its own incompetence to evaluate technical matters of education policy, the court refused to delve too deeply into PDE's decision-making process.²¹³ Given that courts often express incompetence in deciding technical educational issues, the provision regarding sound statistical

²⁰⁷ See Reading Transcript, *supra* note 121, at 100-01 (testimony of John Weiss, Pennsylvania Department of Education).

²⁰⁸ See *id.* The employee of PDE also indicated that no major testing company would commit to developing a test for PDE because of the price and that a test simply translated into Spanish would not be valid.

²⁰⁹ See *Reading I*, 855 A.2d at 172 ("The record supports the Secretary's conclusion that it is not practicable for the Department to provide native language testing at this time. . . . The Department plans to make some native language testing available by 2005."). PDE, however, plans on making native language testing available in Spanish for Mathematics in Grades 3 through 8 and 11 during the 2007 testing cycle. See Pennsylvania Department of Education, 2007 Accommodations Guidelines, May 2006, http://www.pde.state.pa.us/a_and_t/lib/a_and_t/AccommodationsforEnglishLanguageLearners2007.pdf#search=%22pennsylvania%20department%20of%20education%20native%20language%20test%22.

²¹⁰ 20 U.S.C. § 6311(b)(2)(C)(v)(II).

²¹¹ See 34 C.F.R. § 200.7(a) (2006) (stating that the minimum number of students in a disaggregated subgroup must be sufficient to yield reliable information and that AYP decisions must be based on "sound statistical methodology").

²¹² See *supra* notes 129-133 and accompanying text.

²¹³ See *Reading I*, 855 A.2d at 173 ("We are not educators nor is it our place to substitute our judgment for those of learned educators who have experience and knowledge in such matters.").

methodology does very little to empower courts to enforce the law.²¹⁴ Without more precise guidance in NCLB or its regulations indicating what it takes to comply with its language regarding statistical methodology, the law does little to enable courts to address implementation problems related to the “N” number. In combination with the deferential review that accompanies administrative appeals, deferential language in NCLB prevented the *Reading I* court from effectively addressing NCLB implementation problems.

Even where a court has not viewed NCLB compliance through the deferential lens of the substantial evidence test, NCLB language has still made it difficult for a court to address NCLB implementation problems.²¹⁵ The *Pontiac* court interpreted the specific language of the Unfunded Mandates Provision as insufficient to support a decision that NCLB is improperly unfunded. The Unfunded Mandates Provision states that an “officer or employee of the Federal Government” cannot require states or districts to “spend any funds or incur any costs not paid for under this chapter.”²¹⁶ As interpreted by the *Pontiac* court, this provision does not prevent Congress from imposing such requirements.²¹⁷ Indeed, according to the *Pontiac* court, the inclusion of the words “an officer or employee of” in NCLB indicates that Congress clearly meant to prohibit federal officers and employees from imposing *additional*, unfunded, requirements beyond those provided for in the statute;²¹⁸ if Congress generally intended to prohibit unfunded mandates, Congress instead would have stated that the Federal Government will reimburse states for all costs incurred in complying with NCLB.²¹⁹ Accordingly, the *Pontiac* court stated that Congress “has appropriated significant funding for NCLB requirements,” and that Congress did not intend for NCLB requirements “to be paid for *solely*

²¹⁴ See, e.g., *Leandro v. State*, 488 S.E.2d 249, 259 (N.C. 1997) (“We acknowledge that the legislative process provides a better forum than the courts for discussing and determining what educational programs and resources are most likely to ensure that each child of the state receives a sound basic education. . . . The legislature can properly conduct public hearings and committee meetings at which it can hear and consider the views of the general public as well as educational experts . . .”).

²¹⁵ As discussed *supra* notes 188-192, it is arguable that the *Pontiac* court never should have reached the issue of what the Unfunded Mandates Provision means—the *Pontiac* plaintiffs specified no legal grounds, such as their right to appeal an administrative decision after exhausting all remedies, to support their attempted enforcement of a federal statutory provision. If *Pontiac* were an appeal of an administrative decision, the *Pontiac* court would have been required to treat the proper administrative agency’s decision with deference. However, because *Pontiac* had never been heard by an agency, the court did not employ a deferential standard of review. *Sch. Dist. of the City of Pontiac v. Spellings (Pontiac)*, No. 05-CV-71535, 2005 U.S. Dist. LEXIS 29253 (E.D. Mich. Nov. 23, 2005).

²¹⁶ 20 U.S.C.S. § 7907(a) (LEXIS through 2006 legislation).

²¹⁷ See *Pontiac*, 2005 U.S. Dist. LEXIS 29253 at *11.

²¹⁸ See *id.*

²¹⁹ See *id.*

by the federal appropriations.”²²⁰ Due in part to the precise language of NCLB provisions such as the native language testing provision and Unfunded Mandates Provision, courts have thus far failed to constitute an effective venue to address NCLB implementation problems.

4. Standing

In addition to the precise language of isolated NCLB provisions, the more general structure of NCLB constitutes a significant hurdle for using the courts to address NCLB implementation problems. As discussed above, the plaintiffs in *CLE I* and *II* sued ED to invalidate the testing regulations promulgated under NCLB.²²¹ The plaintiffs in these cases particularly claimed that the regulations would result in inaccurate determinations of what students know and can do. However, neither the *CLE I* nor *CLE II* court found for the plaintiffs. Although the courts based their decisions on several legal issues, standing was one of the most important. The *CLE II* court in particular determined that, under the standing test, there must exist “an adequate causal chain . . . [that] must contain at least two links: one connecting the alleged imbalance of the committee to the rule promulgated, and another connecting the rule to plaintiffs’ particularized injury.”²²² Applying this standard, the court found that the basic design of NCLB prevented any such injury from being traceable to the federal government. As NCLB devolves significant discretion to state and local authorities for the development and implementation of standards and assessments, states are more properly thought of as the causal source for any injuries suffered from the inaccurate assessment of students.²²³ In part due to these standing issues, the court did not order any changes in NCLB’s implementation.

The plaintiffs in *Ottawa* faced somewhat similar standing issues. In *Ottawa*, the plaintiffs sued ED to halt the implementation of NCLB consequences in regard to special education students.²²⁴ In response, the *Ottawa* court emphasized that school districts have much flexibility under NCLB.²²⁵ Because NCLB allows districts such flexibility to implement NCLB, particularly in regard to pedagogical decisions, the

²²⁰ *Id.* at *12-13.

²²¹ *See supra* notes 112-117 and accompanying text.

²²² *Ctr. for Law and Educ. v. U.S. Dep’t of Educ. (CLE II)*, 315 F. Supp. 2d 15, 26 (D.D.C. 2004).

²²³ *See id.* (“[T]he allegedly injurious effect of the rules on educational policy depends in large measure on the choices of actors not before the Court—the states.”).

²²⁴ *See supra* notes 150-153 and accompanying text.

²²⁵ *See Order to Dismiss, Bd. of Educ. of Ottawa Twp. High Sch. Dist. 140 v. U.S. Dep’t of Educ.*, No. 1:05-CV-00655 (N.D. Ill. 2005) (“The NCLBA does not mandate the specific actions that a school district must take: the statute leaves those pedagogical questions to the actors implementing it.”).

court found that nothing in NCLB prevents the plaintiffs from implementing changes that comport with students' existing IEPs.²²⁶ Thus, the court refused to find that the plaintiffs had suffered the injury in fact required to maintain standing.²²⁷ Indeed, the *Reading III* court indicated that similar standing issues prevent a district from suing the federal government in regard to AYP determinations—because AYP is a matter for each state to determine, the federal government is not properly thought of as the source of school failure to make AYP.²²⁸ And while the *Pontiac* plaintiffs successfully established standing in their suit against ED,²²⁹ the plaintiffs based their argument on one of the few provisions in NCLB that imposes specific requirements upon federal entities.²³⁰ So, due to the way in which NCLB devolves decision-making authority, it is particularly difficult for plaintiffs targeting NCLB to establish standing against the federal government.

5. Other Legal Hurdles

Along with the legal hurdles discussed above, plaintiffs faced several other legal hurdles of a more isolated nature. That is, plaintiffs faced many legal hurdles that may not apply to future NCLB plaintiffs or courts that hear cases related to NCLB. For example, in *CJE*, the plaintiffs argued against the definition of an HQT adopted by the California Board of Education on the grounds that the Board failed to comply with state-level notice and comment requirements that apply to

²²⁶ See *id.* (“[N]othing in the NCLBA keeps School District Plaintiffs from implementing changes that take into account the IEPs of students with disabilities—and indeed, the text of both the NCLBA and the IDEA suggest the exact opposite conclusion.”).

²²⁷ See *id.* (“Based on the complaint as it is currently written, Plaintiffs fail to satisfy the requirements for Article III standing.”).

²²⁸ *Reading Sch. Dist. v. Dep’t of Educ. (Reading III)*, 875 A.2d 1218, 1220 (Pa. Commw. Ct. 2005) (stating that Reading “is precluded from appealing the determination of the Department to the federal government because, according to the provisions of the Act, the individual states are required to develop their own plans to implement the Act, and whether local school districts have failed to achieve AYP is a matter for each state to determine, not the federal government. Thus, any challenge to a determination that a school or schools within a district has or have not achieved the AYP required by Act must be directed to the state agency in charge of education . . . and cannot be directed to the federal government.”).

²²⁹ To be sure, several legal commentators did not believe that the *Pontiac* plaintiffs could successfully establish standing. See, e.g., Memorandum from Senator Angela Monson & Speaker Martin Stephens, *supra* note 189; Munich & Testani, *supra* note 189. However, the standing problems cited by these commentators were generally based on the organizational nature of the plaintiff teacher unions and not the way in which NCLB devolves decision-making authority to states, districts, and schools.

²³⁰ As discussed *supra* note 218 and accompanying text, the Unfunded Mandates Provision imposes requirements specifically on federal officers and employees. This provision does not devolve any decision-making power to states, districts or schools.

the adoption of such a definition.²³¹ By the time the *CJE* court heard the case, the Board had begun to adopt a new definition that complied with both NCLB and the notice and comment requirements. The court thus dismissed *CJE* as moot.²³² In *CLE I* and *II*, the plaintiffs argued that NCLB testing regulations should be invalidated because ED improperly selected participants for the negotiated rulemaking process that generated the regulations.²³³ In both cases, the court found that the Negotiated Rulemaking Act (NRA),²³⁴ a federal statute that governs negotiated rulemaking processes, precludes judicial review of the process of a negotiated rulemaking committee.²³⁵ In part for this reason, the *CLE I* and *II* courts dismissed both of these cases.²³⁶ In addition, in *Kegerreis v. United States*, a court dismissed the *pro se* claim that NCLB was unconstitutional because the plaintiff's claim rested on no ostensible legal grounds.²³⁷

The hurdles faced by plaintiffs in these cases are certainly important to consider when assessing the use of the courts to affect NCLB's implementation. However, as the NRA applies only to the rulemaking process, and as plaintiffs must always ensure that their claims rest on ostensible legal grounds and are not moot, these types of

²³¹ The California Administrative Procedure Act states that no California state agency may "issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule . . . unless . . . [it] has been adopted as a regulation and filed with the Secretary of State . . ." CAL. GOV. CODE § 11340.5(a) (2006). In order to adopt a regulation, the state agency must comply with a variety of procedures, including public notice and an opportunity for interested parties to comment.

²³² See *Californians for Justice Educ. Fund v. California State Bd. of Educ. (CJE)*, No. A102851, 2003 Cal. App. Unpub. LEXIS 11713, at *10 (Ct. App. Cal. Dec. 17, 2003). The court examined several documents that had been produced by the defendants since the original approval of the HQT definition. These documents included the Board's agenda regarding the need for HQT regulations, a copy of the proposed regulations regarding teacher standards, and an excerpt from the Board's minutes indicating that Board staff should begin a notice and comment period.

²³³ See *Ctr. for Law and Educ. v. U.S. Dep't of Educ. (CLE I)*, 209 F. Supp. 2d 102 (D.D.C. 2002); *Ctr. for Law and Educ. v. U.S. Dep't of Educ. (CLE II)*, 315 F. Supp. 2d 15, 26 (D.D.C. 2004).

²³⁴ See 5 U.S.C.S. §§ 561-570 (LEXIS through 2006 legislation). In the negotiated rulemaking process, representatives of various groups generally must be convened before the promulgation of regulations to determine the substance of proposed regulations. NCLB particularly provides that, prior to issuing regulations regarding standards and assessments, ED must obtain the advice and recommendations of various groups such as administrators, parents, and teachers in accordance with the requirements of the Negotiated Rulemaking Act. See 20 U.S.C.S. § 6571(b)(3)(B).

²³⁵ In *CLE I*, the court stated that Congress intended "to withhold judicial review in cases such as this one, and plaintiffs' strained readings of [NCLB] and the NRA do not persuade the Court otherwise." *CLE I*, 209 F. Supp.2d at 110. In *CLE II*, the court stated, "Section 570 [of the NRA] bars judicial review of agency action relating to the establishment of a negotiated rulemaking committee." *CLE II*, 315 F. Supp. 2d at 33.

²³⁶ See *CLE I*, 209 F. Supp. 2d at 119; *CLE II*, 315 F. Supp. 2d at 33.

²³⁷ See *Kegerreis v. United States*, No. 03-2232-KHV, 2003 U.S. Dist. LEXIS 18012, at *8 (D. Kan. Oct. 9, 2003) ("Plaintiff has not articulated how the NCLB Act presently violates his constitutional rights.").

hurdles are not quite as important for understanding the systemic issues that may continue to prevent courts from effectively addressing NCLB implementation problems.

6. Legal Victories

Plaintiffs have successfully influenced aspects of NCLB's implementation in only a couple of cases decided to date. As discussed in Part II.A.1, Reading challenged PDE's policy of allowing only a limited range of AYP determination appeals.²³⁸ A state trial court found PDE's policy unconstitutional because this policy violated Reading's due process rights.²³⁹ Consequently, the court ordered PDE to hear a wider range of appeals. In the desegregation case discussed above, *Bradley v. Pinellas County School Board*, a court ordered a county to comply with a controlled school choice plan and not NCLB school choice requirements—according to the court, orders issued under the U.S. Equal Protection Clause trump statutory requirements.²⁴⁰

While these cases are important insofar as they represent effective uses of the courts to influence NCLB's implementation, the ultimate implications of these cases are rather limited. The victory in the Reading case only affected an entity's rights to appeal an AYP determination; this case did not address the underlying implementation problems (of the types generally discussed in Part I.C or II.A) at which such an appeal can be aimed. The implications of the desegregation case also appear somewhat limited for the purposes of this Article—although a conflict between court orders in a desegregation case and statutory requirements are quite problematic, such a conflict can arise only in the relatively small subset of situations where a school choice program has been ordered in a desegregation case. Thus, while these cases offer some indication that courts can constitute an effective venue to influence NCLB, these cases hold only limited implications for the courts' more general role in addressing substantive and widespread NCLB implementation problems.

C. *The Lack of Attention to Capacity in NCLB*

Although the legal hurdles discussed in Part II.B certainly constitute major barriers to the judiciary's ability to enforce NCLB and effectively address salient implementation problems, the issues that

²³⁸ See *supra* notes 134-136 and accompanying text.

²³⁹ See *Reading Sch. Dist. v. Dep't of Educ. (Reading III)*, 875 A.2d 1218, 1222 (Pa. Commw. Ct. 2005) (indicating that PDE intentionally misinterpreted NCLB to limit appeal grounds).

²⁴⁰ See DeBray, *supra* note 143.

courts have faced to date do not tell the whole story. It is also important to consider the specific types of issues that courts have *not* faced. NCLB's statutory language naturally shapes the types of problems that plaintiffs have chosen to litigate. Thus far, plaintiffs' claims (with the notable exception of the claims in *Pontiac* and some of the *Reading* plaintiff's claims) have not focused on the capacities that various educational entities possess to implement NCLB requirements. But as discussed in Part I.C, the lack of these capacities appears to be an important underlying factor contributing to the problems cited by NCLB plaintiffs. This section examines how the failure of NCLB itself to address these capacities is reflected in the cases examined in Parts II.A and II.B, and how this failure gives courts little purchase to remedy concomitant implementation problems.

In many of the claims against NCLB, plaintiffs have not cited statutory language regarding the capacities that states, districts, and schools have to implement NCLB testing and accountability requirements. Instead, plaintiffs have focused on the bare provisions mandating the implementation of such requirements. The arguments employed by the plaintiffs in *ACORN* well represent this trend. In addition to Section 1983, the plaintiffs in *ACORN* primarily relied upon the NCLB provisions that require districts to offer school choice and supplemental services as the legal basis for their argument; the plaintiffs did not cite any statutory language detailing the steps that must be taken to ensure that districts *can* implement the school choice and accountability provisions of NCLB.²⁴¹ The argument employed by the *Reading I* plaintiffs regarding native language tests similarly failed to cite any statutory language regarding the capacities to administer such tests.²⁴² And although California was clearly facing a severe teacher shortage and did not have the capacity to comply with the HQT mandates of NCLB,²⁴³ the *CJE* plaintiffs did not focus on any NCLB language regarding the provision of such capacities as well.²⁴⁴

²⁴¹ *ACORN* Complaint, *supra* note 141, at 11.

²⁴² Brief of Petitioner at 22-29, *Reading Sch. Dist. v. Pennsylvania Dep't of Educ.*, 855 A.2d 166 (Pa. Commw. Ct. 2004).

²⁴³ During the 2001-2002 school year, California had about 42,000 teachers who had not completed a teacher preparation program and did not have a preliminary credential issued by the state; instead, these teachers possessed emergency, intern, pre-intern and other provisional certifications. During the 2003-04 school year, slightly more than 28,000 teachers were teaching without the benefit of the state's minimum qualification, and accordingly could not have been considered highly qualified under NCLB. Moreover, due to factors such as an increased number of students and an aging teaching force, California is projected to face a shortage of tens of thousands of credentialed teachers by 2014. See CTR. FOR THE FUTURE OF TEACHING AND LEARNING, CALIFORNIA'S TEACHING FORCE: KEY ISSUES AND TRENDS 2004 (2004) at 4, 8.

²⁴⁴ See *Californians for Justice Educ. Fund v. California State Bd. of Educ. (CJE)*, No. A102851, 2003 Cal. App. Unpub. LEXIS 11713 (Ct. App. Cal. Dec. 17, 2003).

The lack of such statutory language in the plaintiffs' arguments aimed at providing entities with the various capacities they need to implement NCLB likely stems in large part from the fact that NCLB contains little of such language. In regard to the assistance that the federal government must provide to states for Title I implementation, NCLB affirmatively indicates that ED must provide requesting states with assistance developing standards and assessments,²⁴⁵ and creating state plans if these plans are in danger of being denied by ED.²⁴⁶ Moreover, NCLB requires ED to award grants to states for the implementation of school improvement and corrective action measures.²⁴⁷ But these NCLB grant provisions do not require ED to provide any specific level of funds to states,²⁴⁸ and these provisions contain no language that provides for supplying extra financial resources to states that have a large number or proportion of schools in school improvement as a result of NCLB.²⁴⁹

While NCLB does contain some provisions governing the assistance that must be provided by states to districts and schools, these provisions are quite limited as well. As discussed in Part II.B, NCLB provides that states must establish a system of intensive support, establish school support teams, and provide districts identified for school improvement with technical assistance.²⁵⁰ However, these provisions specify few details about the type or amount of technical assistance that must be provided.²⁵¹ Moreover, these provisions specify few details regarding when such assistance must be provided—as *Reading I* highlights, the NCLB provisions regarding the technical assistance that must be provided by states for school failure to make AYP have little bite in ensuring that schools and districts actually receive such technical assistance.²⁵²

The NCLB provisions regarding the financial assistance that states must provide to districts for school improvement are also limited. After ED provides grants to states for the implementation of school improvement measures,²⁵³ states must use such grants to provide subgrants to districts and schools for school improvement.²⁵⁴ In specific regard to the subgrants, NCLB provides that the subgrants must be of “sufficient size and scope” to support required school improvement and

²⁴⁵ See 20 U.S.C.S. § 6311(j) (LEXIS through 2006 legislation).

²⁴⁶ See 20 U.S.C.S. § 6311(e)(1)(E)(2).

²⁴⁷ See 20 U.S.C.S. § 6303(g).

²⁴⁸ See *id.*

²⁴⁹ See 20 U.S.C.S. § 6303(g)(2) (allowing ED to provide extra funds to states only for assisting districts and schools that were in school improvement before NCLB was passed).

²⁵⁰ See *supra* notes 197-199 and accompanying text.

²⁵¹ See *id.*

²⁵² See *supra* notes 202-205 and accompanying text.

²⁵³ See *supra* notes 247-249 and accompanying text.

²⁵⁴ See 20 U.S.C.S. § 6303(g)(5).

corrective action activities.²⁵⁵ However, NCLB also caps the amount available through these subgrants at \$500,000 per school²⁵⁶ and indicates that states may have to prioritize the distribution of such funds on the basis of need and commitment to ensuring that the funds will be used properly.²⁵⁷ Accordingly, some language in NCLB appears to allow school improvement grants to be insufficient for the purpose of providing schools and districts with the financial capacity to implement NCLB consequences effectively.

Regulations promulgated under NCLB expressly address the possible lack of capacity in particular regard to the implementation of public school choice. These regulations provide that a district “may not use lack of capacity to deny students the option to transfer.”²⁵⁸ Although the comments ED received before promulgating these regulations specifically raised the capacity issues that schools would face in implementing the school choice provisions,²⁵⁹ the final regulations provided that schools and districts must work out these capacity issues primarily by themselves.²⁶⁰ So, like the statutory language governing grants for school improvement and corrective action, the regulatory language also appears to contemplate and even permit the possibility that state entities will not possess the capacities to implement NCLB consequences effectively.

The NCLB language regarding native language testing similarly seems to contemplate that state entities will not possess the capacities for the full administration of NCLB testing practices. As highlighted by *Reading I*, the native language testing provision expressly permits a state to test LEP students without the capacities in place to administer native language tests.²⁶¹ In mandating states to administer native language tests only when “practicable,” NCLB lets states off the hook when they do not have the capacity to administer these tests—the bare language of this provision mandates states to administer native language tests only when they have the capacity to do so and in this way perhaps even encourages states to assess students inaccurately.²⁶² So, although

²⁵⁵ See 20 U.S.C.S. § 6303(g)(5)(a).

²⁵⁶ See *id.*

²⁵⁷ See 20 U.S.C.S. § 6303(g)(6).

²⁵⁸ 34 C.F.R. § 200.44(d) (2006).

²⁵⁹ See Title I—Improving the Academic Achievement of the Disadvantaged, 67 Fed. Reg. 71710, 71753 (Dec. 2, 2002) (“Several commenters maintained that existing overcrowding of schools, teacher shortages, transportation difficulties, class-size limits, health and safety concerns, and other capacity issues prevent many LEAs from implementing the public school choice option in accordance with the requirements of § 200.44. One commenter, for example, recommended that the final regulations permit LEAs to preclude transfers to schools that have reached their ‘maximum instructional capacity under State or local laws or ordinances.’”).

²⁶⁰ See *id.*

²⁶¹ See *supra* notes 206-209 and accompanying text.

²⁶² See *supra* note 124 and accompanying text (indicating that the assessment of students in a language that they cannot understand raises serious validity questions).

NCLB actually requires states to engage in valid testing practices, the statute does little to ensure that valid testing practices are administered in regard to LEP students.²⁶³ At least in the case of the administration of native language tests, the actual language included in NCLB hinders courts from ensuring that the capacities are in place to implement NCLB effectively.

Pontiac highlights perhaps more than any other case discussed above the failure of NCLB to provide courts with solid grounds to address effectively NCLB implementation problems related to capacity. Unlike most other provisions in NCLB, the Unfunded Mandates Provision at the very least demonstrates a congressional concern that states, schools, and districts, may not have the capacities to implement fully NCLB requirements. Indeed, this provision is the major legal hook in NCLB that addresses such capacities. However, the Unfunded Mandates Provision is very limited in terms of scope—the provision only addresses financial capacities that state entities may possess, and does not allow any other kind of capacity, such as technical skill or knowledge.²⁶⁴ Thus, even if the *Pontiac* court had broadly interpreted the Unfunded Mandates Provision as prohibiting all “unfunded mandates” (instead of only additional unfunded mandates), the provision by itself is very restricted in the range of problems that it would have allowed the court to address.²⁶⁵

Moreover, even if broadly interpreted, the provision would not give plaintiffs or courts any way to solve the lack of funds that state entities are receiving under NCLB. The provision would only seem to allow courts to halt NCLB’s implementation if NCLB results in unfunded mandates; the provision does not articulate any specific ways that NCLB funds must or should be spent to help states implement NCLB testing and accountability provisions.²⁶⁶ So, taken in

²⁶³ NCLB provides that NCLB assessments must “be used for purposes for which such assessments are valid and reliable, and be consistent with relevant, nationally recognized professional and technical standards.” 20 U.S.C.S. § 6311(b)(3)(C)(iii) (LEXIS through 2006 legislation).

²⁶⁴ See *supra* note 69 and accompanying text.

²⁶⁵ The *Pontiac* court narrowly interpreted the Unfunded Mandates Provision as prohibiting ED from imposing additional mandates that are unfunded under NCLB. See *supra* notes 215-220 and accompanying text. However, the NEA argued in *Pontiac* that the Unfunded Mandates Provision should be interpreted broadly to prohibit *all* unfunded NCLB mandates. See Complaint at 57-58, Sch. Dist. of the City of Pontiac v. Spellings, No. 05-CV-71535, 2005 U.S. Dist. LEXIS 29253 (E.D. Mich. Nov. 23, 2005).

²⁶⁶ The reason for this lack of direction may lie in the fact that the science of creating accountability systems is far from perfect. It is not clear how much money it will take to implement these accountability systems effectively, and the funds required to implement these accountability systems effectively from year to year is difficult to predict. See, e.g., CONN. STATE DEP’T OF EDUC., *supra* note 72, at 4. And although some have attempted to discern how much money it takes to increase student achievement up to a specified level (such as that specified by standards), there is considerable disagreement how to make these determinations as

conjunction with the other cases examined thus far, *Pontiac* highlights that more attention should have been devoted in NCLB to articulating and building the various sorts of capacities that entities need to implement NCLB mandates. Without this sort of attention, NCLB has not been implemented nearly as effectively as it could have been, and the legal system has offered reformers little legal recourse to address related implementation problems.²⁶⁷ Given the various hurdles that plaintiffs have faced and the inattention in NCLB to providing state entities with the capacities they need to implement NCLB fully, plaintiffs and courts should adopt a new legal approach if the courts are to constitute an effective venue for addressing NCLB implementation problems.

III. SCHOOL FINANCE REFORM LITIGATION AND NCLB

In order to construct a new approach for the courts to address NCLB implementation problems, this Article now looks to another area of law in which issues regarding standards- and accountability-based reforms have begun to emerge: that of school finance reform litigation. Data from standards-based tests and mandates regarding testing and accountability from standards-based reforms have begun to constitute important issues in school finance litigation. Until recently, legal issues related to standards, testing, and accountability rarely appeared in the context of school finance litigation. School finance cases (as their label implies) traditionally concentrated on funding disparities across school districts and legal mandates regarding equality that could potentially remedy these disparities. However, due to the ways in which the legal arguments regarding school finance reform have evolved, many of these cases have also begun to involve issues related to standards, testing, and accountability, and NCLB in particular. This recent trend suggests that courts have the potential to constitute a more effective venue to address NCLB implementation problems if they examine such problems

well. See, e.g., ANDREW RESCHOVSKY & JENNIFER IMAZEKI, CONSORTIUM FOR POLICY RESEARCH IN EDUCATION, *ACHIEVING EDUCATIONAL ADEQUACY THROUGH SCHOOL FINANCE REFORM 2* (2000) (describing different approaches to measuring the cost of educational adequacy and suggesting a particular approach).

²⁶⁷ To be sure, it is impossible to determine with precision how effectively NCLB provisions would have been implemented if more attention were paid in NCLB to providing states with the capacities they need. It is unclear precisely what capacities are needed to implement NCLB provisions effectively. Moreover, even if more legal language directed at providing states with capacities were included in NCLB, there is no guarantee that these provisions would have been faithfully implemented. However, it is clear that NCLB has faced problems in areas where statutory attention is lacking.

through the lens of legal theories employed in recent school finance litigation suits.

A. *A Brief Overview of School Finance Reform Litigation*

In the past few decades, school finance litigation has perhaps constituted the most consistently visible type of education litigation in the United States. By February 2005, forty-five states had faced some type of school finance litigation.²⁶⁸ As certain classes of legal arguments have proven more successful than others, plaintiffs have shifted their tactics over time. Thus, scholars have characterized school finance litigation as appearing in three different waves.²⁶⁹ Plaintiffs bringing first wave school finance cases brought their cases in federal courts and relied primarily on the Equal Protection Clause of the U.S. Constitution.²⁷⁰ These plaintiffs generally argued that education is a fundamental right or that wealth constitutes a suspect classification under the Equal Protection Clause.²⁷¹ Therefore, these plaintiffs generally argued that states are prohibited from funding school districts on the basis of the wealth of the people or value of the property present in any given school district because this type of funding scheme results in unconstitutional per pupil spending differences across districts.²⁷² However, when the Supreme Court eventually considered this type of argument, the Court refused to find that education constitutes a fundamental right or that wealth constitutes a suspect class.²⁷³ Thus, the Court applied the rational basis test instead of strict scrutiny and concluded that the Equal Protection Clause does not constitute a viable basis for equalizing differences in education funding.²⁷⁴

In the second wave of school finance cases, plaintiffs continued to rely on arguments based around the idea of equality, but they litigated

²⁶⁸ See Michael Griffith, *School Finance Litigation and Beyond* (Apr. 2005), <http://www.ecs.org/clearinghouse/60/26/6026.htm> (discussing the current state of adequacy litigation and directions in which adequacy suits may turn).

²⁶⁹ The “wave” metaphor has been commonly employed by scholars in describing the different types of school finance litigation. See, e.g., Gail F. Levine, *Meeting the Third Wave: Legislative approaches to Recent Judicial School Finance Rulings*, 28 HARVARD J. ON LEGIS. 507 (1991); Michael Heise, *State Constitutions, School Finance Litigation, and the “Third Wave”: From Equity to Adequacy*, 1995 TEMPLE L. REV. 1151 (1995).

²⁷⁰ U.S. CONST. amend. XIV, § 1.

²⁷¹ See Heise, *supra* note 269.

²⁷² Federal courts initially looked favorably upon equal protection arguments involving fundamental rights. See, e.g., *Serrano v. Priest*, 487 P.2d 1241 (Cal. 1971) (deeming education a fundamental right and reviewing California’s funding system under strict scrutiny).

²⁷³ *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 18 (1973) (“[W]e find neither the suspect-classification nor the fundamental-interest analysis persuasive.”).

²⁷⁴ See *id.* at 54-55.

their claims in state courts.²⁷⁵ Instead of relying on the federal Equal Protection Clause, plaintiffs turned to state constitutions.²⁷⁶ In particular, plaintiffs relied on equal protection clauses contained in state constitutions, which often look very similar to the federal Equal Protection Clause.²⁷⁷ Moreover, plaintiffs relied on “education clauses” contained in state constitutions. Every state constitution contains an education clause, and these clauses generally indicate that states have a duty to provide students with a “thorough and efficient” education or some similar kind of education.²⁷⁸ Basing their arguments on a state equal protection clause²⁷⁹ or education clause,²⁸⁰ or both of these clauses taken together,²⁸¹ plaintiffs attempted to overturn state systems of school finance. However, because second wave plaintiffs were not as successful as they had hoped in equalizing education funding, plaintiffs shifted their legal tactics again.

In the third wave of school finance reform, the focus of the arguments shifted away from educational equality to educational “adequacy.”²⁸² Here, plaintiffs generally based their claims on the education clause of a state constitution. But instead of arguing that the education clause requires states to equalize per pupil spending, plaintiffs argued that the education clause requires states to provide a sufficient level of funds to meet the constitutional guarantee of a “thorough and efficient” education (or whatever type of education was guaranteed by the constitution in question).²⁸³ So, instead of focusing on equality between students, the school finance arguments focused on the substantive opportunities available to students.

Widely considered one of the landmark cases in the third wave, *Rose v. Council for Better Education* provided a model for many of the

²⁷⁵ See Heise, *supra* note 269.

²⁷⁶ *Id.*

²⁷⁷ Most state constitutions contain their own equal protection clauses, which often include language very similar to the federal Equal Protection Clause. See Robert F. Williams, *Equality Guarantees in State Constitutional Law*, 63 TEX. L. REV. 1195 (1985).

²⁷⁸ See Peter Enrich, *Leaving Equality Behind: New Directions in School Finance Reform*, 48 VAND. L. REV. 101 (1995). (To be sure, the author also states that Mississippi may not have an education clause.) In contrast to state constitutions, the federal Constitution does not contain an education clause and includes no explicit mention of education anywhere in its text.

²⁷⁹ See, e.g., *Serrano v. Priest*, 557 P.2d 929, 951-52 (Cal. 1976) (stating that wealth constitutes a suspect class under the state constitution).

²⁸⁰ See, e.g., *Robinson v. Cahill*, 351 A.2d 713 (N.J. 1975) (stating that an education clause requires a state to provide an equal opportunity to receive a quality education to all children across the state).

²⁸¹ See, e.g., *Washakie County Sch. Dist. No. One v. Herschler*, 606 P.2d 310, 333 (Wyo. 1980) (stating that the education clause of a state constitution provides evidence that education constitutes a fundamental right).

²⁸² See Heise, *supra* note 269.

²⁸³ See, e.g., *Claremont Sch. Dist. v. Governor*, 635 A.2d 1375, 1377 (N.H. 1993); *Sch. Admin. Dist. No. 1 v. Comm’r, Dep’t of Educ.*, 659 A.2d 854, 857 (Me. 1995); *McDuffy v. Sec’y of the Executive Office of Educ.*, 615 N.E.2d 516, 553 (Mass. 1993).

subsequent school finance reform decisions and prefigures the recent collision between school finance reform litigation and issues related to standards and accountability.²⁸⁴ *Rose* was filed in Kentucky in response to what appeared to be horrible educational conditions.²⁸⁵ Given the state of education in Kentucky, arguments addressing adequacy and not just equality seemed to make sense. The plaintiffs thus based their arguments on the education clause in the Kentucky constitution and argued that Kentucky had failed to provide students with a minimally adequate level of education as required by the education clause.²⁸⁶ Because the Kentucky education clause is rather vague about exactly what level of education is constitutionally required, the *Rose* court needed to articulate a more precise standard. Thus, the court defined the level of education required by the education clause generally as that which is adequate to produce a citizen capable of participating in a democracy and a modern economy.²⁸⁷ In order to determine whether Kentucky met this standard, the court not only examined the financial inequities present across districts; the court also examined curricula, facilities, student-teacher ratios, and achievement test scores.²⁸⁸ Based on this kind of evidence, the court ruled that Kentucky's system of public schools was not adequate to produce the kind of democratically capable student required by the state constitution and ordered the state legislature to remedy this deficiency.²⁸⁹ In this way, the Kentucky Supreme Court did something remarkably novel: It had shifted the school finance discussion from one that focused primarily on educational inputs to one that focused on substantive educational opportunities.

The response of the Kentucky legislature to the *Rose* court's order seized upon the possibilities offered by this new sort of legal reasoning.

²⁸⁴ *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186 (Ky. 1989).

²⁸⁵ During the 1980s, Kentucky ranked 50th among the states in adult literacy and adults with high school diplomas, 49th in the rate of students continuing to college, and 48th in per pupil expenditures on public schools. Moreover, only 68 percent of ninth graders were graduating from high school in four years, and in the Appalachian counties, over 48 percent of the population was functionally illiterate. See Molly A. Hunter, *All Eyes Forward: Public Engagement and Educational Reform in Kentucky*, 28 J.L. & EDUC. 485, 486 (1999).

²⁸⁶ The Kentucky State Constitution states that "[t]he General Assembly shall, by appropriate legislation, provide for an efficient system of common schools throughout the State." KY. CONST. § 183.

²⁸⁷ See *Rose*, 790 S.W.2d at 212.

²⁸⁸ See *id.* (detailing seven capacities with which Kentucky must provide to its students in order for the students to receive an adequate education) see also *McDuffy*, 615 N.E.2d at 554 (citing the seven *Rose* capacities and mandating that Massachusetts students must receive a similarly adequate education).

²⁸⁹ *Rose*, 790 S.W.2d at 215 ("Since we have, by this decision, declared the system of common schools in Kentucky to be unconstitutional, Section 183 places an absolute duty on the General Assembly to re-create, re-establish a new system of common schools in the Commonwealth.").

In 1990, less than a year after *Rose* came down, the state legislature enacted the Kentucky Education Reform Act (KERA).²⁹⁰ On one level, KERA looked much like legislation that other states had enacted in response to school finance decisions. KERA provided for many changes in the state funding system to equalize and raise educational funding.²⁹¹ On another level, KERA mandated major educational reform in the areas of curriculum and school governance. KERA required Kentucky to develop learning standards, a model curriculum framework based on these standards, assessments of student progress in relation to the standards, and accountability measures that follow the assessment.²⁹² Indeed, the standards-based reforms mandated by KERA look somewhat like those that currently must be developed under NCLB. KERA particularly provided that the state must develop a performance-based assessment for students in grades four, eight, and twelve.²⁹³ Moreover, KERA provided that schools must be held accountable for the performance of their students—KERA required an “accountability index” to be created for each school.²⁹⁴ If a school’s accountability index failed to exceed its performance requirement in any given year, a host of administrative sanctions were to follow.²⁹⁵

Together, the judicial and legislative responses in *Rose* laid the foundation for much of the modern collision between school finance litigation and standards-based reform. The language of the *Rose* decision shifted the focus of school finance litigation at least in part, from input measures to output measures of substantive skills and knowledge, and it is output measures that are the primary focus of standards-based reform. Moreover, the Kentucky legislature’s response to *Rose* rested on the passage of a statute that provided for a system of standards, testing, and accountability. In particular, the legislature considered a standards-based reform law to be a viable response to the judicial command to provide students with an adequate education. Indeed, the basic type of reasoning present in *Rose* and underlying KERA continue through the present as plaintiffs have begun to bring school finance reform suits involving issues related to standards, accountability, and NCLB.

²⁹⁰ KY. REV. STAT. ANN. §§ 156-165 and other provisions (1990).

²⁹¹ C. Scott Trimble & Andrew C. Forsaith, *Achieving Equity and Excellence in Kentucky Education*, 28 U. MICH. J.L. REFORM 599, 612 (1995) (indicating that in the year after KERA’s enactment, total education revenues in Kentucky increased by 38 percent, and the range of per pupil revenue among districts decreased by 45.9 percent).

²⁹² See KY. REV. STAT. ANN. § 156.005 (1992) *et seq.*

²⁹³ See KY. REV. STAT. ANN. § 158.6453 (1992).

²⁹⁴ See KY. REV. STAT. ANN. § 158.6455 (1992).

²⁹⁵ See *id.*

B. *The Collision between Standards, Accountability, and School Finance Reform Litigation*

In the past few years, issues related to standards- and accountability-based reforms, and NCLB in particular, have increasingly begun to surface in the context of school finance litigation. In recent third wave cases that aim at ensuring that students receive an adequate education, issues related to standards and accountability have emerged in two primary ways. First, data from standards-based assessments have been used by courts as a yardstick to measure whether states are meeting their constitutional burden of providing students with an adequate education. Second, courts have begun to consider the extent to which the institution and effective implementation of standards-based accountability systems are necessary to provide students with an adequate education. These recent developments are central to the creation of a new approach to addressing NCLB implementation problems.

Standards and data from standards-based assessments have proven to be particularly useful resources for courts hearing adequacy lawsuits. As discussed above, the standard of educational “adequacy” is rather vague—even if courts define this standard in relation to readiness to participate in a democracy or modern economy, the precise skills and knowledge that students must possess to satisfy this standard are still unclear.²⁹⁶ Accordingly, several state courts hearing third wave cases have looked to legislatively mandated learning standards to provide a concrete basis for the definition of an adequate education.²⁹⁷ By allowing state standards to define educational adequacy, courts can examine student performance on assessments aligned to standards and thereby gain insight into the extent to which the state is providing students with an adequate education. Indeed, some legal scholars have encouraged the use of state standards to define an adequate education in precisely this fashion.²⁹⁸

²⁹⁶ Many scholars have theorized about the fundamental relationship between schooling and democracy. See, e.g., JOHN DEWEY, *DEMOCRACY AND EDUCATION* (1916); AMY GUTMANN, *DEMOCRATIC EDUCATION* (1987). However, few scholars have found solid empirical evidence about the resources needed to transform students into democratically capable citizens. See David E. Campbell, *Vote Early, Vote Often*, *EDUC. NEXT*, Summer 2005, at 62, 65 (2005) (indicating that “[a]lthough well-known for many years, these ideas [regarding the relationship between schooling and democracy] have not been put to a careful empirical test.”).

²⁹⁷ See, e.g., *Leandro v. State*, 488 S.E.2d 249 (N.C. 1997); *Campaign for Fiscal Equity, Inc. v. State (CFE)*, 801 N.E.2d 326 (N.Y. 2003); *Montoy v. State*, No. 99-C-1738, 2003 WL 22902963 (Kan. Dist. Ct. Dec. 2, 2003); *Columbia Falls Elem. Sch. Dist. No. 6 v. State*, 2005 MT 69.

²⁹⁸ See, e.g., James S. Liebman, *Implementing Brown in the Nineties: Political Reconstruction, Liberal Recollection, and Litigatively Enforced Legislative Reform*, 76 VA. L. REV. 349, 428 (1990) (“By enacting stricter and more comprehensive minimum educational standards, the states

Judicial use of legislatively mandated learning standards to define educational adequacy is shaped by theoretical concerns about the proper role of the courts in school finance litigation. Some courts hearing basic adequacy arguments have invoked the “non-justiciable political question doctrine,” which mandates that courts should not rule on issues more properly left to another governmental branch.²⁹⁹ Courts invoking this doctrine have found that defining educational adequacy with specificity requires judges to discuss standards that are neither judicially discoverable nor manageable and have therefore dismissed cases that rely on a state education clause.³⁰⁰ In addition, courts have articulated theoretical concerns in specific regard to the use of legislatively mandated standards to provide substantive content to an education clause. Using standards to define what an education clause requires arguably constitutes a serious violation of the separation of powers—when standards are used to flesh out the requirements of an education clause, a legislature arguably infringes on a state court’s power to determine what a state constitution says and means.³⁰¹

Nevertheless, several courts have used state standards to articulate what an education clause specifically requires. Using standards in this fashion can allow courts to overcome concerns based on the perceived lack of judicial competency to decide what students should know and be able to do.³⁰² Indeed, the concern about judicial competency in the policy arena is much of what animates the non-justiciable political question doctrine.³⁰³ As state standards can provide courts with discoverable and manageable standards for the definition of educational adequacy, courts have weaker grounds to invoke the non-justiciable political question doctrine or cite lack of judicial competency in education as reason for the dismissal of a school finance case.

have absolved the courts of some of the difficult tasks that in the past have discouraged them from entering the adequate-education field and have afforded plaintiffs a doctrinally easier, if not yet easy, row to hoe.”). *But see* Michael Heise, *The Courts, Educational Policy, and Unintended Consequences*, 11 CORNELL J.L. & PUB. POL’Y 633, 636 (2002) (“More recently, litigants have forged a nascent trend of combining educational standards and assessments with school finance adequacy litigation. This trend will accelerate and steepen the courts’ trajectory into educational policymaking.”).

²⁹⁹ *See Baker v. Carr*, 369 U.S. 186, 217 (1962) (articulating six criteria to determine whether a case involves a non-justiciable political question and particularly indicating that courts should not rule on issues where there is a lack of judicially discoverable and manageable standards).

³⁰⁰ *See, e.g., Comm. for Educ. Rights v. Edgar*, 672 N.E.2d 1178 (Ill. 1996); *Coal. for Adequacy and Fairness in Sch. Funding, Inc. v. Chiles*, 680 So.2d 400 (Fla. 1996); *Danson v. Casey*, 399 A.2d 360 (Pa. 1979).

³⁰¹ *See, e.g., CFE*, 801 N.E.2d at 332 (“[S]o to enshrine the Learning Standards would be to cede to a state agency the power to define a constitutional right.”).

³⁰² McUSIC, *supra* note 20, at 91 (stating that the approach of using legislative standards is sound because it allows courts to rely on “the policy established by education experts and endorsed by the legislature or the state department of education.”).

³⁰³ *See supra* notes 299-300 and accompanying text.

Moreover, the precise way in which courts have construed standards has allowed courts to avoid concerns based on the separation of powers. Instead of indicating that legislatively mandated standards conclusively define adequacy, some courts have construed such standards as a *de facto* guide to adequacy.³⁰⁴ That is, courts have construed standards as a useful resource that can help define adequacy, but courts have not actually ceded to another governmental branch the power to define adequacy by enacting standards.

By using state standards in this way, courts have laid the theoretical groundwork for using student performance data to help determine whether students have received an adequate education. Where state standards represent educational adequacy, assessments aligned to state standards can be thought of as also aligned to educational adequacy and able to yield valuable information about whether students are receiving an adequate education. Accordingly, several courts have used data from assessments tied to state standards to help determine whether a state has met the requirements of the relevant education clause.³⁰⁵

In addition to using standards-based assessments to determine whether students are receiving an adequate education, courts hearing school finance cases have begun to examine whether and how well states have implemented standards- and accountability-based reforms. In some recent adequacy cases, courts have explicitly construed the effective implementation of standards- and accountability-based reforms as necessary for a state to fulfill its constitutional burden of providing students with an adequate education.³⁰⁶ While some courts

³⁰⁴ See, e.g., *Campaign for Fiscal Equity v. State*, 719 N.Y.S.2d 475, 484 (N.Y. Sup. 2001) (closely examining student performance against standards but stating “the court must heed the Court of Appeals’ direction to use the new standards with ‘prudence’”); *Hancock v. Driscoll*, No. 02-2978, 2004 WL 877984, at *16 (Mass. Super. Ct., Apr. 26, 2004), *rev’d*, *Hancock v. Comm’r of Educ.*, 822 N.E.2d 1134 (Mass. 2005) (“We shall *presume* at this time that the Commonwealth will fulfil [sic] its responsibility with respect to defining the specifics and the appropriate means to provide the constitutionally required education.” (quoting *McDuffy v. Sec’y of the Executive Office of Educ.*, 615 N.E.2d 516, 554 (Mass. 1993))) (emphasis added); *Columbia Falls Elem. Sch. Dist. No. 6 v. State*, 2005 MT 69 ¶ 26 (“Unless funding relates to needs such as academic standards, teacher pay, fixed costs, costs of special education, and performance standards, then the funding is not related to the cornerstones of a quality education.”).

³⁰⁵ See, e.g., *Hancock v. Driscoll*, No. 02-2978, 2004 WL 877984 (repeatedly reviewing student performance on assessments aligned to standards); *Leandro v. State*, 488 S.E.2d 249, 259 (N.C. 1997) (“Another factor which may properly be considered in this determination is the level of performance of the children of the state and its various districts on standard achievement tests.”).

³⁰⁶ See, e.g., *DeRolph v. State*, 728 N.E.2d 993, 1019 (Ohio 2000) (stating that to provide an adequate education, “states need to have at the heart of their education reform strategy clear and rigorous academic standards, challenging assessments designed to measure progress against those standards, and an accountability system that rewards success and takes action against persistent failure. . . .”); *Columbia Falls Elem. Sch. Dist. No. 6 v. State*, No. BDV-2002-528,

have only vaguely examined the extent to which these reforms are implemented, other courts have conducted detailed examinations—for example, by discussing Massachusetts’ standards-based reforms in the context of school finance litigation, a court repeatedly examined the extent to which curricula and textbooks were aligned with state standards in different districts,³⁰⁷ and whether districts had staff in place to govern the implementation of standards-based curricula.³⁰⁸ Such an examination supported the court’s ultimate inquiry of whether Massachusetts was implementing the standards-based curriculum frameworks effectively as part of providing an adequate education.³⁰⁹ Demonstrating a similar orientation but different emphasis, a New York court construed the effective implementation of the state’s accountability system as central to fulfilling the state’s duty of providing students with an adequate education. Under state law, New York already had an accountability system in place that required the state to identify schools in need of improvement.³¹⁰ The New York Court of Appeals explicitly indicated that the state must determine the extent to which the extant accountability system was tied to an adequate education and modify this system accordingly.³¹¹

In *Claremont School District v. Governor*, the New Hampshire Supreme Court examined the implementation of a standards-based accountability system in the context of school finance reform litigation in the most explicit fashion to date.³¹² The decision in this case was the third major decision issued after over a decade of school finance reform litigation in the state.³¹³ In response to the decision issued in the previous school finance case, the state legislature had attempted several times to create an accountability system.³¹⁴ The plaintiffs in *Claremont* sought a judicial declaration only that the state’s obligation to provide a

2004 WL 844055, at *21 (Mont. Dist. Ct. Apr. 15, 2004) (stating that to provide an adequate education, Montana needs to “(1) specify its expectations for student performance; (2) develop procedures to measure how well students are meeting those expectations; and (3) hold providers of education services . . . accountable for student performance.”).

³⁰⁷ See, e.g., *Hancock*, 2004 WL 877984 at *22.

³⁰⁸ See, e.g., *id.* at *108 n.126, *112.

³⁰⁹ See *id.* The Massachusetts Supreme Court ultimately reversed the Superior Court’s findings in *Hancock* (largely because the court believed that the state needed longer to implement the remedy required by *McDuffy*). Still, in a dissenting opinion, a state supreme court judge who had ruled in the original *McDuffy* litigation (in which he found the Massachusetts school finance system unconstitutional) also construed the effective implementation of the curriculum standards as crucial to making an adequacy determination. See *Hancock v. Comm’r of Educ.*, 822 N.E.2d 1134, 1166 (Mass. 2005) (Greaney, J., dissenting) (“The factual record establishes that the schools attended by the plaintiff children in the focus districts are not currently implementing the Massachusetts curriculum frameworks in any meaningful way . . .”).

³¹⁰ See N.Y. COMP. CODES R. & REGS. tit. 8, § 100.2[p] (2006).

³¹¹ See *Campaign for Fiscal Equity, Inc. v. State (CFE)*, 801 N.E.2d 326, 348-49 (N.Y. 2003).

³¹² *Claremont Sch. Dist. v. Governor*, 794 A.2d 744 (N.H. 2002).

³¹³ *Id.* at 760.

³¹⁴ *Id.* at 746-50.

constitutionally adequate public education requires it to include standards of accountability and, if so, whether existing statutes, regulations, or rules satisfy this obligation.³¹⁵ After examining statements by members of the legislative and executive branch and the decisions of other state courts, the *Claremont* court found that “standards of accountability are an essential component of the State’s duty to provide a constitutionally adequate education.”³¹⁶ The court then proceeded to examine the state’s implementation of its accountability system. Finding that the state’s accountability system merely encouraged schools to meet educational standards instead of requiring schools to meet such standards, the court further stated, “When the State chooses to use an output-based tool to measure whether school districts are providing a constitutionally adequate education, that tool must be meaningfully applied.”³¹⁷ So, the *Claremont* court appeared to find that the effective implementation of an accountability system is required for its state to fulfill its constitutional duty under the state’s education clause.

Considering accountability systems in this light makes much sense for courts hearing school finance cases. In school finance cases, courts have the colossal task of assessing a variety of inputs and outputs, the relationship of inputs and outputs to each other, and how to construct remedies regarding insufficient inputs or outputs—a task at which courts have often felt incompetent to complete.³¹⁸ The effective implementation of accountability systems can address these concerns. Accountability systems entail an increased flow of information in categories tied to the definition of an adequate education (provided that standards are used to define adequacy) and automatically trigger consequences for school failure to provide such an education. As discussed in Part I.B, NCLB requires states to disaggregate data in several different categories and therefore increases the availability of information about student, school, and district performance.³¹⁹ Indeed, courts hearing school finance suits have expressed that disaggregated data resulting from the operation of accountability systems is useful in assessing the educational performance of states and creating appropriate remedies.³²⁰ Instead of being forced to exercise continual oversight

³¹⁵ See *Claremont*, 794 A.2d.

³¹⁶ See *id.* at 752.

³¹⁷ See *id.* at 758.

³¹⁸ See cases listed *supra* note 300 and accompanying text; see also J. Steven Farr & Mark Trachtenberg, *The Edgewood Drama: An Epic Quest for Education Equity*, 17 YALE L. & POL’Y REV. 607, 690 n.465 (1999) (quoting the unpublished statement of a Texas trial judge in regard to a school finance case, “I don’t want to sit here and listen for weeks and weeks and weeks to experts from all over the country. I don’t know how to figure adequacy anyway. . . .”).

³¹⁹ See *supra* note 53 and accompanying text.

³²⁰ See, e.g., *Montoy v. State*, No. 99-C-1738, 2003 WL 22902963, at *42 (Kan. Dist. Ct. Dec. 2, 2003) (“When these broad averages are disaggregated, it becomes clear that many categories of

over the minutia of a state's education policy, a properly functioning accountability system can do much of the work and relieve the court from delving too deeply into technical educational matters.

Given the growing intersection between school finance litigation and policies governing standards and accountability, school finance litigation has also begun to directly involve issues related to NCLB. All the state standards used by courts to define educational adequacy are the same as the standards used to satisfy NCLB requirements.³²¹ NCLB requires states to implement only one accountability system to satisfy both state and federal requirements, and as discussed above, courts have construed the implementation of state-level accountability systems as part of fulfilling their constitutional duty.³²² And even though NCLB was enacted only recently, courts hearing school finance cases have already begun to discuss NCLB explicitly in their opinions and orders. In at least two cases, courts have indicated that states must more fully fund NCLB as part of fulfilling their constitutional duty.³²³ One state supreme court has even indicated expressly that Title I NCLB funds may be considered as an educational input used by a state to provide its students with a constitutionally adequate education.³²⁴ Indeed, it is only

Kansas students (minorities, the poor, the disabled, and the limited English) are failing at alarming rates."); *Hancock v. Driscoll*, No. 02-2978, 2004 WL 877984, at *118 (Mass. Super. Ct., Apr. 26, 2004) (repeatedly reviewing student performance data in the aggregate and disaggregated, and stating that "[i]n the past ten years the Commonwealth has adopted a standards based approach to public school education. As a result, there are now a set of objective criteria or measures that may be used to assess the quality of education being provided. The department and the board use them, and clearly other observers may as well. I find that the student assessment data just summarized support the findings set out above that the plaintiff students . . . are not receiving an adequate education . . .").

³²¹ See JIMMY KIM & GAIL L. SUNDERMAN, *LARGE MANDATES AND LIMITED RESOURCES: STATE RESPONSE TO THE NO CHILD LEFT BEHIND ACT AND IMPLICATIONS FOR ACCOUNTABILITY 17* (2004) ("In building accountability systems to comply with NCLB, states layered the new federal requirements on top of existing systems.").

³²² See *supra* note 107 and accompanying text.

³²³ See *Montoy*, 2004 WL 1094555, at *13 (stating that the "new funding plan must provide resources necessary to close the 'achievement gap' and comply with state accreditation standards, *No Child Left Behind*, and all other relevant statutory and rule requirements.") (emphasis added). Another court indicated that its state had failed to provide an adequate education even without "extra needs that have not been factored in such as the unknown costs of the NCLB." *Columbia Falls Elem. Sch. Dist. No. 6 v. State*, No. BDV-2002-528, 2004 WL 844055, at *23 (Mont. Dist. Ct. Apr. 15, 2004). Although this court did not explicitly state that NCLB must be fully funded to fulfill the state's constitutional burden, the court's reasoning implies that this must be so. The court wrote that the state must "hold providers of education services . . . accountable for student performance. The logic of the approach implies that a state will assure that sufficient resources are available in all school districts, if not all schools, so that they can reasonably be expected to meet state standards." *Id.* at *21. As Montana's accountability system was developed after NCLB was passed and in direct response to NCLB, the order to more fully fund education in regard to standards and accountability applies directly to the policies Montana has adopted to fulfill NCLB requirements.

³²⁴ See *Hoke County Bd. of Educ. v. State*, 599 S.E.2d 365, 395 (N.C. 2004) (stating, "[W]e conclude that the trial court's consideration of Title I funds did not violate . . . the education

a small and logical extension of this reasoning that the standards and accountability system provided by a state under NCLB may be considered when determining whether a state has provided its students with a constitutionally adequate education as well. Thus, even though NCLB includes somewhat new requirements regarding testing and accountability, the legal reasoning used to evaluate educational adequacy has begun to expand to encompass issues directly related to the implementation of NCLB mandates.

In sum, recent developments in school finance law have facilitated judicial consideration of issues related to standards and accountability. Courts have used standards to define what constitutes educational adequacy and have used assessments tied to standards to determine whether students have received an adequate education. Courts have also issued orders regarding the implementation of accountability systems to ensure that students receive an adequate education. In doing so, courts have begun to directly impact NCLB's implementation. These recent developments can serve as the basis for a new legal approach to address NCLB implementation problems.

C. *The NCLB Adequacy Approach*

This section details the new approach that courts could use to address NCLB implementation problems. This new approach, hereinafter referred to as the "NCLB Adequacy Approach," would allow courts to examine NCLB implementation problems directly through the lens of educational adequacy. In short, courts employing the NCLB Adequacy Approach would construe the effective implementation of NCLB mandates regarding standards and accountability as necessary for a state to fulfill its constitutional burden under the relevant education clause.

The legal basis for this new approach directly grows out of the reasoning employed by courts that have decided recent school finance cases. In order for a court to employ this approach, a plaintiff would first bring a claim in the proper state court by arguing that a state is not implementing NCLB effectively and is thereby failing to provide its students with an adequate education. Because the mandate to provide students with an adequate education is vague, a court would have to define with specificity what constitutes educational adequacy in the state. Following the reasoning of the recent school finance cases

provisions of our state's Constitution. In addition, we hold that the relevant provisions of the North Carolina Constitution do not forbid the State from including federal funds in its formula for providing the state's children with the opportunity to obtain a sound basic education.").

discussed above, a court would use state standards to define educational adequacy.

The use of state standards to define adequacy in this context makes sense for several reasons. This use of standards would relieve courts of the difficult decision about how to define adequacy, a decision that many courts have expressed their lack of competency to make.³²⁵ Indeed, the use of standards in this manner could remedy the judicial concerns that led to the dismissal of plaintiffs' claims under the non-justiciable political question doctrine—by using legislatively mandated standards to define adequacy, a court could overcome the concern that the standard for educational adequacy is neither judicially discoverable nor manageable.

Moreover, judges could use legislatively mandated standards in a way that may not raise concerns about the separation of powers. A court could construe these standards as practical suggestions to the judiciary about how the education clause should be defined. If a court does not wish to follow these suggestions, a court can choose to define the education clause differently.³²⁶ Indeed, what it takes to create democratically and economically capable citizens may change over time—the knowledge and skills necessary to make political decisions and be economically competitive do not remain static, and a court could decide that state standards are not well aligned with these ultimate purposes.³²⁷ Under this logic, a court at any time could order a state to revise its standards. This type of activity, however, would raise obvious competency concerns—the basic reason for courts to adopt state standards in the first place lies in courts' perceived incompetence to define adequacy by themselves. So, even though courts technically would possess the power to define adequacy under the NCLB Adequacy Approach, it makes much sense for courts using this approach to consider carefully their states' suggestions about adequacy and adopt these suggestions unless they are egregiously deficient.³²⁸

³²⁵ See *supra* note 318 and accompanying text.

³²⁶ Courts that have looked to state standards have often acted as if standards can provide a useful guide to what constitutes educational adequacy without explicitly equating standards and adequacy. See *supra* note 304 and accompanying text.

³²⁷ See James G. March & Johan P. Olsen, *Democracy and Schooling: An Institutional Perspective*, in REDISCOVERING THE DEMOCRATIC PURPOSES OF EDUCATION 148, 158 (Lorraine M. McDonnell, P. Michael Timpane & Roger Benjamin eds., 2000) (“Democratic institutions seek to provide the processes, resources, and abilities [to students] necessary to learn from experience and to match the changing political environment.”).

³²⁸ This part of the NCLB Adequacy Approach aligns well with the suggestions recently made by prominent legal scholars. Professors Liebman and Sabel suggested that the different branches of government should collaborate more in the field of education. These scholars specifically noted the advantages of the judiciary using NCLB mandated standards to define an adequate education. See James S. Liebman & Charles L. Sabel, *A Public Laboratory Dewey Barely Imagined: The Emerging Model of School Governance and Legal Reform*, 28 N.Y.U. REV. L. & SOC. CHANGE 183, 299 (2003) (“Each step states take to comply with these requirements

A court using the NCLB Adequacy Approach would then proceed to the next step of actually determining whether a state is failing to provide students with a constitutionally adequate education. In order to determine whether students are receiving a constitutionally adequate education, a court would follow the lead of the other courts that have heard recent school finance cases and examine different performance indicators. Disaggregated student performance data on NCLB assessments certainly constitutes one useful indicator for courts to examine.³²⁹ The extent to which schools in a state make AYP can potentially constitute another useful indicator—as AYP is meant to represent how well a school is performing and improving, the extent to which schools in a state make AYP can serve as a window into how well schools are providing students with an adequate education. To be sure, the measurement of organizational performance and AYP is far from perfect.³³⁰ However, AYP or other similar measures of school or district performance at least focuses on organizational entities instead of individuals. In this respect, measures like AYP (if validly constructed) can arguably provide courts with useful information about the quality of education being provided by different state-level organizational entities to students. As states, districts, and schools have generally had a difficult time boosting student performance levels to proficient under state standards³³¹ and ensuring that schools make AYP,³³² these indicators would probably suggest in most cases that a state is failing to

provides plaintiffs in failing schools and judges adjudicating their claims with the definition of an adequate education and with effective ways to achieve it. By requiring states to provide that definition, the NCLB again removes what in the past has been a major obstacle to successful adequacy suits.”).

³²⁹ As discussed *supra* note 320, some courts have found disaggregated student performance data especially useful in school finance suits. To be sure, I do not suggest that courts should construe student data as sufficient by itself to indicate that students have or have not been provided with the constitutionally required opportunity to receive an adequate education. There are a host of factors outside of schools that influence student performance, and a state may be able to provide students with the constitutionally required opportunities even if students do not actually reach proficiency. See, e.g., Nicholas Zill, *Family Change and Student Achievement: What We Have Learned, What It Means for Schools*, in *FAMILY-SCHOOL LINKS: HOW DO THEY AFFECT EDUCATIONAL OUTCOMES?* 139 (Alan Booth & Judith F. Dunn eds., 1996) (analyzing the effects of family change on student achievement).

³³⁰ See *supra* notes 96-100 and accompanying text.

³³¹ For example, during the 2004-2005 school year, 49.2% of 11th graders were not proficient in mathematics, and 34.9% of 11th graders were not proficient in reading in Pennsylvania. During the same year, 37.1% of 8th graders were not proficient in mathematics, and 36.0% of students were not proficient in reading in Pennsylvania. See PENNSYLVANIA DEP'T OF EDUC., STATEWIDE PERFORMANCE LEVEL RESULTS 2004-2005 (2005), http://www.pde.state.pa.us/a_and_t/lib/a_and_t/Stateperformancelevelresults04-05.pdf. Other states have had similar problems ensuring that students reach proficiency; Lynn Olsen, *As AYP Bar Rises, More Schools Fail*, EDUC. WK, Sept. 20, 2006, available at <http://www.edweek.org>.

³³² During the 2004-05 school year, 21,350 schools failed to make AYP. While this number represents a slight decrease from the previous year, it appears that the number of schools failing to make AYP will soon rise. See NATIONAL EDUCATION ASSOCIATION, *supra* note 13.

provide students with an adequate education as defined by state standards.

Assuming that the performance of students and schools within a state does not indicate that a state is providing students with an adequate education, a court then is well positioned to examine the extent to which NCLB is being effectively implemented within a state. In some of the school finance cases discussed above, the effective implementation of a state accountability system was construed as central to a state's ability to provide students with an adequate education.³³³ Courts employing the NCLB Adequacy Approach would follow the lead of these courts and construe the implementation of the NCLB mandated standards-based accountability system as necessary to comply with the state constitution. As NCLB requires states receiving Title I funds to administer a single accountability system for the entire state, the accountability system used to fulfill NCLB mandates must also fulfill the requirements of the state education clause.³³⁴ Moreover, as NCLB mandated accountability systems are policies directly tied to increasing student performance in specific relation to state standards, it would make sense for a court to order states to implement these accountability systems effectively under a state education clause. As opposed to other possible state policies, such as a class size reduction policy, NCLB accountability systems are built to ensure that students receive the level of education specifically defined by state standards.³³⁵ Such an accountability system would also relieve a court from delving too deeply into technical matters of education policy by increasing the flow of information about student and school performance, and automatically triggering responses for insufficient performance.³³⁶ Finally, ordering a state to implement NCLB effectively would relieve the court from crafting a new solution to the problems plaguing a state's education system. In this case, a court would simply order a state to implement

³³³ See *supra* notes 298-307 and accompanying text.

³³⁴ 20 U.S.C.S. § 6311(b)(2)(ii) (LEXIS through 2006 legislation) (stating that each State NCLB accountability system shall "be the same accountability system the State uses for all public elementary schools and secondary schools or all local educational agencies in the State . . .").

³³⁵ At any time, there are multiple education policies being implemented within a state. Class size is but one. However, few of these policies are explicitly tied to state standards as educational accountability policies are. Several scholars have focused on the problems that arise from incoherent or fragmented education policies and have argued that policymakers should focus on creating more coherent education policies. See, e.g., David K. Cohen, *Policy and Organization: The Impact of State and Federal Educational Policy on School Governance*, HARV. EDUC. REV., Nov. 1982, at 474 (tracing how incoherent education policy mandates result from different layers of educational governance); O'Day & Smith, *supra* note 23, at 250 (proposing "systemic reform" as a remedy to the problems of policy incoherence).

³³⁶ This part of the NCLB Adequacy Approach also well aligns with the suggestions made by Professors Liebman and Sabel. See Liebman & Sabel, *supra* note 328, at 299 (stating that NCLB's prescribed consequences for insufficient performance can "solve the justiciability problem long associated with claims for adequate levels of education.").

effectively a comprehensive education policy that the state had adopted but failed to implement effectively thus far.

Accordingly, a court using the NCLB Adequacy Approach could order a state to remedy specific problems that have plagued NCLB's implementation. While there are several types of problems that a court could potentially examine, a few major types of problems stand out. A court could examine the extent to which NCLB mandates regarding standards and accountability are underfunded and order a state to ensure that these mandates are sufficiently funded.³³⁷ Without such funding, it would be difficult to claim that a state's accountability mechanisms are fulfilling the constitutional goal of providing students with an adequate education. Moreover, a court could order a state to provide districts with more technical assistance to implement testing and accountability provisions if such assistance is needed.³³⁸ Without technical assistance, many districts (such as Reading) are having trouble implementing NCLB testing and accountability provisions. If more technical assistance could help districts implement NCLB more effectively, the order to provide more assistance would constitute a well-targeted remedy to the problems that states face implementing NCLB.

Following similar reasoning, a court could examine the extent to which a state's testing practices are valid.³³⁹ The policy logic of NCLB is predicated upon the assumption that the interpretations of NCLB data made by state governments are justifiable. Without justifiable interpretations of this data, it is impossible to determine whether states are complying with their constitutional burden of providing students with an adequate education. Moreover, without justifiable interpretations of this data, it is impossible to ensure that NCLB consequences actually are aligned with their statutory purpose of providing students with an education adequate to meet state standards (and hence the requirements of the state education clause). Thus, a court could, for example, order a state to devote more funds and time to the development of data management systems and the administration of

³³⁷ States are increasingly conducting cost studies to determine the cost of NCLB mandates related to the implementation of NCLB standards and accountability provisions. *See, e.g.*, OFFICE OF THE LEGISLATIVE AUDITOR, STATE OF MINN., EVALUATION REPORT: NO CHILD LEFT BEHIND (2004) (analyzing the cost to implement NCLB in Minnesota); CONN. STATE DEP'T OF EDUC., *supra* note 75 (analyzing the cost to implement NCLB in Connecticut).

³³⁸ In providing districts with more technical assistance, states could undertake a variety of actions, such as providing district personnel with written or oral guidance. This guidance could in turn help districts complete several kinds of activities, such as implementing the supplemental educational services provisions of NCLB.

³³⁹ Unfortunately, precisely what it takes to ensure that testing practices in the case of NCLB are sufficiently valid is not fully clear. *See* Benjamin Michael Superfine, *At the Intersection of Law and Psychometrics: Explaining the Validity Clause of No Child Left Behind*, 33 J.L. & EDUC. 475 (2004) (analyzing ambiguities in the NCLB requirement that states must engage in valid testing practices, specifically in regard to the consequential aspect of validity).

native language tests. Without well-functioning data management systems and the administration of native language tests in certain areas with high LEP populations, testing and accountability systems may not yield justifiable results.

Similarly, a court could order a state to use criterion-referenced tests in situations where psychometric standards indicate that such use would result in more valid interpretations of data. Without the use of such tests, NCLB accountability systems also may not yield justifiable results. This list of problems that courts could address in regard to the validity of NCLB testing practices is certainly not exhaustive, and a court would have to consider in each case which problems apply and need to be addressed. Without such consideration, there would be little assurance that NCLB accountability measures flow from unacceptable student and school performance, and fulfill their purpose of providing students with an adequate education.

By using the NCLB Adequacy Approach to address NCLB implementation problems, courts would be well positioned to avoid the major hurdles that have thus far emerged in the cases that have targeted NCLB. Even in the absence of a Section 1983 action, private plaintiffs could sue under a state education clause to enforce NCLB provisions related to standards and accountability.³⁴⁰ As the federal government (instead of a state government) would be the defendant in such a suit, standing would not constitute a difficult legal hurdle as it did in *CLE II*.³⁴¹ By examining a state's implementation of NCLB without the deferential standard employed by the *Reading I* court in the review of an administrative agency's decision, a court would be better positioned to make a determination that NCLB is not being implemented in accordance with its statutory requirements.³⁴²

Moreover, the specific language of somewhat deferential provisions would not prevent a court from ordering changes in NCLB's implementation. In order to ensure that NCLB testing practices are valid and are hence aimed at providing students with an adequate education as defined by state standards, a court could rule that such tests are required under the state education clause instead of under the native language testing provision. Without such tests, a state may not be able to fulfill its goal of implementing an effective testing and accountability system and thereby providing all students with an adequate education. Similarly, courts could avoid the Unfunded Mandates Provision and instead rule that the education clause requires states to fund NCLB testing and accountability mandates more fully. Without sufficient funds, a state also cannot implement an effective testing and

³⁴⁰ See *supra* notes 172-187 and accompanying text.

³⁴¹ See *supra* notes 221-230 and accompanying text.

³⁴² See *supra* notes 193-196 and accompanying text.

accountability system to fulfill the requirements of the state education clause. Indeed, as the basic logic of adequacy has traditionally allowed courts to address educational entities' capacities to provide students with an adequate education, the approach taken in third wave school finance cases appears to constitute a natural legal response to the underlying capacity problems NCLB has experienced.

D. *The Limitations of the NCLB Adequacy Approach*

Although the NCLB Adequacy Approach could potentially enable the courts to be a more effective venue for addressing NCLB implementation problems, this approach entails some important limitations. First, this approach only appears potentially viable in state courts that find adequacy arguments persuasive. In states where state supreme courts have interpreted the state education clause as insufficient to support an adequacy argument, the NCLB Adequacy Approach would probably not prove effective. According to a recent report, 32 states have faced adequacy suits, and plaintiffs have prevailed in 14 of these suits.³⁴³ However, the rate of plaintiff success in adequacy cases appears to be rising as supreme courts in seven states have ruled in favor of plaintiffs between 2003 and 2005.³⁴⁴ So, the NCLB Adequacy Approach could probably be employed by courts only in a limited, but growing number of states.

Second, the NCLB Adequacy Approach has limitations in regard to its solution for NCLB funding problems. As the NCLB Adequacy Approach would enable a court to examine only a *state's* duty under its own constitution, the federal government would have no responsibility to provide extra funds, and states would be left to increase NCLB funds on their own. As discussed in Part I.C, many states were in the midst of a severe budget crisis when NCLB was enacted and simply may not have enough funds as is.³⁴⁵ Thus, if a court were to order a state to increase NCLB in order to fulfill its constitutional duty, the state would be forced to pull a potentially large amount of funds from other state policy areas, such as health or housing. The desirability of such financial redistribution and educational prioritization would probably vary from state to state, and an analysis of the effects of such redistribution should be conducted before a plaintiff suggests that a court should employ the NCLB Adequacy Approach. However, if a number of reformers were to successfully employ this approach and force states to make difficult funding decisions, the federal government

³⁴³ See Griffith, *supra* note 268.

³⁴⁴ See *id.*

³⁴⁵ See *supra* note 71 and accompanying text.

would likely receive much political pressure to address NCLB funding levels.

Third, there are some important implementation problems that the NCLB Adequacy Approach would not well position a court to address. For example, the approach would not well position a court to address the uneven quality of state standards across the country.³⁴⁶ Courts hearing school finance cases largely equated standards and adequacy because they lacked the competency to define an adequate education by themselves. While some of these courts were careful not to expressly indicate that state legislatures possess the power to define adequacy in each state, the logic of these decisions generally dictates that the courts defer to the legislatures' judgments about what constitutes adequacy. Indeed, in the school finance cases in which the courts used standards as a proxy for adequacy, the courts never considered whether they should order their states to reformulate their standards to make them more difficult. Accordingly, an adequacy-based framework appears ill suited for allowing courts to address the quality of state standards.

Similarly, an adequacy-based framework would not easily facilitate the judicial examination of the validity of AYP determinations; as discussed in Part II.A, statistical methods for making AYP determinations are in part due negotiations between state departments of education and the U.S. Department of Education.³⁴⁷ States generally have incentives to have more valid AYP determinations—where the “N” number is higher, fewer schools would generally fail to make AYP, and states would be forced to implement fewer costly accountability sanctions. However, ED in many cases has required the “N” number to be lower so that schools face a greater threat of accountability sanctions. Because an education clause governs a state's provision of education and not the federal government's, an adequacy-based framework may not constitute an effective lens for courts to address the problems of AYP invalidity.

The problem states have faced implementing the HQT mandate constitutes another issue that the NCLB Adequacy Approach would not well position a court to address. The approach is based on the ways that courts have already considered testing and accountability systems in the context of school finance litigation, and the approach is only an extension of this logic. States' lack of highly qualified teachers is certainly an important policy problem. But the presence of highly qualified teachers is not an essential element of a well-functioning testing and accountability system, and does not necessarily flow from the logic employed by the courts discussed above that ruled in recent

³⁴⁶ See *supra* note 96 and accompanying text.

³⁴⁷ See *supra* note 130 and accompanying text.

school finance cases.³⁴⁸ Indeed, I should emphasize that, although education clauses include vague language and arguably allow courts to address a broad range of policy problems, I do not believe it is appropriate for the courts to use education clauses to deal with several problems in education policy without a good deal of help from other governmental branches. As mentioned in the Introduction, courts have not always constituted the most effective venue for making changes in education policy, in part because of their lack of competence in this field.³⁴⁹ However, by placing clear boundaries on the NCLB Adequacy Approach and limiting it to the logic present in recent school finance cases, the NCLB Adequacy Approach can potentially constitute a useful and carefully directed tool to make courts a more effective venue for addressing some of the major problems plaguing NCLB.

CONCLUSION

NCLB has the potential to change the educational landscape in the United States and arguably has already begun to do so. Building off previous federal statutes such as Goals 2000 and the IASA, NCLB requires states to implement systems of standards and accountability in order to receive Title I funds. However, since NCLB was enacted, it has faced an array of criticism and implementation problems. States, districts, and schools have found it particularly difficult to implement effectively NCLB provisions regarding the measurement of student performance and AYP, and the institution of prescribed consequences for failure to make AYP. These problems appear to stem in large part from the limited capacities that state entities possess to implement these accountability provisions effectively.

Given the politics surrounding NCLB and the implementation problems it has faced, several different types of entities, including private individuals, non-profit organizations, unions, districts, and states, have been parties in suits related to NCLB's implementation. Due in large part to the legal hurdles facing NCLB plaintiffs and the lack of attention in NCLB to providing state-level entities with the various capacities to implement NCLB, the courts have not constituted an effective venue for addressing these problems. Nevertheless, in the

³⁴⁸ It is important to note that courts hearing school finance cases have certainly addressed teacher quality through state education clauses. *See, e.g.*, Campaign for Fiscal Equity, Inc. v. State (CFE), 801 N.E.2d 326, 333-35 (N.Y. 2003). But in these instances, teacher quality appears to be an analytically distinct issue from testing and accountability.

³⁴⁹ As discussed in Part II.B, some courts have applied the non-justiciable political question doctrine to school finance cases and have deplored the use of education clauses as a basis for legal arguments precisely because these clauses are vague and do not contain judicially discoverable or manageable standards. *See supra* notes 299-300 and accompanying text.

context of school finance litigation, legal doctrine has begun to develop that appears able to allow courts to address NCLB implementation problems more effectively. This legal doctrine provides the basis for the NCLB Adequacy Approach, which has the potential to allow courts to address major NCLB implementation problems specifically related to implementation of NCLB testing and accountability mechanisms.

However, even if the NCLB Adequacy Approach were to prove successful, it is still unclear whether courts would constitute the most effective venue for addressing NCLB implementation problems. Reformers have already employed a variety of different strategies to influence the implementation of NCLB. As mentioned in Part I.C, at least 21 state legislatures have considered bills related to the implementation of NCLB.³⁵⁰ These bills embody a variety of different approaches. While some of these bills would work within the structure of NCLB to provide better support for the “effective” portions of NCLB,³⁵¹ other bills would request Congress to amend NCLB to provide for more waivers and increased federal funding.³⁵² Moreover, some bills would direct states or schools not to comply with NCLB,³⁵³ and at least one bill would require the state attorney general to bring suit against the federal government for the funding shortfall.³⁵⁴

Reformers could alternatively employ a non-legislative approach to address NCLB implementation problems. For example, reformers could push states to follow the strategy Texas has pursued to lessen the effects of school failure to make AYP. For the 2003-2004 school year, Texas approved a series of exemptions from NCLB requirements for schools, in clear contravention of NCLB language.³⁵⁵ As a result of these exemptions, many more schools made AYP than otherwise would have made AYP under a strict application of NCLB requirements.³⁵⁶ Although ED has the power to withhold Title I funds from Texas in order to enforce NCLB, as of this writing, ED has not done so for the

³⁵⁰ See *supra* note 104 and accompanying text.

³⁵¹ For example, a bill proposed in Minnesota would require the state commissioner of education to seek waivers from the “ineffective” portions of NCLB. However, this bill also would require the commissioner of education to report on policies and programs related to effective portions of NCLB, including those related to establishing school accountability and providing supplemental services. See H.F. 23, 84th Sess. (Minn. 2005).

³⁵² See H.J.M. 27, 73rd Leg. Assem., Reg. Sess. (Or. 2005).

³⁵³ See, e.g., H.B. 59, 2005-2006 Sess. (Vt. 2005).

³⁵⁴ See, e.g., L.D. 676, 122nd Leg., 1st Spec. Sess. (Me. 2005).

³⁵⁵ The Texas Department of Education granted to schools exemptions from the “one percent rule.” Under federal regulations, schools and districts cannot make AYP if they test more than one percent of their students against out of grade level standards. Texas gave exemptions to schools and districts from this requirement. See David J. Hoff, *Texas Stands Behind Own Testing Rule*, EDUC. WK., Mar. 9, 2005, at 1, 23, available at <http://www.edweek.org>.

³⁵⁶ Without the exemptions granted by Texas, 1718 of the state’s 7813 schools would not have made AYP. With the exemptions, only 402 of the state’s schools did not make AYP. See *id.*

approval of these exemptions.³⁵⁷ If reformers simply want to avoid the implementation of demanding accountability measures, pushing states to follow Texas may constitute the most effective strategy in the end.

However, if reformers wish to pursue a less adversarial strategy, they could push states to work more closely with ED and Margaret Spellings, the current Secretary of Education. Recently, ED indicated that it will allow states, districts, and schools more flexibility in the implementation of NCLB.³⁵⁸ Secretary Spellings accordingly announced a pilot program where interested and qualified states can submit proposals for developing and using “growth” models to measure school progress instead of the model that states must currently use to determine AYP.³⁵⁹ If states use growth models, schools may be allowed to make AYP if their performance is sufficiently better than their performance in the previous year; school performance may not have to be compared to set AYP benchmarks that apply to every school across a state, and fewer schools may fail to make AYP.³⁶⁰ If state entities are allowed such flexibility, they may be able to craft approaches to measuring AYP and instituting consequences that are better aligned with their capacities to do so. With the reauthorization of the ESEA looming in 2007, states may be able to pursue such a strategy and “wait out the storm.”³⁶¹

If reformers wish to influence NCLB’s implementation, such alternative strategies (or a combination of such strategies) may prove quite useful. As discussed in the Introduction, scholars have shown that court-driven reform in education has experienced its share of limitations.³⁶² Courts sometimes face hostile political climates and vague legal doctrine when addressing technical educational issues, and often lack the institutional capacities to craft effective rulings in such

³⁵⁷ ED has already withheld Title I funds from states for other infractions. For example, ED withheld nearly \$800,000 from Georgia for noncompliance with the NCLB requirement to align state tests with content standards systems. *See, e.g.,* Robelen, *supra* note 110. ED also withheld \$444,000 from Texas for failure to meet the NCLB deadline of informing parents of their rights to transfer out of schools that have failed to make AYP. *See Hoff, supra* note 110, at 27. What ED will do in the case of Texas for granting exemptions is unclear as of this writing.

³⁵⁸ *See* U.S. Secretary of Education Margaret Spellings, Raising Achievement: A New Path for No Child Left Behind, Speech at Mount Vernon, VA (Apr. 7, 2005), available at <http://www.ed.gov/news/speeches/2005/04/04072005.html>.

³⁵⁹ *See* U.S. Department of Education, Secretary Spellings Announces Growth Model Pilot, Addresses Chief State School Officers’ Annual Policy Forum in Richmond (Nov. 18, 2005), available at <http://www.ed.gov/news/pressreleases/2005/11/11182005.html>.

³⁶⁰ *See* Darrel Drury & Harold Doran, *The Value of Value-Added Analysis*, POL’Y RES. BRIEFS, Jan. 2003, at 1 (describing the concept behind a value-added analysis and particularly noting that this analysis adjusts for non-school related variables such as socio-economic status).

³⁶¹ *See* Press Release from U.S. Department of Education, Secretary Spellings Praises Schools and Students Raising Achievement Under No Child Left Behind in Pittsburgh, Pennsylvania, Sept. 14, 2006, <http://www.ed.gov/news/pressreleases/2006/09/09142006.html>.

³⁶² *See supra* note 20 and accompanying text.

environments. In the case of NCLB, some of these features are present—although the political climate may be swinging to the side of reforming key aspects of NCLB, the law is still littered with vague provisions, and the courts may not be the best place to flesh out these ambiguities.

Still, looking solely outside the courts likely does not constitute an effective strategy for addressing NCLB design and implementation problems as well. As discussed throughout this Article, it appears that several NCLB provisions are not drafted in a way that can be well implemented, and this Article has not even addressed the much thornier issue of whether well implemented standards-based accountability mechanisms can fulfill their ultimate goal of boosting student achievement.³⁶³ Of course, NCLB was drafted with some concerns about the efficacy of federal education law. NCLB includes the phrase “scientifically based” over one hundred times to describe the types of assistance that various agencies must provide to schools and districts under NCLB, and to describe research supported by grants provided by NCLB. But as this Article illustrates, such language clearly has not been effective to avoid the array of implementation problems that NCLB has faced (and the unintended problems that NCLB may also create). By itself, the statutory language of NCLB has proved insufficient to effectively leverage standards- and accountability-based reforms, and agency action to implement these reforms has proven ineffective at dealing with this basic problem as well. In this respect, the courts have not merely served as a venue for reformers to influence perceived problems that NCLB has experienced; the courts also constitute a symptom of systemic issues underlying NCLB itself, and

³⁶³ In fact, as the empirical evidence suggesting that large-scale accountability systems actually increase student achievement is quite mixed, it is uncertain whether such accountability systems can actually be effective. See, e.g., Audrey L. Amrein & David C. Berliner, *High-Stakes Testing, Uncertainty, and Student Learning*, EDUC. POL’Y ANALYSIS ARCHIVES, Mar. 28, 2002, <http://epaa.asu.edu/epaa/v10n18> (concluding that accountability systems targeted at school and district performance may have no effect or even a negative effect on student performance). But see DAVID GRISSMER & ANN FLANAGAN, NAT’L EDUC. GOALS PANEL, *EXPLORING RAPID ACHIEVEMENT GAINS IN NORTH CAROLINA AND TEXAS* (1998) (finding that two states with strong accountability systems which had consequences for schools and districts made much larger gains on the NAEP between 1992 and 1996 than other states).

³⁶³ Thus far, there is little evidence to indicate that schools currently possess the various sorts of capacities they need to respond to the pressure put upon them by accountability statutes such as NCLB to raise student achievement. See, e.g., Richard Elmore, *Accountability and Capacity*, in *THE NEW ACCOUNTABILITY* 195 (Martin Carnoy, Richard Elmore & Leslie S. Siskin eds., Falmer Press 2003) (indicating that teachers do not know how to teach effectively the content and skills embodied in state standards); Richard Lemons, Thomas Luschei, & Leslie Siskin, *Leadership and the Demands of Standards-Based Accountability*, in *THE NEW ACCOUNTABILITY*, *supra*, at 99 (Martin Carnoy, Richard Elmore & Leslie S. Siskin eds., Falmer Press 2003) (indicating that attempts by states to provide technical assistance and professional development to teachers and administrators around curriculum content, standards, and performance measurements have been generally ineffective).

the litigation discussed in this Article highlights the “pressure points” in NCLB.

Accordingly, I suggest that the NCLB Adequacy Approach should be used as part of a greater effort. In isolation, the various governmental branches likely do not possess the capacities to produce effective, federally driven standards- and accountability-based reform. But by working together, the branches may be able to accomplish this goal. In order for the courts to serve as a more effective venue for interpreting and enforcing the law, they need laws that do not face so many drafting and design problems. As I have suggested in this Article, laws outlining standards- and accountability-based reform (and agency interpretations of these laws) may serve to flesh out states’ greater legal duties under their own state constitutions. For a short period of time in the late 1960s, such an arrangement proved quite effective at dismantling desegregation,³⁶⁴ and other scholars have recently suggested greater cooperation between governmental branches as a desirable organizational arrangement to address other similarly pressing educational problems.³⁶⁵ In short, the NCLB Adequacy Approach appears to constitute a useful approach for the courts to take when addressing the problem of federally driven standards- and accountability-based reforms, but it should be part of a broader effort to improve the underlying structure and implementation of these reforms, if these reforms are to be implemented at all.

³⁶⁴ See ORFIELD, *THE RECONSTRUCTION OF SOUTHERN EDUCATION: THE SCHOOLS AND THE 1964 CIVIL RIGHTS ACT* (1969) (arguing that the courts provided clear leadership to dismantle desegregation only after Congress passed the Civil Rights Act of 1964 and after the Johnson administration employed both the threats of cutoff of federal funds and the Justice Department’s power to file lawsuits).

³⁶⁵ See Liebman and Sabel, *supra* note 328, at 278-83.