

No Child Left Behind, Only the Arts and Humanities: Emerging Inequalities in Education Fifty Years After *Brown*

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*In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.*¹

I. INTRODUCTION

Lucinda Todd understood the influence of music on a child's education. She realized that by experiencing music, a student grasps a world of logic, creativity, and order. In turn, the mysteries of mathematics, science, and language reveal themselves to the young mind. Lucinda firmly believed her musically-inclined daughter deserved an opportunity to experience that magic.² Yet Lucinda's daughter was an African-American in segregated Topeka, Kansas. Only the white schools in the Topeka school district offered musical instruction.³ Lucinda's request was simple: allow her daughter to attend a school where she would have the same opportunity to learn music as white children. When the district denied her request, Lucinda became the first plaintiff in the landmark decision handed down by the United States Supreme Court abolishing the doctrine of "separate but equal" education.⁴ Fifty years later, *Brown v. Board of Education*⁵ continues to challenge America to provide an equal educational opportunity to every child within her realm.

Several generations later, the halls of Congress echoed with debate over the status of education in the nation. Recognizing continued inequalities in education since *Brown*, President George W. Bush introduced a major overhaul of federal education funding.⁶ With bi-

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1. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

2. Bill Blankenship, *KTWU-Produced Documentary Explores Nuances of the School Desegregation Case's History*, TOPEKA CAP. J., May 2, 2004, at F3.

3. Ric Anderson, *Faces of Brown – Sacrifice For Duty*, TOPEKA CAP. J., May 17, 2004, at 8A.

4. *Id.*

5. 347 U.S. at 483.

6. See Center on Education Policy, *From the Capital to the Classroom: Year 2 of the No Child Left Behind Act* 12 (Jan. 2004), at <http://www.ctredpol.org/pubs/nclby2> [hereinafter *Center on Education Policy*].

partisan support, Congress enacted the No Child Left Behind Act⁷ (NCLBA or Act) in 2002 to “challenge the soft bigotry of low expectations.”⁸ Congress intended to ensure that all children, regardless of their race, income, or background, would have an equal opportunity to learn. Describing the reform, President Bush stated, “The premise of the NCLB Act is simple: all children can learn, and the only way to make sure our children are learning is to measure their progress with tests.”⁹

Two years after its enactment, schools and states are beginning to feel the impact of the NCLBA. Accompanying the positive reports of increasing test scores, a less pleasant realization dawns on America. An emerging effect of the NCLBA is an unequal education for America’s disadvantaged children which violates the promise of *Brown*. First, the NCLBA disproportionately burdens America’s poorest schools. In reaction to this burden, impoverished districts are forced to eliminate funding for the arts and humanities. Such cuts occur even as recent studies reveal the benefits of education in the arts, including greater cognitive ability and better performance on core subjects. As the poorest schools have a higher proportion of minority, low-income, and limited English proficiency students, the country’s most disadvantaged children are deprived of the opportunity to experience the benefits afforded by a balanced education. The unfortunate result of the NCLBA is an unequal education for disadvantaged students, dismantling the promise of *Brown*.

To begin an analysis of the NCLBA’s emerging inequalities, Part II of this note will examine the monumental mandate of *Brown*; the federal education programs enacted to realize *Brown*’s vision; and the workings of the NCLBA. Next, Part III-A will detail how the NCLBA disproportionately burdens low-income schools which are primarily attended by disadvantaged students. As Part III-B describes, the NCLBA causes these schools to react by slashing classes in the arts, despite research showing the arts’ importance in education. Therefore, the NCLBA deprives disadvantaged students of an equal education in violation of *Brown*’s vision. Finally, Part III-C will recommend both legal and legislative courses of action advocates can utilize to ensure that the NCLBA fulfills *Brown*’s promise.

7. Pub. L. No. 107-110, 115 Stat. 1425 (2002).

8. President’s Remarks at Hyde Park Elementary in Jacksonville, 39 PUB. PAPERS 37 (Sept. 9, 2003).

9. President’s Radio Address, 39 PUB. PAPERS 37 (Sept. 6, 2003).

II. BACKGROUND

A. *Brown Revisited*

When Lucinda Todd signed on as plaintiff in *Brown*, a system of “separate but equal” education had existed through much of America for over fifty years. In the infamous *Plessy v. Ferguson*¹⁰ decision of 1896, the United States Supreme Court held that segregation by race did not violate Thirteenth and Fourteenth Amendment protections.¹¹ A system of apartheid set in across the land, with markedly inferior facilities and fewer educational opportunities for non-white students. Through a series of coordinated lawsuits, the National Association for the Advancement of Colored People (NAACP) Legal Defense and Education Fund steadily waged war on “separate but equal.”¹² With Lucinda Todd and others as plaintiffs, *Brown* finally gave the NAACP its chance to eradicate the degrading doctrine.

On May 17, 1954, a unanimous Court announced that its “separate but equal” doctrine, which had reigned for half a century, had no place in the field of public education.¹³ If a state chose to provide public schooling, all students had a right to enjoy that education on equal terms.¹⁴ Despite the monumental holding, the Court gave school districts a general order to desegregate with “all deliberate speed,”¹⁵ which resulted in a drive towards equality that “was more deliberate than speedy.”¹⁶ Angered with the slow progress, civil rights and educational advocates turned towards Congress to help reach *Brown*’s goals. Thus began the federal government’s intervention in public education, laying the foundation for the NCLBA.

B. *Early Federal Education Programs*

While sweeping in its breadth, the NCLBA was a direct descendent of a long line of federal programs designed to better equalize educational achievement in American public schools. Although education had traditionally been a bastion of state autonomy, the federal government increasingly stepped into the fray throughout the past fifty years. Beginning with President Lyndon B. Johnson’s “War on Poverty,” the federal government enacted programs to give educa-

10. 163 U.S. 537 (1896).

11. *Id.* at 543, 548.

12. Kevin D. Brown, *Brown v. Board of Education: Reexamination of the Desegregation of Public Education From the Perspective of the Post-Desegregation Era*, 35 U. TOL. L. REV. 773, 783 (2004).

13. *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).

14. *Id.* at 493.

15. *Brown v. Bd. of Educ.*, 349 U.S. 294, 301 (1955).

16. Anne Randall, Note, *Reclaiming Brown’s Vision: A New Constitutional Framework For Mandating School Integration*, 10 GEO. J. ON POVERTY L. & POL’Y 363, 366 (2003).

tional opportunities to disadvantaged students and reinforce the equal rights aims of *Brown*.¹⁷

The Elementary and Secondary Education Act¹⁸ (ESEA) was implemented in 1965. Title I of the ESEA provided federal funds for remedial educational services for school districts with large percentages of disadvantaged students.¹⁹ Since its inception, Title I was the federal government's primary education program to assist economically disadvantaged students.²⁰ The program's goal was to reduce educational funding disparities between at-risk students and their economically advantaged peers.²¹

Amidst charges that the ESEA's Title I funding yielded little results, Congress revised the law with the Improving America's Schools Act of 1994 (IASA).²² To ensure schools properly utilized funds, the IASA introduced accountability provisions into Title I funding using standardized assessments.²³ Unfortunately, the IASA lacked the muscle to hold the states accountable for educational results.²⁴ To address these concerns, President George W. Bush proposed changes in federal education involvement. Passed with enormous fanfare and overwhelming bipartisan support, the NCLBA was signed into law by the President in January 2002.²⁵

C. *No Child Left Behind*

The revolutionary NCLBA reauthorizes the ESEA, but with dramatic changes. Congress enacted the law to plug perceived holes in the enforcement of Title I funding under the ESEA and IASA.²⁶ Under the NCLBA, states and school districts have to comply with

17. David Nash, Note, *Improving No Child Left Behind: Achieving Excellence and Equity in Partnership With the States*, 55 RUTGERS L. REV. 239, 244 (2002).

18. Pub. L. No. 89-10, 79 Stat. 27 (1965) (current version at 20 U.S.C. §§ 6301-7941 (Supp. I 2001)).

19. Secretary Rod Paige, Remarks at the Cato Institute Regarding the 50th Anniversary of the *Brown v. Board of Education* Decision (May 11, 2004), at <http://www.ed.gov/news/speeches/2004/05/05112004.html>; Nash, *supra* note 17, at 245.

20. GAIL L. SUNDERMAN & JIMMY KIM, HARV. UNIV. CIVIL RIGHTS PROJECT, EXPANSION OF FEDERAL POWER IN AMERICAN EDUCATION: FEDERAL-STATE RELATIONSHIPS UNDER THE NO CHILD LEFT BEHIND ACT, YEAR ONE 16 (2004), at <http://www.civilrightsproject.harvard.edu/research/esea/nclb.php> [hereinafter SUNDERMAN & KIM, EXPANSION OF FEDERAL POWER].

21. *Id.*

22. Pub. L. No. 103-382, 108 Stat. 3518 (1994) (current version at 20 U.S.C. §§ 6301-7941 (Supp. I 2001)).

23. Nash, *supra* note 17, at 247.

24. For example, by 2001, only eleven states were in compliance with Title I requirements. Memorandum from Education Secretary Rod Paige, to Editorial Writers (Mar. 11, 2004), at <http://www.ed.gov/news/opeds/edit/2004/03112004.html>.

25. GARY ORFIELD, *Introduction to GAIL L. SUNDERMAN & JIMMY KIM, HARV. UNIV. CIVIL RIGHTS PROJECT, INSPIRING VISION, DISAPPOINTING RESULTS: FOUR STUDIES ON IMPLEMENTING THE NO CHILD LEFT BEHIND ACT 1, 2* (2004), at <http://www.civilrightsproject.harvard.edu/research/esea/nclb.php> [hereinafter ORFIELD, INSPIRING VISION, DISAPPOINTING RESULTS]. Interestingly, despite making the NCLBA a cornerstone of his presidency, President Bush admitted he had not read the bill before signing it. *Id.* at 1.

26. Nash, *supra* note 17, at 253-54.

detailed obligations in order to receive Title I funds.²⁷ President Bush explained, “The era of low expectations and low standards is ending; a time of great hopes and proven results is arriving.”²⁸ To its proponents, the law mirrors the vision of *Brown* by raising the expectations of Title I funding to emphasize equality in educational results.²⁹ The stated purpose of the NCLBA is to ensure that “all children have a fair, equal, and significant opportunity to obtain a high-quality education and reach, at a minimum, proficiency on challenging State academic achievement standards and State academic assessments.”³⁰

A major difference initiated by the NCLBA is that now all students are tested,³¹ not just those attending Title I schools.³² Its framework relies on the concepts of state educational plans, standardized testing, reporting results, and holding schools and districts accountable for academic shortcomings.

Beginning with state educational plans, the NCLBA attempts to balance a state’s traditional autonomy over education with the federal government’s desire to achieve results for its dollars.³³ The law allows each state to draft its own education plan and submit it to the Department of Education.³⁴ Although allowing a state flexibility in drafting its plan, the NCLBA requires that the plan include “challenging academic content standards and challenging student academic achievement standards.”³⁵ Additionally, each plan must contain academic standards for math, reading or language arts, and science.³⁶

Accompanying the education plan requirement, the NCLBA requires each state to implement an accountability system ensuring that public schools and districts make “adequate yearly progress” (AYP).³⁷ While a state can create its own definition of AYP, the NCLBA requires that the definition of AYP “results in continuous and substantial academic improvement” measured by assessments.³⁸ The significance of “continuous and substantial academic improvement” is

27. Symposium, *What Are the Likely Impacts of the Accountability Movement on Minority Children?: The Federal No Child Left Behind Act and the Post-Desegregation Civil Rights Agenda*, 81 N.C. L. REV. 1703, 1721 (2003) [hereinafter *Likely Impacts*].

28. President’s Remarks on Implementation of the No Child Left Behind Act, 39 WEEKLY COMP. PRES. DOC. 24 (June 10, 2003).

29. SUNDERMAN & KIM, EXPANSION OF FEDERAL POWER, *supra* note 20, at 16.

30. 20 U.S.C. § 6301 (Supp. I 2001).

31. *Id.* § 6311(b)(1)(B) (Supp. I 2001).

32. Only schools accepting Title I money, however, can be sanctioned under the NCLBA’s accountability provisions. Scott Young, *The Challenges of NCLB: Some Requirements of the No Child Left Behind Act Are Causing More Chaos Than Cures and Driving Teachers, Parents and Administrators Mad*, STATE LEGISLATORS, Dec. 1, 2003, at 24.

33. *See* 20 U.S.C. § 6311.

34. *Id.* § 6311(a)(1).

35. *Id.* § 6311(b)(1)(A).

36. *Id.* § 6311(b)(1)(C).

37. *Id.* § 6311(b)(2)(A).

38. *Id.* § 6311(b)(2)(C)(iii)-(iv).

that a state must set goals for all public school children, including specific goals for minorities, the economically disadvantaged, the disabled, and the limited English proficient.³⁹ As Education Secretary Rod Paige stated, “[T]he success of schools is now being measured on the academic achievement of all students so that children who need help aren’t hidden in averages.”⁴⁰ Using data from the 2001-2002 school year as a baseline, the NCLBA requires that all students in each group meet the “proficient” level on state assessments within twelve years.⁴¹

Measuring student achievement is vital to ensuring that a state meets its proficiency goals. The NCLBA requires each state to implement a system of yearly academic assessments in math, reading or language arts, and science.⁴² To ensure that the results accurately reflect reality, the NCLBA requires that 95% of students in each subgroup take the assessment.⁴³ The law also requires each state to distribute the results of the assessments by creating a report card for each school in every district, broken down by individual subgroups.⁴⁴ President Bush remarked, “[W]e want to take a look at every single possible group of citizens to determine whether or not we are meeting the high standards that we believe so strongly in our hearts.”⁴⁵

Based on the results of these assessments, the NCLBA requires a district to identify a school as needing “improvement” if it fails to make AYP for two consecutive years.⁴⁶ Then, even if only one subgroup within a school fails to meet AYP, the entire school is designated as needing improvement.

Without an enforcement mechanism, however, the NCLBA would likely fade into obscurity as another ineffective federal education program. Yet the NCLBA has a bite that prior funding programs lacked. Congress granted the United States Department of Education a broad range of options to intervene in order to enforce the law, including penalties for schools failing to make AYP.⁴⁷

39. *Id.* § 6311(b)(2)(C)(v).

40. Memorandum from Education Secretary Rod Paige, to Editorial Writers, *supra* note 24.

41. 20 U.S.C. § 6311(b)(2)(E), (F).

42. *Id.* § 6311(b)(3)(A). States, however, have until the 2007-2008 school year to meet the science standards requirement. *Id.*

43. *Id.* § 6311(b)(2)(I)(ii). There is a limited exception if a subgroup shows progress and makes improvement on another “academic indicator.” *Id.*

44. Erin Kucerik, *The No Child Left Behind Act of 2001: Will it Live Up to its Promise?*, 9 GEO. J. ON POVERTY L. & POL’Y 479, 480-81 (2002).

45. President’s Remarks at Hyde Park Elementary in Jacksonville, *supra* note 8, at 37.

46. 20 U.S.C. § 6316(b)(1)(A) (Supp. I 2001).

47. Symposium, *Challenging Racial Disparities: The Promise and Pitfalls of the No Child Left Behind Act’s Race-Conscious Accountability*, 47 How. L.J. 243, 250 (2004) [hereinafter *Challenging Racial Disparities*]. While the reporting requirements of the NCLBA apply to all schools, only those schools accepting Title I federal funds are sanctioned. Young, *supra* note 32.

Intervention begins with mild repercussions, including the requirement that a school create an improvement plan and grant a school choice provision where children can transfer to another school within the district.⁴⁸ After this point, the penalties increase. Once the Department of Education labels a school as needing “improvement” for three consecutive years, the school must provide supplemental education services.⁴⁹ These services involve providing remedial help to struggling students in tested subjects, usually on an individual basis.⁵⁰ The enforcement provisions of the NCLBA intensify after three years of “improvement” status, including replacing school staff, appointing outside consultants, reorganizing schools, reopening as a charter school, and even privatizing the schools.⁵¹

D. *Debate Over the NCLBA*

Two years after its passage, the effects of the NCLBA are beginning to ripple throughout the nation’s education system. The law has drawn its share of praise and criticism. Beginning with praise, proponents argue that recent test scores exemplify the NCLBA’s success, as math scores are up nine points for fourth graders and five points for eighth graders nationwide.⁵² Additionally, proponents contend that most Americans support concepts of improving teacher quality and early reading education.⁵³ Other supporters praise the NCLBA’s promotion of a demanding educational environment and high achievement requirements for all students.⁵⁴ Since the failure of any racial, low-income, ethnic, or disabled group of students now triggers accountability,⁵⁵ proponents argue that accountability ensures that achievement gaps in public education will no longer be ignored.⁵⁶ Indeed, some commentators have even argued that the NCLBA’s accountability provisions are some of the strongest legislative remedies to racial inequality since the Civil Rights Act of 1964.⁵⁷

48. 20 U.S.C. § 6316(b)(3), (b)(1)(E). The NCLBA, however, contains a safe harbor provision stating intervention is not required for groups needing improvement if their failing rates have reduced by at least 10% and improved on at least one academic measure. *Id.* § 6311(b)(2)(I)(i).

49. *Id.* § 6316(b)(9)-(10).

50. See U.S. DEPARTMENT OF EDUCATION, SUPPLEMENTAL EDUCATIONAL SERVICES: NON-REGULATORY GUIDANCE, (Aug. 22, 2003), available at <http://www.ed.gov/policy/elsec/guid/suppsvsguid.doc>.

51. 20 U.S.C. § 6316(b)(7)(C)(iv), (b)(8)(B).

52. President’s Radio Address, 40 WEEKLY COMP. PRES. DOC. 2A (Jan. 12, 2004).

53. ORFIELD, INSPIRING VISION, DISAPPOINTING RESULTS, *supra* note 25, at 1.

54. *Id.*

55. 20 U.S.C. § 6311(b)(2)(C)(v)(II) (Supp. I 2001).

56. Kucerik, *supra* note 44, at 485. Although racial data was required under the ESEA in 1994, it was never enforced and often the district’s aggregate test scores met state standards eliminating any problems. *Challenging Racial Disparities*, *supra* note 47, at 260.

57. *Challenging Racial Disparities*, *supra* note 47, at 246. This note will take issue with this argument. See *infra* Part III.A-B.

Together with praise, the NCLBA has elicited scathing criticism from officials in education and state government. A common complaint among educators is that the federal government acted unilaterally in passing and implementing the Act. School officials and experts in education contend that they were largely excluded from drafting and implementing the law.⁵⁸ Gary Orfield, author of a study on the NCLBA, explained, "A reasonable stance of the administration would have been one of consultation and flexibility together with assessment and feedback."⁵⁹ Instead, critics argue that the Department of Education has taken a "command and control posture" that insults education officials who disagree with its methods.⁶⁰

Beyond criticism of unilateralism, the NCLBA is increasingly under attack as an unfunded mandate by state legislatures and education officials of both political parties. Congress authorized over \$13 billion for Title I education grants under the Act for fiscal year 2002.⁶¹ Over the following five years, the authorized grants increased to \$25 billion dollars for fiscal year 2007.⁶² Critics point out, however, that the Bush Administration has allocated billions of dollars less than Congress authorized for the program.⁶³ While the Act gives states money to implement assessment requirements, opponents contend that it fails to address the additional administrative costs required.⁶⁴ Coupled with state money problems due to dramatic tax cuts and a national recession,⁶⁵ critics argue that the NCLBA has dramatically increased costs to schools and the states that support them. Education officials worry that over the past few years, growth in federal education spending has fallen far below the level achieved during the pre-NCLBA era.⁶⁶

Viewed from another perspective, state officials argue the NCLBA is too costly. The Ohio state legislature prepared a report in January 2004 estimating that the cost of complying with the Act ex-

58. See SUNDERMAN & KIM, EXPANSION OF FEDERAL POWER, *supra* note 20, at 6.

59. ORFIELD, INSPIRING VISION, DISAPPOINTING RESULTS, *supra* note 25, at 4.

60. SUNDERMAN & KIM, EXPANSION OF FEDERAL POWER, *supra* note 20, at 7. For example, Education Secretary Rod Paige recently called the National Education Association a "terrorist organization" for its opposition to portions of the NCLBA. Sam Dillon, *Education Chief Again Apologizes For "Terrorist" Remark*, N.Y. TIMES, Mar. 2, 2004, at A1.

61. 20 U.S.C. § 6302(a)(1) (Supp. I 2001).

62. *Id.* § 6302(a).

63. David Goodman, *Class Dismissed*, MOTHER JONES, May/June 2004, at 41, 43 (stating that over the past four years, President Bush allocated \$30 billion less for the NCLBA than Congress authorized); *Challenging Racial Disparities*, *supra* note 47, at n.9 (explaining that in 2003 alone, Bush proposed a \$12.35 billion budget for the NCLBA grants, \$6 billion less than Congress authorized); Jennifer McGee, *Congressional Leaders Make Education Funding a Top Domestic Priority*, 26 NATION'S CITIES WEEKLY 1 (Nov. 24, 2003) (stating that for fiscal year 2004, the NCLBA was funded \$8.4 billion below what was authorized).

64. SUNDERMAN & KIM, EXPANSION OF FEDERAL POWER, *supra* note 20, at 9.

65. ORFIELD, INSPIRING VISION, DISAPPOINTING RESULTS, *supra* note 25, at 4.

66. SUNDERMAN & KIM, EXPANSION OF FEDERAL POWER, *supra* note 20, at 6.

ceeded the additional federal revenue by \$1.5 billion annually.⁶⁷ Meanwhile, the Utah legislature endorsed a study to determine the feasibility of forgoing federal education funds to avoid complying with the NCLBA.⁶⁸ Seventeen state legislatures endorsed bills protesting the Act,⁶⁹ and the National Governor's Association recently criticized the law as an unfunded mandate.⁷⁰

Over and above complaints of unilateralism and inadequate funding, opponents criticize the NCLBA's accountability provisions as subjective; leaving out important indicators of educational achievement. First, educators argue that graduation rates are brushed aside. The Department of Education's regulations allow graduation rates to be inferior for any particular group without triggering federal intervention.⁷¹ In fact, as critics point out, Secretary Paige issued regulations stating that graduation rates did not have to be divided into particular subgroups.⁷² In addition to ignoring graduation rates, opponents argue that the Act does not hold schools accountable for the test scores of students who do not attend for the entire year.⁷³ Critics of the NCLBA contend that the failure to account for students who do not attend the full year encourages schools to pressure low performing students out of school to boost performance on assessments.⁷⁴

Along with these concerns, education officials worry that schools will react to the NCLBA by "teaching the test." More specifically, educators argue that schools will concentrate on teaching exam techniques and will teach only the assessed material, rather than encouraging students to truly learn the subject matter.⁷⁵ Opponents point out that research already shows that schools are spending valuable time and money "teaching the test" to meet the Act's proficiency levels.⁷⁶ At the same time, they argue that the cost of days lost to test preparation and instruction not related to general learning are incalculable.⁷⁷

Beyond these common criticisms of the NCLBA, various aspects of its statute and implementation cause many individuals concern. Opponents point to studies revealing that by allowing individual states to create their own education plans, the Act actually dilutes educa-

67. ORFIELD, *INSPIRING VISION, DISAPPOINTING RESULTS*, *supra* note 25, at 5.

68. SUNDERMAN & KIM, *EXPANSION OF FEDERAL POWER*, *supra* note 20, at 38.

69. Goodman, *supra* note 63, at 41, 43.

70. SUNDERMAN & KIM, *EXPANSION OF FEDERAL POWER*, *supra* note 20, at 38.

71. *Challenging Racial Disparities*, *supra* note 47, at 264.

72. 34 C.F.R. 200.19(d)(2) (2003). However, if the safe harbor provision discussed previously is utilized, graduation rates must be divided into subgroups. *Id.*

73. See 20 U.S.C. § 6311(b)(3)(C)(xi) (Supp. I 2001).

74. *Challenging Racial Disparities*, *supra* note 47, at 291.

75. Kucerik, *supra* note 44, at 482. This may result in causing students to lose interest in school and learning. *Id.*

76. *Challenging Racial Disparities*, *supra* note 47, at 284.

77. ORFIELD, *INSPIRING VISION, DISAPPOINTING RESULTS*, *supra* note 25, at 5.

tional standards.⁷⁸ Others worry that the Act undermines public schools in an effort to speed up privatization of the educational system.⁷⁹ Meanwhile, in the legal world debate rages as to whether the NCLBA violates the separation of church and state⁸⁰ and disrupts school desegregation orders.⁸¹ Finally, administrators worry that the assessments are important to school districts while insignificant to students.⁸²

To date, the Department of Education has issued tepid responses to the criticisms of the NCLBA. The Department relaxed requirements for certain subgroups, including limited English proficiency students and those with disabilities.⁸³ Nevertheless, two years later, the Act remains predominantly intact and strictly construed by the Department.

III. ANALYSIS

Two years after the enactment of the NCLBA, communities are beginning to realize its deep impact across the educational spectrum. In addition to the vast array of praise and criticism, the law has caused a disturbing trend of unequal educational opportunities for disadvan-

78. *Challenging Racial Disparities*, *supra* note 47, at 283-84. With fifty different state education systems and wide variations in capabilities, sizes, and traditions, the NCLBA recognizes a need to allow flexibility between state plans. See SUNDERMAN & KIM, EXPANSION OF FEDERAL POWER, *supra* note 20, at 5. This flexibility, however, ensures that the most successful states under the NCLBA are those that have the lowest standards of proficiency. ORFIELD, INSPIRING VISION, DISAPPOINTING RESULTS, *supra* note 25, at 5. In fact, the average proficiency rates in failing schools in one state are often higher than schools meeting AYP in other states. JIMMY KIM & GAIL L. SUNDERMAN, HARV. UNIV. CIVIL RIGHTS PROJECT, LARGE MANDATES AND LIMITED RESOURCES: STATE RESPONSE TO THE NO CHILD LEFT BEHIND ACT AND IMPLICATIONS FOR ACCOUNTABILITY 24 (2004), at <http://www.civilrightsproject.harvard.edu/research/esea/nclb.php> [hereinafter KIM & SUNDERMAN, LARGE MANDATES].

79. See *Challenging Racial Disparities*, *supra* note 47, at 276 (stating that politicians are using the NCLBA's accountability standards to undermine public schools by labeling thousands of public schools as "failing"); *Likely Impacts*, *supra* note 27, at 1726 (explaining that individuals believe the true purpose of the NCLBA is to speed up privatization of schools by exposing the inability of schools to meet annual improvement goals).

80. William Dolan, *No Child Left Behind's Faith-Based Initiative Provision and the Establishment Clause*, 33 J. L. & EDUC. 1, 1 (2004) (stating that the NCLBA's use of faith-based organizations to implement its programs raises concerns about the separation of church and state).

81. Cathryn Vaughn, Note, *The School Choice Provision of the No Child Left Behind Act and its Conflict With Desegregation Orders*, 13 B.U. PUB. INT. L.J. 79, 79, 86 (2003) (explaining how the NCLBA's school choice provision allowing students in schools needing improvement to transfer to another school may conflict with school desegregation orders).

82. See *All Things Considered: Encouraging High School Students to Take the Achievement Tests Required By No Child Left Behind* (NPR radio broadcast, Apr. 12, 2004). Officials worry that the result of the NCLBA is low-stakes testing for students and high-stakes testing for adults. *Id.* Schools are resorting to bribing students with high test scores with shirts, pizza parties, color televisions, and scholarships. *Id.* Additionally, students have discovered the potential for blackmail inherent in the exams. In Tacoma, Washington, students threatened to boycott the assessments unless their school retained classes that were scheduled to be modified. *Id.*

83. NATIONAL EDUCATION ASSOCIATION, ASSESSING LIMITED ENGLISH PROFICIENT STUDENTS, at <http://www.nea.org/esea/nclblepassess.html> (last visited Oct. 28, 2004); NATIONAL EDUCATION ASSOCIATION, ASSESSING STUDENTS WITH DISABILITIES, at <http://www.nea.org/esea/nclbdisabilitiesflex.html> (last visited Oct. 28, 2004).

tagged students, in violation of *Brown's* promised educational equality. First, low-income schools, which are primarily comprised of minority, limited English proficiency, and disadvantaged students, are disproportionately burdened by the NCLBA. In response, impoverished schools must make dramatic cuts to their art and humanities curriculum in order to direct scarce resources towards tested subjects. As classes in the arts reinforce the core subjects while instilling creativity and cognitive ability, the Act deprives disadvantaged students of an equal education. Taken together, the NCLBA results in unequal educational opportunities that severely dismantle the vision of *Brown*.

A. *The NCLBA Disproportionately Burdens the Poorest Schools*

To understand how the NCLBA results in unequal educational opportunities requires a glimpse into America's poorest schools. Often these schools are in urban areas due to an unequal property tax base that directs fewer resources to urban schools than their suburban counterparts.⁸⁴ Students attending urban schools are disproportionately poor compared to suburban students.⁸⁵ Meanwhile, as white families continue to flee urban areas for the alleged safety of the suburbs, the resulting demographics and residential patterns reveal a re-segregated America.⁸⁶

Today, public schools in the nation's one hundred largest cities are predominately minority.⁸⁷ Two thirds of African-American students attend urban schools, while only one quarter of white students do.⁸⁸ A study conducted by Harvard University's Civil Rights Project analyzed public schools in six urban areas, including Los Angeles, Chicago, Atlanta, and New York City.⁸⁹ The study revealed that minority and low-income students in each of the districts ranged from 72 to 90% of total enrollment.⁹⁰ Half of the students in these urban schools receive federal meal subsidies.⁹¹

To date, most high-poverty schools targeted by Title I programs are primarily minority schools in overwhelmingly minority districts.⁹² Indeed, an examination of America's poorest schools uncovers a

84. Kimberly D. Bartman, Comment, *Public Education in the 21st Century: How Do We Ensure That No Child Is Left Behind?*, 12 TEM. POL. & CIV. RTS. L. REV. 95, 96 (2002).

85. *Id.*

86. Vaughn, *supra* note 81, at 84.

87. See *Challenging Racial Disparities*, *supra* note 47, at 256.

88. Bartman, *supra* note 84, at 96.

89. GAIL L. SUNDERMAN & JIMMY KIM, HARV. UNIV. CIVIL RIGHTS PROJECT, INCREASING BUREAUCRACY OR INCREASING OPPORTUNITIES?: SCHOOL DISTRICT EXPERIENCE WITH SUPPLEMENTAL EDUCATIONAL SERVICES, 12 (2004), at <http://www.civilrightsproject.harvard.edu/research/esea/nclb.php> [hereinafter SUNDERMAN & KIM, INCREASING BUREAUCRACY].

90. *Id.*

91. *Id.*

92. SUNDERMAN & KIM, EXPANSION OF FEDERAL POWER, *supra* note 20, at 5.

mostly urban, minority, and disadvantaged educational landscape brimming with at-risk students.

With this backdrop in mind, to its proponents, the underlying idea of the NCLBA was to better realize *Brown's* promise of equality for all students. High poverty schools would receive better teachers and additional money from the federal government.⁹³ This would further the original goal of Title I programming, to reduce disparities in funding between at-risk students and their advantaged peers.⁹⁴ To the dismay of optimistic communities, the NCLBA has instead disproportionately burdened high poverty schools, undermining the goal of Title I funding.

The law's assault on impoverished schools comes from several fronts. First, by holding poor schools accountable for higher numbers of subgroups, low-income districts are struck harder by the law. Second, the NCLBA disproportionately increases education costs to traditionally disadvantaged urban schools through its supplemental instruction and school choice provisions.

To begin, the use of subgroups by the NCLBA disproportionately burdens low-income schools. The law uses the concept of subgroups so that the educational progress of disadvantaged students will not be "hidden in averages."⁹⁵ Once a school has thirty students of a particular category, it must account for a subgroup.⁹⁶ The failure of any subgroup triggers accountability under the Act, whether the group is comprised of racial/ethnic, low-income, or disabled students.⁹⁷ Therefore, the more diverse the school is, the more subgroups that the institution must account for.⁹⁸

Due to this greater accountability, schools enrolling subgroups including minority, low-income, and limited English proficiency students are more likely to need improvement under the NCLBA than less diverse schools without multiple subgroups.⁹⁹ For example, in Illinois and New York, schools needing improvement had two times as many students who were minority, limited English proficiency, and low-income than schools meeting the requirements.¹⁰⁰ Similarly, a study in California revealed that schools needing improvement had a greater chance of containing African-American, Latino, limited English proficiency, and economically disadvantaged subgroups.¹⁰¹

93. ORFIELD, INSPIRING VISION, DISAPPOINTING RESULTS, *supra* note 25, at 6.

94. SUNDERMAN & KIM, EXPANSION OF FEDERAL POWER, *supra* note 20, at 16.

95. Memorandum from Education Secretary Rod Paige, to Editorial Writers, *supra* note 24.

96. Young, *supra* note 32.

97. 20 U.S.C. § 6311(b)(2)(C)(v)(II) (Supp. I 2001).

98. Young, *supra* note 32.

99. KIM & SUNDERMAN, LARGE MANDATES, *supra* note 78, at 14.

100. *Id.* at 7, 27.

101. *Id.* at 8.

There is also a strong correlation between minorities, poverty, and language ability.¹⁰² As low-income schools are disproportionately comprised of each of these groups, they have a higher burden to meet proficiency under the NCLBA. Therefore, disadvantaged schools are at a greater risk of receiving a needing improvement designation.

To make matters worse for impoverished schools, the NCLBA requires that schools assess at least 95% of the students in every subgroup to avoid sanctions.¹⁰³ The result is that schools having a disproportionate number of subgroups have a higher burden, especially when considering the strong correlation between subgroups.¹⁰⁴ “Since these subgroup categories are not mutually exclusive, a single student can count for multiple subgroups”¹⁰⁵ For example, consider a student who recently emigrated with her family from Haiti and now attends a New York City public school. The child would likely qualify as an ethnic or racial minority, an economically disadvantaged, and a limited English proficiency student. Therefore, assuming the school has enough students to comprise each of these categories, one child’s score on the NCLBA assessments would count under three separate subgroups.

Consequently, a few children missing or faring poorly on the exams could skew the school’s results if they happen to fall under multiple subgroups.¹⁰⁶ Schools with a higher enrollment of minority students tend to have more achievement targets than schools with mostly white students, since there is a greater likelihood that these schools contain multiple subgroups and may miss a target due to the scores of a small number of students.¹⁰⁷

While the NCLBA’s stringent subgroup requirements burden low-income districts, other aspects of the law create an additional strain. The accountability provisions adversely impact poor urban schools. Most of the schools needing improvement are in large urban

102. *Id.* at 12-13.

103. 20 U.S.C. § 6311(b)(3)(C)(vii), (b)(2)(I)(ii) (Supp. I. 2001).

104. Nash, *supra* note 17, at 260.

105. KIM & SUNDERMAN, *LARGE MANDATES*, *supra* note 78, at 37.

106. Admittedly, a few students performing above average could skew the results upward if they fall under multiple subgroups. Regardless, research has shown that there is an inverse relationship between poverty and academic results. See 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, 200 (2003). Since there is a high correlation between poverty, minorities, and language ability, a student who falls under several of these subgroups will likely skew the assessment results downward. KIM & SUNDERMAN, *LARGE MANDATES*, *supra* note 78, at 12-13.

107. KIM & SUNDERMAN, *LARGE MANDATES*, *supra* note 78, at 12, 14. As an example, 93% of the schools needing improvement in California contained at least three subgroups, while only 69% of schools meeting AYP contained three subgroups. *Id.* at 8. As the California study reveals, the NCLBA’s use of subgroups causes its sanctions to disproportionately impact low-income schools having the most disadvantaged students. *Id.* at 9-10.

districts.¹⁰⁸ In fact, a recent national study on the NCLBA revealed that schools in urban areas are twice as likely as non-urban areas to be designated as needing improvement.¹⁰⁹ Fifty percent of urban schools had at least one school identified as needing improvement, while only 23% of suburban districts had at least one school designated.¹¹⁰ In New York, 69% of the schools sanctioned in the entire state were in urban New York City.¹¹¹ The study found nearly the same statistics in Illinois, where 66% of schools sanctioned in the state were located in Chicago.¹¹²

While there are numerous reasons urban schools are disproportionately burdened by the NCLBA's accountability provisions, research has consistently shown that a primary reason is the inverse relationship between poverty and academic results.¹¹³ Since urban schools are disproportionately impoverished, their academic performance generally lags behind suburban schools.¹¹⁴ Moreover, schools with a higher concentration of poor students have lower test scores, more inexperienced teachers, and higher dropout rates.¹¹⁵ With a greater number of disadvantaged students, poor urban districts must battle each of these factors while increasingly concentrating on the NCLBA's assessment provisions to survive.

Beyond subgroups and urban impact, the poorest schools also face disproportionate costs in the supplemental instruction and school choice arenas under the Act. The concept that students stuck in failing schools should have a right to attend another school within the district is intuitively appealing. As an initial remedy for schools that need improvement, school choice is a key foundation of the NCLBA.¹¹⁶ The Act forces districts with schools needing improvement to pay the costs necessary to transfer students to other schools in the district.¹¹⁷

Unfortunately, the result of the school choice provision is that it actually harms the poorest schools and the students attending them. First, as already discussed, poor schools disproportionately feel the impact of school choice provisions due to a higher number of schools needing improvement. Second, studies show that low-income parents

108. *Id.* at 27.

109. Press Release, Center on Education Policy, New Report on No Child Left Behind Offers First-Ever Analysis of Implementation Efforts at Federal, State & Local Levels (Jan. 26, 2004) at http://www.ctredpol.org/pubs/nclby2/nclb_press_26jan2004/css/nclb_press_26jan2004.htm [hereinafter Press Release].

110. *Id.*

111. KIM & SUNDERMAN, *LARGE MANDATES*, *supra* note 78, at 27.

112. *Id.*

113. See Winston, *supra* note 106, at 200.

114. Bartman, *supra* note 84, at 96.

115. Winston, *supra* note 106, at 200.

116. 20 U.S.C. § 6316(b)(1)(E) (Supp. I 2001).

117. 34 C.F.R. § 200.44(i) (2003).

do not take advantage of the school choice provisions, while the more affluent and educated do.¹¹⁸ As a result, the NCLBA aggravates the inequalities by requiring districts to reallocate Title I funding so their wealthiest students can transfer to their best schools.¹¹⁹ To make matters worse, the Department of Education issued regulations stating that districts cannot use lack of capacity at receiving schools as an excuse to deny students school choice.¹²⁰ Thus, the NCLBA requires impoverished districts to divert money from their struggling schools in order to enlarge their most successful buildings to make room for transferring students. Taken together, while the school choice provision is appealing at first glance, a closer look reveals that it increases costs to low-income districts while siphoning Title I funding away from its intended recipients.

The supplemental instruction provision of the NCLBA carries the same promise and disappointing results to disadvantaged students. The law provides that after three years of needing improvement, a school district must pay for supplemental instruction for its students.¹²¹ Supplemental instruction entails remedial assistance to students in the tested subjects. When the Department of Education orders supplemental instruction, the school must divert its Title I funding in order to pay the supplemental service provider.¹²² Much of this money is set aside for the immense administrative costs associated with implementing and overseeing supplemental service programs.¹²³ As with the school choice provision, since poorer schools are disproportionately subject to needing improvement status, supplemental instruction costs adversely burden impoverished districts. As the Harvard University Civil Rights Project concluded in its study, supplemental instruction diverts Title I money away from those schools that need it the most.¹²⁴

Proponents of the NCLBA may argue that this disproportional burden on poor schools is necessary to hold underperforming districts accountable for children who would otherwise slip through the cracks.

118. See ORFIELD, *INSPIRING VISION, DISAPPOINTING RESULTS*, *supra* note 25, at 8. Often low-income parents have less information than their wealthier counterparts, resulting in less informed decisions. *Id.*

119. William Mathis, supervisor of several school districts in Vermont, said the NCLBA forces districts to divert money away from their neediest schools to pay for student transfers and supplemental instruction. Michael Dobbs, *More States Are Fighting "No Child Left Behind" Law; Complex Provisions, Funding Gaps in Bush Education Initiative Cited*, WASH. POST, Feb. 19, 2004, at A3.

120. 34 C.F.R. § 200.44(d).

121. 20 U.S.C. § 6316(b)(10)(A).

122. SUNDERMAN & KIM, *INCREASING BUREAUCRACY*, *supra* note 89, at 9-10.

123. *Id.* at 22.

124. *Id.* at 32. The study found that school districts in Arizona, California, Illinois, New York, Virginia, and Georgia all diverted Title I money from needy schools to cover supplemental service costs. *Id.* at 4.

Unfortunately, by failing to provide enough funding to compensate disadvantaged schools for this disparate burden, the Act simply widens the achievement chasm.

Despite billions of dollars authorized for Title I funding and the NCLBA's purpose promising "fair, equal, and significant opportunity" in education,¹²⁵ the law is battering America's most fragile schools. Although the NCLBA's intent was to ensure each child's academic success, the law's harsh subgroup standards, school choice provisions, and supplemental instruction requirements cost the poorest schools dearly. Since schools designated as needing improvement enroll disproportionate numbers of minority, low-income, and limited English speaking students,¹²⁶ the Act burdens the most needy schools and the underprivileged children they serve.

B. *The NCLBA Causes Poor Districts to Eliminate Funding For Arts and Humanities*

After two years, the NCLBA's accountability provisions are in full swing. School districts across America are developing plans and facing sanctions for their schools' failure to meet AYP. Low-income districts, in particular, must respond to the NCLBA's disparate impact in alarming ways. Dependent on federal money, impoverished schools are unlikely to forgo Title I funds.¹²⁷ Instead, schools comply with the Act by eliminating curriculum in the arts and humanities to concentrate on tested subjects. Unfortunately, eliminating the arts at disadvantaged schools deprives children of a balanced education, as studies repeatedly show the positive relationship between the arts and academic success. Actions by low-income districts throughout the nation and at the regional level exemplify the Act's negative effect on education in the arts. The result of the NCLBA is an unequal educational opportunity for disadvantaged students, disarming the promise of *Brown*.

1. Leaving the Arts Behind

In order for schools to meet AYP and avoid sanctions, students must meet proficiency levels in reading and math.¹²⁸ By narrowly restricting proficiency to these subjects, the NCLBA elevates them above all other considerations in gauging academic performance.¹²⁹ In response, schools dependent on Title I funding are structuring their

125. 20 U.S.C. § 6301; 20 U.S.C. § 6302(a) (Supp. I 2001).

126. KIM & SUNDERMAN, LARGE MANDATES, *supra* note 78, at 7.

127. *Center on Education Policy*, *supra* note 6, at 8.

128. 20 U.S.C. § 6311(b)(3)(C)(v)(I) (Supp. I 2001).

129. SUNDERMAN & KIM, EXPANSION OF FEDERAL POWER, *supra* note 20, at 14.

curriculum to align with test standards.¹³⁰ Meanwhile, at the state level, the Act pressures education officials to undermine their commitment to providing a comprehensive education by focusing resources on mandated tested standards while ignoring other subjects in the curriculum.¹³¹

In addition to aligning curriculum to tested subjects, the NCLBA forces struggling low-income districts to “teach to the test.”¹³² Research on standardized testing shows that such accountability provides incentives for districts to replace enriching and advanced curriculum, such as the arts, with test preparation.¹³³ As a result of the Act, educators emphasize strategies in test taking and exclusively drill tested material, as opposed to using teaching methods that encourage creative and independent learning.¹³⁴ A Harvard University Civil Rights Project study revealed that schools with a greater percentage of low-income and minority students are devoting more class time to standardized test preparation than schools with a less diverse student body.¹³⁵ Thus, by focusing on test preparation and aligning their curriculums to concentrate on the Act’s disproportional demands, poor districts must take resources and time away from other areas of the curriculum.

Classes in art, music, foreign language, and history too often first feel the axe of budget cuts. Requiring expensive supplies and smaller classes, these costly programs are vulnerable since they are not tested under the NCLBA. As jazz musician Wynton Marsalis explained, “[States] are spending a fortune to meet the new accountability standards and the [P]resident’s No Child Left Behind Act. And the arts just aren’t something that can be measured with a multiple choice test.”¹³⁶ Thus, despite including the arts in the definition of “core content,”¹³⁷ subjects within this category are the first victims under the Act.

Teachers and educators have recognized the NCLBA’s impact on the arts. A group of teachers recently complained to Education Secretary Paige that the Act has caused districts to narrow their curriculum since the law tests only math and reading, causing schools to

130. Press Release, *supra* note 109.

131. Nash, *supra* note 17, at 262.

132. See *supra* notes 75-76 and accompanying text.

133. *Challenging Racial Disparities*, *supra* note 47, at 284.

134. Kucerik, *supra* note 44, at 482 (stating that opponents of the NCLBA worry that the law will force teachers to concentrate their instruction on test taking strategies instead of teaching independent and critical thinking skills).

135. KIM & SUNDERMAN, *LARGE MANDATES*, *supra* note 78, at 12.

136. Wynton Marsalis, National Press Club Luncheon With Wynton Marsalis, Artistic Director, *Jazz at the Lincoln Center* (Sept. 22, 2003).

137. 20 U.S.C. § 7801(11) (Supp. I 2001).

neglect art and geography.¹³⁸ The Secretary responded to similar criticism stating, “Cutting music and others [sic] arts programs like that is a scapegoat and an alibi. We also know many schools that are simultaneously making achievement in arts as they are against the standards of the Act set by their state.”¹³⁹

Despite the Department of Education’s rhetoric, the NCLBA has proven costly, especially to the nation’s poorest schools. With disproportionate costs, due to high numbers of subgroups, poor urban districts must divert their sorely needed Title I money to transport students between schools and provide costly supplemental instruction.¹⁴⁰ Congress and the Bush Administration’s lack of funding for the Act complicate matters.¹⁴¹ Thus, poor districts must react by “teaching to the test” and concentrating on tested subjects.¹⁴² Ultimately, the schools have no choice but to survive by eliminating classes in non-tested subjects. An examination of budget cuts at the national and regional levels evidence the Act’s effect.

2. The National Scene

After two years of implementing the NCLBA, the mandatory testing provisions have pushed programs in the arts to the margin in schools across America.¹⁴³ Public schools in New York provide a common example. In response to the Act, the Yonkers Public School District increased spending on test preparation while cutting 233 teaching positions and all classes in the arts, athletics, and music.¹⁴⁴ Yonker’s superintendent of schools, Angelo Petrone, stated that although he did not favor cutting arts and music, reading and math are core subjects that are “the meat and potatoes of what we do.”¹⁴⁵

Neighboring New York City public schools faced similar problems with an identical reaction. The low-income, urban district reacted to heightened NCLBA requirements by mandating double periods for math and English while forcing cuts in art, music, and electives.¹⁴⁶

138. Dillon, *supra* note 60.

139. Education Secretary Rod Paige, Address at the National Press Club Luncheon (Sept. 24, 2003) (transcript at <http://www.ed.gov/news/speeches/2003/09/09242003.html>).

140. See *supra* notes 116-124 and accompanying text.

141. See *supra* notes 61-70 and accompanying text.

142. KIM & SUNDERMAN, *LARGE MANDATES*, *supra* note 78, at 12.

143. Swanee Hunt, *The Nourishment of Music*, SCRIPPS HOWARD NEWS SERV., Feb. 25, 2004.

144. NATIONAL EDUCATION ASSOCIATION, *STORIES FROM THE FIELD: CUTS LEAVE MORE AND MORE PUBLIC SCHOOL CHILDREN BEHIND*, at <http://www.nea.org/esea/storiesfromthefield.html> (last visited Oct. 28, 2004) [hereinafter *STORIES FROM THE FIELD*].

145. Richard Lezin Jones, *The Arts, Lost in Yonkers*, N.Y. TIMES, Nov. 19, 2003, at B6.

146. David M. Herszenhorn, *As City Goes Back to School, Bloomberg’s Plan Faces Test*, N.Y. TIMES, Sept. 4, 2003, at A3.

Schools dotting the west coast faced a similar predicament. Public schools in Hillsboro, Oregon recently eliminated two hundred jobs, cut their elementary band program and also reduced staffing for physical education by half in reaction to the Act's costly mandates.¹⁴⁷ Similarly, public schools in Sonoma County, California announced potential cuts in their band program due to the Act's costs.¹⁴⁸

Regardless of the state, the NCLBA's requirements have proven costly to communities. News reports, such as the story that Nebraska public schools are cutting courses in music, art, driver's education, and foreign language to devote money to testing, have proven routine.¹⁴⁹ Costs of implementing the Act are increasingly preventing low-income schools around the country from fully funding balanced curriculum.¹⁵⁰ A recent study funded by the Carnegie Corporation found that schools are teaching more math, science, and reading as a result of the NCLBA.¹⁵¹ At the same time, schools are substantially cutting back on social studies, government, foreign language, geography, and the arts.¹⁵² The report also concluded that districts with large populations of minority students were narrowing their curriculum more than districts with fewer minority students.¹⁵³ The head of the study, Raymond Bartlett, explained, "We're seeing that low-income minority students are being denied the liberal arts curriculum that their more privileged counterparts receive as a matter of course."¹⁵⁴ Taken together, studies reveal that the Act's unimagined result is a dramatic restructuring of priorities in America's poorest schools, removing arts and humanities from a generation of young minds.

3. The Regional Scene

As the NCLBA ripples through America's educational landscape, schools in Kansas have also grappled with the law's impact. Fortunately, Kansas has relatively few schools needing improvement. Only 13% of Kansas schools received the ominous designation last year.¹⁵⁵ Despite successful scores, the NCLBA has proven costly to Kansas

147. Goodman, *supra* note 63, at 44. In response to funding cuts in Oregon schools, communities have found creative fund raising methods to save teaching positions and prevent cuts in art, music, and gym. *Id.* at 46. Methods have included parents selling blood-plasma and local farmers posing nearly nude for a comic pinup calendar. *Id.*

148. STORIES FROM THE FIELD, *supra* note 144. Students reacted to this news by forgoing their allowances and sending the school board one hundred dollars in pennies, nickels, and dimes. *Id.*

149. *Id.*

150. See SUNDERMAN & KIM, INCREASING BUREAUCRACY, *supra* note 89, at 31.

151. Kate Ackerman, *Law Causing Schools to Shift Away From Liberal Arts*, CHATTANOOGA TIMES FREE PRESS, Mar. 9, 2004, at A4.

152. *Id.*

153. *Id.*

154. Mike Bowler, *Liberal Arts May Be Left Behind in Maryland*, BALTIMORE SUN, Mar. 10, 2004, at 2B.

155. Young, *supra* note 32.

schools and its students. The State Board of Education estimated that the Act will cost Kansas an additional \$131 million beyond the increase in federal aid during the 2004-2005 school year.¹⁵⁶ One of the additional costs includes \$6 million for student transportation under the Act's school choice provisions to transport children to other schools within a district.¹⁵⁷ Increasing costs, coupled with stagnant funding at the state level, have resulted in public schools reducing staff, initiating fees for playing sports, and cutting classroom budgets.¹⁵⁸

Public schools in Kansas City, Kansas illustrate the NCLBA's effect. An urban district primarily serving African-American and low-income students, the district has made genuine strides in reaction to the Act.¹⁵⁹ In 2003 alone, three of the district's ten buildings on the Act's school improvement list made sufficient progress to exit the category.¹⁶⁰ All ten schools achieved AYP in reading and the majority met AYP in math.¹⁶¹ Unfortunately, as with many poor urban districts, Kansas City had to account for a large number of subgroups, making compliance with the Act extremely difficult.¹⁶² For the 2002-2003 school year, sanctions required the district to provide school choice to students in ten schools and supplemental instruction to students in three schools.¹⁶³ In response to costly sanctions and stagnated state funding, the district has cut 110 positions to save \$13 million since 2002.¹⁶⁴ Forced to trim an additional \$8 million for the 2004-2005 school year, the school board proposed cuts to middle school athletics, activities, and busing.¹⁶⁵

Only sixty miles to the west along Interstate Seventy, amidst the shimmering state capitol building, the Topeka Public School system continues its work. Fifty years ago, Lucinda Todd challenged the district to open its doors to children of all colors and backgrounds so that

156. Memorandum from Kansas Department of Education, to Senator David Adkins, Chair, Senate Ways and Means Education Subcommittee (Feb. 5, 2004).

157. *Id.*

158. STORIES FROM THE FIELD, *supra* note 144.

159. ELIZABETH PINKERTON ET AL., CENTER ON EDUC. POL'Y, A LOOK INSIDE 33 SCHOOL DISTRICTS: YEAR 2 OF THE NO CHILD LEFT BEHIND ACT, 54 (Feb. 2004), at <http://www.ctredpol.org/pubs/nclby2>. Kansas City public schools are representative of an urban district with a diverse population and needs. Racially, the district is 50% African-American, 25% Hispanic, 21% white, and 4% Asian. *Id.* at 59. Additionally, 75% of students are eligible for free or reduced lunches. *Id.* at 58. Students with disabilities comprise 13% of the student body, while limited English proficiency students also represent 13% of the students. *Id.* at 59.

160. *Id.* at 54.

161. *Id.* at 56.

162. *Id.* Kansas City, Kansas public schools had nine subgroups, four of which did not make AYP in math on the 2003 assessments. *Id.* The four subgroups failing to make AYP were comprised of low-income, limited English proficiency, Asian / Pacific Islander, and African-American students. *Id.*

163. *Id.* at 57.

164. Dawn Bormann, *KCK Schools to Make More Cuts*, KAN. CITY STAR, May 26, 2004, at B-1 to B-2.

165. *Id.*

every student would receive an equal education. Today, the district continues to signify both the dreams and realities of Lucinda's day. An urban school district covering much of the city, the district remains racially diverse.¹⁶⁶ With 63% of its students categorized as economically disadvantaged,¹⁶⁷ the district is representative of America's urban, low-income schools.

Topeka Public Schools have achieved success on recent NCLBA assessments. The district reported gains last year in math and reading proficiency scores, ranging from 2.6% to 16.6%, depending on the age group tested.¹⁶⁸ With numerous subgroups to account for under the Act and continually combating the challenges facing an urban disadvantaged student body, the district is reacting to the law. For the 2004-2005 school year, the district implemented a new elementary math curriculum and mandated that struggling students take an extra class in their failing subject.¹⁶⁹ Consequently, these changes will cost the district an estimated \$1.3 million.¹⁷⁰

Like so many low-income districts, Topeka Public Schools met the NCLBA's costs by grudgingly cutting programs and personnel.¹⁷¹ The district targeted \$6 million in cuts for the 2004-2005 school year, including elementary strings and band, middle school sports, and school nurses.¹⁷² Fortunately, a creative accounting maneuver allowed the district to increase the local mill levy sufficiently to stave off cutting the sports and music programs for the current school year.¹⁷³ Nevertheless, the district was still forced to cut eighty positions and numerous programs from its budget.¹⁷⁴ Ironically, the very programs Lucinda Todd zealously sought from Topeka Public Schools for her daughter's education barely escaped the chopping block in the district's desperation to meet the mandate of the NCLBA.

Meanwhile, the relatively affluent suburban schools outlining Topeka quietly continue educating children in art, history, geography, and music.¹⁷⁵ With 85 to 90% of their students being white and only

166. During the 2002-2003 school year, Topeka was 53% white, 25% African-American, and 16% Hispanic. KANSAS ST. DEP'T OF EDUC., REPORT CARD 2002-2003, at http://online.ksde.org/rcard/county.aspx?cnty_no=089 (last visited Oct. 28, 2004) [hereinafter *Report Card*].

167. *Id.*

168. Barbara Hollingsworth, *USD 501 Test Scores Improve*, TOPEKA CAP. J., May 27, 2004, at 1C [hereinafter Hollingsworth, *USD 501 Test Scores Improve*].

169. *Id.*

170. *Id.*

171. Barbara Hollingsworth, *School Districts Mull Options*, TOPEKA CAP. J., May 11, 2004 at 11A [hereinafter Hollingsworth, *Districts Mull Options*].

172. Hollingsworth, *USD 501 Test Scores Improve*, *supra* note 168.

173. Barbara Hollingsworth, *Sports, Music Spared*, TOPEKA CAP. J., June 4, 2004, at 1A. The district moved its payroll for several positions into a capital outlay fund which was not at its statutorily imposed cap, allowing the district to raise taxes to fund the programs. *Id.*

174. *Id.*

175. This note is not intended to suggest that the NCLBA does not affect suburban schools. For example, the suburban De Soto school district, between Topeka and Kansas City, considered

about 20% being economically disadvantaged, the NCLBA represents a relatively smaller hurdle to Topeka's suburban districts.¹⁷⁶ With less subgroups to account for and safe from costly school choice and supplemental instruction sanctions, the districts can continue providing their mostly white students with an education in the arts and social sciences. Fifty years after Topeka Public Schools delivered *Brown's* mandate for equal educational opportunity to the nation, the district represents the effects of the NCLBA. The law is widening a divide across the nation, where America's disadvantaged students are deprived of equal educational opportunities. While the Act promises that no child is left behind, America's poorest schools are forced to cut art, music, and humanities. Consequently, without the benefits of a balanced education, children *are* left behind.

4. Benefits of a Balanced Education

The NCLBA's disturbing trend on the arts is developing at a time when research shows that students who take electives such as foreign language or music, perform better on core subjects.¹⁷⁷ Music helps children develop their spatial abilities and reading skills, important tools in succeeding in math, science, and language arts.¹⁷⁸ Commenting on cuts in the arts, jazz musician Wynton Marsalis stated,

Now, this isn't culture for culture's sake. We know for a fact that exposing kids to the arts makes a difference not just in their cultural literacy, but in their self-esteem, their academic achievement, their sense of our global heritage and their readiness for the workforce. Just look at the studies. Children who are involved in music pro-

eliminating fifth grade band in order for its students to concentrate on the NCLBA tests. Kimberly Sweet, *Fifth-Grade Band Could Be "No Child" Casualty: De Soto Superintendent Prefers That Band Instruction Time Be Used To Improve Assessment Scores*, KAN. CITY STAR, Feb. 21, 2004, at 4. However, as previously discussed, the NCLBA disproportionately costs urban and low-income districts more due to higher accountability standards. See *supra* Part III-A.

176. *Report Card*, *supra* note 166. Three surrounding suburban districts exemplify the NCLBA divide. Southeast of Topeka, Shawnee Heights school district is only 20% economically disadvantaged and about 15% minority. *Id.* Only 3% of its fourth grade students tested unsatisfactory in math in 2003. *Id.* Similarly, to the north of Topeka, Seaman school district is only 18% disadvantaged and 9% minority. *Id.* Barely 7% of its fourth grade students tested unsatisfactory in math in 2003. *Id.* Finally, to the southwest of the city, Auburn Washburn school district is about 17% economically disadvantaged and 14% minority. *Id.* Only 7% of its fourth graders tested unsatisfactory on the NCLBA's math assessments. *Id.* In comparison, Topeka Public Schools, with 63% of its students economically disadvantaged and 47% minority, had almost 17% of its fourth graders test unsatisfactory on math assessments. *Id.* Due to factors previously discussed, the district will face relatively higher standards due to the NCLBA's mandates, in addition to the challenges of educating more disadvantaged students. The district responded by contemplating cuts in the arts and humanities in order to reinforce the tested subjects. Hollingsworth, *Districts Mull Options*, *supra* note 171. Thus, the Topeka school children would be deprived of balanced educational opportunities that their suburban peers would continue to enjoy.

177. *Lou Dobbs Tonight: Interview With Education Secretary Rod Paige* (CNN television broadcast, Nov. 6, 2003).

178. Wynton Marsalis, *supra* note 136.

grams score more than 100 points higher on the SATs than those who aren't.¹⁷⁹

Meanwhile, the philanthropic Dana Foundation found that the arts stimulate learning in core subjects while encouraging creativity, benefiting overall learning.¹⁸⁰

Beyond the cognitive benefits, researchers in child development believe that the arts expand a student's sense of belonging.¹⁸¹ A McGill University study reported that children who have taken three years of music instruction have higher self-esteem than their counterparts.¹⁸² Finally, commentators contend that the arts provide avenues to success for children who are ignored or forgotten by a traditional education.¹⁸³

With the strong relationship between the arts and the tested subjects, the resulting decline in access to the arts experienced by disadvantaged students in public schools works against the NCLBA's purpose of giving all children equal opportunity "to obtain a high-quality education."¹⁸⁴ The Act actually worsens gaps in achievement that it sought to eliminate by sentencing disadvantaged and minority students to inferior education.¹⁸⁵ The NCLBA accentuates the sharp contrast in educational opportunities between disadvantaged urban school children and affluent suburbia, illustrating that *Brown's* mandate has yet to be met.¹⁸⁶

C. *A Plan of Action*

1. Legal Action

Sadly, in its current form, the NCLBA threatens to dismantle the promise of *Brown*. If proponents of the Act continue to blindly defend the law while a system of "separate and unequal" educational apartheid sets in across the nation, advocates should take legal action. First, advocates can challenge the Act as an unfunded mandate in violation of the statute. Second, citizens can utilize state constitutional equal protection guarantees to challenge the Act's raging inequalities.

179. *Id.* According to the College Entrance Examination Board, which administers the SAT exam, students with a background in the arts score fifty-nine points higher on the verbal portion and forty-four points higher on the math portion of the exam. Charlotte Fox, *Well-Rounded Learning Includes Arts*, ANCHORAGE DAILY NEWS, Mar. 2, 2004, at B4.

180. Sharon Davis Gratto, *Ideas For Success in Arts-Centered Schools*, 105 ARTS EDUC. POL'Y REV. 37 (2004).

181. Bob Hicks, *Art For All, and All For Art*, THE OREGONIAN, Feb. 2, 2003, at D1.

182. Diane C. Persellin, *Research on Music Teaching and Learning During Elementary School Years*, at http://www.music-research.org/Publications/V01N1_research.html (last visited Oct. 28, 2004).

183. Chris Kelly, *Educating America: Fine Arts Instruction Must Not Be Sacrificed*, SUN-SENTINEL, Feb. 21, 2003, at 16.

184. 20 U.S.C. § 6301 (Supp. I 2001).

185. Nash, *supra* note 17, at 241.

186. See Bartman, *supra* note 84, at 95.

Third, advocates can challenge the Act under state constitution “adequate” education guarantees.

a. *Statutory Challenges*

The first course of legal action that advocates could utilize is based on the NCLBA statute itself. As an unfunded mandate, the Act has dramatically increased the costs to state governments and the school districts they operate. The NCLBA explicitly states, however, that communities are not required to use their own funds to implement the law.¹⁸⁷ “Nothing in this Act shall be construed to . . . mandate a State or any subdivision thereof to spend any funds or incur any costs not paid for under this Act.”¹⁸⁸ By passing on the costs to the states and school districts, these bodies must spend their own funds to implement the Act. Therefore, as currently implemented, Congress and the Bush Administration are violating the NCLBA.

Along with violating the funding statute, the NCLBA is failing to meet its stated purpose of ensuring that “all children have a fair, equal, and significant opportunity to obtain a high-quality education.”¹⁸⁹ As disadvantaged students are obtaining an education that is inferior to their privileged counterparts, their education is neither fair nor equal. Moreover, without the educational benefits of the arts, disadvantaged students are deprived of the high quality education promised by the NCLBA.

With these statutory arguments in hand, educational advocates can challenge the NCLBA in federal court. Advocates can seek an injunction¹⁹⁰ against enforcement of the Act or a writ of mandamus¹⁹¹ ordering the Secretary of Education to administer the law in an equitable fashion. Unfortunately, the United States District Court for the District of Kansas recently dismissed a public school teacher’s challenge to the Act, holding that sovereign immunity prevented plaintiffs from suing the United States under the Act.¹⁹² Until more challenges to the NCLBA are made in other federal courts, it remains unclear if sovereign immunity will prevent similar challenges in other states.

187. 20 U.S.C. § 7907(a) (Supp. I 2001).

188. *Id.*

189. 20 U.S.C. § 6301.

190. An injunction is a court order preventing an action. BLACK’S LAW DICTIONARY 629 (7th ed. 2000).

191. Latin for “we command,” a writ of mandamus is a court order to compel a government official to perform his or her duties correctly. *Id.* at 778.

192. *Kegerreis v. United States*, No. 03-2232-KHV, 2003 WL 22327188, at *2 (D. Kan. Oct. 9, 2003).

b. *State Equal Protection Challenges*

Beyond statutory challenges, advocates can utilize equal protection guarantees. Regrettably, federal courts provide little assistance. Despite *Brown's* promise of equal educational opportunity, the federal judiciary has whittled away at the Fourteenth Amendment's equal protection guarantees. Thirty years ago in *San Antonio Independent School District v. Rodriguez*,¹⁹³ the United States Supreme Court held that education was not a fundamental right and therefore was not subject to a higher level of judicial scrutiny.¹⁹⁴ The ruling effectively allowed de facto segregation in American schools.¹⁹⁵ Thus, without the nearly impossible showing of intentional discrimination, the Federal Equal Protection Clause is of little use.

State courts offer more hope for legal challenges to the unequal effects of the NCLBA. Contrary to the Federal Constitution, most state constitutions guarantee a free public education, making it a fundamental right.¹⁹⁶ Since most state equal protection clauses mirror the Fourteenth Amendment and citizens have a fundamental right to a public education, state equal protection challenges are more effective.¹⁹⁷ Numerous state courts have found their public education systems in violation of state equal protection guarantees.¹⁹⁸

With regards to the NCLBA, although states are essentially forced to comply with the law, advocates can utilize state equal protection guarantees to ensure that states provide all students equal educational opportunities. The NCLBA's disproportionate costs on low-income, minority districts induce states and school districts to deprive disadvantaged students of a balanced education. When disadvantaged students are deprived of the opportunity to gain the cognitive and creative benefits of an education in the arts that their privileged counterparts enjoy, students are not enjoying equal protection. This violates students' equal protection rights guaranteed by their state constitutions and can be challenged.¹⁹⁹

193. 411 U.S. 1 (1973).

194. *Id.* at 35.

195. Damian B. Gosheff, Comment, *Brown's Unfulfilled Promise: Education Finance Reform and the Separate But Equal Effect of State Education Clause Remedies – New York as a Model*, 35 U. TOL. L. REV. 889, 889 (2004).

196. *Id.* at 894.

197. *See id.* at 894-95.

198. *Dupree v. Alma Sch. Dist. No. 30*, 651 S.W.2d 90, 91 (Ark. 1983); *Serrano v. Priest*, 557 P.2d 929, 952-53 (Cal. 1976); *Horton v. Meskill*, 376 A.2d 359, 374 (Conn. 1977); *Robinson v. Cahill*, 303 A.2d 273, 277 (N.J. 1973); *Tenn. Small Sch. Sys. v. McWherter*, 851 S.W.2d 139, 156 (Tenn. 1993); *Washakie County Sch. Dist. No. 1 v. Herschler*, 606 P.2d 310, 315 (Wyo. 1980).

199. *See Nash, supra* note 17, at 264.

c. *State "Adequate" Education Challenges*

Along with statutory and state equal protection challenges to the NCLBA, advocates could utilize state "adequate" education guarantees. Despite variations in terminology, virtually every state guarantees an "adequate" public education.²⁰⁰ Plaintiffs have successfully challenged public education systems in several states by arguing that the effects of unequal funding have led to inadequate facilities and overall education.²⁰¹

As schools narrow their curriculum to concentrate on a few tested subjects in reaction to the NCLBA, advocates can use adequacy claims to ensure that states provide their constitutionally mandated level of public education.²⁰² States already acknowledge the necessity of educating students in the arts by implementing uniform academic standards for the subjects.²⁰³ By exacting such standards, states recognize that without the arts, children do not receive an adequate education. Thus, disadvantaged students who are deprived of opportunities to study the arts because of the Act are not receiving an adequate education as guaranteed by their state constitution. Education advocates must vigorously pursue claims to ensure students' rights.

Although the Federal Constitution offers little protection against the Act's disparate impact on disadvantaged students, citizens can utilize these methods to defend students. Through these legal actions, the promise of *Brown* can be fulfilled within the framework of the NCLBA.

2. Legislative Action

Beyond legal challenges, advocates can encourage Congress and the Department of Education to maximize the NCLBA's promised equality. Despite the law's current disturbing trend of "separate and unequal" education, it remains in its infancy. As with any major piece of legislation, the Act will experience growing pains and require minor tweaking to ensure that its notable goals coincide with its results. Virtually every citizen expects and demands that public schools provide a balanced education to all children. Thus, when President Bush stated

200. See Gosheff, *supra* note 195, at 894-95. For example, the Kansas Constitution requires that "[t]he legislature shall make *suitable* provision for finance of the educational interests of the state." KAN. CONST. art. 6, § 6(b) (emphasis added).

201. See Gosheff, *supra* note 195, at 895. For example, courts in Kentucky, Montana, New Jersey and Texas have all held that their systems of education violate their state constitutions under adequacy claims. *Rose v. Council for Better Educ., Inc.*, 790 S.W. 2d 186, 189 (Ky. 1989); *Helena Elementary Sch. Dist. No. 1 v. State*, 769 P.2d 684, 685 (Mont. 1989); *Abbott v. Burke*, 575 A.2d 359, 412 (N.J. 1990); *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391, 393 (Tex. 1989).

202. See Nash, *supra* note 17, at 263.

203. See, e.g., KAN. ADMIN. REGS. 91-31-32(c)(9), (10) (effective July 1, 2005).

that the era of low expectations and standards in education was over, America shared his hopes and today continues to believe in the possibility of *Brown's* promise.²⁰⁴ Relatively small changes in the Act, both at the statutory level and in its implementation, will help ensure that the law earns its name.

Beginning with the statute, the law's accountability provisions can be modified to provide a more accurate reflection of a school's progress. Since the Act focuses solely on assessments to determine AYP, important indicators of educational progress, such as graduation rates, are ignored.²⁰⁵ Focusing assessments wholly on math, science, and reading encourages districts to narrow their curriculum and "teach to the test." Advocates can encourage Congress to modify the Act to provide rewards for states that test beyond the core subjects of math, science, and reading.²⁰⁶ Additionally, given the difficult nature of developing a standardized test toward the arts, the NCLBA should focus less on assessments. Senator Christopher Dodd recently introduced an amendment to the Act that would allow states to look at academic indicators beyond test scores to measure AYP.²⁰⁷ Following Senator Dodd's lead, legislators can broaden AYP beyond tests and base academic proficiency more on graduation rates, college enrollment statistics, and work portfolios.²⁰⁸ By examining AYP in a more balanced manner, the arts and humanities will again have a place in all classrooms, whether the students are disadvantaged or affluent.

Congress must also reexamine the subgroup method of accountability. Inherent in the subgroup concept is the realization that schools with the greatest diversity have the highest burden under the law. Since the Act results in disproportionate costs to the schools with the greatest number of minority and disadvantaged students, underprivileged children inherit inferior educational opportunities. Although some scholars have proposed eliminating the Act's subgroups and merely measuring individual student achievement,²⁰⁹ this extreme solution threatens to undercut the Act's foundation of ensuring that all students meet academic proficiency.²¹⁰ Rather, the Act can level the playing field between disadvantaged and affluent schools by reducing the number of subgroups, especially since many subgroups overlap.²¹¹ As the Harvard Civil Rights Project concluded,

204. President's Remarks on Implementation of the No Child Left Behind Act, *supra* note 28.

205. *See supra* notes 71-74 and accompanying text.

206. Nash, *supra* note 17, at 269.

207. No Child Left Behind Reform Act of 2004, S. 2345, 108th Cong. (2004).

208. *See Challenging Racial Disparities*, *supra* note 47, at 293-94.

209. *Cf.* Kucerik, *supra* note 44, at 483 (stating that some opponents of the NCLBA suggest measuring student achievement only on an individual basis).

210. 20 U.S.C. § 6301 (Supp. I 2001).

211. KIM & SUNDERMAN, *LARGE MANDATES*, *supra* note 78, at 37-38.

[i]f schools are required to meet separate subgroup scores based only on race/ethnicity and poverty status, such a policy change would also benefit disadvantaged schools and multiracial schools. It would do so by reducing the disparate impact on disadvantaged schools and racially integrated schools and by decreasing the number of schools required to implement federal sanctions.²¹²

Additionally, Congress should make subgroups mutually exclusive so that every child's test score is counted only once.²¹³ By amending the Act to limit the number of subgroups and ensuring every test score is only counted once, a few children cannot skew a school's assessment results and low-income schools can better compete with their affluent counterparts.

Along with the recommended changes at the statutory level, Congress, the President, and the Department of Education must support educators in implementing the NCLBA. This involves listening and reacting to concerns of state and local education officials and teachers by issuing more flexible regulations and opening channels of communication.²¹⁴

Most importantly, such support involves fully funding the Act, which is the number one goal for school districts and states in order to meet the law's requirements according to the National Education Association.²¹⁵ As House Minority Leader Nancy Pelosi aptly explained, "[i]t was never imagined, I don't think, that when we would go forward with these mandates on public schools in our country, that we would give them the mandate and withhold the money."²¹⁶

To date, communities have been forced to use Title I and state funds to meet the mandates of the NCLBA, instead of using the funds to improve educational opportunities for the disadvantaged.²¹⁷ Admittedly, even with full funding, the requirements of the Act would create severe problems.²¹⁸ Fully funding the law, however, is perhaps the most effective method of ensuring the Act's success while protecting disadvantaged students from a remedial and empty education.²¹⁹ Illinois Senator Richard Durbin recently introduced an amendment to

212. *Id.* at 41.

213. *Id.* at 38.

214. SUNDERMAN & KIM, EXPANSION OF FEDERAL POWER, *supra* note 20, at 42.

215. NEWS RELEASE, NATIONAL EDUCATION ASSOCIATION, NEW EDUCATION LAW NEEDS RESOURCES AND MODIFICATIONS TO IMPROVE STUDENT ACHIEVEMENT (Jan. 8, 2003) at <http://www.nea.org/nr/nr030108.html>.

216. McGee, *supra* note 63.

217. *Id.*

218. ORFIELD, INSPIRING VISION, DISAPPOINTING RESULTS, *supra* note 25, at 6. For example, the difficulties of meeting the law's inflexible accountability requirements would remain.

219. Admittedly, some of the financial problems facing public schools today are not due to the NCLBA. States have been facing major budget shortfalls over the past three years. SUNDERMAN & KIM, EXPANSION OF FEDERAL POWER, *supra* note 20, at 22. Since education comprises the majority of state budgets, education funding has been severely threatened by these problems. *Id.* at 34.

the Act that would give states the option to defer imposing sanctions on its schools until full federal funding has been appropriated.²²⁰ Advocates must zealously encourage similar proposals to protect disadvantaged students. By ensuring that the NCLBA backs up its promises with financial support, *Brown's* promise of equal educational opportunities would be more easily obtainable for all of America's schools. With these legal and legislative actions, advocates can deliver *Brown's* vision to America's underserved children.

IV. CONCLUSION

Speaking before the libertarian Cato Institute, Education Secretary Rod Paige proclaimed, "The *Brown* chapter is now closed. The age of accountability and choice is just beginning."²²¹ Unfortunately, fifty years after the United States Supreme Court struck down "separate but equal" from America's public schools, unequal schooling remains the way of life for minority and disadvantaged children.²²² The Court recently recognized the inequalities in educational opportunities in its controversial decision upholding affirmative action.²²³ Citing the NCLBA, the Court stated that despite the public's desire for improved education, "it remains the current reality that many minority students encounter markedly inadequate and unequal educational opportunities."²²⁴

Despite the promise and possibility of the NCLBA, the law in its current form is aggravating the search for equality to heights unseen since the "separate but equal" era of public education. The law's reliance on subgroups and assessments disproportionately burden America's most fragile schools. Since disadvantaged schools are primarily comprised of poor, minority, and limited English proficiency students, the elimination of arts and humanities results in unequal education. Indeed, the Act's promise is achievable. However, it requires changes to its statutes and its implementation. It may also require zealously advocating for disadvantaged students in state and federal courts. By aiding the law through its growing pains, the NCLBA's goals can coincide with its results.

At a ceremony celebrating the NCLBA, President George W. Bush stated, "When a student passes from grade to grade without knowing how to read and write, add and subtract, the damage can last

220. Federal Education Fair Accountability Act of 2003, S. 1189, 108th Cong. (2003).

221. Secretary Rod Paige, *supra* note 19.

222. Winston, *supra* note 106, at 191.

223. *Grutter v. Bollinger*, 539 U.S. 306 (2003).

224. *Id.* at 346.

a lifetime.”²²⁵ While these skills are undoubtedly essential to modern survival, Lucinda Todd reminded America fifty years ago that education extends far beyond this core. By unintentionally widening the achievement gap between the affluent and the disadvantaged, the Act creates a society of second class citizens, deprived of the opportunity to experience geography, music, art, history, and physical education. The damage to the children affected, and the nation as a whole, will last a lifetime.

Lucinda Todd had one simple request, give her daughter the chance to learn music in a public school just like white children. So many years later, the challenge to give every student an opportunity to play an instrument, create a painting, and learn the language of another culture continues. The day that America’s most disadvantaged children experience these wonders in their public school is the day that *Brown’s* vision will be fulfilled.

²²⁵. President’s Remarks on Implementation of the No Child Left Behind Act, *supra* note 28.