

2-25-2016

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### Recommended Citation

Geier, Brett (2016) "The Federal Government's Usurpation of Local Control from Public Schools: A Historical Analysis of Politics, Law, and Reaction," *Barry Law Review*: Vol. 21 : Iss. 1 , Article 2.  
Available at: <https://lawpublications.barry.edu/barryrev/vol21/iss1/2>

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## THE FEDERAL GOVERNMENT'S USURPATION OF LOCAL CONTROL FROM PUBLIC SCHOOLS: A HISTORICAL ANALYSIS OF POLITICS, LAW, AND REACTION

Brett Geier\*

### I. INTRODUCTION – THE FEDERAL GOVERNMENT INCREASES ITS INFLUENCE IN PUBLIC EDUCATION

The federal government's involvement in public education, while intentionally absent from the Constitution,<sup>1</sup> is increasing its influence from tangential to a direct effect. Various federal initiatives have infused financial resources into the public education system with the attempt to ameliorate areas of greatest need, while providing direct policy control.<sup>2</sup> The last dozen years have witnessed aggressive action by the federal government in the arena of elementary and secondary education.<sup>3</sup> The financial commitment by the federal government is a vehicle to modify programs based on a national model, which usurps some local control.<sup>4</sup> A massive amount of legislation and federal funding sources have been infused into the nation's public (and in some cases parochial) systems to improve the quality of education for pre-K–12 students.<sup>5</sup> The resources provided by the federal government do not support the change sought. In fiscal year 2013, the federal government appropriated only four percent of its entire budget to education, which for states averages to approximately eleven percent of the total amount allocated to public education.<sup>6</sup> Improving the Nation's education system should conjure a unifying sentiment coalescing all political factions. The apolitical culture of

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1. See Karoli, *Founding Fathers Appalled at Attacks on Free Public Education*, THE WINNING WORDS PROJECT (Aug. 20, 2015), available at

[http://www.winningwordsproject.com/Founding\\_Fathers\\_Appalled\\_at\\_Attacks\\_on\\_Public\\_Education](http://www.winningwordsproject.com/Founding_Fathers_Appalled_at_Attacks_on_Public_Education) (noting that the Founding Fathers disagreed about "who should control public education").

2. E.g., No Child Left Behind Act, 20 U.S.C. § 6301 (2001).

3. E.g., American Recovery and Reinvestment Act, 26 U.S.C.A. § 1 (West 2002); 20 U.S.C. § 6301 (2001).

4. See Brandi M. Powell, Comment, *Take the Money or Run?: The Dilemma of the No Child Left Behind Act for State and Local Governments*, 6 LOY. J. PUB. INT. L. 153, 155 (2005) (commenting that to accept federal funding for education, schools must follow rules determined by the government).

5. *Id.* at 157.

6. *Federal Education Budget Overview*, ATLAS (July 8, 2015), available at <http://atlas.newamerica.org/education-federal-budget>.

education has waned and is yielding to a landscape that is wrought with avarice for the financial resources allocated from the public treasury to educate the citizenry.<sup>7</sup> Political actors implore for educational permutations that increase accountability for teachers, administrators, and local boards of education to construct more proficient students that are prepared for global competition. Many of these legislators, bureaucrats, and lobbyists have endorsed the concept of private education or charter school organizations, which accrue public allocations for profit, yet fail to yield substantial improvement in student achievement.<sup>8</sup>

The change in culture is an anathema for traditionalists in the education profession.<sup>9</sup> Developing punitive measures and providing financial resources to incentivize states to endorse federal mandates and abnegate local control detailed in their respective constitutions is the recent mantra of the federal government. Many of the details regarding these new programs are met with consternation of those required to implement these modifications. No Child Left Behind (2002), Race to the Top (2009), and the reauthorization of No Child Left Behind are the impetuses for the massive educational debate permeating throughout the nation.<sup>10</sup> Policy adjustments never before seen in education, combined with a massive infusion of federal monetary resources, have put the Nation's education system in a position to substantially reform or remain at the precipice of complete disaster.<sup>11</sup> This paper will analyze the federal government's history in education and examine the recent explosion of federal regulations, infusion of money, and intrusion into state and local control.

## II. THE HISTORY OF AMERICAN EDUCATION: THE COLONIAL PERIOD TO *BROWN V. BOARD OF EDUCATION* (1954)

The United States is one of the few prominent nations in the world that does not directly oversee a national system of education.<sup>12</sup> The creation of a decentralized education system did not occur by simple happenstance. The Framers of the Constitution were extremely paranoid of the power usurped by the British monarchy prior to America's independence and went to great lengths to attenuate

7. See Joseph P. Viteritti, *The Federal Role in School Reform: Obama's "Race to the Top"*, 87 NOTRE DAME L. REV. 2087, 2088 (2012) (explaining that education was traditionally state regulated, but modern schools compete for funds).

8. See THE CENTER FOR RESEARCH ON EDUCATION, MULTIPLE CHOICE: CHARTER SCHOOL PERFORMANCE IN 16 STATES 7 (2009), available at <http://credo.stanford.edu/reports/> (noting that private schools tend to not outperform public schools).

9. See Nick Morrison, *Education Reform is Driving Teachers out of the Classroom*, FORBES EDUC. (Feb. 3, 2015), available at <http://www.forbes.com/sites/nickmorrison/2015/02/03/education-reform-is-driving-teachers-out-of-the-classroom/> (stating that education reform is causing educators to leave the profession).

10. 26 U.S.C.A. § 1 (West 2002); 20 U.S.C. § 6301 (2001).

11. E.g., Viteritti, *supra* note 7, at 2102 (quoting President Obama that Race to the Top was not only "one of the largest investments in education in American history," but innovative because it allowed states to compete for funding).

12. See Stephen Lurie, *Why Doesn't the Constitution Guarantee the Right to Education?*, ATLANTIC (Oct. 16, 2013), available at <http://www.theatlantic.com/education/archive/2013/10/Why-Doesnt-the-Constitution-Guarantee-the-Right-to-Education/280583/> (noting that most countries ahead of the U.S. in education systems have a constitutional right to education).

the powers of the national government. Separating the major branches of the national government into the executive, legislative, and judicial branches, as well as sharing power among the national, state, and local authorities, demonstrates the goal the Framers had for ensuring a total collection of power at the center was improbable.<sup>13</sup>

Local control of education had its inception in the colonial and early federal periods.<sup>14</sup> American schools began as local entities, which were largely private and religious.<sup>15</sup> As in England, the education of the country's youth rested primarily with parochial authority.<sup>16</sup> America's founding fathers yearned to continue this tradition, and combined with primitive communication and transportation means, it made a unified system arduous to construct; the foundation for local control of education was entrenched as a product of societal and geographic factors.<sup>17</sup> The Framers of the Constitution purposefully excluded education, delegating the responsibility to the states.<sup>18</sup> The Tenth Amendment was drafted in large part to ensure a decentralized national government, yielding federal powers directly to the states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."<sup>19</sup>

All fifty states have constructed a clause in their respective constitutions to delineate their authority to prescribe public education.<sup>20</sup> State legislatures develop policy based on their respective constitutional edicts, and implementation resides with the local boards of education; national influence in education is therefore restrained.<sup>21</sup> The federal government established the Office of Education in 1867, yet its primary function was limited to collecting data on the status of education in the nation.<sup>22</sup> The political culture and societal mores in the post-Civil War era created a capacity for educational change in spite of the fact it would come decades later. Post-Civil War American courts adjudicated multiple cases that continued *de jure*<sup>23</sup> segregation.<sup>24</sup> The essence of most of the litigation is centered upon equality in higher education institutions.

13. See JAMES W. GUTHRIE ET AL., MODERN EDUCATION FINANCE AND POLICY 36 (2007) (noting the founders of the United States took seriously the separation of powers at the national government and division of authority among the national, state, and local governments).

14. See Ted Brackemyre, *Education to the Masses*, U.S. HIST. SCENE (Apr. 11, 2015) available at <http://ushistoryscene.com/article/rise-of-public-education/> (explaining that families and communities were responsible for education after the revolutionary war).

15. *Id.*

16. *Id.*

17. *Id.*

18. Karoli, *supra* note 1.

19. U.S. CONST. amend. X.

20. Molly A. Hunter, *State Constitution Education Clause Language*, PA. B. ASS'N CONST. REV. COMMISSION, available at <http://pabarcr.org/pdf/Molly%20Hunter%20Article.pdf>.

21. See *State Constitutions and Control of Charters*, EDUC. JUST. (May 23, 2011), available at [http://www.educationjustice.org/newsletters/nlej\\_iss28\\_art2\\_detail\\_StateConstitutions.htm](http://www.educationjustice.org/newsletters/nlej_iss28_art2_detail_StateConstitutions.htm) (the Georgia Supreme Court held that local districts controlled schools).

22. Act of Mar. 2, 1867, ch. 158, 14 Stat. 434 (1867) (establishing a Department of Education).

23. BLACK'S LAW DICTIONARY 490 (9th ed. 2009) ("Existing by right or according to law . . .").

24. See, e.g., *Lum v. Rice*, 275 U.S. 78, 94 (1927) (holding that forcing a Chinese American to attend segregated school did not violate the Constitution); *Cumming v. Cnty. Bd. of Educ.*, 175 U.S. 528, 545 (1899).

*Plessey v. Ferguson*<sup>25</sup> while not a specific education contest, directly impacted the environment for which students attended school.<sup>26</sup> Allowing “separate but equal” facilities between black and white students entrenched *de jure* segregated schools for almost fifty years.<sup>27</sup> The decision laid down by *Plessey* reigned in the United States, sustaining those wishing to maintain segregated facilities.<sup>28</sup> Amelioration started to permeate the judicial culture between 1896 and 1954, modifying the admittance of blacks into higher education institutions. In 1938, the Supreme Court of the United States declared that the University of Missouri’s racial policies for entrance into the law school were a violation of the Equal Protection Clause.<sup>29</sup> Twelve years later, the University of Texas was not fulfilling the requirements of “separate but equal” by establishing a law school exclusively for blacks.<sup>30</sup> In the same year, the Court found that the University of Oklahoma’s separate facilities for a graduate student “handicapped . . . [him] . . . in his pursuit of effective graduate instruction.”<sup>31</sup> The National Association for the Advancement of Colored People (NAACP) was the primary force in bringing forward these cases, but the impetus was to force the upgrading of underfinanced segregated facilities.<sup>32</sup> The NAACP shifted its focus to K–12 education by attacking the “separate but equal” facilities doctrine after these victories.

The year 1954 brought a decision that changed society, culture, and politics in the United States to which the effects are still permeating the Nation.<sup>33</sup> One of the most analyzed decisions by the Supreme Court of the United States in modern American history, *Brown v. Board of Education*,<sup>34</sup> reversed the tenets of *Plessey* and required the desegregation of all public schools at the utmost speed.<sup>35</sup> Several cases that challenged the “separate but equal” doctrine began to matriculate through the court system.<sup>36</sup> Five cases from Kansas, South Carolina, Virginia, Delaware, and Washington D.C. would eventually coalesce to form the core of

25. *Plessey v. Ferguson*, 163 U.S. 537 (1896).

26. *Id.* at 551.

27. *Brown v. Bd. of Educ.*, 347 U.S. 483, 488, 495 (1954) (Black children from Topeka, Kansas, brought action to enjoin a state statute that permitted but did not require cities in Kansas of more than 15,000 in population to maintain separate facilities for black and white students. The Topeka Board of Education elected to segregate elementary schools. The lower federal courts held that there was a detrimental effect on the black students but because the facilities were essentially equal, the plaintiffs were not provided relief. In South Carolina and Virginia, the lower federal courts determined that schools for black children were not equal to schools for white students, yet the courts refrained from requiring black students to be admitted to white schools. In Washington D.C., black students brought suit under the Fifth Amendment instead of the Fourteenth Amendment claiming segregated schools impeded due process rights.).

28. *Plessey*, 163 U.S. at 551 (holding that separate-but-equal did not violate the Constitution).

29. *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 352 (1938) (Plaintiff challenged a policy of the University of Missouri Law School denying admission to blacks. Missouri had no separate law school for blacks, but the state offered to pay for out-of-state tuition. The Court declared Missouri’s policy of providing law school for whites and not blacks violated the Equal Protection Clause under the separate but equal doctrine.).

30. *Sweatt v. Painter*, 339 U.S. 629, 635 (1950).

31. *McLaurin v. Okla. State Regents*, 339 U.S. 637, 70 (1950).

32. See MICHAEL IMBER & TYLL VAN GEEL, *EDUCATION LAW* 233 (4th ed. 2010).

33. See *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

34. *Id.*

35. *Id.* at 495.

36. See *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954); *Briggs v. Elliot*, 132 F. Supp. 776, 778 (E.D.S.C. 1995).

*Brown*.<sup>37</sup> The move to eliminate *de jure* segregation in public schools substantially changed the core of race relations for the United States.

### III. THE FEDERAL GOVERNMENT SEEKS TO REFORM PUBLIC EDUCATION: PRESIDENT JOHNSON AND THE ELEMENTARY AND SECONDARY EDUCATION ACT

In 1963, the ascension of Lyndon B. Johnson to the presidency of the United States was a catalyst for major societal reform. The Civil Rights Act of 1964 required previously *de jure* segregated schools to submit plans to desegregate or risk forfeiting federal funding.<sup>38</sup> President Johnson had a sincere avidity to ameliorate the status of all those in poverty, especially elementary and secondary students. He strongly contended improving education for all students as a path to prosperity.<sup>39</sup> Speaking to his cabinet in 1964, Johnson was emphatic in his yearning to improve education by profoundly declaring to his cabinet, “I want—and I intend—education to be the cornerstone on which we build this administration’s program and record. . . . I consider your first priority of responsibility to support education—not merely the legislation, but the cause itself.”<sup>40</sup> President Johnson was growing increasingly concerned with the lack of federal monetary support for education by articulating a national travesty if federal aid was not infused.<sup>41</sup>

Increased high school dropout rates, overcrowding in classrooms, underpaid teachers, and a decline in the quality of instruction led President Johnson to succinctly declare, “[t]he kids is where the money ain’t.”<sup>42</sup> The United States had been trying since the days of Andrew Jackson to improve education, yet three political obstacles persisted in preventing change: (1) segregation; (2) fear of government control; and (3) the separation of church and state. *De jure* segregation, while deemed unconstitutional by the *Brown* ruling, did not simply dissipate into the annals of American history.<sup>43</sup> For many, *de jure* segregation was not resolved; it was simply overridden.

With the passage of the Civil Rights Act in 1964, President Johnson was now able to focus toward mitigating the effect of the remaining obstacles. The federal control issue was a significant dichotomous conundrum as Republicans tended to support block grants; whereas Democrats, at least non-southern Democrats,

37. *Brown*, 347 U.S. 483; *Bolling*, 347 U.S. 497; *Davis v. Cnty. Sch. Bd. of Prince Edward Cnty.*, 103 F. Supp. 337 (E.D. Va. 1952); *Briggs*, 132 F. Supp. 776; *Belton v. Gebhart*, 32 Del. Ch. 343 (Del. Ch. 1952).

38. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241.

39. See Julian E. Zelizer, *How Education Policy Went Astray*, THE ATLANTIC (Apr. 10, 2015) (Johnson stated that “[b]y passing this [education] bill, we bridge the gap between helplessness and hope . . .”).

40. ROBERT DALLEK, *FLAWED GIANT: LYNDON JOHNSON AND HIS TIMES 1961–1973*, at 198 (1999).

41. *Id.* at 196.

42. LYNDON B. JOHNSON, *THE VANTAGE POINT PERSPECTIVES OF THE PRESIDENCY 1963–1969*, at 206 (1971).

43. Ian Millhiser, ‘*Brown v. Board of Education*’ Didn’t End Segregation, *Big Government Did*, NATION (May 14, 2014), available at <http://www.thenation.com/article/Brown-v-Board-Education-Didnt-End-Segregation-Big-Government-Did/> (explaining that *Brown* did not have a practical effect; it took until the Civil Rights Act to really change America).

approved of federal appropriations based upon congressionally determined categories.<sup>44</sup> As James Guthrie amplifies,

[b]ecause the Civil Rights Act interposes the federal government between citizens and their state legislatures and local school boards, it periodically has the effect of transforming the racial controversy into a federal control issue. In the minds of some anti-desegregation congressmen, the federal government, by requiring racial desegregation, has usurped local and state decision-making prerogatives.<sup>45</sup>

President Johnson's victory in 1964, combined with his unwavering record to eliminate poverty, created an enormous accumulation of political capital to expend on this societal conjuncture.<sup>46</sup> With uncharacteristic swiftness, the bill, which became famously known in education nomenclature as the Elementary and Secondary Education Act (ESEA), was passed by Congress three months after its introduction.

Conquering the divisiveness of the separation of church and state remained the last obstacle for Johnson toward fulfilling his ambition. Combatants on both sides of the church-state issue were firmly entrenched in their philosophical tenets.<sup>47</sup> Thus, if legislation was not permissive enough, the parochial constituents would exercise their collective authority to negate it.<sup>48</sup> Likewise, separatists were as emphatic to ensure that monies from the public treasury were not appropriated for religious aspirations.<sup>49</sup> Advocates on either side of the issue were too influential, and the only viable solution was to reach a compromise.

The religious issue is noteworthy because of the federal support that other legislation and programs were provided.<sup>50</sup> The guarantee of separation between church and state is a primary tenet of the founding fathers, which they hoped would never be breached.<sup>51</sup> Despite the fact that thirty-seven states prohibited the use of public funds for sectarian purposes, approximately three-quarters of them allocated

44. James W. Guthrie, *A Political Case History: Passage of the ESEA*, 49 PHI DELTA KAPPAN 302, 303 (1964).

45. *Id.*

46. MARTIN GILENS, *AFFLUENCE AND INFLUENCE: ECONOMIC INEQUALITY AND POWER IN AMERICA* 222 (2012) (noting that Johnson was concerned about poverty, and that he "accumulated political capital" after his victory over Goldwater).

47. See Philip Hamburger, *Against Separation*, THE PUB. INT., Spring 2004, at 177, 179 (2004) (describing Eighteenth Century American's opposing views to the separation of church and state).

48. *Lemon v. Kurtzman*, 403 U.S. 602, 622 (1971) ("Partisans of parochial schools . . . [will] promote political action to achieve their goals.").

49. See *Shifting Boundaries: The Establishment Clause and Government Funding of Religious Schools and Other Faith-Based Organizations*, PEW RES. CENTER (May 14, 2009), available at <http://www.pewforum.org/2009/05/14/Shifting-Boundaries-the-Establishment-Clause-and-Government-Funding-of-Religious-Schools-and-Other-Faith-Based-Organizations/> ("Strict separationists therefore claim that most, or even all, government funding of religion is unconstitutional.").

50. *E.g.*, Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241.

51. See Letter from Thomas Jefferson to the Danbury Baptists (Jan. 1, 1802) (regarding the drafting of the First Amendment and Jefferson's desire for the country to distinguish government from religion).

some public funds for parochial use.<sup>52</sup> Items such as transportation,<sup>53</sup> loaning of textbooks,<sup>54</sup> counseling services,<sup>55</sup> and support for students with special education services are examples of public funds supporting private education endeavors.<sup>56</sup> In 1980, the Supreme Court of the United States upheld government support for state-mandated testing,<sup>57</sup> in spite of the fact that a few years earlier it ruled that aid to develop state-required and teacher-created tests violated the Establishment Clause because such examinations had the potential to advance sectarian motives.<sup>58</sup> The Supreme Court's decisions continued to aggrandize the burgeoning conflict of separating church and state.<sup>59</sup> This permeation ensured federal resources would continue to benefit students that are in need of remedial or specialized services.<sup>60</sup> Thus, ESEA's future of supporting public and parochial students in need of specialized services was jurisprudentially solidified.<sup>61</sup>

The Catholic Church's influence during ESEA's formation was the most prominent source of parochial support for funding students in private schools. John Gardner, President of the Carnegie Corporation, commissioned a report that stressed the urgent need for taking action.<sup>62</sup> The report advocated to not send aid to elementary and secondary schools on a general basis, but send it based on a formula related to poverty of an area.<sup>63</sup> In order to alleviate constitutional encroachment by violating the Establishment Clause of the First Amendment, ESEA was crafted in such a manner that it employed the "child benefit theory" enumerated in the courts.<sup>64</sup> The child benefit theory delineated aid provided to students and aid directed to schools or institutions.<sup>65</sup> Jurisprudence established a compromising position for the Johnson Administration, in spite of the displeasure of the Catholic lobby arguing that the measures fell short of their expectations.<sup>66</sup> A

52. See NATIONAL CENTER FOR EDUCATION STATISTICS, PRIVATE SCHOOL UNIVERSE SURVEY (2005); see also U.S. DEPT. OF EDUC., STATE REGULATION OF PRIVATE SCHOOLS (2009).

53. Fred C. Lunenburg, *State Aid to Private Schools: A Question of Separation of Church and State*, 4 FOCUS ON C., U., AND SCHS. 1, 1 (2010) available at <http://www.nationalforum.com/Electronic%20Journal%20Volumes/Lunenburg,%20Fred%20C.%20State%20Aid%20to%20Private%20Schools%20FOCUS%20V4%20N1%202010.pdf>.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Comm. for Pub. Educ. & Religious Liberty v. Regan*, 444 U.S. 646, 662 (1980).

58. *Lemon v. Kurtzman*, 403 U.S. 602, 625 (1971).

59. *E.g.*, *Nat'l Coal. for Pub. Ed. & Religious Liberty v. Harris*, 489 F. Supp. 1248, 1270 (1980) (holding that federal funding to private parochial schools did not violate the First Amendment).

60. Lunenburg, *supra* note 53 (noting that federal funding is used primarily for special education).

61. *Harris*, 489 F. Supp. at 1270 (holding that federal funding of education does not violate the First Amendment).

62. See Janet Y. Thomas & Kevin P. Brady, *Chapter 3: The Elementary and Secondary Education Act at 40: Equity, Accountability, and the Evolving Federal Role in Public Education*, REV. OF RES. EDUC. 52 (2005) (describing Gardner's commission to create new ideas about federal funding of education).

63. *Id.* (Gardner's report "recommended that education be categorical, or targeted according to specific needs, including the education of poor children.").

64. Lenore Hervey, *State Aid to Parochial Schools*, FIRST AMENDMENT CENTER 326 (1997) (explaining that child-benefit theory formed the model for ESEA's inclusion of parochial students).

65. *Id.*

66. See Zelizer, *supra* note 40 (explaining that using a student-centered approach allowed Johnson to compromise the interests of public and private schools).



tenuous coalition was constructed that was imperative for ESEA's passage, and if either side withdrew its support and gave any signs of opposition, its fate would have been sealed.<sup>67</sup> The Catholic bloc had indeed endorsed the measure, yet its support was fragile and could be quickly withdrawn.<sup>68</sup>

Support for ESEA by all factions was completed, in large part, due to its reliance on poverty as the primary element for allocating funds directly to students as espoused by the child benefit theory. The business rules for ESEA articulated a fairly simplistic formula for distribution:

$$A/2 \times B = P^{69}$$

In 1965, the initial appropriation was \$1 billion, which was doubled the following year, and by the end of the decade it reached \$3 billion.<sup>70</sup> The legislation that appropriated funding directly to the communities in need read in part:

In recognition of the special education needs of children of low-income families and the impact that concentrations of low-income families have on the ability of local educational agencies to support adequate educational programs, the Congress hereby declares it to be the policy of the United States to provide . . . to local educational agencies serving areas with concentrations of children from low income families.<sup>71</sup>

President Johnson's legislative success earned him the title of "Education President."<sup>72</sup> The coalition President Johnson so tirelessly forged would soon start to fray with the actors going in divergent paths, retreating to the comfort of their dogmatic positions.<sup>73</sup> Even more disturbing was the release of a study in 1977, which concluded that over fifty percent of the funds allocated to poor students had, indeed, gone to students above the poverty line.<sup>74</sup> Joseph Viteritti articulated the fact that Title I funds emanating from ESEA were being used for general fund appropriations, and administrators did not want to use these funds exclusively for economically disadvantaged students.<sup>75</sup> Thus, as time progressed, the federal

67. Ase Meistad, *Lobbying on Behalf of God: Religious Interest Groups and the No Child Left Behind Act of 2001* (Nov. 2003) (unpublished dissertation, University of Bergen) (explaining that approval from both the United States Catholic Conference and the National Education Association was essential to passing ESEA).

68. See U.S. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, *THE FEDERAL ROLE IN THE FEDERAL SYSTEM: THE DYNAMICS OF GROWTH, INTERGOVERNMENTALIZING THE CLASSROOM: FEDERAL INVOLVEMENT IN ELEMENTARY AND SECONDARY EDUCATION* 32 (1981), available at <http://catalog.hathitrust.org/Record/000803509> [hereinafter *DYNAMICS OF GROWTH*].

69. A = The state's average expenditure per pupil; B = The number of poor school children in a local district; P = The payment to the school district.

70. *DYNAMICS OF GROWTH*, *supra* note 68, at 4.

71. Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27.

72. PAUL S. BOYER, *THE OXFORD COMPANION TO UNITED STATES HISTORY* 321 (2001).

73. See *DYNAMICS OF GROWTH*, *supra* note 69, at 34.

74. See NAT'L INST. OF EDUC., *EVALUATING COMPENSATORY EDUCATION: AN INTERIM REPORT ON THE NIE COMPENSATORY EDUCATION STUDY 19* (1976), available at <http://catalog.hathitrust.org/Record/000172060>.

75. Viteritti, *supra* note 7, at 2091.

support was declining for the original purpose. Certainly, this was a position that Johnson would have been most displeased with had he ever viewed such analyses.

ESEA was, in large part, legislation engineered to supplement the decision of *Brown* and the Civil Rights Act of 1964.<sup>76</sup> The nation was transforming a divided society into one that recognized minority issues, not only of color but of poverty as well. The pawky President's intention was to incentivize local and state communities to accept these federal monies, which would allow the federal government to affect policy it was purposefully excluded from years before.<sup>77</sup> Future presidents would continue the tradition of manipulating policy through financial incentives.<sup>78</sup> State and local governments would be questioned and even viewed as negligent for turning down federal money.<sup>79</sup>

While ESEA was a massive infusion of federal influence in public education, the political climate of the 1970s and 1980s retracted the federal government's involvement in education, as the achievement of cabinet-level status for the Department of Education in 1980 was the only significant accomplishment.<sup>80</sup> This anointing was extremely controversial as illustrated by the future campaign promises of Ronald Reagan in 1980 and Bob Dole in 1996 to abolish the Department of Education.<sup>81</sup> The Department of Education weathered a tumultuous inception and insipid history to become a vehicle of reform and national policy transformation.<sup>82</sup> The following statement articulates the consternation of local control advocates regarding the Department of Education's influence, furthering the theory of increasing intrusion of local control by the federal government, and continued ineptness at making significant improvements:

Federal involvement in education and spending of taxpayer's dollars would not necessarily be such a bad concept if the DOE had shown progress or improvement in the quality of education. According to the National Center for Education Statistics, the original budget in 1980 was \$13.1 billion. The budget in 2011 is \$77.8 billion. However, while spending has risen, the improvement in education has shown little increase.<sup>83</sup>

76. See DYNAMICS OF GROWTH, *supra* note 68, at 8.

77. See N.Y. STATE EDUC. DEP'T, FEDERAL EDUCATION POLICY AND THE STATES, 1945-2009: A BRIEF SYNOPSIS 16-22 (2009), available at [http://www.archives.nysed.gov/common/archives/files/ed\\_background\\_overview\\_essay.pdf](http://www.archives.nysed.gov/common/archives/files/ed_background_overview_essay.pdf).

78. *Id.* at 23.

79. *Id.* at 80.

80. See Catherine R. Barnes, "Race to the Top" Only Benefits Big Government, 40 J.L. & EDUC. 393, 397-98 (2011) (discussing the overall encroachment of the federal government into the arena of education, which is explicitly a state duty).

81. Matthew Hurt, *Fulfilling Reagan's Promise: Republicans Set Their Sights on No Child Left Behind*, UNITED LIBERTY (Jan. 2, 2015, 10:05 AM), <http://www.unitedliberty.org/articles/19024-fulfilling-reagans-promise-republicans-set-their-sights-on-no-child-left-behind> (last visited Mar. 23, 2015).

82. Barnes, *supra* note 80, at 398-99.

83. *Id.*

The relatively inactive federal government began permeating into a political segment, which had been historically reserved to the states.<sup>84</sup> As financial resources continued to be infused into the education system, states and local districts found it difficult to deny such scarce and needed funds, thus aligning many of their policies with tenets espoused by national policymakers.<sup>85</sup>

#### IV. THE NATION'S EDUCATION SYSTEM IS DEFINED AS "AT-RISK"

In 1983, President Reagan's National Commission on Educational Excellence delivered an ominous and disconcerting analysis on public education in the United States.<sup>86</sup> *A Nation at Risk* is a seminal report in educational history commissioned in 1981 by President Reagan's Secretary of Education, Terrell H. Bell, and chaired by David P. Gardner, then president of the University of Utah.<sup>87</sup> The eighteen-member blue-ribbon panel articulated the hypothesis that America's schools were failing in comparison to the remainder of the industrialized world.<sup>88</sup> The report analyzed the quality of elementary and secondary education in the United States and found a "rising tide of mediocrity."<sup>89</sup> This sentiment touched off a tremendous upsurge in reform efforts at the local, state, and national level. With the nation in the midst of a recession, business and government leaders used the report as an opportunity to assign blame for a depressed economy.<sup>90</sup> The United States was shaken with the release of this report and various factions of the school and government communities viewed this as a vehicle for change.<sup>91</sup> However, the report served more as symbolism rather than quality empirical research.

David Berliner and Bruce Biddle provided a stern rebuttal to the report and the external negative perception created.<sup>92</sup> The primary thesis of the supporters of the report was that the inadequate education system was responsible for the downturn in the economy, and that the quality of education relates directly to the nation's successes or failures.<sup>93</sup> If this presumption was accurate, then there should not have

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84. *Id.*

85. *Id.*

86. James E. Adams Jr. & Rick Ginsberg, *Education Reform—Overview, Reports of Historical Significance*, STATEUNIVERSITY.COM, <http://education.stateuniversity.com/pages/1944/Education-Reform.html>">Education Reform-OVERVIEW, REPORTS OF HISTORICAL SIGNIFICANCE</a> (last visited on Mar. 6, 2013) (Reports that the United States had engaged in unthinking, unilateral educational disarmament, asserting that if an unfriendly foreign power had attempted to impose on America the mediocre educational performance the commissioners found, the nation might well have viewed it as an "act of war." Its recommendations included strengthening the curriculum, lengthening the school day and the school year, paying teachers based on performance and increasing homework.).

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. DAVID BERLINER & BRUCE BIDDLE, *THE MANUFACTURED CRISIS*, 13–64 (1995) (This seminal contradiction to the report *A Nation At Risk* relied upon multiple data analyses that showed data in the report was misleading. Blame for the education crisis was originally assigned to educators. However, *The Manufactured Crisis* did a lot to scientifically show much of the blame lay with societal and economic factors that are out of educators' control).

93. *Id.*

been an economic upsurge in the 1990s.<sup>94</sup> In addition, they justified their contention by analyzing SAT, ACT, and NAEP scores longitudinally, which showed steady achievement—not the cataclysmic status of education as described in *A Nation at Risk*.<sup>95</sup> Consensus by opponents to *A Nation at Risk* was that the rhetoric used by politicians and business officials stressed the need for more private control of education including the concepts of vouchers and charter schools.<sup>96</sup> The concept that the nation's schools were failing resonated across the country.<sup>97</sup> Providing quality schools struck a chord with parents seeking to provide the greatest opportunity for their children, and the nation as a whole yearned for an improved economy, and increased security.<sup>98</sup> Yet, if uninformed “experts” espouse bombastic tenets, and the details are illustrating a dire condition where one does not exist, speculation of nefarious motives increases.<sup>99</sup>

The aegis for modern-day education reform originated in the late 1980s when the National Governor's Association (NGA), convened under the administration of George H. W. Bush, made standards-based reforms, including accountability measures, a priority.<sup>100</sup> Setting expectations for what students should know and be able to do drives standards-based education.<sup>101</sup> In contrast to norm-referenced assessment, standards-based reform assesses students on clear, measurable standards for all students.<sup>102</sup> Curriculum, assessments, and professional development are aligned to these standards. Some states had implemented standards-based reforms prior to the NGA and became models for other states.<sup>103</sup> Standards-based education became the educational paradigm reformers would embrace in the 1990s and continuing into the twenty-first century.<sup>104</sup>

## V. GOALS 2000—AN INITIATIVE FOR THE TWENTY-FIRST CENTURY

On March 31, 1994, President Bill Clinton signed into law P.L. 103-227, titled, The Goals 2000: Educate America Act, which became known in educational nomenclature as “Goals 2000.” The premise was that outcomes-based education required that more students attain certain standards, and this increased expectation would yield higher levels of achievement.<sup>105</sup> The final product of Goals 2000 was

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94. *Id.*

95. *Id.*

96. Viteritti, *supra* note 7, at 2097.

97. Powell, *supra* note 4, at 157–58.

98. *Id.*

99. BERLINER & BIDDLE, *supra* note 92, at 62–63.

100. See Kathryn A. McDermott, *What Causes Variation in States' Accountability Policies?* 78 PEABODY J. EDUC. 153, 154 (2003).

101. *Id.*

102. Compare Norm-Referenced Achievement Tests, FAIRTEST (Aug. 17, 2007, 2:20 PM), <http://www.fairtest.org/norm-referenced-achievement-tests>, with Criterion-and Standards-Referenced Tests, FAIRTEST (Aug. 17, 2007, 2:29 PM), <http://www.fairtest.org/criterion-and-standards-referenced-tests>.

103. McDermott, *supra* note 100, at 154.

104. See *id.*

105. See *id.*

the work of all state governors initiated under the auspice of President George H. W. Bush in 1989.<sup>106</sup> Goals 2000 can be summarized in the following eight points:

- All children in America will start school ready to learn;
- the high school graduation rate will increase to at least ninety percent;
- all students will leave grades 4, 8, and 12 having demonstrated competency over challenging subject matter including English, mathematics, science, foreign languages, civics and government, economics, the arts, history, and geography; and every school in America will ensure that all students learn to use their minds well, so they may be prepared for responsible citizenship, further learning, and productive employment in our nation's modern economy;
- United States students will be first in the world in mathematics and science achievement;
- every adult American will be literate and will possess the knowledge and skills necessary to compete in a global economy and exercise the rights and responsibilities of citizenship;
- every school in the United States will be free of drugs, violence, and the unauthorized presence of firearms and alcohol and will offer a disciplined environment conducive to learning;
- the nation's teaching force will have access to programs for the continued improvement of their professional skills and the opportunity to acquire the knowledge and skills needed to instruct and prepare all American students for the next century; and
- every school will promote partnerships that will increase parental involvement and participation in promoting the social, emotional, and academic growth of children.<sup>107</sup>

Congress appropriated \$105 million for fiscal year 1994 alone to support Goals 2000.<sup>108</sup> States were required to submit applications to develop school improvement plans and make available sub-grants to local schools and awards for pre-service and professional development.<sup>109</sup> Goals 2000 had multiple aspirations constructed upon the principles of outcomes-based education.<sup>110</sup> Predictably, all of the goals were not attained by the year 2000. Many of the goals were commendable

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106. *Id.*

107. Goals 2000: Educate America Act, 20 U.S.C. § 5812 (1994).

108. NIDHI KATRI & DAVID SWEET, IMPLEMENTING PERFORMANCE ASSESSMENT: PROMISES, PROBLEMS AND CHALLENGES 7 (Michael B. Kane & Ruth Mitchell eds., 2009).

109. 20 U.S.C. § 5812 (1994).

110. *See id.*

but just not practical in the six-year timeline.<sup>111</sup> In 1999, the program was summarized as not meeting the intended expectations:

The nation has not met any of the eight educational goals for the year 2000 set a decade ago by President Bush and the governors of all 50 states, although measurable progress has been made toward the goals pertaining to preschoolers and student achievement in math and reading . . . .

The National Education Goals Panel's final report before the 2000 deadline showed that more children were "ready to learn"—healthier and better prepared through preschool or parental reading—when they entered kindergarten. Students also demonstrated higher math proficiency, particularly in elementary and middle school, and a slight improvement in reading proficiency in middle school.

In the case of two goals, teacher quality and school safety, the panel reported the nation has actually gone backward. The percentage of teachers holding a college degree in the main subject they teach dropped from 66 percent to 63 percent, and there was a significant increase in student use of illicit drugs, from 24 percent to 37 percent in 10th grade.<sup>112</sup>

It became apparent, as the nation approached the year 2000, that the anticipated effect by the federal government was falling short, as illustrated by important statistics like student achievement gaps in ethnicity and decreasing high school graduation rates.<sup>113</sup>

There were three other large pieces of legislation enacted in the 1990s: The Improving America's Schools Act (1994),<sup>114</sup> the Individuals with Disabilities Act (1997),<sup>115</sup> and the reauthorization of the Perkins Vocational–Technical Education Act (1998).<sup>116</sup> In spite of their broad goals, these initiatives had a common theme amongst them: to assess all students at least once at the elementary, middle, and high school level. Uniformly assessing students based upon common standards, and holding institutions accountable for the results, was a new paradigm for some states, and for others it reinforced the policies already enacted.<sup>117</sup> The 1990s shifted

111. See Kenneth J. Cooper, 89 *Education Summit Goals Still Unmet*, WASH. POST (Dec. 3, 1999), <http://www.washingtonpost.com/archive/politics/1999/12/03/89-education-summits-goals-still-unmet/eadd5a4-691b-4288-b50f-9a3aceaff979/>.

112. *Id.*

113. *Id.*

114. Improving America's Schools Act of 1994, 20 U.S.C.A. § 6301.

115. Individuals with Disabilities Education Act, 20 U.S.C.A. § 1400 (2005).

116. Carl D. Perkins Career and Technical Education Improvement Act of 2006, 20 U.S.C.A. § 2301.

117. McDermott, *supra* note 100, at 153.

education policy innovation at the state level to the federal government.<sup>118</sup> While intentions by the federal government were to improve student achievement, holding states and schools accountable for the adjustments was an almost insurmountable obstacle.

The leverage needed to force states to enact accountability measures seemed to be an elusive proposition prior to 2001. In the same year, public education in the United States was observed as having many different combinations of assessment and procedures.<sup>119</sup>

Thirty-five states identified underperforming schools and [fifteen] did not.<sup>120</sup> Eighteen states had the legal authority to [takeover] or reconstitute a failing or mismanaged school.<sup>121</sup> Sixteen states had the power to replace staff in a failing school. Only five states that had the legal power to impose, takeover, reconstitution, or staff replacement had actually done so.<sup>122</sup>

The nation was in a prime political condition to entertain education reform legislation because of the accountability vacuum and a weak educational outlook.<sup>123</sup> The enthusiasm was short-lived as sentiment for the law quickly digressed to descriptors such as “draconian” or “Machiavellian.”<sup>124</sup> As No Child Left Behind became the standard for education reform, supporters, excluding the Executive Administration, recognized the many faults imbedded in the legislation.<sup>125</sup>

## VI. PUBLIC LAW 107-110: NO CHILD LEFT BEHIND ACT OF 2001

### A. The Act Overhauls Education

In 2002, President George W. Bush’s Administration, along with bipartisan cooperation from Congress, passed the most comprehensive education reform legislation in American history up to that point.<sup>126</sup> ESEA was expiring and required renewal. Many practitioners in concert with politicians viewed this authorization as an opportunity to reform education assessment and accountability measures

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.* at 155 (citing Education Week and the Pew Charitable Trusts, *Quality Counts 2001* 68 (Virginia B. Edwards, ed. 2001)).

123. See McDermott, *supra* note 100, at 154.

124. See Thomas Rentschler, *No Child Left Behind: Admirable Goals, Disastrous Outcomes*, 12 WIDENER L.R. 637, 638 (2005); see also Susan Ohanian, *NCLB in Your Face*, OHANIAN.ORG (Dec. 1, 2003), [http://www.susanohanian.org/show\\_nclb\\_stories.html?id=83](http://www.susanohanian.org/show_nclb_stories.html?id=83) (discussing NCLB as a Machiavellian reform).

125. McDermott, *supra* note 100, at 154.

126. See *id.*

throughout the nation.<sup>127</sup> No Child Left Behind (NCLB) was signed into law on January 8, 2002.<sup>128</sup> NCLB entered the nomenclature of education with a thunderous cacophony.<sup>129</sup> Some hailed the legislation as a savior-like innovation, which would rescue all failing schools.<sup>130</sup> Others saw it as a punitive attack on public education, which would open the door to private education and charter schools usurping public funds.<sup>131</sup> The legislation is significantly nebulous, yet the four primary objectives of NCLB can be consolidated thusly: (1) accountability for results; (2) an emphasis on doing what works based upon best practice and research; (3) expanded parental options; and (4) expanded local control and flexibility.<sup>132</sup>

Accountability for results required states to develop evaluation systems covering all public schools and students.<sup>133</sup> NCLB mandated that the states implement a challenging set of standards in mathematics and reading; annual testing in grades 3–8; assessment results and state progress disaggregated by poverty, race, ethnicity, disability, limited English proficiency; and annual measurement objectives that reached 100% in math and reading by the 2013–14 school year.<sup>134</sup> Individual schools and school districts faced increasing sanctions over a seven-year period as delineated in the statute.<sup>135</sup> The punitive sanctions of NCLB require schools failing to meet adequate yearly progress (AYP) to provide students with options and programs for remediation.<sup>136</sup> Students residing in these schools must be provided a transfer option to a school making AYP in the district with the financial burden borne by the school; supplemental education provided from an approved list of providers; and lastly, a mandated change in governance should the school not meet the AYP.<sup>137</sup> NCLB and the graduated sanctions place an enormous amount of institutional and individual pressure to meet these standards.<sup>138</sup> Frustration is rampant among educators regarding this system in large part due to unattainable goals and differences among states related to proficiency standards on examinations.<sup>139</sup>

The methods employed by NCLB may actually have hindered the attainment of the goals of the law.<sup>140</sup> The “Statement of Purpose” in the legislation articulates its intent to ensure that all children reach “challenging” standards in reading and mathematics and close the academic achievement gap that exists by race and class.<sup>141</sup> Soon after the implementation of the law, scholars, practitioners, and some

127. See Robert L. Linn, *Accountability Systems: Implications of Requirements of the No Child Left Behind Act 2001*, 31 AM. EDUC. RES. ASS'N 3, 3 (2001).

128. *Id.*

129. See Rentschler, *supra* note 124, at 638.

130. See McDermott, *supra* note 100, at 154.

131. See Rentschler, *supra* note 124, at 642.

132. No Child Left Behind Act, 20 U.S.C. § 6301 (2002).

133. *Id.* at 32; see also Linn, *supra* note 127 at 3.

134. See 20 U.S.C. § 6301 (2002); see also Linn, *supra* note 127 at 3.

135. See 20 U.S.C. § 6301 (2002).

136. 20 U.S.C.A. § 6316(b)(7)(C) (West 2002).

137. 20 U.S.C.A. § 6316(b)(7)(C)(i-iv) (West 2002).

138. 20 U.S.C.A. § 6301(4) (West 2002).

139. Linn, *supra* note 127, at 16.

140. See *id.* at 24–25.

141. 20 U.S.C.A. § 6301(3) (West 2002).



policymakers were quick to flay its perceived flaws.<sup>142</sup> Researchers concluded that NCLB set unrealistic demands through the AYP provision, most notably the requirement that all schools be 100% proficient in reading and mathematics by the year 2014.<sup>143</sup> Further, it was noted that virtually no schools serving large populations of low socio-economic students would clear the arbitrary hurdles set by NCLB.<sup>144</sup> The more diverse and at-risk the school population, the better the chance that the school will fail to make AYP. Enacting punitive measures on these schools is antithetical to improving public education.<sup>145</sup> This postulation of NCLB can be summed thusly, “[s]anctions intended to force gains in test scores, such as, in-district transfers, tutoring, and school restructuring, will do the opposite. They will pit parent against teacher, parent against parent, and school against school.”<sup>146</sup> The ends do not justify the means. Creating conflict is in direct contrast to the intended goal of perpetuating unification of educational missions.<sup>147</sup> However, if there resides, even at a minimal level, a political impetus to reduce local public control, and matriculate to a more private control of education, then conflict and division will be a welcome paradigm by those seeking the change.

### B. The Law Goes to Court

The NCLB law lacked the financial support that was necessary to modify the schools identified as “not meeting the benchmarks” in NCLB.<sup>148</sup> “Compounding the flaws of the law, the federal government has failed to provide adequate funding to implement its provisions.”<sup>149</sup> A growing number of studies conclude that for all students to attain proficiency, the per-capita spending per low-income student would have required it to double.<sup>150</sup> One theory behind this machination is the desire that the law would have forced upon states the moral obligation to fulfill the resource needs of the schools to meet the requirements.<sup>151</sup> This was misguided, as most states were required to constrict their budgets as the “Great Recession” loomed on the horizon.<sup>152</sup>

A consortium of school districts in three states, the National Education Association (NEA), and ten NEA affiliates sued the United States Department of Education, arguing the Secretary of Education had violated the provision requiring states and school districts to comply with NCLB mandates even though states and

142. See Monty Neill, *Leaving Children Behind: How No Child Left Behind Will Fail Our Children*, 85 PHI DELTA KAPPAN 225 (Nov. 2003).

143. *Id.* at 225.

144. *Id.* at 225–26.

145. *Id.* at 226.

146. *Id.* (discussing the major flaws of the No Child Left Behind Act and how the measures intended to increase student achievement, especially for low-income and minority children, may have the opposite effect).

147. *Id.* at 225.

148. Neill, *supra* note 142, at 226.

149. *Id.*

150. *Id.* at 226; see William J. Mathis, *No Child Left Behind: Costs and Benefits*, 84 PHI DELTA KAPPAN 679, 680 (May 2003).

151. Neill, *supra* note 142, at 226.

152. *Id.*

school districts were not provided with sufficient funds to pay for the mandates.<sup>153</sup> The district court dismissed the complaint on the grounds that even though the law prohibited a federal officer from imposing an unfunded mandate, the statute did not bar the Congress from doing so.<sup>154</sup> On appeal, the Sixth Circuit Court reversed and remanded the case back to the district court.<sup>155</sup> The Sixth Circuit determined that the question was whether NCLB clearly furnishes notice to the state that if it chooses to participate, it must pay for additional costs to implement the act. The court concluded that the provision was ambiguous, and one could not plausibly contend that a state officer would understand this requirement.<sup>156</sup> Thus, a state need not comply with NCLB requirements for which federal funds fell short.

The No Child Left Behind Act of 2002 had a promising inception. It was passed with bipartisan support in Congress led by President George W. Bush. Contesting a law that was designed to dramatically improve the nation's schools would be difficult for any policymaker or educator to reject.<sup>157</sup> Yet, quite quickly, opponents of the law began to contest the possibility that it could deliver what it purported, and the sanctions seemed so draconian that those in opposition conjectured that NCLB was a veiled attempt to declare public education a dismal failure and private school management the solution to the ills.<sup>158</sup> NCLB continues to be an education doctrine, which must be addressed.

President Barak Obama, elected in 2008, along with much of the nation, recognized the serious flaws in the Act.<sup>159</sup> As ESEA approached its reauthorization deadline, it became quite clear that many of the tenets of NCLB were unattainable and the friction that it caused would be insurmountable.<sup>160</sup> While NCLB faded somewhat in stature, it remains a relevant piece of legislation that causes frustration for many schools.<sup>161</sup> As the deadline passed for schools to reach 100% proficiency in mathematics and reading, it was plainly obvious this goal was unattainable.<sup>162</sup>

153. Sch. Dist. of City of Pontiac v. Spellings, No. CIV.A. 05-CV-71535-D, 2005 WL 314945, at \*1 (E.D. Mich. Nov. 23, 2005).

154. *Id.* at \*4.

155. Sch. Dist. of City of Pontiac v. Sec'y U.S. Dep't Educ., 512 F.3d 252, 273 (6th Cir. 2008).

156. *Id.* at 266, 272.

157. Neill, *supra* note 142, at 225.

158. *Id.*

159. Press Release, President Barak Obama, Remarks by the President on No Child Left Behind Flexibility, (Sept. 23, 2011), *available at* <https://www.whitehouse.gov/the-press-office/2011/09/23/remarks-president-no-child-left-behind-flexibility>.

160. *Id.*

161. DAVID DESCHRYVER, THE OBAMA IMPRINT: ARRA, REAUTHORIZATION AND THE ROAD AHEAD, 16–17 (Andrew Brownstein et al. eds., 2010).

162. *Id.*

## VII. AMERICAN RECOVERY AND REINVESTMENT ACT - RACE TO THE TOP

### A. Overview

Anyone engaged in competition yearns for victory. Human nature promotes that a competitor seek to be the best at what he or she strives to obtain. The Obama Administration engaged in a new mode of education reform that enticed states to improve education through a massive competitive grant known as Race to the Top (RTT).<sup>163</sup> The title conjures a vision of all schools in the nation scrambling, groping, and crawling to ensure they finish ahead of their competitors. In February 2009, President Obama signed into law the American Recovery and Reinvestment Act (ARRA).<sup>164</sup> ARRA's primary foundation was couched in Keynesian theory for a national economic recovery.<sup>165</sup> Public works projects and auto manufacturing restructuring are examples of the many components that ARRA sought to economically stabilize. Education policy was not exempt from the federal government's involvement, and both federal and state governments took the opportunity to initiate massive reforms.<sup>166</sup> Since ARRA's creation in 2009, "education policy has not been the same since."<sup>167</sup>

Congress inserted these priorities into the legislation, but the United States Department of Education, under the leadership of Secretary Arne Duncan, postured itself to leverage the text into a national reform movement.<sup>168</sup> The Obama Administration outlined four basic reform priorities in Race to the Top:

- Making improvements in teacher effectiveness and in the equitable distribution of qualified teachers for all students, particularly students who are most in need;
- establishing pre-K through college and career data systems that track progress and foster continuous improvement;
- making progress toward rigorous college- and career-ready standards and high quality assessments that are valid and reliable for all students, including English language learners and students with disabilities;
- providing intensive support and effective interventions for the lowest-performing schools.<sup>169</sup>

163. Katherine Brandon, *The President on Race to the Top*, THE WHITE HOUSE BLOG (July 24, 2009, 5:43 PM) available at <https://www.whitehouse.gov/blog/2009/07/24/president-race-top> (last visited on Feb. 4, 2013).

164. U.S. DEP'T OF EDUC., RACE TO THE TOP PROGRAM EXECUTIVE SUMMARY 2 (Nov. 2009) [hereinafter EXECUTIVE SUMMARY].

165. JOHN M. KEYNES, THE GENERAL THEORY OF EMPLOYMENT, INTEREST, AND MONEY 128–29 (1936) (arguing that employment is not determined by the price of labor as articulated by the neoclassic theory, but by the amount of money that is spent. He further states that cutting the cost of labor and benefits is not only hard-hearted but futile. In a depression, the government needs to provide whatever is necessary to jumpstart the economy.).

166. DeSchryver, *supra* note 161, at 1, 3.

167. *Id.* at 1.

168. *Id.*

169. *Id.*

The federal government appropriated \$4.35 billion dollars to help incentivize the states to reform educational policies, which for many states required massive and far-reaching legislative changes.<sup>170</sup> Many state legislators across the nation were seeking to implement many of the reforms delineated in RTT prior to its passage.<sup>171</sup> However, there was significant resistance from various factions, and with a lack of political fortitude, states had to acquiesce to minimal, and often insignificant improvements.<sup>172</sup> Permitting the opportunity to acquire this amount of funding for school improvement is a position most legislators supported and educators reluctantly endorsed.<sup>173</sup> President Obama became the centerpiece of this progressive agenda when he announced on July 24, 2009:

This is one of the largest investments in education reform in American history. And rather than divvying it up and handing it out, we are letting states and school districts compete for it. That's how we can incentivize excellence and spur reform and launch a race to the top in America's public schools.<sup>174</sup>

The President furthered his announcement by describing the criteria employed to assess the state proposals:

This competition will not be based on politics or ideology or the preferences of a particular interest group. Instead, it will be based on a simple principle—whether a state is ready to do what works. We will use the best evidence available to determine whether a state can meet a few key benchmarks for reform—and states that outperform the rest will be rewarded with a grant. Not every state will win and not every school district will be happy with the results.<sup>175</sup>

### **B. Race to the Top: The Winners**

RTT has had three rounds of award winners since the announcement in 2009.<sup>176</sup> Using the broad objectives listed above as the guide for assessing state applications, forty states and the District of Columbia submitted applications in the

170. EXECUTIVE SUMMARY, *supra* note 164, at 2.

171. Remarks by the President on No Child Left Behind Flexibility, 2011 DAILY COMP. PRES. DOC. 201100674 (Sept. 23, 2011).

172. DeSchryver, *supra* note 161, at 5–6.

173. *Id.* at 5.

174. Remarks on Education Reform, 2009 DAILY COMP. PRES. DOC. 200900595 (July 24, 2009)

175. *Id.*

176. Press Release, U.S. Dep't of Educ., Press Office, Department of Education Awards \$200 Million to Seven States to Advance K–12 Reform (Dec. 23, 2011) [hereinafter \$200 Million to Seven States], *available at* <http://www.ed.gov/news/press-releases/departments-education-awards-200-million-seven-states-advance-k-12-reform> (last visited on Oct. 13, 2015).

first round. The initial applicant pool was reduced to sixteen.<sup>177</sup> Much to the chagrin of many state governors, the U.S. Department of Education awarded only two winners in March 2010: Delaware and Tennessee.<sup>178</sup> The competition continued in the summer of 2010, when the second round winners were announced in August.<sup>179</sup> Combined with round one, forty-six states and the District of Columbia submitted applications.<sup>180</sup> Eleven states and the District of Columbia were awarded RTT funds.<sup>181</sup> Secretary of Education Arne Duncan was boastful in declaring the RTT a program for successful change: “As we look at the last eighteen months, it is absolutely stunning to see how much change has happened at the state and local levels, unleashed in part by these incentive programs.”<sup>182</sup> Duncan continued his pontification, “[t]hese states show what is possible when adults come together to do the right thing for children. . . . The creativity and innovation in each of these applications is breathtaking. . . . We set a high bar and these states met the challenge.”<sup>183</sup> Duncan was entrenched in the philosophy that the federal government made significant structural changes to the manner in which it involved itself in reform at the local level.<sup>184</sup> In order for states and districts to position themselves for awards, the changes that were required forced legislators to crystalize them in legislation.<sup>185</sup> Phase Three saw the Department of Education award seven more states RTT funds at the end of 2011.<sup>186</sup> Viewing the program as successful, the federal government looked to make the next allocation more acute by targeting individual districts instead of states.<sup>187</sup>

RTT-District (RTT-D) modified its structure so that individual districts could seek grants from this program.<sup>188</sup> The Department of Education wanted to attract single districts committed to the four core reform areas in RTT, which personalized learning at the classroom level.<sup>189</sup> The intent was to serve schools with a minimum of 2,500 students, with at least forty percent of students qualifying for either a free or reduced lunch.<sup>190</sup> In the spirit of this paradigm, the Department of Education

177. Press Release, U.S. Dep’t of Educ., Delaware and Tennessee Win First Race to the Top Grants (Mar. 29, 2010), *available at* <http://www.ed.gov/news/press-releases/delaware-and-tennessee-win-first-race-top-grants> (last visited on February 4, 2013).

178. *Id.*

179. Press Release, U.S. Dep’t of Educ., Nine States and the District of Columbia Win Second Round Race to the Top Grants (Aug. 24, 2010), *available at* <http://www.ed.gov/news/press-releases/nine-states-and-district-columbia-win-second-round-race-top-grants> (last visited on Feb. 4, 2013).

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. Press Release, U.S. Dep’t of Educ., Education Department Invites Districts to Apply for \$400 Million Race to the Top Competition to Support Classroom-Level Reform Efforts (Aug. 12, 2012) [hereinafter Districts to Apply for \$400 Million], *available at* <http://www.ed.gov/news/press-releases/education-department-invites-districts-apply-400-million-race-top-competition-support-classroom-level-reform-efforts> (last visited on Oct. 13, 2015).

185. EXECUTIVE SUMMARY, *supra* note 164, at 2.

186. \$200 Million to Seven States, *supra* note 176.

187. Districts to Apply for \$400 Million, *supra* note 184.

188. *Id.*

189. *Id.*

190. *Id.*

received over 200 applications from eighty districts across twenty-one states.<sup>191</sup> Duncan made a strategic decision to bypass higher-scoring, urban districts in favor of funding more rural schools.<sup>192</sup> RTT in all four phases infused a significant amount of revenue into the K–12 education spectrum, requesting significant change to the status quo.<sup>193</sup> If RTT does not improve student achievement, consternation will build among policymakers due to the increased spending without and from public educators and for the usurpation of local control.<sup>194</sup>

### C. Schools Withdraw from Race to the Top

In contrast with policymakers' concern for improving student achievement as a result of such a substantial investment is the fact that some local school districts are withdrawing from the Race to the Top grant awarded to their respective states.<sup>195</sup> Delaware, Massachusetts, New York, North Carolina, and Ohio have all had local districts or charter schools withdraw from the program.<sup>196</sup> There have been a myriad of reasons for the districts withdrawing, though a central complaint has been the district-level grants issued to pay for the states' Race to the Top requirements were not enough to pay for actual costs.<sup>197</sup> Delaware lost its largest school district consisting of 17,000 students forfeiting \$2.3 million of its \$10 million grant.<sup>198</sup> Massachusetts saw thirty-eight of its 276 participants withdraw, while North Carolina lost seven charter schools but no districts.<sup>199</sup> Ohio had 538 districts approve inclusion into RTT, but 107 have since dropped out.<sup>200</sup> New York provides the most intriguing example of districts withdrawing from RTT. Forty districts terminated their participation due to the state's plan to collect a plethora of student data, which would be stored in a cloud-repository developed and operated by a private, non-profit group.<sup>201</sup> These districts, responding to parent concerns, are

191. Press Release, U.S. Dep't of Educ., U.S. Department of Education Names Five Winners of \$120 Million from Race to the Top-District Grant Competition (Dec. 17, 2013), *available at* <http://www.ed.gov/news/press-releases/us-department-education-names-five-winners-120-million-race-top-district-grant-c> (last visited Mar. 18, 2014).

192. Michelle McNeil, *Rural Districts Score Big in Latest Race to Top Round*, 33 EDUC. WK. 15, Jan. 8, 2014, at 14 (the five winners were Clarendon County School District Two in central South Carolina – \$25 million, Clarksdale Municipal School District in Mississippi – \$10 million, Houston Independent School District – \$30 million, Kentucky Valley Educational Cooperative – \$30 million, and Springdale School District in northwest Arkansas – \$26 million).

193. THE WHITE HOUSE, EDUCATION FOR K-12 STUDENTS, RACE TO THE TOP, *available at* <https://www.whitehouse.gov/issues/education/k-12/race-to-the-top> (last visited on Oct. 16, 2015).

194. DeSchryver, *supra* note 162, at 5–6.

195. Lesli A. Maxwell, *In Five States, Districts Bail out on Race to the Top Grants: Costs, Privacy Issues Spur Reconsideration* 33 EDUC. WK. 18, Jan. 22, 2014, at 8, *available at* <http://www.edweek.org/ew/articles/2014/01/22/18rtt-districts.h33.html>.

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. Maxwell, *supra* note 197, at 8.

reluctant to place private student data with a third-party vendor, and therefore have disassociated themselves from the federal program.<sup>202</sup>

#### D. Teacher Evaluations

The first goal of Race to the Top was to address the quality of educators instructing students in K–12 schools.<sup>203</sup> Some improvements to the quality of education can be accomplished through pre-service training and appropriate professional development once employed by the school, but the standard that seemed to lack the most validity and reliability is teacher and administrator evaluation.<sup>204</sup> NCLB is an input-driven modification to improve teacher quality.<sup>205</sup> The major tenet of enhancing instruction during this period was credentialing and certificating teachers to ensure they were highly qualified.<sup>206</sup> The problem with this approach is that, methodologically, it does not ensure, nor predict, student success.<sup>207</sup> Philosophically, requiring teachers to have appropriate credentials to instruct a certain subject or grade level is logical. However, in many classes throughout the United States, instructors who lacked the appropriate content knowledge were teaching children in various classes.<sup>208</sup> Options were afforded to these instructors to seek alternative methods to attain highly qualified status in lieu of state-mandated certification requirements and retain their current assignment.<sup>209</sup> Nonetheless, having highly qualified instructors in every classroom was a priority, and NCLB sought to correct that deficiency.<sup>210</sup>

Referring to the production-function model, RTT moved the emphasis from the credentialing of educators to improve student achievement to the effectiveness of teachers to improve student achievement.<sup>211</sup> In essence, the focus is no longer on inputs but on the processes or throughputs.<sup>212</sup> In this paradigm, it became unacceptable to conclude that, singularly, certain credentials will correlate to

202. *Id.* at 9–10.

203. See ELAINE WEISS, BOLDER, BOLDER APPROACH TO EDUC., ECON. POLICY INST., MISMATCHES IN RACE TO THE TOP LIMIT: LACK OF TIME, RESOURCES, AND TOOLS TO ADDRESS OPPORTUNITY GAPS PUTS LOFTY STATE GOALS OUT OF REACH 46 (Patrick Watson & Lora Engdahl, eds. 2013), available at <http://www.epi.org/publication/race-to-the-top-goals/>.

204. *Id.* at 46, 57.

205. Cf. ALLAN R. ODDEN & LAWRENCE O. PICUS, SCHOOL FINANCE: A POLICY PERSPECTIVE 52–53 (Emily Barrosse, et al., eds., 5th ed. 2008) (“The production function is an economic tool used to measure the contribution of individual inputs to the output in some product.”); but cf. Kimberly D. Bartman, Comment, *Public Education in the 21st Century: How Do We Ensure that No Child is Left Behind?*, 12 TEMP. POL. & CIV. RTS. L. REV. 95, 116–17 (2002) (“In evaluating student performance, it is important to focus on input measures such as, teacher quality . . .”).

206. See WEISS, *supra* note 203, at 47.

207. *Id.* at 15, 78.

208. *Id.* at 47.

209. *Id.* at 47.

210. *Id.* at 6.

211. Cf. WEISS, *supra* note 203, at 5–6 (discussing development of teacher evaluations that relies on student achievement and the RTT requirement to remove barriers to credentialing so that more teachers can be qualified); but cf. ODDEN, *supra* at note 205, at 52–53 (discussing the production function model).

212. *Id.*

improved student achievement.<sup>213</sup> Teachers are required to demonstrate appropriate pedagogical techniques, which empirically demonstrate improved student achievement. This requires administrators to become proficient evaluators of instruction, including data assessment.<sup>214</sup>

In The Widget Study published in 2009, researchers concluded that for teacher evaluations, which used a binary evaluation instrument that denoted the teacher as “satisfactory” or “unsatisfactory,” 99% of teachers were deemed to be at least satisfactory. For those districts that used a more comprehensive instrument (more than 2 evaluation responses), the study concluded that teachers were considered to be at the top two levels: either “great” or “good.”<sup>215</sup> These results demonstrate that enhancement of evaluator skills needs to occur.<sup>216</sup> Accepting this high level of educator quality is certainly suspect when analyzing student achievement data. There is strong debate among scholars as to the amount of effect teachers have on student achievement irrespective of confounding variables such as socio-economic status or the educational attainment of the parents.<sup>217</sup> The entire variance for low student achievement cannot be solely placed upon the effectiveness of the teacher. RTT forced the concept of traditionally evaluating instructors to new, and in some cases, very contentious levels.

An amplification of this frustration was the eight-day teacher strike in the Chicago Public Schools that occurred in the fall of 2012 in response to multiple issues. However, the main point of contention was the method and procedure in which new teacher evaluation models were enacted.<sup>218</sup> Many educators were apoplectic due to at least fifty percent of a teacher’s overall evaluation being calculated for student achievement results on state summative examinations.<sup>219</sup> Various statistical formulae are used to predict the outcome of student achievement with actual results.<sup>220</sup> This computation then describes the “value” a teacher adds to the learning of the student, which is defined as the Value-Added Model or “VAM.”<sup>221</sup> This system is under immense pressure.<sup>222</sup> The current anxiety emanating from the education community is in response to the most recent education legislation enacted by the federal government.<sup>223</sup>

213. Diane Wells Rivers, *Race to the Top and Effective Models for School Improvement: Evidence and Alternative Models*, 2 (July 1, 2010) (unpublished research brief, The University of Nebraska of Omaha), available at <http://coe.unomaha.edu/moec/briefs/racetothetop.pdf>.

214. See WEISS, *supra* note 203, at 46, 53.

215. DANIEL WEISBERG ET AL., *THE WIDGET EFFECT: OUR NATIONAL FAILURE TO ACKNOWLEDGE ON DIFFERENCES IN TEACHER EFFECTIVENESS* 6 (2d ed. 2009), available at <http://files.eric.ed.gov/fulltext/ED515656.pdf>.

216. *Id.*

217. Cf. DIANE RAVITCH, *REIGN OF ERROR: THE HOAX OF THE PRIVATIZATION MOVEMENT AND THE DANGER TO AMERICA’S PUBLIC SCHOOLS* 99–100 (2013) (asserting that a teacher’s effectiveness will depend on other factors such as “family live and poverty”); but cf. MICHELLE RHEE, *RADICAL: FIGHTING TO PUT STUDENTS FIRST* xxii (2013) (indicating that a great teacher can help any child learn, regardless of the child’s circumstances).

218. Liana Heitin, *Chicago Strike Puts Spotlight on Teacher-Evaluation Reform*, 32 EDUC. WK., Sept. 12, 2012, at 16, available at <http://www.edweek.org/ew/articles/2012/09/12/04strike-eval.h31.html>.

219. *Id.* at 16–17.

220. *Id.* at 16.

221. *Id.*

222. *Id.*

223. See WEISS, *supra* note 203, at 81.



Traditionally, teacher evaluations were subjective administrator observations that were superficial in nature.<sup>224</sup> If an individual exhibited appropriate professional characteristics, had good rapport with students and parents, effectively managed a classroom, and participated in the general mission of the school, he or she was generally found to be a “good” to “outstanding” educator.<sup>225</sup> Merging student achievement data to predict the value a teacher adds to a student’s success in an instructor’s evaluation was the exception rather than the norm.<sup>226</sup> RTT required states to enact legislation that included student achievement data in teachers’ evaluation.<sup>227</sup> RTT provided specific language regarding teacher evaluation instruments by declaring that states “design and implement rigorous, transparent, and fair evaluation systems for teachers and principals that . . . take into account data on student growth . . . as a significant factor.”<sup>228</sup> While the Department of Education did not specifically articulate the weight student growth should have in the evaluation instrument, there was a subtle encouragement that it should be, minimally, fifty percent.<sup>229</sup> In 2010, thirteen state legislatures passed laws related to the teacher evaluation instrument with the hope of prevailing in the RTT competition.<sup>230</sup> Several states incorporated the threshold of fifty percent of the evaluation be reliant upon student achievement.<sup>231</sup> States like Colorado, Louisiana and Michigan took this path, while New York required forty percent and Oklahoma thirty-five percent. In 2011, five more states passed laws affecting teacher evaluation.<sup>232</sup> The momentum for change was strong.

### E. The Federal Government Defines Persistently Lowest Achieving Schools

The Obama Administration, through the United States Department of Education, set a precise vision on improving the performance of the nation’s lowest schools.<sup>233</sup> The mantra that was voiced for this program was “tight about ends and loose about means.”<sup>234</sup> RTT sought to improve only the absolute worst schools in

224. See JIM HULL, TRENDS IN TEACHER EVALUATION: HOW STATES ARE MEASURING TEACHER PERFORMANCE 13 (2013) available at <http://www.centerforpubliceducation.org/Main-Menu/Evaluating-performance/Trends-in-Teacher-Evaluation-At-A-Glance/Trends-in-Teacher-Evaluation-Full-Report-PDF.pdf>.

225. See WEISBERG ET AL., *supra* note 215.

226. See HULL, *supra* note 224, at 1–2.

227. *Id.* at 2.

228. Reform Support Network, *Measuring Student Growth for Teachers in Non-Tested Grades and Subjects*, available at <http://www2.ed.gov/about/inits/ed/implementation-support-unit/tech-assist/measuring-student-growth-teachers.pdf>.

229. See WEISS, *supra* note 203, at 71, 80.

230. *Educators (Teachers/Principals) 2010 Enacted Legislation Evaluation*, NATIONAL CONFERENCE OF STATE LEGISLATURES (Aug. 26, 2010), available at <http://www.ncsl.org/research/education/educators-teachers-principals-2010-enacted-evalu.aspx>.

231. See Comparison of States that Use Student Achievement in Teacher Evaluation Systems, New York State Governor Andrew M. Cuomo 1–3 (2011), available at <http://www.governor.ny.gov/sites/governor.ny.gov/files/archive/assets/documents/RTTTStateComparison1.pdf>.

232. *Id.*

233. See WEISS, *supra* note 203, at 8.

234. DeSchryver, *supra* note 161, at 2.

each state and allowed them to prescribe the necessary interventions.<sup>235</sup> The goal of turning these schools around was unwavering. While the sanctions imposed by NCLB were not implemented with fidelity, the federal government's role within RTT was identified as "prescriptive, muscular, and set on turning those schools around."<sup>236</sup> Each school has unique circumstances, traits, and demographics; yet, NCLB viewed them equally, and sanctions were imposed based upon this unyielding paradigm.<sup>237</sup> The U.S. Department of Education established a term for these failing schools and made it operational in RTT.<sup>238</sup> Persistently Lowest-Achieving Schools (PLAS) are identified by each state and specific prescriptive federal intervention is required of these schools. A PLAS school is defined as:

(a) Any Title I school in improvement, corrective action, or restructuring that:

- (i) [i]s among the lowest-achieving five percent of Title I schools in improvement, corrective action, or restructuring or the lowest-achieving five Title I schools in improvement, corrective action or restructuring in the State, whichever number of schools is greater; or
- (ii) [i]s a high school that has had a graduation rate as defined in 34 C.F.R. § 200.19(b) that is less than [sixty] percent over a number of years; and

(b) [a]ny secondary school that is eligible for, but does not receive, Title I funds that—

- (i) [i]s among the lowest-achieving five percent of secondary schools or the lowest-achieving five secondary schools in the State that are eligible for, but do not receive, Title funds, whichever number of schools is greater; or
- (ii) [i]s a high school that has had a graduation rate as defined in 34 C.F.R. § 200.19(b) that is less than [sixty] percent over a number of years.<sup>239</sup>

Those schools that met this definition of the bottom five percent of schools in a state were left in somewhat of a quandary because the RTT legislation did not specifically articulate what interventions were required. That issue was detailed in the School Improvement Grant (SIG).

235. See WEISS, *supra* note 203, at 5.

236. DeSchryver, *supra* note 161, at 8–11.

237. See UNITED STATES DEP'T OF EDUC., EXECUTIVE SUMMARY OF THE NO CHILD LEFT BEHIND ACT OF 2001 1 (2002), available at <http://www2.ed.gov/nclb/overview/intro/execsumm.pdf>.

238. *Id.*

239. UNITED STATES DEP'T OF EDUC., OFFICE OF ELEMENTARY AND SECONDARY EDUC., GUIDANCE ON FISCAL YEAR 2010 SCHOOL IMPROVEMENT GRANTS UNDER SECTION 1003(g) OF THE ELEMENTARY AND SECONDARY EDUCATION ACT OF 1965 1 (2012) [hereinafter Guidance on SIG], available at <http://www2.ed.gov/programs/sif/sigguidance02232011.pdf>.

## F. School Improvement Grants

Beginning in fiscal year 2008, the United States Congress appropriated over \$500 million for the SIG program, and combined with the ARRA allocation of \$3 billion, made a serious commitment to education reform.<sup>240</sup> The federal government required massive accountability with such an investment.<sup>241</sup> Section 1003(g) of the ESEA thoroughly delineated the expectations of the SIG program:

- Transformation: Schools must replace the principal, strengthen staffing, implement a research-based instructional program, provide extended learning time, and implement new governance and flexibility.
- Turnaround: Schools must replace the principal and rehire no more than 50 percent of the school staff, implement a research-based instructional program, provide extended learning time, and implement a new governance structure.
- Restart: Schools must convert or close and reopen under the management of an effective charter operator, charter management organization, or education management organization.
- School Closure: Schools must close and enroll their students in other, higher-performing schools in the district.<sup>242</sup>

Out of the four possible restructuring paths, the transformation model presents the option that causes the least amount of change and disruption.<sup>243</sup> It is not coincidental that the majority of PLAS identified schools have selected the transformation option.<sup>244</sup> Approximately seventy-four percent of SIG applicants selected the transformation model, twenty percent the turnaround model, four percent the restart model, and only two percent sought the school closure option.<sup>245</sup> A major concern for many schools is that the initial legislation passed by state legislatures to prepare for the RTT application was a calculated gamble.<sup>246</sup> The states not selected as RTT winners were left with legislation enacted with no

240. UNITED STATES DEP'T OF EDUC., SCHOOL IMPROVEMENT GRANT FUNDING 1 (2015), available at <http://www2.ed.gov/programs/sif/funding.html>.

241. Guidance on SIG, *supra* note 239, at 94.

242. *Id.* 46–56.

243. JEFF KUTASH ET AL., THE SCHOOL TURNAROUND FIELD GUIDE 26 (2010), available at <http://www.wallacefoundation.org/knowledge-center/school-leadership/district-policy-and-practice/Documents/The-School-Turnaround-Field-Guide.pdf>.

244. EILEEN M. O'BRIEN & CHUCK DERVARICS, WHICH WAY UP: AT A GLANCE 2 (2013), available at <http://www.centerforpubliceducation.org/Main-Menu/Policies/Which-Way-Up-At-a-glance>.

245. Michael Corry & Angela Carlson-Bancroft, *Transforming and Turning Around Low-Performing Schools: The Role of Online Learning* (2014), available at <http://files.eric.ed.gov/fulltext/EJ1033256.pdf>.

246. See Joe Onosko, *Race to the Top Leaves Children and Future Citizens Behind: The Devastating Effects of Centralization and High Stakes Accountability*, 19 DEMOCRACY & EDUC., No. 2 at 1, 5–8, available at <http://democracyeducationjournal.org/cgi/viewcontent.cgi?article=1017&context=home>.

financial resources to make the required changes.<sup>247</sup> In addition, schools that were identified as a PLAS faced major changes, which can be expensive.<sup>248</sup> The SIG program offered financial assistance; yet, like RTT, the award is competitive among the PLAS schools in the respective state.<sup>249</sup> Schools not awarded SIG support face increased costs as a result of RTT with decreasing general operating revenues due to the economic downturn.<sup>250</sup>

Race to the Top did not follow past paradigms by simply suggesting individual schools implement recommended changes and collect data in a disheveled manner. It mandated that states change law and establish transparent accountability practices to be in place for the state to be eligible for the award and held local school districts accountable for the modifications.<sup>251</sup> An example of the intrusiveness is articulated by a summary produced by the Michigan Association of School Boards (MASB), which raised early warnings for the legislation.<sup>252</sup> MASB analyzed the legislation required by RTT and noted that many of the bills being proposed in the Michigan Legislature had direct and indirect effects on collective bargaining authority.<sup>253</sup> Much of the legislation being introduced conflicted with union contracts and the laws crafted gave the school boards the authority to set aside many of those contractual restrictions.<sup>254</sup> Timing seemed to be right for state legislatures to encroach upon some of the perceived traditional organizations and legislation that had been impediments for the right-wing education agenda, specifically, union power to collectively bargain a number of issues.<sup>255</sup>

A number of reforms and issues collided at once. Andrew Rotherham, co-founder and partner at Bellweather Education and former education advisor to President Clinton, answers the timing of all these changes by stating,

[a]ll of this came about as a result of fortuitous timing—a happy coincidence of events. . . . It was a bad economy, states were in desperate financial need, these issues had a long history in the

247. Ben Boychuk, *The 'Parent Trigger' in California: Some Lessons from the Experience so Far*, THE HEARTLAND INST. 1 (2011) (the Parent Trigger law was included in a series of legislation that was quickly passed in January 2010 to be in position to be awarded an RTT grant. California was not awarded a grant, but the Parent Trigger remained in place), available at <https://www.heartland.org/policy-documents/parent-trigger-california-some-lessons-experience-so-far>.

248. KATHRYN DOHERTY, ET AL., UNITED STATES DEP'T OF EDUC., PLANNING AND EVALUATION SERV., TURNING AROUND LOW-PERFORMING SCHOOLS: A GUIDE FOR STATE AND LOCAL LEADERS 2–3 (1998) available at <http://www2.ed.gov/pubs/turning/index.html>.

249. See WEISS, *supra* note 203, at 76.

250. *Id.* at 69.

251. Guidance on SIG, *supra* note 239, at 46.

252. MICHIGAN ASSOCIATION OF SCHOOL BOARDS, RACE TO THE TOP: LEGISLATION SUMMARY 1 (2009), available at <http://mymassp.com/files/summary%20RTT.pdf>.

253. *Id.* at 1–2.

254. *Id.* at 2.

255. *Id.* at 3.

states and [there was] an administration willing to aggressively pursue this agenda.<sup>256</sup>

Periods of crisis often create a culture that is amenable to change. The recalcitrant education community is seen as a primary obstacle to the reform efforts proffered by the state and federal government to this point.<sup>257</sup> By requiring state legislatures to enact laws to be eligible for RTT funds, the federal government is mandating change to happen with limited concern for the iconic methods of the past.

### G. SIG Implementation Yields Mixed Results

In analyzing the data collected from the first year of SIG schools, the results of the program yield ambiguous findings.<sup>258</sup> Multiple researchers have opined various conclusions to the preliminary results of the SIG program.<sup>259</sup> Out of 731 schools awarded funds from SIG, sixty-five percent saw increases in mathematics and sixty-four percent saw increases in reading.<sup>260</sup> In contrast, thirty-four percent had a decline in mathematics and thirty-seven percent declined in reading after funds were received.<sup>261</sup> Paradoxically, twenty-six percent of these schools that were on a path to improvement in mathematics exhibited a declension after procuring SIG dollars, combined with twenty-eight percent of the schools in reading doing the same.<sup>262</sup> The majority of schools witnessing growth are elementary schools.<sup>263</sup>

The results have caused disagreement among researchers with many of them pontificating ambivalent results. Diane Stark Rentner, the deputy director of the Center on Education Policy, commented the data looked better than she had expected.<sup>264</sup> Her conjecture, prior to viewing the results, was that the program would yield stagnating results.<sup>265</sup> Her conclusion was several schools focused on climate, and they are postponing achievement efforts until later in the grant period.<sup>266</sup> Juxtaposing this perspective with Andrew Smarick at Bellweather

256. See DeSchryver, *supra* note 161, at 5 (quoting Andrew Rotherham in a personal interview that was conducted on July 22, 2010).

257. See *Help for Your Community: Obstacles to Reform*, MAKING SCHOOLS WORK WITH HEDRICK SMITH, 1-2 (2005), available at <http://www.pbs.org/makingschoolswork/hyc/obstacles.html>.

258. See Alyson Klein, *Ed. Dept. Analysis Paints Mixed Picture of SIG Program*, EDUC. WK. at 3, Nov. 19, 2012, available at

[http://www.edweek.org/ew/articles/2012/12/05/13sig.h32.html?qs=ed.+dept.+analysis+paints+mixed+picture+of+sig+program\\_](http://www.edweek.org/ew/articles/2012/12/05/13sig.h32.html?qs=ed.+dept.+analysis+paints+mixed+picture+of+sig+program_)

259. *Id.*

260. Press Release, U.S. Dep't of Educ., U.S. Department of Education Releases Early Snapshot of School Improvement Grants Data: Snapshot of School Improvements Data (Nov. 19, 2012), available at <http://www2.ed.gov/documents/press-releases/sig-data-presentation.pdf>.

261. *Id.* at 1.

262. *Id.* at 4.

263. Press Release, U.S. Dep't of Educ., U.S. Department of Education Releases Early Snapshot of School Improvement Grants Data (November 19, 2012), available at [http://www.ed.gov/news/press-releases/us-department-education-releases-early-snapshot-school-improvement-grants-data\\_](http://www.ed.gov/news/press-releases/us-department-education-releases-early-snapshot-school-improvement-grants-data_)

264. KLEIN, *supra* note 258, at 1.

265. *Id.* at 3.

266. *Id.*

Education provides an interesting antithesis. He terms the results as “heartbreaking,” concluding that more than one-third of schools declined in growth in spite of the expenditure of several billion dollars.<sup>267</sup> Smarick furthers his rancor stating that most schools typically see an increase in achievement at the inception of program designed to improve student achievement. In this case, many schools did not see an initial increase, which does not bode well for achievement in the future.<sup>268</sup> Robin Lake, the director of the Center of Reinventing Public Education at the University of Washington, amplifies the confounding results by articulating the notion that the program was never clearly defined in spite of the ambitious and bold change discussed by the Department of Education.<sup>269</sup> Arne Duncan succinctly concludes the argument at this time by stating, “[o]ne year of gains isn’t success. One year of declines isn’t failure.” “[I]t’s way . . . too early to draw any conclusions.”<sup>270</sup> The fact the federal government has infused so many resources into this program, and usurped an enormous amount of authority from the local governing bodies, puts enormous stressors upon the federal organizers; yet, change of this magnitude will take more time for appropriate evaluations to be completed.

### VIII. NO CHILD LEFT BEHIND REDUX

As the nation continues its education reform march, the deadline of the 2013–14 school year passed for all schools to reach 100% proficiency in math and reading as defined by the NCLB law.<sup>271</sup> The majority of education professionals agree this goal was unattainable.<sup>272</sup> In addition to the deadline, ESEA, which houses NCLB, required reauthorization in 2012.<sup>273</sup> As Congress began to conduct meetings and receive expert testimony on NCLB, it became painstakingly obvious that bipartisan gridlock would impede reauthorization. With no approval imminent, the Obama Administration sought to continue the reform efforts initiated in the Race to the Top program without intrusion from NCLB.<sup>274</sup> In order for states to receive a “NCLB waiver,” they are required to submit an ESEA flexibility plan to the United States Department of Education.<sup>275</sup> States that have sought and are

267. *Id.*

268. *Id.* at 4.

269. *Id.* at 4.

270. KLEIN, *supra* note 258, at 1–2.

271. David J. Hoff, *Not All Agree on Meaning of NCLB Proficiency*, EDUC. WK., Apr. 17, 2007, available at <http://www.edweek.org/ew/articles/2007/04/18/33proficient.h26.html?qs=nclb+proficiency>.

272. Challen Stephens, *No Child Left Behind on the Way out, but Not Anytime Soon*, TIMES WATCHDOG REP. (Aug. 12, 2010, 7:03 PM), available at [http://blog.al.com/breaking/2010/08/times\\_watchdog\\_report\\_no\\_child.html](http://blog.al.com/breaking/2010/08/times_watchdog_report_no_child.html).

273. U.S. DEP’T OF EDUC., ESEA OVERVIEW: REAUTHORIZATION OF THE ELEMENTARY AND SECONDARY EDUCATION ACT (2011), available at <https://www2.ed.gov/about/overview/budget/budget12/justifications/eseaoverview.pdf>.

274. U.S. DEP’T OF EDUC., A BLUEPRINT FOR REFORM: REAUTHORIZATION OF THE ELEMENTARY AND SECONDARY EDUCATION ACT (2010), [hereinafter BLUEPRINT] (Obama’s blueprint for education reform), available at <http://www2.ed.gov/policy/elsec/leg/blueprint/blueprint.pdf>.

275. U.S. DEP’T OF EDUC., ESEA FLEXIBILITY: FLEXIBILITY TO IMPROVE STUDENT ACADEMIC ACHIEVEMENT AND INCREASE THE QUALITY OF INSTRUCTION (2012) [hereinafter ESEA FLEXIBILITY] (report on ESEA flexibility from U.S. Department of Education), available at <http://www2.ed.gov/policy/eseaflex/approved-requests/flexrequest.doc>; U.S. DEP’T OF EDUC., ESEA FLEXIBILITY: PRINCIPLES FOR IMPROVING STUDENT

seeking NCLB flexibility must meet several qualifications. Some of those elements are: (1) propose their own accountability; (2) set their own student-achievement goals; (3) identify struggling schools; and, (4) create evaluation systems for teachers and building leaders.<sup>276</sup> In addition, the Department of Education is requiring states to identify “priority,” “focus,” and “reward” schools and requires states to make those lists public.<sup>277</sup> To support these identifications, the Department of Education is looking for states to implement turnaround principles in the priority schools and interventions in the focus schools.<sup>278</sup> The Obama Administration is not seeking flexibility to maintain the status quo. The intent is to give states the freedom to set their own student-achievement goals, and design their own interventions for failing schools.<sup>279</sup> Currently, thirty-four states plus the District of Columbia have secured a waiver and a total of forty-six have requested the flexibility waiver.<sup>280</sup> Iowa and California were rejected and North Dakota and Vermont have withdrawn their requests.<sup>281</sup>

The posture that several states have taken relative to NCLB is noteworthy. For instance, Texas has historically espoused states’ rights, and has positioned itself contrary to federal law.<sup>282</sup> In this particular segment, Texas has shunned the Race to the Top initiative and Common Core implementation.<sup>283</sup> These two components are contrary to the Obama Administration’s main educational goals.<sup>284</sup> California’s waiver plan was rejected, yet ten districts have organized to petition the Department of Education for a collective waiver.<sup>285</sup> These ten districts would set common goals replacing the 100% proficiency standard.<sup>286</sup> In addition, they would plan to eliminate disparities in other areas besides academic improvements.<sup>287</sup>

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ACADEMIC ACHIEVEMENT AND INCREASING THE QUALITY OF INSTRUCTION (2012) [hereinafter ESEA FLEXIBILITY PRINCIPLES] (report on ESEA flexibility principles from U.S. Department of Education), available at <http://www2.ed.gov/policy/eseaflex/approved-requests/flexrequest.doc>.

276. ESEA FLEXIBILITY, *supra* note 275, at 1; ESEA FLEXIBILITY PRINCIPLES, *supra* note 277, at 1–3, 6.

277. ESEA FLEXIBILITY PRINCIPLES, *supra* note 275, at 1–2; Tamar Lewin & Motoco Rich, *No Child Left Behind Faces Its Own Reckoning*, N.Y. TIMES, Mar. 22, 2015, at A16.

278. See ESEA FLEXIBILITY PRINCIPLES, *supra* note 275, at 2, 7; Michele McNeil, *Rural States in Hunt for NCLB Waivers: Fresh Batch of Applications Hits Ed. Dept.*, EDUC. WK., Sept. 26, 2012, at 20–21.

279. BLUEPRINT, *supra* note 274, at 5, 9; Alyson Klein & Michele McNeil, *Obama Offers Waivers from Key Provisions of NCLB: Plan Waives Cornerstone Provisions of Law*, EDUC. WK., Sept. 28, 2011, at 1, 20–21.

280. Michele McNeil, *Details Trickling Out on Latest NCLB Waiver Bids: No Sure Thing Seen in Leeway on NCLB*, EDUC. WK., Mar. 1, 2013, at 18–19, 22.

281. *Id.*

282. See *Roe v. Wade*, 410 U.S. 113 (1973) (striking down Texas state law prohibiting a woman to obtain an abortion); *Texas v. Johnson*, 491 U.S. 397 (1989) (striking down Texas state law making it a crime to intentionally desecrate a state or national flag); *Lawrence v. Texas*, 539 U.S. 558 (2003) (striking down Texas state law criminalizing acts of homosexual sodomy).

283. Sam Dillon, *Texas Shuts Door on Millions in Education Grants*, N.Y. TIMES, Jan. 14, 2010, at A22; Morgan Smith, *With Pre-K Grant, Texas Switches Gears on Federal Cash*, TEX. TRIB. (Sept. 16, 2014), available at <http://www.texastribune.org/2014/09/16/texas-will-apply-obama-administration-pre-k-grant/>.

284. BLUEPRINT, *supra* note 274, at 2; Morgan Smith, *In Texas Schools, Perry Shuns Federal Influence*, TEX. TRIB. (Sept. 4, 2011), available at <http://www.texastribune.org/2011/09/04/tk/>.

285. L.A. UNITED SCH. DIST., NCLB WAIVER FOR CORE DISTRICTS (Sept. 2013), <http://coredistricts.org/wp-content/uploads/2013/02/CORE-ESEA-Flexibility-Request.pdf>.

286. *Id.*

287. *Id.*; See also Lesli A. Maxwell, *9 California Districts Seek Own NCLB Waiver*, EDUC. WK., Mar. 6, 2013, at 22.

The states which have requested or have been granted a flexibility waiver, have many similarities among them. Items such as accepting the Common Core Curriculum, improving student achievement gaps, increased flexibility for spending Federal Title I revenue, elimination of the student transfer requirement and rigorous, fair, and transparent teacher and administrator evaluations are some of the commonalities.<sup>288</sup> Only four states, Alaska, Nebraska, Texas, and Virginia have not adopted the Common Core Curriculum.<sup>289</sup> Eliminating the rule mandating that Title I funding be allocated to tutoring or restructuring a school for failure to meet AYP standards will provide about \$1 billion to schools, which would have otherwise been predetermined.<sup>290</sup> The common waivers being requested are not coincidental. It is a conscientious tenet of the Obama Administration to reduce the effect of NCLB on schools, and to reform them in the manner as deemed appropriate by the Department of Education, which is implementing RTT.<sup>291</sup>

The flexibility waiver and current education reform climate has provided the opportunity for states to incorporate various new efforts outside the commonalities described above. Interestingly, several states either implemented or significantly revised comprehensive evaluation measures for teachers and principals incorporating student achievement as a certain percentage of the assessment.<sup>292</sup> As noted, the evaluation modification caused frustration among those impacted by its implementation.<sup>293</sup> This displeasure is probably best captured with the strike by the Chicago Teachers Union (CTU) in September 2012, which had not authorized a strike in twenty-five years.<sup>294</sup> One of the main grievances of the CTU was the speed and depth of the evaluation system being proposed.<sup>295</sup> In the tentative agreement, Chicago district officials lessened the immediate impact of the system.<sup>296</sup> The CTU actually struck against Rahm Emanuel, a Democrat, who served as President Obama's Chief of Staff.<sup>297</sup> Therefore, a supporter of traditional public education has taken a position, which is antithetical to past conventions.

NCLB required states to evaluate students in grades 3–8 in mathematics and reading at least once per year.<sup>298</sup> Multiple states have declared that assessing just these two subjects does a disservice to science, writing, and social studies.<sup>299</sup> A

288. ESEA FLEXIBILITY, *supra* note 275, at 1; ESEA PRINCIPLES, *supra* note 275, at 3; Klein & McNeil, *supra* note 279, at 1, 20–21; Lewin & Rich, *supra* note 277, at A16.

289. Alison Klein, *Rift Seen Among Republicans on Common Core*, EDUC. WK., Sept. 26, 2012, at 19, 23.

290. Alison Klein, *Tide of NCLB Waivers Rises; Tally Stands at 33 and Counting*, EDUC. WK., Aug. 8, 2012, at 24; Klein & McNeil, *supra* note 279, at 1, 20–21.

291. Klein & McNeil, *supra* note 279, at 1, 20–21; Lewin & Rich, *supra* note 277, at A16.

292. See, *Overview of State ESEA Waivers*, PENN HILL GROUP available at <http://pennhillgroup.com/eseawaiveranalysis/> (last visited Dec. 1, 2015).

293. Sophia Tareen, *Teacher Evaluations at Center of Chicago Strike*, HUFFINGTON POST (Nov. 13, 2012, 5:12 AM), available at [http://www.huffingtonpost.com/2012/09/13/teacher-evaluations-at-ce\\_0\\_n\\_1880264.html](http://www.huffingtonpost.com/2012/09/13/teacher-evaluations-at-ce_0_n_1880264.html).

294. *Id.*; See also Heitin, *supra* note 218, at 16.

295. Heitin, *supra* note 218, at 16.

296. Stephen Sawchuk, *Cost Issues Unresolved in Chicago*, EDUC. WK., Sept. 26, 2012, at 1, 13.

297. Joseph A. Palermo, *Chicago Teachers Union vs. Mayor Rahm Emanuel (The Democrats' Scott Walker?)*, HUFFINGTON POST: THE BLOG (Sept. 11, 2012 7:58 PM), available at [http://www.huffingtonpost.com/joseph-a-palermo/chicago-teachers-strike-democrats\\_b\\_1875598.html](http://www.huffingtonpost.com/joseph-a-palermo/chicago-teachers-strike-democrats_b_1875598.html).

298. *No Child Left Behind*, EDUC. WK., Sept. 19, 2011, available at <http://www.edweek.org/ew/issues/no-child-left-behind/>.

299. Erik W. Robelen, *Waivers to Widen Test Menu*, EDUC. WK., Apr. 25, 2012, at 1, 20–21.



majority of states, therefore, are requesting flexibility that includes at least a science assessment, if not all three subject achievement measures.<sup>300</sup> Assessing individual schools and school districts remains a cornerstone of the waiver request. While each state is allowed to determine its accountability process, these processes are much more detailed and have multiple layers.<sup>301</sup> States have taken the mandate of identifying reward, focus, and priority schools and in many cases have created several subcategories, which provide more incentives for high-achieving schools and the potential for increased intervention the lower a school ranks on the achievement spectrum.<sup>302</sup> An example of this is Colorado's approved waiver request.<sup>303</sup> Colorado identified five levels of reward schools, three levels of focus schools, and the SIG definition for priority schools.<sup>304</sup> A major concern among school administrators when comparing schools is the number of individual factors that impact student achievement.<sup>305</sup> Schools that have a higher socio-economic status often correlate to higher student achievement.<sup>306</sup> However, schools are typically compared on an equal setting.<sup>307</sup> New Jersey has placed into law a "peer school ranking" system comparing each school's performance to schools with similar demographics.<sup>308</sup> Connecticut has included school climate into its accountability process,<sup>309</sup> and Georgia school districts will receive a rating for financial efficiency related to the use of instructional funds from all sources.<sup>310</sup> Multiple opportunities are occurring for states to implement reform efforts, which are being touted by the national government and many private organizations.

While the Obama Administration is seeking to reform schools through the RTT process, it has been less interested in addressing the needs of NCLB. RTT requires states and local school districts to subscribe to specific postulates enacted by the federal government, yet it is willing to employ the argument of local control in providing NCLB waivers to states.<sup>311</sup> Arne Duncan said, "[t]hese requests reflect the desire of the states to have more flexibility in implementing their locally developed ideas about how to improve education—and not be forced into a one-

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300. *Id.*

301. Jeremy Ayers et al., NO CHILD LEFT BEHIND WAIVERS: PROMISING IDEAS FROM SECOND ROUND APPLICATIONS, CTR. FOR AM. PROGRESS (July 2012), available at <https://www.americanprogress.org/wp-content/uploads/issues/2012/07/pdf/nochildwaivers.pdf>.

302. U.S. DEP'T EDUC., COLORADO DEPARTMENT OF EDUCATION: ESEA FLEXIBILITY REQUEST (2012), available at <http://www2.ed.gov/policy/eseaflex/approved-requests/co.pdf>.

303. *Id.*

304. *Id.*

305. Jeanne Ponesse, *Socioeconomic Status Tops Study of Education Factors*, EDUC. WK., July 10, 1996, available at <http://www.edweek.org/ew/articles/1996/07/10/40norc.h15.html?qs=socio+economic+status>.

306. *Id.*

307. See Mathew D. Knepper, Comment, *Shooting for the Moon: The Innocence of the No Child Left Behind Act's One Hundred Percent Proficiency Goal and Its Consequences*, 53 ST. LOUIS U. L. REV. 899, 900 (2009).

308. N.J. DEP'T EDUC., ESEA WAIVER REQUEST FROM NEW JERSEY (2012), available at <http://www.state.nj.us/education/grants/nclb/waiver/waiver.pdf>.

309. U.S. DEP'T EDUC., ESEA FLEXIBILITY REQUEST: CONNECTICUT (2012), available at <http://www2.ed.gov/policy/eseaflex/approved-requests/ct.pdf>.

310. U.S. DEP'T EDUC., ESEA FLEXIBILITY REQUEST: GEORGIA (2012), available at <http://www2.ed.gov/policy/eseaflex/approved-requests/ga.pdf>.

311. Michele McNeil, *Waiver Machine Rolls On as Stragglers Climb Aboard*, EDUC. WK., Mar. 13, 2013, at 18–19, 22.

size-fits-all approach.”<sup>312</sup> Duncan articulated that he does not concur the waivers are an end-run to the spirit of the NCLB law. Others contest this position, highlighted by State Superintendent Tom Luna from Idaho.<sup>313</sup> He contends the federal government is trying to intervene in an area that has been historically reserved for the states.<sup>314</sup> Specifically, he noted, “[i]t’s an affront to states’ rights.”<sup>315</sup> Some lawmakers proclaim Duncan has overstepped his authority.<sup>316</sup> A significant conundrum has merged with these two enormous education reform efforts. Some of the pieces blend and represent a seamless combination of programs. However, the majority of waivers invite major confusion for the practitioners and is beholden of political gamesmanship.

## IX. CONCLUSION

Education reform in the United States is ascending rapidly in terms of federal involvement. The ESEA Act of 1965 provided a legal vehicle by which the federal government can manipulate various components of public education, which it refrained from doing in the past. Traditionally, the federal government delegated the authority to facilitate public educational systems to the states and local boards of education. The Johnson Administration made strong inroads into the sealed environment of local education by providing financial resources that persuaded states and local boards to abdicate much of their legal obligations for the potential increase of federal revenue. Massive modifications were required by the federal government to the local district and states to subscribe to federal government initiatives. Philosophies have differed over the decades as to the role the national government should have in an area that has, traditionally, been reserved to local governing bodies. Much of the frustration on the part of teachers and principals is that programs, rules, and regulations change at a mind-numbing pace. Change of this magnitude does not happen as quickly as some government officials and private entities would prefer. The legislation and policy implementation intended to improve the educational system may actually be causing it to slow down.<sup>317</sup> Those responsible for implementation are scurrying to continue to enact the goals handed down by the federal government and rules established by the states; some private

312. *Id.*

313. Andrew Ujifusa, *Arne Duncan Spars with State K-12 Chiefs over District Waivers*, EDUC. WK.: BLOG (Mar. 19, 2013, 5:07 PM), available at [http://blogs.edweek.org/edweek/state\\_edwatch/2013/03/arne\\_duncan\\_spars\\_with\\_state\\_k-12\\_chiefs\\_over\\_district\\_waviers.html](http://blogs.edweek.org/edweek/state_edwatch/2013/03/arne_duncan_spars_with_state_k-12_chiefs_over_district_waviers.html).

314. *Id.*

315. *Id.*

316. Alyson Klein, *As NCLB Waivers Take Hold, Revision of Law Remains up in Air*, EDUC. WK., Feb. 20, 2013, at 25.

317. See PETER SENGE, *THE FIFTH DISCIPLINE: THE ART & PRACTICE OF THE LEARNING ORGANIZATION* 62–63 (1990) (hypothesizing all organizations operate under congruent paradigms. Within systems thinking are eleven laws. The sixth law that is articulated is that “faster is slower.” This contention is important for this thesis as the federal government continues to make modifications to public education without appropriate time for previous changes to have an impact).

entities continue to support the declination of public education in anticipation that corporations can maneuver even further into public education.

The federal government has taken an intrusive role in public education at the local level through state legislatures, which is antithetical to its history. It is usurping control from local boards of education in the name of reform. There are numerous private individuals that view public education funding as an untapped profit source. Attempts to characterize public education as failing are well established. Lawrence Fernberg, from Keystone State Educational Coalition, summarizes the attempt to degrade public education thusly, “I think people have gotten pretty accustomed to all of their schools being labeled failing by now. The law has lost all credibility.”<sup>318</sup> As the federal government continues its encroachment on the public education sector, opposition continues to coalesce. In fact, legislation has been introduced to mitigate the intrusion of the Department of Education.<sup>319</sup> The National School Board Association (NSBA) is a strong proponent of this piece of legislation. This is illustrated by the comments of Thomas J. Gentzel, the executive director:

In recent years local school board members and educators have become increasingly concerned that the local governance of our nation’s school districts is being unnecessarily eroded through over reaching federal policies and requirements established by the U.S. Department of Education. . . . Public education decisions made at the federal level must support the needs and goals of local school districts and the communities they serve. The U.S. Department of Education should not be imposing its rules and priorities to our nation’s more than 13,500 school districts by trying to by-pass Congress and input from the local level.<sup>320</sup>

Most schools in the nation have been reacting to these arduous modifications for well over a decade. While the federal government has gone to great means to define and identify failing schools, resources to ameliorate these institutions have fallen short. Espousing hyperbole about the current state of public education and the methods needed to remediate it have become folly for bipartisan rancor.

Arguably, the George W. Bush and Obama Administrations have provided the most intrusive education policies to date and are not that dissimilar in methods.<sup>321</sup> President Johnson’s ESEA program dedicated a large infusion of financial

318. McNeil, *supra* note 280, at 18–19, 22.

319. Local School Board Governance and Flexibility Act, H.R. 1386, 113th Cong. (2013–2014).

320. Alexis Rice, *Local School Board Governance and Flexibility Act Introduced in U.S. Congress*, NAT’L SCH. BOARDS ASS’N (Mar. 21, 2013), <http://schoolboardnews.nsba.org/2013/03/local-school-board-governance-and-flexibility-act-introduced-in-u-s-congress/> (last visited October 30, 2015) (quoting Thomas J. Gentzel, NSBA Executive Director).

321. Erik W. Robelen, *Obama Echoes Bush on Education Ideas*, EDUC. WK., Apr. 8, 2009, at 1, 18–19; See also Valerie Strauss, *Who Was the ‘Best’ Education President?*, WASH. POST, Nov. 21, 2011, available at [https://www.washingtonpost.com/blogs/answer-sheet/post/who-was-the-best-education-president/2011/11/20/gIQUAL3kkgN\\_blog.html](https://www.washingtonpost.com/blogs/answer-sheet/post/who-was-the-best-education-president/2011/11/20/gIQUAL3kkgN_blog.html).

resources but did not emphasize punitive actions based upon student achievement standards.<sup>322</sup> No Child Left Behind (Bush) and Race to the Top (Obama) seek to operationalize a failing school and dictate measures to remediate these identified schools or ultimately transfer authority for the school away from public supervision.<sup>323</sup> A paradox has developed with both of these initiatives in that they have detailed the mandate that reform must correlate with best practice and research. However, in several instances, the change mandated is not couched in best practice and research—a significant source of hypocrisy.<sup>324</sup> For example, as part of Race to the Top, improving failing schools requires specific criteria to be addressed.<sup>325</sup> One of the requirements imbedded in the reform policy is to provide teachers with merit pay for improving student achievement.<sup>326</sup> Ironically, as schools grapple with constricting budgets, the federal government is requesting schools expend revenue into an area that has yet to be empirically proven to advance student achievement.<sup>327</sup> Thus, irony permeates the reform culture, as the federal government contradicts itself.

In a bipartisan fashion, the phenomenon of charter schools seems to be the solution to remediate failing schools in deference to student achievement results and research conclusions for many policymakers. Those studying the effect of charter schools will need to continue to develop rigorous studies to accurately describe the overall benefit of these schools, as current results are ambiguous.<sup>328</sup> Corporate greed will need to be abnegated in the public education arena as this will only serve to divide and not unite. The political lens of policymaking is to understand how conflict is resolved for finite financial resources. Contests for these funds will continue to be a source of conflict unless these resources find legal protection, and their use by private interests is restricted. Because corporate oversight of charter schools has led to some malfeasance and significant misappropriation of funds,<sup>329</sup> some legislators are requesting more oversight of these organizations.<sup>330</sup>

The solution from the federal government over the years has been to allocate additional financial resources to students who are in the most need. Ironically, there

322. Robelen, *supra* note 321, at 1, 18–19; Strauss, *supra* note 321.

323. Robelen, *supra* note 321, at 1, 18–19; Strauss, *supra* note 321.

324. *What Teachers Need to Know About Race to the Top*, EDUC. WK.: TEACHER, Sept. 2, 2009, available at [http://www.edweek.org/tm/articles/2009/09/02/rtt\\_explained.html?qs=what+teachers+need+to+know+about+race+to+the+top](http://www.edweek.org/tm/articles/2009/09/02/rtt_explained.html?qs=what+teachers+need+to+know+about+race+to+the+top).

325. *Id.*

326. *Id.*

327. See Ballou, et al., *Teacher Pay for Performance: Experimental Evidence from the Project on Incentives in Teaching*, VAND. U., NAT'L CTR. ON PERFORMANCE INCENTIVES (2010), available at <http://www.hechingerreport.org/static/pointstudy.pdf>; See also Al Ramirez, *Merit Pay Misfires*, EDUC. LEADERSHIP: THE EFFECTIVE EDUCATOR, Jan. 2011, at 55–58; William J. Slotnik, *The Buck Stops Here: Tying What Students Learn to What Educators Earn*, PHI DELTA KAPPAN, May 2010, at 44–48; Andrew Ujifusa, *Standardized Testing Costs States \$1.7 Billion a Year, Study Says*, EDUC. WK., Nov. 29, 2012, available at <http://www.edweek.org/ew/articles/2012/11/29/13testcosts.h32.html>.

328. Debra Viadero, *Study of Charters in 8 States Finds Mixed Effects*, EDUC. WK., Mar. 18, 2009, available at <http://www.edweek.org/ew/articles/2009/03/17/27charter.h28.html>.

329. See *Florida's Shameful Situation on Charter Schools*, BRADENTON HAROLD, Oct. 30, 2012, available at <http://www.bradenton.com/opinion/editorials/article34565700.html>.

330. *Id.*

is consistent evidence that federal dollars are not directed at the students who need it the most.<sup>331</sup> Designing a competition for those scarce resources may in fact entrench the recipients of these funds to schools that need it the least.<sup>332</sup> Stanford University completed a study, which further supports this notion.<sup>333</sup> The report found that the student achievement gap has widened between rich and poor students in the last three decades and is even larger than the gap among racial categories.<sup>334</sup> Policymakers in concert with researchers need to ensure that money earmarked for students in need is indeed reaching its intended target. Those responsible for managing the financial support for these programs must ensure efficiency.

Teacher and administrator evaluations will continue to be a point of contention until a system that is empirically proven is implemented. The correlation of teacher value to the achievement of students is not without merit. However, because of the fast pace by which the concept was implemented, the percentage of the evaluation attributed to student achievement has varied among the states.<sup>335</sup> In some instances, teachers were held accountable for students they never taught.<sup>336</sup> For educators, they are faced with human abnormalities and differences. Merit pay seems to provide an incentive for educators on the premise that they are not fulfilling their responsibilities and will produce increased student achievement scores based upon financial rewards.<sup>337</sup>

More focus is being placed on public education than at any point in the nation's history. Many progressive modifications are being suggested and implemented, and in many cases, this is being done in spite of local control. By close examination, it can be ascertained rather quickly, that motives for improvement are not exclusively reserved to student achievement. Private organizations are focused on improving profits and are seeking to secure funds that have been traditionally reserved for the private sector. Unfortunately, for educators and students, they are caught in the widening gyre of policymaking and accountability measures, done in the name of students but implemented in the spirit of greed.

331. Symposium, *Educational Innovation and the Law*, 87 NOTRE DAME L. REV. 2087, 2119 (2012).

332. *Id.*

333. *Id.*

334. *Id.*; See also Sean F. Reardon, *The Widening Academic Achievement Gap Between Rich and Poor: New Evidence and Possible Explanations*, in WHITTIER OPPORTUNITY: RISING INEQUALITY, SCHOOLS, AND CHILDREN, 91 (Greg J. Duncan & Richard Murnane eds., 2011).

335. Cara Fitzpatrick & Lisa Gartner, *Confused by Florida's Teacher Scoring? So Are Top Teachers*, TAMPA BAY TIMES, Mar. 1, 2014, available at <http://www.tampabay.com/news/education/k12/confused-by-floridas-teacher-performance-scores-so-are-award-winning/2168062>.

336. *Id.*

337. Nancy Zuckerbrod, *Many Teachers Dubious of Merit Pay*, WASH. POST, July 4, 2007, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/07/04/AR2007070401015.html>.