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Being Choosy: An Analysis of Public School Choice under No Child Left Behind

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BEING CHOOSY: AN ANALYSIS OF PUBLIC SCHOOL CHOICE UNDER NO CHILD LEFT BEHIND

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I. INTRODUCTION

*“We do not want children trapped in schools that will not change and will not teach.”*¹

Dubbed the “No Child Left Behind Act” (“NCLB”),² Congress’s sweeping and much publicized 2002 revision and reenactment of the Elementary and

¹ Remarks on Signing the No Child Left Behind Act of 2001 in Hamilton, Ohio, 1 PUB. PAPERS 23, 25 (Jan. 8, 2002).

² 20 U.S.C. §§ 6301-7941 (Supp. II 2002).

Secondary Education Act (“ESEA”),³ is the most ambitious and intrusive federal education legislation to date.⁴ The revision effort, spearheaded by President Bush’s leadership, passed with bipartisan support⁵ in a laudable attempt to once and for all close the persistent achievement gap between advantaged and disadvantaged children.⁶ Although the ESEA was enacted for that purpose nearly forty years ago and has been periodically revised ever since, little national academic improvement has been observed.⁷ Indeed, since 1965, American taxpayers have spent more than \$321 billion in federal funds on public education; yet, over three decades later, sixty percent of twelfth-graders are still not reading proficiently.⁸ In addition, the disparity between reading scores of minority students and white students has continued to widen, increasing sixteen percentage points in the last decade.⁹ NCLB represents the latest federal effort to quell the

³ The ESEA was first enacted in 1965. It created the federal “Title I” funding system, a key element of President Lyndon B. Johnson’s “War on Poverty,” that benefits low-income public school districts. See ESEA, Pub. L. No. 89-10, 79 Stat. 27 (1965); Peter Zamora, *In Recognition of the Special Educational Needs of Low-income Families?: Ideological Discord and Its Effects Upon Title I of the Elementary and Secondary Education Acts of 1965 and 2001*, 10 GEO. J. ON POVERTY L. & POL’Y 413, 418 (2003) (discussing the history and origin of the ESEA and the increased federal presence in education policy). Since 1965, the ESEA has been periodically amended and reenacted under a series of popular names. The current version of the ESEA was revised in 2002 and is popularly called the “No Child Left Behind Act.”

⁴ See James Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U. L. REV. 932, 937 (2004). A number of States and educational groups argue that the federal government has gone too far. A task force for the National Conference of State Legislatures stated that “the federal government’s role has become excessively intrusive in the day-to-day operations of public education.” TASK FORCE ON NO CHILD LEFT BEHIND: FINAL REPORT 11 (National Conference of State Legislatures ed. 2005). Several states have considered or passed resolutions charging that NCLB “egregiously violates the time-honored American principles of balanced federalism.” S. Res. 437, 2005 Sess. (Va. 2005); H.R.J. Res. 27, 73rd Leg. (Or. 2005); H.R. 6, 77th Leg., 1st Sess. (W.Va. 2004).

⁵ ANDREW RUDALEVIGE, ACCOUNTABILITY AND AVOIDANCE IN THE BUSH EDUCATION PLAN: THE ‘NO CHILD LEFT BEHIND ACT OF 2001’ I (2002).

⁶ 20 U.S.C. § 6301(3). The purpose of NCLB is to “ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education.” 20 U.S.C. § 6301. NCLB seeks to accomplish this purpose by “[c]losing the achievement gap between high and low-performing children, especially the achievement gaps between minority and non-minority students, and between disadvantaged children and their more advantaged peers.” *Id.*

⁷ This failure is partly due to dismal state compliance with NCLB’s predecessor revision, the Improving America’s Schools Act of 1994 (“IASA”), Pub. L. No. 103-382, 108 Stat. 3518 (1994).

⁸ The Facts About Getting Results, http://www.ed.gov/nclb/accountability/results/getting_results.pdf (1998 figure) (last visited Oct. 6, 2005).

⁹ Zamora, *supra* note 3, at 413 (citing National Center for Education Statistics, Educational Achievement and Black-White Inequality (July 2001)). The sixteen-percentage point increase was measured by the National Assessment of Educational Progress (NAEP) between 1988 and 1999. *Id.*

“rising tide of mediocrity” threatening to engulf many of America’s public schools.¹⁰

NCLB hopes to live up to the promise of its name by pairing stringent accountability measures with lofty student performance goals.¹¹ Under the Act, states are required to create “challenging” performance standards and hold districts and schools accountable for ensuring that students meet these standards.¹² Consequences for falling short of performance goals are tougher than ever.¹³ The most intensely debated penalty facing persistently underachieving schools is mandatory public school choice.¹⁴ Schools that do not meet yearly progress goals for two consecutive years are required to offer all of their students the opportunity to transfer to a higher performing school.¹⁵ Advocates hope that the provision will act not only as a “life preserver for economically disadvantaged children” but also as a “competitive incentive for public schools to improve.”¹⁶ Yet, early results suggest that despite high congressional expectations, NCLB choice is not adequately fulfilling either role.¹⁷ Thus far, the public school choice provisions have proven to be a small band-aid for a very large wound.¹⁸ Individual students continue to be held back by the “soft bigotry of low expectations”¹⁹ because of slipshod implementation and the lack of meaningful transfer options.²⁰ In the face of low student transfer numbers, competitive incentive has dwindled and schools remain largely uninspired by the school choice requirement.²¹ If public school choice is to play an integral role in ensuring that no

¹⁰ NATIONAL COMM’N ON EXCELLENCE IN EDUC., UNITED STATES DEP’T OF EDUC., *A NATION AT RISK: THE IMPERATIVE FOR EDUCATION REFORM, A REPORT TO THE NATION AND SECRETARY OF EDUCATION* 5 (1983) [hereinafter *A NATION AT RISK*].

¹¹ 20 U.S.C. § 6316.

¹² 20 U.S.C. § 6311(b)(1)(A)-(C).

¹³ 20 U.S.C. § 6316.

¹⁴ 20 U.S.C. § 6316(b)(1)(E).

¹⁵ *Id.*

¹⁶ *Empowering Success: Flexibility and School Choice: Before the Committee on Education and the Workforce*, 107th Cong. 63-64 (2001) (testimony of Clint Bolick, Litigation Director, Institute for Justice).

¹⁷ See Ronald Brownstein, *Implementing No Child Left Behind*, in *THE FUTURE OF SCHOOL CHOICE* 213, 214 (Paul E. Peterson ed., 2003) (noting that on any given morning the number of students transferring under NCLB in even the Nation’s largest cities “might not fill a single school bus”).

¹⁸ See CYNTHIA G. BROWN, *CITIZENS’ COMMISSION ON CIVIL RIGHTS, CHOOSING BETTER SCHOOLS: A REPORT ON STUDENT TRANSFERS UNDER THE NO CHILD LEFT BEHIND ACT* 27 (Dianne M. Piché and William L. Taylor eds., 2004), available at <http://www.cccr.org/ChoosingBetterSchools.pdf> [hereinafter *CHOOSING BETTER SCHOOLS*].

¹⁹ This phrase was frequently used by President Bush in his speeches about the need for education reform. See Remarks and a Question-and-Answer Session at Griegos Elementary School in Albuquerque, 37 WEEKLY COMP. PRES. DOC. 1169, 1170 (Aug. 20, 2001).

²⁰ See *infra* Part III.C.1-2.

²¹ See *CHOOSING BETTER SCHOOLS*, *supra* note 18, at 29.

child is left behind, obstacles to effective implementation must be eliminated. Congress and the Department of Education must work together with States to create quality transfer options.²² Parents must be given the opportunity to enforce the promise that their children will not be “trapped in schools that will not change and will not teach.”²³

This Article discusses public school choice under NCLB, points to obstacles that are preventing the program from reaching its full potential, and suggests changes that would address these obstacles. Part I of this Article provides a brief overview of the rise of school choice as a vehicle for school reform and presents the ideologies of both proponents and opponents of choice. Further, Part I explains the structure of the No Child Left Behind legislation and some of its key components. Part II discusses the congressional debate concerning proposed school choice programs and then lays out the resulting public school choice provisions. Part II then goes on to discuss these provisions and to highlight some of the obstacles that are preventing the current version of NCLB choice from realizing its goals. Part III suggests ways in which transfer opportunities could be increased to provide parents and students with meaningful educational choices. Part IV makes projections about the future of public school choice under the NCLB regime.

II. BACKGROUND

A. *School Choice*

School choice is not a concept unique to NCLB.²⁴ Many states and local communities had already instituted some form of school choice before the 2002 Act.²⁵ Indeed, the concept of school choice has been gaining momentum for decades.²⁶ While wealthy and middle class parents have always exercised “choice” over which schools their children attend by building homes in affluent

²² See *infra* Part IV.

²³ See Remarks on Signing the No Child Left Behind Act of 2001 in Hamilton, Ohio, 1 PUB. PAPERS 23, 25 (Jan. 8, 2002); see also *infra* Part IV.

²⁴ See Philip T.K. Daniel, *A Comprehensive Analysis of Educational Choice: Can the Polemic of Legal Problems be Overcome?*, 43 DEPAUL L. REV. 1, 3 (1993) (noting that school choice has been a goal of reformers since at least the eighteenth century).

²⁵

In 1989, four states—Arkansas, Iowa, Nebraska, and Ohio—adopted parental choice in some form; in 1990, seven states—Wisconsin, Colorado, Washington, Vermont, Utah, Idaho, and Kentucky—enacted choice plans; and in 1990, ten states approved some form of new choice legislation, 37 states had choice legislation pending in one form or another, and at least 12 states had citizen coalitions working on choice initiatives or proposals.

Id. at 2 n.5 (citing United States Dep’t of Educ., Office of Intergovernmental and Interagency Affairs, Ctr. For Choice in Educ., Review of State Choice Legislation (Sept. 1992)).

²⁶ See *id.* at 6-7.

districts or paying for private education, choice options for low-income students did not begin to arise in America until the mid-1980s.²⁷ On the heels of national reports bemoaning the condition of the nation's public schools,²⁸ many states scrambled to create programs to improve public education.²⁹ From this effort, school choice "emerged as the single most rousing idea" in the push for reform.³⁰

At the core of the school choice movement are two theories. The first, taking a page from economic market analysis, suggests that the market pressure created by school choice will force educators to improve in order to compete for students.³¹ Just as monopolies are bad for business, supporters reason, they are also bad for education.³² Competition promises to foster new ideas and a higher quality of education overall because schools must either demonstrate performance or else lose their students to competitors.³³ The second theory focuses on an individualized approach to education. It suggests that increasing educational options will improve education because students will be free to choose the option that best suits their individual needs.³⁴ Because children respond differently to different kinds of educational environments, a system that adapts to individual learning styles will likely produce the best results.³⁵

Yet, not everyone shares the view that school choice will be a "panacea"³⁶ for the floundering public school system.³⁷ Opponents to choice pro-

²⁷ See *id.*

²⁸ The most prominent report was conducted by the U.S. Department of Education. See generally A NATION AT RISK, *supra* note 10.

²⁹ Reform activities included: "increased state allocations for local school system budgets; tighter state controls over curriculum, personnel training, textbook selection, instructional methods, and discipline; the creation of school-based management plans; and a greater voice in school decisions for teachers." Daniel, *supra* note 24, at 7.

³⁰ *Id.* (quoting CARNEGIE FOUND. FOR THE ADVANCEMENT OF TEACHING, SCHOOL CHOICE: A SPECIAL REPORT 1 (1992)).

³¹ NATIONAL WORKING COMMISSION ON CHOICE IN K-12 EDUCATION, SCHOOL CHOICE: DOING IT THE RIGHT WAY MAKES A DIFFERENCE 15-16 (The Brown Center on Education Policy, The Brookings Institution ed., 2003), available at <http://www.brookings.edu/gs/brown/20031117schoolchoicereport.pdf>. [hereinafter COMM'N ON CHOICE]. Support for public school choice policies reflects a faith in market pressures that is a consistent theme of conservative politics. GAIL L. SUNDERMAN, IMPLEMENTING A MAJOR EDUCATIONAL REFORM: NO CHILD LEFT BEHIND AND FEDERAL-STATE RELATIONSHIPS: FIRST IMPRESSIONS 9 (2003).

³² COMM'N ON CHOICE, *supra* note 31, at 15-16.

³³ *Id.*

³⁴ *Id.*

³⁵ See *id.*

³⁶ JOHN E. CHUBB & TERRY M. MOE, POLITICS, MARKETS AND AMERICA'S SCHOOLS 217 (1990). Chubb and Moe are perhaps the most adamant proponents of school choice as a reform method. They argue that choice "has the capacity . . . to bring about the kind of transformation that, for years, reformers have been seeking to engineer in myriad other ways. Indeed, if choice is to work to [the] greatest advantage, it must be adopted *without* these other reforms, since the latter are

grams argue that market forces open public education to corruption rather than correction and that competition always results in stratification by race, class, or religion.³⁸ Further, detractors fear that school choice will cause an exodus of the best students and the best teachers from lower-performing schools, thus leaving struggling schools worse off than before.³⁹

Regardless of the opinions of critics, however, the past two decades have seen an attempt to create more educational alternatives than ever before.⁴⁰ Many states provide a host of educational options such as magnet schools,⁴¹ charter schools,⁴² “alternative” schools,⁴³ and home schooling. Additionally, a few states are testing the waters with more far-reaching and innovative choice options such as open enrollment,⁴⁴ voucher programs,⁴⁵ and “virtual” schools.⁴⁶ By enacting NCLB, the federal government joins the movement to arm America’s students with increased public education opportunities by mandating public school choice programs in underperforming schools that accept Title I funding.⁴⁷

predicated on democratic control and are implemented by bureaucratic means.” *Id.* (emphasis in original).

³⁷ COMM’N ON CHOICE, *supra* note 31, at 16-17.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* at 14-15.

⁴¹ A school that specializes in a particular field or methodology such as math and science, foreign language, or fine arts. *Id.* at 14.

⁴² A public school operated independently of the local school board. Charter schools operate under contract with the State or district and are free from many of the governmental regulations that regular public schools must follow. CHOOSING BETTER SCHOOLS, *supra* note 18, at 27.

⁴³ A school that provides a more flexible and less restrictive environment for students who are struggling in traditional high schools. *Id.*

⁴⁴ Programs that permit students to enroll in or transfer to inter- or intra-district schools. *Id.*

⁴⁵ State, federal, or private money given to a student to be used toward tuition at a private school. *Id.* at 28. Recently, the U.S. Supreme Court held that use of federal voucher money to attend a religious school does not violate the Establishment Clause when the money reaches such school as a result of individual rather than government choice. *Zelman v. Simmons-Harris*, 536 U.S. 639, 653 (2002).

⁴⁶ School curriculum is accessed primarily via the internet. BRYAN C. HASSEL & MICHELLE GODARD TERRELL, HOW CAN VIRTUAL SCHOOLS BE A VIBRANT PART OF MEETING THE CHOICE PROVISIONS OF THE NO CHILD LEFT BEHIND ACT? 2-4, <http://www.nationaletechplan.org/documents/Hassel-Terrell-VirtualSchools.pdf> (last visited Oct. 6, 2005). Virtual schools may be operated by the State, a district, a business, or a university. *Id.* Online curriculum may also be used to supplement home school education. *Id.*

⁴⁷ 20 U.S.C. § 6316(b)(1)(E) (Supp. II 2002).

B. *The No Child Left Behind Act*

NCLB is composed of several Titles, the most important and well known of which is Title I.⁴⁸ Title I was first enacted in 1965 pursuant to Congress's spending power.⁴⁹ Under Title I, high-poverty districts receive annual grants to improve the quality of education for disadvantaged children.⁵⁰ Districts then distribute money to high-poverty schools.⁵¹ In exchange for the federal funding, states, districts,⁵² and schools must comply with various conditions.⁵³ When Title I was in its infancy, grants initially came with very few prescriptions.⁵⁴ As a result, many states applied the money to more general educational purposes and underprivileged children continued to receive a smaller portion of the pie.⁵⁵ Since 1965, a number of subsequent revisions to Title I have addressed this problem by tying more and more strings to the receipt of federal funds.⁵⁶ NCLB is perhaps the most prescriptive version yet, promising states and schools increased funding and flexibility but requiring a much greater accountability for results.⁵⁷

⁴⁸ Title I of the No Child Left Behind Act is composed of 9 Parts (Parts A-I). Part A, however, is the one commonly referred to as "Title I." Thus, this Article refers to Title I, Part A: "Improving Basic Programs Operated by Local Education Agencies" as simply "Title I." The remaining Parts of Title I are each geared toward specific populations such as migratory children and dropouts.

⁴⁹ See 20 U.S.C. §§ 6301-7941.

⁵⁰ All school districts with at least a two percent child poverty rate as determined by 20 U.S.C. § 6333(c), are eligible to received federal Title I funds. 20 U.S.C. § 6333(b).

⁵¹ Individual schools within Title I districts receive funds in rank order on the basis of the total number of children from low-income families in each eligible attendance area or school. 20 U.S.C. § 6313(c).

⁵² NCLB refers to school districts as "local education agencies" ("LEAs"). Although a charter school within a school district would constitute its own LEA, in all other instances the terms "district" and "LEA" are coextensive. Thus, this Article will refer to LEAs simply as "districts."

⁵³ See 20 U.S.C. §§ 6311-6322.

⁵⁴ Zamora, *supra* note 3, at 424.

⁵⁵ *Id.* Senators Dominick, Murphy, and Fannin foresaw this problem when the ESEA was first passed. They noted that Title I funds "are to be so widely disbursed that over 94 percent of the counties in the country would receive funds. This can hardly be called a pinpointing of funds to areas of need." ESEA, Pub. L. No. 89-10, 79 Stat. 27 (1965). In 1999, the Department of Education began making allocations at the district level, in an effort to reduce states' roles in the allocation process and to make district treatment more uniform. Comprehensive Information Source on Title I and Compensatory Education, <http://www.titlei.com/distfund.htm> (last visited Oct. 6, 2005).

⁵⁶ See Zamora, *supra* note 3, at 432-33.

⁵⁷ *Departments of Labor, Health and Human Services, Education, and Related Agencies Appropriations for 2002: Before Labor-HHS-Education Appropriations Subcommittee*, 107th Cong. 755 (2001) (testimony of John A. Boehner).

To achieve its purpose of “ensur[ing] that all children have a fair, equal, and significant opportunity to obtain a high-quality education,”⁵⁸ NCLB requires schools to comply with rigorous teaching, testing, and accountability standards.⁵⁹ At the core of these new requirements is a high-stakes testing system that calls for states to develop “challenging” academic standards⁶⁰ and to more than double the number of tests required by the previous version of the ESEA.⁶¹ The results of these tests and other indicators, such as graduation and attendance rates, are then used to determine whether schools are making adequate yearly progress toward the Act’s ultimate goal of one hundred percent student proficiency by the year 2014.⁶²

Adequate yearly progress (“AYP”) is the measuring stick by which all schools are judged under NCLB.⁶³ Title I schools that fail to meet AYP are

⁵⁸ 20 U.S.C. § 6301.

⁵⁹ 20 U.S.C. §§ 6311-6322.

⁶⁰ 20 U.S.C. § 6311(b)(1).

⁶¹ Compare 20 U.S.C. § 6311(b)(3) with IASA, Pub. L. No. 103-382, § 1111(b)(3), 108 Stat. 3518, 3524-25 (1994). NCLB requires annual tests in reading and math in grades three through eight, at least one such test between grades ten through twelve, and beginning in 2007-8 at least three science tests between grades three through twelve. 20 U.S.C. § 6311(b)(3). The annual testing requirement does not begin until 2005-6. *Id.* Before then, students must be tested once in grades three through five, once in grades six through nine, and once in grades ten through twelve. *Id.* Under the Improving America’s Schools Act, (“IASA”), no science testing was required and only two tests, rather than the current six, were required between grades three and eight. Pub. L. No. 103-382, § 1111(b)(3), 108 Stat. 3518, 3524-25 (1994).

⁶² 20 U.S.C. § 6311(b)(2). It is left to the discretion of each state to implement a testing system and to determine what test score constitutes proficiency. See Ryan, *supra* note 4, at 953. It is further up to the states to set the requisite yearly progress goals so that by 2014 all schools will achieve one hundred percent proficiency. *Id.* at 940. Despite statutory language encouraging “continuous and substantial academic improvement” during each year leading up to 2014, a number of states have structured their progress goals like “balloon mortgages” so that schools are only required to make very small improvements in the first several years of implementation. *Id.* at 946-47. While this method makes it easier for schools to meet AYP in the initial stages of NCLB, as 2014 nears, those schools will likely find it impossible to make the large gains that will be necessary to reach the one hundred percent proficiency mark. *Id.*

⁶³ See Ryan, *supra* note 4, at 940. NCLB’s stringent accountability system relies heavily on standardized testing to measure the quality of school performance. *Id.* Since AYP hinges on meeting “proficiency” goals as measured by student test scores, tests are extremely high-stakes for schools and districts desiring to avoid sanctions. However, there is a notable disconnect between a school’s interest in test results and a student’s interest. More often than not, no consequences flow to individual students who perform poorly on the state tests used to measure student proficiency. ‘No Child’ Law Prompts Student Incentives, All Things Considered, April 12, 2004, <http://www.npr.org/templates/story/story.php?storyId=1834479>. These test scores generally are not examined by or even ever reported to college admissions boards or scholarship programs. *Id.* Nor is a specific score required to earn a high school diploma. *Id.* Consequently, schools are not only finding it difficult to motivate students to perform but also to even show up for the test. *Id.* Test day attendance is of great concern to schools because NCLB imposes sanctions if less than 95% of the student body or of any subgroup takes each assessment test. 20 U.S.C. § 6311(b)(2)(I)(ii). As a result, many schools are beginning to offer student incentives, ranging

deemed “in need of improvement” and trigger a series of additive and increasingly invasive reform methods.⁶⁴ After two consecutive years of failure to meet AYP, schools enter “improvement” status and must offer their students the opportunity to transfer to a non-failing school.⁶⁵ Additionally, the school must create an improvement plan and is entitled to technical assistance from the state with such tasks as analysis of testing data, professional development, and revision of the school budget.⁶⁶ After three consecutive years of failure, schools must also offer supplemental services, such as after-school or summer school tutoring, to those low-income students who choose not to transfer.⁶⁷ After four years of failure, schools enter the “corrective” phase, which includes such measures as instituting new curriculum, replacing school staff, and appointing an expert to advise administration. Finally, after five years of failure, schools are subject to “restructuring” under which school operations are turned over to a private management company or the state.⁶⁸ A school that is identified for improvement, corrective action, or restructuring remains in such status until the school makes AYP for two consecutive years.⁶⁹ Parents of children attending affected schools must be notified promptly of a change in status and be provided with an explanation of the low achievement problem.⁷⁰

In order to avoid “in need of improvement” status, schools must meet AYP for both the entire student body and for certain statutorily identified subgroups of students.⁷¹ If any of these subgroups fails to meet AYP, the entire school is treated as failing.⁷² To illustrate, if in a given year a school must reach 75% proficiency, 75% of the student body as a whole must be proficient and 75% of the students in each subgroup must be proficient. If, for example, only

from “ice cream to DVD players and college scholarships,” in order to get kids to take the tests required under NCLB. ‘No Child’ Law Prompts Student Incentives, *supra*.

⁶⁴ 20 U.S.C. § 6316(b).

⁶⁵ 20 U.S.C. § 6316(b)(1).

⁶⁶ *Id.*

⁶⁷ 20 U.S.C. § 6316(b)(5).

⁶⁸ 20 U.S.C. § 6316(b)(7)-(8).

⁶⁹ 20 U.S.C. § 6316(b)(12).

⁷⁰ 20 U.S.C. § 6316(b)(6).

⁷¹ Schools must disaggregate data for and meet AYP in each of the following subgroups: 1) economically disadvantaged students, 2) students from major racial and ethnic groups, 3) students with disabilities, and 4) students with limited English proficiency. 20 U.S.C. § 6311(b)(2)(C)(v)(II)(aa)-(dd).

⁷² 20 U.S.C. § 6316(b)(1)(A). If a subgroup does not meet proficiency goals, a school can still meet AYP under the “safe harbor” provision. GAO REPORT TO THE SECRETARY OF EDUCATION, NO CHILD LEFT BEHIND ACT: EDUCATION NEEDS TO PROVIDE ADDITIONAL TECHNICAL ASSISTANCE AND CONDUCT IMPLEMENTATION STUDIES FOR SCHOOL CHOICE PROVISION 6 n.6 (2004), *available at* <http://www.gao.gov/new.items/d057.pdf> [hereinafter GAO REPORT]. To qualify for “safe harbor” a school must have reduced the percentage of students in the failing subgroup by at least 10% since the previous year. *Id.* Further, the subgroup must show progress on another academic indicator such as graduation rates. *Id.*

65% of a school's subgroup of mentally handicapped students meet proficiency, then the entire school is penalized for failing to meet AYP.

All public schools in a state are required to meet AYP, but only those schools that accept federal Title I funding are subject to the penalty provisions.⁷³ Currently, over half of the public schools in the Nation receive Title I funds.⁷⁴ Of the nation's approximately forty-nine million students, about twenty-five million attend schools eligible for Title I money.⁷⁵ Even with the help of federal funding, however, many schools that serve low-income populations still struggle to make ends meet.⁷⁶ Accordingly, although many educators consider NCLB's standards unrealistic, no state has yet opted out of Title I funds to avoid NCLB's penalties.⁷⁷

III. ANALYSIS OF NCLB'S CHOICE PROVISIONS

*"[NCLB] will give students a chance, parents a choice, and schools a charge to be the best in the world."*⁷⁸

Recognizing that school reform too often moves at a glacial pace, Congress authorized public school choice for all students attending schools in the improvement, corrective, and restructuring penalty phases of NCLB reform.⁷⁹ By revising the ESEA to make public school choice mandatory rather than optional, Congress provided an escape valve for individual students floundering in inadequate schools.⁸⁰ In this way, NCLB attempts to prevent at-risk students from falling further behind while waiting for their schools to improve--something the Nation has been waiting for since the passage of the ESEA nearly forty years ago.⁸¹ Additionally, proponents hope that pressure created by the

⁷³ See DEPARTMENT OF EDUCATION, PUBLIC SCHOOL CHOICE: NON-REGULATORY GUIDANCE 2 (Draft Feb. 6, 2004), available at <http://www.ed.gov/policy/elsec/guid/schoolchoiceguid.pdf>. [hereinafter NON-REGULATORY GUIDANCE].

⁷⁴ Fact Sheet on Title I, Part A, <http://www.ed.gov/rschstat/eval/disadv/title1-factsheet.pdf> (last visited Oct. 6, 2005). Fifty-eight percent of public schools receive Title I funding. *Id.*

⁷⁵ GAO REPORT, *supra* note 72, at 5.

⁷⁶ See Gina Austin, Note, *Leaving Federalism Behind: How the No Child Left Behind Act Usurps States' Rights*, 27 T. JEFFERSON L. REV. 337, 341 (2005).

⁷⁷ See National Conference of State Legislatures, *No Child Left Behind, Quick Facts 2004-2005*, <http://www.ncsl.org/programs/educ/NCLB2005LegActivity.htm#legactivity05> (last visited Oct. 6, 2005).

⁷⁸ 147 CONG. REC. E437 (daily ed. March 22, 2001) (introduction of H.R. 1, the No Child Left Behind Act, by Rep. Boehner).

⁷⁹ 20 U.S.C. § 6316 (Supp. II 2002).

⁸⁰ NON-REGULATORY GUIDANCE, *supra* note 73, at 2.

⁸¹ See *Transforming the Federal Role in Education for the 21st Century: Hearing on H.R. 1, H.R. 340, and H.R. 345: Before the Committee on Education and the Workforce Hearings*, 107th Cong. 81, 85 (2001) (testimony of Gail E. Foster, Ed. D., on behalf of Black Alliance for Educational Options and Toussaint Institute Fund).

free-market competition of school choice will motivate schools to reform and thereby promote NCLB's ultimate goal of high-quality education at *all* public schools.⁸²

While most members of Congress agreed that some form of school choice should be included in NCLB, there was much disagreement about the kind and extent of choice necessary to improve the educational opportunities of low-income students.⁸³ The resulting legislation was the product of much debate and compromise and reflects a blend of educational approaches from different administrations throughout the years.⁸⁴

A. *The Debate*

After the one hundred and sixth Congress ended in a stalemate that saw no reauthorization of the ESEA, newcomer President Bush made it a central goal of his domestic policy to achieve the elusive balance of bipartisanship required to create legislation that would leave no child behind.⁸⁵ The ideological splits were typical, with Democrats demanding increased spending for smaller classes, teacher training, and school construction (the "traditional" ESEA focuses), while Republican critics charged that such measures would once again mean more money and no change.⁸⁶

Conservatives were adamant that private school choice would be the best reform method.⁸⁷ Liberals, on the other hand, feared that a voucher program would "raid the [public school] system, bleeding and hemorrhaging"⁸⁸ by draining resources from already struggling public schools. In order for the White House to fulfill its campaign promise that "bipartisan education reform will be the cornerstone of [this] Administration,"⁸⁹ a compromise needed to be struck. It became clear that to get the legislation to move, Republicans would have to give up on private school choice in order for Democrats to support annual testing.⁹⁰ To the chagrin of Congress's most staunch private school choice supporters, President Bush did not try to force private options because he did

⁸² NON-REGULATORY GUIDANCE, *supra* note 73, at 2.

⁸³ See 147 CONG. REC. H2590 (daily ed. May 23, 2001) (debating the addition of a private school voucher system to NCLB).

⁸⁴ RUDALEVIGE, *supra* note 5, at 2-3. For instance, NCLB's focus on high standards draws on the Clinton administration's IASA and "Goals 2000," the accountability structure has roots in Congressional debates from Clinton's second term, and the notion of school choice has been explicitly debated at least since the Reagan administration. *Id.* at 7-8.

⁸⁵ *Id.* at 15-16.

⁸⁶ *Id.* at 27.

⁸⁷ *Id.*

⁸⁸ 147 CONG. REC. H2593 (daily ed. May 23, 2001) (argument of Congressman Joe Baca, CA).

⁸⁹ RUDALEVIGE, *supra* note 5, at 21.

⁹⁰ *Id.*

not want to “sacrifice accountability on the altar of [private] school choice.”⁹¹ Accordingly, Title I “portability,” a form of private school voucher, was removed from the draft legislation early on in the debates.⁹² Private school choice remained defeated despite a later amendment attempt to resurrect it.⁹³ A privatization option for supplemental services was included as a partial substitute for the absence of private school vouchers.⁹⁴

B. *The Compromise: NCLB’s Public School Choice Provisions*

On January 8, 2002, President Bush signed into law the final version of NCLB that was approved by a bipartisan Congress. The legislation provides that public school choice is a mandatory consequence for those federally funded schools that fail to meet AYP.⁹⁵ When a Title I school does not make AYP for two consecutive years, all students in that school become eligible to transfer to a non-failing public school.⁹⁶ If all students cannot attend their first choice of school or if there are insufficient transportation funds to accommodate all transferring students, priority for seats and transportation money must be given to the lowest achieving low-income students.⁹⁷ Districts may not, however, use lack of capacity as a reason to deny student transfers.⁹⁸ If no AYP-proficient schools are available within a district, the district must attempt, to the extent practicable, to enter into cooperative transfer agreements with neighboring districts.⁹⁹

Further, districts are obligated to provide for transportation to receiving schools but only as long as the child’s original school remains in improvement

⁹¹ *Id.* at 30.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ 20 U.S.C. § 6316 (Supp. II 2002). Under an unsafe schools provision, transfer options must also be provided to students who 1) attend persistently dangerous schools or 2) become victims of violent criminal offenses on school grounds. 20 U.S.C. § 7912. A district need not offer public school choice in any instance if state law prohibits choice by placing restrictions on public school assignments or the transfer of students from one public school to another. 34 C.F.R. § 200.44(b) (2005).

⁹⁶ 20 U.S.C. § 6316(b)(1)(E)(i). Students may also be given the opportunity to transfer to charter schools, virtual schools, or magnet schools. NON-REGULATORY GUIDANCE, *supra* note 73, at 13-14.

⁹⁷ 20 U.S.C. § 6316(b)(1)(E)(ii); NON-REGULATORY GUIDANCE, *supra* note 73, at 8. If there are no eligible transfer schools within a district, that district must try, to the extent practicable, to establish a cooperative agreement with neighboring districts to allow for interdistrict transfers. If interdistrict transfers cannot be established, the district may offer supplemental services as a substitute for school choice during the first year of improvement. 34 C.F.R. § 200.44(h).

⁹⁸ 34 C.F.R. § 200.44(d).

⁹⁹ 20 U.S.C. § 6316(b)(11).

status.¹⁰⁰ Districts must notify parents about the option to transfer before the first day of school.¹⁰¹ The notice must be comprehensive, unbiased, and easy to understand.¹⁰² At a minimum, it must include information about eligibility, transportation, and the performance and programs of available transfer schools.¹⁰³ If more than one school in the district is meeting AYP, the district must offer more than one transfer option to students.¹⁰⁴

Despite one representative's statement that public school choice was a "noble compromise," other congressional members were left feeling that the compromise ripped out "what [was] really the heart and core of the President's Leave No Child Behind proposal"—private school choice.¹⁰⁵ While NCLB certainly secured a victory for advocates of public school choice in the ongoing debate about public school reform,¹⁰⁶ it is unclear if public school choice in its configuration under NCLB was a victory for students trapped in persistently underperforming schools.¹⁰⁷ Although it is still early in the implementation of public school choice, it is apparent that in many districts across the country substantial obstacles are preventing the program from providing low-income students with real and significant educational alternatives.¹⁰⁸ One study found that

¹⁰⁰ 20 U.S.C. § 6316(b)(13). Districts must spend at least 20% of Title I funds on public school choice transportation and supplemental services. 20 U.S.C. § 6316(b)(10). A minimum of 5% must be reserved for each. If 20% is not enough to fully fund both programs, districts are not required to spend more. *Id.* In deciding who should get the limited money, the district should give priority to the lowest achieving students. *Id.* If districts do not need the full 20% to fill all the requests for transportation and supplemental services, the remaining funds can be used elsewhere. *Id.* Districts must allow students to stay in chosen schools until they complete the highest grade available at the transfer school. 20 U.S.C. § 6316(b)(13).

¹⁰¹ 34 C.F.R. § 200.44(a)(2).

¹⁰² NON-REGULATORY GUIDANCE, *supra* note 73, at 11.

¹⁰³ The district must also provide information about the receiving schools' facilities, parental involvement opportunities, and teacher qualifications. 20 U.S.C. § 6316(b)(6); 34 C.F.R. § 200.37(b)(4).

¹⁰⁴ 34 C.F.R. § 200.44(a)(4)(i).

¹⁰⁵ 147 CONG. REC. H2594 (daily ed. May 23, 2001) (statement of Rep. Owens).

¹⁰⁶ Brownstein, *supra* note 17, at 213.

¹⁰⁷ No studies have yet been conducted on the affect of public school choice under NCLB on student achievement. GAO REPORT, *supra* note 72, at 17 n.18. The Department of Education, however, has contracted for an extensive study of NCLB that will examine the implementation of many of the Act's key provisions, including school choice. *Id.* The report, which the Department is referring to as the "National Longitudinal Study of No Child Left Behind," is expected to be released in 2007. *Id.* Although the study is still in the design stages, the Department expects that it will examine at least three areas concerning public school choice under NCLB: 1) the demographics of transferring and non-transferring students, 2) the reasons parents decide to transfer or not transfer their eligible children and, 3) the effect of choice on the academic performance of transferring students. *Id.* at 16-17. Thus far, currently available research shows that parents who have available choices are consistently more pleased with school quality than parents who do not. COMM'N ON CHOICE, *supra* note 31, at 20.

¹⁰⁸ See GAO REPORT, *supra* note 72, at 18; CHOOSING BETTER SCHOOLS, *supra* note 18, at 31.

in the 2003-2004 school year only 5.6% of eligible students requested transfers, and of that number only 1.7% actually transferred.¹⁰⁹

C. *Obstacles to Effective Implementation of Public School Choice under NCLB*

While it is clear that the effect of school choice often depends to a large extent on the character and make-up of individual districts,¹¹⁰ common difficulties have emerged in the implementation of the NCLB provisions.¹¹¹ In order for students to benefit from public school choice, quality schools must be available for the choosing. Unfortunately, districts across the country are struggling to provide students with this most basic requirement.¹¹² Obstacles to providing meaningful transfer options arise primarily from two types of sources. First, many districts are plagued with physical limitations. Population size, number of available schools, and distance between those schools pose real barriers to increasing educational options.¹¹³ Secondly, NCLB's choice mandate has met with administrative obstacles. The resistance or inattentiveness of administrators charged with implementation of school choice seriously effects parental interest and student transfer opportunities.¹¹⁴

1. Physical Obstacles: Availability, Distance, and Capacity

Districts of all population sizes are finding themselves faced with a sheer lack of high quality public schools within a reasonable driving distance to offer as transfer options.¹¹⁵ In rural districts, there is often only one school available for each grade level.¹¹⁶ Thus, if, for example, the local elementary school fails to meet AYP, there is simply no other school in the district, failing or non-failing,¹¹⁷ for elementary students to attend. In 2004, Kansas had seventeen such schools that were unable to offer choice. Further, approximately ninety-percent of Nebraska districts currently have only one school per grade

¹⁰⁹ CHOOSING BETTER SCHOOLS, *supra* note 18, at 37. Percentages are based on data collected from 10 states and 53 districts in remaining states. *Id.* at 122 n.72.

¹¹⁰ COMM'N ON CHOICE, *supra* note 31, at 20.

¹¹¹ CHOOSING BETTER SCHOOLS, *supra* note 18, at 55-65.

¹¹² *Id.* at 63-65.

¹¹³ *See id.* at 59-70.

¹¹⁴ *Id.* at 31-32, 55-59.

¹¹⁵ Brownstein, *supra* note 17, at 214.

¹¹⁶ Judith A. Winston, *Rural Schools in America: Will No Child be Left Behind? The Elusive Quest for Equal Educational Opportunities*, 82 NEB. L. REV. 190, 207 (2003).

¹¹⁷ NCLB itself does not use the term "failing" to refer to schools that miss AYP goals. Rather, the Act labels those schools as "in need of improvement." The media, however, has "translated" the latter designation to mean "failing." Ryan, *supra* note 4, at 945-46.

level.¹¹⁸ Urban areas face a different problem, but the result is the same. City school districts contain many schools for each grade level but high concentrations of low-income students and insufficient district resources frequently mean that if one school is failing, the majority of them are also failing.¹¹⁹

NCLB touches just briefly upon this problematic issue.¹²⁰ The Act directs districts, “to the extent practicable,” to establish a cooperative transfer agreement with higher performing neighboring districts when no schools of choice are available within a student’s district.¹²¹ In addition, when an entire school district is identified for improvement, NCLB gives states the option of authorizing interdistrict transfers regardless of the existence or non-existence of a cooperative agreement between two districts.¹²² If districts are unable to effectuate interdistrict transfers, schools may offer supplemental services in lieu of transfer options during the first year of improvement status.¹²³

The precatory language of the statute which asks districts to act only “to the extent practicable” and merely permits, but does not require the state to authorize interdistrict transfers, has proven inadequate to ensure that students locked in districts without options will have access to quality education.¹²⁴ Since the implementation of NCLB in 2002, only two districts in the entire country reported transferring students across district lines.¹²⁵ Many more districts made transfer requests of neighboring districts but were denied.¹²⁶ Although a district is not permitted to use lack of capacity as a reason to deny students the option to transfer to schools within its own boundaries,¹²⁷ other districts are not prohibited from denying out of district transfers for that reason.¹²⁸

¹¹⁸ CHOOSING BETTER SCHOOLS, *supra* note 18, at 64.

¹¹⁹ Harrisburg, Pennsylvania has eighteen available schools, yet during the 2003-2004 school year, each of them was failing. *Id.* at 63.

¹²⁰ 20 U.S.C. § 6316(b)(11) (Supp. II 2002).

¹²¹ *Id.* Districts may also enter in cooperative transfer agreements with charter schools or virtual schools within the State. NON-REGULATORY GUIDANCE, *supra* note 73, at 17.

¹²² 20 U.S.C. § 6316(c)(10)(C)(vii).

¹²³ 34 C.F.R. § 200.44(h)(2) (2005).

¹²⁴ CHOOSING BETTER SCHOOLS, *supra* note 18, at 67.

¹²⁵ In 2003-2004 in Northwest Arctic Borough, Alaska, two students transferred to another village. *Id.* Airfare and boarding were provided by the district but the students remained in the new school for only one semester. *Id.* New Haven, Connecticut included six interdistrict magnet schools in its transfer offerings in 2003-2004. *Id.*

¹²⁶ *Id.* at 68-69. For example, requests of Philadelphia, Chester-Upland, Orleans Parish, and Richmond school districts to surrounding districts about the possibility of interdistrict transfers were all rejected. *Id.* One North Carolina district refused to accept transfer students from neighboring districts stating that to do so would “create an administrative nightmare.” *Id.*

¹²⁷ 34 C.F.R. § 200.44(d). Lack of capacity and health and safety concerns—including overcrowding problems—do not excuse a district from offering school choice. NON-REGULATORY GUIDANCE, *supra* note 73, at 14-16. The district is expected to create the additional capacity necessary to comply with NCLB. *Id.*

¹²⁸ See 34 C.F.R. § 200.44(d).

Accordingly, many districts cite lack of capacity as an excuse to deny interdistrict transfers.¹²⁹

The shortage of quality transfer schools is not only a problem of capacity but also one of administrative resistance. Principals and superintendents in high performing, often suburban districts have shown an unwillingness to open their doors to “refugees” from failing urban schools.¹³⁰ This demonstrated reluctance is likely caused by the lack of financial incentives,¹³¹ fears of overcrowding and falling test scores,¹³² and political resistance by suburban parents.¹³³ Unwillingness of administrators in AYP proficient schools to accept interdistrict transfers is particularly unfortunate because, in many areas of the country, failing districts are comprised largely of minority and low-income students whereas neighboring, suburban districts are populated mainly by affluent white students.¹³⁴ As a result, NCLB’s choice provisions are doing very little to upset the status quo; affluent families can buy property in quality school districts, while families who are unable to foot the bill are relegated to more urban areas in which schools are frequently underperforming.¹³⁵

This situation is unlikely to improve under the current regime. As the one hundred percent proficiency deadline nears and schools are expected to make greater and greater gains, the availability of transfer schools is likely to worsen. Without requirements or incentives for suburban schools to accept transfer students, it is probable that interdistrict transfers will not become a viable remedy to alleviate the increasing pressure to provide school choice options.

¹²⁹ The superintendent of Dayton, Ohio schools reported that his request for interdistrict transfers was denied by over a dozen neighboring school districts, most of which cited lack of capacity as the reason for their denial. Brownstein, *supra* note 17, at 214. Despite the prohibition against using lack of capacity to deny transfers, many districts including Long Beach, Los Angeles, Chicago, Atlantic City, Providence, and Richmond continue to do so. CHOOSING BETTER SCHOOLS, *supra* note 18, at 62-63. Those districts that have heeded the prohibition, such as New York City and Portland, Oregon, have faced complaints about overcrowding and increased class sizes. *Id.*

¹³⁰ Brownstein, *supra* note 17, at 214.

¹³¹ Generally, Title I funding is allocated to individual schools according to a count of low-income children residing in a school’s attendance area. NON-REGULATORY GUIDANCE, *supra* note 73, at 21 (citing Pub. L. No. 107-110, § 1113, 115 Stat. 1425, 1469-71 (2002) (codified at 20 U.S.C. § 6313)). Funding may follow transfer students if the students are transferring to a Title I school and the district has chosen to allocate money on an enrollment basis rather than an attendance area basis. *Id.* (citing Pub. L. No. 107-110, § 1113(b)(1)(B), 115 Stat. 1425, 1470 (2002) (codified at 20 U.S.C. § 6313(b)(1)(B))). However, Title I funding may not follow transfer students to non-Title I schools. *Id.* Schools in more affluent districts, therefore, may not meet the poverty threshold required to receive Title-I funds and thus have no monetary incentive to accept low-income transfer students.

¹³² Zamora, *supra* note 3, at 441-42.

¹³³ James E. Ryan & Michael Heise, *The Political Economy of School Choice*, 111 YALE L.J. 2043, 2046 (2002).

¹³⁴ CHOOSING BETTER SCHOOLS, *supra* note 18, at 67.

¹³⁵ Ryan & Heise, *supra* note 133, at 2047.

2. Administrative Obstacles: Notification, Information, and Active Resistance

No Child Left Behind has been met with a great deal of opposition from teachers and administrators in schools across the country.¹³⁶ Many local educators view NCLB's improvement goals as unrealistic and resent being forced to implement school choice penalties that amount to "a public confession of failure" when students are unable to meet those goals.¹³⁷ In a recent educational survey, teachers in both passing and failing schools overwhelmingly disagreed with the proposition that public school choice will lead low-performing schools to improve.¹³⁸ As a result of this opposition, school choice under NCLB, which relies largely on the efforts of educators for promotion and implementation, has been unenthusiastically supported, ignored, and even actively discouraged.¹³⁹

Relying on schools to actively implement reforms that challenge their own "bureaucratic self-interests" is inherently difficult.¹⁴⁰ Many school officials view school choice as a threat to the integrity and reputation of their school.¹⁴¹ Educators who have dedicated their professional lives to teaching are not eager to notify the public that their school has failed to meet progress goals, particularly now that teachers and administrators stand to lose their jobs if AYP continues to go unmet.¹⁴² In order for a school choice program to be successful, parents and students must be aware that transfer options are available. Under NCLB, district administrators are required to notify parents of available transfer

¹³⁶ The National Education Association's ("NEA") website compiles what it terms the "growing chorus of voices" against NCLB, <http://www.nea.org/esea/chorus1.html> (last visited Oct. 6, 2005). One of the main points of contention is the allegation that NCLB is an "unfunded mandate"—a law that imposes responsibilities upon states without allocating sufficient funds to cover the costs of implementing those responsibilities. *See id.* On August 22, 2005, Connecticut became the first state to sue the federal government over the No Child Left Behind Act. Complaint at 1, *Conn. v. Spellings*, Civ. Action No. 305CV1320 (D. Conn. Aug. 22, 2005), available at http://www.npr.org/documents/2005/aug/ct_nclb_suit.pdf. In its complaint, Connecticut alleges that the "[Secretary of Education] is requiring Connecticut to expend substantial sums in excess of federal funding to comply with NCLB mandates." *Id.* at 8.

¹³⁷ *See* William L. Taylor, *Title I as an Instrument for Achieving Desegregation and Equal Educational Opportunity*, 81 N.C. L. Rev. 1751, 1759 (2003).

¹³⁸ GAIL L. SUNDERMAN ET AL., LISTENING TO TEACHERS: CLASSROOM REALITIES AND NO CHILD LEFT BEHIND 31-32 (2004), available at http://www.civilrightsproject.harvard.edu/research/articles/NCLB_Survey_Report.pdf. The "Teacher's Voice" survey conducted by the Harvard Civil Rights Project polled teachers in two districts—one in Fresno, CA and one in Richmond, VA. *Id.* at 12. These districts were selected because they represent different regions, demographics, and state educational policies. *Id.* at 13. Overall, 75.6% of Fresno teachers in failing schools and 81% of Fresno teachers in passing schools felt that school choice would not cause low-performing schools to improve. *Id.* at 31-32.

¹³⁹ *See* Brownstein, *supra* note 17, at 215.

¹⁴⁰ *See id.*

¹⁴¹ *See id.*

¹⁴² *See generally id.*

options when a school fails to meet AYP for two or more consecutive years.¹⁴³ At a minimum, the notice must explain the option to transfer, provide information about the academic achievement of the available transfer school(s), and notify parents that transportation will be paid for or provided by the district.¹⁴⁴ Distributing accurate and comprehensive information is critical to the operation of school choice. If parents are unaware or unsure, they cannot make intelligent decisions about the direction of their child's education. In the face of a lack of information, parents may forego a beneficial opportunity or may inadvertently choose a transfer school that is less appropriate for their child's educational needs.¹⁴⁵

Because NCLB depends on school officials to implement and promote school choice, many parents remain uninformed or underinformed. In fact, a recent study by the Harvard Civil Rights project revealed that seventy-five percent of parents in Buffalo, New York were not aware that their child was attending a school identified for improvement.¹⁴⁶ Despite the resolute stance of the contents and language of NCLB's penalty provisions, the reality of the matter may be that those districts that choose to flout the Act's notice and information requirements will meet with little, if any, repercussion. NCLB's enforcement scheme is surprisingly weak. The statute vests the sole discretionary power to penalize violations of NCLB in the head of the Department of Education,¹⁴⁷ a government agency that some commentators assert has been plagued by "a culture of non-enforcement" in recent years.¹⁴⁸ While virtually all districts have

¹⁴³ 20 U.S.C. § 6316(b)(6) (Supp. II 2002). Districts must also notify parents of: the reasons their child's school failed to meet AYP, how the school compares in academic achievement to other district schools, what the state, district, and school are doing to address the problem, and ways in which parents can become involved. *Id.* If the school is required to offer supplemental educational services, the district must send a notice explaining the availability of these services as well. 34 C.F.R. § 200.37(b)(5) (2005).

¹⁴⁴ 34 C.F.R. § 200.37(b)(4).

¹⁴⁵ Because schools under NCLB are ranked by trend rather than absolute score, sometimes transfer schools have a lower test average than sending schools because the transfer school was making gains from a lower base. Brownstein, *supra* note 17, at 218. This type of information is critical to parental decision-making.

¹⁴⁶ JIMMY KIM & GAIL L. SUNDERMAN, FINDINGS FROM THE FIRST PHASE OF SCHOOL CHOICE IMPLEMENTATION IN THREE DISTRICTS: BUFFALO, NEW YORK, RICHMOND, VIRGINIA, DEKALB COUNTY, GEORGIA 12 (The Civil Rights Project, Harvard University, Working Draft, 2003), <http://www.okea.org/ESEA/actionresources/CivilRightsChoice.pdf>.

¹⁴⁷ The Secretary of Education may withhold federal funds from states that violate NCLB's requirements. 20 U.S.C. § 6311(g)(2). No enforcement scheme is available however, to penalize the violations of individual districts. *ACORN v. N.Y.C. Dep't of Educ.*, 269 F. Supp. 2d 338, 346 n.6 (S.D.N.Y. 2003) (citing 20 U.S.C. §§ 6312(a)(1)(b)(e)). For a discussion of the problems caused by the lack of enforcement mechanisms *see infra* Part IV.B.

¹⁴⁸ Taylor, *supra* note 137, at 1759-60; *see also Closing the Achievement Gap in America's Public Schools: The No Child Left Behind Act: Hearing Before the House Committee on Education and the Workforce*, 109th Cong. (2005) (testimony of Kati Haycock, Director, The Education

sent out some form of notice to families concerning school choice options, many districts sent late,¹⁴⁹ incomplete, or overtly discouraging letters.¹⁵⁰ Because students cannot benefit from school choice if parents do not have the knowledge necessary to make informed choices, transfer rates are unlikely to improve if the notice and information requirements are not enforced. Even the most well intentioned districts, if left unchecked, may neglect to adequately inform parents as the 2014 deadline approaches and priorities shift toward attempting to raise achievement levels to one hundred percent.¹⁵¹

IV. REMOVING OBSTACLES: CREATING MEANINGFUL PUBLIC SCHOOL TRANSFER OPTIONS

*“There must be a moment in which parents can say, ‘I’ve had enough of this school.’ Parents must be given real options in the face of failure in order to make sure reform is meaningful.”*¹⁵²

In order for NCLB to fulfill its promise to provide significant educational opportunities to low-income students trapped in underperforming schools, the supply and promotion of quality choices must be increased. The remaining portion of this Article discusses potential remedies for both the physical and administrative limitations that NCLB school choice is currently facing.

Trust) (“[A] lot of good will has been squandered and momentum undercut by the U.S. Department of Education’s mishandling of [NCLB] . . . For the first two and half years after NCLB was enacted, the Department refused to exert any authority at all over the states’ implementation. The Department did not ask for and did not review state definitions or plans. Guidance from the Department has been erratic and inconsistent -- both across states and over time.”).

¹⁴⁹ Many districts notified parents too close to the first day of school, giving them a very short time to make a decision about transferring their child. CHOOSING BETTER SCHOOLS, *supra* note 18, at 58.

¹⁵⁰ Department of Education guidance provides that districts may not impede parents’ opportunities to exercise school choice by making the process difficult or inconvenient. NON-REGULATORY GUIDANCE, *supra* note 73, at 12. As an example, the guidance states that “parents should not have to appear in person to state their choices.” *Id.* A number of districts have disregarded the Department’s guidance by requiring parents to call the school principal or make an appointment in order to exercise choice. CHOOSING BETTER SCHOOLS, *supra* note 18, at 58. Other districts have attempted to discourage choice through correspondence. One letter from an Akron, Ohio public school emphasized to parents that “*transportation to the new school is your responsibility*” even though transportation is supposed to be provided by the district. *Id.* (emphasis in original). Another letter, from the Superintendent of schools in Woonsocket, Rhode Island, stated: “While I am required to make this well-intentioned program [choice] available to your child, please be advised that I have serious reservations about the implied benefits for your child.” *Id.*

¹⁵¹ Currently, most states have made public school choice implementation a low priority and have provided little assistance to districts or parents. *Id.* at 10.

¹⁵² Remarks on Signing the No Child Left Behind Act of 2001 in Hamilton, Ohio, 1 PUB. PAPERS 23, 25 (Jan. 8, 2002).

A. *Addressing Physical Obstacles: Mandating Interdistrict Choice*

Within the confines of NCLB's public school choice program, the most obvious solution to a lack of genuine transfer options can be found just across district lines. Low-income students attending schools that serve large, concentrated low-income populations consistently perform worse on achievement tests than those low-income students who attend schools that serve a wealthier population.¹⁵³ Currently, a weak interdistrict transfer policy is preventing many low-income students from obtaining access to real educational opportunities, which often lie in more affluent outlying districts.¹⁵⁴ To help dispel the debilitating reluctance of these neighboring districts to accept transfer students, Congress should create a combination of financial and academic incentives for those districts to do so.

For instance, NCLB compensates for intradistrict choice by permitting allocation of Title I funds on an enrollment basis between schools within a district.¹⁵⁵ The Act does not, however, consider student enrollment for purposes of determining the size of Title I grants to the districts themselves.¹⁵⁶ As a result, neighboring districts have no financial incentive to accept transfer students because the federal per pupil money, which is allocated according to population, remains with the sending district.¹⁵⁷ Additionally, NCLB prohibits Title I money from following transfer students to non-Title I schools,¹⁵⁸ the type of wealthy suburban school that low-income students would most benefit from attending.¹⁵⁹ Under the current allocation scheme, would-be receiving schools have a financial disincentive to accepting transfer students because such students come without additional federal funding and put a strain on the school's existing resources.¹⁶⁰

As a way to encourage interdistrict transfer options, Congress should revise NCLB to permit states to reserve a portion of Title I funding before allocating it to the districts for the purpose of providing grants to those schools that

¹⁵³ Zamora, *supra* note 3, at 414. "Lower-income students performed their worst at schools where the student population was overwhelmingly poor. But when lower-income students attended schools where most of the students were more affluent, they achieved higher scores -- matching or exceeding the county average." Brigid Schulte & Dan Keating, *Pupils' Poverty Drives Achievement Gap*, WASH. POST, Sept. 2, 2001, at A1.

¹⁵⁴ See 20 U.S.C. § 6316(b)(11) (Supp. II 2002). Districts need only try "to the extent practicable" to establish a cooperative agreement with neighboring districts. *Id.*

¹⁵⁵ 20 U.S.C. § 6313(b)(1)(B).

¹⁵⁶ 20 U.S.C. § 6333(c). District grant amounts are determined by reference to the most recent population data available from the Department of Commerce. *Id.* Districts are allocated money according to the number of low-income children populating each district. *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ NON-REGULATORY GUIDANCE, *supra* note 73, at 21.

¹⁵⁹ See Ryan & Heise, *supra* note 133, at 2045-46.

¹⁶⁰ See 20 U.S.C. § 6333(c).

accept interdistrict transfers.¹⁶¹ The size of each grant should be determined by the number of interdistrict transfer students attending a particular school. Non-Title I schools should not be excluded from receiving such grants because those wealthier and largely suburban schools are precisely the ones whose participation is key to the success of a nationwide public school choice program.¹⁶² Further, to alleviate legitimate concerns that an influx of students from lower-performing schools will jeopardize the ability of high-performing schools to meet their own AYP goals, Congress should create an AYP grace period of one or two years.¹⁶³ In this period, transfer student scores would be measured for research purposes but exempted from the count toward an individual school's AYP. In this way, receiving schools will not be as discouraged from accepting students because they will be provided with a buffer time period in which to improve the performance of transfer students.

Creating both a grace period and a financial incentive for receiving schools may quell a significant amount of overt opposition toward interdistrict transfers. Yet, in some areas of the country, nothing shy of a legal mandate would convince privileged schools to open their doors to urban children.¹⁶⁴ Requiring districts to accept transfer students from across district lines is likely to be politically unpopular among suburbanites who wield a great deal of political power.¹⁶⁵ Suburban parents are generally pleased with the education their children receive in local public schools and fear that school choice would undermine the "physical and financial sanctity" of these neighborhood schools.¹⁶⁶ Because school choice may threaten the "exclusivity and superiority" of suburban schools, suburbanites are likely to oppose "any changes to the status quo that might upset [their] advantaged position."¹⁶⁷ However, in order to achieve the lofty goals of No Child Left Behind, it is imperative that the program not be allowed to falter on the shoals of apathy, resistance, or political discomfort. Congress should work to pass a provision that would require availability of interdistrict transfer options when there are no available schools to choose from on an intradistrict level.¹⁶⁸ The provision should require states to ensure that school choice is available to those students stuck in districts where there are no available transfer opportunities because all possible schools are failing.

¹⁶¹ Currently, NCLB allows states to reserve a portion of Title I funds to cover administrative and school improvement costs and to help fund new districts and charter schools. 20 U.S.C. § 6303(a).

¹⁶² Ryan & Heise, *supra* note 133, at 2135 (noting that suburbanites constitute the largest obstacle to increasing opportunities for choice).

¹⁶³ See CHOOSING BETTER SCHOOLS, *supra* note 18, at 14.

¹⁶⁴ Generous payments failed to induce suburban districts in Milwaukee and St. Louis to open their doors to more than a handful of struggling students. Ryan & Heise, *supra* note 133, at 2126.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 2045.

¹⁶⁷ *Id.* at 2045, 2135.

¹⁶⁸ CHOOSING BETTER SCHOOLS, *supra* note 18, at 14.

B. Addressing Administrative Obstacles: Litigating NCLB under §1983

Lax enforcement of spending conditions has repeatedly and seriously hampered the effect of the ESEA and its various revisions.¹⁶⁹ For instance, when NCLB was enacted in 2002, only nineteen states were in compliance with the standards and assessment systems mandated just six years earlier by its predecessor revision, the Improving America's Schools Act.¹⁷⁰ On its face, NCLB promises much tighter accountability, yet it explicitly creates no judicial or administrative procedures to ensure the enforcement of its strict provisions.¹⁷¹ Instead, the Act falls back on the typical remedy for noncompliance with Spending Clause legislation¹⁷² by providing the Secretary of Education with the authority to terminate funds for violations of the Act.¹⁷³ Under NCLB, however, "a funds cutoff is a drastic remedy with injurious consequences to the supposed beneficiaries of the Act."¹⁷⁴ Resorting to what one commentator called "the blunt and seldom-used club" of withholding federal funds¹⁷⁵ would cripple those low-income schools that the Act was passed to assist. Parents are left in the untenable position of wanting to push for compliance yet not wanting the government to revoke the Title I funds that provide necessary resources for their children's education. In order to force recalcitrant districts and administrators to comply with NCLB's choice mandates, parents and students should be able to turn to the courts for assistance. The availability of a private cause of action for violation of NCLB's choice provisions would empower parents to seek more appropriate remedies and to free their children from persistently underperforming schools. This article argues that civil rights statute 42 U.S.C. §1983 is the most appropriate and viable cause of action available to enforce public school choice under NCLB.¹⁷⁶

¹⁶⁹ Zamora, *supra* note 3, at 431.

¹⁷⁰ SUNDERMAN, *supra* note 31 at 6.

¹⁷¹ See *infra* notes 257, 259.

¹⁷² *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 28 (1981) ("[T]he typical remedy for state noncompliance with federally imposed conditions is not a private cause of action for noncompliance but rather action by the Federal Government to terminate funds to the State.").

¹⁷³ 20 U.S.C. § 6311(g) (Supp. II 2002).

¹⁷⁴ Sasha Samberg-Champion, *How to Read Gonzaga: Laying the Seeds of a Coherent Section 1983 Jurisprudence*, 103 COLUM. L. REV. 1838, 1859 n.141 (2003) (quoting *Pennhurst*, 451 U.S. at 52 (White, J., dissenting)).

¹⁷⁵ *Id.* at 1839.

¹⁷⁶ Over the years, education litigation has taken numerous forms. Suits in tort, contract, property, and constitutional law have all been attempted by parents filing educational malpractice claims. See Melanie Natasha Henry, Comment, *No Child Left Behind? Educational Malpractice Litigation for the 21st Century*, 92 CAL. L. REV. 1117, 1127 (2004). For the most part, however, courts have largely rejected these claims. See *id.*

1. Introduction to §1983

Section 1983, enacted by the Civil Rights Act of 1871, is “the basic vehicle for federal court review of alleged state and local violations of federal law.”¹⁷⁷ It provides a private cause of action against any person who, under the color of state law, abridges “rights, privileges, or immunities secured by the Constitution and laws” of the United States.¹⁷⁸ The statute confers no substantive rights but rather bestows a remedy by empowering federal courts to prevent and redress violations of federal law.¹⁷⁹ Under §1983, a right conferred by a federal statute is presumed to be privately enforceable.¹⁸⁰ In order to take advantage of this presumption, a plaintiff must first assert a violation of a federal *right* rather than merely a violation of federal *law*.¹⁸¹ Courts have traditionally examined three factors in determining whether a particular statutory provision gives rise to an individual federal right: 1) “Congress must have intended that the provision in question benefit the plaintiff;” 2) “the right assertedly protected by the statute [must not be] so ‘vague and amorphous’ that its enforcement would strain judicial competence;” and 3) “the statute must unambiguously impose a binding obligation on the States.”¹⁸² Once a federal right is established, the presumption of enforceability can be rebutted only by showing that Con-

¹⁷⁷ ERWIN CHERMERINKSY, *FEDERAL JURISDICTION* 466 (4th ed. 2003). The language of the statute provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress

42 U.S.C. § 1983 (2000).

¹⁷⁸ 42 U.S.C. § 1983. Until 1980 there was a good deal of debate concerning whether §1983 could be used to remedy violations of federal statutory rights at all. Bradford C. Mank, *Suing Under §1983: The Future After Gonzaga University v. Doe*, 39 HOUS. L. REV. 1417, 1433 (2003). In 1871, when §1983 was first created, the language of the statute only explicitly referred to enforcement of constitutional rights. *Id.* at 1427. It was not until three years later that Congress amended the section to include the words “and laws.” *Id.* Commentators generally took one of three divergent interpretations of the amendment: 1) that Congress meant only to clarify, not modify the available action and thus the only enforceable rights are constitutional ones; 2) that Congress intended the only enforceable “laws” to be civil rights laws; or 3) that Congress intended to allow a private remedy for any federal law. *Id.* at 1427-28. The Supreme Court brought an end to this dispute in 1980 when it held that the plain meaning of “and laws” provided a remedy for all federal statutes that confer rights on individuals. *Maine v. Thiboutot*, 448 U.S. 1, 4-8 (1980).

¹⁷⁹ CHERMERINKSY, *supra* note 177, at 470.

¹⁸⁰ *Gonzaga Univ. v. Doe*, 536 U.S. 273, 284 (2002).

¹⁸¹ *Id.* at 283 (citing *Blessing v. Freestone*, 520 U.S. 329, 340 (1997)).

¹⁸² *Blessing*, 520 U.S. at 340-41.

gress specifically or impliedly foreclosed use of §1983 as a remedy under the statute in question.¹⁸³

For approximately the past twenty years, the United States Supreme Court has vacillated between broad and narrow conceptions of the types of rights that are capable of invoking the protection of a §1983 cause of action.¹⁸⁴ In 2002, the Court decided *Gonzaga University v. Doe*, the latest installment in a progression of §1983 cases that Chief Justice Rehnquist admitted are not “models of clarity.”¹⁸⁵ The issue in *Gonzaga* concerned the enforceability of the Family Education Rights and Privacy Act (“FERPA”) under §1983. Upon graduation from Gonzaga University, John Doe applied for a teaching position at a local elementary school.¹⁸⁶ As part of the application process, the school required all new teachers to obtain an affidavit of good moral character from the dean of their graduating college.¹⁸⁷ A university official overheard one student tell another of sexual misconduct by John Doe.¹⁸⁸ After contacting the state agency responsible for teacher certification and openly discussing these allegations, the university refused to provide Doe with the requisite affidavit.¹⁸⁹ Doe sued Gonzaga and the university official for violating FERPA, a federal law that prohibits federally funded educational institutions from releasing educational records to unauthorized persons.¹⁹⁰ A jury awarded Doe \$150,000 in compensatory damages and \$300,000 in punitive damages on the FERPA claim.¹⁹¹ The Washington Supreme Court affirmed the jury award and ruled, like every federal court of appeals to consider the question, that §1983 could be used to enforce FERPA.¹⁹²

The United States Supreme Court reversed, holding that FERPA is unenforceable under §1983 because it does not confer a federal right in “clear and unambiguous terms.”¹⁹³ The Court explained that the Act simply prohibits federal funding from aiding schools with the “policy or practice” of releasing confidential student information.¹⁹⁴ Because students like John Doe are merely within the “general zone of interest” that FERPA was intended to protect, the

¹⁸³ *Id.* at 341 (citing *Livadas v. Bradshaw*, 512 U.S. 107, 133 (1994)).

¹⁸⁴ See Mank, *supra* note 178, at 1433.

¹⁸⁵ *Gonzaga*, 536 U.S. at 278.

¹⁸⁶ *Id.* at 277.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 278-79.

¹⁹¹ *Id.* at 277.

¹⁹² *Id.* at 299 (Stevens, J., dissenting) (noting that “all of the Federal Courts of Appeals expressly deciding the question have concluded that FERPA creates federal rights enforceable under §1983”).

¹⁹³ *Id.* at 290-91.

¹⁹⁴ *Id.* at 288.

Court concluded that the Act does not confer individual student entitlement to confidentiality.¹⁹⁵ The Court stated that the text of a statute must be “phrased in terms of the persons benefited” in order to confer private federal rights.¹⁹⁶ The majority directed lower courts to adopt an implied right of action approach to the creation of enforceable rights inquiry under §1983.¹⁹⁷ While acknowledging that unlike implied cause of action claimants §1983 claimants need not prove congressional intent to create a private remedy, the Court rejected the notion that the initial inquiry—whether a statute confers any right at all—is any different in either analysis: “Both inquiries simply require a determination as to whether or not Congress intended to confer individual rights upon a class of beneficiaries.”¹⁹⁸ Accordingly, the Court noted that “where the text and structure of a statute provide no indication that Congress intends to create new individual rights, there is no basis for a private suit, whether under §1983 or under an implied right of action.”¹⁹⁹

Notwithstanding Rehnquist’s promise in *Gonzaga* to “resolve any ambiguity”²⁰⁰ in the Court’s §1983 precedent, at best the opinion creates another layer of uncertainty. Legislative history has long played a role in determining congressional intent to confer an individual federal right in both §1983 and implied right of action contexts.²⁰¹ Yet, the majority’s heavy emphasis on the text of FERPA seems to threaten the use of legislative history to determine if a federal statute creates an individual right. Because of *Gonzaga*, it remains uncertain whether “clear” and “unambiguous” evidence of “congressional intent” to establish an individual right is limited to an examination of statutory text or if legislative history may be considered.²⁰² This unclarity has serious ramifications for parents seeking to enforce school choice obligations under NCLB. At worst, some commentators fear, it effectively eliminates the private cause of action as a method of enforcing state compliance with federal spending man-

¹⁹⁵ *Id.* at 283, 287-88.

¹⁹⁶ *Id.* at 284 (citing *Cannon v. Univ. of Chi.*, 441 U.S. 677, 692 n.13 (1979)).

¹⁹⁷ *Id.* at 283.

¹⁹⁸ *Id.* at 285.

¹⁹⁹ *Id.* at 286.

²⁰⁰ *Id.* at 278.

²⁰¹ See Mank, *supra* note 178, at 1469 n.357; *Thompson v. Thompson*, 484 U.S. 174, 179 (1988) (quoting *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 18 (1979) (“In determining whether to infer a private cause of action from a federal statute, our focal point is Congress’ intent in enacting the statute ‘[I]ntent may appear implicitly in the language or structure of the statute, or in the circumstances of its enactment.”)); *Cannon*, 441 U.S. at 694 (the *Cort* analysis for determining if a private right of action may be implied “requires consideration of legislative history”); *Wilder v. Va. Hosp. Ass’n*, 496 U.S. 498, 515 (1990) (“Any doubt that Congress intended [to create enforceable rights under §1983] . . . is quickly dispelled by a review of the legislative history of the Boren Amendment.”); *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 20 (1981) (“the legislative history buttresses our conclusion” that Congress intended to confer enforceable rights).

²⁰² See Mank, *supra* note 178, at 1421.

dates such as NCLB.²⁰³ At least one district court has taken the majority's narrow emphasis on statutory language as an instruction to look no further than the text of the school choice provisions of the Act when determining whether Congress "intended that the provision[s] in question benefit the plaintiff."²⁰⁴ As a result, that court held that §1983 is unavailable as a remedy under NCLB. The following section is a summary of that court's decision and its application of *Gonzaga* to NCLB. Section three then analyzes the decision of the district court and argues for a more narrow interpretation of *Gonzaga's* effect on the availability of §1983 causes of action.

2. *ACORN v. N.Y.C. Dep't of Educ.*²⁰⁵

In 2003, parents of New York City schoolchildren filed the first suit concerning compliance with the newly enacted NCLB.²⁰⁶ Brought under §1983, the suit alleged that local and state officials in the Albany School District and the New York City Department of Education failed to comply with NCLB's public school choice and supplemental services ("SES") mandates.²⁰⁷ Specifically, the parents claimed that the defendant school districts violated parental notification requirements by providing either no school choice information, untimely information, or information that was inaccurate and misleading.²⁰⁸ Further, the plaintiffs presented evidence that even when parents managed to file legitimate transfer requests, the districts violated NCLB by outright rejecting the vast majority of applications.²⁰⁹ The plaintiffs sought a preliminary injunction

²⁰³ *Gonzaga* suggests, but does not explicitly say, that rights created under Spending Clause legislation are somehow different from rights conferred under other congressional powers. "Since *Pennhurst*, only twice have we found spending legislation to give rise to enforceable rights." *Gonzaga*, 536 U.S. at 280.

²⁰⁴ *ACORN v. N.Y.C. Dep't of Educ.*, 269 F. Supp. 2d 338, 347 (S.D.N.Y. 2003) (finding that NCLB's school choice provisions do not confer enforceable federal rights). Outside of the school choice context, one other district court has held that provisions of NCLB do not confer enforceable federal rights. *Fresh Start Academy v. Toledo Board of Educ.*, 363 F. Supp. 2d 910, 916 (N.D. Ohio 2005) (denying relief to supplemental service provider that alleged misappropriation of NCLB funds because NCLB does not confer an enforceable right on SES providers).

²⁰⁵ 269 F. Supp. 2d 338. Association of Community Organizations for Reform Now ("ACORN") "is the nation's largest community organization of low- and moderate-income families, working together for social justice and stronger communities." About ACORN, <http://www.acorn.org> (last visited Oct. 6, 2005).

²⁰⁶ *ACORN*, 269 F. Supp. 2d at 339. Since *ACORN* was decided only three other cases have addressed challenges under NCLB. *Coachella Valley Unified Sch. Dist. v. Cal.*, 2005 WL 1869499, at *2-3 (N.D. Cal. Aug. 5, 2005) (rejecting challenge under NCLB to lack of testing accommodations for students with limited English proficiency because plaintiffs failed to state a federal question); *Fresh Start Academy*, 363 F. Supp. 2d at 911; *Kegerreis v. U.S.*, 2003 U.S. Dist. LEXIS 18012, at *6-7 (D. Kan. Oct. 9, 2003) (rejecting challenge to the constitutionality of NCLB because plaintiff lacked standing).

²⁰⁷ *ACORN*, 269 F. Supp. 2d at 342.

²⁰⁸ *Id.* at 343.

to force the districts to send out adequate notices immediately, to provide legitimate transfer options, and to prevent the districts from improperly diverting Title I money.²¹⁰

The United States District Court for the Southern District of New York denied the plaintiffs' request for an injunction.²¹¹ Specifically, the court found that NCLB is not enforceable under §1983. The court cited three reasons for its holding that NCLB is privately unenforceable.²¹² First, the court concluded that the Act lacks the "necessary rights creating language" to support entitlement to individual enforcement.²¹³ In step with the exclusively textualist approach of the United States Supreme Court's majority opinion in *Gonzaga*, the court stated that "if Congress wishes to create new rights . . . it must do so in clear and unambiguous terms"²¹⁴ Because the language of NCLB's choice provisions is framed to focus on what states and districts "must provide" rather than what parents and students are entitled to, the court concluded that Congress did not intend to create a personal right to school choice.²¹⁵

Second, the court found that like FERPA, the statute at issue in *Gonzaga*, NCLB has an "aggregate focus."²¹⁶ Because the transfer provisions give priority to low-income students as a group, the court reasoned that Congress created NCLB's transfer and SES provisions to benefit children collectively, rather than individually.²¹⁷ Therefore, the court concluded that NCLB is not concerned with "whether the needs of any particular person have been satisfied" and cannot give rise to individual rights.²¹⁸

Finally, the court noted that the "nature of the enforcement mechanisms" in NCLB indicate that Congress did not intend to create individual rights.²¹⁹ Because the Act gives the Secretary of Education sole enforcement authority, the court concluded that Congress intended to centralize enforcement in order to avoid the hazards of conflicting interpretations that might arise from individual lawsuits.²²⁰ Therefore, the court held, parents and students cannot judicially enforce the provisions of NCLB in a §1983 action.²²¹

²⁰⁹ *Id.*

²¹⁰ *Id.* at 339.

²¹¹ *Id.* at 347.

²¹² *Id.* at 344-46.

²¹³ *Id.* at 344, 347.

²¹⁴ *Id.* at 344 (quoting *Gonzaga Univ. v. Doe*, 536 U.S. 273, 290 (2002)).

²¹⁵ *Id.* at 344-45.

²¹⁶ *Id.* at 345.

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.* at 347.

²²¹ *Id.*

3. Making Room for NCLB in §1983 after *Gonzaga University v. Doe*

Despite the conclusion of the district court in *ACORN*, arguably NCLB's choice provisions do and should confer individually enforceable rights. In considering the potential enforceability of NCLB choice, the most pressing unclarity created by *Gonzaga* is whether an examination of congressional intent requires a strictly textual approach or whether a "consideration of legislative history is permitted."²²² Justices Breyer and Souter, in their concurring opinion, explicitly rejected an approach to §1983 that would require sole reliance on the text of a congressional Act:

[T]he statute books are too many, the laws too diverse, and their purposes too complex, for any single legal formula to offer more than general guidance. I would not, in effect, predetermine an outcome through the use of a presumption—such as the majority's presumption that a right is conferred only if set forth "unambiguously" in the statute's "text and structure."²²³

Although their concern is well founded, Justices Breyer and Souter likely overstated the extent of the majority's reliance on a textualist approach.²²⁴ The Court in *Gonzaga* never explicitly stated that the "clear and unambiguous" intent required to confer an individual right must be found in the language of the statute alone.²²⁵ In fact, while the Court's opinion largely focused on the text and structure of FERPA to determine congressional intent to create a right, the majority did briefly consider legislative history.²²⁶ Indeed, Chief Justice Rehnquist quoted a joint statement from the congressional record to buttress the conclusion that FERPA does not confer enforceable rights.²²⁷ While *Gonzaga* is undoubtedly capable of a narrow interpretation that forecloses the use of legislative history in an enforceable rights inquiry, a broader interpretation of the case is more reasonable and consistent with §1983 jurisprudence.²²⁸

The Court in *Gonzaga* denied relief to John Doe because he failed to prove the first factor of the test that federal courts use to determine whether a

²²² See *Gonzaga*, 536 U.S. 273; Mank, *supra* note 178, at 1421.

²²³ *Gonzaga*, 536 U.S. at 291 (Breyer, J., concurring).

²²⁴ See Mank *supra*, note 178, at 1471.

²²⁵ *Id.*

²²⁶ *Gonzaga*, 536 U.S. at 290 (citing a joint statement of the congressional record to support the conclusion that Congress created a centralized review provision in FERPA due to "concern that regionalizing the enforcement of [FERPA] may lead to multiple interpretations of it, and possibly work a hardship on parents, students, and institutions.").

²²⁷ *Id.*

²²⁸ See *supra* note 201 and accompanying text.

statute confers an individual right—"Congress must have intended that the provision in question benefit the plaintiff."²²⁹ The district court in *ACORN* read *Gonzaga* as a restriction on the type of evidence that can be used to prove what Congress "must have intended."²³⁰ A better reading, however, is that the Court meant to restrict not evidence of congressional intent but rather the type of "benefit" that is sufficiently specific and definite to qualify as an enforceable right. The Court adamantly rejected interpretations of its precedent that have permitted plaintiffs to recover under §1983 when they merely fall within the "general zone of interest" that a statute was intended to protect.²³¹ The Court emphasized that only "*rights*, not the broader or vaguer 'benefits' or 'interests'" may be enforced under the authority of § 1983.²³² Although the Court stated that Congress must speak with a "clear and unambiguous" voice to confer a federal right, nothing in the opinion barred courts from listening to the congressional voice that is recorded in legislative history.²³³ The Court in *Gonzaga* did not deny relief to the plaintiff because of an oversight by Congress to fully record its "clear and unambiguous" intent within the text of the Act.²³⁴ Rather, the plaintiff's claim in *Gonzaga* failed because the benefit Congress intended to confer under FERPA was not specific and individual enough to rise to the level of a federal right.²³⁵

Unlike the statute at issue in *Gonzaga*, NCLB confers a federal right rather than merely a federal benefit.²³⁶ The district court in *ACORN*, interpreting *Gonzaga* narrowly, began and ended its inquiry into the requisite congressional intent with the text of NCLB's choice provisions.²³⁷ Had the court delved deeper, however, it would have discovered legislative history supportive of a congressional intent to confer individual entitlement to school choice under NCLB.²³⁸ Indeed, the choice provisions in NCLB were meant to "empower[] parents" by "moving accountability" away from the Department of Education, Washington, and the State capitals.²³⁹ By mandating public school choice, Congress intended to put decision-making power "around the kitchen table, where parents can make the decision as to what school . . . meets the needs of their

²²⁹ See *Gonzaga*, 536 U.S. at 282-90.

²³⁰ See *ACORN v. N.Y.C. Dep't of Educ.*, 269 F. Supp. 2d 338, 344-48 (S.D.N.Y. 2003).

²³¹ *Gonzaga*, 536 U.S. at 283.

²³² *Id.* (emphasis in original).

²³³ See *supra* notes 223-28 and accompanying text.

²³⁴ See generally *Gonzaga*, 536 U.S. 273.

²³⁵ *Id.* at 287-90.

²³⁶ See Henry, *supra* note 176, at 1158-66; Sarah D. Greenberger, Note, *Enforceable Rights, No Child Left Behind, and Political Patriotism: A Case for Open-Minded Section 1983 Jurisprudence*, 153 U. PA. L. REV. 1011, 1028 (2005).

²³⁷ See *ACORN v. N.Y.C. Dep't of Educ.*, 269 F. Supp. 2d 338 (S.D.N.Y. 2003).

²³⁸ See *infra* notes 239-43 and accompanying text.

²³⁹ 147 CONG. REC. H2591 (May 23, 2001) (statement of Rep. Hoekstra).

children.”²⁴⁰ NCLB choice was enacted to create a “safety valve” and a “life preserver” for individual students trapped in persistently failing schools.²⁴¹ In this way, the choice provisions were not meant to apply simply on a level of institutional policy and practice, but rather were meant to focus on providing individual students with educational options. In light of the goals of NCLB choice, it is illogical to deny parents of schoolchildren the power to enforce NCLB’s choice provisions merely because the explicit language of the statute speaks in terms of what “the local educational agency shall . . . provide”²⁴² rather than what “parents shall receive.”²⁴³

In addition, although the context and legislative history of NCLB provides the clearest indication that Congress intended to confer a federal right to school choice, NCLB is not entirely devoid of the type of “rights creating language” emphasized by the Court in *Gonzaga*.²⁴⁴ Indeed, the popular title of the Act itself, “No Child Left Behind,” indicates that the statutory scheme was designed to provide each and every student with quality educational opportuni-

²⁴⁰ *Id.*

²⁴¹ See *Empowering Success: Flexibility and School Choice: Before the Committee on Education and the Workforce*, 107th Cong. 63 (2001) (testimony of Clint Bolick, Litigation Director, Institute for Justice) [hereinafter Bolick]; *Departments of Labor, Health and Human Services, Education, and Related Agencies Appropriations for 2002: Before Labor-HHS-Education Appropriations Subcommittee*, 107th Cong. 755 (2001) (testimony of John A. Boehner) [hereinafter Boehner].

²⁴²

[T]he local educational agency shall, not later than the first day of the school year following such identification, provide all students enrolled in the school with the option to transfer to another public school served by the local educational agency, which may include a public charter school, that has not been identified for school improvement under this paragraph, unless such an option is prohibited by State law.

20 U.S.C. § 6316(b)(1)(E) (Supp. II 2002).

²⁴³ One commentator has noted that if Congress frames statutory language in terms of what parents must receive then the statute will not clearly allocate responsibility for carrying out that mandate. Henry, *supra* note 176, at 1161. If Congress wants parents to receive an opportunity, it is natural that it would specify a particular person or entity to provide that opportunity. *Id.* Title IV, the example of a rights-creating statute cited by the majority in *Gonzaga*, is fundamentally different than NCLB and many other potentially rights-conferring statutes. See 42 U.S.C. § 2000d (2000). Title IV confers a negative right—the right not to be discriminated against by any entity receiving federal funds. *Id.* NCLB, however, confers a positive right—the right to transfer. See 20 U.S.C. § 6316. Title IV does not require any specific action or implementation, but NCLB requires a good deal of both. In order to ensure that parents and students receive their right to transfer under NCLB, Congress necessarily had to affirmatively confer the responsibility for implementation onto a specific entity.

²⁴⁴ Justice Stevens noted in his dissent in *Gonzaga* that the sort of “no person shall” rights creating language envisioned by the Court has never been present in §1983 cases. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 297 (2002). For the sake of argument, however, notes 246-48 and the accompanying text point to such rights-creating language in NCLB.

ties.²⁴⁵ Further, NCLB provides that students who choose to transfer “shall be enrolled in classes and other activities in the public school . . . in the same manner as all other children at the public school.”²⁴⁶ Also, school districts are required to provide prompt notice and “explanation of the *parents’ option* to transfer.”²⁴⁷

The district court in *ACORN* concluded from the text of the choice provisions that Congress had no intent to confer an individual right to choice because NCLB has an “aggregate focus.” While it is true that NCLB as a whole is meant to have an aggregate impact in order to “improve[] the academic achievement of *all* students,”²⁴⁸ the choice provisions of the Act have a narrower, more individualized purpose. First, unlike the whole of the Act which is aimed at comprehensive education reform, NCLB’s school choice provisions were designed to provide an escape valve for *individual* children.²⁴⁹ By enacting broad accountability, teaching and testing requirements, Congress clearly recognized that choice would not be a panacea for public education as a whole. Rather, the Act treats choice as an individualized solution, specifically focusing on how to ensure that primarily low-income students trapped in failing schools receive a meaningful education.²⁵⁰ Further, unlike the nondisclosure provisions in FERPA, which only required “substantial compliance” or “reasonable efforts” in order for educational institutions to continue to receive funding,²⁵¹ the transfer provisions of NCLB require strict adherence.²⁵² The fact that FERPA does not require nondisclosure in every instance provided further support for the *Gonzaga* Court’s conclusion that FERPA has only an aggregate focus.²⁵³ Under NCLB, however, partial performance is insufficient: “[T]he local educational agency *shall* . . . provide all students enrolled in the school [identified for improvement] with the option to transfer to another public school”²⁵⁴ Because school choice is “‘couched in mandatory, rather than precatory, terms,’”²⁵⁵ students have a right to transfer options under the Act.

²⁴⁵ See *Gonzaga*, 536 U.S. at 294 (Stevens, J., dissenting) (stating that the title of FERPA, The Family Educational Rights and Privacy Act, indicates that the entire statutory scheme was designed to protect individual rights).

²⁴⁶ 20 U.S.C. § 6316(b)(1)(F).

²⁴⁷ 20 U.S.C. § 6316(b)(6)(F) (emphasis added).

²⁴⁸ 20 U.S.C. § 6301(4) (emphasis added).

²⁴⁹ See Bolick & Boehner, *supra* note 241.

²⁵⁰ *Id.*

²⁵¹ FERPA only requires that funding recipients “comply substantially” with the Act. *Gonzaga*, 536 U.S. at 288.

²⁵² See *infra* note 254 and accompanying text.

²⁵³ *Gonzaga*, 536 U.S. at 288.

²⁵⁴ 20 U.S.C. § 6316(b)(E)(i) (emphasis added).

²⁵⁵ *Gonzaga*, 536 U.S. at 282 (quoting *Blessing v. Freestone*, 520 U.S. 329, 340-41 (1997)).

The court in *ACORN* also concluded that because NCLB contains no provisions for individual enforcement, Congress must have intended a centralized enforcement scheme in order to avoid multiple interpretations of the Act.²⁵⁶ NCLB's lack of individual enforcement mechanisms, however, actually supports the opposite conclusion. Unlike FERPA, which requires the Secretary of Education to establish a review board for investigating and adjudicating violations, NCLB provides absolutely no federal review mechanism or complaint procedure for an aggrieved individual.²⁵⁷ Where plaintiffs have sought enforcement of spending clause legislation via §1983, the Supreme Court has found it "significant" to a conclusion of enforceability if federal Acts or agencies in charge of administering those Acts do not provide beneficiaries with any complaint procedures.²⁵⁸ Although NCLB vests in the Secretary of Education the power to withhold funds when the Act is violated,²⁵⁹ such "generalized powers are insufficient to indicate a congressional intention to foreclose §1983 remedies."²⁶⁰ In a case concerning the enforceability of the Public Housing Act, the Supreme Court stated that the power to revoke funding is an insufficient mechanism to "effectively oversee the performance of the some 3,000 local [public housing authorities] across the country."²⁶¹ By comparison, this same mechanism is exponentially more inadequate to remedy violations of NCLB school choice provisions because the Secretary of Education is charged with overseeing approximately 17,000 districts--nearly six times the amount the Court was concerned about in regards to the Public Housing Act.²⁶² Accordingly, the fact that NCLB contains no provision for individual enforcement makes the availability of a §1983 cause of action more, rather than less, necessary.

The school choice provisions of NCLB meet all the standards that the Supreme Court has articulated for establishing a federal right: the provisions are "directed to the benefit of individual students and parents;" the provisions are "binding on [the] States;" and the right conferred "is far from 'vague and amorphous.'"²⁶³ Despite any confusion caused by the Supreme Court's reliance on

²⁵⁶ *ACORN v. N.Y.C. Dep't of Educ.*, 269 F. Supp. 2d 338, 345-46 (S.D.N.Y. 2003).

²⁵⁷ The only penalty NCLB provides for violation of the act is the possibility of revocation of Title I funds. 20 U.S.C. § 6311(g).

²⁵⁸ *Gonzaga*, 536 U.S. at 280.

²⁵⁹ "[T]he Secretary may withhold funds for State administration . . . until the Secretary determines that the State has fulfilled those requirements." 20 U.S.C. § 6311(g). NCLB does not specifically confer authority on the Secretary to remedy district violations—the level of school administration most likely to require coercion.

²⁶⁰ *Wright v. City of Roanoke Redev. and Hous. Auth.*, 479 U.S. 418, 428 (1987).

²⁶¹ *Id.*

²⁶² National Center for Education Statistics, Common Core of Data, <http://nces.ed.gov/ccd/> (last visited Oct. 6, 2005).

²⁶³ See *Gonzaga*, 536 U.S. at 295 (Stevens, J., dissenting) (quoting *Blessing v. Freestone*, 520 U.S. 329, 340-41 (1997)).

implied cause of action cases in *Gonzaga*, plaintiffs seeking enforcement of federal statutes under §1983 need not bear the burden of proving congressional intent to create individual remedies.²⁶⁴ Section 1983 itself supplies a general remedy for vindication of federal rights.²⁶⁵ A narrow reading of *Gonzaga* risks undermining congressional intent by rendering §1983 meaningless as an independent source of authority.²⁶⁶ A broad reading, on the other hand, serves the very purpose of §1983—“to interpose the federal courts between the States and the people, as guardians of the people’s rights.”²⁶⁷ NCLB promises choice to students in failing schools. When this promise is abridged, students must not be left without remedy. NCLB unambiguously confers an individual right to school choice. Accordingly, courts must not foreclose the availability of §1983 causes of action to students who have been denied transfers under NCLB.

V. CONCLUSION: PROJECTING THE FUTURE OF NCLB PUBLIC SCHOOL CHOICE

*“And now it’s up to you, the local citizens of our great land, the compassionate, decent citizens of America, to stand up and demand high standards, and to demand that no child—not one single child in America—is left behind.”*²⁶⁸

When discussing or proposing federal education policy it is important to recognize that overall the federal government’s role in public education is comparatively small.²⁶⁹ It is merely a “seven percent investor” in a system in which states and local communities foot the majority of the bill, and thus have traditionally exercised largely undisturbed control over the direction and operation of public schools.²⁷⁰ Instituting change on a national level is “like trying to leverage change in a huge company owned by someone else.”²⁷¹ Consequently,

²⁶⁴ In a footnote in *Gonzaga*, the Court concluded that nothing in FERPA’s nondisclosure provisions indicated a congressional intent to confer “individual rights on millions of school students from kindergarten through graduate school without having ever said so explicitly.” *Id.* at 286 n.5. Citing a “tradition of deference” to state and local school officials, the Court stated that Congress could not have intended to flout this deference by subjecting school officials to private suits for money damages. *Id.* In making this observation, the Court confused its implied right of action inquiry with its § 1983 inquiry. Unlike implied right of action plaintiffs, §1983 plaintiffs are not required to prove congressional intent to provide a private cause of action. *Id.* at 284.

²⁶⁵ *Gonzaga*, 536 U.S. at 284. It is only the violation of *rights* not *laws* that give rise to a §1983 action. *Id.*

²⁶⁶ See Samberg-Champion, *supra* note 174, at 1882.

²⁶⁷ See CHEMERINKSY, *supra* note 177, at 470.

²⁶⁸ Remarks on Signing the No Child Left Behind Act of 2001 in Hamilton, Ohio, 1 PUB. PAPERS 23, 26 (Jan. 8, 2002).

²⁶⁹ RUDALEVIGE, *supra* note 5, at 3.

²⁷⁰ *Id.*

²⁷¹ *Id.*

while the federal government may certainly be able to prompt reform by requiring strict accountability, any major successes must necessarily rise up from the local level. Only with the efforts of local educators across America will public school choice under NCLB become a vehicle for positive change. Resistance to school choice must not be tolerated by states and local communities.

Admittedly, even assuming the best intentioned implementation of a public school choice program, physical limitations such as distance and capacity will prevent the majority of students from transferring to higher performing schools. “Better” schools are finite and have, despite the suggestion of Department of Education regulations,²⁷² finite capacity. But, to those impoverished and disempowered families whose children have for decades been consigned to dead end schools, school choice promises a glimmer of hope. While school choice certainly cannot solve all of this nation’s sociological contradictions, it can save the futures of individual children.

To make good on NCLB’s promise to narrow the achievement gap between advantaged and disadvantaged students, interdistrict transfer options must be created and parents must be allowed to act as private attorneys general to enforce the rights of their children to an equal and adequate education.

Decades ago, the defenders of the status quo stood in the schoolhouse door and said to some, you may not come in. Now, the defenders of the status quo stand in the schoolhouse door and say to the grandchildren of many of those same Americans, you may not come out.²⁷³

If no child is to be left behind, those doors must be thrown open so that all students have access to a quality education. The hard-learned lesson of the past is that money and good intentions alone cannot solve the inequities of America’s public school system. For the good of America’s children, NCLB’s choice must be given a chance.

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²⁷² 34 C.F.R. § 200.44(d) (2005).

²⁷³ 147 CONG. REC. H2590 (daily ed. May 23, 2001) (statement of Rep. Pence).

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