

CULTIVATING MINDS, NOT DATA POINTS: A CRITICAL EXAMINATION OF EDUCATION POLICY

Caroline E. Burks[†]

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I. INTRODUCTION

The No Child Left Behind Act (“NCLB”) passed through Congress with flying colors and became law in 2002.¹ By standardizing the curriculum and tests of all public schools in America, the NCLB aimed to give all children an equal education and harshly penalized schools that failed to achieve adequate yearly progress.² If a school failed to adequately progress for five consecutive years, it must either turn over operations to the state or a private company, replace all or most of the staff who are relevant to its failure, or reopen as a charter school.³ The stated purpose of the NCLB was to promote equal education for African American and white children, but it failed to do so.⁴ While there are many aspects of the NCLB that failed to meet the needs of marginalized students, in particular, curricula that is not culturally relevant, a lack of support and harsh penalization, and the use of standardized tests as the primary measure of success have failed to holistically capture the achievements of schools and students.⁵

After the NCLB failed to adequately eradicate the inequality gaps in public education, the Obama administration once again set Congress on the path to radically alter the federal role in public education and to implement the Every Student Succeeds Act (“ESSA”). The ESSA was not a better alternative. As these measures have perpetually failed the middle-class communities they allege to serve, a new initiative, one that leaves behind clunky impositions on failing schools, needs to be implemented. A controlled choice program that allows for interdistrict school choice would promote socioeconomic and racial diversity within schools. This system would encourage schools to thrive and attract a large student body through free market choice but would not penalize struggling schools. In order for a controlled choice system to flourish, students and parents must be able to travel to the best school for their specific learning needs. This requires an improvement in public transportation and school transportation to allow middle-class students, residing near schools that do not meet their needs, to effect their choice to attend a better school.

[†] Caroline Burks is a law student at The University of Texas School of Law. Thanks to Professor Mechele Dickerson for providing guidance, for giving research advice, and for producing helpful comments.

¹ Press Release, White House Office of the Press Secretary, No Child Left Behind (Jan 8, 1990) (on file with The White House Archives).

² See generally No Child Left Behind Act of 2001, Pub. L. No. 107-110, §1001 115 Stat. 1425, 1439-1431 (2002).

³ David Hursh, *Exacerbating Inequality: The Failed Promise of the No Child Left Behind Act*, 10 RACE ETHNICITY & EDUC. 295, 297 (2007).

⁴ *Id.* at 300, 305.

⁵ *Id.* at 298–99.

II. NO CHILD LEFT BEHIND FAILED MINORITY STUDENTS

A. Minority Communities Were Set Up to Fail

It is no secret in the education world that standardized test scores strongly correlate to the student's family income.⁶ Accordingly, schools whose students needed the NCLB policy goals the most were the most likely to fail. The NCLB also served to distract from a larger problem that drastically contributed to the failures of low-income schools: low paying jobs, lack of affordable housing, and dismal public transportation.⁷ The NCLB framed schools as the root of the problem, stating that poor quality education, rather than the underlying societal problems, led to drastic inequality.⁸ The NCLB also contributed to an "up or out" mentality within schools, where students who did not pass were encouraged to drop out or transfer; this put the students most in need even further behind.⁹

B. History of Failure

It was clear to many education professionals that the NCLB was leaving minority students in the dust despite its intended purpose of closing the achievement gap.¹⁰ Originally, score gaps and increased pressure and incentive from the federal government to decrease the achievement gap led to great initiatives for change within school districts.¹¹ New York and Washington, D.C. aggressively reorganized districts and schools through data aggregation analysis.¹² Schools that could afford to restructure and change curriculums to address students who were falling behind implemented changes; admittedly, these schools had very few students who were originally behind the curve.¹³

However, schools in the Mississippi Delta and many other areas of the country that serve a student body made up almost entirely of impoverished,

⁶ *Id.*

⁷ *Id.* at 305–06.

⁸ *Id.*

⁹ *Id.* at 302.

¹⁰ See SEAN F. REARDON ET AL., TRENDS IN ACADEMIC ACHIEVEMENT GAPS IN THE ERA OF NO CHILD LEFT BEHIND I (2013).

¹¹ Sophie Quinton, *The Lessons of No Child Left Behind*, ATLANTIC (Apr. 24, 2015), <https://www.theatlantic.com/politics/archive/2015/04/the-lessons-of-no-child-left-behind/431970/>. ("It fueled ambitious reform efforts in cities like New York and Washington, D.C. The disaggregated data 'became a vehicle for us to start to explore equity issues, and look at basic principles of accountability that we wanted to build out,' says Joel Klein, former chancellor of the New York City Education Department.")

¹² *Id.*

¹³ Cory Turner, *No Child Left Behind: What Worked, What Didn't*, NPR (Oct. 27, 2015), <https://www.npr.org/sections/ed/2015/10/27/443110755/no-child-left-behind-what-worked-what-didnt>.

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minority students suffered from increased penalties;¹⁴ students were forced to travel farther to school when their neighborhood school was closed or to sit in increasingly overcrowded classrooms due to budget cuts.¹⁵ The pressures set in place by the NCLB set these schools up for failure from the beginning by limiting instructional time, decreasing funding for failing schools, and ultimately making it nearly impossible for districts that were disenfranchised to catch up.¹⁶ After a school, which already likely lacked resources to change, failed, the penalties quickly turned the school into a sinking ship.¹⁷ For the 2010-2011 school year, 48 percent of schools did not meet the standards of adequate yearly progress; this would mean that nearly half of all schools are sinking ships, dragging students down with them.¹⁸

For instance, testing in Minnesota showed that the fourth-grade math gap narrowed by only 7 percent—white students still failed 8 percent of the time and African Americans failed 38 percent of the time.¹⁹ The results were similar for eighth-grade reading levels: 43 percent of African Americans and 44 percent of Hispanics scored below basic proficiency, while only 15 percent of white students scored below basic proficiency.²⁰ Results from the ACT, a college admissions assessment tool with the maximum score of thirty-six, confirms this gap and highlights the ineffectiveness of the NCLB. In 2003, white students scored an average of 22.9 whereas African American students scored an average of 17.4; in 2007, white students scored an average of 22.3 whereas African American students still scored only an average of

¹⁴ Quinton, *supra* note 11.

¹⁵ *From the Capital to the Classroom Year 3 of the No Child Left Behind Act*, CENTER ON EDUC. POL'Y 46, 119 (Mar. 2005) <https://nepc.colorado.edu/sites/default/files/EPRU-0504-120-OWI.pdf>; John Rosales, *Closing Schools: Privatization Disguised as 'Accountability'*, NAT. EDUC. ASSOC. (Dec. 15, 2015) <https://www.nea.org/advocating-for-change/new-from-nea/closing-schools-privatization-disguised-accountability>; Sarah D. Sparks, *School Closures: What Do They Mean for Students and Communities*, EDUC. WEEK (Mar. 27, 2017) http://blogs.edweek.org/edweek/inside-school-research/2017/03/school_closures_community_effects.html.

¹⁶ Quinton, *supra* note 11 (“By requiring all schools and all students to meet the same standards, NCLB set schools like Moore’s up for failure. There’s no way to reallocate resources when resources are tight to begin with and almost all students earn low scores. Under pressure to raise test scores dramatically and quickly, Moore says, local elementary and middle schools started drilling students for state tests during social-studies and science classes.”).

¹⁷ Turner, *supra* note 13 (“For these, often poorer schools, the law was like quicksand...’you’re not really doing anything to address the needs of that school.’ It was more punishment than panacea.”).

¹⁸ Andrea L. Bell & Katie A. Meinelt, *A Past, Present, and Future Look at No Child Left Behind*, A.B.A. (Oct. 1, 2011), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/human_rights_vol_38_2011/fall2011/a_past_present_and_future_look_at_no_child_left_behind/.

¹⁹ John Fitzgerald, *No Child Left Behind Fails Minority Students*, MINNESOTA 2020 (Sept. 28, 2007), <http://www.mn2020.org/issues-that-matter/education/no-child-left-behind-fails-minority-students>.

²⁰ *Id.*

17.²¹ To put this in perspective, in 2008, the score gap of the reading and math levels between African American and white 17-year-old students can be seen as the equivalent of two to three years of schooling.²²

Overall, the gaps narrowed most significantly in areas where minority students lagged behind the furthest, but the NCLB did not provide educational opportunities for minority students and for white students equally.²³ The NCLB managed to narrow the achievement gap over the course of kindergarten to eighth grade, by only one fifth of a standard deviation, which still left minority students behind on a national scale.²⁴

C. A Better Solution? Be Flexible on the Fix: 'Reset' Sooner or Decrease Sanctions

Sanctions often hit minority and urban populations hardest; failing schools quickly turned to sinking ships that dragged down students who did not have the resources to leave. There were two modes of recovery: prior to receiving any sanctions or after the forced restructuring.²⁵ Schools that successfully raised failing test scores prior to sanctions had few students struggling and a multitude of resources.²⁶

The other option? A lobotomy. After year six of failing, schools had to restructure. This often involved cutting off the head by firing the principal. Thomas Ahn, an economist interested in educational policy, found that this was the only meaningful way to restructure a school— giving the failed school a “lobotomy.”²⁷ This change led to happier teachers, higher test scores, and, sometimes, less segregation within the school district.²⁸ This was especially true in restructuring teaching methods and student selection (i.e., charter, magnet schools).²⁹ This solution did not always work either:

²¹ *Id.*

²² See Sam Dillon, ‘No Child’ Law is Not Closing a Racial Gap, N.Y. TIMES (Apr. 28, 2009), <https://www.nytimes.com/2009/04/29/education/29scores.html> (“The 2008 score gap between black and white 17-year-olds, 29 points in reading and 26 points in math, could be envisioned as the rough equivalent of between two and three school years’ worth of learning....”).

²³ See REARDON ET AL., *supra* note 10, at 5 (“[The] patterns evident so far do not suggest a strong effect of NCLB on achievement gaps...”).

²⁴ *Id.*

²⁵ Thomas Ahn & Jacob Vigdor, *Were All Those Standardized Tests for Nothing?* (AMERICAN ENTER. INST. Working Paper, 2013).

²⁶ Turner, *supra* note 13 (“He found that many schools improved after that first warning with no sanctions at all — just the threat of sanctions. Because these schools had relatively few kids below grade-level and enough money and staff to focus on them.”).

²⁷ *Id.*

²⁸ *Id.*

²⁹ Cory Turner, *Forcing Schools To Hit The ‘Reset’ Button*, NPR (Oct. 27, 2015), <https://www.npr.org/sections/ed/2015/10/27/450903995/forcing-schools-to-hit-the-reset-button>.

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many schools complained that finding qualified, replacement staff was a significant problem and often left the school further understaffed.³⁰

The rest of the sanctions? Ineffective. Tutoring was not cost-efficient for schools that already had limited funds; tutoring also often had no impact on math and reading scores.³¹ Allowing students to transfer schools, while thoughtful, is often impractical for those living in low-income areas or where schools are few and far between.³² Although a “lobotomy” is effective, it is inefficient because a school must wait six years—roughly half of the time a typical student spends in public education—to encounter this process.³³ A possible solution? Allow states to individually determine how to fix schools that are falling behind rather than a one-size-fits-all solution enforced by the Federal “Big Brother.”³⁴

III. THE WRONG SOLUTION: COMMON CORE STANDARDS

Common Core Standards were announced and developed in 2009, then widely adopted in 2010 and 2011.³⁵ By 2013, forty-five states and Washington, D.C. had adopted the Common Core Standards under pressure from the Obama administration.³⁶ The Common Core Standards were ambiguous, eliminated many common teaching techniques, devalued historical and artistic context within the English Language Arts curriculum, and failed to teach students the basics despite setting near impossible standards for poorly-prepared teachers.³⁷ Simply put, middle-class students

³⁰ Catherine Gewertz, *Restructuring Schools Under NCLB Found to Lag*, EDUC. WEEK (Dec. 9, 2009), https://www.edweek.org/ew/articles/2009/12/09/15restructure_ep.h29.html.

³¹ Libby Nelson, *The scariest lesson of No Child Left Behind*, VOX (July 27, 2015), <https://www.vox.com/2015/7/27/9045491/no-child-left-behind-accountability> (some studies did show an effect when the student attended 40 or more hours of tutoring, but the majority have found no effect); U.S. DEP’T OF EDUC., NCEE 2012-4053, IMPACTS OF TITLE I SUPPLEMENTAL EDUCATIONAL SERVICES ON STUDENT ACHIEVEMENT (2012), <https://ies.ed.gov/ncee/pubs/20124053/pdf/20124053.pdf>.

³² See Caroline Hendrie, *NCLB Transfer Policy Seen as Flawed*, EDUC. WEEK (April 19, 2005), <https://www.edweek.org/ew/articles/2005/04/20/32choice.h24.html>.

³³ Nelson, *supra* note 31 (“...even if it’s effective, it doesn’t mean it’s efficient. Schools didn’t undergo restructuring until after students had been failing to make progress for six years.”).

³⁴ *Id.* (“Schools fall behind for lots of reasons—far more reasons than one set of strategies can fix. Even supporters of a bigger federal role in education now think it’s the right call to let states or school districts decide what to do about schools that are falling behind.”).

³⁵ Valeria Strauss, *Everything you need to know about Common Core – Ravitch*, WASH. POST (Jan. 18, 2014) <https://www.washingtonpost.com/news/answer-sheet/wp/2014/01/18/everything-you-need-to-know-about-common-core-ravitch/>; Catherine Gewertz, *The Common Core Explained*, EDUC. WEEK (Sept. 30, 2015) <https://www.edweek.org/ew/issues/common-core-state-standards/index.html>.

³⁶ Alan Singer, *Results Are in: Common Core Fails Tests and Kids*, HUFFPOST (May 2, 2016), https://www.huffpost.com/entry/results-are-in—common-co_b_9819736.

³⁷ Valerie Strauss, *The ‘seven deadly sins’ of Common Core—by an English teacher*, WASH. POST (Aug. 18, 2016), <https://www.washingtonpost.com/news/answer-sheet/wp/2016/08/18/the-seven-deadly-sins-of-common-core-by-an-english-teacher/>.

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who already attended passing schools were relentlessly prepared for fill-in-the-bubble tests while education in the sciences, arts, and critical thinking skills lagged behind those subjects that were tested upon.³⁸ Facing backlash over Common Core Standards, many states simply changed the name to make it appear they had created new state standards.³⁹

Common Core Standards not only made many teachers and students uncomfortable and, frankly, bored, but also failed to create any meaningful changes in the education of low-income and middle-class students.⁴⁰ In all fairness, many students started from “behind” the standardized requirements when it came to Common Core Standards; for example, a school district in Dunn, Kentucky saw over 70 percent of elementary students scoring “proficient” or better in reading and math on state tests prior to implementing Common Core Standards, but only 48 percent in reading and 40 percent in math after implementing Common Core Standards.⁴¹ Dunn is a mostly middle-class neighborhood with only 19 percent of the student body receiving reduced-price or free lunch.⁴² The scores have slowly crept up, with approximately 54 percent of students testing at a “proficient” level three years later.⁴³ However, the achievement gap between white and Black students has only grown; the gap has grown 4 percent in math and 2.1 percent in reading for Kentucky students between third and sixth grade.⁴⁴ Students are worse off in two major areas—they read less fiction literature (which is believed to be academically superior) and fewer students take algebra in eighth grade—a reversal in trend from what education scholars saw prior to 2011.⁴⁵

These results should not surprise anyone, though. Then U.S. Secretary of Education, and former New York Commissioner of Education, John B.

³⁸ The Times Editorial Board, Editorial, *Every Student Succeeds Act fails too many students*, L.A. TIMES (Dec, 10, 2015), <https://www.latimes.com/opinion/editorials/la-ed-school-law-20151211-story.html>.

³⁹ Strauss, *supra* note 37; John Campbell, *Common Core gets new name in NY*, PRESS CONNECTS (May 9, 2017), <https://www.pressconnects.com/story/news/local/new-york/2017/05/09/remember-common-core-ny-standards-get-new-name/101469008/>.

⁴⁰ *Id.*

⁴¹ Luba Ostashevsky, *More Than Five Years After Adopting Common Core, Kentucky's Black-White Achievement Gap is Widening*, HECHINGER REP. (May, 22, 2016), <https://hechingerreport.org/five-years-adopting-common-core-kentuckys-black-white-achievement-gap-widening/>.

⁴² *Id.* Free and reduced-price lunch (FRPL) statistics are generally a proxy for the poverty level concentration within a school; for instance, high-poverty schools see 75% of students being eligible for FRPL. *Concentration of Public School Students Eligible for Free or Reduced-Price Lunch*, NATIONAL CENTER FOR EDUCATION STATISTICS (May 2020), https://nces.ed.gov/programs/coe/indicator_clb.asp.

⁴³ Ostashevsky, *supra* note 41.

⁴⁴ *Id.*

⁴⁵ Tom Loveless, *Reading and Math in the Common Core Era*, BROOKINGS (Mar. 24, 2016), <https://www.brookings.edu/research/reading-and-math-in-the-common-core-era/>.

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King, Jr., conceded that the tests are “designed so that 70% of students will fail, with a much higher percentage among students with disabilities, English Language learners, and children who live in poverty.”⁴⁶ In fact, some believe it will further racial determinism, close doors to higher education for Latino and African American students, and further feed the school-to-prison pipeline.⁴⁷ SAT and ACT scores have also seen decreases in regions using the Common Core Standards.⁴⁸ Although some critics have attempted to shift the blame onto the NCLB in general, this can be easily rebuked by the fact that non-Common Core Standards states are doing better overall than states using Common Core Standards.⁴⁹

IV. THE FIX THAT DIDN’T FIX ANYTHING: EVERY STUDENT SUCCEEDS ACT

In early December 2015, President Obama signed into law the bipartisan Every Student Succeeds Act (“ESSA”) to replace the NCLB. Obama, at the signing ceremony, stated:

The goals of No Child Left Behind... were the right ones: high standards, accountability, closing the achievement gap, making sure that every child was learning... But in practice, it often fell short... This bill makes long overdue fixes to the last education law, replacing the one-size fits all approach to reform with a commitment to provide every student with a well-rounded education... It often forced schools and school districts into cookie-

⁴⁶ Alan Singer, *Results Are in: Common Core Fails Tests and Kids*, HUFFPOST (May 2, 2016), https://www.huffpost.com/entry/results-are-in—common-co_b_9819736.

⁴⁷ Yohuru Williams, *By Any Dreams Necessary, Malcolm X and the Problem of High Stakes Testing*, HUFFPOST (Feb. 10, 2015), https://www.huffpost.com/entry/by-any-dreams-necessary-m_b_6648002 (“Proponents of high stakes testing resurrect such determinism, presumably without the racial overtones, by reducing students, their hopes and dreams for the future, to test scores. Effectively, they close the door to the hope of achievement through hard work and academic engagement.”).

⁴⁸ Joy Pullman, *Stick a Fork in Common Core—It’s Done*, FEDERALIST (Apr. 4, 2016), <https://thefederalist.com/2016/04/04/stick-a-fork-in-common-core-its-done/>; Caralee J. Adams, *2015 SAT, ACT Scores Suggest Many Students Aren’t College-Ready*, EDUC. WEEK (Sep. 4, 2015), <https://www.edweek.org/ew/articles/2015/09/09/2015-sat-act-scores-suggest-many-students.html>; Ze’ev Wurman, *Re-Assess Common Core and Consider Reversing Direction*, BREITBART (Dec. 25, 2015), <https://www.breitbart.com/politics/2015/12/25/re-assess-common-core-and-consider-reversing-direction/>; Richard Innes, *Latest on Common Core in Kentucky: College Professors Report Entering Freshmen Are Not College Ready*, BIPPS (Dec. 12, 2015), <http://www.bipps.org/latest-on-common-core-in-kentucky-college-professors-report-entering-college-freshmen-are-not-ready/>; Karen R. Effrem, *Falling ACT Scores Are Latest Evidence Of Common Core Failure*, NAT’L PULSE (Oct. 24, 2018), <https://thenationalpulse.com/commentary/falling-act-scores-latest-evidence-common-core-failure/>; Elin Johnson, *Another Drop in College Readiness*, INSIDE HIGHER EDUC. (Nov. 4, 2019), <https://www.insidehighered.com/admissions/article/2019/11/04/act-shows-decline-students-ready-college>.

⁴⁹ Joy Pullman, *supra* note 48.

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cutter reforms that didn't always produce the kinds of results that we wanted to see.⁵⁰

Overall, the act did not change the standards to which the federal government held schools, but it gave control back to the states to determine how to deal with struggling schools.⁵¹

The ESSA required states to develop a plan that included high standards, protection of marginalized groups, and accountability standards; the plan was then submitted to the federal government for approval and enacted.⁵² Early childhood education was made a federal initiative and teacher evaluations were no longer directly linked to student outcomes.⁵³ Federal funding could be flexibly directed between schools and additional funds became available through grants for music, art, and technological education.⁵⁴ However, federal testing still takes place under the ESSA.⁵⁵ While many praise the ESSA, as it disposed of the NCLB, there remain many reasons for criticism.

States must, in their plan, make efforts to improve the scores of children in the bottom 5 percent and in high schools where more than a third of students drop out.⁵⁶ However, mediocre schools have no obligations to improve and states are not penalized for allowing them to remain mediocre.⁵⁷ Additionally, by abandoning federal standards, states can decide what an adequate education means for their state.⁵⁸ States must plan to improve student academic performance and at least one non-academic factor.⁵⁹ States

⁵⁰ Jason Russell, *No Child Left Behind is Dead. Here's What's Replacing it*, WASH. EXAMINER (Dec. 10, 2015), <https://www.washingtonexaminer.com/no-child-left-behind-is-dead-heres-whats-replacing-it>; Cory Turner, *President Obama Signs Education Law, Leaving 'No Child' Behind*, NPR (Dec. 10, 2015), <https://www.npr.org/sections/thetwo-way/2015/12/10/459219774/president-obama-signs-education-law-leaving-no-child-behind>.

⁵¹ Alia Wong, *The Bloated Rhetoric of No Child Left Behind's Demise*, ATLANTIC (Dec. 9, 2015) <https://www.theatlantic.com/education/archive/2015/12/the-bloated-rhetoric-of-no-child-left-behinds-demise/419688/>.

⁵² Jazelle Hunt, *No Child Left Behind Replacement Focuses on Marginalized Groups*, NBC NEWS (Dec. 10, 2015), <https://www.nbcnews.com/news/nbcblk/no-child-left-behind-replacement-focuses-marginalized-groups-n477791>.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ The Times Editorial Board, Editorial, *Every Student Succeeds Act fails too many students*, L.A. TIMES (Dec. 10, 2015) <https://www.latimes.com/opinion/editorials/la-ed-school-law-20151211-story.html>.

⁵⁷ *Id.*

⁵⁸ *Id.* (“[I]t leaves entirely squishy what sorts of educational standards states are expected to set, and what steps even the worst schools will have to take to show they’re improving.”).

⁵⁹ Sarah Rankin, *Virginia Submits New Education Plan for Federal Review*, ASSOCIATED PRESS (Sept. 18, 2017), <https://apnews.com/9fce350e665f405fadb9711b21482490>.

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must implement the plan, and the federal government will enforce sanctions against the bottom 5 percent of schools in each state and high schools where less than two-thirds of students graduate.⁶⁰

Overall, the success of the ESSA is hard to determine; however, it is not moving the needle fast enough for many critics.⁶¹ This may largely be due to Congress; since changing political demographics after 2016, Congress largely ignored and then rolled back the rules established by the ESSA.⁶² Within days of obtaining her cabinet position, U.S. Secretary of Education Betsy DeVos rolled back multiple rules established by the ESSA by a barely-passing 50-49 vote in the Senate.⁶³ DeVos has since approved multiple state education plans that violated the ESSA statute's requirements.⁶⁴ For example, while the ESSA requires standards and assessments to be the same statewide for all students, Arizona's plan allows for different weighing of ratings for elementary schools, middle schools, and high schools.⁶⁵ Unsurprisingly, states have embraced these low standards; all of the states' plans for round one (April 2017) and round two (September 2017) of ESSA approvals, as required by the Department of Education, were "mostly uncreative, unambitious, unclear or unfinished."⁶⁶

⁶⁰ Michael Heise, *From No Child Left Behind to Every Student Succeeds: Back to a Future for Education Federalism*, 117 COLUM. L. REV. 1859, 1973 (2017).

⁶¹ Anna Hyslop, *Analysis: Even With Newfound Power Under ESSA, States Will Not See Equal Success When it Comes to Education – and Will Need Serious Help to Raise the Floor*, 74 MILLION (Feb. 21, 2018), <https://www.the74million.org/article/with-newfound-power-states-will-not-see-equal-success-and-need-serious-help-to-raise-the-floor/>; James Nehring, *The Every Student Succeeds Act will Fail*, BOS. GLOBE (Oct. 8, 2016), <https://www.bostonglobe.com/ideas/2016/10/08/the-every-student-succeeds-act-will-fail/7VdWTs1xQJPm4aKaJ3ac6H/story.html>.

⁶² David Goldstein, *Obama Education Rules are Swept Aside by Congress*, N.Y. TIMES (Mar. 9, 2017), <https://www.nytimes.com/2017/03/09/us/every-student-succeeds-act-essa-congress.html>.

⁶³ Emma Brown, *Trump signs bills overturning Obama-era education regulations*, WASH. POST (Mar. 27, 2017, 4:43PM), <https://www.washingtonpost.com/news/education/wp/2017/03/27/trump-signs-bills-overturning-obama-era-education-regulations/>; Todd Kominiak, *ED just released new ESSA accountability rules. What that means for your schools.*, K12 INSIGHT (Mar. 16, 2017), <https://www.k12insight.com/trusted/new-essa-accountability-rules/>; Dana Goldstein, *Obama Education Rules Are Swept Aside by Congress*, N.Y. TIMES (Mar. 9, 2017), <https://www.nytimes.com/2017/03/09/us/every-student-succeeds-act-essa-congress.html>.

⁶⁴ Hyslop, *supra* note 61; Charles Barone & Dana Laurens, *ED's Failure to Enforce ESSA Will Hurt Students – Part 1*, EDUC. REFORM NOW (Sept. 27, 2017), <https://edreformnow.org/federal-policy/eds-failure-enforce-essa-will-hurt-students-part-1/>.

⁶⁵ Barone & Laurens, *supra* note 64.

⁶⁶ Anna Hyslop, *Betsy DeVos and the Soft Bigotry of Low ESSA Expectations*, REALCLEAR EDUC. (Dec. 14, 2017), https://www.realcleareducation.com/articles/2017/12/14/betsy_devos_and_the_soft_bigotry_of_low_essa_expectations__110237.html.

V. WHAT NOW?

A. School Choice Expansion: Magnet, Charter, and Public Options

School choice allows parents to choose the educational environment that would best suit their child and send the public education funds to the public, private, or charter school of choice. School choice has been shown to have many benefits. For parents who desire safe learning environments for their children, the ability to freely choose a school results in a reduced likelihood of fighting, racial conflict, and property destruction.⁶⁷ Parents are 35 percent more likely to report that their child is in a very safe school when exercising the right to choose their child's school.⁶⁸ Students enrolled in elite charter schools in Harlem, New York were far less likely to become incarcerated or pregnant.⁶⁹ Voucher programs also place students in schools that are substantially less segregated than their neighborhood schools.⁷⁰ In some regions, school choice is also decreasing the number of families that move out to the suburbs, as they no longer have to worry about the quality of schooling their child will receive based upon district zoning, which can help to improve property values.⁷¹

Wealthy families have always exercised the option to send their child to the school of their choice by enrolling their child in private education and paying for it themselves.⁷² Low-income families in certain states have been vastly helped in this regard through tax credits and vouchers.⁷³ Nationally, about 5 percent of private school enrollments comes from low-income children paying for school with a school choice scholarship; that number

⁶⁷ Corey DeAngelis, *More private school choice means more student safety*, WASH. EXAMINER (Jun. 27, 2018), <https://www.washingtonexaminer.com/opinion/more-private-school-choice-means-more-student-safety>.

⁶⁸ *Id.*

⁶⁹ Corey DeAngelis, *More School Choice, Less Crime*, CATO INST. (June 22, 2017), <https://www.cato.org/blog/self-interested-schooling-choices-improve-social-order>.

⁷⁰ See generally GREG FORSTER, FREEDOM FROM RACIAL BARRIERS: THE EMPIRICAL EVIDENCE ON VOUCHERS AND SEGREGATION (2006) (voucher-accepting schools are significantly less segregated than public schools).

⁷¹ EP. 27: *Urban Sprawl, The Environment and School Choice with Bart Danielsen*, ENGAGE BY EDCHOICE (Jan. 11, 2018), <https://www.edchoice.org/podcasts/series-roundup-interview-dr-bartley-danielsen-urban-sprawl-environment-school-choice/>; Elle Moxley, *More School Choice Might Be Keeping Middle Class Families in Kansas City*, KCUR 89.3 (Oct. 26, 2017), <https://www.kcur.org/education/2017-10-26/more-school-choice-might-be-keeping-middle-class-families-in-kansas-city>.

⁷² Colleen Hroncich, *School Choice: Stuck in the Middle (Class)*, COMMONWEALTH FOUND. (Jan. 24, 2019), <https://www.commonwealthfoundation.org/policyblog/detail/school-choice-stuck-in-the-middle-class>.

⁷³ *Id.*

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fluctuates to nearly 20 percent in some states.⁷⁴ However, this has slowly squeezed middle-class families out of private schools. As one Florida private school leader stated, “I fear we’ve become a school for the haves and the have-nots....We’re losing the middle class.”⁷⁵ In the past fifty years, the number of low-income and high-income students attending private schools has grown, while the percentage of middle-income students in private schools has been cut by almost half.⁷⁶

Parents with financial means can choose to relocate to better, higher-achieving school districts or place their children in private schools, while those parents who cannot must continue to send their children to their assigned schools or find other options, which includes joining the lottery of their local charter school in hopes of being selected.⁷⁷

As private school tuition has risen 97 percent from 1988 to 2014, most middle-class families have opted away from private school now.⁷⁸ Perhaps the best solution would not be to allow students to enroll into private schools, but to offer middle-class parents an opportunity to select the best public or private school for their child, regardless of district.

St. Louis, Missouri has the longest-running school desegregation program in the country called the Voluntary Interdistrict Choice Corporation (VICC), that allows for Black children to attend a top-tier, suburban, public school while also attracting white suburban children to city magnet schools.⁷⁹ From 1981 to 2018, more than 70,000 Black children living in cities attended elite suburban public schools and 9,000 suburban white children attended city magnet schools.⁸⁰ Although some of these students were from low-income

⁷⁴ Renee Stoeckle, *It's Time to Expand School Choice to the Middle Class*, REDEFINED (Aug. 10, 2018), <https://www.redefinedonline.org/2018/08/its-time-to-expand-choice-to-the-middle-class/>.

⁷⁵ *Id.*

⁷⁶ Richard J. Murnane et al., *Who Goes to Private School? Long-Term Enrollment Trends by Family Income*, EDUC. NEXT (July 17, 2018), <https://www.educationnext.org/who-goes-private-school-long-term-enrollment-trends-family-income/>.

⁷⁷ Ain A. Grooms, *The Voluntary Interdistrict Desegregation Program in St. Louis and the Geography of Opportunity*, 2 URB. EDUC. RES. & POL'Y ANN. 9, 15 (2014). Parents who cannot move their children have become desperate enough to risk felony charges and lie about where they live,⁷⁷ and may likely do it again if they had to. Kelly Phillips Erb, *Would You Lie About Where You Live To Get Your Child Into A Better School?*, FORBES (Nov. 6, 2016), <https://www.forbes.com/sites/kellyphillipserb/2016/11/06/would-you-lie-about-where-you-live-to-get-your-child-into-a-better-school/#2afd13232f48>.

⁷⁸ William Daughtrey et al., *Tuition Trends in Independent Day Schools*, VAND. UNIV. INSTITUTIONAL REPOSITORY (May, 2016) (unpublished capstone project) (on file with the Peabody College of Vanderbilt University), <https://ir.vanderbilt.edu/handle/1803/8216>.

⁷⁹ Camille Respass, *As St. Louis' School Desegregation Program Winds Down, No One Can Say What Comes Next*, RIVERFRONT TIMES (Aug. 22, 2018), <https://www.riverfronttimes.com/stlouis/st-louis-desegregation-transfer-program-is-winding-down-yet-no-one-has-any-idea-what-might-come-next/Content?oid=23305900>.

⁸⁰ *Id.*

families, most were not.⁸¹ A Black family earning \$60,000 or more will likely live in an area with a higher poverty rate than a white family that is impoverished.⁸² St. Louis is mostly known as a testament to school desegregation, and it provides an important secondary point: schools are perfectly capable of handling socio-economic integration through school of choice.

Additionally, it is not enough to allow a student to transfer to another school in the district, as 84 percent of segregation is between districts, not within them.⁸³ Open enrollment was enacted widely from 1993 to 2003, with forty-seven states plus Washington, D.C. having such a policy on the books by 2007 in order to combat educational inequity.⁸⁴ The policies vary widely, including whether open enrollment is mandatory.⁸⁵ Open enrollment works based upon an open market idea, where schools compete for the brightest students and state funds. Sadly, when compared to interdistrict desegregation, open enrollment results in a greater racial and social stratification.⁸⁶ However, even when interdistrict stratification is based upon socio-economic status and not race, schools become more racially diverse.⁸⁷

When a school is at least 25 percent middle-class, or ideally 50 percent, then the entire school benefits and the educational achievement of the middle-class students is unaffected by a non-majority low-income student population.⁸⁸ In fact, the students are more prepared to enter the workforce, as they are well-educated and more socially aware.⁸⁹ Most argue that the 50 percent tipping point cannot be violated; once middle-class families feel outnumbered by low-income families, they will flee to wealthier areas which

⁸¹ *Id.*; Marquita Laneé' Bowers-Brown, *The St. Louis Desegregation Transfer Program: Do African American Students Perform Better In an Integrated Suburban Setting?* 199–200 (2015) (dissertation, University of Missouri) (on file at <https://irl.umsl.edu/cgi/viewcontent.cgi?article=1179&context=dissertation>).

⁸² Grooms, *supra* note 77, at 11 (citing John R. Logan et al., *Segregation in Neighborhoods and Schools: Impacts on Minority Children in the Boston Region* (2003) (paper presented at the Harvard Color Lines Conference) (on file at <https://files.eric.ed.gov/fulltext/ED480995.pdf>)).

⁸³ JENNIFER JELLISON HOLME & AMY STUART WELLS, SCHOOL CHOICE BEYOND DISTRICT BORDERS: LESSONS FOR THE REAUTHORIZATION OF NCLB FROM INTERDISTRICT DESEGREGATION AND OPEN ENROLLMENT PLANS, <https://www.pitac.org/pdf/ASW-interdistrict.pdf>.

⁸⁴ MICAH A. WIXOM, OPEN ENROLLMENT 50-STATE REPORT—ALL DATA POINTS (Educ. Comm'n of the States ed., 2018); MICHEAL F. LOVENHEIM & PATRICK WALSH, DOES CHOICE INCREASE INFORMATION? EVIDENCE FROM ONLINE SCHOOL SEARCH BEHAVIOUR (Nat'l Bureau of Econ. Research ed., 2017).

⁸⁵ See generally Holme & Wells, *supra* note 83 (reviewing interdistrict choice programs and requirements).

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ See RICHARD D. KAHLENBERG, ALL TOGETHER NOW: CREATING MIDDLE-CLASS SCHOOLS THROUGH PUBLIC SCHOOL 111-12 CHOICE (Booking Inst. Press ed., 2003).

⁸⁹ *Id.*

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they often cannot afford.⁹⁰ This should not be difficult to attain, as it is estimated that only 33 percent of public-school students come from poor families.⁹¹

Wealthy suburbanites generally do not see a decrease in quality in their schools or property values, and they will continue to be able to attend their assigned neighborhood school, should they choose to do so.⁹² Meanwhile, property values in other school districts tend to appreciate with the option of choice while providing middle and low-income parents leverage with their school officials, who will struggle to maintain enrollment if parents can leave when they are disappointed.⁹³ For these reasons, support for school choice has skyrocketed to 60-70 percent.⁹⁴ With such strong public support, many elected officials have thrown their weight behind passing school choice policies.⁹⁵ What is one of the strongest reasons for the middle-class to desire socio-economic integration? Getting the best bang for their buck. The middle-class will see more equal schools when low-income children are spread out evenly amongst all districts.⁹⁶

How is choice realistically implemented to desegregate racially and socio-economically? The best option is to implement a controlled choice plan, where parents rank their top three to five choices and the schools then accept students based upon their respective rankings, sibling preferences,⁹⁷ mandated minimum percentages for low-income, middle-income and racial minorities, and distance from home.⁹⁸ Students' current academic achievement should not be a factor in deciding which school they attend.⁹⁹ This cherry-picking of students inevitably leads to less socio-economic and racial diversity, as admissions tests historically disenfranchise African

⁹⁰ *Id.* at 218.

⁹¹ *Id.* at 112.

⁹² *Id.* at 107, 113.

⁹³ *Id.* at 120.

⁹⁴ *Id.* at 147.

⁹⁵ *Id.* at 148.

⁹⁶ *Id.* at 158. Note that a perfectly equal balance will never be attainable.

⁹⁷ Sibling preference allows for families to remain together, as it guarantees a child placement if space is available once an older child is enrolled in the same school. *Id.* at 116.

⁹⁸ Ideally, the system would allow for students within walking distance, approximately 1/8-1/4 of a mile, to the school priority to decrease the need for transportation interdistrict. However, the school would still be required to meet mandatory minimum percentages for socio-economic classes and minorities. *Id.*

⁹⁹ *See id.* at 127 (“as schools become more publicly accountable, those schools with a choice of students will have a powerful incentive to pick the brightest ones... ‘There are only two ways to get high-achieving students: recruit them, or transform low achievers into high achievers. Currently it is easier to recruit high achievers than to create them.’”). The exception to this principle lies in students with specific academic needs that would prevent them from being properly integrated into the average classroom, such as schools specialized to accommodate certain learning or physical disabilities.

American students, and wealthy students have access to tutors to better ensure their admission into the best schools over low-income and middle-income children.¹⁰⁰ The proof lies in the pudding: New York City Public Schools rely solely on grades and test scores to admit students to their elite public schools and the state's schools are now more segregated than Mississippi's.¹⁰¹ Alternatively, Chicago Public Schools implemented a policy through which 30 percent of elite high school seats are given to the top scorers on standardized tests, while the remaining 70 percent of the seats are evenly distributed to four socioeconomic tiers based on test scores, guaranteeing socioeconomic diversity.¹⁰²

This strategy maximizes parental choice and satisfaction while also guaranteeing interest of specialized schools, particularly to language immersion and technical-learning programs.¹⁰³ Schools that fail to have enough selections to fill their seats within a prescribed number of years will close, while schools that are continuously overrepresented on rankings will be replicated.¹⁰⁴ This will ensure that parents' choices are available and school offerings match community preference.¹⁰⁵ This strategy is already implemented in multiple districts.¹⁰⁶ Another reason to implement this strategy is that allowing controlled choice in education results in lower absenteeism and drop-out rates and greater educational achievement.¹⁰⁷

B. Improve Public Transportation

During the NCLB days, schools had to offer students the ability to leave the school and go to a different school if the school failed to meet standards for two years.¹⁰⁸ Sadly, this option is simply not feasible for children from single-car, urban neighborhoods who rely on public transportation or walking to attend school.¹⁰⁹ Approximately 11 percent of Americans rely on public

¹⁰⁰ Winnie Hu & Elizabeth A. Harris, *A Shadow System Feeds Segregation in New York City Schools*, N.Y. TIMES (Jun. 17, 2018), <https://www.nytimes.com/2018/06/17/nyregion/public-schools-screening-admission.html>; Richard D. Kahlenberg, *Elite, Seperate, Unequal*, N.Y. TIMES (Jun. 22, 2014), <https://www.nytimes.com/2014/06/23/opinion/new-york-citys-top-public-schools-need-diversity.html>.

¹⁰¹ Kahlenberg, *supra* note 100.

¹⁰² *Id.*

¹⁰³ KAHLENBERG, *supra* note 88, at 118.

¹⁰⁴ *Id.* at 119.

¹⁰⁵ *Id.* at 116.

¹⁰⁶ *Id.* at 103–04.

¹⁰⁷ *Id.* at 54–55, 61.

¹⁰⁸ Thomas Ahn & Jacob Vigdor, *Were All Those Standardized Tests for Nothing?* (AMERICAN ENTER. INST. Working Paper, 2013).

¹⁰⁹ Kimberly A. Goyette, *Race, Social Background, and School Choice Options*, 41 EQUITY & EXCELLENCE IN EDUC. 114, 117 (2008).

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transportation on a daily or weekly basis.¹¹⁰ Two-thirds of public transportation users have a household income of less than \$50,000.¹¹¹ Latino and African American children are more likely to walk or bicycle to school.¹¹² When these children live in low or middle-income neighborhoods, their chances of being killed from not having sidewalks or street lighting doubles.¹¹³

Safety and public transportation woes are not uncommon stories for middle- and low-income, likely minority, families across the country. In Detroit, parents take long bus routes, sometimes up to 6 hours, with their children because of safety concerns.¹¹⁴ They do this in order to access magnet schools that offer their children better opportunities than the neighborhood schools, which many low-income parents are stuck with.¹¹⁵ This problem has been amplified as neighborhood schools have closed due to low enrollment or have abysmal test scores, forcing students to make longer commutes to reach charter schools.¹¹⁶

The potential in school choice is severely undermined by poor public transportation, and the school district should not be solely responsible for solving this issue.¹¹⁷ When students cannot get to the school that best suits their educational needs, their school of choice does not offer any real benefit.¹¹⁸ When there is a lack of transportation and both parents must work inflexible hours at full-time jobs, public transportation is the only option.¹¹⁹ School districts will have limited ability to fix this problem on their own: “The more you have kids coming from the same neighborhood, going to

¹¹⁰ Monica Anderson, *Who relies on public transit in the U.S.*, PEW RESEARCH CENTER (Apr. 7, 2016) <https://www.pewresearch.org/fact-tank/2016/04/07/who-relies-on-public-transit-in-the-u-s/>.

¹¹¹ Mike Maciag, *Public Transportation’s Demographic Divide*, GOVERNING (Feb. 25, 2014), <https://www.governing.com/topics/transportation-infrastructure/gov-public-transportation-riders-demographic-divide-for-cities.html>; SAFE ROUTES P’SHP, *FIGHTING FOR EQUITABLE TRANSPORTATION: WHY IT MATTERS 1* (2015), <https://www.saferoutespartnership.org/sites/default/files/pdf/Fighting-For-Equitable-Transportation-Why-It-Matters.pdf>.

¹¹² SAFE ROUTES P’SHP, *supra* note 111, at 1.

¹¹³ *Id.* at 2.

¹¹⁴ Erin Einhorn, *Six Hours, Eight Buses: The Extreme Sacrifice Detroit Parents Make to Access Better Schools*, CHALKBEAT (Apr. 8, 2016), <https://www.chalkbeat.org/posts/detroit/2016/04/08/six-hours-eight-buses-the-extreme-sacrifice-detroit-parents-make-to-access-better-schools/>.

¹¹⁵ *Id.*; see also KAHLBERG, *supra* note 88, at 121.

¹¹⁶ Einhorn, *supra* note 114.

¹¹⁷ *Id.* (“[M]any of the city’s new options do not provide transportation, and new schools are often far from where kids live – a serious challenge in a city where a quarter of families have no access to a car and where the public transit system is woefully insufficient.”).

¹¹⁸ Juana Sanchez, *What Good Is School Choice for Low-Income Families if It Doesn’t Come With a School Bus*, EDUC. POST (Jun. 1, 2017), <https://educationpost.org/what-good-is-school-choice-for-low-income-families-if-it-doesnt-come-with-a-school-bus/>.

¹¹⁹ *Id.*

different schools, the more expensive and complicated the transportation service needs to be.”¹²⁰ A much larger, more complex system that the school district alone cannot implement will be needed to allow a truly successful school choice program.¹²¹

If school choice continues to be championed, public transportation must be radically improved or students will suffer.¹²² Middle-class families will have to make sacrifices in order to transport students, or simply forego better schools for their child.¹²³ Low-income students will have little to no options and will have diminished opportunity to enter the middle-class due to poor educational outcomes.¹²⁴ The effect is so pronounced that one study found that families in a district that does not provide yellow bus transportation were “willing to choose an elementary school with proficiency rates up to 11 percentage points lower if the school was one mile closer to them.”¹²⁵ The effects of poor transportation does not stop at test scores: students who have to rely on buses often cannot participate in after school programs, leading to higher rates of obesity, segregation, and affluence in after-school programming.¹²⁶

VI. CONCLUSION

The clunky “fixes” of the failing education system brought in by the NCLB and the ESSA have failed, and continue to fail, students in lower and middle-income communities. The only real fix will come from integrating schools racially and socio-economically. The best way to do this would be to allow for school choice across district lines through a careful system that helps schools to achieve an appropriate and representative percentage of

¹²⁰ Yesenia Robles, *How Limited Transportation Undermines School Choice—Even In Denver, Where an Innovative Shuttle System Has Drawn Betsy DeVos’s Praise*, CHALKBEAT COLO. (Mar. 21, 2017), <https://co.chalkbeat.org/2017/3/21/21101047/how-limited-transportation-undermines-school-choice-even-in-denver-where-an-innovative-shuttle-syste>.

¹²¹ *Id.*

¹²² Leah Binkovitz, *Why School Choice Is Also About Transit*, KINDER INST. FOR URB. RES. (May 10, 2017), <https://kinder.rice.edu/2017/05/10/why-school-choice-is-also-about-transit>.

¹²³ *Id.*

¹²⁴ *Id.*; *The Cycle of Educational Failure and Poverty*, STAND TOGETHER FOUNDATION (Jan. 24, 2017) <https://standtogetherfoundation.org/cycle-educational-failure/>.

¹²⁵ Matthew Chingos & Kristin Blagg, *Whether school choice policies actually increase choice depends on where you live*, URB. INST. (Apr. 5, 2017), <https://www.urban.org/urban-wire/whether-school-choice-policies-actually-increase-choice-depends-where-you-live>; *see generally*, STEVEN GLAZERMAN & DALLAS DOTTER, MARKET SIGNALS: HOW DO DC PARENTS RANK SCHOOLS, AND WHAT DOES IT MEAN FOR POLICY? (2016), <https://www.mathematica.org/our-publications-and-findings/publications/market-signals-how-do-dc-parents-rank-schools-and-what-does-it-mean-for-policy>.

¹²⁶ Gail Cornwall, *How Lack of Access to Transportation Segregates Schools*, FORBES (May 1, 2018), <https://www.forbes.com/sites/gailcornwall/2018/05/01/why-tech-is-prepping-to-overhaul-school-transportation/>.

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students from all racial backgrounds and socio-economic classes. The idea of giving students an out when their neighborhood schools are failing is not new and was suggested by the NCLB. However, the NCLB provided no guidance to parents on how to do so and did not guarantee that neighboring schools would accept the student or be any better. Instead of imposing the burden of finding the best educational opportunity on parents, and largely requiring them to turn to private or magnet schools, all schools should be open to all students based upon algorithmic admissions practices. Controlled school choice would follow the sink-or-swim market approach that open enrollment, accepted by most states, already encourages. However, for controlled school choice to truly succeed and provide opportunities for middle-class students, public transportation needs to be vastly improved to remove the barrier of transportation facing parents who do not have flexible job schedules or the ability to drive their child moderate distances to school.