

THE FEDERAL ROLE IN SCHOOL REFORM:  
OBAMA’S “RACE TO THE TOP”

*Joseph P. Viteritti\**

INTRODUCTION .....	2087
I. ESEA AND THE EVOLVING FEDERAL ROLE .....	2088
II. NO CHILD LEFT BEHIND .....	2094
III. THE OBAMA AGENDA .....	2100
IV. ASSESSING RTT .....	2105
A. <i>Testing and Standards</i> .....	2108
B. <i>Evaluating Teachers</i> .....	2109
C. <i>Turning Around Failing Schools</i> .....	2111
D. <i>Charters and Choice</i> .....	2113
V. REVISITING NCLB .....	2116
CONCLUSION .....	2117
APPENDIX .....	2120

INTRODUCTION

Given the level of discretionary funding that has been made available to him by Congress and the way he has chosen to exercise his administrative authority, Secretary of Education Arne Duncan is for all practical purposes the most powerful federal executive in the history of American education, pushing the boundaries of the federal/state relationship to new limits. This essay provides a critical review of federal education policy enacted under President Barack Obama with a particular focus on the centerpiece Race to the Top initiative implemented by Secretary Duncan. It assesses the Obama policy in the context of the evolving federal role in education that began with the passage of the Elementary and Secondary Education Act (ESEA) of

---

© 2012 Joseph P. Viteritti. Individuals and nonprofit institutions may reproduce and distribute copies of this Article in any format, at or below cost, for educational purposes, so long as each copy identifies the author, provides a citation to the *Notre Dame Law Review*, and includes this provision in the copyright notice.

\* Joseph P. Viteritti is the Thomas Hunter Professor of Public Policy at Hunter College, CUNY. Kaitlyn O’Hagan of the Roosevelt House Public Policy Institute provided valuable research assistance.

1965 as an effort to improve educational opportunity for economically disadvantaged students. It argues that while the Obama agenda is a reasonable attempt to reshape educational policy (and particularly No Child Left Behind), contrary to what the administration claims, its approach to education policy is neither entirely research based nor apolitical, and the competitive nature of the funding may eventually prove to undermine the redistributive objectives of the original ESEA legislation.

Part I of this essay traces the evolution of federal education policy. It will begin by examining the objectives and strategies originally enunciated by President Lyndon B. Johnson with the passage of the Elementary and Secondary Education Act of 1965. It will then explain how these goals changed over the years through the administration of President Bill Clinton, as the program became less concerned with directing resources to children who were economically disadvantaged and more concerned with accountability. Part II reviews the details of the No Child Left Behind (NCLB) legislation enacted during the administration of President George W. Bush, which established the political and programmatic context for policymaking during the Obama administration. Although this legislation was designed to impose accountability on states that accepted federal funding, it also highlighted the needs of children who were denied an opportunity for a decent education, a disproportionate number of whom were economically disadvantaged children of color.

Part III scopes out the broad outlines of the Obama education agenda, while Part IV assesses the main provisions of the Race to the Top (RTT) initiative. Particular attention is given in the latter to those provisions that pertain to testing and standards, teacher evaluation, turnaround strategies for failing schools, and charters and choice. Part V describes how Secretary of Education Arne Duncan used his administrative discretion to make No Child Left Behind more consistent with the objectives of Race to the Top. Part VI serves as a conclusion.

## I. ESEA AND THE EVOLVING FEDERAL ROLE

The Elementary and Secondary Education Act (ESEA) that President Lyndon Johnson managed to push through Congress in 1965 was a historical breakthrough in a country that had traditionally considered education a state and local function. The initial appropriation of \$1 billion in funding was doubled in 1966, and by the end of the dec-

ade was up to \$3 billion.<sup>1</sup> Under Title I, the major provision of the law, funds were specifically to be appropriated to communities on the basis of economic need. The legislation read:

In recognition of the special educational 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 financial assistance . . . to local educational agencies serving areas with concentrations of children from low-income families . . . .<sup>2</sup>

In order to gain support of the Catholic lobby, the law guaranteed that poor children attending private and parochial schools would not be excluded from participating in the program.<sup>3</sup> In order to address potential constitutional problems arising under the Establishment Clause of the First Amendment and defuse anti-Catholic sentiment coming from Southern legislators, the law provided that all funds and programs would be administered by public schools.<sup>4</sup> Parochial school students were permitted to participate through the use of audio-visual devices, television and radio programs, and mobile teaching units. The precautions taken in ESEA represented a legislative enactment of the “child benefit theory” enunciated in the courts, which recognizes a legal distinction between aid provided to students and aid provided to schools or institutions.<sup>5</sup>

---

1 See STEPHEN K. BAILEY & EDITH K. MOSHER, *ESEA: THE OFFICE OF EDUCATION ADMINISTERS A LAW* 37–71 (1968) (providing legislative history). For a more detailed account, see JULIE ROY JEFFREY, *EDUCATION FOR CHILDREN OF THE POOR* (1978).

2 Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, § 201, 79 Stat. 27, 27 (repealed 1981).

3 See JOSEPH A. CALIFANO, JR., *THE TRIUMPH & TRAGEDY OF LYNDON JOHNSON* 71 (1991).

4 See *id.*

5 See EUGENE EIDENBERG & ROY D. MOREY, *AN ACT OF CONGRESS* 75–95 (1969) (explaining the application of the principle in the drafting of ESEA). The child benefit concept first arose in a 1930 case upholding a Louisiana law that set aside tax funds to pay for textbooks for public, private, and parochial schools. This was not a First Amendment challenge, however. See *Cochran v. Bd. of Educ.*, 281 U.S. 370, 373, 375 (1930). The court later applied the theory in *Everson v. Board of Education*, 330 U.S. 1, 16 (1947), which found that providing transportation services to students in religious schools in New Jersey did not violate the Establishment Clause of the First Amendment. Child benefit theory also provided an essential part of the reasoning for subsequent landmark cases that allowed tuition aid to children attending religious schools. See, e.g., *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Mueller v. Allen*, 463 U.S. 388 (1983); see also JOSEPH P. VITERITTI, *THE LAST FREEDOM* (2007) (providing a general critique of First Amendment jurisprudence involving religion); Joseph P. Viter-

The legislative strategy undertaken to accommodate the Establishment Clause was remarkable in light of the fact that Congress had previously made aid available to religious institutions under the GI Bill, the National Defense Education Act, the National School Lunch Act, and the Hill-Burton Hospital Reconstruction Act.<sup>6</sup> Notwithstanding these precautions, in 1985 the United States Supreme Court decided that public school teachers could not be sent into parochial school buildings to provide remedial instruction.<sup>7</sup> The ruling required public school districts to rent additional space so that instruction could be delivered on religiously neutral territory. The decision was eventually overruled in 1997,<sup>8</sup> on an appeal from the New York City school district, which had claimed that renting extra space was costing more than \$14 million annually.<sup>9</sup>

ESEA was part of a larger campaign to provide educational opportunities to poor and minority children that began with the landmark *Brown v. Board of Education*<sup>10</sup> decision of 1954 that prohibited racial segregation in schools. The Civil Rights Act of 1964<sup>11</sup> required previously segregated school districts to submit desegregation plans or risk the loss of federal funding. In addition to providing extra aid for low-income students, President Johnson had hoped that the infusion of new federal money through ESEA would provide school districts with an added incentive to comply with the desegregation mandate.<sup>12</sup> The spending-incentive approach utilized by President Johnson was a shrewd tool through which officials at the federal level could affect policy in the states and localities. It would be applied by subsequent presidents, but none so effectively as President Obama and his Secretary of Education Arne Duncan.

Over time, research would prove that ESEA was falling very short of its goal to enhance the educational opportunities of poor children. In 1969 Martin and McClure completed a study on behalf of the NAACP Legal Defense Fund arguing that Title I monies were misused

---

itti, *Reading Zelman: The Triumph of Liberty, Equality and Pluralism*, 76 S. CAL. L. REV. 1105 (2003) (offering a detailed analysis of the latter case and its significance).

6 BAILEY & MOSHER, *supra* note 1, at 33.

7 *Aguilar v. Felton*, 473 U.S. 402, 408 (1985).

8 *Agostini v. Felton*, 521 U.S. 203, 209 (1997).

9 Joseph Berger, *Limit on Remedial Education Appealed*, N.Y. TIMES, Aug. 31, 1996, at A25.

10 347 U.S. 483 (1954). See generally MARTHA MINOW, IN *Brown's Wake* (2010) (documenting the impact of *Brown* on federal education policy); ROSEMARY C. SALOMONE, EQUAL EDUCATION UNDER LAW (1986) (same).

11 Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended at 42 U.S.C. §§ 2000a-2000n-6 (2006)).

12 CALIFANO, *supra* note 3, at 70.

by school districts, finding that the districts used their appropriations as a form of general aid without spending it on low income children who were supposed to be its beneficiaries.<sup>13</sup> In a subsequent article, Jerome Murphy concluded that thirty percent of the administrators participating in Title I did not want to use funds exclusively for students from economically disadvantaged families.<sup>14</sup>

In 1984, the first longitudinal study of the ESEA program showed that although there was some evidence that the students in the program accelerated at a faster pace than their peers, these gains were not sustained over time.<sup>15</sup> A year earlier, Secretary of Education Terrell Bell published *A Nation at Risk* (NAR).<sup>16</sup> The widely read report alerted the nation to the fact it was falling behind the rest of the developed world in academic achievement.<sup>17</sup> It also documented high rates of adult illiteracy, declining scores on college entrance examinations, and a rise in remedial programs in colleges, corporations, and the military.<sup>18</sup> It recommended the strengthening of high school graduation requirements; setting rigorous, measurable performance standards; the more effective use of time in school; a longer school day and school year; and improvements in the preparation, compensation, and accountability of teachers.<sup>19</sup> Education historians mark the report as the beginning of the standards movement, if not the entire modern school reform movement.<sup>20</sup>

Despite the fact that the NAR report was commissioned by his own Secretary of Education, President Ronald Reagan did not show

13 RUBY MARTIN & PHYLLIS McCLURE, TITLE I OF ESEA: IS IT HELPING POOR CHILDREN? (1969).

14 Jerome T. Murphy, *Title I: Bureaucratic Politics and Poverty Politics*, 6 INEQUALITY IN EDUC. 9 (1970) (citing BAILEY & MOSHER, *supra* note 1, at 316); Jerome T. Murphy, *Title I of ESEA: The Politics of Implementing Federal Education Reform*, 41 HARV. EDUC. REV. 35, 49 (1971).

15 Launor F. Carter, *The Sustaining Effects Study of Compensatory and Elementary Education*, 13 EDUC. RESEARCHER, Aug. -Sept. 1984, at 4, 6.

16 NAT'L COMM'N ON EXCELLENCE IN EDUC., A NATION AT RISK. (1983). For commentary on the report and its impact, see Milton Goldberg & Anita Madan Renton, *A Nation at Risk: Ugly Duckling No Longer*, in COMMISSIONS, REPORTS, REFORMS, AND EDUCATIONAL POLICY 19 (Rick Ginsberg & David N. Plank eds., 1995); A NATION REFORMED? (David T. Gordon ed., 2003); *A Nation at Risk: A 20-Year Reappraisal*, 79 PEABODY J. EDUC. (SPECIAL ISSUE) 1 (2004);.

17 See Rick Ginsberg & David N. Plank, *Introduction to COMMISSIONS, REPORTS, REFORMS, AND EDUCATIONAL POLICY*, *supra* note 16, at 3, 9.

18 *Id.* at 11.

19 See Goldberg & Renton, *supra* note 16, at 17-24.

20 See, e.g., MARIS A. VINOVSIS, FROM *A Nation at Risk* to *No Child Left Behind* (2009); Diane Ravitch, *A Historic Document*, in OUR SCHOOLS AND OUR FUTURE 25, 34-35 (Paul E. Peterson, ed., 2003).

much interest in education. Believing that schooling is a state and local function, he had pledged to abolish the federal Department of Education created by President Jimmy Carter, but the shockwaves that the report sent through the country kept education very much in the public consciousness.<sup>21</sup> Within a year, thirty-five states had set new graduation requirements, twenty-two developed curriculum reforms, and twenty-nine set new policies regarding testing.<sup>22</sup>

In 1989, President George H.W. Bush attended a meeting with the nation's governors in Charlottesville, Virginia in order to engage the state executives in a discussion on how to make education a national priority. It was an unusual move for a Republican president. More unusual was the enthusiasm with which the state officials embraced the offer of federal cooperation.<sup>23</sup> In response to Bush, the National Governor's Association agreed to create a National Education Goals Panel that would develop a national report card for assessing progress towards specific academic goals.<sup>24</sup> These goals were the foundation for "America 2000," a more comprehensive proposal put forward by President Bush that fell to defeat in a Democrat-controlled Congress in 1991.<sup>25</sup> In addition to proposing national goals, the Bush package included voluntary national testing.<sup>26</sup> Under its new provisions, students in Title I public schools would have been permitted to transfer to public, private, or religious schools of their choice, taking their federal funding with them.<sup>27</sup>

In 1997, Abt Associates completed another major study of ESEA involving 40,000 students that found no discernible difference in academic performance between students in the program and a control group.<sup>28</sup> Study after study had shown that despite years of spending, the learning gap between the races and between rich and poor stu-

---

21 PATRICIA ALBJERG GRAHAM, *SCHOOLING AMERICA* 153–58 (2005) (discussing President Reagan's reaction to the report).

22 U.S. DEP'T OF EDUC., *THE NATION RESPONDS* 144–46 (1984) (including a chart depicting state educational reforms).

23 See VINOVSIS, *supra* note 20, at 10–31.

24 See DIANE RAVITCH, *NATIONAL STANDARDS IN AMERICAN EDUCATION* 57–58 (1995).

25 See *id.* at 138–39.

26 See *id.* at 139–43.

27 See *id.* at 139.

28 MICHAEL J. PUMA, ET AL., *ABT ASSOCIATES, INC., PROSPECTS: FINAL REPORT ON STUDENT OUTCOMES* vi (1997). See also David J. Hoff, *Chapter 1 Aid Failed to Close Learning Gap*, *EDUC. WEEK*, Apr. 2, 1997, at 1 (describing a study finding that Title I failed to close the learning gap)

dents remained the same.<sup>29</sup> By the time President Bill Clinton was elected, there was a deep sense of frustration with the quality of American education, and demands for more accountability had gained strong momentum.<sup>30</sup> A key player among the state governors who had signed on to work with President Bush, Clinton had pledged to help develop national education standards when he campaigned for the White House.<sup>31</sup> With the Democrats in control of both houses of Congress, Clinton could be somewhat more successful than his predecessor.<sup>32</sup>

The “Goals 2000” plan that Clinton put before Congress in 1994 had a strong resemblance to Bush’s “America 2000.”<sup>33</sup> It outlined a set of national education goals, and authorized the formation of a National Education Goals Panel.<sup>34</sup> Despite pleas from Republican lawmakers, it did not include a choice provision.<sup>35</sup> The overall strategy of “Goals 2000” was to offer financial incentives for states to develop improvement plans.<sup>36</sup> Grants were also made available for consortia around the country to develop voluntary opportunity-to-learn standards involving curricula instructional materials and technologies. While the resulting network of professionals from state government, local school districts, labor unions, universities, business, and the health professions was large and cumbersome, it did manage to propel a national movement for standards and assessments.<sup>37</sup> Almost every state began to develop new academic criteria and measurements, although the criteria for review by the Secretary of Education were not very rigorous.<sup>38</sup>

---

29 See Geoffrey D. Borman & Jerome V. D’Agostino, *Title I and Student Achievement: A Meta-Analysis of Federal Evaluation Results*, 18 EDUC. EVALUATION & POL’Y ANALYSIS 309, 324 (1996) (detailing the results of 17 federal studies comparing Title I students to control groups).

30 See RAVITCH, *supra* note 24, at 1; Marshall S. Smith, *Education Reform in America’s Public Schools: The Clinton Agenda*, in DEBATING THE FUTURE OF AMERICAN EDUCATION 9, 9–10 (Diane Ravitch ed., 1995).

31 See *Federal Education Policy and the States, 1945–2009*, N.Y. STATE EDUC. DEP’T, [http://www.archives.nysed.gov/edpolicy/research/res\\_essay\\_bush\\_ghw\\_edsummit.shtml](http://www.archives.nysed.gov/edpolicy/research/res_essay_bush_ghw_edsummit.shtml) (last visited Mar. 29, 2012).

32 See *id.* at 17–19 (discussing the passage of Goals 2000).

33 See *id.* at 20–25 (describing the Goals 2000 legislation); Richard Riley, *Reflections on Goals 2000*, 96 TCHRS. C. REC. 380 (1995); Smith, *supra* note 30, at 10–25 (describing in detail the administration of Goals 2000).

34 Smith, *supra* note 30, at 17.

35 See RAVITCH, *supra* note 24, at 139.

36 See Smith, *supra* note 30, at 20.

37 See *id.* at 21–22.

38 See VINOVSIS, *supra* note 20, at 115–17.

As Clinton was about to complete his first term in office, ESEA—still the largest portion of the federal education budget, was due for reauthorization. At that point an appropriation of \$6.3 billion was delivering services to more than 5 million students.<sup>39</sup> Clinton had hoped to convert Title I (then called Chapter I) into a standards-based program. The Improving America's Schools Act (IASA) he got passed through a Republican controlled Congress in 1994 increased spending significantly.<sup>40</sup> States were told that they would need to adopt rigorous academic standards and assessments in order to qualify for funding, but the Department of Education hesitated to enforce tough standards when reviewing applications.<sup>41</sup> Clinton later tried to develop a set of voluntary national tests, but Congress would not cooperate.<sup>42</sup> Liberal Democrats were reluctant to set higher targets for underperforming children without a larger infusion of resources; conservative Republicans were uncomfortable with the prospect of having Washington oversee a system of national testing.<sup>43</sup>

By the end of 2001, only nineteen states complied with IASA assessment requirements. None of those in violation lost funding.<sup>44</sup> Research was continuing to show that money meant for low-income students was not reaching them.<sup>45</sup> More importantly, there was no significant progress in narrowing the learning gap.<sup>46</sup>

## II. NO CHILD LEFT BEHIND

There is a general misunderstanding that No Child Left Behind (NCLB), enacted in January 2002, was a bold federal initiative imposed by President George W. Bush to wrest accountability from recalcitrant state governments. In actuality, NCLB garnered wide bipartisan support, having passed in the House of Representatives by a

---

39 VINOVSIS, *supra* note 20, at 75–76.

40 For a general legislative history, see VINOVSIS, *supra* note 20, at 75–84. For a detailed breakdown of the law, see generally JAMES B. STEDMAN, CONG. RESEARCH SERV., IMPROVING AMERICA'S SCHOOLS ACT: AN OVERVIEW OF P.L. 103-382 (1994), available at <http://www.eric.ed.gov/PDFS/ED379792.pdf>.

41 STEDMAN, *supra* note 40, at 8.

42 See RAVITCH, *supra* note 24, at 156–57.

43 See *id.* at 150–51.

44 VINOVSIS, *supra* note 20, at 172.

45 See CHRISTOPHER T. CROSS, POLITICAL EDUCATION 141 (updated ed. 2010).

46 See PAUL E. BARTON & RICHARD J. COLEY, EDUC. TESTING SERV., THE BLACK-WHITE ACHIEVEMENT GAP 34 (2010) (finding that while some progress occurred during the 1970's and 1980's, overall progress grew slower between then and 2008). See generally STEADY GAINS AND STALLED PROGRESS (Katherine Magnuson & Jane Waldfogel eds., 2008) (presenting several empirical studies regarding the race gap in standardized testing).



vote of 381 to 41, and in the Senate by 87 to 10.<sup>47</sup> To be sure, the presence of a Republican in the White House with a strong commitment to education reform was essential to convince GOP law makers that the time was right for Washington to set more exacting terms in exchange for federal dollars, but Democratic leaders like Senator Ted Kennedy and Representative George Miller also played pivotal roles in getting the bill through the legislative process.<sup>48</sup> There was also wide support in the states themselves.<sup>49</sup>

Bush had made education a high priority as governor of Texas, but he was not unique. Ever since 1983, when Secretary of Education Terrell Bell published *A Nation at Risk*<sup>50</sup> and began ranking the states by performance, it became difficult for state executives to ignore public demands for better schools.<sup>51</sup> By 2001, every state in the union had developed content standards in reading and math, and twenty-eight had created some kind performance standards.<sup>52</sup> In a subtle way NCLB affirmed what was already occurring in the states, at least in so far as standards were concerned, and made additional federal money available for the efforts.

Unlike Clinton's IASA initiative that made testing more or less voluntary on a practical level, NCLB mandated testing and standards as a condition for funding. States that chose not to participate could turn down federal funding and be exempt from the requirements of the new law. Therefore NCLB was not truly a mandate.<sup>53</sup> In order to

47 PAUL MANNA, *SCHOOL'S IN* 127 (2006).

48 For the legislative history of NCLB, see PATRICK J. MCGUINN, *NO CHILD LEFT BEHIND AND THE TRANSFORMATION OF FEDERAL EDUCATION POLICY, 1965–2005*, at 165–76 (2006); Andrew Rudalevige, *No Child Left Behind: Forging a Congressional Compromise*, in *NO CHILD LEFT BEHIND?* 23, 33–43 (Paul E. Peterson & Martin R. West eds., 2003). On the partisan roles, see generally Tom Loveless, *The Peculiar Politics of No Child Left Behind*, in *STANDARDS-BASED REFORM AND THE POVERTY GAP* (Adam Gamoran ed., 2007).

49 See CROSS, *supra* note 45, at 141 (citing a survey that showed support for NCLB in 45 states).

50 See *supra* note 16.

51 For a description of evolving state initiatives, see Maris A. Vinovskis, *Gubernatorial Leadership and American K-12 Education*, in *A LEGACY OF INNOVATION* (Ethan Sribnick ed., 2008).

52 VINOVSIS, *supra* note 20, at 117.

53 In 2007, the states of Michigan, Texas, and Vermont sued in federal court claiming that the Department of Education could not force them to comply with the law unless the federal government made sufficient additional funding available to cover the costs of compliance. After the trial court rejected their claims, the Sixth Circuit ruled in their favor, 2-1, but the Court of Appeals then reheard the case *en banc* and reached a split decision, leaving the district court ruling in effect. See *Sch. Dist. of Pontiac v. Sec'y of U.S. Dep't of Educ.*, 584 F.3d 253, 256 (6th Cir. 2009).

sweeten the pie, federal funding was increased twenty percent from \$18.8 billion to \$22 billion at the inception of the law.<sup>54</sup> Some spending flexibility was built into the new Title I Program, while at the same time changes were made in the formula that would funnel additional assistance to economically depressed districts, as had been intended in the original version of the law.<sup>55</sup> The grand federalist bargain within NCLB was to grant states the authority to develop their own tests and set their own standards. Under the new law, states would be expected to administer annual tests in reading and math for grades three through eight by 2005–2006. State test scores must be disaggregated at the school, school district, and state levels in a number of discrete categories: race, gender, income, disability, and English language proficiency.<sup>56</sup>

States were required to set annual targets for improving achievement and closing performance gaps between discrete groups of students.<sup>57</sup> Baselines and measures for “annual yearly progress” (AYP) had to be developed.<sup>58</sup> All students were expected to reach proficiency by 2014.<sup>59</sup> Additional funding was made available under NCLB for reading instruction. While states and districts could choose their own reading programs, they had to adopt a phonics (as opposed to whole language) approach in order to qualify for funding. All states accepting federal funding under NCLB would also be required to participate in the National Assessment for Educational Progress (NAEP) testing regime administered nationally to random samples of students in reading and math.<sup>60</sup>

Schools failing to meet state performance objectives for two consecutive years were to be identified as “in need of improvement.” The designation made them eligible for technical assistance from their states, and students attending them were supposed to be given an opportunity to attend another public school.<sup>61</sup> After an additional year in such a designation, parents were to be given a portion of Title

---

54 Under President George W. Bush, total spending for elementary and secondary education grew from \$27.3 billion in 2001 to \$37.9 billion in 2008 (39%). U.S. DEP’T OF EDUC., EDUCATION DEPARTMENT BUDGET HISTORY TABLE (2011), *available at* <http://www2.ed.gov/about/overview/budget/history/edhistory.pdf> (last visited Mar. 6, 2012).

55 See CROSS, *supra* note 45, at 140–41.

56 See *id.* at 138–39.

57 *Id.*

58 See *id.* at 139.

59 *Id.*

60 *Id.*

61 MCGUINN, *supra* note 48, at 180 tbl.9.2 (providing table summarizing NCLB provisions).

I funding to pay for supplemental services from a state-approved provider outside the school.<sup>62</sup> During the third year in this category, the school would be expected to make major changes in its personnel.<sup>63</sup> After the fourth consecutive year, a school would be required to undergo a major organizational overhaul, which could involve closing, converting to a charter school, or assumption of control by a private management company.<sup>64</sup>

In its original proposal to Congress, the Bush administration wanted to grant students at failing schools the right to transfer to private and religious schools and take their funding with them. The proposal was opposed by Democratic Party leaders and even some members of Bush's own party who were not ready to support a voucher type plan initiated in Washington.<sup>65</sup> The charter school and private provider provisions in the latter part of the law, however, were very much in keeping with Bush's policy priorities, which were supportive of school choice and open to having private providers involved in public education.

At the insistence of Democratic Party leaders, especially Representative George Mitchell, NCLB also tried to address the need for better-prepared teachers. Funds were made available for the recruitment, retention, and training of teachers and principals. Beginning in the 2002–2003 school year, all new teachers hired with Title I funding would need to carry ratings of “highly qualified.”<sup>66</sup> By 2005–2006, all Title I instructors would need to meet that standard, and all teachers in core courses would be required to have a college degree and to prove their competence either by passing a state test or having majored in their assigned subject areas.<sup>67</sup> Teacher aides hired to work in Title I programs after 2002–2003 would be expected to have two years of college.<sup>68</sup> Overall, NCLB set higher expectations for American education than any piece of legislation that preceded it, but

---

62 *Id.*

63 *Id.*

64 *Id.*

65 See Elizabeth H. DeBray-Pelot, *School Choice and Educational Privatization Initiatives in the 106th and 107th Congresses: An Analysis of Policy Formation and Political Ideologies*, 109 TCHRS. C. REC. 927, 935 tbl.1 (2007) (indicating the initial position of President Bush and the final compromise in Congress). For an insider's view of the legislative strategy adopted by the Bush White House, see generally EUGENE W. HICKOK, *SCHOOLHOUSE OF CARDS* (2010).

66 MCGUINN, *supra* note 48, at 180 tbl.9.2.

67 *Id.* at 178.

68 Erik W. Robelen, *An ESEA Primer*, EDUC. WEEK, Jan. 9, 2002, at 28.

implementing these goals across a complex intergovernmental network of federal and state agencies proved to be another matter.<sup>69</sup>

While educators continue to debate the merits of standardized tests and the effect they can have on actual performance, the NCLB requirement that test results be disaggregated by sub-groups of students forced the country to face up to the great disparities in achievement that would continue to be found on the basis of race and income. Civil rights organizations and liberal education advocates appreciated this requirement as a way to ensure better results for poor and minority children and supported it throughout the legislative process.<sup>70</sup> Although allowing the states to set their own standards was an important concession that satisfied reluctant lawmakers wanting to protect local education prerogatives, the policy also compromised expectations that NCLB would raise the proficiency bar for all students across the nation. States set widely different bars for proficiency. A study completed by the American Institutes for Research using international benchmarks found that the actual proficiency between students in the most and least rigorous states could be as much as four grade levels.<sup>71</sup>

Many local policy makers set passing criteria at a low level so that students would appear to be performing better than they actually were. An analysis conducted by the U.S. Department of Education comparing state passing rates with passing rates on the highly regarded NAEP tests from 2005 showed that there were not only wide variations among the states for what a student needed to know to get a “proficient” score, but also that rating criteria on the state tests were lower than those on the national NAEP test.<sup>72</sup>

There were also serious problems with measuring annual yearly progress (AYP) as a way to determine which students, schools, districts, and states were meeting federal expectations. Researchers ques-

---

69 For an excellent overview of the implementation issues regarding NCLB, see generally DAVID K. COHEN & SUSAN L. MOFFITT, *THE ORDEAL OF EQUALITY* (2009) (questioning the institutional capacity of state and local agencies to deliver services effectively); PAUL MANNA, *COLLISION COURSE* (2011).

70 Jesse Hessler Rhodes, *Progressive Policy Making in a Conservative Age? Civil Rights and the Politics of Federal Education Standards, Testing, and Accountability*, 9 *PERSP. ON POL.* 519, 519–20, 530–31 (2011) (describing the role of these groups in the federal legislative process).

71 GARY W. PHILLIPS, *AM. INST. RESEARCH, INTERNATIONAL BENCHMARKING* (2011).

72 See NAT’L CTR. FOR EDUC. STAT., *MAPPING STATE PROFICIENCY STANDARDS ONTO NAEP SCALES 9* (2007); see also Paul E. Peterson & Carlos Xabel Lastra-Anadon, *State Standards Rise in Reading, Fall in Math*, *EDUC. NEXT*, Fall 2010, at 12, 15 (finding different proficiency standards in reading and math among the states and generally lower standards in the states when compared to the NAEP).

tioned the validity of how test scores were applied to reach such decisions.<sup>73</sup> Even with such loose criteria in place, in the 2008–2009 school year, eighteen percent of all schools in the country were designated as being “in need of improvement.”<sup>74</sup> In cases where it was determined that corrective action was needed, students either were not given or did not take advantage of opportunities to which they were entitled. Participation in the choice option rarely exceeded two percent of the eligible students; participation in supplementary service options rarely exceeded twenty-five percent.<sup>75</sup>

There is much speculation regarding the possible causes of such low participation in these optional programs, ranging from allegations of administrative incompetence at the local level to suspicion that district and school officials undermined programs that would divert resources from regular public schools. The school choice question, however, highlights a basic flaw in policy design. The fact of the matter is that districts with a large number of failing students do not have many desirable schools from which to choose.<sup>76</sup> Thus, the transfer option was essentially an empty promise to those students who might have most benefitted from it. By eliminating the private choice option that President Bush wanted to include in the law, Congressional Democrats rendered the policy useless. Bush finally was able to get Congress to approve a voucher plan for the District of Columbia in 2003,<sup>77</sup> after local Democratic leaders pleaded before Congress that poor children needed opportunities beyond the floundering public schools found in Washington, but that would only relieve the problem in one city.<sup>78</sup>

Since it was not part of the Bush administration’s policy priorities, the Department of Education did little to enforce the teacher quality provisions of the law. As late as 2007, not one state had met the highly

---

73 See, e.g., Thomas J. Kane & Douglas O. Staiger, *Volatility in School Test Scores: Implications for Test-Based Accountability Systems*, in BROOKINGS PAPERS ON EDUCATION POLICY 235, 235 (Diane Ravitch ed., 2002) (detailing sampling issues that complicate the reporting of test score trends).

74 EPE RESEARCH CTR., SCHOOLS—ADEQUATE YEARLY PROGRESS AND IMPROVEMENT STATUS UNDER NCLB (2008).

75 PAUL MANNA, CTR. ON EDUC. POL’Y, FEDERAL AID TO ELEMENTARY AND SECONDARY EDUCATION 11 (2008).

76 See *infra* notes 136–38 and accompanying text.

77 District of Columbia School Choice Incentive Act of 2003, Pub. L. No. 108-199, 118 Stat. 126 (2004).

78 See Anthony A. Williams et al., *Washington’s Children Deserve More Choices*, WASH. POST, Sep. 3, 2003, at A17. The bill was also strongly supported by Democratic Senator Diane Feinstein of California. See Dianne Feinstein, *Let D.C. Try Vouchers*, WASH. POST, July 22, 2003, at A17.

qualified teacher deadline set for the 2005–2006 school year, and Secretary of Education Margaret Spellings issued assurances that states would not be penalized with a loss of federal funding for the infractions.<sup>79</sup> That fall, twenty-two percent of the states and six percent of the school districts indicated in a national survey that they were unlikely to ever meet the requirements.<sup>80</sup>

NCLB officially expired in 2007.<sup>81</sup> As the Bush administration was entering its last year with low approval ratings, there was not much interest in Congress to take up revision and deal with criticisms that had surfaced. Democrats and Republicans agreed that the assignment could be taken up by the new president, whoever it might be.<sup>82</sup> By the time Barack Obama moved into the White House, NCLB seemed to have had the opposite effect that its architects intended when they wrote the law. Expectations about the future of American education were lowered. The national goal of having every child reach proficiency in basic skills by 2014 appeared to be out of reach.<sup>83</sup> The talk of waivers was in the air, and local politicians were telling their representatives in Washington to be more realistic about what school districts could deliver.

### III. THE OBAMA AGENDA

Three years into its tenure, the Obama administration was still unable to get Congress to reenact or revise NCLB. However, the American Recovery and Reinvestment Act (ARRA) that was passed in early 2009 to stimulate the national economy in the midst of a serious recession contained more federal funding for education than had ever been made available by Congress.<sup>84</sup> As a result, Secretary of Education Arne Duncan was granted more discretion to shape policy for elementary and secondary schools than any federal official in history,

---

79 See MANNA, *supra* note 69, at 58.

80 See *id.* at 101.

81 *Making Your Voices Heard: What Does NCLB Reauthorization Mean?*, PUB. EDUC. NETWORK, [http://www.publiceducation.org/nclb\\_main/Reauth\\_What\\_It\\_Means.asp](http://www.publiceducation.org/nclb_main/Reauth_What_It_Means.asp) (last visited Mar. 6, 2012).

82 See Regina Bankole & Rob Williams, *Reauthorization of the No Child Left Behind Act: Political Forces and Perspectives*, 1 J. CROSS-DISCIPLINARY PERSP. EDUCATION 7, 11 (2008).

83 See CTR. ON EDUC. POL'Y, *STATE TEST SCORE TRENDS THROUGH 2008–09, PART 4, at 2–3* (2011) (examining test scores in 19 states for which reading and math scores were available between 2002 and 2011 and finding that while Title 1 students have made gains in achievement since 2002, and often improved more than non-Title 1 students, the former still remain well behind the latter).

84 American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115.

and he used it rather pointedly. ARRA included the following allocations:

- \$5 billion for early education, including Head Start, Early Head Start, child care and children with special needs;
- \$77 billion for reforms to enhance elementary and secondary education, including \$48.6 billion to bolster state education budgets that were destabilized by the financial crisis;
- \$5 billion for competitive funds to generate innovation and reform that would close the achievement gap.<sup>85</sup>

Since the initial \$5 billion chunk of funding was used to maintain federal commitments in preschool and special education programs, and the bulk of the next \$77 billion was used to plug holes in state budgets and save jobs for teachers and other personnel, it was the latter \$5 billion that the Secretary used to shape new policy.<sup>86</sup> The latter included a \$650 million Investing in Innovation Fund (i3) designed to stimulate innovative proposals from school districts, individual schools, and nonprofit organizations promising to improve teacher effectiveness, low performing schools, standards and assessments, or data systems.<sup>87</sup> “Scale-up” grants for up to \$50 million would be awarded for proposals that provided strong evidence for success. Two tiers of smaller grants (up to \$30 million and up to \$5 million) under “i3” would permit applicants to present plans backed by more modest evidence.<sup>88</sup> The “America COMPETES” Act dedicated \$46 million over three years to improve education in science, technology, engineering, and math.<sup>89</sup> An additional \$143 million was made available to support teacher residency and apprenticeship programs under the Teacher Quality Partnership.<sup>90</sup>

---

85 *Education*, THE WHITE HOUSE, <http://whitehouse.gov/issues/education> (last visited Feb. 23, 2012). See also Farhana Hossain et al., *The Stimulus Package: Education and Job Training*, N.Y. TIMES (last updated Dec. 23, 2011), [http://projects.nytimes.com/44th\\_president/stimulus/education-and-job-training](http://projects.nytimes.com/44th_president/stimulus/education-and-job-training) (detailing appropriations relating to education in the stimulus bill).

86 SARA MEAD ET AL., BELLWEATHER EDUC. PARTNERS, CONFLICTING MISSIONS AND UNCLEAR RESULTS 9 (2009) (finding that although some ARRA funding was used to advance ongoing reforms, most of it was applied to compensate for funding cuts being made at the state and local levels).

87 See Michele McNeil, *Coveted ‘i3’ Cash Prompts Application Gold Rush*, EDUC. WEEK, July 14, 2010, at 1, 28.

88 *Id.* at 28.

89 COMPETES is an acronym for Creating Opportunities to Meaningfully Promote Excellence in Technology, Education, and Science. See Erik Robelen, *Obama Signs Leaner Version of America COMPETES Act*, EDUC. WEEK, Jan. 12, 2011.

90 Stephen Sawchuk, *Teacher Residencies Make Strides, Encounter Obstacles*, EDUC. WEEK, Jan. 13, 2011.

By far, the most significant and central feature of the education agenda put forward by the Obama Administration was Race to the Top (RTT). The program dedicated \$4.35 billion for a competitive grant program that would be allocated only to states that met specific criteria established by the Department of Education to demonstrate that state decision makers would follow the direction set by Secretary Duncan. Announcing the program on July 24, 2009, President Obama declared:

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>91</sup>

In discussing the criteria set by the administration in reviewing state proposals, the President further explained:

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>92</sup>

The draft criteria that the Secretary of Education set for evaluating state plans revolved around four broad policy objectives: adopting internationally benchmarked standards; improving the recruitment, retention, and compensation of teachers and school administrators; improving data collection; and implementing strategies to turnaround failing schools.<sup>93</sup> Any state with a law that disallowed the use of student achievement data for evaluating teachers or principals—which at the time included New York and California, among others—was automatically barred from competition.<sup>94</sup> Among the strategies outlined for upgrading teachers and principals was merit pay.<sup>95</sup> Among the turnaround strategies identified was an increased supply of high qual-

---

91 *Remarks By the President on Education, July 24, 2009*, THE WHITE HOUSE, [http://www.whitehouse.gov/the\\_press\\_office/Remarks-by-the-President-at-the-Department-of-Education](http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-at-the-Department-of-Education) (last visited Mar. 6, 2012).

92 *Id.*

93 See Michele McNeil, *Rich Prize, Restrictive Guidelines*, EDUC. WEEK, Aug. 12, 2009, at 1 (citing a document from the Department of Education).

94 *Id.*

95 *Id.*



ity charter schools.<sup>96</sup> States also lost points if they had laws that imposed a cap on the number of charter schools.<sup>97</sup>

Forty states and the District of Columbia submitted applications for RTT funding.<sup>98</sup> To the disappointment of many governors, the Department of Education made awards to only two states (Delaware and Tennessee) in March of 2010, but also announced sixteen finalists whose plans remained under consideration.<sup>99</sup> In August, nine states and the District of Columbia were granted awards.<sup>100</sup> When issuing the news, Secretary Duncan was keen to point out that during the course of the competition thirty-five states and the District of Columbia “have adopted rigorous common, college- and career-ready standards in reading and math, and thirty-four states have changed laws and policies to improve education,” suggesting that the new law already had a discernible effect.<sup>101</sup> In May 2011 the Secretary announced that a smaller fund of money would be divided among nine states that had narrowly missed being selected.<sup>102</sup>

While RTT could fairly be described as an aggressive attempt by the federal government to drive education policy, the Obama administration made a serious effort to coordinate it with significant activities that were simultaneously occurring in the states. In order to address the wide variations in standards existing among the states, in 2009 the National Governors Association and the Council of Chief State School Officers convened experts in English and math from around the country to establish benchmarks for what students should

---

96 *Id.*

97 *Id.* The rating criteria were slightly changed in November, 2009. See Sam Dillon, *After Criticism, the Administration is Praised for Final Rules on Education Grants*, N.Y. TIMES, Nov. 12, 2009, at A20. See appendix for scored criteria set by the Department of Education to review applications.

98 *Id.* at A3.

99 See Sam Dillon, *In School Aid Race, Many States Are Left Behind*, N.Y. TIMES, Apr. 5, 2010, at A1.

100 The states were Florida, Georgia, Hawaii, Maryland, Massachusetts, New York, North Carolina, Ohio, and Rhode Island. Arne Duncan, *Nine States and the District of Columbia Win Second Round Race to the Top Grants*, THE WHITE HOUSE (Aug. 24, 2010, 1:52 PM), <http://www.whitehouse.gov/blog/2010/08/24/nine-states-and-district-columbia-win-second-round-race-top-grants>.

101 *Id.*

102 In the original competition grants ranged from \$75 million for the smallest winners, such as Hawaii and Rhode Island, to \$700 million for the largest, such as Florida and New York. A total of \$200 million was divided among nine runner-ups. Michele McNeil, *New Race to Top Money Eyed Warily by Some*, EDUC. WEEK, June 8, 2011, at 18.

be learning from grade to grade.<sup>103</sup> One year later, the two organizations disseminated a set of common core standards that states could adopt on a voluntary basis.<sup>104</sup> In order to propel the process, the Obama administration indicated that states agreeing to adopt the English and math benchmarks would be given points in the grant competition for RTT funding.<sup>105</sup> Within two months from when the standards were disseminated, thirty-nine states announced their plans for adoption as the August 2, 2010 deadline for the first round of competition approached.<sup>106</sup>

Under RTT, the Department of Education also made money available for consortia of states and private parties to work together to develop grade-by-grade assessments that were coordinated with the curriculum standards.<sup>107</sup> This initiative was designed to address a major flaw in testing policy that had become evident as a result of NCLB. In order for a test to have validity, it should be aligned with a particular curriculum so that there is a symmetry between what students are taught and what they are tested on. Many, if not most, states had put the testing cart before the teaching horse, administering standardized exams before having adopted a core curriculum. The new policy would hopefully not only allow testing to correspond to teaching, it would also raise the standards for both using international benchmarks.<sup>108</sup>

On September 2, 2010 Secretary Duncan announced that two groups had won grants for developing common assessments. The Partnership for Assessment and Readiness for College and Careers (PARC), with a membership of twenty-six states, received a \$170 million award; the Smarter Balance Assessment Consortium, with a thirty-one-state membership, received \$160 million.<sup>109</sup> Twelve states were members of both groups. In all, forty-four states and the District of Columbia were members of either or both.<sup>110</sup> The groups are expected to develop their plans by the 2014–2015 school year. In

---

103 See Tamar Lewin, *States Embrace Core Standards for the Schools*, N.Y. TIMES, July 21, 2010, at A1, A3.

104 *Id.* at A3.

105 *Id.* at A1.

106 See Catherine Gewertz, *States Adopt Standards at Fast Clip*, EDUC. WEEK, July 14, 2010, at 1, 18; Lewin, *supra* note 103, at A1.

107 See Catherine Gewertz, *Common-Assessment Consortia Add Resources to Plans*, EDUC. WEEK, Feb. 23, 2011, at 8.

108 See *id.*

109 See Sam Dillon, *U.S. Asks Educators to Reinvent Student Tests, and How They Are Given*, N.Y. TIMES, Sep. 3, 2010, at A11.

110 *Id.*

announcing the awards, Secretary Duncan called the new development “an absolute game-changer in public education.” He continued:

An assessment system and curriculum can only be as good as the academic standards to which the assessments and curriculum are pegged. We *want* teachers to teach to standards— if the standards are rigorous, globally competitive, and consistent across states. Unfortunately, in the last decade, numerous states dummed down their academic standards and assessments. In effect, they lied to parents and students. They told students they were proficient and on track to college success, when they were not even close.<sup>111</sup>

The collaboration between the federal and state governments that resulted from the RTT initiative was not just significant from a policy perspective; it also marked a milestone in the evolution of federalism as it pertained to education. What we have here is the federal government using its power and resources to move the country toward national standards designed collectively by the states, rather than forcing states to follow federal standards coming from Washington.

#### IV. ASSESSING RTT

A fair reading suggests that there was much in RTT that was designed to address factors that were found to be problematic with ESEA and had been specifically problematic with regard its latest iteration, NCLB. Despite grumblings at the local level about the excessive emphasis placed on testing, a national consensus had emerged that valid tests were needed to gauge progress, that higher standards were needed to move the county forward, that assessments had to be aligned with a core curriculum, and most important of all, that the states would play a leadership role to advance reform. RTT’s focus on quality teaching also highlighted an essential ingredient of the reform agenda that had been a low priority during the Bush administration. And the demand to turn around failing schools brought federal education policy back to the egalitarian roots President Lyndon Johnson had planted with the original passage of ESEA in 1965; for, after all, academic failure was most persistent in poor communities and those communities had a disproportionate number of African-American and Latino children.

---

111 *Beyond the Bubble Tests: The Next Generation of Assessments—Secretary Arne Duncan’s Remarks to State Leaders at Achieve’s American Diploma Project Leadership Team Meeting*, U.S. DEP’T OF EDUC. (Sept. 2, 2010), <http://www.ed.gov/news/speeches/beyond-bubble-tests-next-generation-assessments-secretary-arne-duncans-remarks-state-1> (emphasis added).

There is, however, a fundamental flaw in the competitive strategy behind RTT that seems to have reversed the logic of a compensatory education policy. The competitive allocation of resources could benefit those states and districts with the greatest capacity, rather than those jurisdictions that needed the most assistance and served the most challenged students. There can be honest disagreement about this approach. One of the constant criticisms of ESEA over the years is that it had thrown good money after bad, investing in programs and delivery systems that were chronically failing.<sup>112</sup> Federal decision makers had been urged to support success rather than failure; to reward those schools, administrators and teachers that were doing a good job. Nonetheless, the competitive approach has its drawbacks. Constituent groups that could usually be counted within the camp of the Democratic Party, especially with the nation's first African-American president in the White House, challenged the direction the administration was taking.

In July 2010, a group of civil rights organizations, led by the NAACP and the National Urban League, issued its own education policy framework on the eve of the latter's annual conference calling for changes in ESEA and demanding that Secretary Duncan dismantle key aspects of his core agenda as outlined in RTT.<sup>113</sup> They argued that relying on competitive funding means that the majority of low income and minority children who live in the states that lose it will not benefit from the new funds. They also criticized the administration's "extensive reliance" on charter schools as a solution for turning around failing schools in urban areas.<sup>114</sup>

Although both the President and Secretary Duncan acknowledged the criticism by these organizations when they spoke at the conference of the National Urban League, the administration did not make any significant policy changes to accommodate the criticism.<sup>115</sup>

---

112 See COHEN & MOFFITT, *supra* note 69, at 17–44 (arguing that most states lacked the institutional capacity and resources to implement NCLB effectively).

113 The groups also included the NAACP Legal Defense and Education Fund, The Lawyers Committee for Civil Rights Under Law, National Council on Educating Black Children, Rainbow PUSH Coalition, and the Schott Foundation for Public Education. See Michele McNeil, *Civil Rights Groups Call for New Federal Education Agenda*, EDUC. WEEK (July 26, 2010, 10:00 a.m.), <http://blogs.edweek.org/edweek/campaign-k-12/2010/7/civil-rights-groups-call-for-n.html>.

114 *Id.*

115 See *Remarks by the President on Education Reform at the National Urban League Centennial Conference*, THE WHITE HOUSE (July 24, 2010, 10:09 a.m.), <http://www.whitehouse.gov/the-press-office/remarks-president-education-reform-national-urban-league-centennial-conference>; *Secretary Arne Duncan's Remarks at the National Urban League Centennial Conference*, U.S. DEP'T OF EDUC. (July 27, 2010), <http://www.ed.gov/>

Some civil rights groups have also contended, without much satisfaction, that the Department of Education failed to give adequate attention to English language learners when appropriating money for RTT.<sup>116</sup>

The proposition of using standardized tests to evaluate, compensate and tenure teachers also drew strong criticism from the teacher's unions. Nor, it should be added, were either of the two national organizations that represent teachers pleased with the emphasis on charter schools.<sup>117</sup> Delegates of the larger National Education Association (NEA), with 3.2 million members, actually passed a vote of "no confidence" with regard RTT.<sup>118</sup> The smaller American Federation of Teachers (AFT), with 1.5 million members, took a more moderate tone. Following the lead of its more conciliatory president Randi Weingarten, the AFT indicated that under certain conditions, the union could consider using student test scores for evaluating teachers if the approach used included due process protections.<sup>119</sup> Of course the conditions needed to satisfy the AFT president and her members were a tall order and went to the heart of the problem many believed inherent in the administration's approach to reform.

Despite assurances by President Obama that grants for RTT would be made without regard to politics or ideology, there were strong concerns that some of the key priorities behind RTT were not research based. The administration seemed to be moving ahead with more certainty than was warranted. This does not necessarily mean that the priorities set were entirely motivated by politics, especially since the White House was willing to take actions that contradicted the preferences of key political allies. Nevertheless, given the significance of the actions taken under the RTT banner, these concerns are worthy of attention.

In May 2011, the National Academy of Sciences released the results of a nine-year study performed at the behest of the National Research Council that raised serious doubts about the efficacy of test-

---

news/speeches/secretary-arne-duncans-remarks-national-urban-league-centennial-conference.

116 These groups included National Council of La Raza and the National Association of Latino Elected and Appointed Officials. See Mary Ann Zehr, *Groups Say Race to Top Overlooked ELL Pupils*, EDUC. WEEK, Oct. 6, 2010, at 18.

117 Stephen Sawchuk, *NEA, AFT Choose Divergent Paths on Obama Goals*, EDUC. WEEK, Aug. 25, 2010, at 1.

118 *Id.*

119 *See id.*

based incentives to improve educational performance.<sup>120</sup> Overseen by a distinguished group of researchers, the study looked at test-based incentive systems, high school exit exams, experiments in teacher merit pay, and other testing and accountability systems throughout the country.<sup>121</sup> The group reached two major conclusions:

—Test-based incentive programs, as designed and implemented in programs that have been carefully studied, have not increased student achievement enough to bring the United States close to the levels of the highest achieving countries.

—The evidence we have reviewed suggests that high school exit exam programs, as currently implemented in the United States, decrease the rate of high school graduation without increasing achievement.<sup>122</sup>

Other research focused on key aspects of the RTT agenda questioned whether there is sufficient evidence available for them to merit such priority status at a time when resources are in short supply. Let us take each in turn.

#### A. *Testing and Standards*

There is no doubt that following on the heels of NCLB and initiatives propelled by the states, RTT has provided a stimulus for more change; however, at times its targets have been too ambitious or downright unrealistic. In order for change to have significant effects, an extraordinary amount of coordination must take place at the state level. Not only must assessments be aligned with core curriculum standards, these standards must be translated into actual curriculum materials that can be used in the classrooms, teachers must be trained to use them, and teacher evaluation systems must reflect all of the above.<sup>123</sup> A study released by the Center for Education Policy at the

---

120 NAT'L RESEARCH COUNCIL, INCENTIVES AND TEST-BASED ACCOUNTABILITY IN EDUCATION (Michael Hout & Stuart W. Elliot, eds., 2011) .

121 See *id.* at 1–6.

122 *Id.* at 84–85. But see Thomas S. Dee & Brian A. Jacob, *The Impact of No Child Left Behind on Students, Teachers, and Schools*, in BROOKINGS PAPERS ON ECONOMIC ACTIVITY: FALL 2010, at 149, 150 (David H. Romer & Justin Wolfers eds., 2010) (finding that NCLB generally helped the performance of elementary school students in mathematics, but not in reading); Helen F. Ladd & Douglas L. Lauen, *Status Versus Growth: The Distributional Effects of School Accountability Policies*, 29 J. POL'Y ANALYSIS & MGMT. 426, 428 (2010) (“Emerging from research of this type is that the introduction of a school-based accountability program generally raises achievement when achievement is measured by the high-stakes test used in the accountability system.”).

123 NANCY KORBER & DIANE STARK RENTNER, CTR. ON EDUC. POL'Y, STATES' PROGRESS AND CHALLENGES IN IMPLEMENTING COMMON CORE STATE STANDARDS 6 (2011).

end of 2010 indicated that this is a long, tedious process with quite a bit of room for error and delay.<sup>124</sup>

The national survey received responses from forty-two states and the District of Columbia. Of these, thirty-six states indicated that they had provisionally adopted the common standards in mathematics and English put forward by the National Governors Association in cooperation with the Council of State Schools Officers. (By now forty-four actually have).<sup>125</sup> Thirty-three states indicated that they would alter their professional development to align with the standards and that they expected the changes to be implemented by 2012.<sup>126</sup> An equal number said that they were planning changes in curriculum guides and materials, but only fourteen expected the changes to be complete by 2012. While thirty-six states indicated that they were planning changes in testing, twenty-seven did not expect to have the changes made before 2014 or later.<sup>127</sup> This lag in the test development stands to reason since the two groups working to design common assessments under RTT are not expected to be done until 2014. In the meantime, states will lumber along with curricula, tests, and training materials that officials at the federal and state levels agree are inadequate. This puts the remainder of the reform agenda in a more realistic and sobering context.

### B. *Evaluating Teachers*

Beyond aligning curriculum, testing, and teacher development in a timely fashion, the kind of teacher evaluation system that the Obama administration seeks to establish requires the development of valid and reliable instruments for isolating the contribution that individual teachers make to what individual students learn. This is indeed a complex endeavor. As John Ewing, president of *Math for America*, an organization dedicated to improving math education, explains, there are many variables that determine student achievement, and using test scores to gauge the contribution of a particular teacher is ridden with methodological traps.<sup>128</sup> Test scores are influenced by a number

---

124 See Catherine Gewertz, *Full Standards-Based System Several Years Off*, EDUC. WEEK, Jan. 12, 2011, at 9.

125 KORBER & RENTNER, *supra* note 123, at 6.

126 *Id.*

127 *Id.*

128 John Ewing, *Mathematical Intimidation: Driven by the Data*, 58 NOTICES AM. MATHEMATICAL SOC'Y, 667, 670 (2011). For a more easy-to-read summary, see Valerie Strauss, *Leading Mathematician Debunks 'Value Added'*, WASH. POST (May 9, 2011), [http://www.washingtonpost.com/blogs/answer-sheet/post/leading-mathematician-debunks-value-added/2011/05/08/AFb999UG\\_blog.html](http://www.washingtonpost.com/blogs/answer-sheet/post/leading-mathematician-debunks-value-added/2011/05/08/AFb999UG_blog.html). See generally DANIEL

of factors, including a student's incoming level of achievement, the contribution of other teachers, peer groups, and parental involvement. Tests, after all, are only samples that cover a limited selection of material. With coaching and drilling, test scores can be raised without improving learning.

William Sanders, who pioneered the "value-added modeling" (VAM) approach in Tennessee in the mid-1990's and replicated it in North Carolina and other states, contends, however, that if evaluations apply robust methods and safeguards, it is possible to distinguish effective teachers from ineffective teachers.<sup>129</sup> Sanders has disciples and supporters who have brought their own data to the discussion to show that the VAM approach can work when it is designed and implemented correctly.<sup>130</sup> In one particular study in Tennessee, Sanders and Ballou found that controlling for student characteristics had a negligible impact on estimated teacher effects.<sup>131</sup> Other researchers have found evidence that student test scores are higher in schools that offer merit pay for teachers.<sup>132</sup> Additionally, a broader debate is shaped by the fact that without attempting to build evaluation systems on hard data, most teacher evaluation systems do not distinguish between successful and unsuccessful teachers and end up rating ninety-eight percent of all teachers satisfactory.<sup>133</sup>

There is conflicting evidence on the prospect of developing an airtight system that could be used to assess, promote, tenure, retain, and compensate teachers. One author who reviewed value-added assessments that have been implemented in Houston and New York City said that they "are at best a crude indicator of the contribution

KORETZ, MEASURING UP (2008) (providing a thorough analysis of shortcomings in testing).

129 See William Sanders et al., *The Tennessee Value-Added Assessment System: A Quantitative Outcomes-Based Approach to Educational Assessment*, in GRADING TEACHERS, GRADING SCHOOLS (Jason Millman ed., 1997) (describing the original experiment).

130 See, e.g., HENRY I. BRAUN, EDUC. TESTING SERV., USING STUDENT PROGRESS TO EVALUATE TEACHERS 15 (2005), available at <http://www.isbe.state.il.us/peac/pdf/primer.pdf> (last visited Mar. 7, 2012); Jesse Rothstein, *Teacher Quality in Educational Production: Tracking, Decay, and Student Achievement*, 125 Q.J. ECON. 175, 176 (2010).

131 See Dale Ballou et al., *Controlling for Student Background in Value-Added Assessment of Teachers*, 29 J. EDUC. & BEHAV. STAT. 60 (2004).

132 See David N. Figlio & Lawrence W. Kenny, *Individual Teacher Incentives and Student Performance*, 91 J. PUB. ECON. 901, 913 (2007).

133 DANIEL WEISBERG ET AL., THE NEW TEACHER PROJECT, THE WIDGET EFFECT 12 (2009). See generally STEVEN GLAZERMAN ET AL., BROWN CTR. ON EDUC. POL'Y, EVALUATING TEACHERS (2010) (arguing for the implementation of a value-added approach to teacher evaluations).



that teachers make to their students' academic outcomes."<sup>134</sup> A three year study of the Metropolitan Nashville School System in which middle school teachers participated voluntarily showed that students of teachers eligible for bonuses did no better in the long term than those of teachers in a control group that were not eligible for bonuses.<sup>135</sup> An evaluation of the Teacher Advancement Program implemented in Chicago, where Secretary of Education Arne Duncan was superintendent, showed that after two years there was no evidence that the program allowing teachers to be promoted and earn extra compensation based on a combination of their value added to student achievement and classroom observations raised student test scores.<sup>136</sup> In all fairness, it would have been unreasonable to expect such a program to have a significant influence on student performance after only two years.

Another more comprehensive review of existing research on VAM's prepared on behalf of the Economic Policy Institute found that while standardized test scores are one measure that might be used to make judgments about teacher effectiveness, they should be only part of a more comprehensive evaluation.<sup>137</sup> That, in fact, is what the Obama Administration is demanding.

### C. *Turning Around Failing Schools*

No reasonable person believes that children should be forced to attend failing schools. Yet the Obama demand to turn around failing schools or close them down was met with some opposition. There was a certain logic to the plan. About twelve percent of high schools nationwide produce half the country's dropouts.<sup>138</sup> Secretary Duncan, who made school turnarounds a centerpiece of his tenure as superintendent of schools in Chicago, targeted 5000 of the lowest per-

---

134 SEAN P. CORCORAN, ANNENBERG INST. FOR SCH. REFORM, CAN TEACHERS BE EVALUATED BY THEIR STUDENTS' TEST SCORES? SHOULD THEY BE? 28 (2010).

135 MATTHEW SPRINGER ET AL., NAT'L CTR. ON PERFORMANCE INCENTIVES, TEACHER PAY FOR PERFORMANCE 43-44 (2010).

136 STEVEN GLAZERMAN & ALLISON SEIFULLAH, MATHEMATICA POL'Y RESEARCH, INC., AN EVALUATION OF THE TEACHER ADVANCEMENT PROGRAM IN CHICAGO 31 (2010).

137 EVA L. BAKER ET AL., ECON. POL'Y INST., BRIEFING PAPER NO. 278, PROBLEMS WITH THE USE OF STUDENT TEST SCORES TO EVALUATE TEACHERS 20 (2010).

138 See ROBERT BALFANZ, CTR. FOR SOCIAL ORG. OF SCH., LOCATING AND TRANSFORMING THE LOW PERFORMING HIGH SCHOOLS WHICH PRODUCE THE NATION'S DROPOUTS (2007); see also Editorial, *Lessons for Failing Schools*, N.Y. TIMES, July 6, 2009, at A18 (praising Duncan's plan for helping strugglign schools). See generally ROBERT BALFANZ & NETTIE LEGTERS, CTR. FOR RESEARCH ON THE EDUC. OF STUDENTS PLACED AT RISK, REPORT NO. 70, LOCATING THE DROPOUT CRISIS (2004) (detailing the types of high schools that typically have high dropout rates).

forming schools for transformation or closure as part of RTT.<sup>139</sup> If effective, the effort could have a real impact on the achievement gap defined by race since a disproportionate number of students who attend failing schools are poor and minority. In actuality, however, school turnarounds involved a softer alternative to the more aggressive approach that initially had been envisioned.

When Duncan first proposed the plan, he endorsed a model for addressing school failure that would have either replaced the principal and half the teachers in a school so designated, reopened the school under a charter operator, or closed it down completely.<sup>140</sup> The revised guidelines issued in November 2009 placed more of an emphasis on working with existing staff in a school through training, coaching, and curriculum development before taking more drastic measures.<sup>141</sup> While the change was somewhat related to protests from educators and teachers' unions, it was also a response to on-the-ground realities in the field. As a survey by the *New York Times* later found, there was not a sufficient number of professionals available to fill principal vacancies.<sup>142</sup> On average, forty-four percent of the schools targeted for turnaround retained their original principals. The percentage varied from sixty-eight percent in Michigan to twenty-eight percent in New York.<sup>143</sup>

Although there is not an extensive body of research available to document the ingredients of successful turnaround strategies, evaluations of programs such as Success for All and Direct Instruction show that they can result in significant levels of improvement over time.<sup>144</sup>

---

139 See Lesli A. Maxwell, *Rules Ease Overhaul Strategies*, EDUC. WEEK, Dec. 2, 2009, at 1.

140 See *id.*

141 *Id.*

142 See Sam Dillon, *Replace the Principals? Who Would Step In?*, N.Y. TIMES, Feb. 8, 2011, at A15.

143 The other states that participated were California, Texas, Ohio, Missouri, Georgia, and California, which included 317 of the 730 schools that the Department identified for school improvement. *Id.*

144 See Geoffrey D. Borman et al., *Final Reading Outcomes of the National Randomized Field Trial of Success for All*, 44 AM. EDUC. RES. J. 701, 726–27 (2007); Elizabeth Coyne Crowe et al., *Examining the Core: Relations Among Reading Curricula, Poverty, and First Through Third Grade Reading Achievement*, 47 J. SCH. PSYCH. 187 (2009) (reporting on Direct Instruction); Jean Stockard, *Promoting Reading Achievement and Countering the "Fourth Grade Slump": The Impact of Direct Instruction on Reading Achievement in the Fifth Grade*, 15 J. EDUC. STUDENTS PLACED AT RISK 218 (2010). *But see* Debra Viadaro, *Research Doesn't Offer Much Guidance on Turnarounds*, EDUC. WEEK, Aug. 12, 2009, at 10 (raising doubts about the overall practical utility of research on turnaround strategies).

The alternative of closing down failing schools does not offer much hope on its own since districts with large numbers of failing students tend to have a relatively small number of desirable schools to offer as alternatives. A study performed by the Consortium on Chicago School Research at the University of Chicago in Secretary Duncan's former school district is informative on this issue.<sup>145</sup> Between 2001 and 2009 the Chicago Public School District closed forty-four schools because of low academic performance or underutilization.<sup>146</sup> Among other things, the study found that most students who transferred out of closed schools wound up in schools that were academically weak.<sup>147</sup>

The bottom line is that if failing schools are to be closed down, parents and students need to be furnished with better educational alternatives. Thus one can understand the appeal of charter schools, which do provide new and more education options, often in places where they are needed the most.

#### *D. Charters and Choice*

Unfortunately, the Obama administration's approach, particularly its emphasis on charter schools, does not entirely comport with the research evidence. Most research on charter schools shows that, on the whole, they do not perform any better than regular public schools.<sup>148</sup> One widely cited Stanford University study of 2403 charter schools in fifteen states and the District of Columbia, or seventy percent of the charter school population nationally, is a case in point.<sup>149</sup> Comparing each charter school with a regular public school that was a "virtual twin" in the demographic composition of its student body, the Stanford study found that seventeen percent of the charters provided a superior educational opportunity, forty-six percent showed results that were indistinguishable, and thirty-seven percent had academic results that were inferior to regular public schools.<sup>150</sup> The results varied by state, with charter schools in five states having higher learn-

---

145 MARISA DE LA TORRE & JULIA GWYNNE, CONSORTIUM ON CHICAGO SCH. RESEARCH, *WHEN SCHOOLS CLOSE* (2009).

146 *Id.* at 1.

147 *Id.* at 2.

148 A recent meta-analysis of forty charter school studies found that while charter schools outperform traditional schools in reading and math at the elementary school level, there were no differences in performance at the high schools level. See JULIAN R. BETTS & Y. EMILY TANG, *CTR. ON REINVENTING PUB. EDUC., THE EFFECT OF CHARTER SCHOOLS ON STUDENT ACHIEVEMENT* 55 (2011).

149 *CTR. FOR RESEARCH ON EDUC. OUTCOMES, MULTIPLE CHOICE* (2009).

150 *Id.* at 44.

ing gains, in six states having lower gains, and in four having mixed results.<sup>151</sup> The study found that charter school performance in particular states was correlated with the contours of state policy. Charter schools in jurisdictions without caps on the number of charter schools, which RTT selection criteria encouraged, tended to perform better. Charter schools in states that had multiple entities that could authorize their establishment tended to do worse.<sup>152</sup>

There is evidence that charter schools are more racially isolated than regular public schools. One study of forty states and the District of Columbia conducted by The Civil Rights Project at UCLA found just that, noting that patterns varied by region and that since a disproportionate number of charter schools are in urban areas, they tend to attract a high percentage of black students.<sup>153</sup> The report also noted that segregation has been increasing at regular public schools.<sup>154</sup> It is also worth noting that students attend charter schools as a matter of choice, whereas attendance at regular public schools is usually the result of an assignment based on residence, which is often segregated. Indeed, one of the more compelling arguments for school choice is that it empowers poor and minority parents to select the school their children attend.<sup>155</sup> Having educational alternatives can be especially beneficial in urban areas where poor and minority children are routinely assigned to failing public schools. Study after study of school choice programs consistently show that parents express higher satisfaction with choice schools than traditional public schools, and one reason they give is the opportunity to choose the school their child attends.

Another more recent study performed in Massachusetts by a group of economists from MIT showed that while charter schools in that state did not generally boost student achievement, they were particularly effective in urban districts populated by low-income stu-

---

151 Jurisdictions where charter schools had higher gains included Arkansas, Colorado, Illinois, Louisiana and Missouri; those with lower gains included Arizona, Florida, Minnesota, New Mexico, Ohio and Texas; those with mixed results included California, District of Columbia, Georgia, and North Carolina. *Id.* at 42.

152 *Id.* (the charter school cap accounts for a difference of .03 standard deviations).

153 ERICA FRANKENBERG ET AL., CIV. RIGHTS PROJECT, CHOICE WITHOUT EQUITY 80 (2010).

154 *See id.*

155 *See* JOSEPH P. VITERITTI, CHOOSING EQUALITY 114 (1999) (arguing that school choice advances social justice).

dents.<sup>156</sup> Students in urban charter schools not only out-performed their urban public school peers in reading and math, but also out-performed their non-urban public school peers in math.<sup>157</sup> Studies of charter schools in Chicago and New York reported similar positive effects when charter school students were compared with their public school peers.<sup>158</sup> These studies parallel research on Catholic schools, which shows that these schools of choice were especially effective in improving the high school graduation rates of low income students in urban environments.<sup>159</sup>

While the Obama administration enthusiastically supports choice in the form of charter schools, it tried to end a successful school voucher program in the District of Columbia that provided scholarships for 1900 low income students to attend private and parochial schools. The President argued that he “doesn’t believe that vouchers are a long-term answer to our educational problems and the challenges that face our public school system.”<sup>160</sup> The administration had decided to end the five-year-old program in March 2009 by agreeing to continue to fund students already in the program, but not allow any others to apply. The Secretary of Education also rescinded 216 scholarships that had already been awarded on the basis of a lottery.<sup>161</sup>

A Congressionally mandated evaluation of the program conducted for the Department of Education compared academic performance of students participating in the D.C. scholarship program with a control group of students who had applied for the program but were not selected by the lottery.<sup>162</sup> It found that while there was no

---

156 Joshua D. Angrist et al., *Explaining Charter School Effectiveness* (Nat’l Bureau of Econ. Research Working Paper No. 17332, 2011), available at <http://www.nber.org/papers/w17332>.

157 See *id.* at 10.

158 See, e.g., CAROLINE M. HOXBY ET AL., NEW YORK CITY CHARTER SCHOOLS EVALUATION PROJECT, HOW NEW YORK CITY’S CHARTER SCHOOLS AFFECT ACHIEVEMENT (2009); Caroline M. Hoxby & Jonah E. Rockoff, *The Impact of Charter Schools on Student Achievement* (Harvard Institute of Econ. Research Working Paper Series, 2004). These findings of higher performance in urban charter schools are also corroborated in the meta-analysis of Betts & Tang, *supra* note 139.

159 See, e.g., William N. Evans & Robert M. Schwab, *Finishing High School and Starting College: Do Catholic Schools Make a Difference?* 110 Q.J. ECON. 941, 943–44 (1995); Derek Neal, *The Effects of Catholic Secondary Schooling on Educational Achievement*, 15 J. LAB. ECON. 98, 100 (1997).

160 *Press Briefing by Press Secretary Robert Gibbs*, THE WHITE HOUSE (Mar. 11, 2009, 2:17 p.m.), <http://www.whitehouse.gov/the-press-office/briefing-white-house-press-secretary-robert-gibbs-31109>.

161 See Editorial, *School Vouchers*, WASH. POST, Jan. 29, 2011, at A14.

162 PATRICK WOLF ET AL., INST. OF EDUC. SCI., EVALUATION OF THE D.C. OPPORTUNITY SCHOLARSHIP PROGRAM: FINAL REPORT (2010).

conclusive evidence that the program improved academic outcomes in reading and math, students who had used the scholarship program to attend a private school had a high school graduation rate that was twenty percent higher than those who had not participated in the program.<sup>163</sup> Parents also express higher levels of satisfaction than those in the control group.<sup>164</sup> In 2011, Congress restored funding for the D.C. Scholarship Program as part of a budget compromise with the Obama Administration and extended it for five years.<sup>165</sup>

## V. REVISITING NCLB

In the fall of 2011, President Obama and Secretary of Education Duncan announced the implementation of new guidelines that would be used to grant waivers to states that were out of compliance with ten central provisions of the NCLB law, including the requirement that all students be proficient in reading and math by 2014. Declaring the ten-year-old law “broken” and noting that eighty percent of the schools nationally would not reach the annual yearly progress (AYP) expected of them, Secretary Duncan also outlined a set of conditions that states would need to meet in order to qualify.<sup>166</sup> The conditions were very much aligned with the priorities set in the Race to the Top initiative, towards which many states had already been moving.

Acknowledging that forty-four states and the District had already agreed to adopt common standards and that forty-six states and the District of Columbia are in the process of developing high quality assessments, the administration added that beyond meeting these requirements, states would need to focus on improving the lowest performing five percent of their schools and create guidelines for teacher evaluations tied in part to student performance.<sup>167</sup> In addition to having the 2014 proficiency deadline waived, states would be permitted to reset the bar for acceptable growth and design their own accountability systems. States would also be relieved of having to provide after school tutoring at failing schools or providing bus transportation to better schools.<sup>168</sup> While dropping the 2014 target of universal profi-

---

163 *Id.* at 3–4.

164 *Id.* at 1.

165 Michelle D. Anderson, *Budget Compromise Puts Vouchers Back on Track for Students in D.C.*, EDUC. WEEK, Apr. 27, 2011, at 25.

166 Michele McNeil & Alyson Klein, *Obama Outlines NCLB Flexibility*, EDUC. WEEK, Sept. 28, 2011, at 1. *See also* Sam Dillon, *Obama to Offer Waiver on Parts of Education Law*, N.Y. TIMES, Sept. 23, 2011, at A19 (describing the conditions and the plan’s policy goals).

167 *See* McNeil & Klein, *supra* note 166.

168 *See* Dillon, *supra* note 166.

ciency might be deemed “realistic,” it also amounts to a lowering of expectations, the burden of which is bound to fall on the neediest students.

Although the language of NCLB permits the Secretary of Education to grant waivers, some have questioned whether his setting new terms for such waivers was tantamount to using administrative discretion to rewrite the law in violation of the separation of powers doctrine. Republican Representative John Klein of Minnesota protested, “In my judgment, he is exercising an authority and power he doesn’t have.”<sup>169</sup> Klein added, “We all know the law is broken and needs to be changed. But this is part and parcel with the whole picture with this administration: they cannot get their agenda through Congress, so they’re doing it with executive orders and rewriting rules. This is executive overreach.”<sup>170</sup>

In February 2012 the Secretary of Education granted waivers from key provisions of NCLB to ten states, including the requirement bringing all students to proficiency in reading and math by 2014.<sup>171</sup> Shortly thereafter, twenty-six additional states and the District of Columbia submitted applications for a second round of waivers to be granted.<sup>172</sup> In the meantime Congress and the President were still unable to make substantial progress toward renewing the Elementary and Secondary Education Act.

#### CONCLUSION

The Obama administration has moved the boundaries of federalism significantly, enabling the federal government to have a marked influence on elementary and secondary education nationally. It has done so in a way that advances the major objectives of No Child Left Behind (NCLB), retaining a commitment to test-based information that allows education officials to monitor the progress of states, school districts, and distinct populations of students, even while offering waivers to avoid some of the law’s requirements. It has applied funding creatively to engage the states in a cooperative process that moves the country closer to establishing standards that are consistent with international benchmarks. The continuing focus on assessment is

---

169 Sam Dillon, *Obama Gives States Voice in No Child Left Behind*, N.Y. TIMES, Sept. 24, 2011, at A1, A13.

170 *Id.*

171 The states included Colorado, Florida, Georgia, Indiana, Kentucky, Massachusetts, Minnesota, Oklahoma, New Jersey, and Tennessee. See Winnie Hu, *10 States Are Given Waivers From Education Law*, N.Y. TIMES, Feb. 10, 2012, at A13.

172 Michelle Mcneil, *26 States, D.C., Join Quest for NCLB Waivers*, EDUC. WEEK, March 7, 2012.

important because it will be impossible to improve school performance generally or close the achievement gap for underperforming students without clear information about where improvement is needed.

Although President Obama and Secretary Duncan have overstated the level of support that is found in professional research to ground their priorities, with some exceptions, the policies themselves are reasonable in light of problems that have become apparent with the implementation of NCLB. Education research is not a science; it rarely provides undisputed evidence; and disagreement among researchers can be used as a rationale for perpetuating a status quo that does not serve students well.<sup>173</sup> Some degree of experimentation is appropriate in situations where it is widely apparent that existing practices are inhibiting progress. Conflicting evidence in research, however, should not be used as an opportunity to act politically when there is reason to believe that better alternatives exist. On this score the administration has a mixed record.

Given the tentative condition of state standards and assessments, not to mention the overly optimistic timelines that the Obama administration has set for converting them into credible instruments for teaching and evaluation, the current demand to hold teachers accountable on the basis of student performance must proceed with great caution. What appears to be sound policy may unravel as school officials at all levels attempt to put these requirements into practice. So long as the development of sound assessments remains a work in progress, the use of student tests to evaluate the performance of teachers is fraught with problems.

The administration's focus on failing schools and its determination to either reverse their course or close them down seems to be very much in accord with the original goals of the Education and Secondary Education Act, which specifically was enacted to address the educational needs of low income students. Well-designed strategies to turn such schools around should be an immediate priority for all education administrators. When such interventions do not succeed, parents should be offered alternatives. Because low-income districts have relatively few effective schools, it is reasonable to expand the range of options though the implementation of well-monitored choice programs.

---

173 See generally Joseph P. Viteritti, *Schoolyard Revolutions: How Research on Urban School Reform Undermines Reform*, 188 POL. SCI. Q. 233 (2003) (arguing that by putting the burden of proof on reformers, the research community undermined the implementation of school choice experiments).



Although charter schools have had a mixed record of performance, there is some evidence that they have been especially effective in urban communities, where they are needed the most. That being said, the Obama administration's attempt to close down a well-received and moderately successful voucher program in the ailing District of Columbia school district, while it aggressively supports charter schools, may be the most indefensible education decision it has made.

Finally, the Obama administration's conversion of federal funding into a series of competitive grant programs carries enormous risks. Its reasoning on this matter is understandable. Over the years, the federal government has garnered much deserved criticism for investing billions of dollars in programs that do not work. Nevertheless, there has also been consistent evidence over the years indicating that federal ESEA dollars are not directed at the students who need them the most. A competitive strategy that rewards states and school districts that demonstrate the most capacity may in fact ensure that federal dollars are awarded to those schools that need them the least. A recent report completed at Stanford University finds that the achievement gap between rich and poor students has grown significantly over the past three decades, in fact exceeding the gap defined by race.<sup>174</sup> This new evidence should serve as a cold reminder that President Lyndon Johnson's determination to target school reform efforts at low-income students was well-founded, and that we have a long way to go before we can in good conscience redirect our focus.

---

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

## APPENDIX

Scored Criteria for “Race to the Top” Program<sup>175</sup>**State Success Criteria** (125 points)

- Articulating State’s education reform agenda and LEA’s participation in it (65 points)
- Building strong state capacity to implement, scale up and sustain proposed plans (30 points)
- Demonstrating significant progress in raising achievement and closing gaps (30 points)

**Standards and Assessments** (70 points)

- Developing and adopting common standards (40 points)
- Developing and implementing common, high-quality assessments (10 points)
- Supporting the transition to enhanced standards and high-quality assessments (20 points)

**Data Systems to Support Instruction** (47 points)

- Fully implementing a statewide longitudinal data system (24 points)
- Accessing and using State’s data (5 points)
- Using data to improve instruction (18 points)

**Great Teachers and Leaders** (138 points)

- Providing high-quality pathways for aspiring teachers and principals (21 points)
- Improving teacher and principal effectiveness based on performance (58 points)
- Ensuring equitable distribution of effective teachers and principals (25 points)
- Improving the effectiveness of teacher and principal preparation programs (14 points)
- Providing effective support to teachers and principals (20 points)

**Turning Around the Lowest Achieving Schools** (50 points)

- Intervening in the lowest achieving schools and LEAs (10 points)
- Turning around the lowest achieving schools (40 points)

---

175 U.S. DEP’T OF EDUC., RACE TO THE TOP PROGRAM: EXECUTIVE SUMMARY (2009).

**General Selection Criteria** *(55 points)*

- Making education funding a priority *(10 points)*
- Ensuring successful conditions for high-performing charters and other innovative schools *(40 points)*
- Demonstrating other significant reform conditions *(5 points)*

