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# Implication of the No Child Left Behind Act for Educational Equity and Segregation

L. Darnell Weeden\*

## INTRODUCTION

The issue to be addressed is whether the No Child Left Behind Act (“NCLBA”) is a proper tool for advancing equity in education. Provisions of the NCLBA that require states to adhere to educational accountability have been construed as being seriously underfunded.<sup>1</sup> These provisions have been argued as underfunded in not providing the states with adequate federal funding to compensate for the state’s compliance with the Act’s provisions.<sup>2</sup> The prerequisites of NCLBA have also been viewed as conflicting with established desegregation orders in public schools.<sup>3</sup> However, some parents of public school students see NCLBA as an effective method of providing their children with better educational opportunities.<sup>4</sup> There are many good reasons for opposing the NCLBA accountability provisions and developing the position that NCLBA accountability provisions are in violation of the Spending Clause.<sup>5</sup> Laws that require public schools to expend more economic resources than they can reasonably afford should be considered unconstitutional.<sup>6</sup>

This paper will include a brief discussion in Part I of the historical development of federal aid for public elementary and secondary education. Part II addresses the Spending Clause. Part III presents an evaluation of *State of Connecticut v. Spellings*. Part IV gives an analysis of the NCLBA

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<sup>1</sup> See *City of Pontiac v. Spellings*, 2005 WL 3149545 (E.D. Mich. 2005); *Connecticut v. Spellings*, 453 F. Supp. 2d 459 (D. Conn. 2006).

<sup>2</sup> *Spellings*, 2005 WL 3149545 at \*1.

<sup>3</sup> Anita F. Hill, *A History of Hollow Promises: How Choice Jurisprudence Fails to Achieve Educational Equality*, 12 MICH. J. RACE & L. 107, 148 (2007).

<sup>4</sup> See Sam Dillon, *Alabama Plan Brings Out Cry of Resegregation*, N.Y. TIMES, Sept. 17, 2007, at A1.

<sup>5</sup> *Spellings*, 453 F. Supp. 2d at 459.

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

accountability requirements. Part V reviews the 2007 Congressional debate about the NCLBA. Part VI explores the impact of the NCLBA on school integration.

### I. A HISTORICAL DEVELOPMENT

Since the 1960s, the United States has funded public school education through the Elementary and Secondary Education Act (“ESEA”).<sup>7</sup> The ESEA authorizes the disbursement of federal aid to school districts and school systems.<sup>8</sup> In 1965, the Act came out of the efforts of President Johnson to combat poverty and Congress’ quest to provide “educational rights that apply to all students.”<sup>9</sup> Decades later in the 1980s, the government, under President Reagan, published *A Nation at Risk*, which reported on the weak reading skills of the nation’s students and insisted on the need to reverse mediocre education in the nation.<sup>10</sup> The focus of education throughout the country then began to shift to higher standards and achievement.<sup>11</sup>

In 1994, President Clinton reauthorized the ESEA and set the stage for the accountability provisions that the NCLBA would later adopt.<sup>12</sup> In 1994, Congress passed Goals 2000: Educate America Act (“Goals 2000”), which provided federal funds to states for the development of state standards and assessment systems.<sup>13</sup> As a compliment to Goals 2000, President Clinton authorized the Improving America’s Schools Act (“IASA”).<sup>14</sup> IASA “required that states assess all students at certain grade levels.”<sup>15</sup> Together these two laws were “aimed at providing states with the capacities and incentives to engage in standards-based reforms.”<sup>16</sup> Due to problems with the implementation of these laws, they were abandoned and never reautho-

<sup>7</sup> Kimberly D. Bartman, *Public Education in the 21st Century: How Do We Ensure That No Child is Left Behind?*, 12 TEMP. POL. & CIV. RTS. L. REV. 95, 110 n.133 (2002).

<sup>8</sup> *Id.*

<sup>9</sup> Benjamin Michael Superfine, *Using the Court to Influence the Implementation of No Child Left Behind*, 28 CARDOZO L. REV. 779, 785 (2006).

<sup>10</sup> John Heintz, *Political Currency and Hard Currency: The No Child Left Behind Act Turns Three*, 40 J. MARSHALL L. REV. 345, 346 (2006) (citing THE NAT’L COMM.ON EXCELLENCE IN EDUC., *A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM* (1983)).

<sup>11</sup> Superfine, *supra* note 9, at 786.

<sup>12</sup> Erin Archerd, *Spanish-Language Test Accommodations: Recommended or Required by NCLB?*, 9 HARV. LATINO L. REV. 163, 167 (2006).

<sup>13</sup> Superfine, *supra* note 9, at 786.

<sup>14</sup> *Id.*

<sup>15</sup> Archerd, *supra* note 12, at 167.

<sup>16</sup> Superfine, *supra* note 9, at 786.

alized.<sup>17</sup> A few years later, President George W. Bush signed into law the NCLBA, to achieve equal academic standards throughout the nation.<sup>18</sup>

## II. SPENDING CLAUSE ANALYSIS

The Spending Clause of the U.S. Constitution provides that “[t]he Congress shall have Power . . . to provide for . . . the general Welfare of the United States.”<sup>19</sup> Commentator Gina Austin believes that the federal government’s regulation of the state’s authority to maintain educational programming violates the Spending Clause by requiring states to follow national guidelines in order to receive financial support for schools.<sup>20</sup> The Supreme Court identified four requirements in *South Dakota v. Dole* that allow for federal funding without the Spending Clause.<sup>21</sup> The funding must be exercised to promote the general welfare of the United States.<sup>22</sup> The condition for funding cannot be ambiguous.<sup>23</sup> The money should have a relationship to a federal concern.<sup>24</sup> Lastly, the conditional funding must not conflict with another constitutional provision.<sup>25</sup>

The four Spending Clause restrictions were designed to prohibit Congress from using federal funds to place an undue regulatory burden on the states.<sup>26</sup> Most of the cases involving accusations of Spending Clause violations have resulted in federal courts upholding Congress’ conditional spending legislation.<sup>27</sup>

## III. AN ANALYSIS OF *STATE OF CONNECTICUT v. SPELLINGS*

### A. Arguments Against Compliance with Accountability Standards: Emphasis on *State of Connecticut v. Spellings*

In *State of Connecticut v. Spellings*,<sup>28</sup> the State challenged the U.S. Secretary of the Department of Education’s (“DOE”) interpretation of sev-

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<sup>17</sup> *Id.* at 787.

<sup>18</sup> L. Darnell Weeden, Essay, *Does the No Child Left Behind Law (NCLBA) Burden the States as an Unfunded Mandate Under Federal Law?*, 31 T. MARSHALL L. REV. 239, 240 (2006) (citing 20 U.S.C. § 6301 (West 2002)).

<sup>19</sup> U.S. CONST. art. I § 8, cl. 1.

<sup>20</sup> Weeden, *supra* note 18, at 242 (citing Gina Austin, *Leaving Federalism Behind: How the No Child Left Behind Act Usurps States’ Rights*, 27 T. JEFFERSON L. REV. 337, 352 (2005)).

<sup>21</sup> *Id.* at 243 (citing *South Dakota v. Dole*, 483 U.S. 203 (1987)).

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

<sup>23</sup> *Id.*

<sup>24</sup> Austin, *supra* note 20, at 352.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Connecticut v. Spellings*, 453 F. Supp. 2d 459, 464 (D. Conn. 2006).

eral key elements of the NCLBA. The State alleged that the Secretary's interpretation of the "Unfunded Mandates Provision" of the NCLBA is contrary to its plain language and Congress' intent in enacting it.<sup>29</sup>

In Count I of its complaint, the State sought a declaratory judgment that would compel the Secretary to clarify the meaning of the Unfunded Mandate Provision of the NCLBA.<sup>30</sup> The State alleged that the Secretary's interpretation of the NCLBA violates the Spending Clause and the Tenth Amendment in Count II of the complaint.<sup>31</sup> Count III of the complaint challenged the Secretary's denial of waivers and alleged failure to comply with statutory requirements.<sup>32</sup> In Count IV, the State alleged a violation of the federal Administrative Procedures Act ("APA").<sup>33</sup>

Under Count I, involving the declaratory judgment claim, the parties challenged the Secretary's interpretation of the following three provisions of the NCLBA: (1) the requirement that special education assessments be conducted at grade level rather than instructional level; (2) the requirement that English-language-learning students receive mathematics assessments in their first year in the country and reading assessments in the following year; and (3) the requirement that non-formative annual testing occur in every grade.<sup>34</sup> Although the Court held that the State of Connecticut had standing to bring the action, the Court determined it did not have subject-matter jurisdiction to hear the case because the Secretary had not yet taken steps to enforce her interpretation of the NCLBA.<sup>35</sup>

### 1. Declaratory Judgment

The Secretary raised a number of objections to the State's claims in Count I (declaratory judgment claim). When deciding on a standing objection, the Court must presume the fact alleged, accept the truth of the plaintiff's allegations of jurisdiction, and construe all inferences in favor of the plaintiff.<sup>36</sup> The Court found that the State met the requirement of standing because the State alleged that by denying the State's waiver requests, the Secretary was requiring the State to expend substantial sums in excess of federal funding to comply with the NCLBA provisions.<sup>37</sup> The Court reasoned that if the current funding is inadequate, a declaratory judgment pro-

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<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 480.

<sup>31</sup> *Id.* at 491.

<sup>32</sup> *Id.* at 495.

<sup>33</sup> *Id.* at 501.

<sup>34</sup> *Spellings*, 453 F. Supp. 2d at 464 (citing 5 U.S.C. §§ 701-706 (2002)).

<sup>35</sup> *Id.* at 482, 489.

<sup>36</sup> *Id.* at 481.

<sup>37</sup> *Id.*

hibiting the Secretary from requiring the State to expend more financial resources to comply with the NCLBA provisions would remedy the State's alleged injury.<sup>38</sup>

Although the Court found that the State had standing, the Court acknowledged that allowing the State to challenge the Secretary's interpretation of the NCLBA prior to any agency action against the State would undermine the comprehensive system for enforcement provided by Congress.<sup>39</sup> The General Education Provisions Act ("GEPA") provides the Secretary with a variety of mechanisms for enforcing the terms of NCLBA.<sup>40</sup> GEPA contains a comprehensive enforcement scheme that requires notice to the agency's Secretary and a hearing before the Administrative Law Judge, which is subject to a discretionary review by the Secretary.<sup>41</sup> After a final agency action, the complaint may be appealed to the United States Court of Appeals.<sup>42</sup> The Court found that it did not have jurisdiction over the matter until after concrete positions have been taken at the administrative level and a full administrative record has been developed; thus, formal and final agency action must have been taken prior to seeking judicial recourse.<sup>43</sup>

When deciding on prudential ripeness, a court evaluates both the fitness of the issues for judicial decision and the hardship to the parties of withholding court considerations.<sup>44</sup> The Court considered that fitness entailed statutory construction and was fit for judicial review, but desired a further development of the record.<sup>45</sup> The court found that because the State was in compliance with the NCLBA, the State was not in danger of imminent enforcement and thus not subject to any hardship.<sup>46</sup> The Court stated that it would rather have a final action by an administrative agency before making a decision on the matter.<sup>47</sup> The Court reasoned that the issue should be taken up with the DOE.<sup>48</sup> The Court reasoned that in order for it to decide the matter at hand, both parties were required to take the issue up at the federal administrative level.<sup>49</sup>

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<sup>38</sup> *Id.* at 482.

<sup>39</sup> *Id.* at 484.

<sup>40</sup> *Spellings*, 453 F. Supp. 2d at 474; 20 U.S.C. §§1221-1240 (2002).

<sup>41</sup> *Spellings*, 453 F. Supp.2d at 483-84.

<sup>42</sup> *Id.* at 484.

<sup>43</sup> *Id.* at 489.

<sup>44</sup> *Id.* at 490.

<sup>45</sup> *Id.*

<sup>46</sup> *Spellings*, 453 F. Supp. 2d at 491.

<sup>47</sup> *See id.* at 490.

<sup>48</sup> *Id.* at 482, 484.

<sup>49</sup> *Id.* at 489.

## 2. Spending Clause and Tenth Amendment Claims

The State's Spending Clause claim (Count II) focuses on the State's reasons for accepting federal funding under NCLBA.<sup>50</sup> Under the Spending Clause, Congress may attach conditions on the receipt of federal funds provided to states, as long as the exercise of the spending power is in pursuit of the general welfare and the conditions on funding are laid out unambiguously.<sup>51</sup> The State understood that the federal government would pay for all of the costs that were associated with complying with the NCLBA.<sup>52</sup> The State claimed that the Secretary changed that condition as the State initially understood it to be.<sup>53</sup>

The State's Tenth Amendment claim (also Count II) concerns the notion that the Secretary has the authority to withhold all Title I funding if the State does not comply with the NCLBA's testing requirements.<sup>54</sup> This claim focuses on the penalties that the State would face, if the Secretary should find that the State was not in compliance with the NCLBA.<sup>55</sup> The State alleged that the penalties for noncompliance, which would include the DOE's withholding of Title I funds and other school-related funding, would be harsh and unrelated to the State's initial acceptance of the federal funding.<sup>56</sup> Similar to the State's declaratory judgment claim in Count I, the Court found that Count II allegations of Spending Clause and Tenth Amendment violations sought pre-enforcement declaratory rulings.<sup>57</sup> The Court explained that such a decision on Count II would be directly tied to the Secretary's interpretation of the NCLBA.<sup>58</sup> The Court determined that in order to decide on the Spending Clause claim, the Court would have to analyze the Secretary's interpretation of the NCLBA.<sup>59</sup> The Court cited the State's compliance as a reason why the Secretary has not yet withheld funding.<sup>60</sup> The Court concluded that it did not have subject-matter jurisdiction to hear the Count II claim.<sup>61</sup>

The State's denial of waivers and abdication of statutory responsibility claim (Count III) focuses on whether the Secretary's denial of the waivers

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<sup>50</sup> *Id.* at 491-94.

<sup>51</sup> *Spellings*, 453 F. Supp. 2d at 491.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 492-93.

<sup>54</sup> *Id.* at 493-94.

<sup>55</sup> *See id.* at 493.

<sup>56</sup> *Spellings*, 453 F. Supp. 2d at 493.

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

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

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

<sup>60</sup> *Id.* at 494.

<sup>61</sup> *Spellings*, 453 F. Supp. 2d at 494.

was arbitrary and capricious and whether the Secretary meaningfully considered the state waivers.<sup>62</sup> The Court found that Congress did not grant the Court any authority to consider a matter that is committed to the agency's discretion.<sup>63</sup> Although the State alleged in its abdication of statutory responsibility claim that the Secretary flatly refused to consider waiver requests concerning a testing method, the Court found that there was proof of the Secretary's reasons for refusing the State's requests, including the fact that the State and Secretary had a number of discussions about the matter.<sup>64</sup>

The State claimed in Count IV that the Secretary arbitrarily and capriciously denied the State's request for plan amendments and violated the APA in failing to provide an adequate hearing prior to rejecting the State's plan amendments.<sup>65</sup> The Court found that a detailed analysis of the plan amendments and an administrative record would better enable the Court to make a decision on the denial of the State's request for plan amendments.<sup>66</sup> The Court refused to dismiss the APA violation claim by the state because it believed that a detailed administrative record would be helpful to the Court.<sup>67</sup> The Court believed that if the Secretary did violate the APA, the appropriate solution would be to remand the hearing of the plan amendment to the DOE.<sup>68</sup> The State, however, stated in portions of its complaint and brief that it wanted the court, and not the DOE, to rule on the matter.<sup>69</sup> Therefore, the Court found that the second part of the count, in which the State alleged that the Secretary violated the APA in failing to provide an adequate hearing prior to rejecting the State's plan amendments, was moot.<sup>70</sup> The Court found the APA violation count moot because the State did not seek to remand the issue for a hearing, but rather wanted the Court to decide the merits of the plan amendments.<sup>71</sup>

The State was able to continue with its claim that the Secretary's denial of the State's requests for NCLBA plan amendments was arbitrary and capricious in nature and in violation of the APA.<sup>72</sup> On appeal, the State motioned for entry of judgment on the dismissed Counts I (declaratory judgment) and II (Spending Clause and 10<sup>th</sup> Amendment), under Rule 54(b),

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<sup>62</sup> *Id.* at 495.

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

<sup>64</sup> *Id.* at 501.

<sup>65</sup> *Id.*

<sup>66</sup> *Spellings*, 453 F. Supp. 2d at 502.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 503.

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

<sup>71</sup> *Spellings*, 453 F. Supp. 2d at 503.

<sup>72</sup> *See id.* at 501, 503.



which provides that where the district court has dismissed some, but not all claims in an action, certifying its judgment as final under Rule 54(b) is generally not appropriate if the same or closely related issues remain to be litigated.<sup>73</sup> The Appeals Court denied the Rule 54(b) motion and held that because legal questions raised by Counts I (declaratory judgment) and II (Spending Clause and 10<sup>th</sup> Amendment) were inextricably intertwined, they were not appropriate for an entry of judgment under Rule 54(b).<sup>74</sup>

The legal battles are shaping up. I believe that the litigation landscape involving NCLBA is challenging. As indicated in *Connecticut v. Spellings*, one can anticipate a battle over jurisdiction about who has the power to hear disputes between the state and the DOE. These disputes clearly raise issues of accountability requested by the federal government and the state's reluctance to comply with federal requests because it believes that the federal government has issued an unfunded mandate. The *Connecticut v. Spellings* Court clearly indicated that it would rather not enter the NCLBA litigation thicket without the benefit of prior agency proceedings. When it comes to educational policies, I think it is fair to conclude that the battle for control over education policy has only just begun. I anticipate, in the absence of strong congressional intervention, that NCLBA litigation will be a persistent pattern for years to come.

#### IV. ANALYSIS OF THE NCLBA ACCOUNTABILITY REQUIREMENTS

##### A. Arguments Against Compliance with Accountability Standards: Emphasis on Commentary

Professor Danielle Holley-Walker has noted that there are two important issues that are involved in the debate of the burdens that NCLBA imposes on states.<sup>75</sup> One is the federal government's failure to provide sufficient financial resources for the statutory requirements.<sup>76</sup> Holley-Walker cited *School District of Pontiac v. Spellings*, in which the state of Connecticut sued the DOE, alleging that the federal government's requirement that states use more money to pay for student testing than what the federal government provides is unlawful.<sup>77</sup> Another burden is the notion that NCLBA imposes regulation that has traditionally been the responsibility of the

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<sup>73</sup> *Connecticut v. Spellings*, No. 3:05CV1330(MRK), 2007 WL 329118, at \*1 (D. Conn. Feb. 1, 2007).

<sup>74</sup> *Id.* at \*1-2.

<sup>75</sup> See Danielle Holley-Walker, *The Importance of Negotiated Rulemaking to the No Child Left Behind Act*, 85 NEB. L. REV. 1015, 1024-25 (2007).

<sup>76</sup> *Id.* at 1024.

<sup>77</sup> *Id.* at 1024-25.

states.<sup>78</sup> Holley-Walker stated that before NCLBA was enacted, every state in the nation already had student testing systems in place.<sup>79</sup> Professor Holley-Walker also provided information suggesting that some states have to expend their resources to pay for both state and federally mandated accountability standards.<sup>80</sup>

Benjamin Michael Superfine has cited the failure to provide states, districts, and schools with the needed capacities, such as financial resources, to comply with NCLBA mandates as one of the major problems plaguing the implementation of NCLBA.<sup>81</sup> States and state-level entities claim to have only a limited ability to implement NCLBA testing and accountability provisions effectively.<sup>82</sup> The courts have not constituted an effective venue for addressing these problems.<sup>83</sup>

Superfine believes that the NCLBA Adequacy Approach would allow courts to examine NCLBA implementation problems in terms of educational adequacy.<sup>84</sup> The Adequacy Approach would allow courts to examine the NCLBA's implementation problems directly through the lens of educational adequacy.<sup>85</sup> This will allow courts that use the approach to interpret the NCLBA accountability mandates as necessary for a state to fulfill its duties under the law.<sup>86</sup> Courts would construe the effective implementation of NCLBA mandates regarding standards and accountability as necessary for a state to fulfill its constitutional burden under the relevant education clause.<sup>87</sup> The courts would use state standards to define education adequacy in the state.<sup>88</sup> However, Superfine believes that the NCLBA Adequacy Approach would be problematic for states because courts would only consider the duty of a state under its constitution in solving the NCLBA's funding problems.<sup>89</sup> The approach would not require the federal government to provide the states with additional funding to implement the NCLBA's provisions, but instead would leave the states with less financial resources for other areas of state funding such as health and housing.<sup>90</sup>

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<sup>78</sup> *Id.* at 1025.

<sup>79</sup> *Id.*

<sup>80</sup> *See id.* at 1026.

<sup>81</sup> Superfine, *supra* note 9, at 781.

<sup>82</sup> *Id.* at 782.

<sup>83</sup> *Id.* at 842.

<sup>84</sup> *Id.* at 834.

<sup>85</sup> *Id.* at 835.

<sup>86</sup> *Id.* at 834.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 835.

<sup>89</sup> *Id.* at 840.

<sup>90</sup> *Id.*

## B. Strain of NCLBA Meeting Accountability Requirements

A number of states have public schools that are failing to reach the goals of achievement set by the NCLBA.<sup>91</sup> The NCLBA is in its fifth year, which has been prescribed as the year in which penalties for non-achievement will be more severe.<sup>92</sup> The severe penalties include firing teachers and principals, shutting down schools, or a major change in the leadership of the school.<sup>93</sup>

However, many educational experts have stated that failing schools have not actually been penalized as prescribed under the law.<sup>94</sup> The schools have been labeled as failing, but there has not been any action taken as a result.<sup>95</sup> A federal survey reveals that failing schools have been able to avoid changes in leadership.<sup>96</sup> As a result of the lack of serious penalties handed down, parents are upset about the lack of action being taken as required under the law.<sup>97</sup>

One superintendent in Los Angeles stated that she would like to shut down low-performing schools but it would be hard to do considering that more than half of the schools in her district do not meet the NCLBA standards.<sup>98</sup> The NCLBA also would not allow removal of some teachers under the penalties provision because the NCLBA does not prevail over teacher union contracts that were in place before the law was enacted.<sup>99</sup> Under union contract provisions of the United Teachers of Los Angeles, teachers are not allowed to examine their own student's scores if it would result in the teachers being evaluated based on the scores.<sup>100</sup> One teacher at a school where teachers are not allowed to examine their own students' scores believes that students suffer as a result of the teachers not being evaluated.<sup>101</sup> A parent at that same school believes that teachers should teach a curriculum based on what the standardized tests will cover.<sup>102</sup>

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<sup>91</sup> See Diana Jean Schemo, *Failing Schools Strain to Meet U.S. Standard*, N.Y. TIMES, Oct. 16, 2007, at A21.

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

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

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

<sup>96</sup> *Id.*

<sup>97</sup> Schemo, *supra* note 91.

<sup>98</sup> *See id.*

<sup>99</sup> *See id.*

<sup>100</sup> *See id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

## V. THE 2007 CONGRESSIONAL DEBATE ABOUT THE NCLBA

The newest draft House Bill to renew the NCLBA has been criticized by civil rights groups and teachers unions.<sup>103</sup> When the House Education Committee held its hearing in mid-September, the groups that voiced their criticisms included the Center for American Progress and Achieve Inc., the National Urban League, and the Citizens' Commission on Civil Rights.<sup>104</sup> These groups all oppose a proposal that would allow school districts to create their own measure of student progress rather than use statewide tests.<sup>105</sup> The groups claim that the intent of NCLBA to teach children of all races and income levels would be defeated.<sup>106</sup> The new proposals in a House draft bill for NCLBA would no longer rely solely on math and reading test scores in determining the progress of a school.<sup>107</sup> The new proposals would allow schools to show their academic strength by including test results in other subjects and other factors such as attendance, promotion, performance in advanced placement courses, and graduation rates.<sup>108</sup> There is also a proposed draft that would allow schools to test non-English speakers in their native language for up to five years, rather than the current three.<sup>109</sup>

The proposal in the draft that would allow schools to test non-English speakers in their native language for up to five years, rather than the current three, has been criticized by DOE Secretary Margaret Spellings.<sup>110</sup> Spellings contended that the law would weaken the NCLBA's effort to raise achievement level for poor and minority students.<sup>111</sup> Spellings also complained that the proposals would defeat the NCLBA's accountability efforts.<sup>112</sup> Spellings particularly cited the testing of non-English speakers, saying that the law would allow such immigrant students to get as high as the 10<sup>th</sup> grade before they are ever tested in English.<sup>113</sup>

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<sup>103</sup> Diana Jean Schemo, *Teachers and Rights Groups Oppose Education Measure*, N.Y. TIMES, Sept. 11, 2007, at A25.

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

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

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

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> Diana Jean Schemo, *Secretary of Education Criticizes Proposal*, N.Y. TIMES, Sept. 6, 2007, at A18.

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

<sup>111</sup> *Id.*

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

<sup>113</sup> *Id.*

## VI. IMPACT OF NCLBA ON SCHOOL INTEGRATION/SEGREGATION ISSUES

Holley-Walker also has suggested that some schools exclude minority students from the annual reports of student progress.<sup>114</sup> These schools request that they be exempt from NCLBA provisions that require a large number of minority students to be included in assessment results.<sup>115</sup> This action results in incentives to maintain a low percentage of minority students in those schools.<sup>116</sup> Holley-Walker disagreed with the argument that NCLBA fosters integration efforts through the NCLBA's provision that allows student to transfer out of low-performing schools and into academically superior schools.<sup>117</sup>

If the academically superior schools are predominantly white, then the transfer option, when exercised by a minority, creates a more racially diverse student body at the predominantly white school.<sup>118</sup> When a high-performing student leaves the low-performing school, the low-performing school suffers a loss both in intellectual achievement and intellectual diversity. When better performing students abandon low-performing schools, the low-performing school's risk of intellectual deficiency is expanded. A proper role for public officials under NCLBA is to provide incentives for low-performing schools to become competitive in the field of education without encouraging bright students to abandon them. However, data shows that few students are exercising the transfer option.<sup>119</sup> Contrary to the integration suggestion, Holley-Walker asserted that NCLBA may in fact cause a reversal of the desegregation efforts of the past 40 years.<sup>120</sup> Professor Holley-Walker suggested that desegregation plans in some parts of the country will be undermined by the mix that can occur by implementing the NCLBA provisions.<sup>121</sup> The DOE requires that some schools districts follow NCLBA provisions in spite of possible conflicts with established desegregation plans and also advised school districts to ignore established desegregation plans.<sup>122</sup>

One commentator, Anita Hill, has suggested that forcing the integration of poor and minority students into more economically advantaged schools will increase the race and class problems that already exist.<sup>123</sup> Hill

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<sup>114</sup> Holley-Walker, *supra* note 75, at 1028.

<sup>115</sup> *See id.*

<sup>116</sup> *See id.* at 1028-29.

<sup>117</sup> *See id.* at 1029.

<sup>118</sup> *See id.*

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

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *See id.*

<sup>123</sup> *See Hill, supra* note 3, at 147

also acknowledged that the provision of the NCLBA that allows students who attend non-performing schools to transfer to other public schools within the same school district will conflict with established desegregation orders.<sup>124</sup> It is Professor Hill's position that school districts in both the South and the North will have their school desegregation efforts negatively impacted because of the NCLBA.<sup>125</sup> Furthermore, some black parents in the South have actually turned to the NCLBA to prevent schools from becoming once again segregated by race. After white parents in Tuscaloosa, Alabama, objected to overcrowded schools, school officials approved a sweeping rezoning plan.<sup>126</sup> Under the rezoning plan, a large majority of the hundreds of students commanded to rearrange their school plans during the fall of 2007 were black—and several were dispatched to virtually all-black, low-performing schools.<sup>127</sup> Black parents have challenged the Tuscaloosa rezoning plan because they believe school officials are implementing the plan in order to re-segregate the schools.<sup>128</sup> In a new change of legal direction for an integration fight, Black parents in Tuscaloosa have asserted that the rezoning plan violates the spirit of the federal NCLBA.<sup>129</sup> The NCLBA provides students in failing schools the right to enroll in a better performing school.<sup>130</sup> Tuscaloosa is the city in which Governor George Wallace came to campus to prevent blacks from entering the University of Alabama as students.<sup>131</sup> As Sam Dillon observed: "Three decades of federal desegregation marked by busing and white flight ended in 2000. Though the city is 54 percent white, its school system is 75 percent black."<sup>132</sup> Civil rights lawyers maintain that Tuscaloosa's rezoning battle is somewhat novel because the NCLBA has become a primary issue.<sup>133</sup> School districts are confronting "uncharted territory over whether a reassignment plan can trump the law's prohibition on moving students into low-performing schools."<sup>134</sup> Even if the NCLBA may be used to help parents challenge a rezoning plan influenced by race in Tuscaloosa, Alabama, Professor Charles R. Lawrence, III, an ardent critic of NCLBA, has argued that the NCLBA is an ill-conceived law implemented to ignore the root causes of racial segregation

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<sup>124</sup> *Id.* at 148.

<sup>125</sup> *See id.*

<sup>126</sup> Sam Dillon, *Alabama School Rezoning Plan Brings Out Cry of Resegregation*, N.Y. TIMES, Sept. 17, 2007, at A1, available at 2007 WLNR 18155451.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> Dillon, *supra* note 126.

<sup>133</sup> *Id.* at A16.

<sup>134</sup> *Id.*

in public schools.<sup>135</sup> In his view, the NCLBA affirmatively hurts public policy in education by redirecting public attention and resources away from addressing the inequities of race and class while perpetuating, as well as reinforcing, social and racist practices that keep on preventing poor, working-class black and brown children from have equal access to educational opportunity.<sup>136</sup>

The NCLBA maximum injury is inflicted by ignoring the race and class history that created the conditions that have caused the educational achievement gap that it pretends to close.<sup>137</sup> As Lawrence observed: “The [NCLBA] speaks often of race, requiring schools to keep separate data by ethnicity and holding schools accountable for improving the test scores of non-white students. But nowhere does it speak of ending racism or dismantling segregation.”<sup>138</sup> Supporters of NCLBA condemn the disproportionate harm that American schools impose upon poor black and brown children, but these defenders of NCLBA do not acknowledge any societal or governmental responsibility for that harm.<sup>139</sup> In order to have moral credibility, Professor Lawrence contends that advocates of NCLBA must acknowledge the educational harm suffered by historically underrepresented groups in the political process originated in America’s profound and entrenched separation involving white and black, rich and poor.<sup>140</sup> Said Lawrence: “To listen to the discourse on No Child Left Behind is to hear a story of failing schools without a history—a history of segregation, of inadequate funding, of white flight, of neglect, of eyes averted and uncaring while the savage inequalities of American education grew ever wider.”<sup>141</sup> The reworked justification for NCLBA erases history while relying on the modern myth of formal racial equality.<sup>142</sup> Formal racial equality is narrative conveyed by federal courts.<sup>143</sup> In this narrative, school districts are confirmed as unitary under the Equal Protection Clause, despite the fact that black children go to schools without any white classmate; that they are institutions of learning where inequality does not exist, even though some children of color continue to attend schools with toilets that do not work and leaky roofs as other students study on campuses furnished with state-of-the-art science labs and

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<sup>135</sup> Charles R. Lawrence III, *Who is the Child Left Behind?: The Racial Meaning of the New School Reform*, 39 SUFFOLK U. L. REV. 699, 706 (2006).

<sup>136</sup> *Id.*

<sup>137</sup> *See id.*

<sup>138</sup> *Id.* (citations omitted).

<sup>139</sup> *Id.*

<sup>140</sup> *See id.*

<sup>141</sup> Lawrence, *supra* note 135.

<sup>142</sup> *Id.* (citations omitted).

<sup>143</sup> *Id.*

Olympic-sized swimming pools. In reality, racially and economically segregated suburbs exist as havens for white flight without any legal or constitutional liability for the segregation staying alive in either the suburban schools or the inner city schools attended by their not-so-distant neighbors.<sup>144</sup> NCLBA made use of Marion Wright Edleman's Children's Defense Fund call for Americans to come together and 'Leave No Child Behind' in adopting its name.<sup>145</sup> Professor Lawrence maintained that the Bush Administration has used the NCLBA to lay claims as champions of poor black children without honoring its duty to articulate the role that America has played in the oppression of a black child's right to educational equity.<sup>146</sup>

In Tuscaloosa, Alabama, many black parents energetically reject a rezoning plan that required black students to transfer to low-performing schools.<sup>147</sup> Said Kendra Williams, a hospital receptionist whose two children were rezoned: "We're talking about moving children from good schools into low-performing ones, and that's illegal. It's all about race. It's as clear as daylight."<sup>148</sup> Some key Tuscaloosa school officials defend the rezoning plan as a proper response to claims of overcrowded schools.<sup>149</sup> Although school board members stated that the rezoning plan was not based on race, black members of the town believed that the plan was another attempt to return to separate-but-equal practice in education.<sup>150</sup>

One issue for consideration under the NCLBA is whether a school rezoning plan can be defeated by construing the NCLBA as prohibiting school officials from moving minority students into low-performing schools.<sup>151</sup> When the rezoning matter was challenged in Alabama, the Alabama state superintendent concluded that the rezoning plan did not violate federal law.<sup>152</sup> The Alabama state superintendent concluded African-American students could be transferred from a high-performing school to a lower performing minority school without violating NCLBA as long as the transferred African-American student had a right to retransfer back to the better schools under NCLBA.<sup>153</sup> Many black parents believed that it is an arbitrary use of power that defies the purpose of the NCLBA to allow school officials to use school zoning laws to ship African-American stu-

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<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 706-07.

<sup>147</sup> Dillon, *supra* note 126.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*



dents away from high-performing, racially integrated schools to low-performing, racially identifiable schools. Black parents in Tuscaloosa, Alabama, as well as other southern communities in Florida, Tennessee, and North Carolina, are attempting to use the NCLBA to assure that African-American children are not routinely assigned into those schools that have a reputation for being academically unsuccessful.<sup>154</sup>

Professor Lawrence fears that the NCLBA and formal-equality rationale may cause African Americans and others to forget that the continuing existence of racial inequality in education has not been realized in Tuscaloosa, Alabama.<sup>155</sup> The debate about NCLBA benefits and faults, and lack of historical context did not cause supporters of educational equity in Tuscaloosa to “forget the deep structures of inequality that remain in place.”<sup>156</sup> In fact, parents in Tuscaloosa hope to use the NCLBA to breathe new life into *Brown v. Board of Education*, and to fight a segregation system designed to oppress children by teaching them that they are inferior because of the color of their skin.<sup>157</sup> Professor Lawrence concluded: “We are segregated still, by race and by class, and segregation still achieves its purposes well. Can No Child Left Behind claim to be about equality without dismantling segregation, a system designed for inequality? I think not. But that is exactly the claim it makes.”<sup>158</sup> Daniel J. Losen, a Legal and Policy research associate with The Civil Rights Project (CRP) at Harvard University, asserted that “[o]ne new step toward fulfilling *Brown’s* promise might be found in the principle of race-conscious accountability embedded within the [NCLBA].”<sup>159</sup> The race-based accountability rationale advanced by the NCLBA may well provide an extraordinary array of novel tools for civil rights advocates seeking equity in education.<sup>160</sup> Title I of NCLBA makes available the biggest separate source of federal education funding directed at assisting states in addressing the educational requirements that socio-economically disadvantaged students must meet.<sup>161</sup> Every state must use Title I funds to enhance its own educational spending and is barred from using federal money to replace its expenditures.<sup>162</sup> Practically, each school district in the United States collects some of the roughly \$10 billion appro-

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<sup>154</sup> *Id.*

<sup>155</sup> Lawrence, *supra* note 135, at 707.

<sup>156</sup> *Id.*

<sup>157</sup> Dillon, *supra* note 126.

<sup>158</sup> Lawrence, *supra* note 135, at 707.

<sup>159</sup> Daniel J. Losen, *Challenging Racial Disparities: The Promise and Pitfalls of No Child Left Behind Act’s Race-Conscious Accountability*, 47 HOW. L.J. 243, 244 (2004) (citation omitted).

<sup>160</sup> *Id.* at 247.

<sup>161</sup> *Id.* at 244.

<sup>162</sup> *Id.* at 244-45 (citations omitted).

priated annually.<sup>163</sup> To accomplish its objective, Title I also includes a variety of monitoring and enforcement constraints that place conditions on spending by the state, district, and school.<sup>164</sup>

While approving NCLBA, Congress explicitly added race-conscious accountability standards to Title I in an effort to equalize the terrible racial disparities in educational success between whites and other racial groups.<sup>165</sup> The goal of the NCLBA contains the next statement, “[c]losing the achievement gap between high and low-performing children, especially the achievement gaps between minority and nonminority students, and between disadvantaged and their more advantaged peers. . . .”<sup>166</sup> NCLBA provides a different accountability system which embraces technical assistance,<sup>167</sup> along with progressively more severe sanctions at the school and district level.<sup>168</sup> The main goal of NCLBA is to advance the academic skills and aptitude of all students by means of subgroup accountability to prohibit school officials from ignoring racial disparities in achievement by not disclosing the subgroup achievement gap when the data is analyzed in the aggregate.<sup>169</sup> Under the NCLBA, the constant failure of any focal, racial, or ethnic group and of socioeconomically disadvantaged students at the school or district level is capable of initiating an intervention that could lead to sanctions.<sup>170</sup> Notwithstanding significant shortcomings with its execution,<sup>171</sup> and what scores of educators maintain is an inappropriately test-driven accountability plan,<sup>172</sup> Title I’s changed accountability scheme on the whole is one of the most race-conscious legislative remedies to address racial inequity in K-12 education ever since Congress passed Title VI of the Civil Rights Act of 1964 (Title VI).<sup>173</sup>

Even if No Child Left Behind was not intended to affirmatively dismantle racial segregation, I think it offends the goal and purpose of the NCLBA to allow public school officials to remove a black student from a high-performing school with racial diversity and send that student to a low-performing school that is virtually all black. Supporters of educational equity in Tuscaloosa, Alabama, may find it useful to follow Losen’s advice

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<sup>163</sup> *Id.* at 245

<sup>164</sup> *Id.* (citing 20 U.S.C.A. § 6301 (West 2000 & Supp. 2003)).

<sup>165</sup> Losen, *supra* note 159, at 245.

<sup>166</sup> *Id.* (citation omitted).

<sup>167</sup> *Id.* (citing See 20 U.S.C.A. § 6316(b)(4)(West 2000 & Supp. 2003)).

<sup>168</sup> *Id.* at 245.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* at 246. (citation omitted).

<sup>172</sup> *Id.* (citation omitted)

<sup>173</sup> *Id.* citing 42 U.S.C. § 2000d (2002)).

and engage in a campaign to raise awareness that the NCLBA has “several race-conscious accountability provisions and requirements” that should prevent school officials from transferring black students out of a high-performing integrated school to a low-performing school with a majority of black students in order to increase the percentage of white students attending the high performing integrated school.<sup>174</sup> “Although the accountability approach as represented by the NCLBA is far from ideal, the race-conscious accountability requirements increase the chance that racial disparities will be reported and discussed publicly. Despite the problems, the new principle that all should take responsibility for tackling unacceptable and inadequate achievement outcomes for every major racial and ethnic group is fundamentally sound and potentially transformative.”<sup>175</sup> Race-conscious accountability provisions are permissible only to achieve the race neutral objective of excellence in education for all students regardless of either race or class.

## VII. CONCLUSION

The NCLBA places a constitutionally impermissible regulatory-funding burden on states and schools systems. Spending Clause regulation of state school educational systems violates a state’s right to control its own local educational policy as authorized by the Tenth Amendment to the U.S. Constitution. However, a state is not free to adopt local educational polices that violate one’s right to be free of racial discrimination under the equal-protection-of-law concept. Those underfunded, highly regulatory provisions of the NCLBA should rightfully be regarded by the courts as the government’s exercise of power in violation of the Spending Clause. If Congress were ever to adequately fund the NCLBA, “the overarching question is whether the race-conscious accountability approach in NCLB provides any useful tools for advocates seeking racial justice.”<sup>176</sup> I believe that a properly funded and properly implemented NCLBA may be used as a tool to promote racial justice in education.

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<sup>174</sup> *Id.* at 295.

<sup>175</sup> *Id.* at 295 n.286 (“More specific suggestions for advocacy on No Child Left Behind will be included in a video and guidebook currently in production at The Civil Rights Project at Harvard, [www.civilrightsproject.harvard.edu](http://www.civilrightsproject.harvard.edu). CRP also has posted issue-specific ‘action kits’ for community groups, which are currently available at this address, in the areas of special education and school discipline.”).

<sup>176</sup> *Id.* at 295-96.